
CASE NOTE

“I’LL TAKE FORM OVER SUBSTANCE FOR \$800, TREBEK”: WHY *BLUEFORD* WAS TOO RIGID AND HOW STATES CAN PROPERLY PROVIDE DOUBLE JEOPARDY PROTECTION

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INTRODUCTION

In August 2009, Arkansas tried Alex Blueford for the murder of a one-year-old child.¹ Blueford was charged with capital murder, which included three lesser offenses: first-degree murder, manslaughter, and negligent homicide.² After deliberation, a jury of Blueford’s peers reported to the trial judge that it unanimously opposed the charges of capital and first-degree murder,³ yet despite the protection offered by the Double Jeopardy Clause of the Fifth Amendment,⁴ Arkansas attempted to retry Blueford on those charges.⁵ Notwithstanding persuasive arguments from Blueford’s counsel, the Supreme Court held that Blueford was never acquitted of either charge and was therefore not protected from retrial under the Double Jeopardy Clause.⁶

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¹ *Blueford v. Arkansas*, 132 S. Ct. 2044, 2048 (2012).

² *Id.*

³ *Id.* The jury was deadlocked on the charge of manslaughter and did not vote on negligent homicide. *Id.*

⁴ See U.S. CONST. amend. V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .”).

⁵ *Blueford*, 132 S. Ct. at 2049.

⁶ *Id.* at 2053.

Blueford embodies two distinct yet related propositions. First, the Court held that the jury foreperson's report that the jury was unanimous in opposing capital and first-degree murder charges did not constitute an acquittal as to those charges.⁷ Second, and more crucially, the Court determined that the trial judge was not required to allow the jury to give effect to that unanimous vote—either by issuing partial verdict forms or polling the jury—before finding that “‘circumstances manifest[ed] a necessity’ to declare a mistrial.”⁸ In “cases in which the mistrial was justified by ‘manifest necessity,’” the Double Jeopardy Clause does not bar retrial.⁹ Accordingly, the Court concluded that the Double Jeopardy Clause did not prevent the state from retrying Alex Blueford, or a similarly situated defendant, for murder.

Critics asserted that the Supreme Court's decision to give Arkansas a “second shot” at convicting Blueford of murder¹⁰ directly contravened the core principles of the Fifth Amendment's Double Jeopardy Clause: that the state should not be allowed to repeatedly attempt to convict individuals for the same alleged offense, and that the finality of judgments is of paramount importance to the smooth functioning of the judicial system.¹¹ So great was the Framers' fear of this oppressive practice¹² that they expressly protected against it in the Bill of Rights.

Did the Court actually give states the “proverbial second bite at the apple”¹³ in violation of the Double Jeopardy Clause or is there more to this case? The discrete issue in *Blueford* is not so much about interpreting the Double Jeopardy Clause as it is about convoluted jury forms and instructions.¹⁴ Part I of this Note provides an overview of double jeopardy jurisprudence. Part II discusses the *Blueford* decision and analyzes its strengths and weaknesses, including the Court's rigid application of past precedent without consideration for the policy behind the Clause or the practical implications of its decision. Part III offers solutions to the problem of the acquittal-first instructions presented in *Blueford*, including eliminating

⁷ *Id.* at 2050.

⁸ *Id.* at 2052-53 (quoting *Wade v. Hunter*, 336 U.S. 684, 690 (1949)).

⁹ *Oregon v. Kennedy*, 456 U.S. 667, 683 (1982) (Stevens, J., concurring in the judgment) (quoting *Arizona v. Washington*, 434 U.S. 497, 505 (1978)); see also *infra* Section I.A.

¹⁰ See, e.g., Mike Sacks, *Supreme Court Allows Arkansas Second Shot at Murder Trial in Double Jeopardy Dispute*, HUFFINGTON POST, May 24, 2012, http://www.huffingtonpost.com/2012/05/24/supreme-court-double-jeopardy-arkansas-murder-alex-blueford_n_1542396.html.

¹¹ See *Green v. United States*, 355 U.S. 184, 187 (1957).

¹² See *Blueford*, 132 S. Ct. at 2057 (Sotomayor, J., dissenting).

¹³ *Id.* at 2053 (citation and internal quotation marks omitted).

¹⁴ See *id.* at 2058 (discussing the problems that develop in acquittal-first jurisdictions and proposing that trial judges in these jurisdictions honor a defendant's request for a partial verdict before declaring a mistrial on the ground of jury deadlock).

“convict-on-any-or-acquit-on-all” jury forms and requiring judges to provide partial verdict forms or to poll a jury before declaring a mistrial due to a hung jury.

I. LEGAL BACKGROUND

A. *The Double Jeopardy Clause: What Does It Protect and When Is It Triggered?*

The Double Jeopardy Clause, which protects the accused against both multiple trials and multiple punishments for the same crime,¹⁵ is fundamental to the American justice system:

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 insecurity¹⁶

Over the past two hundred years, the Court has strictly construed the Double Jeopardy Clause so that its protections apply only when certain conditions are satisfied. Double Jeopardy acts as a bar to a second (or third or fourth) trial only when jeopardy both attached *and* terminated during the earlier proceeding.¹⁷ Attachment occurs when the jury is empaneled and sworn¹⁸ or when a plea is accepted. However, jeopardy only terminates, thereby barring retrial, “[i]f the defendant is acquitted by the jury, or if he is convicted”¹⁹ or criminally punished for the offense.²⁰

The most controversial facet of double jeopardy jurisprudence, and the issue in *Blueford*, stems from the impact of a mistrial on double jeopardy. The general rule is that when a trial judge declares a mistrial, double

¹⁵ *Witte v. United States*, 515 U.S. 389, 395-96 (1995) (citations omitted); *see also Price v. Georgia*, 398 U.S. 323, 326 (1970) (“The ‘twice put in jeopardy’ language of the Constitution thus relates to a potential, *i.e.*, the risk that an accused for a second time will be convicted of the ‘same offense’ for which he was initially tried.”).

¹⁶ *Green*, 355 U.S. at 187; *see also United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).

¹⁷ *See Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173-74 (1873).

¹⁸ *Crist v. Bretz*, 437 U.S. 28, 38 (1978).

¹⁹ *Oregon v. Kennedy*, 456 U.S. 667, 682 (1982) (Stevens, J., concurring in the judgment).

