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Reliable Way To Enforce The Double Jeopardy Clause When
Juries Deadlock On Counts With Lesser Included Offenses**

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LET'S CALL THE POLL THING OFF: PARTIAL VERDICT FORMS AS A MORE RELIABLE WAY TO ENFORCE THE DOUBLE JEOPARDY CLAUSE WHEN JURIES DEADLOCK ON COUNTS WITH LESSER INCLUDED OFFENSES

Ben Osborn*

ABSTRACT

The practice of charging lesser included offenses often leads juries to acquit on some levels of a given count but deadlock on others, but many states do not give effect to such acquittals and instead record only the deadlock for the entire count. Because the Double Jeopardy Clause only attaches to formally recorded verdicts, defendants' double jeopardy rights will thus often depend on whether and how a jury is afforded the opportunity to give effect to such partial acquittals. Some states expressly forbid such partial acquittals, a practice deemed constitutional by the United States Supreme Court. New Mexico not only allows partial verdicts, but also takes the unusual approach of requiring trial courts to poll juries which deadlock on counts with lesser included offenses to see whether the jury voted to acquit on any level of the offense. This comment argues that New Mexico is correct to allow partial verdicts on lesser included offenses, but that it has not chosen the proper means to do so. Polling is too imprecise to protect defendants' double jeopardy rights. Instead of polling, the Court should require that juries be provided partial verdict forms, which would enable the jury to mark "guilty" or "not guilty" on each level of a count with lesser included offenses. This small change in the verdict form would strengthen constitutional protections while promoting judicial efficiency and ensuring more accurate verdicts.

INTRODUCTION

Imagine you are a jury foreperson in a murder trial. The case involves a young man who found his best friend and girlfriend in bed in the home the three shared.¹ In a fit of rage, the young man shot and killed his friend, and severely wounded his girlfriend. After a two-week trial, you and the jury retire to deliberate

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1. This hypothetical is based on State v. Phillips, 2017-NMSC-019, 396 P.3d 153.

one homicide count, including first-degree murder and the lesser included offenses of second-degree murder and voluntary manslaughter. You are given verdict forms which allow you to convict on first-degree, convict on second-degree, convict on manslaughter, or acquit on all charges. You do not have the ability to acquit on any specific level of the count; you must either convict on one or acquit on all. Some states would instruct that you must begin with first-degree murder, and may only even consider the lesser offenses if you unanimously agree that the defendant is not guilty of first-degree murder.² Other states would have you begin with first-degree murder, but you could move on to second-degree murder if, after careful deliberation, you are unable to reach agreement on first-degree murder.³

On the first day of deliberation, the jury votes unanimously to acquit on first-degree murder after finding there was no premeditation. You are unable to give effect to that vote with the verdict forms you have been provided, so you move on to the lesser offenses. At the end of the second day of deliberations, you send the following note to the judge:

Some of us are guilty on 2nd degree because we believe the State has proven there was not sufficient provocation, so we moved to manslaughter and therefore the same people who support 2nd degree are forced to vote against manslaughter. We all agree on every other element in both 2nd degree and manslaughter. How do we proceed? We have been in deliberations on this issue since 9am. We moved to manslaughter about an hour ago.⁴

The judge, hoping to avoid weighing in too heavily, responds with a curt, “You have been given all the instructions.”⁵ You and the rest of the jury retire for the weekend without coming to any conclusion. On Monday, you hold a series of votes, revealing the jury has maintained its agreement to acquit on first-degree murder, but there is no hope of agreement on the lesser offenses of second-degree murder and voluntary manslaughter. You send another note to the Judge: “What does it mean if we don’t sign any of the papers on the homicide count? We are hung.”⁶ The judge then summons you to the courtroom, to appear before the judge, counsel, the defendant, and the victim and her family. At this point, a judge in any courtroom would ask gently probing questions to see whether further deliberation could break the impasse.⁷ In this case, though, you believe you are hopelessly deadlocked.

In most states, the trial judge may discharge the jury, without giving any effect to your acquittal on first-degree murder, and the state may retry the case on all levels of the offense before a new jury. Even if you were in an acquittal-first state, the first category, the judge may discharge you without inquiring about the purported acquittal, despite your even considering second-degree murder indicates you must

2. This is called an “acquittal-first” transition instruction. *See, e.g.*, *Blueford v. State*, 2011 Ark. 8, 2, 370 S.W.3d 496, 498 (2011).

3. This is called an “unable-to-agree” transition instruction. *See, e.g.*, UJI 14-250 N.M. R. ANN.

4. Brief for Petitioner at 3, *State v. Phillips*, 2017-NMSC-019 (No. 35,881).

5. *Id.*

6. *Id.*

7. This kind of questioning is colloquially referred to as an *Allen* charge, and was approved by the United States Supreme Court in *Allen v. U.S.*, 164 U.S. 492 (1896).

have acquitted on first-degree.⁸ On the other hand, in an unable-to-agree jurisdiction, no such inference can be rationally drawn, because it is just as likely that you deadlocked on each level of the offense, as it is that you acquitted on any level.

The United States Supreme Court has held that trial judges are under no obligation to accept a partial verdict⁹ reflecting the acquittal on first-degree murder in this situation.¹⁰ This means that the defendant may be retried for first-degree murder, despite the jury's vote to acquit on that offense, without violating the Double Jeopardy Clause.¹¹ Most states hold that trial judges have no discretion to accept partial verdicts in such a scenario.¹² Only a few states,¹³ agreed with by three dissenting justices of the Supreme Court in *Blueford v. Arkansas*,¹⁴ would require the judge to accept a partial verdict reflecting the acquittal.

No matter which state you are in, you wonder why you were not given the ability to mark "not guilty" on the charge of which you acquitted. The whole experience seemed rather opaque to you as a lay juror, with all of the procedural bickering and attorney head-scratching and judge chin-stroking. But you know the jury acquitted on first-degree murder, and so it bothers you that the defendant will be retried on that offense.

New Mexico requires the judge in this situation to poll the jury.¹⁵ The judge must ask each juror, in open court, which way he or she voted on each level of the count, beginning with the greatest charge until the judge can determine where the jury deadlocked.¹⁶ If the judge finds the jury unanimously acquitted on any offense, she must render a partial verdict reflecting the acquittal. Now imagine that, instead of discharging you, the judge polled each juror, in open court, before a packed gallery full of observers with an emotional stake in the outcome. The judge starts with you, asking whether the jury "truly deadlocked on the greater offense of first-degree murder."¹⁷ You are confused, because while you know the jury agreed on that

8. See generally *Blueford v. Arkansas*, 566 U.S. 599 (2012).

9. A partial verdict allows a jury to find a defendant guilty or not guilty on some, but not all charges. See *Stone v. Superior Court*, 31 Cal. 3d 503, 517, 646 P.2d 809, 819 (1982). The more commonly used alternative to partial verdicts, a general or "all or nothing" verdict, requires a jury to render formal findings on all charges or else deadlock. See *A Juvenile v. Commonwealth*, 392 Mass. 52, 55, 465 N.E.2d 240, 243 (1984).

10. *Blueford*, 566 U.S. at 610.

11. *Id.*

12. See, e.g., *Walters v. State*, 255 Ark. 904, 906, 503 S.W.2d 895, 897 (1974); *People v. Hall*, 25 Ill. App. 3d 992, 995, 324 N.E.2d 50, 52-53 (1975); *A Juvenile v. Com.*, 392 Mass. 52, 56-57, 465 N.E.2d 240, 243 (1984); *People v. Hickey*, 103 Mich. App. 350, 353, 303 N.W.2d 19, 21 (1981); *State v. Hutter*, 145 Neb. 798, 806-07, 18 N.W.2d 203, 209 (1945); *State v. Booker*, 306 N.C. 302, 305-06, 293 S.E.2d 78, 80 (1982).

