Dodging Mistrials with a Mandatory Jury Inquiry Rule

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I. INTRODUCTION

Jurors undoubtedly face difficult, if not seemingly impossible, decisions in the jury room. Deadlocked or hung juries are not uncommon.¹ In deciding that a jury is hung and that a mistrial should be declared, a judge must also make a difficult decision. Faced with such a decision, a judge’s reasoning is often based solely on a speculative assessment of the jury.² For instance, a judge might have to determine whether a jury is

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². See, e.g., United States v. Horn, 583 F.2d 1124, 1125 (10th Cir. 1978). In Horn, the court held that a judge abused his discretion by declaring a mistrial without first questioning the jury and when, [w]ithout ceremony, the judge announced: I am now going to do what I should have done last evening when I received your note that you were deadlocked. I perhaps should have at that time declared a mistrial but I thought maybe going home and sleeping upon it, being a little fresher this morning and may be [sic] you might break the deadlock but you have been out an hour this morning and have not so I am going to declare a mistrial.
deadlocked by considering only the fact that the jury deliberated for three days and sent back a single vague note at the end of the third day. Armed with only those limited facts, a judge tasked with determining whether a jury is hung, much like the jury itself, faces a seemingly impossible decision.

Judges are not, however, without discretion to use several tools to encourage jurors to reach a decision. Although prohibited from expressly coercing jurors, judges may use techniques such as an Allen charge or a further instruction to encourage jurors to continue deliberations in the hope that, eventually, the jurors may reach a verdict. Judges commonly use these techniques because a judge must ultimately conclude that "there is manifest necessity" in declaring a mistrial on account of a hung jury. This high burden is founded on the oft-repeated principle that a defendant has a "valued right to have his trial completed by a particular tribunal." Justice Joseph Story stated that principle while cautioning that a mistrial "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." Put differently, once a jury begins its deliberations, a judge can declare a mistrial only with clear proof that the jury is genuinely and hopelessly deadlocked.

In practical terms, this high burden means that, even if a jury writes a note stating that it is deadlocked, a judge cannot declare a mistrial without considering all of the factors that might have influenced the ju-

Id.

3. See United States v. Razmilovic, 507 F.3d 130, 133–34 (2d Cir. 2007).
4. See, e.g., id. at 139 (noting that a judge can instruct the jury to continue deliberating, inquire whether the jury is deadlocked with respect to all defendants and all counts, give an Allen charge, and instruct on the possibility of partial verdict) (citations omitted).
5. See, e.g., United States v. Nickell, 883 F.2d 824, 828 (9th Cir. 1989) (describing an Allen charge as "a supplemental instruction given by the court to encourage a jury to reach a verdict after that jury has been unable to agree after some period of deliberation" and noting that "[t]he original form of the instruction was approved by the Supreme Court in Allen v. United States, 164 U.S. 492, 501 (1896)").
6. Razmilovic, 507 F.3d at 139 (citing United States v. MacQueen, 596 F.2d 76, 79 (2d Cir. 1979)).
7. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); see also infra Part III.
rors to write that note.\textsuperscript{11} To declare a mistrial where a jury was not truly deadlocked is not a fair outcome for the parties, the attorneys, the judge, or the jury.\textsuperscript{12} In Justice Story's words, an outcome not founded on manifest necessity defeats "the ends of public justice."\textsuperscript{13}

This Comment posits that judges can meet this high burden and definitively determine whether a jury is deadlocked in every case by using a simple tool: a jury inquiry. In its simplest form, a jury inquiry consists of a judge asking the jurors, individually or collectively, whether a verdict can be reached in a reasonable amount of time.\textsuperscript{14} In this way, a judge can elicit concrete and reliable evidence, directly from the jury, that a mistrial is or is not warranted.\textsuperscript{15} A jury inquiry is much like jury polling, which is required under Federal Rule of Criminal Procedure 31(d)\textsuperscript{16} after a verdict if a party requests it, or may be taken at the judge's discretion.\textsuperscript{17} The Supreme Court or Congress can mandate a similar jury inquiry rule with an amendment to Rule 31, which should read:

\textbf{Jury Inquiry.} An inquiry into the status of the members of a jury shall be conducted prior to the declaration of a mistrial and discharge of the jury when such a mistrial is the result of what the court assumes to be a deadlocked or hung jury. Such an inquiry shall be directed to each juror individually and shall be done in open court. In conducting such an inquiry, the court must ask, specifi-

\textsuperscript{11} See infra Part III; see also United States v. Horn, 583 F.2d 1124, 1125 (10th Cir. 1978) (where, despite a note stating they were deadlocked, the judge instructed the jurors "to reach an agreement if agreement is possible 'without violence to individual judgment'").

\textsuperscript{12} See United States v. See, 505 F.2d 845, 850–51 (9th Cir. 1974).

\textsuperscript{13} Perez, 22 U.S. at 580.

\textsuperscript{14} See, e.g., JURY INSTRUCTIONS COMM. OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 5.5C (Aug. 2004 ed.) (explaining that, in the Ninth Circuit, when there is a purported deadlock, a trial judge should "ask the following question of each member of the panel, 'Do you feel there is a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?'").

\textsuperscript{15} See generally infra Parts III, IV.

\textsuperscript{16} This Comment will use the word "Rule" to refer to individual rules in the Federal Rules of Criminal Procedure.

\textsuperscript{17} This Comment distinguishes between "jury inquiries" and "jury polls" because these terms refer to two closely related, yet distinct, concepts. Jury inquiries consist of asking each individual juror whether he or she believes the jury is nearing a verdict or whether he or she believes there is a reasonable probability that the jury, as a whole, can reach a verdict in a reasonable amount of time. See, e.g., United States v. Horn, 583 F.2d 1124, 1129 (10th Cir. 1978). Polling a jury, on the other hand, consists of receiving an actual tally of "not guilty" and "guilty" votes from jurors. FED. R. CRIM. P. 31(d). Due to the somewhat interchangeability of these terms, some of the quotations from court decisions and/or court memoranda do not distinguish between these two concepts. To the extent this occurs, this Comment attempts to make the distinction apparent by modifying quotations when necessary. The differences between these methods will be discussed more fully in Part IV.B.
cally, whether each member of the jury believes that there is a reasonable probability that the jury can, in a reasonable amount of time, reach a verdict as to each count and as to each defendant of the case at bar if sent back to the jury room for further deliberation. The court may conduct such a jury inquiry on its own or at the request of a party if there is any indication, explicit or implicit, that the jury is deadlocked or hung.

Like Rule 31(d), a jury inquiry rule should be discretionary and implemented either at the request of a party or at the court’s discretion. Unlike Rule 31(d), however, there are certain circumstances in which a jury inquiry rule should be mandatory, namely, whenever a judge seeks to declare a mistrial due to a hung or deadlocked jury.

In such instances, a mandatory jury inquiry rule is advantageous for a number of reasons. First, an inquiry would give the judge quantitative evidence from which to determine whether further deliberations might overcome a deadlock. Accordingly, the judge would have a basis for his decision to either require the jury to continue deliberating or to declare a mistrial and discharge the jury. Second, the direct statement from the jury would provide evidence to determine whether a mistrial was declared hastily and without “manifest necessity.” For example, if a mistrial was appealed, less would be required of an appeals court because, with a direct statement that the jury was deadlocked, there would be little basis upon which to argue that the judge abused his discretion. Finally, an inquiry into each defendant and each count could uncover whether the jury has made a unanimous decision as to certain counts and whether the jury has deadlocked as to others. Because most jurors do

18. See, e.g., Horn, 583 F.2d at 1127; Arnold v. McCarthy, 566 F.2d 1377, 1387 (9th Cir. 1978); United States v. See, 505 F.2d 845, 851 (9th Cir. 1974); United States v. Goldstein, 479 F.2d 1061, 1069 (2d Cir. 1973).

19. See, e.g., Horn, 583 F.2d at 1127; Arnold, 566 F.2d at 1387; See, 505 F.2d at 851; Goldstein, 479 F.2d at 1069.

20. See Horn, 583 F.2d at 1129 (noting that “manifest” means something that is “evident, visible, and plain”) (citation omitted).

21. See United States v. Razmilovic, 507 F.3d 130, 137 (2d Cir. 2007) (noting that the abuse of discretion standard requires a finding that the judge exercised “sound discretion”) (citing Arizona v. Washington, 434 U.S. 497, 514 (1978)); see also Brief for Defendant-Appellant Michael DeGennaro at 27 n.7, United States v. Razmilovic, 507 F.3d 130 (2d Cir. 2007) (No. 06-4195-cr-L), 2006 WL 5428289 [hereinafter DeGennaro Br.]; see also Brief for Defendant-Appellant Michael DeGennaro at 27 n.7 (citing Horn, 583 F.2d at 1127–28; Arnold, 566 F.2d at 1387).

22. DeGennaro Br., supra note 21, at 27 n.7 (“This case well illustrates the wisdom of such a [mandatory jury inquiry] rule, because further inquiry of the jury would very likely have revealed that the jury was willing and able . . . to deliver complete verdicts as to two of the three defendants . . . .”).
not have legal training, unless advised of Rule 31(b), jurors are most likely unaware of their option to declare a partial verdict. Where an inquiry reveals that certain counts were decided unanimously, those decisions may be recorded and accepted as partial verdicts. Thus, a jury inquiry will lighten judicial dockets by eliminating counts and entire defendants from subsequent proceedings.

This Comment considers the concept of a jury inquiry and concludes that, with a mandatory jury inquiry rule, judges will ensure that the public ends of justice are met before a mistrial is declared. Part II of this Comment examines the United States v. Razmilovic trial to give a concrete example of how a jury inquiry would have prevented a hastily declared mistrial. Part III.A examines the circuit trend regarding the definition of "manifest necessity." Toward the end of the 1970s, many circuits began to opine that jury inquiries were important when attempting to determine whether there was manifest necessity, especially where juries were apparently deadlocked. Part III.B demonstrates how the trend has solidified, in some circuits, into a mandatory rule that requires a judge to inquire into the status of the jury prior to declaring a mistrial. Part III.C also considers cases from circuits that have rejected the mandatory rule and examines the rationale behind such decisions.

Part IV looks into the practicality of jury inquiries. Part IV.A asks whether a mandatory jury inquiry rule should be limited to only multiple defendant cases. Part IV.B considers the form that the rule should take: whether the inquiry should be performed individually or collectively and whether in open court or out of court. Part IV.C sets forth the instruction that a trial judge should use in conducting the inquiry. And Part IV.D once more sets forth the language of the rule as it should be written in the Federal Rules of Criminal Procedure. Part V concludes by revisiting the Razmilovic case and reconsidering the trial as if a mandatory jury inquiry rule had been in effect. By reflecting on this concrete example, this

23. FED. R. CRIM. P. 31(b): (1) "If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed"; (2) "If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed"; (3) "If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree."

24. Statistics on this point are unavailable; however, an example of a case in which the jurors were unaware of their right to a partial verdict can be found in Razmilovic, 507 F.3d at 139.

25. FED R. CRIM. P. 31(b).

26. See, e.g., Razmilovic, 507 F.3d at 142 (holding that retrial of Mr. DeGennaro and Mr. Borghese was barred under the Fifth Amendment's Double Jeopardy Clause).
Comment demonstrates that a mandatory jury inquiry rule not only promotes judicial efficiency, but also provides reliable evidence that will prevent mistrials.

II. THE PRACTICAL EFFECTS OF THE JURY INQUIRY RULE IN THE CONTEXT OF THE RAZMILOVIC TRIAL

To demonstrate how a mandatory jury inquiry rule could affect a trial, imagine yourself as a juror in the following scenario. You sit alongside eleven other jurors for nearly two months. Over forty witnesses testify about three defendants and their purported involvement in a twenty-five count indictment. Each defendant was an executive in a complex public company, specializing in a business practice that you knew nothing about prior to the trial. Imagine the difficulty, day in and day out, of not discussing the case with the jurors sitting beside you.

Now imagine that, after nearly two months of silence and small talk, you are suddenly ordered to deliberate. You can rely only on your recollection and possibly some notes you took during the six weeks of testimony, plus various exhibits of financial and accounting data, and a twenty-five count indictment. You have no legal training or background. You know only that you must reach a unanimous verdict. And you know that you have a limited ability to converse with the judge and cannot, under any circumstance, reveal what has transpired in your deliberations.

