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THE POWER OF THE JUDICIARY TO DISMISS CRIMINAL CHARGES AFTER SEVERAL HUNG JURIES: A PROPOSED RULE TO CONTROL JUDICIAL DISCRETION

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I. INTRODUCTION

The State of Arizona charged John Henry Knapp with first degree murder in the house-fire death of his two minor daughters.1 The first trial in 1973 ended in a hung jury with seven of the twelve jurors voting in favor of conviction.2 At his second trial six months later, Knapp was convicted3 and spent over a decade on death row.4 In 1987, nearly fifteen years after the first trial, the state court granted Knapp's postconviction petition for relief on the grounds that advances in fire science had raised serious questions as to the validity of the arson theory advanced by the prosecution; namely, that the fire had necessarily been caused by flammable liquid rather than accidentally caused by the children playing with

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2. See id. at 393.
4. See PARLOFF, supra note 1, at 395.
matches. As part of his basis for ordering a new trial, the judge specifically found that the newly discovered evidence "would probably change the verdict upon a retrial of this case."

At the third trial the jury once again hung, seven to five in favor of conviction. On the eve of a fourth retrial, the case was disposed of by plea bargain.

During the preparation for the fourth trial, the defense team examined whether the court could dismiss the case on the grounds that the prosecution had failed three times without any fault on the part of the defense to obtain an unimpeachable conviction. The team moved to dismiss the case on the grounds that three attempts to convict were enough. As stated in the caption of the motion: "Enough Is Enough."

In 1966 approximately five percent of the cases that proceeded to trial ended in deadlocked juries. That percentage has probably increased since then. The occurrence of a small per-

5. See Knapp v. Martone, 823 P.2d 685, 686 (Ariz. 1992); see also PARLOFF, supra note 1, at 233-34.
6. PARLOFF, supra note 1, at 233-34.
7. See id. at 393.
8. See id. at 401-03 (discussing the circumstances surrounding the plea agreement).
10. See Motion to Dismiss, supra note 9. Alternatively, Michael Berch moved to prevent the prosecution from improving its chances for a conviction by altering its theory of the case to accommodate positions inconsistent with those it took in the three previous trials. The court denied each motion.
11. See id.
13. Many celebrated cases have ended in deadlock. In March 1996 brothers Lyle and Erik Menendez were convicted of the first degree murder of their parents in the first retrial following a hung jury. See Ann W. O'Neill & Bob Pool, Menendez Jurors Sure of Their Decisions, L.A. TIMES, Apr. 22, 1996, at B1. Byron De La Beckwith was tried and convicted several years ago for civil rights slayings in Mississippi in the 1960s. See Beckwith v. State, 615 So. 2d 1134 (Miss. 1992). The first jury hung. See id. at 1135.

Hung juries are not limited to celebrity cases. A Los Angeles County Public Defender document indicates that 429 cases hung from July 1, 1994 to February 16, 1996. See Los Angeles County Public Defender Analysis of Database of Hung Juries
centage of deadlocked juries, however, is not necessarily a symptom that something is wrong with the criminal justice system. Instead, it may demonstrate that the system truly works. There will always be cases in which the requisite number of jurors simply cannot agree on a verdict, even if they focused solely on the evidence presented and the instructions given.

*State v. Knapp* raised and this Article examines a separate issue: How many times may the state retry a defendant whom it has been unable to convict? At what point should the court simply refuse to hear the case and declare that an impasse has been reached? These questions implicate several legal, political, and ethical issues. This Article concludes that double jeopardy is not the source of the courts' power to dismiss a prosecution after several hung juries. Another principle that may limit the prosecutor's right to repeated attempts to obtain a conviction is the courts' inherent power, also referred to as the courts' supervisory role, in the administration of justice.¹⁴ Several courts have already recog-

Since 7/1/94 [hereinafter Hung Jury Database]; Los Angeles County Public Defender's Office Data Base Totals [hereinafter Base Totals]. Of these, 259 were felonies. That number represents approximately 5.4% of all felony trials. See Fredrick M. Muir, *Supervisors Warned on '3 Strikes,'* L.A. TIMES, Sept. 14, 1994, at B1 (Los Angeles District Attorney Gil Garcetti stated that the number of felony jury trials has remained steady at about 2400 per year). One hundred twenty-nine felony cases were set for retrial; of the 48 felonies that have been tried, 37 resulted in verdicts: 30 were guilty and 7 were not guilty. See Hung Jury Database, supra. Eleven, or nearly 23%, hung. See id. Of these, three were dismissed, five were plea bargained, and three were set for a third trial. See id.