13. See, *Whiteaker v. State*, 808 P.2d 270, 274 (Alaska Ct. App. 1991); *Stone v. Superior Court*, 31 Cal. 3d 503, 514, 646 P.2d 809, 817 (1982); *State v. Tate*, 256 Conn. 262, 284-85, 773 A.2d 308, 323-24 (2001) *Dissell v. Adams*, 497 N.Y.S.2d 570, 572, 115 A.D.2d 1006, 1008 (1985); *State v. Grabowski*, 644 A.2d 1282, 1283 (R.I. 1994).

14. *Blueford*, 566 U.S. at 610 (Sotomayor, J., dissenting, joined by Ginsburg and Kagan, J.J.).

15. Rule 5-611(D) NMRA. Most other states expressly reject such polling. See *infra* note 103 and accompanying text.

16. Rule 5-611(D).

17. *State v. Phillips*, 2017-NMSC-019, ¶ 10.

offense, you were unable to express that agreement in any verdict with the forms you were provided. This colloquy results:

Foreperson: So I don't understand how the . . .

Judge: Yes or no, whether you were deadlocked with regards to the greater offense of first-degree murder. You cannot reach a decision as to that charge?

Foreperson: I hate to say the wrong thing, but I believe we did reach a decision, and we went down to the next charge; is that correct?

Judge: So with regards to first-degree, you were not deadlocked?

Foreperson: No.

Judge: I'm asking you, [Ms. Foreperson].

Foreperson: No.¹⁸

The judge then continues polling the next five jurors, with four indicating no deadlock on first-degree murder and the sixth juror saying she thought you were deadlocked because you were unable to produce any verdict on that offense. On the seventh juror, the judge for some reason changes the wording of the question, which amplifies Juror # 7's confusion:

Judge: Were you deadlocked as to the first-degree murder charge?

Juror # 7: Can I ask a question? I mean, deadlocked meaning we couldn't agree?

Judge: Correct. You could not arrive at a *verdict*.¹⁹

Jury # 7: Then yes, we were deadlocked.²⁰

The next five jurors agree with Juror # 7, meaning that seven jurors claim no deadlock on first-degree murder, and five indicate deadlock. The judge declares a mistrial and reserves the state's right to retry on first-degree murder.

Confronted with almost exactly this fact pattern in *State v. Phillips*, the Supreme Court of New Mexico agreed that the trial judge improperly polled the jury by not only failing to resolve the ambiguity in the jury's agreement, but actually adding to that ambiguity by using confusing and non-uniform polling questions.²¹ The Court then implicitly disagreed with the United States Supreme Court, and held that the federal Double Jeopardy Clause prohibits retrying the defendant on both first- and second-degree murder.²² The Court then doubled down on New Mexico's unusual polling requirement, holding that the broader remedy for the lower court's confusing poll was to affirm the requirement that all courts confronted with a similar situation conduct the same kind of poll that gave rise to the confusion in *Phillips*.²³ The holding requires trial judges to resolve ambiguity in jury consensus via polling, but *any* deadlock in an unable-to-agree state like New Mexico will be wholly

18. *Id.*

19. This question comes despite the fact that the judge knows the jury did not render a verdict, because that's how you all got into this polling situation in the first place.

20. *Phillips*, 2017-NMSC-019, ¶ 11.

21. *Id.* ¶ 19.

22. *Compare id.* ¶ 18, with *Blueford v. Arkansas*, 566 U.S. 599, 610 (2012).

23. *Phillips*, 2017-NMSC-019, ¶ 18.

ambiguous. Unlike in an acquittal-first state, in which a jury may only consider a lesser offense after unanimously agreeing to acquit on the greatest offense, in an unable-to-agree state like New Mexico the jury may consider and deadlock on each level of the offense. Read literally, Phillips thus creates a per se rule triggering polling every time a jury deadlocks on any count with lesser included offenses.

This comment argues that the New Mexico Supreme Court is correct to allow partial verdicts on lesser included offenses, but that it has not chosen the proper means to do so. Instead of polling, the Court should require juries be provided partial verdict forms, which would enable the jury to mark “guilty” or “*not guilty*” on each level of a count with lesser included offenses. If the jury deadlocks, it should indicate the numerical split without showing which side of the split voted for which outcome, which would eliminate the need for polling.

While merely adding a box to a piece of paper may seem trivial, I argue that such a change can have concrete implications for defendants’ constitutional rights against double jeopardy. Partial verdict forms would be more workable, and offer greater protections to defendants than polling, while ensuring convictions on those charges supported by the evidence and reducing the need for potentially coercive questioning by judges. Jury polling can intrude on the deliberative process and open the “black box” of the jury room,²⁴ and is too imprecise to protect defendants’ double jeopardy rights. New Mexico’s insistence on pre-verdict polling as a means of judicial efficiency creates a risk of jury confusion and coercion, while raising the prospect of costly appeals. The insistence may even be self-defeating, because an alleged double jeopardy violation enables interlocutory appeal, so the interest in trial efficiency may actually result in inefficiency at the appellate level. Most importantly, it is likely that in several trials that are not appealed, ambiguity may go unresolved by polling, and a misinterpretation of jurors’ responses to polling may violate defendants’ constitutional rights to freedom from double jeopardy.

This Comment argues in two directions: first, against states which reject partial verdicts, and second, against New Mexico’s means of rendering partial verdicts. This Comment proceeds in three parts. Part II explores the conceptual underpinnings of partial verdicts, including principles of double jeopardy, lesser included offenses, transition instructions, and pre-verdict polling. Part III discusses partial verdict forms and how they would work in an unable-to-agree state like New Mexico. Finally, Part IV responds to the rationales offered by other states that have rejected the use of partial verdict forms and shows why those rationales should be rejected in an unable-to-agree state like New Mexico.

I. BACKGROUND ON PARTIAL VERDICTS IN AN UNABLE-TO-AGREE STATE LIKE NEW MEXICO

Partial verdicts involve the major criminal procedure issues of double jeopardy, lesser included offenses, and transition instructions. While some scholars

24. See, e.g., *United States v. Thomas*, 116 F.3d 606, 619 (2d Cir. 1997) (noting that “[t]he jury as we know it is supposed to reach its decisions in the mystery and security of secrecy; objections to the secrecy of jury deliberations are nothing less than objections to the jury system itself.”).

posit that partial verdicts make the most sense in acquittal-first jurisdictions,²⁵ partial verdicts have no less utility in an unable-to-agree jurisdiction like New Mexico. Instead, the universal logic of double jeopardy and the mechanics of lesser included offenses render the use of partial verdicts just as important, if not more so, than in acquittal-first jurisdictions, where the jury's deliberative process is more transparent.

A. Double Jeopardy

Careful analysis of the law of double jeopardy reveals that partial verdicts are an important tool for vindicating defendants' rights against double jeopardy. That partial verdicts are not required in most states serves as a considerable loophole whereby defendants are routinely acquitted of an offense by one jury, which deadlocks on other offenses, only to be convicted of the same offense by a later jury. Further, by increasing the risk of deadlock, general verdicts effectively gut defendants' ability to use the doctrine of collateral estoppel.²⁶ Partial verdicts can thus remedy the current double jeopardy underprotection on lesser offenses, while also putting teeth into the underutilized doctrine of collateral estoppel.