Finally, imagine that after fewer than four days of deliberation, you and your fellow jurors have decided twenty-four of the twenty-five counts unanimously, but cannot reach consensus on the last count. Looking for guidance, you and your fellow jurors decide to send the judge a note. It is the end of the day. You and your fellow jurors are tired and ready to retire for the evening. The foreperson’s note states, quite simply, that the jury is “deadlocked” and would like to go home today. Shortly thereafter, the judge releases the jury for the day, instructing the jury to return to court the following morning.

You spend your commute home and the dinner hour wondering how you will decide the last count. Your thoughts are interrupted, however, by a call from the judge’s chambers. The judge declared a mistrial. You are not to come back the next day. Your deliberations are over. The case no longer rests in your hands. Your time and efforts are for naught. Even though you had unanimously agreed on twenty-four counts, you and your fellow jurors will never be able to announce your verdict. How would you feel? Would you feel as if you had fulfilled your duty as a juror? Will the unanimous decisions you and your fellow jurors reached be ignored?
Later you discover that you had the option to declare a partial verdict.\(^{27}\) Thus, you and your fellows jurors could have rendered a "not guilty" verdict for the two defendants you had unanimously decided were not guilty. And you could have rendered a "not guilty" verdict as to the other defendant on all but one count. Is it fair that you had this option but were unaware of it during your deliberations?

This scenario is *United States v. Razmilovic*.\(^{28}\) The jurors sat for over six weeks, beginning two days after the first of the year and ending on February 15, 2006.\(^{29}\) Over forty witnesses testified about a purported scheme involving a number of employees at Symbol Technologies, Inc., the world’s largest manufacturer of bar-code scanners and related technologies.\(^{30}\) Three former Symbol executives were defendants: Kenneth Jaeggi, the former chief financial officer, Michael DeGennaro, the former senior vice-president of finance, and Frank Borghese, the former senior vice-president of sales.\(^{31}\) In a highly complex case, the defendants were charged in a twenty-five count indictment, ranging from manipulation of the company’s financial records, to conspiracy to defraud the Internal Revenue Service, to stock option back-dating.\(^{32}\) The indictment spanned three years of company history and implicated a number of sophisticated accounting, tax, and securities concepts.\(^{33}\)

The jury began its deliberations on February 15th, after receiving instructions from the judge that included the following: (1) the jury must consider each count and each defendant separately; (2) the jury must reach any verdict unanimously; and (3) the jury must communicate with the court only in writing and by way of a note.\(^{34}\) The judge further admonished the jury that the notes it sent should not disclose where the jury stood on the issue of guilt or innocence.\(^{35}\)

Despite otherwise detailed instructions, the jury received no instruction regarding partial verdicts under Rule 31(b).\(^{36}\) Rule 31(b) gives flexibility to juries deciding complex cases like *Razmilovic*. The rule provides that decisions as to each count must be unanimous, but deci-

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27. FED. R. CRIM. P. 31(b)(1).
29. DeGennaro Br., supra note 21, at 4, 8.
30. Id. at 2, 4.
31. Id. at 2–3.
32. Id. at 2–4.
33. Id. at 3.
34. Id. at 8–9.
35. Id. at 9.
36. Id.
sions as to each defendant need not be unanimous. Thus, the rule allows the jury to return a partial verdict as to certain counts and against certain defendants. And, in some instances, a partial verdict also allows the jury to return a guilty or not guilty verdict for a defendant for whom all counts were decided unanimously. The Razmilovic jury would have greatly benefited had it been instructed of Rule 31(b).

The jury returned to its deliberations on Tuesday, February 21, following the three-day President’s Day weekend. In the early afternoon, the jury sent a note asking the judge if “each count require[d] a unanimous decision.” To this, the judge simply responded “yes,” and gave no further explanation.

The jury sent another note to the court at the end of the day, which the judge read aloud to the parties: “Judge, we are at a dead lock [sic]. We have exhausted all our options. This has been going on since Thursday. P/S – We are ready to go home today. Thank you.”

Despite stating that the jury was deadlocked, the note did not elaborate on whether there was a deadlock on only certain counts, to only certain defendants, or to all counts and all defendants. The jurors adhered to the judge’s instruction and revealed no specifics regarding their deliberations. The “deadlock” statement was even more ambiguous given the note submitted earlier in the day regarding the unanimity requirement. Considered alongside the earlier note, the jurors likely believed they were deadlocked because they were unaware of their option to declare a partial verdict and because they had not reached a unanimous decision on all counts. In fact, it would be discovered later that the jurors reached unanimous decisions as to all but a single count against a single defendant.

Furthermore, at first glance the comment that the jurors were “ready to go home today” could convey to a reasonable person that they were

37. FED. R. CRIM. P. 31(b).
38. Id.
39. Id.
41. Id. at 11.
42. Id.
43. Id.
44. Id.
45. Id.
46. See id.
47. Id. at 15–16.
48. Id.
49. Id. at 18 n.5.
ready to stop deliberating altogether.\textsuperscript{50} However, the note was sent at the end of the day; thus, the comment could also convey merely what it said—they were done for the day.\textsuperscript{51} The Razmilovic jurors later confirmed that the latter was in fact the case: they were prepared to return the next day, but were eager for the court’s guidance as to how to proceed.\textsuperscript{52}

Regardless of how the note would later be scrutinized and interpreted, Judge Wexler read the note aloud and advised the parties that he would excuse the jurors for the day with instructions to return the following morning.\textsuperscript{53} After the jurors left the courtroom, the judge stated that the trial would continue the next morning unless someone wanted him to declare a mistrial.\textsuperscript{54} Judge Wexler gave no reason why a mistrial might be justified.\textsuperscript{55} Yet, Mr. Jaeggi’s counsel took Judge Wexler’s recommendation and moved for a mistrial without articulating a basis for why a mistrial was warranted other than the ambiguous note.\textsuperscript{56} Mr. DeGen- naro’s counsel instantly objected to a mistrial; instead, he asked the judge to poll the jurors to determine whether they had reached a partial verdict.\textsuperscript{57} The Government also objected.\textsuperscript{58} Despite these objections, the judge hastily declared a mistrial.\textsuperscript{59}

Judge Wexler also rejected counsel’s requests to poll the jurors.\textsuperscript{60} He announced that “to save money,” a member of his staff would call the jurors that night to inform them that their jury service was concluded and that they need not return to court.\textsuperscript{61} Judge Wexler entertained little ar-

\textsuperscript{50} See id. at 11.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 18 n.5.
\textsuperscript{53} Id. at 12.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 12–13. Mr. Borghese’s counsel initially moved for a mistrial but then reversed himself and joined in the request that inquiry be made of the jury as to whether it had reached a verdict as to any defendant on any count. Id. at 13. The court transcript, however, did not reflect that Mr. Borghese’s counsel eventually joined in the inquiry request. Id. at 13 n.4. Nevertheless, on appeal, the Second Circuit reasoned that, although Mr. Borghese initially joined in Mr. Jaeggi’s motion, “within seconds of the trial court declaring a mistrial [counsel for Mr.] Borghese stated that he joined in DeGennaro’s request that the jury be polled before any decision on the mistrial was finalized.” United States v. Razmilovic, 507 F.3d 130, 141 (2d Cir. 2007). As a result, the Second Circuit held that Mr. Borghese “cannot be said to have deliberately foregone his right to have his guilt determined by his original tribunal.” Id. at 142.
\textsuperscript{58} DeGennaro Br., supra note 21, at 13.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 13–14, 17.
\textsuperscript{61} Id. at 14–15.
argument regarding the mistrial and eventually sent the parties home, concluding, "Counsel, it is over."\textsuperscript{62}

As Judge Wexler directed, the jury was discharged that evening via phone calls from his bailiff.\textsuperscript{63} Defense counsel later learned from several of the jurors that the "deadlock" comment on the note was in reference to only one of the twenty-five counts in the indictment: a conspiracy charge against Mr. Jaeggi.\textsuperscript{64} In short, other than a single count against Mr. Jaeggi, the jurors were prepared to find that all three defendants were not guilty of all charges.\textsuperscript{65}

Despite this information, Judge Wexler declined another request by defense counsel to allow the jury to return a partial verdict.\textsuperscript{66} Mr. DeGennaro and Mr. Borghese then moved to dismiss the indictment on April 28, 2006, arguing that retrial was barred by the Double Jeopardy Clause of the Fifth Amendment.\textsuperscript{67} On August 31, 2006, Judge Wexler denied the motions to dismiss.\textsuperscript{68} Mr. DeGennaro and Mr. Borghese then appealed to the Second Circuit, arguing that Judge Wexler had abused his discretion by declaring a mistrial without clear evidence that the jury was genuinely deadlocked.\textsuperscript{69}

The Second Circuit found in favor of Mr. DeGennaro and Mr. Borghese.\textsuperscript{70} The court held that Judge Wexler abused his discretion by hastily declaring a mistrial without an adequate showing of manifest necessity.\textsuperscript{71} Therefore, the Double Jeopardy Clause\textsuperscript{72} barred retrying Mr. DeGennaro and Mr. Borghese.\textsuperscript{73} To determine whether the jury was genuinely deadlocked, the court considered the following factors: (1) whether there were statements by the jury that it could not agree; (2)

\textsuperscript{62} Id. at 16.
\textsuperscript{63} Id. at 14–15.
\textsuperscript{64} Id. at 18 n.5.
\textsuperscript{65} Brief and Special Appendix for Defendant-Appellant Frank Borghese at 10, United States v. Razmilovic, 507 F.3d 130 (2d Cir. 2007) (No. 06-4195-cr(L)), 2006 WL 5428290 [hereinafter Borghese Br.].
\textsuperscript{66} DeGennaro Br., supra note 21, at 19–20.
\textsuperscript{67} Id. at 20. Mr. Jaeggi did not appeal the decision because his counsel had moved for the mistrial; therefore, he could not assert that retrial was barred by the Double Jeopardy Clause. Razmilovic, 507 F.3d at 140–41 ("When a defendant moves for or consents to a mistrial, the Double Jeopardy Clause usually imposes no bar to retrying that defendant." (citing United States v. Huang, 960 F.2d 1128, 1133 (2d Cir. 1992))).
\textsuperscript{68} DeGennaro Br., supra note 21, at 20.
\textsuperscript{69} Id. at 20–21; Borghese Br., supra note 65, at 19–20.
\textsuperscript{70} Razmilovic, 507 F.3d at 142.
\textsuperscript{71} Id.
\textsuperscript{72} U.S. CONST. amend. V.
\textsuperscript{73} Razmilovic, 507 F.3d at 142.
whether the length and complexity of the trial correlated to the amount of time that the jury had deliberated; and (3) whether Judge Wexler took any actions to determine whether the jury was genuinely deadlocked.74

Part III takes up the first and third factors of this test, explaining how appellate courts interpret these factors when reviewing mistrial decisions. Part IV then demonstrates how a mandatory jury inquiry rule will provide uncontroverted evidence to determine whether these factors are met and whether, in any given case, a jury is genuinely deadlocked.

III. THE CIRCUIT COURTS’ TREND IN DEFINING MANIFEST NECESSITY

When reviewing whether a trial judge abused his discretion by declaring a mistrial due to a hung jury, an appellate court must consider the totality of the circumstances and assess whether there was “a reasonable possibility that an impartial verdict [could have been] reached.”75 Practically speaking, an appellate court must ask whether the jury was “hopelessly deadlocked?”76 Appellate courts afford trial courts substantial deference because, regardless of the parties’ conduct, ultimately “the trial judge must . . . take care to assure himself that the situation warrants action on his part.”77 Therefore, an appellate court will reverse only if the decision to declare a mistrial was not manifestly necessary.78

Part III.A first takes up this vague manifest necessity concept, which the “Supreme Court has explicitly and repeatedly refused to make . . . any more precise.”79 As a result, this Part explains that circuit courts have developed different standards upon which to view a trial judge’s actions during jury deliberations. Part III.A concludes by showing that every circuit generally agrees that the length of deliberations, “without more,” is not enough to prove that a jury is genuinely deadlocked, yet the circuits do not agree what constitutes that something more.80

Part III.B sets forth the Ninth and Tenth Circuit interpretations of the “something more” concept. In those circuits, trial judges must receive a statement directly from the jury that it cannot agree.81 Practically

74. Id. at 137–38.
76. See id.
78. Id.; see also United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).
81. See United States v. See, 505 F.2d 845, 851 (9th Cir. 1974).
speaking, the Ninth and Tenth Circuits require trial judges to individually question jurors prior to declaring a mistrial and, therefore, adhere to the rule that this Comment advocates for: a mandatory jury inquiry rule.\textsuperscript{82} Yet, Part III.B concludes by noting that the rule adopted in the Ninth and Tenth Circuits is unlimited in scope and, in many ways, overly broad.