²⁰ *See, e.g., Price*, 398 U.S. at 326-27 (holding that a conviction of a lesser included offense barred a second trial for the greater offense).

jeopardy bars retrial, with an exception for “cases in which the mistrial was justified by ‘manifest necessity.’”²¹ This exception, however, has largely swallowed the rule. Demonstrating manifest necessity has become such a low burden that, except in rare instances, mistrials do not bar retrial.

The doctrine of manifest necessity first developed in 1824 in the seminal case, *United States v. Perez*.²² In *Perez*, the trial judge discharged the jury and declared a mistrial because the jury was unable to agree on a verdict.²³ The Court held that because the defendant had been neither convicted nor acquitted, there was “manifest necessity” to declare a mistrial, and jeopardy thus did not bar retrial.²⁴ Manifest necessity is a fluid concept, but a hung jury—as in *Blueford*—has repeatedly been found to qualify, thereby circumventing double jeopardy and permitting retrial.²⁵

Blueford is therefore not a straightforward case about the proper interpretation of the Double Jeopardy Clause, but rather a complicated inquiry into what constitutes manifest necessity to declare a mistrial.

B. *Acquittal-First Instructions*

Alex Blueford’s appeal would not have reached the Arkansas Supreme Court—let alone the United States Supreme Court—had Arkansas not been an “acquittal-first” jurisdiction. As a matter of Arkansas law, before a jury may consider a lesser included offense, it must “first determine that the proof is insufficient to convict on the greater offense.”²⁶ In other words, unless a jury votes unanimously to acquit on the greater charge, it cannot deliberate over a lesser charge.²⁷

Acquittal-first instructions developed after, and primarily in response to, the advent of the lesser included offense instruction, which provides that, “[a] jury [is] permitted to find [a] defendant guilty of any lesser offense

²¹ *Kennedy*, 456 U.S. at 683 (Stevens, J., concurring in the judgment) (quoting *Arizona v. Washington*, 434 U.S. 497, 505 (1978)).

²² 22 U.S. (9 Wheat.) 579 (1824).

²³ *Id.* at 579.

²⁴ *Id.* at 580.

²⁵ *See, e.g.*, *Renico v. Lett*, 130 S. Ct. 1855, 1862–63 (2010) (“[W]hen a judge discharges a jury on the grounds that the jury cannot reach a verdict, the Double Jeopardy Clause does not bar a new trial for the defendant before a new jury.” (citing *Perez*, 22 U.S. (9 Wheat.) at 579–80)).

²⁶ *Blueford v. Arkansas*, 132 S. Ct. 2044, 2054 (2012) (Sotomayor, J., dissenting).

²⁷ *Id.* (citing *Hughes v. State*, 66 S.W.3d 645, 651 (Ark. 2002)). *But see* Brief of *Amici Curiae* State of Michigan, 22 Other States & 1 Territory in Support of the State of Arkansas at 17, *Blueford*, 132 S. Ct. 2044 (No. 10-1320), 2012 WL 105561 (arguing that Arkansas “is not an ‘acquittal first’ jurisdiction” because the jury instructions do not explicitly require unanimity or acquittal before the jury moves on to lesser offenses).

necessarily included in the offense charged.”²⁸ For example, in a jurisdiction allowing for lesser included offenses, if a defendant is charged with murder, the jury may also find the defendant guilty of manslaughter. Although the lesser included offense rule “originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged,”²⁹ courts began viewing the rule as beneficial to defendants because it “ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard.”³⁰ In response to the lesser included offense rule, states developed acquittal-first jury instructions to ensure that the greatest offense would always be deliberated on and to prevent juries from voting to convict on a lesser charge merely to avoid conflict.³¹

There are three traditional approaches to jury instructions when lesser included offenses are submitted to the jury: (1) the acquittal-first instruction or “step approach,” which requires a unanimous jury acquittal of the greater charge before the jury may proceed to consider a lesser charge; (2) the “unable to agree” charge, which directs the jury to consider a lesser charge only if it is unable to agree on the greater charge; and (3) the “unstructured” approach, which does not require any particular sequence of deliberation.³²

Critics argue that acquittal-first instructions coerce jurors, hinder judicial efficiency by producing more hung juries, and invade the jury’s province as ultimate fact-finder.³³ Proponents of acquittal-first instructions assert that they improve the functioning of the constitutionally mandated jury system because they (1) ensure that a jury thoroughly deliberates on each offense, (2) produce a conclusive decision on each offense considered, and (3) guard against compromise verdicts.³⁴ Prior to *Blueford*, the Court

²⁸ *Beck v. Alabama*, 447 U.S. 625, 633 (1980).

²⁹ *Id.*

³⁰ *Id.* at 634 (citing *Keeble v. United States*, 412 U.S. 205, 212-13 (1973)); see also David F. Abele, Comment, *Jury Deliberations and the Lesser Included Offense Rule: Getting the Courts Back in Step*, 23 U.C. DAVIS L. REV. 375, 377 (1990) (“A jury can more accurately determine the degree of a defendant’s guilt, if any, with this additional option.”).

³¹ See, e.g., *People v. Hickey*, 303 N.W.2d 19, 21 (Mich. Ct. App. 1981) (noting that “jury votes on included offenses may be the result of a temporary compromise in an effort to reach unanimity”).

³² *People v. Helliger*, 691 N.Y.S.2d 858, 861 (N.Y. Sup. Ct. 1998) (citing Abele, *supra* note 30, at 380-82).

³³ See, e.g., Abele, *supra* note 30, at 382-90.

³⁴ See *id.* at 397-98. In a compromise verdict, the jury avoids fully discussing the greater offense by convicting on a lesser included offense on which all jurors can agree. See *id.* at 390 n.136 (listing five categories of compromise verdicts).

had looked unfavorably upon this type of instruction,³⁵ yet had failed to substantively address the issue of whether acquittal-first jury instructions could violate the Double Jeopardy Clause.

C. *Single Verdict Jury Forms*

Also significant in *Blueford* is that Arkansas used single verdict, convict-on-any-or-acquit-on-all jury forms. Under the direction of a single verdict jury form, a jury has only three options: (1) convict on any charge, (2) acquit on all charges, or (3) hang.³⁶ The jury does not have the opportunity to acquit on only some of the charges (i.e., to issue a partial verdict). The problem presented by single verdict jury forms in an acquittal-first jurisdiction had not been contemplated by the Court prior to *Blueford*.