The Double Jeopardy Clause of the Fifth Amendment provides that no person may "be subject for the same offense to be twice put in jeopardy of life or limb."²⁷ The Clause forbids subsequent prosecution for the same offense after either acquittal or conviction and multiple punishments for the same offense.²⁸ The Clause protects the guilty and the innocent alike. The United States Supreme Court provided the oft-cited rationale in *Green v. United States*:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.²⁹

The Clause also protects the defendant's interest in finality, the "valued right to have his trial completed by a particular tribunal"³⁰ in order to "conclude his

25. See generally Jalem Peguero, Note, *A Second Shot at Proving Murder: Sacrificing Double Jeopardy for Rigid Formalism in Blueford v. Arkansas*, 4 CAL. L. REV. CIR. 107 (2013); Robert Sheppard, *Double Jeopardy Blues: Why in Light of Blueford v. Arkansas States Should Mandate Partial Verdicts in Acquit-First Transition Instruction Cases*, 83 MISS. L.J. 373, 424 (2014).

26. "Collateral estoppel" is often referred to as "issue preclusion." See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1980).

27. U.S. CONST. amend. V.

28. *Ohio v. Johnson*, 467 U.S. 493, 498 (1984); *State v. Montoya*, 2013-NMSC-020, ¶ 23, 306 P.3d 426.

29. *Green v. United States*, 355 U.S. 184, 187-188 (1957)

30. *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

confrontation with society.”³¹ The Fourteenth Amendment incorporates the Double Jeopardy Clause against state prosecutions.³²

Double jeopardy is perhaps the oldest principle in the Bill of Rights.³³ Yet this longevity has not lent itself to conceptual clarity. The Supreme Court holds that jeopardy attaches when the jury is impaneled and sworn,³⁴ but the Court has not articulated a clear test as to when precisely jeopardy terminates such that a subsequent prosecution would constitute an impermissible second jeopardy, because the Court has employed a balancing test to determine which types of mistrials do not constitute an “end” to the defendant’s first jeopardy.³⁵ A trial court may declare a mistrial, even over a defendant’s objections, whenever “taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.”³⁶ It is in the trial judge’s discretion to decide whether such manifest necessity exists, but that discretion “ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.”³⁷ Despite the Clause’s absolute terms, it does not protect against reprosecution following an earlier trial which ended in circumstances beyond the state’s control. Gross prosecutorial misconduct requiring a mistrial is not manifestly necessary, and so will bar against subsequent prosecution, but an advancing army³⁸ or juror illness, render it manifestly necessary to declare a mistrial and so will not bar subsequent prosecution.³⁹ Jury deadlock is often described as the quintessential instance in which it is manifestly necessary to declare a mistrial.⁴⁰

Consistent with, and perhaps adding to this complexity, the United States Supreme Court has often changed the rules of double jeopardy. In 1975, Justice Rehnquist established a test for determining when the state may retry a case that was dismissed by the trial court but reversed on appeal.⁴¹ Three years later, however, Justice Rehnquist overruled that test and wrote a new one.⁴² Similarly, in 1990, the Court established a test for determining when different offenses could be deemed the “same” for double jeopardy purposes,⁴³ but three years later the Court overturned that test.⁴⁴ And less than a year after that, the Court ignored the 1993 test and applied

31. *United States v. Jorn*, 400 U.S. 470, 486 (1971).

32. *See Benton v. Maryland*, 395 U.S. 784, 794 (1969).

33. *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting) (describing double jeopardy as “one of the oldest ideas found in western civilization”).

34. *Crist v. Bretz*, 437 U.S. 28, 32–38 (1978).

35. *See, e.g., Arizona v. Washington*, 434 U.S. 497, 505 (1978) (noting that “[b]ecause of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.”).

36. *United States v. Perez*, 22 U.S. 579, 580 (1824).

37. *Id.*

38. *Wade v. Hunter*, 336 U.S. 684, 691 (1949).

39. *Arizona v. Washington*, 434 U.S. 497, 505 (1978).

40. *Id.* at 509.

41. *United States v. Jenkins*, 420 U.S. 358, 365 (1975).

42. *United States v. Scott*, 437 U.S. 82 (1978).

43. *Grady v. Corbin*, 495 U.S. 508 (1990).

44. *United States v. Dixon*, 509 U.S. 688 (1993).

a version of the 1990 test.⁴⁵ As the Court itself aptly noted, “the decisional law in the [double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.”⁴⁶

Even less clear is how jeopardy attaches to charges with lesser included offenses. A lesser included offense is generally the “same” for double jeopardy purposes.⁴⁷ However, there are several tests for determining when one offense is included in another and so the “same.”⁴⁸ Whether and how the jury is instructed on lesser included offenses for any charge, and whether and how a mistrial is declared will have concrete implications for the defendant’s double jeopardy rights. In this regard, the Court’s construction of double jeopardy can sometimes underprotect defendants from subsequent prosecution when juries deadlock on some, but not all offenses included within a given count. This is because courts may constitutionally declare a mistrial without giving effect to partial acquittals, leaving defendants vulnerable to later being convicted of those same offenses. Underlining the local relevance of this point is an older study which found that nearly a quarter of criminal trials in New Mexico result in hung juries,⁴⁹ vastly more than the national average of almost 5.6 percent in state cases⁵⁰ and about three percent in federal cases.⁵¹

But while the Double Jeopardy Clause may sometimes underprotect defendants on lesser included offenses, in other areas its reach extends even to entirely separate offenses. In the famous case of *Ashe v. Swenson*, the United States Supreme Court held that the Double Jeopardy Clause barred the prosecution of a defendant who had previously been acquitted of robbing a separate victim in the same occurrence.⁵² The Court held that the doctrine of collateral estoppel, rooted in civil litigation, was necessary to protect criminal defendants amid a rapidly proliferating body of criminal statutes.⁵³ Applied to criminal law, collateral estoppel provides that the government may not retry any issue that has previously been resolved in the defendant’s favor.⁵⁴ The rule is asymmetric, protecting only defendants.⁵⁵ However, while the rule is theoretically a powerful tool for defendants, it may be underutilized because it is so difficult to apply. Many courts use general verdicts that do not specify precisely which issues are resolved by juries, and many offenses contain several distinct factual predicates, each of which may be sufficient

45. *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994).

46. *Albernaz v. United States*, 450 U.S. 333, 343 (1981).

47. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932).

48. *See infra*, Part I.B.

49. Thomas L. Grisham & Stephen F. Lawless, Note, *Jurors Judge Justice: A Survey of Criminal Jurors*, 3 N.M. L. REV. 352, 53 (1973) (the number was even higher in Bernalillo County at over a third).

50. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 461 (1966).

51. Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569, 582 (2007).

52. *Ashe v. Swenson*, 397 U.S. 436 (1970).

53. *Id.* at 444 n.10.

54. *See In re Forfeiture of Fourteen Thousand Six Hundred Thirty-Nine Dollars (\$14,639) in U.S. Currency in Various Denominations & Two (2) Digital Pagers*, 1995-NMCA-088, ¶ 24, 120 N.M. 408, 414.

55. *See Ashe*, 397 U.S. at 443

to produce conviction.⁵⁶ As such, a defendant seeking the protection of collateral estoppel must prove, often by conjecture, that the jury necessarily must have resolved an issue in her favor in order to preclude it in subsequent litigation.

To decide whether collateral estoppel bars subsequent litigation, trial courts must “examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.”⁵⁷ Collateral estoppel is thus unique in criminal procedure in that it expressly requires scrutinizing jury deliberations. Even more unusual is that the defendant shoulders the burden to show that an issue was necessarily decided in her favor by a prior jury.⁵⁸ That burden cannot be met when the jury returns inconsistent verdicts,⁵⁹ but the fact that a jury acquits on some charges and hangs on others does not bar the defendant’s ability to preclude an issue necessarily decided in the acquittal.⁶⁰

A final point on collateral estoppel: the doctrine’s asymmetry means that prosecutors are discouraged from bifurcating trials in order to gain any sort of strategic upper hand against defendants.⁶¹ If a prosecutor wins in one trial, she would still have to reprove each element in a later, related trial. However, if the jury finds for the defendant on *any* issue, that issue is forever foreclosed from the prosecutor. The doctrine incentivizes the practice of throwing everything at a defendant at once in a single trial. This is the point of collateral estoppel: the government should not be able to re prosecute the defendant endlessly on slightly different charges for essentially the same conduct. But the practice can produce rather complicated charges,⁶² often with lesser included offenses that have facts interlocking with other charges. Requiring a jury to convict on one offense or acquit on all could increase the incidences of deadlock, which, without partial verdicts, could result in a full retrial on all charges. This undermines the efficacy of collateral estoppel as a vehicle to protect defendants’ double jeopardy rights.