Finally, Part III.C addresses the circuits which have not adopted a mandatory rule like the Ninth and Tenth Circuits. In fact, some courts have expressly declined to adopt the Ninth and Tenth Circuits’ mandatory jury inquiry rule.\textsuperscript{83} The courts that have rejected the rule provide no substantive justification for doing so; rather, those courts reason merely that the trial judge’s sound discretion must be afforded deference\textsuperscript{84} or that “every case [must] turn[] on its own facts.”\textsuperscript{85} However, as Part III.C explains, these declining courts have failed to recognize that the jury inquiry rule would not disregard these standards: the trial judge will still be afforded deference\textsuperscript{86} and the facts will still be considered.\textsuperscript{87} These declining circuits also fail to recognize that, given the uniquely difficult decision trial judges confront with a potentially hung jury, such decisions should not be based on judicial instinct alone.\textsuperscript{88} A mandatory jury inquiry rule ensures that instinct is not the sole rationale. Rather, such a rule requires trial judges to determine whether a jury is hung by using quantitative and reliable evidence from the very body they must ultimately assess: the jurors themselves.\textsuperscript{89}

\textsuperscript{82}Arnold, 566 F.2d at 1387 (citing See, 505 F.2d at 851); United States v. Horn, 583 F.2d 1124, 1127–29 (10th Cir. 1978).

\textsuperscript{83}United States v. Razmilovic, 507 F.3d 130, 140 n.3 (2d Cir. 2007); United States v. MacQueen, 596 F.2d 76, 82 (2d Cir. 1979); see also State v. Graham, 83 P.3d 143, 151–52 (Kan. 2004) (declining to adopt a mandatory jury inquiry rule).

\textsuperscript{84}Infra Part III.C (discussing Razmilovic, 507 F.3d at 140 n.3); see also Graham, 83 P.3d at 150–51.

\textsuperscript{85}Infra Part III.C (discussing MacQueen, 596 F.2d at 82).

\textsuperscript{86}See Arnold, 566 F.2d at 1387 (citing See, 505 F.2d at 852 n.12; United States v. Goldstein, 479 F.2d 1061, 1069 (2d Cir. 1973); United States v. Lansdown, 460 F.2d 164, 169 (4th Cir. 1972)).

\textsuperscript{87}See Horn, 583 F.2d at 1128–29 (reviewing the record and holding that there was “virtually a complete lack of evidence of deadlock”).


\textsuperscript{89}See Horn, 583 F.2d at 1128 (holding that mistrial was not manifestly necessary because the judge did not make an inquiry of the jury and so there was “virtually a complete lack of evidence of deadlock as of the time that the mistrial was granted . . . [and] a dearth of evidence as to the jury’s inability thereafter to reach a verdict”); see also Arnold, 566 F.2d at 1387; See, 505 F.2d at 851.
A. Early Decisions: Setting Forth that "Something Additional" Must be Established to Prove "Manifest Necessity," but Declining to Articulate What "Something Additional" Entails

Beginning in the 1970s, the circuits of the United States Court of Appeals began to closely examine Justice Story's manifest necessity standard and question whether there was, in fact, a way to quantify those "circumstances" that Justice Story found "impossible to define."\(^{90}\) Undoubtedly, the courts could not foresee every circumstance; nevertheless, a checklist of factors would be a useful guide for future appellate courts to review mistrials declared on account of genuinely deadlocked juries.\(^{91}\) A checklist first emerged in the 1970s and then grew through the insights of numerous circuit courts. Yet, by the end of the decade, judicial interest in the manifest necessity standard had waned. As a result, only a handful of 1970s decisions represent the universe of circuit court interpretations of manifest necessity.

Tracking the development of these cases provides insight into the circuits' reasoning and also details a full checklist of factors that courts currently use when determining manifest necessity. With each decision, a trend toward stricter judicial responsibility and individual questioning of jurors becomes more apparent.\(^{92}\) As a result, appellate courts more often overturn a trial judge's mistrial decision when the trial judge failed to question each juror concerning the probability of reaching a verdict.\(^{93}\) Even so, while the circuits agreed that the crucial issue was the subjective belief of the jury,\(^{94}\) the circuits also continued to emphasize the trial judge's role as ultimate decision-maker.\(^{95}\) The result is appellate courts that are willing to defer to a trial judge's "sound discretion" in those cases that do not fit neatly into the factors laid out in precedent. As Parts III.B and III.C explain more fully, such deference is a primary reason courts have not deemed it necessary to adopt a mandatory jury inquiry rule.

First, in United States v. Lansdown, the Fourth Circuit emphasized that, to assess "whether there is a possibility that the jury can reach a
verdict within reasonable time” the “most reliable source . . . is the jury itself.”96 Although the judge had ultimate discretion, the court stressed that jurors themselves were the best indicators as to whether they were deadlocked.97 The Fourth Circuit further articulated a starting point from which future courts would consider the manifest necessity standard: “The conclusion that a jury is unable to reach a verdict must be supported by something in addition to the trial court’s conclusion that the jury has deliberated long enough.”98 The length of deliberations thus became the first factor and the outer boundary for the courts’ conception of manifest necessity. However, a judge must have considered more than merely the length of the deliberations to establish that the jury was genuinely hung and that a mistrial was manifestly necessary.99 Unfortunately, the court did not set forth any other factors that, in addition to lengthy deliberations, would constitute manifest necessity.100 Nevertheless, the decision encouraged other circuits to question what factors might add up to that “something additional.”101

The following year in United States ex rel. Russo v. Superior Court, the Third Circuit further articulated the Fourth Circuit’s “something additional” concept.102 In Russo, the court barred retrial because, despite the likelihood that the jury was exhausted after deliberating for fifteen hours, the length of the deliberations was insufficient to establish that the jury was deadlocked.103 Instead, the court noted that the trial judge had not taken adequate measures to establish that the jury was exhausted.104 Specifically, “not only was there no inquiry as to the physical condition of the jurors, there was no questioning them as to their progress towards reaching a verdict.”105 Having not gathered any information directly from the jurors, the Third Circuit held that the trial judge failed to use sound discretion and that the mistrial was hasty, improper, and not manifestly necessary.106

96. Lansdown, 460 F.2d at 169.
97. Id.
98. Id. (emphasis added).
99. Id.
100. Id.
101. See id.
103. Id. at 16.
104. Id. at 15–16.
105. Id. at 16.
106. Id. at 16–17.
In *United States v. See*, decided the next year, the Ninth Circuit weighed in on the discussion of manifest necessity.\(^{107}\) The court referred to *Lansdown* and set forth a number of "significant factors" relevant to determining whether a judge had abused his discretion.\(^{108}\) Of these factors, the "crucial factor in determining the probability of agreement is a statement from the jury that it is "hopelessly deadlocked."\(^{109}\) The court further explained that the burden is on the trial judge to "question the jury . . . on the possibility that its current deadlock could be overcome by further deliberations."\(^{110}\) The court did not opine on the form the inquiry should take; but rather, the court noted that jury polling was the "preferred method in some states,"\(^{111}\) while questioning the jury as a group on the "possibility of a verdict" was an acceptable alternative.\(^{112}\)

The Ninth Circuit did not go so far as to say that an inquiry or polling would be required in every criminal case. Instead, the decision to conduct a jury inquiry fell solely on the trial judge, who was instructed to take adequate steps to gather the most reliable evidence from which to make his decision.\(^{113}\) Prior to declaring a jury deadlock, the trial judge should consider the following factors: (1) "the exhaustion of the jury"; (2) "the length of the trial and the complexity of the issues"; and (3) "the time taken in deliberations."\(^{114}\) These three factors set the stage for even further specification of the manifest necessity standard and affirmed that the ultimate decision-making and fact-finding responsibility rested on the trial judge.\(^{115}\)

Only a few months after the Ninth Circuit decided *See*, the Third Circuit further emphasized the trial judge's responsibilities.\(^{116}\) In *United States ex rel. Webb v. Court of Common Pleas*, the court began its opinion by noting the very "narrow limits" under which a trial court could declare a mistrial: "a trial court must exercise *extreme caution* before declaring a mistrial."\(^{117}\) In *Webb*, despite questioning the jury foreman,
the court held that the trial judge abused his discretion by declaring a mistrial because "there [was] no clear showing that the foreman's responses here necessarily represented the unanimous opinion of the jury ...." Thus, the Webb court added an additional unanimity requirement that was satisfied only if the jury was questioned individually, not simply through a single representative.

In so holding, the court placed further emphasis on a clear and unambiguous response from the jurors themselves. The judge could not rely simply on instinct. As Lansdown first established, there must be something in addition to the judge's instinct. The Webb court defined that something additional as not just words directly from the jury foreman, but as words directly from each juror. To obtain such a statement necessarily requires a jury inquiry.

One year later, in United States v. Gordy, the Fifth Circuit extended Webb's unanimity requirement and also added requirements concerning the information sought to be obtained from the jury inquiry. The court held that the trial court erred in declaring a mistrial, first noting that "[n]o dialogue was developed with panel members individually." Instead, the trial judge spoke only with the foreman, which alone, the court held, insufficiently demonstrated genuine deadlock. Second, even if the foreman had correctly interpreted the feelings of the other jurors, his "report alone cannot answer the more important question of whether [the jury's] present inability to agree should have been characterized as permanent." Thus, the purpose of a jury inquiry was not to determine whether the jurors were currently deadlocked; rather, the purpose of a jury inquiry was to determine whether the jurors believed they could reach a decision in a reasonable amount of time. Finally, the court

118. Id. at 1044.
119. Id.
120. See id.
121. See id.
122. United States v. Lansdown, 460 F.2d 164, 168–69 (4th Cir. 1972) (noting that judicial discretion was becoming even narrower).
123. See Webb, 516 F.2d at 1044.
124. See FED. R. CRIM. P. 31 advisory comm. notes (1998) ("The Committee is persuaded by the authorities and practice that there are advantages of conducting an individual poll of the jurors. Thus, the rule requires that the jurors be polled individually when a polling is requested, or when polling is directed sua sponte by the court.").
126. Id.
127. Id. at 636.
128. Id. (emphasis added).
129. See id.
held that the trial judge’s “communications with the jurors prior to discharge were too inconclusive to demonstrate the existence of a ‘manifest necessity’ to terminate the trial.”  

130 Hence, the information obtained from the jurors must be conclusive: there should be no “doubts” and there should be “a record clearly demonstrating that the panel members felt no verdict could be reached if they were given more time.”  

131 In total, the Fifth Circuit announced new standards that required a judicial inquiry into the subjective beliefs of each individual juror as to the capability of reaching a verdict in a reasonable amount of time.  

132 This requirement further established that the jurors must be questioned individually.  

133 And like the decisions from courts of appeals before it, the Gordy court emphasized the trial judge’s role in determining genuine deadlock.  

134 Beginning in 1972, each year that passed brought with it a new circuit decision more specifically defining Justice Story’s manifest necessity standard.  

135 The circuits agreed that two issues were of central importance: the subjective belief of the jury,  

136 balanced with the judge’s role as the ultimate decision-maker.  

137 As the 1970s neared an end, however, the Ninth and Tenth Circuits tipped the balance in favor of the jury by mandating inquiries before a judge could declare a mistrial.

B. The Ninth and Tenth Circuits Set Forth the Jury Inquiry Rule in Arnold v. McCarthy and United States v. Horn

In 1978, the Ninth and Tenth Circuits adopted rules that required trial judges to question jurors individually prior to declaring a mistrial.  