II. THE DECISION: *BLUEFORD V. ARKANSAS*

A. *Factual and Procedural Setting*

In 2008, Arkansas charged Alex Blueford with capital murder, first-degree murder, manslaughter, and negligent homicide.³⁷ Arkansas alleged that “Blueford, acting under circumstances manifesting an extreme indifference to the value of human life, caused the death of Matthew McFadden, Jr., a person fourteen years of age or younger.”³⁸ At the close of the trial, the judge instructed the jury on the pertinent definitions of each of the four charges.³⁹ Before directing the jury to commence deliberations, the trial judge delivered the following instruction under Arkansas’s acquittal-first rule:

If you have a reasonable doubt of the defendant’s guilt on the charge of capital murder, you will consider the charge of murder in the first degree. . . . If you have a reasonable doubt of the defendant’s guilt on the charge of murder in the first degree, you will then consider the charge of manslaughter. . . . If you have a reasonable doubt of the defendant’s guilt on the

³⁵ See *Smith v. Spisak*, 130 S. Ct. 676, 690–91 (2010) (Stevens, J., concurring in part and concurring in the judgment) (“By requiring Spisak’s jury to decide first whether the State had met its burden with respect to the death sentence, and to reach that decision unanimously, the instructions deprived the jury of a meaningful opportunity to consider the third option that was before it, namely, a life sentence.”).

³⁶ See *Blueford v. Arkansas*, 132 S. Ct. 2044, 2052 (2012).

³⁷ *Blueford v. State*, 370 S.W.3d 496, 497 (Ark. 2011), *aff’d*, 132 S. Ct. 2044.

³⁸ *Id.*

³⁹ *Id.*

charge of manslaughter, you will then consider the charge of negligent homicide.⁴⁰

The court then presented the jury with a set of verdict forms, allowing the jury to either convict Blueford of one of the charged offenses or acquit him of all offenses; the jury was not permitted to acquit on some offenses but not others.⁴¹

After deliberating for a few hours, the jury foreperson reported to the trial judge that the jury was deadlocked.⁴² The court inquired as to the jury's progress on each offense and the foreperson disclosed that the jury was unanimous against the charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not yet voted on negligent homicide.⁴³ The court ordered the jury to continue deliberation.⁴⁴ After another thirty minutes, the jury remained deadlocked.⁴⁵ Without repolling the jury on its progress with respect to each of the four charges or providing partial verdict forms, the court declared a mistrial.⁴⁶

When Arkansas subsequently sought to retry Blueford for capital and first-degree murder, he moved to dismiss the charges on double jeopardy grounds.⁴⁷ Blueford argued that the jury foreperson's report constituted an express acquittal as to the capital and first-degree murder charges, or in the alternative, that the jury's consideration of the lesser charges constituted an implicit acquittal as to the greater.⁴⁸

⁴⁰ *Blueford*, 132 S. Ct. at 2048 (ellipses in original). This language, taken directly from Arkansas's model criminal jury instruction, ARKANSAS MODEL JURY INSTRUCTIONS: CRIMINAL No. 302 (Ark. Supreme Court Comm. on Criminal Jury Instructions, 2d ed. 1994), has been interpreted by the Supreme Court of Arkansas as requiring a jury to complete its deliberations on a greater offense before it may consider a lesser. See *Hughes v. State*, 66 S.W.3d 645, 651 (Ark. 2002) (“[B]efore [a jury] may consider any lesser-included offense, the jury must first determine that the proof is insufficient to convict on the greater offense. Thus, the jury must, in essence, acquit the defendant of the greater offense before considering his or her guilt on the lesser-included offense.”).

⁴¹ *Blueford*, 132 S. Ct. at 2049. I also refer to these jury instructions as “single verdict” or “convict-on-any-or-acquit-on-all” instructions.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* As mentioned in Section I.A, *supra*, a mistrial does not bar retrial under the Double Jeopardy Clause if declaration of a mistrial is manifestly necessary.

⁴⁷ *Id.*

⁴⁸ See Brief for Petitioner at 15, *Blueford*, 132 S. Ct. 2044 (No. 10-1320), 2011 WL 5971358 (“[T]he jury instructions establish acquittals on the greater offenses by virtue of the jury's deadlock on the lesser-included offense.”).

Arkansas asserted that the foreperson's report was not an acquittal because it did not bear the hallmarks of finality,⁴⁹ and that the acquittal-first jury instructions did not render the mid-deliberation report of the jury's deadlock an implicit acquittal.⁵⁰ The state argued that this was a standard case in which a deadlocked jury manifestly necessitated the declaration of a mistrial.⁵¹ The trial court denied Blueford's motion to dismiss, and the Supreme Court of Arkansas affirmed on interlocutory appeal.⁵² On October 11, 2011, the United States Supreme Court granted Blueford's petition for certiorari.⁵³

B. *Why Grant Certiorari?*

Does a jury foreperson's report to a judge carry any weight? Do criminal defendants have a constitutional right to partial verdicts? Does the refusal of a court to poll the jury preclude manifest necessity for granting a mistrial and, therefore, bar retrial under the concept of double jeopardy? The *Blueford* Court would implicitly or explicitly resolve all of these questions. The Court faced two primary issues in *Blueford*: (1) whether to require additional action—either by providing partial verdict forms or polling the jury—before a trial judge may declare a mistrial under the doctrine of manifest necessity,⁵⁴ and (2) what impact acquittal-first jury instructions should have on the finality of jury verdicts, including whether a foreman's report to a judge constitutes an acquittal.⁵⁵

This first issue has sparked debate among lower courts in recent years.⁵⁶ A majority of acquittal-first jurisdictions have held that “polling the jury on the various possible verdicts submitted to it would constitute an unwarranted and unwise intrusion into the province of the jury,”⁵⁷ reasoning that “jury votes on included offenses may be the result of a temporary compromise in

⁴⁹ See Brief for Respondent at 9, *Blueford*, 132 S. Ct. 2044 (No. 10-1320), 2012 WL 20549 (arguing that an acquittal “is a resolution; it represents juror agreement at the end of deliberations; it is unmistakably clear when it is issued; and it ordinarily cannot be reconsidered once it is accepted”).

⁵⁰ See *id.* at 10-11.

⁵¹ *Id.* at 8.

⁵² *Blueford v. State*, 370 S.W.3d 496, 499, 502 (Ark. 2011), *aff'd*, 132 S. Ct. 2044.

⁵³ *Blueford v. Arkansas*, 132 S. Ct. 397, 397 (2011).