Partial verdicts can thus play an important role in protecting defendants’ double jeopardy rights. If a jury hangs on a count with lesser included offenses, but unanimously agrees to acquit on some level of the offense, partial verdicts ensure that agreement is given effect. Absent partial verdicts, a defendant may receive a unanimous vote of acquittal from one jury, only to be formally convicted of the same offense, despite the Double Jeopardy Clause’s prohibition on that point. Adding collateral estoppel to the mix, partial verdicts could even affect a defendant’s double

56. See, e.g., *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam); *State v. Salazar*, 1997-NMSC-044, ¶ 32, 945 P.2d 996 (stating that “a jury’s general verdict will not be disturbed in such a case where substantial evidence exist in the record supporting at least one of the theories of the crime presented to the jury”); *State v. Godoy*, 2012-NMCA-084, ¶ 6, 284 P.3d 410.

57. *Ashe*, 397 U.S. at 444 (quoting Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38–39 (1960)).

58. *Schiro v. Farley*, 510 U.S. 222, 233 (1994).

59. See *United States v. Powell*, 469 U.S. 57, 64 (1984).

60. *Yeager v. United States*, 557 U.S. 110, 117 (2010).

61. See *United States v. Dixon*, 509 U.S. 688, 710 n.15 (1993) (noting that the doctrine of collateral estoppel means prosecutors “have little to gain and much to lose from [a bifurcation] strategy”).

62. See, e.g., *Yeager*, 557 U.S. at 125. In *Yeager*, the Court extended the doctrine of collateral estoppel beyond the simple fact pattern of *Ashe*, and applied it to a case involving a 126-count indictment.

jeopardy rights on separate counts. Partial verdicts transform the “nonevent”⁶³ of a hung jury, which offers no double jeopardy protections, into a real event which precludes reprosecution on both the acquitted charges *and* any other charge which necessarily requires revisiting an issue the jury must have decided in the defendant’s favor to reach the acquittal. Given the defendant’s interest in “conclud[ing] his confrontation with society,”⁶⁴ the Double Jeopardy Clause thus bolsters the notion that when the jury has functionally reached a verdict, courts should give form and effect to the jury’s agreement. And yet the United States Supreme Court has “never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict.”⁶⁵ Whatever double jeopardy stands for, the defendant’s interest in finality merits consideration of the most direct means of breaking impasse: partial verdict forms.

B. Lesser Included Offenses

While the Double Jeopardy Clause primarily protects the defendant’s interest in ending her confrontation with society, the practice of submitting lesser included offenses protects both society’s and defendants’ interest in accurate convictions.⁶⁶ The practice of lesser included offenses can be fairly characterized as a tool for juries to precisely express their findings. Partial verdicts thus serve this interest by giving juries a more precise means of communicating findings.

The practice of submitting lesser included offenses to juries arose in part out of double jeopardy’s bar on retrying defendants twice for the same offense, as it better enabled the state to maximize the probability of success on the one shot it gets at conviction.⁶⁷ However, early courts also recognized the benefits of giving juries a more precise way to express their findings.⁶⁸ The merging of charges into single counts promotes judicial efficiency while serving society’s interest in conviction for any crime supported by the evidence.⁶⁹ The practice was initially seen to benefit the prosecution at the expense of defendants, as it was believed that presenting juries with the option of convicting on a lesser offense would diminish the former binary choice of either convicting or acquitting on the single charge presented, increasing the risk of conviction.⁷⁰ Today, it is well recognized that the practice also benefits

63. *Yeager*, 557 U.S. at 118.

64. *United States v. Jorn*, 400 U.S. 470, 486 (1971).

65. *Blueford v. Arkansas*, 566 U.S. 599, 609 (2012).

66. See 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 515, nn.2–3 (4th ed. 2011).

67. See, e.g., *R. v. Segar* (1696) 90 Eng. Rep. 554, 555 (acquittal on one offense barred subsequent prosecution for a similar offense); *Turner’s Case* (1664) 84 Eng. Rep. 1068; see also 1 J. CHITTY, CRIMINAL LAW 250 (5th Am. ed. 1847).

68. MATTHEW HALE, PLEAS OF THE CROWN 301–302 (1st Am. ed. 1736) (noting that the jury “may find the defendant guilty of part, not guilty of the rest, or may find the defendant guilty of the fact, but vary in the manner”).

69. See *Beck v. Alabama*, 447 U.S. 625, 633 (1980) (noting that the practice “developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged”).

70. *Missouri v. Hunter*, 459 U.S. 359, 372 (1983) (Marshall, J., dissenting) (noting that “[t]he very fact that a defendant has been arrested, charged, and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes”).

defendants.⁷¹ Submitting lesser included offenses to the jury guards against the possibility that jurors will convict the defendant of the greater offense of which they have doubts, but nonetheless believe the defendant still committed some crime.⁷² Having taken on a constitutional dimension, the practice is now universally required in capital cases,⁷³ and some courts have a sua sponte duty to submit lesser offenses to juries.⁷⁴

There are several tests to identify whether one crime is included within another. At common law, courts focused on the abstract elements of the various offenses to see whether one crime was fully included within the elements of another.⁷⁵ However, this straightforward approach could lead to the rather perverse rule that a defendant convicted of attempted murder could not be later tried for murder if the victim ended up dying.⁷⁶ A majority of courts today follows some variation of the “cognate approach.”⁷⁷ This approach focuses on the either the factual allegations in the indictment or the evidence submitted at trial to determine whether a lesser included offense can be adduced from the manner in which the principal offense is alleged to have been committed.⁷⁸ New Mexico uses a mix of these approaches, focusing on whether the lesser crime is included in the elements of the greater crime, but also on whether the allegations in the indictment gave sufficient notice to the defendant of the lesser offenses, and whether the evidence adduced at trial is legally sufficient for a jury to find the defendant guilty of a lesser offense.⁷⁹ This means that a defendant’s double jeopardy protections against subsequent

71. See, e.g., *Keeble v. United States*, 412 U.S. 205, 212–13 (1973) (noting that lesser included offenses allow a jury a more precise way to express its findings. “Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.”); *United States v. Harary*, 457 F.2d 471, 479 (2d Cir. 1972).

72. *State v. Andrade*, 1998-NMCA-031, ¶ 11, 954 P.2d 755.

73. *Keeble*, 412 U.S. at 208 (noting that it is “beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater”); *Beck*, 447 U.S. at 635–36 (observing that “state courts that have addressed the issue have unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence warrants it”).

74. See, e.g., *People v. Barton*, 906 P.2d 531, 536 (Cal. 1995).

75. *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

76. See Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1813 (1997).

77. *State v. Jeffries*, 430 N.W.2d 728, 731 (Iowa 1988).

78. For example, while the offense of operating a motor vehicle without the owner’s consent would not be a lesser offense of larceny of a vehicle under the statutory approach, it would be a lesser offense under the cognate theory if, at trial, the prosecution is unable to prove the requisite intent for larceny. See *State v. Everett*, 157 N.W.2d 144 (Iowa 1968).