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130. Id.
131. Id.
132. The Gordy court noted that in United States v. Amaya, 509 F.2d 8 (5th Cir. 1975), the Fifth Circuit had held that merely asking the jury where it was “numerically divided” was error per se. Gordy, 526 F.2d at 636 n.2. The Gordy court stated that this rule was “designed to prevent coerced verdicts” that result when jurors feel unduly influenced to come to a conclusion given the pressure of the questioning. Id. As is discussed in Part IV.B, however, the way in which the jury inquiry is conducted can lessen the coercion with which the Amaya court was undoubtedly concerned.
134. See Gordy, 526 F.2d at 636.
136. United States v. See, 505 F.2d 845, 851 (9th Cir. 1974) (citing United States v. Lansdown, 460 F.2d 164, 170 (4th Cir. 1972)).
137. See, 505 F.2d at 850 (citing Illinois v. Somerville, 410 U.S. 458, 462 (1973)).
138. United States v. Horn, 583 F.2d 1124, 1127–29 (10th Cir. 1978); Arnold v. McCarthy, 566 F.2d 1377, 1387 (9th Cir. 1978).
In two cases decided in 1978, these circuits suggested that jury inquiries were mandatory whenever the jury appeared to be deadlocked and the judge was considering a mistrial.\textsuperscript{139} The Ninth Circuit first set forth a mandatory jury inquiry requirement in \textit{Arnold v. McCarthy}.\textsuperscript{140} In that case, the court cited cases that had set forth a number of factors\textsuperscript{141} necessary to assess whether a jury was hopelessly deadlocked.\textsuperscript{142} Citing \textit{See}, the court asserted that the most critical factor was the jury's own statement.\textsuperscript{143} Then, the court went a step further to announce the following rule: "Upon receiving a communication from the jury stating that it cannot agree, the trial court \textit{must} question the jury to determine independently whether further deliberations might overcome the deadlock."\textsuperscript{144}

Though the court held that the trial judge did not abuse his discretion in the case at bar,\textsuperscript{145} the precedential value of the decision lay in the court's assertion of a new rule imposing a mandatory requirement on trial judges.\textsuperscript{146} As demonstrated in Part III.A, the rule was not completely novel because courts had hinted at it throughout the 1970s. Nevertheless, the \textit{Arnold} decision represented a significant step: the rule was finally stated definitively in a circuit court holding.

Yet, the \textit{Arnold} court did not limit the rule to a finite set of cases or circumstances.\textsuperscript{147} Consequently, in the Ninth Circuit, a jury inquiry is

\textsuperscript{139} See \textit{Horn}, 583 F.2d at 1127–29; \textit{Arnold}, 566 F.2d at 1387.
\textsuperscript{140} \textit{Arnold}, 566 F.2d at 1387.
\textsuperscript{141} \textsuperscript{Supra Part III.A.}
\textsuperscript{142} \textit{Arnold}, 566 F.2d at 1387–88. The \textit{Arnold} court listed the following factors as those courts have isolated as useful in determining whether a judge has properly exercised his discretion to declare a deadlocked jury: (1) a timely objection by defendant, (2) the jury's collective opinion that it cannot agree, (3) the length of the deliberations of the jury, (4) the length of the trial, (5) the complexity of the issues presented to the jury, (6) any proper communications which the judge has had with the jury, and (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict. \textit{Id.} at 1386–87 (citing \textit{United States v. Gordy}, 526 F.2d 631, 635–36 (5th Cir. 1976); \textit{United States ex rel. Webb v. Court of Common Pleas}, 516 F.2d 1031 (majority and dissenting opinions); \textit{United States v. See}, 505 F.2d 845, 851–52 (9th Cir. 1974); \textit{United States ex rel. Russo v. Superior Court}, 483 F.2d 7, 16 (3d Cir. 1973); \textit{United States v. Goldstein}, 479 F.2d 1061, 1068 (2d Cir. 1973); \textit{United States v. Lansdown}, 460 F.2d 164, 170 (4th Cir. 1972)).
\textsuperscript{143} \textit{Arnold}, 566 F.2d at 1386–87 (citing \textit{See}, 505 F.2d at 851).
\textsuperscript{144} \textit{Arnold}, 566 F.2d at 1386–87.
\textsuperscript{145} \textit{Id.} at 1387–88.
\textsuperscript{146} \textit{Compare Lansdown}, 460 F.2d at 169 (ambiguous "something additional" factor), \textit{with Arnold}, 566 F.2d at 1387 (prior to mistrial, "court \textit{must} question the jury") (emphasis added).
\textsuperscript{147} The \textit{Arnold} court stated simply that an inquiry must be conducted whenever a judge received "a communication from the jury stating that it cannot agree." \textit{Arnold}, 566 F.2d at 1387. The
required in every case in which the jury is potentially deadlocked.\textsuperscript{148} Had the \textit{Arnold} court reconsidered its statement, it might have qualified the rule to limit its scope. The court, however, never had the opportunity to reconsider the case in a subsequent proceeding,\textsuperscript{149} nor has the court qualified the decision in any later holding.\textsuperscript{150} Thus, the question of scope remains open—whether, when, and to what extent should the rule be applied?\textsuperscript{151}

A few months after \textit{Arnold}, the Tenth Circuit extended the rule in \textit{United States v. Horn}.\textsuperscript{152} Like the Ninth Circuit, the Tenth Circuit recognized the trend toward a mandatory rule.\textsuperscript{153} Also, like in \textit{Arnold}, the court adopted the language requiring trial courts to “question the jury to determine independently whether further deliberations might overcome the deadlock.”\textsuperscript{154}

Unlike \textit{Arnold}, however, the \textit{Horn} court held that the judge’s decision to declare a mistrial constituted an abuse of discretion.\textsuperscript{155} The appellate court explained:

Had the court, following the one-hour plus deliberation, called the jurors back into court and made an inquiry as to their progress, and had it asked whether they were close to a verdict, or, if deadlocked, whether all members of the jury agreed that this was the situation, then there would have been a good basis for arguing that manifest necessity existed. The term “manifest” suggests apparent or that which is clear and which requires no proof, that which is open, palpable, incontrovertible. It is synonymous with evident, visible or

court did not further specify whether that “communication” must be explicit (e.g., through a jury note) or could also be implicit (e.g., through jury body language). \textit{Id}. Moreover, the court did not attempt to limit the rule to criminal or civil cases, or to certain circumstances; instead, the court merely declared that “the trial court must question the jury to determine independently whether further deliberations might overcome the deadlock.” \textit{Id}.\textsuperscript{148}

\textsuperscript{148} The case was not heard again in the Ninth Circuit Court of Appeals.

\textsuperscript{149} As of March 15, 2008, the only decision to fully examine \textit{Arnold} was \textit{United States v. Byrski}, 854 F.2d 955 (7th Cir. 1988), which addressed \textit{Arnold}, but did not assert a mandatory jury inquiry rule. Thus, the \textit{Razmilovic} court is the only court to have addressed the jury inquiry requirement since \textit{Arnold}. See infra Part III.C.

\textsuperscript{150} Part IV of this Comment assesses the appropriate scope of the mandatory nature of the jury inquiry rule.

\textsuperscript{151} \textit{United States v. Horn}, 583 F.2d 1124 (1978).

\textsuperscript{152} \textit{Id.} at 1127; \textit{supra} Part III.A.

\textsuperscript{153} \textit{Horn}, 583 F.2d at 1127.

\textsuperscript{154} \textit{Id.} at 1129.
plain. It definitely does not mean something which exists only in the mind of the judge.156

Like the Lansdown court, the Horn court noted the need for “something in addition” to the judge’s instinct.157 The court further defined this something additional as evidence directly from the jury that is “visible,” “palpable,” and “incontrovertible.”158 More specifically, the trial judge must get a statement from every juror through, arguably, a jury inquiry.159 The Horn court suggested that a statement directly from a jury accomplishes two significant objectives. First, the trial judge is further assured that the jury is genuinely deadlocked.160 Second, the statement can be used as palpable evidence if a subsequent appeal questions the manifest necessity of the mistrial.161

The Arnold and Horn decisions require trial courts in the Ninth and Tenth Circuits to question purportedly deadlocked jurors prior to declaring a mistrial.162 However, these courts did not limit the scope of this inquiry, which has resulted in a rule that is overly broad.163 Possibly as a result of its broad application, the rule has not received much attention from other circuits.164 The one circuit that has specifically addressed a mandatory jury inquiry rule has not given a concrete rationale for declining to adopt it.165

C. Other Circuits Have Either Failed to Address or Have Not Set Forth an Adequate Rationale for Rejecting a Mandatory Jury Inquiry Rule

The Razmilovic decision is the Second Circuit’s most recent rejection of a mandatory jury inquiry rule.166 The Second Circuit had previously done so at the close of the 1970s in United States v. MacQueen.167

156. Id. (internal citation omitted).
157. Id. at 1128–29.
158. Id. at 1129.
159. Id.
160. Id. at 1127–29.
161. Id.
162. Arnold v. McCarthy, 566 F.2d 1377, 1387 (9th Cir. 1978); Horn, 583 F.2d at 1129.
163. See Arnold, 566 F.2d at 1387; Horn, 583 F.2d at 1129.
164. Other than the Ninth Circuit in Arnold, 566 F.2d at 1387, and the Tenth Circuit in Horn, 583 F.2d at 1129, the Second Circuit is the only circuit to directly address whether a jury inquiry rule should be mandatory. See infra Part III.C.
165. See United States v. Razmilovic, 507 F.3d 130 (2d Cir. 2007); United States v. MacQueen, 596 F.2d 76 (2d Cir. 1979).
166. Razmilovic, 507 F.3d. at 140 n.3.
167. MacQueen, 596 F.2d 76.
With these two decisions, the Second Circuit represents the only circuit to expressly reject a mandatory jury inquiry rule.168 Yet, neither of these decisions provides any substantive rationale for such a rejection.

In *MacQueen*, the Second Circuit held that a retrial was not barred by the Double Jeopardy Clause because the judge gave the jurors adequate instructions regarding the possibility of reaching a partial verdict.169 In dicta, the court noted that because “every case turns on its own facts,” a rule mandating an inquiry into whether the jury had reached a partial verdict was unnecessary.170 Yet, other than this quotation, taken from an earlier Second Circuit opinion, *Drayton v. Hayes*, the *MacQueen* court failed to explain why a mandatory jury inquiry rule should be rejected.171 Moreover, upon closer examination, the *MacQueen* court’s reliance on this quotation was misplaced.

The *Drayton* court took the quotation from *Downum v. United States*,172 a Supreme Court decision holding that a retrial following discharge of a first jury was barred by the Double Jeopardy Clause.173 However, the *Drayton* court inaccurately cited *Downum* to support its assertion that “per se rules are inappropriate in the mistrial context.”174 The *Downum* court stated merely that “[e]ach case must turn on its facts,”175 which is a far stretch from the principle that mandatory rules are always inappropriate. Moreover, the Supreme Court ultimately concluded that any doubts concerning the propriety of a mistrial ought to be resolved “in favor of the liberty of the citizen, rather than [through the] exercise [of] ... unlimited, uncertain, and arbitrary judicial discretion.”176

When the *Drayton* court asserted that mandatory rules ought to be avoided in the context of mistrials, it ignored the *Downum* court’s ultimate holding that any doubt concerning the propriety of a mistrial should not be left to judicial discretion.177 In fact, *Downum* suggests that the Supreme Court might actually prefer a mandatory rule that protects “the

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168. While other circuits have failed to address the mandatory rule, none have gone as far as the Second Circuit and expressly rejected the rule. See supra note 150.
169. *MacQueen*, 596 F.2d at 82.
170. *Id.* (citing *Drayton v. Hayes*, 589 F.2d 117, 122 (2d Cir. 1979)).
171. *MacQueen*, 596 F.2d at 82.
173. *Id.* at 737.
176. *Id.* at 737–38 (citation omitted).
177. See *Drayton*, 589 F.2d at 122.
liberty of the citizen" over "arbitrary judicial discretion."\textsuperscript{178} Thus, the Second Circuit's \textit{Drayton} and \textit{MacQueen} decisions rejecting mandatory rules in the mistrial context are not grounded in reliable authority and fail to provide any reasonable rationale for rejecting a mandatory jury inquiry rule.\textsuperscript{179}

In \textit{Razmilovic}, the court confined its rejection of the mandatory rule to a footnote.\textsuperscript{180} Although the court admitted that "the step of [questioning] the jury may be a reasonable step," the court rejected a mandatory jury inquiry rule, reasoning instead that a mistrial decision was "properly left to the sound discretion of the trial judge."\textsuperscript{181} This rationale was ironic, however, because the court ultimately concluded that the trial judge did not use sound discretion.\textsuperscript{182} The court thus admitted that a jury inquiry would have been reasonable in the case before it, but declined to investigate further whether a jury inquiry might be justified in every case.\textsuperscript{183}

The court's failure to give a concrete rationale suggests that it declined to adopt a jury inquiry rule not because it disagreed with it, but because such a rule was unnecessary to find an abuse of discretion on the

\textsuperscript{178} See \textit{Downum}, 372 U.S. at 737.