⁵⁴ *Blueford*, 132 S. Ct. at 2052.

⁵⁵ *Id.* at 2051.

⁵⁶ See, e.g., *Commonwealth v. Roth*, 776 N.E.2d 437, 447 n.10 (Mass. 2002) (asserting that several jurisdictions have expressed “diametrically opposed” views on the subject of partial verdicts' impact on double jeopardy).

⁵⁷ *State v. Booker*, 293 S.E.2d 78, 80-81 (N.C. 1982) (emphasis omitted) (quoting *People v. Hickey*, 303 N.W.2d 19, 21 (Mich. Ct. App. 1981)).

an effort to reach unanimity.”⁵⁸ A minority of jurisdictions, however, *require* partial verdicts before declaring a mistrial owing to a hung jury. These states show greater deference to the concept of manifest necessity and declare that there can be no manifest necessity warranting the declaration of a mistrial where the trial court makes no inquiry into the jury’s deliberations as to the greater offenses.⁵⁹ The minority has held that a judge must poll the jury before declaring a mistrial because, if the jury is deadlocked only as to the lesser offenses, the Double Jeopardy Clause requires a partial verdict of acquittal as to the greater offenses.⁶⁰

C. *The Supreme Court’s Decision*

Chief Justice Roberts wrote for the majority in resolving the issues presented in *Blueford*. The Court found, by a 6–3 margin, that double jeopardy did not bar retrial because Blueford was neither convicted nor acquitted of any of the charges against him.⁶¹ In reaching this holding, the Court addressed two issues. First, the Court determined that the jury foreperson’s report—explaining that the jury unanimously opposed the capital and first-degree murder charges—did not constitute an acquittal.⁶² Second, the Court declared that the trial court was not required to take further action before declaring a mistrial based on manifest necessity.⁶³

In rejecting the notion that the trial judge should have taken action to determine whether the jury remained unanimous against the greater charges, Chief Justice Roberts relied heavily on past precedent, noting “[w]e have 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.”⁶⁴ The Chief

⁵⁸ *Hickey*, 303 N.W.2d at 21.

⁵⁹ See, e.g., *Stone v. Superior Court*, 646 P.2d 809, 820 (Cal. 1982) (en banc). Several states have held that there can be no manifest necessity to declare a mistrial where the trial court fails to inquire as to a partial verdict. See, e.g., *State v. Tate*, 773 A.2d 308, 324–25 (Conn. 2001); *State v. Pugliese*, 422 A.2d 1319, 1321 (N.H. 1980); see also *Whiteaker v. State*, 808 P.2d 270, 277–78 (Alaska Ct. App. 1991).

⁶⁰ See *Stone*, 646 P.2d at 820.

⁶¹ See *Blueford v. Arkansas*, 132 S. Ct. 2044, 2053 (2012).

⁶² *Id.* at 2050.

⁶³ *Id.* at 2052–53.

⁶⁴ *Id.* at 2052.

Justice was not blind to the fact that, because of the unique jury forms, the jury did not have the option to partially acquit.⁶⁵

After brusquely resolving the partial verdict issue—the main subject of the circuit split—Chief Justice Roberts dedicated most of the opinion to explaining that the jury foreperson’s report lacked finality and, therefore, constituted neither an implicit nor explicit acquittal.⁶⁶ The Chief Justice explained that the foreperson’s report “was not a final resolution of anything” because it was made before the jury had concluded deliberations, thus depriving it of the finality necessary to constitute an acquittal.⁶⁷

Chief Justice Roberts further emphasized the need for finality by rejecting any analogy to two previous Supreme Court cases that discussed implicit acquittals, *Green v. United States*⁶⁸ and *Price v. Georgia*⁶⁹—cases on which Blueford heavily relied.⁷⁰ In *Green* and *Price*, the Chief Justice noted, the Court held that “the Double Jeopardy Clause is violated when a defendant, tried for a greater offense and convicted of a lesser included offense, is later retried for the greater offense.”⁷¹ Blueford argued that the only difference between his case and *Green* and *Price* was that in those cases, the defendant was actually convicted, whereas in Blueford’s case, the jury was deadlocked—a distinction that should “only favor[] him, because the Double Jeopardy Clause should, if anything, afford greater protection to a defendant who is *not* found guilty of the lesser included offense.”⁷² Chief Justice Roberts rejected this argument, concluding that it unjustifiably assumed that “the votes reported by the foreperson did not change, even though the jury deliberated further after that report.”⁷³

In rejecting Blueford’s argument that “an acquittal is a matter of substance,”⁷⁴ Chief Justice Roberts essentially admitted that he was exalting form over substance. He substantiated his reasoning by devising hypothetical

⁶⁵ See *id.* (“As permitted under Arkansas law, the jury’s options in this case were limited to two: either convict on one of the offenses, or acquit on all.”).

⁶⁶ The implicit or explicit nature of an acquittal is irrelevant to the double jeopardy inquiry. Retrial is barred “whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge.” *Price v. Georgia*, 398 U.S. 323, 329 (1970) (footnote omitted).

⁶⁷ *Blueford*, 132 S. Ct. at 2050.

⁶⁸ 355 U.S. 184 (1957).

⁶⁹ 398 U.S. 323.

⁷⁰ See Brief for Petitioner, *supra* note 48, at 15 (citing *Green* and *Price* to argue that the “Court repeatedly has concluded that a jury has reached a verdict based on what is necessarily implied by its actions”).

⁷¹ *Blueford*, 132 S. Ct. at 2052 (citing *Price*, 398 U.S. at 329; *Green*, 355 U.S. at 190).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 2050.

situations to demonstrate why the foreperson's report lacked the finality necessary to bar retrial. After acknowledging that "[a] jury is presumed to follow its instructions,"⁷⁵ the Chief Justice concluded that, hypothetically, the jury could nevertheless have changed its mind about one of the greater offenses after deliberating over a lesser offense—arguably in contravention of its instructions⁷⁶—since votes taken in a jury room prior to being returned in open court are merely preliminary and are not binding on the jury.⁷⁷

D. *The Dissent*

The dissenting opinion, authored by Justice Sotomayor and joined by Justices Ginsburg and Kagan, highlights several of the weaknesses in the majority's analysis and finds that, by exalting form over substance, the majority broke the cardinal rule of not allowing the state another "bite at the apple."⁷⁸ Justice Sotomayor's dissent provides the better assessment of the case because it directly addresses the salient issues that arise in acquittal-first, single verdict jurisdictions. The dissent explains that although the Arkansas acquittal-first jury instructions do not expressly *forbid* reconsideration, the way they are written and the manner in which they were explained to the jury clearly indicate that the jury did intend to acquit Blueford on the capital and first-degree murder charges.⁷⁹ Justice Sotomayor emphasized that if the concern was finality, the foreperson's colloquy with the judge left little doubt that the jury's deliberations as to the capital and first-degree murder charges were unanimous.⁸⁰

Justice Sotomayor would have held that Blueford was acquitted of capital and first-degree murder⁸¹ or, at a minimum, that double jeopardy barred retrial on those charges because the trial court should have taken further action (and honored Blueford's request for a partial verdict) before declaring a mistrial.⁸² Justice Sotomayor's approach would have more properly safeguarded against double jeopardy violations.