79. See *State v. Meadors*, 1995-NMSC-073, ¶ 12, 908 P.2d 731 (laying out the tests for whether a court may instruct a jury on a lesser offense if:

(1) the defendant could not have committed the greater offense in the manner described in the charging document without also committing the lesser offense, and therefore notice of the greater offense necessarily incorporates notice of the lesser offense; (2) the evidence adduced at trial is sufficient to sustain a conviction on the lesser offense; and (3) the elements that distinguish the lesser and greater offenses are sufficiently in dispute such that a jury rationally could acquit on the greater offense and convict on the lesser, while also considering whether the elements of the lesser crime are included within the elements of the greater).

prosecutions for similar offenses will depend on a complex mix of the elements of the crimes, the allegations in the indictment, and the evidence presented at trial.

While the practice of submitting lesser included offenses benefits both defendants and prosecutors, the practice may reduce defendants' double jeopardy protections. It is well settled that juries may return verdicts as to some *counts* but not on others.⁸⁰ Were lesser included offenses submitted in separate counts, a jury's acquittal on a greater offense would be rendered as a verdict even if the jury deadlocks on a lesser included offense submitted in a separate count. The Double Jeopardy Clause would then prohibit the government from retrying the greater offense. But if that jury was confronted with the lesser included offense in the same count, the acquittal would not be given effect unless the court could accept a partial verdict reflecting the acquittal. Without partial verdicts, this device of judicial expediency thus offers fewer double jeopardy protections than if the defendant were charged with each offense in a different count. Judicial expediency should not serve to circumvent constitutional rights.⁸¹ The typical "all or nothing" approach,⁸² whereby a jury must either convict on one charge or acquit on all charges, is an inexact tool for determining jury consensus, particularly in complicated trials with complicated charges. Similarly, one purpose of the practice—precision of jury verdicts—is negated when juries are restricted in their ability to express consensus. While the concepts of double jeopardy and lesser included offenses are confusing in the abstract, that confusion need not be compounded by the "all or nothing approach." Instead, a straightforward option allowing juries a more direct means of expressing consensus would simplify the questions of whether jeopardy terminated and whether the jury reached any agreement on lesser included offenses.

C. Transition Instructions

While the concepts of double jeopardy and lesser included offenses frame the broad procedural contours of what happens at trial, transition instructions take us inside the jury room, and constitute a relevant factor for determining the proper means of resolving ambiguity when a jury deadlocks on lesser included offenses. Transition instructions govern how and when a jury may move from a greater offense to a lesser offense within a given count.⁸³ While partial verdicts accommodate the interests of double jeopardy and lesser included offenses, analysis of transition instructions shows that polling is a suboptimal means of balancing those interests, and that partial verdict forms come closer to the mark.

80. *Selvester v. United States*, 170 U.S. 262, 270 (1898) (Gray, J., concurring).

81. *See, e.g., Stone v. Superior Court*, 31 Cal.3d 503, 517–18, 646 P.2d 809, 819, 183 Cal.Rptr. 647 (1982) (arguing that since prosecutors have discretion to charge lesser included offenses in separate counts or within a single count, "[i]t would be anomalous to formulate a rule that prevents a trial court from receiving a partial verdict on a greater offense on which the jury clearly favors acquittal merely because the prosecutor elected to charge only that offense, and left it to the court to instruct on any lesser included offense supported by the evidence"); *see also Green v. United States*, 355 U.S. 184, 199 n.10 (1957) (noting that constitutional protections should not turn on whether a prosecutor chooses to charge a defendant for various degrees of an offense in a single count or in separate counts).

82. *See Blueford v. Arkansas*, 566 U.S. 599, 604 (2012).

83. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

There is no clear consensus across different jurisdictions as to the optimal instruction. On the one hand are “acquittal-first” jurisdictions, which require juries to unanimously agree to acquit on greater charges before considering lesser charges.⁸⁴ Several jurisdictions follow this approach.⁸⁵ This method is conducive to careful deliberation on each charge, but this instruction might equally lead to minority jurors feeling coerced to assent to conviction on a greater charge in order to avoid prolonged deliberations.⁸⁶ On the other hand are “unable-to-agree” instructions, which allow juries to consider lesser offenses if, after reasonable deliberation on the greater offense, the jury is unable to come to unanimous agreement.⁸⁷ This method is purported to better accommodate social psychological evidence of actual deliberation,⁸⁸ and to allow jurors to fully consider each alleged offense before deciding on the ultimate verdict.⁸⁹ Some jurisdictions view this method as conducive to haphazard deliberation and compromise verdicts.⁹⁰ New Mexico is an “unable-to-agree” jurisdiction.⁹¹

It is important to note which transition instruction is used in order to understand exactly where a jury is deadlocked and where it has acquitted. In an acquittal-first state, a jury which deadlocks on an intermediate offense is presumed to have not even considered the lesser offense, and so double jeopardy will not bar retrial on any of the lesser offenses charged in that count. Further, such a jury necessarily will have acquitted on the greatest offense in order to have moved on to the intermediate offense. In an acquittal-first jurisdiction, more straightforward inferences may be drawn from jury deadlock, and so trial courts are better positioned to probe juries for partial verdicts.

84. See, e.g., *People v. Boettcher*, 69 N.Y.2d 174, 182, 505 N.E.2d 594, 597 (1987).

85. See, e.g., *United States v. Moccia*, 681 F.2d 61 (1st Cir. 1982); *Lindsey v. State*, 456 So.2d 383, 387 (Ala. Crim. App. 1983), aff’d, 456 So.2d 393 (Ala. 1984); *Nell v. State*, 642 P.2d 1361 (Alaska Ct. App. 1982); *State v. Wussler*, 139 Ariz. 428, 430, 679 P.2d 74 (1984); 1 ARK. MODEL JURY INSTR., CRIM., No. 302 (2d ed. 1994); *Lamar v. State*, 243 Ga. 401, 403, 254 S.E.2d 353 (1979); *State v. Van Dyken*, 242 Mont. 415, 425–26, 791 P.2d 1350 (1990), cert. denied, 498 U.S. 920 (1990); *People v. Boettcher*, 69 N.Y.2d 174, 181–83, 505 N.E.2d 594, 513 N.Y.S.2d 83 (1987); *State v. Wilkins*, 34 N.C. App. 392, 399–400, 238 S.E.2d 659 (1977); *State v. Turnidge*, 359 Or. 364, 494, 374 P.3d 853, 930 (2016); *Commonwealth v. Hart*, 388 Pa. Super. 484, 499–500, 565 A.2d 1212 (1989); *State v. Clayton*, 658 P.2d 624, 627 (Utah 1983); *State v. McNeal*, 95 Wis.2d 63, 68, 288 N.W.2d 874 (1980).

86. *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978).

87. See UJI 14-6012 N.M. R. ANN.; UJI 14-250 N.M. R. ANN.; see also *Pharr v. Israel*, 629 F.2d 1278, 1282 (7th Cir.1980); *Catches v. U.S.*, 582 F.2d 453, 459 (8th Cir.1978); *United States v. Jackson*, 726 F.2d 1466, 1469–70 (9th Cir.1984); *People v. Richardson*, 184 P.3d 755, 764 n.7 (Colo. 2008); *Wright v. U.S.*, 588 A.2d 260, 262 (D.C. App.1991); *State v. Ferreira*, 8 Haw. App. 1, 4–5, 791 P.2d 407 (1990); *State v. Korbelt*, 231 Kan. 657, 661, 647 P.2d 1301 (1982); *People v. Handley*, 415 Mich. 356, 358–60, 329 N.W.2d 710 (1982); *State v. Thomas*, 40 Ohio St.3d 213, 218–20, 533 N.E.2d 286 (1988); *Tarwater v. Cupp*, 304 Or. 639, 645, 748 P.2d 125 (1988); *State v. Labanowski*, 117 Wash.2d 405, 414, 816 P.2d 26 (1991).