\textsuperscript{179} A rationale for rejecting a mandatory jury inquiry rule that was not addressed in either Second Circuit decision is the possibility that a jury inquiry followed by further deliberations might unduly coerce the jurors into a verdict. The issue of coercion has been addressed in the context of jury polling and \textit{Allen} charges. See, e.g., \textit{United States v. Ajiboye}, 961 F.2d 892 (9th Cir. 1992). Yet, the Second Circuit did not address coercion in the context of a jury inquiry. This Comment argues that a jury inquiry followed by further deliberations would not be unduly coercive. While one law review article states that it could be coercive to poll a jury and then require them to go back for more deliberations, the author provides no support for his assertion. Reichelt, supra note 1, at 586 (stating that the court erred by not addressing the "inherently coercive effect that interviewing the entire panel of jurors individually would have had on the course of deliberations had the trial court decided not to remove the dissenter from the panel"). On the contrary, the drafters of the Federal Rules of Criminal Procedure confirm that the goal of the polling requirement is to prevent coercion, not promote it, specifically noting that the purpose of the polling requirement is to ensure that "each of the jurors approves of the verdict as returned [and] that no one has been coerced or induced to sign a verdict to which he does not fully assent." \textit{Fed. R. Crim. P. 31} advisory comm. notes (1998) (citing Humphries v. District of Columbia, 174 U.S. 190, 194 (1899)). Moreover, Rule 31(d) gives a judge the option of sending the jury back to deliberate following a jury poll. Had drafters of the Federal Rules considered such polling inherently and irreversibly coercive, it is unlikely that they would have left judges with the option.

\textsuperscript{180} \textit{United States v. Razmilovic}, 507 F.3d 130, 140 n.3 (2d Cir. 2007).

\textsuperscript{181} \textit{Id}. Note that this is one such instance in which the court used the word "polling," yet intended to address the concept of a jury inquiry. To avoid confusion, the quote above replaced the word "polling" with "questioning."

\textsuperscript{182} \textit{Id}.

\textsuperscript{183} \textit{Id} at 140.

\textsuperscript{184} \textit{Id} at 140 n.3.
facts before it.\textsuperscript{185} Had Judge Wexler’s abuse of discretion been less ob-
vious, the Second Circuit might have chosen to extend the mandatory jury inquiry rule to provide a more identifiable basis upon which to rest its holding.

Aside from the Second Circuit, no other circuit court has expressly rejected the Ninth and Tenth Circuits’ mandatory jury inquiry rule.\textsuperscript{186} Given the trend toward jury inquiries and the failure of any court to pro-
vide a reasonable rationale for rejecting the rule, a mandatory jury in-
quiry rule would likely receive the general support of the circuits.\textsuperscript{187}

IV. THE SCOPE OF THE MANDATORY JURY INQUIRY RULE

A mandatory jury inquiry rule would require a trial judge to inquire into the status of the jury when the jury appears deadlocked and the judge is considering a mistrial. The rule would apply only in instances where an inference could be drawn that the jury was deadlocked. A judge could infer a jury deadlock from explicit actions taken by the jury, such as a note. The judge could also draw the inference from jury con-
duct, for instance, long deliberations or tired body language. The rule would not apply where justification for the mistrial is due to any impro-
priety by a party, the judge, or the jury.\textsuperscript{188} Additionally, the rule would apply only in criminal cases.\textsuperscript{189}

\textsuperscript{185} See id. Specifically, the Second Circuit held that Judge Wexler abused his discretion because he failed to discuss any of the following factors, which the Second Circuit held would have helped accurately assess whether the jury was genuinely deadlocked: (1) a statement from the jury that it cannot agree; (2) the length and complexity of the trial; (3) what actions, if any, that the trial court took to determine whether the jury was deadlocked, which would include any alternatives the court chose not to pursue. \textit{id.} at 137–38, 140 (citing Dunkerly v. Hogan, 579 F.2d 141, 148 (2d Cir. 1978) (holding that “the apparent availability of at least one alternative to a mistrial ... leads us to conclude that mistrial was not a ‘manifest necessity’”)).

\textsuperscript{186} See discussion \textit{supra} note 150.

\textsuperscript{187} In his appellate brief to the Second Circuit, Mr. Borghese stated that he was “unaware of a single appellate decision in any jurisdiction upholding a mistrial ... on the grounds of a genuinely deadlocked jury, where ... the trial court did nothing to probe as to the genuineness of a purported deadlock.” Borghese Br., \textit{supra} note 65, at 22–23.

\textsuperscript{188} A jury inquiry rule should not extend to situations of supposed jury tampering or impro-
priety because the rationale behind discharging a jury in those cases is that evidence was not pre-
sented fairly to the jury. Illinois v. Somerville, 410 U.S. 458, 463 (1973). In such cases, where the evidence is effectively “spoiled,” it would “not serve the ends of public justice” to require that the government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.” \textit{Id.} Thus, where there is a question of spoliation or impropriety, the judge can declare a mistrial on his own discretion and without an inquiry. \textit{Id.} With a jury deadlock, on the other hand, the concern is not spoliation; rather, the jury is simply unable to reach a verdict following a fairly presented trial. United States v. Horn, 583 F.2d 1124, 1126–27 (10th Cir. 1978) (citing Arizona v. Washington, 434 U.S. 497, 508–09 (1978)). In other words, had
This Part will address the scope and application of the rule. Part IV.A considers whether the rule should apply only in multi-defendant trials, such as the Razmilovic trial, or whether it should also extend to single-defendant trials. Part IV.B takes up the form of the jury inquiry, namely whether it should be conducted in open court or outside of court, and whether it should be conducted as to each individual juror or collectively. Part IV.C sets forth the form of the instruction and the question put to the jury when a trial judge decides to conduct a jury inquiry. And Part IV.D provides a draft of the proposed jury inquiry rule, to be added as an amendment to Federal Rule of Criminal Procedure 31.

A. Multiple-Defendant Trials Versus Single-Defendant Trials

In his brief to the Second Circuit in Razmilovic, Defendant-Appellant DeGennaro asked that the court, "[a]t a minimum . . . adopt a per se rule for multi-defendant cases requiring in-person inquiry of the jury to verify that the deadlock is intractable and that further deliberations would be of no use, before discharging the jury."\textsuperscript{190} The Second Circuit declined Mr. DeGennaro’s request and provided no adequate rationale for doing so.\textsuperscript{191}

Mr. DeGennaro argued for a mandatory jury inquiry rule that was limited in scope to multiple-defendant cases.\textsuperscript{192} The Razmilovic trial provided a perfect example of the necessity of such a rule in the multiple-defendant context. The jury was asked to render verdicts on three

the jury reached a verdict, it would have been valid. \textit{See Horn}, 583 F.2d at 1127. Therefore, inquiry into the jury’s status could elicit a response that there exists an “apparent possibility” that the jury may agree if given additional time. \textit{Id.} at 1128.

189. Throughout this Comment, a jury inquiry has been compared to (and at times conflated with) a jury poll. Rule 31(d) requires a jury poll after a verdict has been rendered at the request of a party or at the judge’s discretion. \textsc{FED. R. CRIM. P. 31(d)}. However, unlike the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure do not contain a comparable jury polling rule. Although this fact alone would not inhibit the Federal Rules of Civil Procedure from adopting a jury inquiry rule, given the comparisons between jury polls and jury inquiries discussed in Part IV.C, civil adoption may be an even more contentious issue. Thus, applying a jury inquiry rule in civil cases is beyond the scope of this Comment.

190. \textit{DeGennaro Br.}, \textit{supra} note 21, at 27 n.7.

191. \textit{Supra} Parts II, III.C; \textit{United States v. Razmilovic}, 507 F.3d 130, 140 n.3 (2d Cir. 2007).

192. \textit{DeGennaro Br.}, \textit{supra} note 21, at 27 n.7. Counsel for Mr. DeGennaro likely reasoned that the court would be more inclined to adopt a mandatory rule if it was limited to a smaller subset of cases. Although he could not be certain without consulting with Mr. DeGennaro’s counsel, William Hauptman, one of Mr. Jaeggi’s attorneys, agreed that by “limiting it to cases where there are more than one defendant, [Mr. DeGennaro would] not [be] asking the Second Circuit to come up with a rule that applies in all criminal cases, which [courts] generally are loathe to do.” \textit{E-mail} from William Hauptman, Associate, Shearman & Sterling LLP, to Missy Mordy, author, Seattle University School of Law (March 11, 2008, 09:35 EST) (on file with author) [hereinafter Hauptman E-mail].
defendants and twenty-five counts.\textsuperscript{193} And, although the jury reached unanimous verdicts on all but one of those counts, the judge nevertheless declared a mistrial under the mistaken belief that the jury was genuinely deadlocked.\textsuperscript{194}

As Mr. DeGennaro explained, there are a number of rationales for applying the rule to multiple-defendant cases. First, as Razmilovic demonstrated, there is the danger of discharging a jury where it is deadlocked on only one count against one defendant but unanimous on the remaining counts.\textsuperscript{195} Mr. DeGennaro noted that a multiple-defendant case with an increased likelihood of a deadlock "well illustrates the wisdom of such a rule, because further inquiry of the jury would very likely have revealed that the jury was willing and able . . . to deliver complete verdicts as to two of the three defendants."\textsuperscript{196} The greater chance of a deadlock leads to greater risk that one defendant charged in a multiple-defendant case will be subjected to double jeopardy.

The second rationale for applying the rule to multiple-defendant cases is to ensure that a jury is aware of its option to declare a partial verdict\textsuperscript{197} by inquiring into the status of the jury as to each count of the indictment.\textsuperscript{198} A judge could then advise (or remind) the jurors of their option to declare a partial verdict, to which the jurors might declare a verdict as to certain counts or certain defendants.\textsuperscript{199} An additional rationale for the rule is efficiency: partial verdicts extinguish certain counts, and even certain defendants, from being retried, sparing time and resources.\textsuperscript{200}

The final rationale for adopting a mandatory rule in multiple-defendant cases is to provide judges with clear and unambiguous evidence that there is manifest necessity for a mistrial. A jury inquiry would put the question to the jury, not the judge, whether "further deliberation might produce some agreement."\textsuperscript{201} Therefore, instead of relying on judicial instinct, a judge would have specific evidence that each juror be-

\begin{footnotesize}
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\item \textsuperscript{193} DeGennaro Br., \textit{supra} note 21, at 2–3.
\item \textsuperscript{194} \textit{Id.} at 13.
\item \textsuperscript{195} \textit{Id.} at 18; Borghese Br., \textit{supra} note 65, at 10.
\item \textsuperscript{196} DeGennaro Br., \textit{supra} note 21, at 27 n.7.
\item \textsuperscript{197} \textsc{FED. R. CRIM. P.} 31(b).
\item \textsuperscript{198} DeGennaro Br., \textit{supra} note 21, at 18; Borghese Br., \textit{supra} note 65, at 10.
\item \textsuperscript{199} \textsc{FED. R. CRIM. P.} 31(d).
\item \textsuperscript{200} See, \textit{e.g.}, United States v. Razmilovic, 507 F.3d 130, 142 (2d Cir. 2007) (holding that the Double Jeopardy Clause barred two of the three defendant-appellants from being retried). Indeed, using a jury inquiry would have in fact saved the money that Judge Wexler thought he was saving by not conducting an inquiry. DeGennaro Br., \textit{supra} note 21, at 14–15.
\item \textsuperscript{201} See United States v. Goldstein, 479 F.2d 1061, 1069 (2d Cir. 1973).
\end{itemize}
\end{footnotesize}
believed it fruitless to continue deliberations.\textsuperscript{202} If a defendant believed the discharge was an improper use of judicial discretion, the appellate court could rest its decision on unquestionable evidence that the trial judge's decision to declare a mistrial was manifestly necessary.\textsuperscript{203}

These rationales also support extension of the rule to single-defendant cases. First, single-defendant cases often involve multiple counts; thus, as with multi-defendant cases, a judicial inquiry might reveal that the jury has reached a partial verdict. If so, the judge could extinguish some of the counts against the defendant.\textsuperscript{204} Second, by extinguishing some counts, the charges brought against the defendant in a subsequent trial would be limited to those that the first jury did not decide unanimously.\textsuperscript{205}

Third, as with the multiple-defendant cases, a trial judge would hear firsthand from the jury the extent to which they were genuinely deadlocked. Using such concrete information from each individual juror, the judge could determine whether the jury should continue deliberations or be discharged and a mistrial declared.\textsuperscript{206} This third justification validates extension of the jury inquiry rule to cases involving just one defendant and even just one count: in such cases, a statement directly from the jury provides assurance that a mistrial is manifestly necessary.