¹⁴. We have interchanged the terms “inherent” and “supervisory” powers, as many courts do. Terminology, however, should not confound the important distinction regarding the source of the power. In true supervisory cases the source may, in part, stem from congressional acts and court rules that are subject to congressional overrule. Thus in *McNabb v. United States*, 318 U.S. 332 (1943), the first case to refer to “supervisory powers,” the Court asserted that affirming the conviction would “stultify” congressional policies. See id. at 345. *McNabb* has been overturned by statute. See *Omnibus Crime Control and Safe Streets Act of 1968*, 18 U.S.C. § 3501 (1968). Inherent powers, on the other hand, may include powers that inhere in the judicial office and that may not be affected by congressional overrule. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). The Supreme Court has also developed important bodies of procedural law without referring to the source of the power at all. For example, ten years before *McNabb*, the Court decided in the absence of any congressional act that evidentiary questions should be formulated “in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past.” *Funk v. United States*, 290 U.S. 371, 382 (1933). The entrapment defense, which developed in the 1920s, is yet another example of the courts' exercise of inherent powers. See Kelly M. Hayes, Note, *Criminal Law—Florida Adopts a Dual Approach to Entrapment—Cruz v. State, 465 So. 2d 516 (Fla. 1985)*, 13 FlA. ST. U. L. REV. 1171 (1986). The recognition and exercise of inherent or supervisory powers contain an element of protecting
nized this power to bar repeated prosecutions.\textsuperscript{15} Others have denied it.\textsuperscript{16} The battle still rages with no clear victor. As such, this Article turns to an analysis of the principles that underlie and the significant cases that explore the nature of the courts' inherent power.

Part II of this Article examines traditional notions of double jeopardy and concludes that double jeopardy is not the source of the courts' power to dismiss cases. Part III explores other potential sources of this judicial power. The judiciary bears the ultimate responsibility to oversee the administration of justice. To function properly as an independent branch of government, the judiciary should be able, in the absence of legislative direction to the contrary, to abort prosecutions under the circumstances mentioned in this Article. This power stems from common law principles regarding the inherent power or supervisory role\textsuperscript{17} of the judiciary. After addressing the principle of separation of powers, this Article concludes that the principle does not militate against, but in fact supports, the forthright recognition of the courts' inherent power to dismiss prosecutions.

Part IV reviews the factors that the court should appropriately consider in exercising its discretion in a particular case. We propose that the prudential exercise of discretion must be "guided by considerations of fundamental fairness, as well as the judiciary's responsibility for the proper overall administration of the criminal justice system."\textsuperscript{18}

Part V examines the rarely discussed question whether the dismissal should be with or without prejudice. The final part of

\textsuperscript{15} See Annotation, Propriety of Court's Dismissing Indictment or Prosecution Because of Failure of Jury to Agree After Successive Trials, 4 A.L.R.4th 1274 (1981) [hereinafter Failure of Jury to Agree].

\textsuperscript{16} See id. At times it is difficult to discern from the opinions whether the refusal is predicated on a lack of power or on discretionary grounds.

\textsuperscript{17} In this context the terms are often interchanged. See supra note 14 and accompanying text (distinguishing courts' supervisory powers from inherent powers).

this Article proposes a rule that should be considered by the Advisory Committee to the United States Supreme Court and its counterparts in the several states. It builds upon the areas in which courts have already recognized their inherent powers to control litigation. We extrapolate from these decisions a guiding principle to govern the disallowance of repeated prosecutions. Despite misgivings of several courts that the power to bar reprosecution after several hung juries would encroach upon the prerogatives of the executive, the better reasoned view militates against wholesale abdication of the right to bar reprosecution. Indeed separation of powers principles would seem to favor a power reposed in the courts to declare that "Enough Is Enough" and that the preferred route is to promulgate a rule.