88. Note, *State v. Wussler: An Unfortunate Change in Arizona’s Lesser-Included Offense Jury Instruction*, 27 ARIZ. L. REV. 515, 525 nn. 67–69 (1985).

89. *Allen*, 301 Or. 35, 717 P.2d 1178 (1986).

90. See *Tsanas*, 572 F.2d at 346; see also *State v. Abdalaziz*, 248 Conn. 430, 435, 729 A.2d 725, 728 (1999).

91. *State v. Phillips*, 2017-NMSC-019, ¶ 4, 396 P.3d 153.

Such inferences are much harder to make in an unable-to-agree state, like New Mexico. A jury which deadlocks on a lesser offense will not necessarily have reached any agreement on the greater offense. The jury may have even deadlocked on each level of the count, meaning that double jeopardy would not bar retrial on any offense. A trial judge presented with such a situation will have no concrete basis on which to presume deadlock or agreement, and so will have to poll the jury on each level of the offense. *Phillips* requires trial judges to resolve ambiguity in juror consensus via polling, but any deadlock in such an instance will be wholly ambiguous. Read literally, *Phillips* creates a per se rule triggering polling *every time* a jury deadlocks on a count with lesser included offenses. Polling thus places a heavy burden on trial courts,⁹² and raises the risk that polls will be improperly conducted, endangering defendants' double jeopardy rights, the state's interest in conviction, and society's interest in jury independence.

Partial verdict forms would achieve the policy goals of polling with none of its imprecision. A trial judge, having given the jury a clear means to express consensus or lack thereof, is presented with a clear picture of whether and where the jury deadlocked, acquitted, or convicted. Rather than meeting ambiguity with imprecision, partial verdict forms allow the jury itself to directly communicate its consensus. Partial verdict forms thus simplify jury expression in an unable-to-agree jurisdiction while protecting defendants' double jeopardy rights and ensuring judicial efficiency.

D. The Difficulties of Pre-verdict Polling

Rule 5-611(D)'s polling requirement arises from a series of cases beginning in the late 1970s. In *State v. Castrillo*, the defendant was charged with homicide in a count alleging either first-degree murder or the lesser included offenses of second-degree murder and manslaughter.⁹³ The jury was given verdict forms enabling it to convict on one offense or acquit on all.⁹⁴ The jury deadlocked, and the district court, without asking whether the jury agreed to acquit on any of the offenses, declared a mistrial.⁹⁵ The defendant was later convicted of second-degree murder in a second trial.⁹⁶ The defendant appealed that conviction, arguing it violated his double jeopardy rights,⁹⁷ relying on an affidavit from the first jury's foreman that the jury voted to acquit on first- and second-degree murder.⁹⁸ Even though the first jury was deadlocked on the homicide count, the Supreme Court of New Mexico agreed.⁹⁹ The Court noted that "[t]he record [was] silent upon which, if any, of the specific included offenses the jury had agreed and upon which the jury had reached an impasse,"¹⁰⁰ and held that the principles of double jeopardy required trial judges to clarify that

92. See *infra* note 106 and accompanying text.

93. 1977-NMSC-059, ¶ 1, 566 P.2d 1146.

94. *Id.*

95. *Id.* ¶ 14.

96. *Id.* ¶ 1.

97. *Id.*

98. *Id.* ¶ 2.

99. *Id.* ¶ 14.

100. *Id.*

record before declaring a mistrial.¹⁰¹ In the face of such ambiguity, all doubts must be resolved “in favor of the liberty of the citizen.”¹⁰² *Castrillo* thus imposes a duty on trial judges to identify precisely where a jury deadlocks, lest the state’s retrial options be limited only to the least included offense.

Castrillo was unusual at the time it was decided. Few, if any, states had adopted this definition of manifest necessity. Soon after, the case was relied upon by similarly situated defendants around the country. Most courts rejected this argument and declined to follow *Castrillo*’s holding.¹⁰³ These courts generally held that polling “would constitute an unwarranted and unwise intrusion into the province of the jury.”¹⁰⁴ Nonetheless, New Mexico codified the holding of *Castrillo* in Rule 5-611(D).¹⁰⁵

Recent New Mexico cases show just how difficult it can be for trial judges to conduct pre-verdict polling.¹⁰⁶ Judges must definitively resolve ambiguity, often by obtaining jurors’ individual opinions in open court, but without coercing any individual jurors because juries may sometimes return to deliberations after the poll.¹⁰⁷ Rule 5-611(D) mandates polling only when the record is ambiguous, a term which is itself subjective and prone to appellate litigation.¹⁰⁸ Further, as described above, in an unable-to-agree state like New Mexico, jury consensus is by definition ambiguous whenever the jury deadlocks on a count with a lesser included offense. Finally, polling can subject individual jurors’ votes to public scrutiny, which may result in some jurors changing their votes in the face of such scrutiny. This is precisely what the sanctity and secrecy of the juror room is supposed to protect against.¹⁰⁹

Other states have also encountered such difficulties, leading many courts to expressly prohibit such polling. Consider the following colloquy from a trial in Massachusetts, in which a judge tries to respect individual jurors’ privacy by only questioning the foreperson:

The Judge: So the question is, as to any of the charge[s] that you and the jury have considered, have you been able to reach a unanimous verdict of guilty or not guilty?
The Foreperson: On?

101. *Id.*

102. *Id.* (quoting *State v. Spillmon*, 1976-NMSC-048, ¶ 5, 553 P.2d 686, 688).

103. *Fitzgerald v. Lile*, 732 F. Supp. 784, 789 (N.D. Ohio 1990), *aff’d*, 918 F.2d 178 (6th Cir. 1990); *People v. Richardson*, 184 P.3d 755, 764 (Colo. 2008); *Speaks v. United States*, 617 A.2d 942, 950 (D.C. 1992); *State v. Bell*, 322 N.W.2d 93, 96 (Iowa 1982); *Com. v. Roth*, 437 Mass. 777, 791, 776 N.E.2d 437, 447 (2002); *People v. Hickey*, 103 Mich. App. 350, 353, 303 N.W.2d 19, 21 (1981); *State v. Booker*, 306 N.C. 302, 305, 293 S.E.2d 78, 80 (1982); *State v. Despenza*, 38 Wash. App. 645, 652, 689 P.2d 87, 93 (1984); *Peterson v. State*, 586 P.2d 144, 148 (Wyo. 1978).

104. *Hickey*, 103 Mich. App. at 353.

105. Rule 5-611(D) NMRA (committee commentary).

106. *See, e.g., State v. Phillips*, 2017-NMSC-019, ¶ 10, 396 P.3d 153.

107. *See State v. Holloway*, 1987-NMCA-090, ¶ 17, 164, 740 P.2d 711, 715.

108. *See id.*; *State v. Lewis*, 2017-NMCA-056, ¶ 11, 399 P.3d 954, 958, cert. granted, June 23, 2017, No. S-1-SC-36428.

109. *See Holloway*, 1987-NMCA-090, ¶ 7.

The Judge: On any of the charges you have considered in this case, have you been able to reach a unanimous verdict? That is, have all twelve of you been able to agree as to guilty or not guilty?

The Foreperson: On any of the-

The Judge: On any of the charges?

The Foreperson: Yes, we have, Your Honor.

The Judge: All right. Then I'm going to ask you further, and I'm going to take the first indictment, and this is the indictment that charges motor vehicle homicide. And I'm going to ask you, with regard to the offense as charged, and this is the second entry on the slip, motor vehicle homicide: as to that charge, were you able to agree, all twelve of you, as to a verdict of guilty or not guilty? Not what it was, but simply whether all twelve of you were able to agree to a verdict of guilty or not guilty?

The Foreperson: Yes, Your Honor.