In sum, the rationales for extending the rule to multiple-defendant cases are also applicable in single-defendant cases, and even single-count cases. Therefore, the jury inquiry rule should not be limited to multiple-defendant cases. Having determined that the rule should apply to both types of cases, the next subpart considers how the inquiry should be conducted.

\textbf{B. The Form of the Jury Inquiry}

The Federal Rules of Criminal Procedure codify polling as an acceptable method of ascertaining whether the jury's verdict was unanimous.\textsuperscript{207} Although this Comment focuses on jury inquiries, not jury polls, both methods involve a form of juror questioning. Likewise, both tools require jurors to disclose subjective beliefs to a judge, and both en-
counter many of the same concerns.\textsuperscript{208} Given the lack of any formal jury inquiry rule, and given the similarities between a jury poll and a jury inquiry, this Comment will now discuss the appropriate form of a jury inquiry by examining the polling process.

Rule 31(d) is silent as to the precise way in which a jury poll should be conducted; however, the advisory committee notes to the 1998 amendments make clear that each juror should be polled individually.\textsuperscript{209} In \textit{King v. Ford Motor Co.}, the court held that jury polls can be conducted using "any formulation that serves to ascertain that the verdict was unanimous."\textsuperscript{210} A poll may not, however, be conducted where "the trial judge’s interrogation during a jury poll serves to coerce a reluctant juror into changing his vote."\textsuperscript{211}

Despite the similarities noted above, there are also a number of distinctions between a jury poll and a jury inquiry. The most important distinction is the completion of a jury poll after the jury has reached a ver-

\textsuperscript{208} As is discussed in this Part, the main concerns with both jury polls and jury inquiries center around coercion. See \textit{King v. Ford Motor Co.}, 209 F.3d 886, 896 n.7 (6th Cir. 2000) (citing \textit{Green v. Zant}, 738 F.2d 1529, 1537–38 (11th Cir. 1984)); see also \textit{Arnold v. McCarthy}, 566 F.2d 1377, 1386–87 (9th Cir. 1978) (noting that the final factor a judge must consider when determining whether mistrial is manifestly necessary is to consider "the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict").

\textsuperscript{209} The advisory committee notes state the following:

Currently, Rule 31(d) is silent on the precise method of polling the jury. Thus, a court in its discretion may conduct the poll collectively or individually. As one court has noted, although the prevailing view is that the method used is a matter within the discretion of the trial court, \textit{United States v. Miller}, 59 F.3d 417, 420 (3d Cir. 1995) (citing cases), the preference, nonetheless of the appellate and trial courts, seems to favor individual polling. \textit{Id.} (citing cases). That is the position taken in the American Bar Association Standards for Criminal Justice § 15-4.5. Those sources favoring individual polling observe that conducting a poll of the jurors collectively saves little time and does not always adequately assure that an individual juror who has been forced to join the majority during deliberations will voice dissent from a collective response. On the other hand, an advantage to individual polling is the "likelihood that it will discourage post-trial efforts to challenge the verdict on allegations of coercion on the part of some of the jurors." \textit{Miller}, 59 F.3d at 420 (citing \textit{Audette v. Isaksen Fishing Corp.}, 789 F.2d 956, 961 n.6 (1st Cir. 1986)).

The Committee is persuaded by the authorities and practice that there are advantages of conducting an individual poll of the jurors. Thus, the rule requires that the jurors be polled individually when a polling is requested, or when polling is directed sua sponte by the court. The amendment, however, leaves to the court the discretion as to whether to conduct a separate poll for each defendant, each count of the indictment or complaint, or on other issues.


\textsuperscript{210} \textit{King}, 209 F.3d at 896 n.7 (citing \textit{Green}, 738 F.2d at 1537–38).

\textsuperscript{211} \textit{King}, 209 F.3d at 896 n.7 (citing \textit{Green}, 738 F.2d at 1537–38).
dict. The purpose of the jury poll is to confirm the jury’s unanimity.\textsuperscript{212}
On the other hand, a jury inquiry is done to determine only whether the jury could potentially reach a verdict in a reasonable amount of time.\textsuperscript{213}
Both seek to determine whether the jury should continue to deliberate or should be discharged. However, a jury inquiry is arguably less intimidating\textsuperscript{214} because there is less riding on a juror’s answer—a jury inquiry asks only whether the jurors should continue to deliberate.\textsuperscript{215} In contrast, a jury poll asks the jury to confirm a verdict that was supposedly unanimous.\textsuperscript{216} Should a juror disagree with the majority during a poll, the result is to invalidate a purportedly valid verdict and a judge must decide whether to order jurors to continue to deliberate or to declare a mistrial.\textsuperscript{217} But should a juror disagree with the majority during an inquiry, then the worst that would happen is that the jurors would be required to continue to deliberate and attempt to reach a verdict.\textsuperscript{218}

Given these differences between a jury poll and a jury inquiry, an inquiry need not be structured exactly like a poll. While coercion and intimidation are still central concerns to be considered with respect to a jury inquiry, the risk that those factors will affect a jury verdict is less apparent with a jury inquiry. Accordingly, a jury inquiry need not be structured exactly as the advisory committee has recommended for a jury poll. Instead, a jury inquiry could be done in any number of ways, in-

\begin{itemize}
\item \textsuperscript{212} \textit{Fed. R. Crim. P.} 31(d).
\item \textsuperscript{213} See \textit{United States v. Horn}, 583 F.2d 1124, 1128 (10th Cir. 1978).
\item \textsuperscript{214} For clarity, this Comment distinguishes between “intimidation” and “coercion.” As used in this Comment, “intimidation” refers to the pressure that may result after the poll or inquiry. More specifically, as discussed in this Part, intimidation occurs when the jurors are sent back to the jury room to deliberate following a non-unanimous poll or following an inquiry in which at least one juror believes that reaching a verdict is possible. “Coercion,” on the other hand, is used to refer to the pressure a juror might feel when stating his opinion in open court or even merely to a judge out of court.
\item \textsuperscript{215} \textit{Horn}, 583 F.2d at 1128.
\item \textsuperscript{216} \textit{United States v. Love}, 597 F.2d 81, 84 (6th Cir. 1979).
\item \textsuperscript{217} \textit{Gov’t of the Virgin Islands v. Hercules}, 875 F.2d 414, 418, 419 n.7 (citing \textit{Love}, 597 F.2d at 84; \textit{United States v. Morris}, 612 F.2d 483, 490 (10th Cir. 1979)); see also \textit{Hercules}, 875 F.2d at 419 n.8 (noting that, “[i]f upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged”).
\item \textsuperscript{218} See \textit{Horn}, 583 F.2d at 1128–29. When there is a split opinion among the jurors as to whether a verdict can be reached in a reasonable amount of time, the judge should send the jurors back to continue deliberations. See, e.g., Transcript of Proceedings at 7–10, \textit{United States v. Cook}, No. CR 05-424-TSZ (W.D. Wash. Mar. 20, 2007) (docket no. 310-2). Only when all of the jurors agree that further deliberations would be fruitless should the judge declare a mistrial under a finding of manifest necessity.
\end{itemize}
cluding: (1) individually in open court; 219 (2) as a group in open court; (3) as a group outside of court; 220 or (4) individually outside of court. None of these methods is perfect. In the following subparts, the positive and negative aspects of each method are discussed.

1. Questioning Each Juror Individually in Open Court

While Rule 31(d) does not restrict the jury polling process to any specific form, 221 a poll might be coercive given the circumstances in which a juror's vote is disclosed. 222 A jury poll is often conducted in open court after the judge or jury foreman has announced the verdict. 223 Generally, per the advisory committee, the judge asks each juror individually whether the vote of the jury was his individual vote. 224

In United States v. Sexton, the Fifth Circuit held that a juror was improperly coerced when, during the poll, the court asked whether the verdict of the foreman was her verdict and she answered that she "didn't vote either way." 225 Citing two other appellate court decisions, 226 the Sexton court held that coercion is most often found where a juror is found to have "voted under the compulsion of the Court." 227 In short, the court implied that coercion often results when the judge forces a juror to state his or her verdict in open court. 228 In those cases, "the polling procedure itself creates a coercive... situation." 229

219. For this Comment, "in open court" refers to when a juror is questioned in front of all parties and jurors in front of a court reporter. As a result, the juror's individual "vote" will be recorded by the court reporter and will be part of the official trial record. See FED. R. CRIM. P. 31 advisory comm. notes (1998).

220. For this Comment, "outside of court" or "out of court" will mean not in open court. These types of hearings may otherwise be considered ex parte or in camera proceedings, but it is important to note that proceedings that are "outside of court" might not include all parties of record. This Comment suggests, however, that these "outside-of-court" inquiries should become part of the official trial record in some way, likely by requiring the judge to provide a synopsis on the record of what was discussed once the judge and jury return to the courtroom.

221. King v. Ford Motor Co., 209 F.3d 886, 896 n.7 (citing Audette v. Isaksen Fishing Corp., 789 F.2d 956, 959 (1st Cir. 1986)).

222. United States v. Sexton, 456 F.2d 961, 966 (5th Cir. 1972) (citing Bruce v. Chestnut Farms-Chevy Chase Dairy, 126 F.2d 224, 225 (D.C. Cir. 1942)).

223. FED. R. CRIM. P. 31(d).


225. Sexton, 456 F.2d at 964.


227. Sexton, 456 F.2d at 964.

228. See id. at 966 (citing Williams v. United States, 419 F.2d 740, 751–52 (D.C. Cir. 1969)).

229. Sexton, 456 F.2d at 966. (citing Williams, 419 F.2d at 751–52).
Because courts have found the open-court polling procedure to be a source of coercion, an inquiry in open court might not be the best option.\textsuperscript{230} Jurors may feel singled out and, therefore, reluctant to state their honest opinions in front of the parties, the attorneys, the judge, and the other jurors. The pressure inherent in stating one's opinion in front of such a cast of individuals is unquestionable.\textsuperscript{231} For example, a juror who disagrees with the majority might nonetheless state that he agrees because agreeing is more appealing than being singled out as the lone dissenter.\textsuperscript{232} Thus, while extremely important to collect information regarding the jury's status, to gather this information in open court could make the information unreliable.\textsuperscript{233}

2. Questioning the Jury as a Group, Through the Jury Foreman, in Open Court

Courts most often find undue coercion when the jurors are polled as a collective group in open court.\textsuperscript{234} Though some courts have noted that a jury inquiry done "as a group is an acceptable alternative,"\textsuperscript{235} questioning the jury as a group retains the possibility that the jurors will feel coerced.\textsuperscript{236} Like individual questioning in open court, a group statement in open court leaves open the possibility that a disagreeing juror would not speak up given the pressures inherent in a courtroom full of attorneys, judges, and jurors.\textsuperscript{237} Moreover, the Third Circuit in \textit{Webb} warned that, in many cases, questioning the foreman does not represent the unani-
mous decision of the jurors.\textsuperscript{238} In fact, in \textit{Webb}, the Third Circuit held that the trial court’s questioning of the foreman was insufficient to establish that “the foreman’s responses . . . represented the unanimous opinion of the jury, or even that of a majority of the panel.”\textsuperscript{239}

Given that coercion is still inherent and that unanimity of the jury is questionable given the collective statement spoken by the jury foreman, questioning the jury as a group in open court is likely the least reliable method to conduct a jury inquiry.