⁷⁵ *Id.* at 2051 (quoting *Weeks v. Angelone*, 528 U.S. 225, 234 (2000)).

⁷⁶ *Id.* at 2054 (Sotomayor, J., dissenting) ("The State's closing arguments repeated this directive: '[B]efore you can consider a lesser included of capital murder, you must first, all 12, vote that this man is not guilty of capital murder.'" (alteration in original)).

⁷⁷ *Id.* at 2051 (majority opinion).

⁷⁸ *Id.* at 2053 (Sotomayor, J., dissenting) (internal quotation marks and citation omitted).

⁷⁹ *Id.* at 2056-57.

⁸⁰ *Id.* at 2056.

⁸¹ *Id.* at 2054-55.

⁸² *See id.* at 2058 (noting that while a jury's "genuine inability" to reach a verdict constitutes manifest necessity to declare a mistrial, a jury in an acquittal-first jurisdiction "that advances to

E. *Analysis of the Decision*

1. Strengths

Before discussing the decision's weaknesses, it is worth recognizing what the Court did right. Though this Note contends that *Blueford* was wrongly decided, the decision does have several strengths: its easy-to-follow, bright-line rule on finality; its preservation of jury rooms as black boxes; and its deference to the Court's past double jeopardy decisions, as well as those of lower courts.

The first strength of the decision is Chief Justice Roberts's establishment of a bright-line—though ultimately too formalistic—rule: that a foreman's report in open court is not an acquittal. There is continuous debate over rules versus standards and “whether the certainty and evenhandedness of a clear, bright-line rule justifies the possibility that the rule may work imperfectly in some cases.”⁸³ The rule that an acquittal cannot occur while a jury is still deliberating makes double jeopardy issues easier to resolve. Furthermore, the Chief Justice's emphasis on the need for finality is especially fitting because one of the main policy justifications behind the Double Jeopardy Clause is the importance of the finality of decisions, be they acquittals or convictions.⁸⁴

Second, Chief Justice Roberts's opinion valiantly attempts to protect the clandestine jury process. Requiring judges to inquire into the details of a jury's deliberations before they have concluded *could* hinder this furtive process.⁸⁵ Juries are black boxes and they need not justify their verdicts nor explain their reasoning, but rather, should remain “completely independent: of the state, of the parties and of the community itself.”⁸⁶ “Unlike most aspects of a criminal trial that are open for everyone to see, jury deliberations

the consideration of a lesser included offense has not demonstrated [such] an inability” with respect to the greater offense).

⁸³ *Teare v. Comm. on Admissions*, 566 A.2d 23, 30 (D.C. 1989).

⁸⁴ *See, e.g., Yeager v. United States*, 129 S. Ct. 2360, 2365-66 (2009).

⁸⁵ I argue later, however, that this argument falls flat. *See infra* Section III.B; *cf.* Mary S. O'Keefe, Note, *Acceptance of Partial Verdicts as a Safeguard Against Double Jeopardy*, 53 *FORDHAM L. REV.* 889, 898 (1985) (“The contention that a partial verdict would be coercive because it requires an ‘unwarranted and unwise intrusion into the province of the jury’ is equally unsupported by the facts surrounding the receipt of a partial verdict. Coercion is only a concern when the jury is still considering its verdict. A deadlocked jury has completed its deliberations; inquiry into whether a partial verdict has been reached will therefore not be intrusive.” (footnotes omitted)).

⁸⁶ Barbara A. Babcock, Opinion, *Preserving the Jury's Privacy*, *N.Y. TIMES* (July 24, 2002), <http://www.nytimes.com/2002/07/24/opinion/preserving-the-jury-s-privacy.html>.

are secret. There are no exact procedures that jurors must follow during these deliberations. The jury is free to deliberate in any manner that it sees fit.”⁸⁷

Third, the Court deferred to both lower court decisions and past precedent. Double jeopardy jurisprudence has long placed tremendous weight on deference to lower court judges: “The decision whether to grant a mistrial is reserved to the ‘broad discretion’ of the trial judge, a point that ‘has been consistently reiterated in decisions of this Court.’”⁸⁸ Chief Justice Roberts relied heavily on past precedent in determining that the trial judge was not required to take action before declaring a mistrial.⁸⁹ The fact that the “Court had never ‘overturned a trial court’s declaration of a mistrial after a jury was unable to reach a verdict on the ground that the “manifest necessity” standard had not been met’”⁹⁰ made the majority understandably hesitant to do so for the first time in *Blueford*. Although the resulting decision was admittedly rigid, it gave deference to almost two hundred years of case law, thereby strengthening the past rulings of the Supreme Court.

Ultimately, the majority opinion is fairly persuasive. It establishes an easy-to-follow rule that promotes the goal of finality, protects the integrity of the jury system, gives fair deference to lower court judges, and is consistent with hundreds of years of developing case law. The decision’s weaknesses and omissions, however, cannot be ignored.

2. Missing the Forest for the Trees: Exploring *Blueford*’s Weaknesses

Despite its strengths, Chief Justice Roberts’s opinion is, in the end, too formalistic. It draws bright lines that are too rigid and may lead to adverse results, it is too deferential to past precedent, and it fails to substantively address Arkansas’s unique jury instructions. By interpreting the Double Jeopardy Clause so narrowly and failing to account for the policy rationale

⁸⁷ *Deliberations in the Jury Room*, LAWYERS.COM, <http://criminal.lawyers.com/Criminal-Law-Basics/Deliberations-in-the-Jury-Room.html> (last visited Jan. 25, 2013); see also Julie A. Seaman, *Black Boxes*, 58 EMORY L.J. 427, 432 (2008) (noting that juries perform their role “as fact finder shrouded in secrecy, and it is impossible to say why or how the jury convicted or acquitted in any given case”).