The Judge: All right. Then I'm going to go over to the second indictment. The first indictment, by the way-

The Foreperson: Your Honor, I think I need to go back.

The Judge: All right, then let me put the question again.

The Foreperson: Yes, thank you, Your Honor.

The Judge: All right, now the first indictment is the indictment that charged motor vehicle homicide, which is the charge relating to the death of [the victim]. And this is the indictment that has a total of six options. The first option is not guilty. The second was, guilty of the offense as charged. And then there were one, two, three, four so-called lesser, included offenses. Now, do you have any doubt because it's important that I understand whether or not you, in turn, understand my question-do you have any doubt, when I refer to the 'offense as charged,' which particular option I'm referring to?

The Foreperson: I remember from that paper that we worked on, and my belief is that we have reached-

The Judge: And I don't want you to tell me what your decision is-

The Foreperson: -no, no, no-a unanimous decision-

The Judge: -as to that charge.

The Foreperson: -as to the second one down.

The Judge: All right. Now, I just want to be certain that you understand that that is the offense that requires proof beyond a reasonable doubt of five elements?

The Foreperson: Yes, sir.

The Judge: And that's the one you believe you have reached a unanimous decision about, guilty or not guilty?

The Foreperson: I'm still not sure I understand, I'm afraid.¹¹⁰

This example illustrates the difficulties judges face in charting a delicate path with an imprecise tool.

The problems with such polling are more than anecdotal. Indeed, there is a vast body of research in the social sciences that even modest changes in poll

110. *Com. v. Roth*, 437 Mass. 777, 780 n.5, 776 N.E.2d 437, 440 (2002).

formatting can significantly impact polling responses.¹¹¹ Myriad variables such as the length, ordering, and phrasing of questions and instructions can play profound roles in the shaping of responses.¹¹² This dynamic was amply borne out in *Phillips*, in which relatively small changes in questioning by the judge yielded diametrically opposing answers by jurors to questions seeking the same basic answer.¹¹³ Well-documented response bias, along with the propensity of judges to unwittingly induce such bias, should give any judge pause before relying on pre-verdict polling to safeguard the rights of defendants and ensure accurate verdicts.

In sum, the Double Jeopardy Clause requires judges to use reasonable means to ascertain whether juries have acquitted on any level of a count with a lesser included offense before declaring a mistrial due to deadlock. However, in an unable-to-agree state like New Mexico, polling is too imprecise to reliably protect defendants' rights against double jeopardy, and can intrude into the deliberative process by revealing juries' votes in open court.

II. VERDICT PROCEDURE: HOW PARTIAL VERDICT FORMS WORK

Partial verdict forms are a more effective safeguard for double jeopardy rights when juries deadlock on counts with lesser included offenses in an unable-to-agree state like New Mexico. Partial verdict forms promote freedom of deliberation, allow juries to express precisely their findings, protect against juror coercion, and promote judicial efficiency, all by simply adding a box to existing jury forms. That extra box allows the jury to mark guilty *or not guilty* for each charged offense.

As the jury deliberates each offense, it must keep in mind that a unanimous agreement of not guilty on any offense must be reflected in the verdict form for that offense. Consider the following instructions, tailored to the situation presented in *Phillips*:

If the jury agrees that the defendant is not guilty of first-degree murder, but cannot agree whether the defendant is guilty of second-degree murder or voluntary manslaughter, mark "not guilty" on the form for first-degree murder. On the forms for second-degree murder and voluntary manslaughter, simply indicate the jury's numerical split in the final vote taken on each of those offenses.

Such instructions would have had the jury render a partial verdict of acquittal on first-degree murder, which would prohibit subsequent reprosecution on

111. NORMAN BRADBURN, SEYMOUR SUDMAN, & BRIAN WANSINK, ASKING QUESTIONS 3 (2004) ("The fact that seemingly small changes in wording can cause large differences in responses has been well known to survey practitioners since the early days of surveys."); Graham Kalton and Howard Schuman, *The Effect of the Question on Survey Responses: A Review*, 1 J. R. STAT. SOC. 42, 42 (1982) (noting that the "survey literature abounds with examples demonstrating that survey responses may be sensitive to the precise wording, format and placement of the questions asked").

112. Charles F. Cannell, Peter V. Miller, Lois Oksenberg, *Research on Interviewing Techniques*, in SOCIOLOGICAL METHODOLOGY 389, 392 (S. Leinhardt ed., 1981); Charles F. Cannell et al., *A Summary of Studies of Interviewing Methodology*, 69 VITAL HEALTH AND STAT. 1, 13 (1977).

113. See *supra* note 19 and accompanying text.

that offense. The trial judge would not have been faced with any ambiguity as to the jury's consensus, and so would have no need to poll the jury. Further, there would be no need for an appellate court to resolve ambiguity in favor of the defendant, and so the state would have been allowed to retry on second-degree murder as well as voluntary manslaughter. The trial judge would be spared from having to conduct an awkward poll, the defendant would be spared from the appellate ordeal and the risk of a double jeopardy violation, and the state would be spared from losing its shot at the conviction supported by the evidence.

If done correctly, partial verdicts may easily be treated just as any other final verdict. The crucial component is that courts should only accept partial verdicts when a jury has carried its deliberations as far as possible. A valid verdict must reflect a jury's final disposition.¹¹⁴ For this reason, courts often reject requests that temporary votes be rendered into formal, final verdicts.¹¹⁵ To ensure that the verdict reflects the jury's final consensus, a partial verdict should not be submitted to the court while the jury is still deliberating. This promotes freedom of the deliberative process by retaining the jury's ability to revisit any issue while still deliberating, and allowing the jury to carry its deliberations as far as possible without deadlock.

If a jury deadlocks on any given charge, it should indicate on the verdict form the numerical split of jurors on each side of the issue, without indicating which side voted for which action. This would prevent the need for questioning by the trial judge to determine whether further deliberations would be fruitful, as seen in several of the above cases. It would also protect the hypothetical lone holdout from the coercive effect of having such dissent openly identified. Courts are often concerned that jury majorities can coerce minority viewpoints into agreement in order to end the deliberations and be released from service. A jury poll, however, could require the lone dissenter to express that view in open court, while partial verdict forms enable that lone juror to retain her anonymity.

Partial verdicts also promote judicial efficiency. New Mexico generally insists that juries be provided separate verdict forms for each count charged.¹¹⁶ Because an alleged double jeopardy violation enables interlocutory appeal, any efficiency gained at the trial level by using general verdict forms may result in inefficiency at the appellate level.¹¹⁷ Similarly, the practice of submitting lesser included offenses within a given count arose in part out of an interest in judicial efficiency.¹¹⁸ A rule which increases the likelihood of appeal on such offenses thus threatens the efficiency justifying the practice in the first place.

114. Rule 5-611(A) NMRA; N.M. R. CRIM. P. 44(a).

115. *Blueford v. Arkansas*, 566 U.S. 599, 608 (2012).

116. *See State v. Cisneros*, 1967-NMSC-015, ¶ 6, 423 P.2d 45.

117. *See State v. Phillips*, 2017-NMSC-019, ¶ 13, 396 P.3d 153; *State v. Tate*, 256 Conn. 262, 276, 773 A.2d 308, 318 (2001) ("Because jeopardy attaches at the commencement of trial, to be vindicated at all, a colorable double jeopardy claim must be addressed by way of interlocutory review.").

118. *See supra* note 69 and accompanying text.

III. POLICY RATIONALES AGAINST PARTIAL VERDICT FORMS

Partial verdicts are often criticized as intrusive on the deliberative process, potentially coercive, and conducive to unnecessary compromise.¹¹⁹ However, these criticisms often mischaracterize partial verdicts or take them out of context. Further, much of the criticism is more applicable to jury polling as a means of rendering partial verdicts than to partial verdicts per se. If a partial verdict is taken after a jury has carried its deliberations as far as it can, there is no intrusion into the deliberative process, no risk of coercion, and minimal risk of unnecessary jury compromise.