3. Questioning the Jury as a Group, Outside of Court

As discussed in the previous subpart, questioning the jury as a group might lead to an unreliable inquiry.\textsuperscript{240} The \textit{Webb} court noted that the statement of a jury foreman might not be the unanimous decision of the jury.\textsuperscript{241} While an outside-of-court jury inquiry would not present the coercion inherent in an open-court inquiry,\textsuperscript{242} timid jurors might still be less inclined to disagree with the majority unless explicitly asked their opinions.\textsuperscript{243} As a result, any type of group inquiry is suspect for failing to represent the unanimous conclusions of the group. Additionally, as discussed in the next subpart, all communications made outside of court are also suspect and should be avoided, especially when an inquiry might be the basis for a later appeal.

4. Questioning Each Juror Individually, Outside of Court

A final option is to question each juror individually, outside of court. This could be done in a number of ways, such as: (1) requiring each juror to respond to the inquiry in the judge’s chambers;\textsuperscript{244} or (2) requiring each juror to respond to the inquiry in writing.\textsuperscript{245} To require each juror to respond individually and without the inherent pressure of a surrounding group of jurors, attorneys, or parties, provides the least coer-

\textsuperscript{238} \textit{Webb}, 516 F.2d at 1044 (noting that there was “no clear showing that the foreman’s responses here necessarily represented the unanimous opinion of the jury, or even that of a majority of the panel”).
\textsuperscript{239} \textit{Id}.
\textsuperscript{240} \textit{Supra} Part III.B.2.
\textsuperscript{241} \textit{Webb}, 516 F.2d at 1044.
\textsuperscript{242} \textit{Kesley}, 47 F.2d at 454.
\textsuperscript{243} Lichtman, \textit{supra} note 232, at 152; \textit{see also} \textit{supra} Parts IV.B.1–2.
\textsuperscript{244} This may be done in what is termed an \textit{ex parte} proceeding, where at least one attorney is present during the discussion. \textit{See} \textit{BLACK’S LAW DICTIONARY} 1241 (8th ed. 2004).
\textsuperscript{245} Although this Comment does not elaborate further into this written method of an inquiry, it is an option that may be considered if a mandatory jury inquiry rule is adopted.
cive setting; therefore, this method would likely produce the most reliable juror responses.

Nevertheless, an out-of-court inquiry is rife with problems, the foremost being that it is open to attack on grounds of impropriety. Consequently, an out-of-court method would require two additional safeguards. First, if done out of court, the inquiry must nevertheless be documented. This may be done either by using a court reporter during the out-of-court inquiry or by requiring the judge to provide a synopsis of the inquiry in open court. If no official record is made of the inquiry, there would be no clear evidence of a genuine deadlock and, thus, one of

246. Almost all courts conduct jury polls in open court. See, e.g., United States v. Grosso, 358 F.2d 154, 160 (3d Cir. 1966) (noting that the "object of a jury poll is 'to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned and thus to enable the court and the parties to ascertain with certainty that a unanimous verdict has in fact been recorded and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented'" (quoting Miranda v. United States, 255 F.2d 9, 16-17 (1st Cir. 1958) (emphasis added and in original)), rev'd on other grounds, 390 U.S. 62 (1968).

While no rule or holding requires a court to conduct a jury poll in open court, courts commonly construe the polling rule as requiring an open court dialogue. Grosso, 358 F.2d at 160. There are two commonly cited rationales for conducting a poll in open court. First, a poll is conducted in open court merely out of convenience: the jurors will already be in open court when the verdict is read. See, e.g., Gov't of the Virgin Islands v. Hercules, 875 F.2d 414, 418, 419 n.8 (3d Cir. 1989) (citing STANDARDS RELATING TO TRIAL BY JURY, supra note 110, § 5.5). Second, a poll is conducted in open court to prevent future appeals grounded in the parties' speculation as to the unanimity of the poll. United States v. Miller, 59 F.3d 417, 420 (3d Cir. 1995); Audette v. Isaksen Fishing Corp., 789 F.2d 956, 961 n.6 (1st Cir. 1986). If done in open court, the parties will hear the poll firsthand and an official record will be made, greatly limiting any speculation on unanimity. Miller, 59 F.3d at 420; Audette, 789 F.2d at 961 n.6. With a jury inquiry, on the other hand, neither rationale necessarily applies. First, convenience is not always a consideration because a jury will likely be deliberating, thus not in open court, when the jury inquiry is deemed necessary. See, e.g., United States v. Horn, 583 F.2d 1124, 1125, 1129 (10th Cir. 1978) (holding an inquiry may have been appropriate when the jury sent a note from the jury room). Second, unlike a poll, in which a potential verdict rests on the outcome, an inquiry is done when there is no potential verdict and, therefore, a verdict does not rest on the outcome of the inquiry. See, e.g., Horn, 583 F.2d at 1128 (noting that the central inquiry is "whether there was a possibility that the jury could reach a verdict," not whether the verdict was unanimous and thus could be entered as final). In sum, an open court dialogue may not be necessary in the jury inquiry context. As will be discussed in this Part, however, maintaining the integrity of the court and establishing a record from which the court can cite in future appellate proceedings may still be undermined by an out-of-court inquiry.

247. William Hauptman notes the rationale behind making a record of information discussed in an ex parte discussion:

There is no rule about what goes on the record, but if the trial court wants to keep his job [and to maintain the integrity of the court], he will make sure that everything an appellate court will need to see is on the record. In situations where the court needs to tell the parties what happened behind closed doors, the court will usually just let everyone know generally what happened and what their decision is based on that.

Hauptman E-mail, supra note 192.
the important evidentiary benefits of the inquiry would be lost.\textsuperscript{248} Moreover, without a record, the parties might question the propriety of the inquiry, which would once more defeat its evidentiary purpose.

The second safeguard recognizes the danger of impropriety where the discussion between a judge and a juror goes unchecked by the parties.\textsuperscript{249} Without the parties in the room, no one with a stake in the outcome can verify the substance of the discussion.\textsuperscript{250} To ensure that the inquiry is honest and reliable, the second safeguard requires that both parties be present during the inquiry.\textsuperscript{251} The ultimate effect, then, is that an out-of-court inquiry would not be a simple one-on-one conversation with a judge. Rather, an out-of-court inquiry would be no different than an open-court inquiry, resulting in the same inherent pressures.\textsuperscript{252}

While none of these methods is perfect, the simplest and most reliable option is likely an open-court inquiry conducted of each individual juror. First, an individual inquiry is preferable. As the advisory committee to Rule 31(d) explained, “conducting a poll of the jurors collectively saves little time and does not always adequately insure that an individual juror who has been forced to join the majority during deliberations will voice dissent from a collective response.”\textsuperscript{253} An advantage to questioning each juror individually is that there is less likelihood that the verdict will later be challenged as coercive.\textsuperscript{254} Second, an open-court inquiry is preferable. An open-court inquiry may cause some jurors to hesitate to

\textsuperscript{248} Id.; Horn, 583 F.2d at 1127-28.

\textsuperscript{249} William Hauptman notes that any ex parte contact with a jury raises serious issues that appellate courts are very wary of. No one is supposed to speak with a juror about a case unless it is in court, with the lawyers and judge present. The problem is [not just] one of appearances, but also one of potential jury tampering, influencing, etc.

Hauptman E-mail, supra note 192.

250. Under the Code of Conduct for United States Judges, Canon 3 notes that judges “should be patient, dignified, respectful, and courteous to . . . jurors” and should “neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding.” CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3, § A(3)-(4), available at http://www.uscourts.gov/guide/vol 2/ ch 1. html#1. This Canon suggests that judges are advised to maintain a distance from jurors and should not hold ex parte proceedings unless authorized by law or with the consent of the parties. Id. While an out-of-court inquiry would not necessarily violate this Canon, the Code of Conduct suggests that at least one other party should be present at the proceeding, that the parties consent to the proceeding, and that the proceeding become part of the record. See id.

251. Id.

252. Supra Parts IV.B.1-2.


254. Id. (citing United States v. Miller, 59 F.3d 417, 420 (3d Cir. 1995); Audette v. Isaksen Fishing Corp., 789 F.2d 956, 961 n.6 (1st Cir. 1986)).
speak up or respond truthfully, thus making the inquiry potentially unreliable. Nevertheless, the alternative is an out-of-court inquiry, which either includes the above-mentioned safeguards, and so effectively becomes an open-court inquiry, or is subject to allegations of impropriety or jury tampering.\textsuperscript{255} Such allegations could nullify not only the jury inquiry, but the entire outcome of a trial. Given the greater risk associated with an out-of-court inquiry, the preferable choice is an individual, open-court inquiry which, much like a jury poll, documents the inquiry on the official record and is conducted before all parties and counsel.

C. The Question to Be Asked of the Jury

In \textit{Bruce v. Chestnut Farms-Chevy Chase Dairy}, the D.C. Circuit set out what it considered the least coercive method of conducting a jury poll.\textsuperscript{256} The court noted that “[t]he correct practice, when a poll of the jury is asked, is for the clerk to call the roll and ask each juror as his name is called to answer—for the plaintiff, or—for the defendant.”\textsuperscript{257} The court further advised that “it is both unwise and undesirable that the Court should enter into an argument with the juror or require an explanation.”\textsuperscript{258} While the court’s holding was in the context of jury polling as opposed to a jury inquiry, similar guidelines should be followed to avoid a jury inquiry “procedure [that] itself creates a coercive or confusing situation.”\textsuperscript{259}

First, the court should adopt a standard procedure and standard instruction to read to the jurors, such as the following:

There has been some indication that you, the members of the jury, have been unable to come to a collective decision as to the defendant(s) in this case. The Court greatly appreciates your service; however, the Court also wants to ensure that your service does not become unduly burdensome or coerced. To avoid against undue pressures, I will be asking you whether there is any reasonable possibility, however slight, of reaching a unanimous verdict in this case. The following question will be asked of each of you individually: “Do you feel there is a reasonable probability that the jury can reach a unanimous verdict as to each count if sent back to the jury room for further deliberation?” Remember that this question

\textsuperscript{255} Hauptman E-mail, \textit{supra} note 192.
\textsuperscript{256} Bruce v. Chestnut Farms-Chevy Chase Dairy, 126 F.2d 224, 225 (D.C. Cir. 1942).
\textsuperscript{257} \textit{Id.}
\textsuperscript{258} \textit{Id.}
\textsuperscript{259} See \textit{Williams v. United States}, 419 F.2d 740, 750 (D.C. Cir. 1969) (Wright, J., dissenting).
refers to each count you are charged with deciding. Also, when answering, do not give any indication as to your vote on each count. This inquiry is being done only to determine whether further deliberations will be in the best interest of this court and in the best interest of the parties, or whether this court might be required to declare a mistrial.\(^{260}\)

There are a few important parts to this instruction. First, the instruction focuses on the fact that the jury should answer whether there is a reasonable probability of reaching a verdict.\(^{261}\) The defendant has a "valued right to have his trial completed by a particular tribunal."\(^{262}\) Thus, the defendant should have his fate decided by the original tribunal if there is any reasonable probability of reaching a verdict.

Second, the instruction stresses that the jury will be answering whether it might reach a decision as to each count in the indictment. By asking about each count, the judge can determine whether the jury might be able to reach at least a partial verdict, and if so, the judge can then instruct or remind the jury of the partial verdict option.\(^{263}\) This instruction will prevent mistrials in situations where the judge does not instruct the jury on their option to declare a partial verdict.\(^{264}\)

Third, the instruction stresses that the members of the jury are not stating their decision as to the fate of the defendant. Rather, jurors are

\(^{260}\) The Jury Instructions Committee of the Ninth Circuit suggests a similar procedure and instruction for determining whether the jury is deadlocked:

Initially, the court may ask the foreperson the following questions:

"Is there anything else the court can do to assist in the jury's deliberations?"

"Would an additional instruction assist in your deliberations?"

"Would the rereading of any testimony help the jury reach a conclusion?"

If the foreperson's response to all three questions is, "No," then inquire "In your opinion, is the jury hopelessly deadlocked?" If the foreperson's response is, "Yes," ask the foreperson, "Is there a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?"

If the foreperson's response is, "No," then ask the following question of each member of the panel, "Do you feel there is a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?" The court may wish to poll the jury and record their answers which must be a yes or no.

JURY INSTRUCTIONS COMM. OF THE NINTH CIRCUIT, supra note 14, § 5.5C.