⁸⁸ *Renico v. Lett*, 130 S. Ct. 1855, 1863 (2010) (quoting *Illinois v. Somerville*, 410 U.S. 458, 462 (1973)); see also *Arizona v. Washington*, 434 U.S. 497, 510 (1978) (“The trial judge’s decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court.”).

⁸⁹ See *Blueford v. Arkansas*, 132 S. Ct. 2044, 2052 (2012).

⁹⁰ *Renico*, 130 S. Ct. at 1864 (quoting *Winston v. Moore*, 452 U.S. 944, 947 (1981) (Rehnquist, J., dissenting from denial of certiorari)).

behind it, the Court failed to provide proper protection to citizens facing retrial.

Although line-drawing is often arbitrary, bright-line rules provide certain undeniable benefits: judicial economy, predictability, and fairness. Where, however, the line drawn by the court is too formalistic, it can lead to absurd outcomes.⁹¹ As the *Blueford* dissent recognized, “[i]n ascertaining whether an acquittal has occurred, ‘form is not to be exalted over substance.’”⁹² The Court failed to give proper weight to the undeniable implication of the intersection between acquittal-first instructions and double jeopardy—that is, if a jury must acquit on a greater charge before considering a lesser, by deliberating on that lesser charge, the jury has functionally acquitted as to the greater.

The majority focused heavily on finality but failed to appreciate that in acquittal-first jurisdictions, finality is often unattainable. Chief Justice Roberts’s conclusion that the jury foreperson’s report was not final cannot be reconciled with acquittal-first jury instructions generally. At crucial times, the Court seemed to contradict its own reasoning. For example, the Chief Justice stated that a jury is presumed to follow its instructions.⁹³ According to this logic, the jury would have had to first acquit Blueford of the greater charges before deliberating on the lesser. However, Chief Justice Roberts ultimately justified the majority’s holding by arguing that in acquittal-first jurisdictions, there is nothing preventing the jury from later changing its mind as to the greater charge.⁹⁴ This argument fails.

First, given the circumstances of the case, not only did the jury probably intend to acquit Blueford of capital and first-degree murder, but also, under the acquittal-first instructions, its report was, as a logical matter, final. The trial court’s instructions—that if the jurors had a *reasonable doubt* as to Blueford’s guilt on a greater charge, they must then deliberate on a lesser charge—are telling: “reasonable doubt” is the burden of proof in a criminal prosecution in Arkansas.⁹⁵ So, if it is fair to assume that the jurors followed the instructions of the trial court, it must also be fair to assume—as Justice

⁹¹ See, e.g., *Blueford*, 132 S. Ct. at 2056 (Sotomayor, J., dissenting) (noting that, in substance, the announcement in open court of the jury’s unanimous vote against the capital and first-degree murder charges was tantamount to a formal acquittal, yet this announcement offered Blueford no double jeopardy protection).

⁹² *Id.* (quoting *Sanabria v. United States*, 437 U.S. 54, 66 (1978)).

⁹³ *Id.* at 2051 (majority opinion).

⁹⁴ *Id.*

⁹⁵ ARKANSAS MODEL JURY INSTRUCTIONS: CRIMINAL No. 110 (Ark. Supreme Court Comm. on Criminal Jury Instructions, 2d ed. 1994).

Sotomayor noted in dissent⁹⁶—that the jury did not move on to deliberate the lesser charges until it had made a definitive determination that the prosecution failed to meet its burden of proof as to the greater charges. Indeed, the prosecution clarified for the jury that “before you can consider a lesser included of capital murder, you *must* first, all 12, vote that this man is not guilty of capital murder,”⁹⁷ explaining that this was “not a situation where you just lay everything out here and say, well, we have four choices. Which one does it fit the most?”⁹⁸ Chief Justice Roberts’s assertion that the jury could have subsequently reconsidered its unanimous vote does not hold water as applied to the facts of this case.⁹⁹

Second, the Court was overly deferential to the trial judge’s finding of manifest necessity. Although the Court has “expressly declined to require the ‘mechanical application’ of any ‘rigid formula’ when a trial judge decides to declare a mistrial due to jury deadlock,”¹⁰⁰ the Court has emphasized that manifest necessity is a high bar: “[T]he power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes”¹⁰¹ Such urgent circumstances were not present in *Blueford*. In order to provide citizens with full double jeopardy protection under the Fifth Amendment, the Court should have subjected the trial judge’s decision to declare a mistrial to greater scrutiny.

Third, *Blueford* essentially eliminated “implicit acquittals” in acquittal-first jurisdictions, except in situations where the jury convicts on one of the lesser charges. Courts have regularly held that when a jury convicts on a lesser included charge, the defendant has been implicitly acquitted on the

⁹⁶ *Blueford*, 132 S. Ct. at 2054 (Sotomayor, J., dissenting).

⁹⁷ *Id.* at 2048 (majority opinion) (emphasis added).

⁹⁸ *Id.*

⁹⁹ Although from a formalist perspective, Justice Roberts was correct that “nothing in the instructions prohibited the jury from reconsidering such a vote,” *id.* at 2051, I do not agree that the jury either believed it could reconsider or intended to reconsider. As Justice Sotomayor argued, the jury “scrupulously” followed its instructions to unanimously acquit of the more serious charges before moving forward, and the only plausible inference is that the jurors spent the thirty minutes after the forewoman announced the jury’s unanimous vote debating not the greater charges on which all were agreed, but the charge of manslaughter on which they were deadlocked. *See id.* at 2056 (Sotomayor, J., dissenting).

¹⁰⁰ *Renico v. Lett*, 130 S. Ct. 1855, 1858 (2010) (quoting *Wade v. Hunter*, 336 U.S. 684, 691 (1949)).