A. Intrusion into the Deliberative Process and Risk of Juror Coercion

Some courts reject partial verdicts because they “constitute an unwarranted and unwise intrusion into” the deliberative process.¹²⁰ Since deadlocked juries are particularly susceptible to coercion or undue influence,¹²¹ any inquiry into whether the jury has unanimously agreed on any particular charge impermissibly suggests to the jury the “judge’s desire to salvage *something* from the trial.”¹²² This concern is well founded. Jury coercion can violate a defendant’s due process rights.¹²³ However, this concern applies to pre-verdict polling rather than to partial verdict forms. A partial verdict form does not communicate anything to the jury other than that it may express any acquittal on which it agrees. While polling certainly can coerce a jury which returns to deliberations after the poll, that concern is far less pressing when a court merely gives the jury a full opportunity to express its will via verdict forms. Partial verdict forms do not alter the deliberative process, as juries proceed with the transition instructions just as they would absent these forms. However, instead of simply proceeding to the lesser offense when a jury agrees to acquit on the greater, it would mark that acquittal and ensure that such agreement is translated into a verdict. Absent such forms, jury deliberation is not so much coerced as it is negated, as final juror agreement goes unrecorded and ignored.

Similarly, many cases rejecting partial verdicts involve defendants’ attempts to give formal effect to informal jury statements. These courts are concerned with extracting too much meaning from fleeting jury consensus which may have given way to deadlock.¹²⁴ Defendants often assert double jeopardy rights when mistrials are declared after a jury has communicated its agreement to acquit on an offense charged, but before the close of deliberations.¹²⁵ In such an instance, courts generally refuse to give effect to that communication, instead holding that only final,

119. See, e.g., *People v. Hickey*, 103 Mich. App. 350, 353, 303 N.W.2d 19, 21 (1981).

120. *A Juvenile v. Com.*, 392 Mass. 52, 56, 465 N.E.2d 240, 244 (1984).

121. See *Com. v. Connor*, 392 Mass. 838, 844, 467 N.E.2d 1340 (1984).

122. *Com. v. Roth*, 437 Mass. 777, 792, 776 N.E.2d 437, 448 (2002) (emphasis in original).

123. *State v. McCarter*, 1980-NMSC-003, ¶ 7, 604 P.2d 1242 (holding that a coerced jury verdict “violates due process because it impinges on the right to a fair and impartial trial.”).

124. See, e.g., *Blueford v. Arkansas*, 566 U.S. 599 (2012). *Blueford* involved a jury’s declaration that it was unanimous in informally voting to acquit the defendant of the greater charge, but returned to the jury room for another thirty minutes before returning to the courtroom and declaring itself deadlocked. The defendant later unsuccessfully argued that the informal declaration should equate to a formal acquittal for double jeopardy purposes.

125. See, e.g., *State v. Booker*, 306 N.C. 302, 304, 293 S.E.2d 78 (1982).

formally submitted verdicts are binding.¹²⁶ Much of the precedent rejecting partial verdicts arise out of situations in which juries informally express agreement, but continue deliberating before being discharged without any formal and ultimate expression of that agreement. The precedent often relied upon to reject partial verdicts is thus more descriptive of a procedural difficulty presented by mid-deliberation declarations by juries, rather than of the concept of partial verdicts per se. Partial verdict forms relieve courts of having to depend on such mid-deliberation communications by giving the jury a final opportunity to express its disposition before being discharged for hopeless deadlock on other levels of the offense.

B. Inducement of Unnecessary Compromise

Partial verdicts are also feared for their potential to bring about premature decisions by juries grasping for agreement, while full verdicts are supposed to induce juries to see their deliberations through to the end.¹²⁷ This argument is premised on the normative view that a verdict is more valid if it follows from comprehensive deliberation. Requiring juries to either convict on one offense or acquit on all, the arguments goes, ensures that a jury does not compromise in the interest of expediency.

This perspective tends to view any compromise as disfavored.¹²⁸ Such a concern reflects the reasonable belief that compromise arises from jurors' desire to end deliberations quickly rather than methodically or on the weight of the evidence.¹²⁹ But not all compromise arises out of such expediency,¹³⁰ and a blanket disfavoring of compromise may defeat some benefits of deliberation which naturally results in compromise as jurors discuss and weigh each other's views. Jury deliberation is a dynamic process which requires at least some susceptibility to attempts at persuasion and willingness to engage other perspectives.¹³¹ Similarly, inability to compromise increases the risk of deadlock, which itself causes inefficient use of judicial resources. Further, compromise is a fact of the criminal justice system: 95% of all criminal convictions arise out of plea bargaining, itself a form of compromise.¹³² Finally, a structure which denies jurors the opportunity to compromise might itself be a form of coercion, as such a system inhibits the freedom to change one's mind in the face of informed deliberation.

But more fundamentally, partial verdicts pose no special risk of compromise because partial verdicts do not alter the deliberative process. The

126. *Blueford*, 566 U.S. at 610.

127. *People v. Hickey*, 103 Mich. App. 350, 353, 303 N.W.2d 19, 21 (1981).

128. Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 784 (1998) (arguing that, "useful as they may be, compromise verdicts are lawless verdicts").

129. See Howard S. Suskin, *Collateral Estoppel and the Compromise Verdict*, 18 INTL. SOC'Y BARRISTERS Q. 354, 374 (1983); *Hickey*, 103 Mich. App. at 353.

130. Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1603 (2011) (noting that "[n]egotiation decisions—like other decisions—are influenced by the nature of the decision maker. And for centuries, the jury has been heralded because jurors have a special type of decision-making competence.").

131. Leo J. Flynn, *Does Justice Fail When the Jury Is Deadlocked?* 61 JUDICATURE 129, 132 (1977);

132. Orr Larsen, *supra* note 130, at 1571.

deliberative process for lesser included offenses is more shaped by transition instructions than by the means available for juries to express the product of such deliberations. A jury unable to express its agreement may thus actually be more prone to compromise and vote to convict on one offense so as to salvage something from the ordeal of the trial.¹³³ Partial verdicts do not ensure against compromise verdicts any more than do general verdicts, but rather act as a safeguard against *unnecessary* compromise while still protecting the double jeopardy rights of the defendant. The degree to which partial verdicts may intrude on the deliberative process is thus substantially outweighed by the constitutional protections they afford defendants.

IV. CONCLUSION

Partial verdicts protect the double jeopardy rights of defendants facing counts with lesser included offenses. The practice of submitting lesser included offenses is justified in part by verdict precision, and partial verdicts further that policy by providing the jury with a more direct means to express its findings. Absent partial verdicts, a defendant may be functionally acquitted by one jury only to be convicted by another, and each jury is limited in its ability to accurately express its findings. A defendant acquitted of one offense should not forfeit her double jeopardy rights just because a jury deadlocks on a separate offense, and the justice system's reliance on juries as factfinders merits affording juries precise means of expressing their findings. At the same time, polling is an inefficient and imprecise means of effectuating partial verdicts. Further, far from being a rarity, in an unable-to-agree state like New Mexico, *Phillips's* holding effectively mandates polling every time a jury deadlocks on a lesser included offense. Polling's risk of juror coercion is compounded by its imprecision and typically clumsy application. Instead, simply adding a box to a jury verdict form, a mere edit on a piece of paper, can vindicate defendants' double jeopardy rights while serving the societal interests of accuracy and efficiency.

133. Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621, 627–28 (2004) (discussing that juries presented with more than one guilty option are more likely to convict than juries presented with only one guilty option and more than one option of acquittal).