\(^{261}\) See United States v. Horn, 583 F.2d 1124, 1128 (10th Cir. 1978) (noting that the inquiry is "whether there was a possibility that the jury could reach a verdict" and if "there existed no apparent possibility" then the court could be assured that the jury was genuinely deadlocked).


\(^{263}\) FED. R. CRIM. P. 31(b).

\(^{264}\) See DeGennaro Br., supra note 21, at 16, 18; United States v. Razmilovic, 507 F.3d 130, 139 (2d Cir. 1978) (citations omitted) (noting that the judge failed to instruct jurors of their right to declare a partial verdict).
stating only whether there is a possibility of reaching a verdict on any particular count.265 When instructing the jury, the trial judge should stress that the jurors are not to state their determinations as to guilt or innocence.266

Finally, the instruction stresses to the jurors that their answers to the inquiry should be a simple “yes” or “no” and should not depend on whether the jurors have already decided a verdict as to any count. In other words, if the jury already decided that a defendant was guilty as to one count, the members of the jury should answer with a simple “yes,” not a statement such as “we have already decided that count.” The trial court should emphasize that the purpose of the inquiry is not to determine whether decisions have been made.267 Instead, the inquiry seeks to determine whether a final verdict could be reached in a reasonable amount of time.268

D. The Timing of the Jury Inquiry

“If the [jury] poll reveals a lack of unanimity,” Rule 31(d) permits a trial judge to “direct the jury to deliberate further.”269 Various courts emphasized this part of Rule 31(d), holding that it was not error to direct the jury to return to the jury room for further deliberations following a non-unanimous jury poll.270 Given the similarities between a poll and an inquiry,271 it follows that directing the jury to continue to deliberate after the inquiry would also be proper.272

Although a jury poll is conducted only after a verdict has purportedly been reached, a judge may require jurors to deliberate further if the

265. See Horn, 583 F.2d at 1128.
266. Reichelt, supra note 1, at 618 n.282 (citing jury inquiry instructions from Hon. Joel D. Horton, District Court Judge, Idaho Fourth Judicial District, which stress the following: “If you conclude that you are hopelessly deadlocked and that further deliberations will not be fruitful, the presiding juror should indicate . . . the fact that the jury is deadlocked, without revealing the numerical division of the jury panel . . . .”) (emphasis added).
267. See id.; see also JURY INSTRUCTIONS COMM. OF THE NINTH CIRCUIT, supra note 14, § 5.5C.
268. See Horn, 583 F.2d at 1128–29.
269. FED. R. CRIM. P. 31(d).
270. Deane v. Dunbar, 777 F.2d 871, 875 (2d Cir. 1985); United States v. Lee, 532 F.2d 911, 915 (3d Cir. 1976); Castleberry v. NRM Corp., 470 F.2d 1113, 1117 (10th Cir. 1972); United States v. Edwards, 469 F.2d 1362, 1367 (5th Cir. 1972); Bruce v. Chestnut Farms-Chevy Chase Dairy, 126 F.2d 224, 225 (D.C. Cir. 1942).
271. Supra Part IV.B.
272. This conclusion is even further supported by the fact that a juror directed to continue deliberating following a jury inquiry is less likely to be coerced than a juror sent back to deliberate following a poll. See supra Part IV.B.
poll reveals a lack of unanimity. Thus, a jury poll is not necessarily done at the end of a trial; rather, it is done prior to entering judgment and discharging the jury. A jury inquiry, also done prior to the end of trial, is no different. More importantly, the policy of a jury inquiry is to prevent judges from hastily declaring mistrials. To effectuate that policy, the mandatory jury inquiry rule must allow for additional deliberation after the jury inquiry and so long as the jury is not genuinely deadlocked.

Because an inquiry may necessarily extend a trial, it should be done only when there is an explicit or implicit indication from the jurors that they are deadlocked and when a judge is considering a mistrial. Given that the decision is ultimately in the hands of a judge, this device rests at judge's discretion. However, like jury polling, it would also be appropriate to allow parties to request jury inquiries. But, unlike a poll, because an inquiry could be requested at several points in a trial, the judge need not conduct an inquiry at the behest of every party motion.

273. Fed. R. Crim. P. 31(d) ("If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.") (emphasis added).

274. See, e.g., Castleberry, 470 F.2d at 1117; Bruce, 126 F.2d at 225; Alusa v. Lehigh Valley R.R. Co., 26 F.2d 950, 950 (W.D.N.Y 1928) ("The right to the polling of a jury . . . may be exercised at any time before the verdict is recorded.").

275. See United States v. Horn, 583 F.2d 1124, 1128 (10th Cir. 1978) ("If the trial judge in this case had . . . called the jury into the courtroom and had inquired of it what progress, if any, had been made, and whether there was a possibility that the jury could reach a verdict, and if the jury had reported that there existed no apparent possibility, there would be something in the record on which to base a conclusion that there was manifest necessity for the declaring of a mistrial.").

276. Of course, this raises the question: when, exactly, should an inquiry be conducted? In other words, if the inquiry is done a few days or even hours prior to the declaration of a mistrial, is this sufficient to establish that the jury was still deadlocked at the time the mistrial was declared? Given this concern, it would be advisable to conduct an inquiry just prior to the declaration of the mistrial. And, although it will most likely be within the discretion of the trial judge, a few hours might not be sufficient given the circumstances. But see, e.g., United States v. Cook, 07-30289, 288 F. App'x 351, 2008 WL 2872629, at *1 (9th Cir. July 24, 2008) (affirming Western District of Washington District Court Judge Thomas S. Zilly's decision that no mistrial was warranted after Judge Zilly questioned the jury whether further deliberations would be fruitful; the responses indicated that the jurors were not hopelessly deadlocked; Judge Zilly sent the jurors back to deliberate; and only five to ten minutes after sending them back to deliberate, the jury returned a verdict); see also Transcript of Proceedings, United States v. Cook, No. CR 05-424-TSZ (W.D. Wash. Mar. 20, 2007) (docket no. 310-2).

277. See Fed. R. Crim. P. 31(d) ("the court must on a party's request, or may on its own, poll the jurors individually").

278. Id. ("the court must on a party's request . . . poll the jurors individually") (emphasis added).
stead, a party should provide some implicit or explicit evidence that the jury is deadlocked prior to being afforded a jury inquiry.279

E. The Language of the Jury Inquiry Rule

A mandatory jury inquiry rule should be added to Federal Rule of Criminal Procedure 31 to require a jury inquiry prior to declaring a mistrial.280 The Ninth and Tenth Circuits provide a good framework for the rule;281 however, to better define those instances in which the inquiry must be conducted, the rule should be phrased as follows:

Jury Inquiry. An inquiry into the status of the members of a jury shall be conducted prior to the declaration of a mistrial and discharge of the jury when such a mistrial is the result of what the court assumes to be a deadlocked or hung jury. Such an inquiry shall be directed to each juror individually and shall be done in open court. In conducting such an inquiry, the court must ask, specifically, whether each member of the jury believes that there is a reasonable probability that the jury can, in a reasonable amount of time, reach a verdict as to each count and as to each defendant of the case at bar if sent back to the jury room for further deliberation. The court may conduct such a jury inquiry on its own or at the request of a party if there is any indication, explicit or implicit, that the jury is deadlocked or hung.

279. This also leaves open the question of whether there should be a limit to the number of jury inquiries that may be done throughout the course of a jury's deliberations. Although not binding on the issue of a jury inquiry, the Ninth Circuit has held that giving more than one Allen charge to a given jury is per se error. United States v. Seawell, 550 F.2d 1159, 1162–63 (9th Cir. 1977). Similarly, in United States v. Cook, the Ninth Circuit cited Seawell when it affirmed a trial court's decision to conduct a jury inquiry after it had given an Allen charge. Cook, No. 07-30289, 2008 WL 2872629, at *1 (9th Cir. July 24, 2008). The court held that "[u]nder the circumstances, asking the jury to return to the jury room and to continue deliberations did not amount to giving a second Allen instruction in violation of United States v. Seawell." Cook, 2008 WL 2872692, at *1. Therefore, like the question of when the jury inquiry should be done, the number of jury inquiries that may be conducted in any given trial should be left to discretion of the trial judge and the sound determination of the courts.

280. Although beyond the scope of this Comment, a mandatory jury inquiry rule might also extend to civil trials. Even though only the Federal Rules of Criminal Procedure contain a jury polling rule, case law has allowed for the use of jury polls in civil trials. Alusa v. Lehigh Valley R.R. Co., 26 F.2d 950, 950 (W.D.N.Y 1928) ("the right to poll exists, unless it has been expressly waived"); see also Castleberry v. NRM Corp., 470 F.2d 1113, 1116–17 (10th Cir. 1972). Thus, although this Comment argues only that the jury inquiry rule should be added to the Federal Rules of Criminal Procedure, courts may eventually extend its use to civil cases as well.

281. See supra Part III.B.
This rule addresses all of the possible concerns raised throughout this Comment. First, the rule requires a jury inquiry to be conducted when it "is the result of what the court assumes to be a deadlocked or hung jury." Thus, the rule is mandatory whenever a judge contemplates a mistrial on account of a purportedly hung jury. Second, and at the same time, the rule allows a judge to conduct an inquiry at the request of a party or at the judge's discretion. In this way, the inquiry may also be conducted when a mistrial is not contemplated but where the jury's status is questioned. Third, the inquiry is to be directed to each juror "individually" and in "open court." Thus, the rule requires an individual response from each juror to be officially recorded for use in a possible future appeal. Fourth, the inquiry asks whether the jurors might reach a verdict in a reasonable amount of time and, therefore, seeks to avoid potentially exhausting a jury with fruitless deliberations. And finally, the inquiry explains that the jury is to consider the likelihood of a verdict with respect to each count. Consequently, the inquiry seeks to prevent situations, like the Razmilovic trial, in which jurors are unaware of their option to declare a partial verdict.

V. CONCLUSION: HOW THE NEW RULE WOULD HAVE CHANGED THE OUTCOME OF RAZMILOVIC

A mandatory jury inquiry rule will have incredible benefits. These benefits become startlingly obvious when the rule is applied hypothetically to the Razmilovic trial. First, had the rule been adopted, Judge Wexler would have been required to conduct a jury inquiry prior to discharging the jury. In so doing, the judge would have determined that the jury had reached a partial verdict. The partial verdict would have acknowledged that two defendants, Mr. DeGennaro and Mr. Borghese, were not guilty of all charges against them. Moreover, of the twenty-three counts against Mr. Jaeggi, only one would have remained. Thus, an inquiry would have eliminated a number of issues to be decided by a second tribunal.

Second, Judge Wexler might have determined that the jury could have reached a verdict on all counts in a reasonable amount of time. If

282. This Comment does not address whether conducting two jury inquiries might be per se error. See supra note 279.
283. See Borghese Br., supra note 65, at 10; DeGennaro Br., supra note 21, at 18; see also United States v. Razmilovic, 507 F.3d 130, 139-40 (2d Cir. 2007).
284. See Borghese Br., supra note 65, at 10; DeGennaro Br., supra note 21, at 18.
285. See Borghese Br., supra note 65, at 10.
so, the Judge might have given an *Allen* charge or simply sent them back with additional instructions to continue deliberations. In so doing, the court would have maintained the defendants' valued right to have their case decided by a particular tribunal.

Finally, the jury inquiry would have spared the Second Circuit from hearing another appeal. Even forgetting the possibility of a partial verdict, had the jurors indicated that they did not believe a verdict could be reached, each juror's statement would have provided definitive evidence that Judge Wexler did not abuse his discretion in finding them genuinely deadlocked and declaring a mistrial. Thus, the inquiry could have effectively rendered the appeal meritless.

Thus, as the *Razmilovic* case makes clear, a mandatory jury inquiry rule is fair, efficient, and reliable. It saves potential judicial resources. It ensures that the jury understands its right to declare a partial verdict. It elicits answers that can be used on appeal as proof of genuine deadlock. And, most importantly, it can save defendants from being tried twice for the same offense.

286. See *Razmilovic*, 507 F.3d at 140.
289. In February 2008, Mr. Jaeggi pleaded guilty to a single felony count. Although at trial he faced up to thirty years in prison, Mr. Jaeggi's plea agreement resulted in probation with no incarceration and no fine.