¹⁰¹ *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). The Court has consistently reiterated this high bar for establishing manifest necessity. *See, e.g., Arizona v. Washington*, 434 U.S. 497, 506 (1978) (requiring a “high degree” of necessity before concluding that a mistrial is appropriate).

greater charges.¹⁰² *Blueford* makes clear that a jury deadlocked on the lesser charge does not merit the same treatment. As the *Blueford* dissent recognized, however, “[i]t would be anomalous if the Double Jeopardy Clause offered less protection to a defendant whose jury has deadlocked on the lesser and thus convicted of nothing at all.”¹⁰³ Under *Blueford*’s reasoning, in a convict-on-any-or-acquit-on-all jurisdiction, if a jury unanimously voted to acquit Defendant A on first-degree murder but was hung on negligent homicide, double jeopardy protection would not be triggered. Yet, if with respect to Defendant B, that same jury voted unanimously against first-degree murder but convicted on negligent homicide, Defendant B would be entitled to double jeopardy protection against retrial on the first-degree murder charge. Therefore, at least with respect to double jeopardy, Defendant B would be better off than Defendant A, against whom the prosecution presumably had a weaker case.

Fourth, the Court should have spent more time addressing acquittal-first jury instructions and whether the trial judge was required to poll the jury or provide partial verdict forms before declaring a mistrial. Most notable in the *Blueford* decision is not what Chief Justice Roberts wrote, but what he failed to write. The legally formalistic decision is almost completely devoid of any substantive discussion of acquittal-first jury instructions or partial verdicts. The key legal issue in *Blueford* stems from the implications of acquittal-first jury instructions on the operation of the Double Jeopardy Clause, but even after *Blueford*, that issue remains largely unresolved.

III. OPTIONS AFTER *BLUEFORD*

Despite *Blueford*’s attempt to draw clear, bright-line rules, Chief Justice Roberts’s opinion leaves many issues unresolved. To best resolve these issues while respecting the Court’s decision, state legislatures should eliminate acquittal-first instructions altogether or, at a minimum, require trial judges to poll the jury or provide partial verdict forms before finding manifest necessity to declare a mistrial.

¹⁰² See, e.g., *Price v. Georgia*, 398 U.S. 323, 326-27 (1970); *Green v. United States*, 355 U.S. 184, 190 (1957); *People v. Gause*, 971 N.E.2d 341, 342 (N.Y. 2012).

¹⁰³ *Blueford*, 132 S. Ct. at 2058 (Sotomayor, J., dissenting).

A. *States Should Eliminate Acquittal-First Instructions
with Single Verdict Forms*

Although the *Blueford* Court refused to hold them unconstitutional,¹⁰⁴ states should eliminate acquittal-first jury instructions with single verdict forms¹⁰⁵ because they impinge on protections that are vital to our criminal justice system.¹⁰⁶ Before *Blueford*, the Court had, in certain circumstances, questioned the validity of jury instructions that limited a jury's options for conviction.¹⁰⁷ While there are both benefits and drawbacks to acquittal-first instructions,¹⁰⁸ when paired with a failure to poll the jury or to provide partial verdict forms, they impede double jeopardy protection and encroach on the province of the jury.

Acquittal-first instructions, combined with single verdict forms, give the state too much power. The state, with all of its resources, should not be able to use coercive jury forms or confusing instructions to ensure conviction. If the prosecution cannot prove its case beyond a reasonable doubt, it should not be able to manipulate the jury's deliberations to increase the likelihood of either conviction on a lesser offense or a hung jury, thereby giving the state another "bite at the apple."¹⁰⁹

¹⁰⁴ In fact, Chief Justice Roberts largely glossed over the question of the constitutionality of acquittal-first jury instructions.

¹⁰⁵ Some states have already done so. See, e.g., *State v. LeBlanc*, 924 P.2d 441, 442 (Ariz. 1996) (en banc) (concluding that the elimination of acquittal-first instructions "reduces the risks of false unanimity and coerced verdicts [because] [w]hen jurors harbor a doubt as to guilt on the greater offense but are convinced the defendant is culpable to a lesser degree, they may be more apt to vote for conviction on the principal charge out of fear that to do otherwise would permit a guilty person to go free"); *Green v. State*, 80 P.3d 93, 96 (Nev. 2003) (rejecting the use of an acquittal-first transition instruction because it "improperly invites compromise verdicts," and approving the use of an "unable to agree" transition instruction).

¹⁰⁶ There are, however, many states that use these instructions, including but not limited to Alaska, California, Connecticut, New Hampshire, and New Mexico. See *Blueford*, 132 S. Ct. at 2058 (Sotomayor, J., dissenting) (collecting cases).

¹⁰⁷ Cf., e.g., *Beck v. Alabama*, 447 U.S. 625, 627 (1980) (holding it unconstitutional to withhold from a jury the option of convicting a capital defendant of a lesser included offense). Although *Beck* did not specifically deal with acquittal-first jury instructions, the instructions that the Court found unconstitutional stifled the jury's deliberations and actions in the same way that the *Blueford* instructions, which prohibited the jury from issuing a partial verdict, did.

¹⁰⁸ See Laura Anne Cooper, Comment, *Should Juries Be Able to Agree to Disagree?*: *People v. Boettcher and the "Unanimous Acquittal First" Instruction*, 54 BROOK. L. REV. 1027, 1044-48 (1988); *supra* notes 33-34 and accompanying text.

¹⁰⁹ See *supra* text accompanying note 78; cf. *Arizona v. Washington*, 434 U.S. 497, 507-08 (1978) (noting that the Double Jeopardy Clause is intended to prevent prosecutors from declaring a mistrial in order to obtain a more favorable opportunity to convict the defendant).

Under *Blueford*, there is nothing to prevent an overzealous prosecutor from abusing the lesser included offense instruction when the state's evidence is insufficient, thereby allowing the state a "second shot" at conviction. If a prosecutor, who is certain the defendant is guilty but cannot prove it, added some lesser included offense hoping to hang the jury, she might be able to buy the state more time to find evidence.¹¹⁰ Of course, juries are more likely to hang whenever lesser included offenses are charged, but without single verdict forms, they will be more likely to find a charge on which all jurors agree—even if that agreement comes in the form of acquittal as to the greater charge.

Acquittal-first jury instructions with single verdict forms also impede the jury process. The U.S. justice system uses a secret jury process because juries require independence to come to an accurate, unanimous decision.¹¹¹ These jury instructions interfere with how a jury deliberates, but provide no legitimate countervailing, justice-promoting benefits. The jury's free will regarding how to most justly and efficiently deliberate is overridden.¹¹²

The issues raised in *Blueford* could therefore evaporate if states, either through judicial decree or legislation, banned the concurrent use of single verdict jury forms and acquittal-first jury instructions.

B. States Should Mandate that Trial Judges Take Action Before Declaring a Mistrial

Even if states choose not to do away with acquittal-first instructions, there are less drastic measures available to remedy the problems created by *Blueford*. Justice Sotomayor, writing for the *Blueford* dissent, got it right when she proffered, "I would therefore hold that the Double Jeopardy Clause requires a trial judge, in an acquittal-first jurisdiction, to honor a defendant's request for a partial verdict before declaring a mistrial on the ground of jury deadlock."¹¹³ This remedy—which could be implemented by

¹¹⁰ Cf. generally Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 AM. J. CRIM. L. 257 (1999) (discussing parties' strategies in deciding whether to ask the court to instruct the jury on lesser included offenses); Monroe H. Freedman, *The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors' Offices*, 52 WASHBURN L.J. 1 (2012) (discussing prosecutorial misconduct, especially when prosecutors purposefully violate defendants' constitutional rights).

¹¹¹ See generally Seaman, *supra* note 87.

¹¹² In extreme cases like *Blueford*, acquittal-first instructions combined with single verdict forms lead to a result no different from a judge refusing to acknowledge a jury's verdict and declaring a mistrial.

¹¹³ *Blueford v. Arkansas*, 132 S. Ct. 2044, 2058 (2012) (Sotomayor, J., dissenting).

the legislature or by courts—would reinstitute the seemingly forgotten high bar of manifest necessity.

Defendants' Fifth Amendment rights are not adequately protected if judges in acquittal-first jurisdictions retain the discretion to decline to poll juries before declaring a mistrial. One commentator noted that "judges now know that if they want to prevent a retrial of charges that the jury has already acquitted, they must get a formal statement of a verdict on all counts from hung juries," but a judge with the primary goal of preserving the prosecutor's options could "simply do what the judge did in *Blueford*."¹¹⁴ But judges should not be able to "preserve the prosecutor's options"¹¹⁵: the Double Jeopardy Clause is expressly aimed at preventing this type of manipulative behavior.¹¹⁶

This solution is consistent with *Blueford* because the Court, though holding that a judge is not required to poll the jury or to offer partial verdict forms, made no mention of whether states could mandate that judges follow this procedure—and thus neither expressly nor impliedly banned any such rule or law. Constitutional protections relating to criminal procedure are the floor, not the ceiling, and a state remains free to provide *greater* protection to its citizens than the Constitution requires.¹¹⁷ For jurisdictions that, prior to *Blueford*, *required* partial verdicts before the declaration of a mistrial owing to a hung jury,¹¹⁸ there is no constitutional barrier preventing them from continuing to do so.

Requiring trial judges to poll an alleged hung jury before declaring a mistrial would not intrude upon the jury process or overrule precedent, but would instead create a procedural safeguard for the Double Jeopardy Clause—similar to the now-mandated *Miranda* warnings, which protect the Fifth Amendment's right against self-incrimination.¹¹⁹ Further, if trial judges were required to take a quick poll, significant government resources would be conserved by avoiding retrial (on some or all charges), which would drastically increase judicial efficiency.

¹¹⁴ Craig M. Bradley, *What Is Double Jeopardy?*, TRIAL, Dec. 2012, at 52, 53.

¹¹⁵ *Id.*

¹¹⁶ See *supra* text accompanying note 110.

¹¹⁷ Cf. *Michigan v. Long*, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting) (asserting that "Michigan simply provided greater protection to one of its citizens than some other State might provide or, indeed, than this Court might require throughout the country").

¹¹⁸ See *supra* note 60.

¹¹⁹ *Miranda* warnings are not themselves constitutionally required, *Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974), but function as procedural safeguards through which to effectuate the Fifth Amendment's guaranteed protections.

Some courts label jury polling “an unwarranted and unwise intrusion into the province of the jury.”¹²⁰ I argue instead, however, that acquittal-first instructions constitute the more significant intrusion. Admittedly, it seems odd—if jury independence and secrecy are of such great importance—to ask a jury to complete additional forms or require it to speak with the judge more often. It could be asserted that my argument is paradoxical: instructions encroach on the jury’s province, but courts should nevertheless provide more of them. However, encouraging states to eliminate acquittal-first instructions and to add a requirement of partial verdict forms or jury polling before declaring a mistrial, is fully consistent with allowing juries complete freedom to deliberate. Because the forms or polling would be required only as a last resort, *after* the jury had completed its deliberations and immediately before declaring a mistrial, there would be no intrusion on or interruption of the jury’s free and confidential deliberations.¹²¹

CONCLUSION

Blueford v. Arkansas will affect many citizens whose liberty hangs in the balance. Chief Justice Roberts strayed from the Double Jeopardy Clause’s fundamental protections by holding, first, that a jury foreperson’s report in an acquittal-first jurisdiction did not constitute an acquittal; and second, that the trial judge was not required to poll the jury to establish manifest necessity to declare a mistrial. The opinion is overly formalistic, and does little to alleviate the issues plaguing acquittal-first jurisdictions. Fortunately, states remain at liberty to combat the problems associated with messy acquittal-first jury instructions, which do little besides confuse both judges and juries,¹²² by eliminating this type of instruction altogether.

Alternatively, requiring judges to poll juries or to provide partial verdict forms before declaring a mistrial would properly protect defendants’ rights. In spite of *Blueford*’s holding, states remain free to offer protections that extend beyond the constitutional minimum and some have continued to mandate that trial judges poll juries to provide proper protection under the Double Jeopardy Clause.¹²³ I am advocating not that states unreasonably

¹²⁰ *People v. Hickey*, 303 N.W.2d 19, 21 (Mich. Ct. App. 1981).

¹²¹ See O’Keefe, *supra* note 85, at 898 (“A deadlocked jury has completed its deliberations; inquiry into whether a partial verdict has been reached will therefore not be intrusive.”).

¹²² See, e.g., *Blueford v. Arkansas*, 132 S. Ct. 2044, 2059-60 (2012) (Sotomayor, J., dissenting) (noting that even the trial judge was confused by the Arkansas jury instructions).

¹²³ See, e.g., *State v. Fennell*, 66 A.3d 630, 646 (Md. 2013) (“[B]efore a proper finding of manifest necessity for a mistrial could have been made, the trial judge should have inquired into the jury’s status of unanimity prior to its discharge.”).

extend the scope of the Constitution's protections or overturn hundreds of years of precedent, but only that they adopt procedural safeguards that will provide every citizen with the protections enumerated in the Double Jeopardy Clause; no more, no less.

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