II. DOUBLE JEOPARDY DOES NOT REQUIRE DISMISSAL OF PROSECUTION AFTER ONE OR MORE HUNG JURIES

In 1824 Justice Story wrote for a unanimous Supreme Court in *United States* v. *Perez* that a defendant could be retried following a hung jury. Although the decision alludes to neither the Fifth Amendment nor the Double Jeopardy Clause, it has been con-

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19. The judge in the third retrial of Knapp expressed concern about this issue. *See also* United States v. Gonsalves, 691 F.2d 1310 (9th Cir. 1982), vacated and remanded on other grounds, 464 U.S. 806 (1983) (supervisory powers doctrine complements separation of powers principle); *cf.* People v. Baker, 335 N.Y.S.2d 487, 496 (1972) (stating that "there is no law or precedent that gives the court the power to absolve [the defendants] from the serious charges that stand unresolved and unadjudicated"); *Parloff*, *supra* note 1, at 395 (discussing executive policy choices).

20. 22 U.S. (9 Wheat.) 579 (1824). Interestingly, *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812), a seminal case that recognized the inherent power of the courts to preserve their own existence and to promote justice, had already been decided. *See id.* at 33. The *Perez* Court did not refer to *Hudson* or to the inherent or implied powers doctrine. *See United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824). Indeed, it was not until *McNabb* v. *United States*, 318 U.S. 332 (1943), that the inherent power doctrine embraced matters other than housekeeping and the observance of order in the proceedings. *See infra* note 93 and accompanying text (distinguishing power to dismiss from power to employ mere housekeeping rules).


22. *See United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824). It is assumed for purposes of discussion that, apart from fairness concerns embodied in the Due Process Clause, the defendant has no specific constitutional right to terminate proceedings. Specific guarantees would, of course, inform the court's decision to terminate criminal proceedings even at the initial stages. *See United States* v. *Armstrong*, 116 S. Ct. 1480 (1996) (examining selective prosecution based on race); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (challenging selective prosecution based on race); *see also infra* note 30 (discussing due process in the context of the inherent powers doctrine).
sistedly followed in later cases squarely presenting the question whether retrial following a hung jury violates the Double Jeopardy Clause. Since the decision in Perez, much energy has been expended in analyzing whether the Double Jeopardy Clause is the source of the courts' power to restrict reprosecutions after one or more hung juries. Despite modern Supreme Court pronouncements clearly holding that jeopardy attaches at the time the jury is impaneled and sworn, the Court recently reaffirmed the Perez ruling. Chances are slim that the Court will alter its position.

Although several scholarly works and judicial opinions criticize Perez, this Article concludes that Perez should be followed not only in the federal system, but also in state systems interpreting similar state double jeopardy provisions. The opposite ap-
proach—that is a blanket rule forbidding retrial after, for example, one hung jury—is problematic for several reasons:

1. It would impose a tremendous hardship on the government and society in those circumstances in which one or two intransigent jurors hold out;

2. It would encourage the defense with few or no attendant risks to try the case in such a manner as to invite a hung jury;

3. It would make judges reluctant to find the “manifest necessity” required for granting a mistrial;

4. It might induce more states to permit convictions on less than unanimous verdicts and would present the Supreme Court an additional opportunity to consider adopting a rule permitting less than unanimous verdicts in federal prosecutions.

Examining the purposes underlying the Double Jeopardy Clause does not lead to a different conclusion. The clause serves or conviction on the merits. See John W. Winkle III, The Mississippi State Constitution: A Reference Guide 34 (Reference Guides to the State Constitutions of the United States No. 12, 1993). Whether a Mississippi court would be free to use its inherent powers to prevent reprosecutions after several hung juries is certainly more problematic than in states not having a similar constitutional provision. See id.

30. Unanimous verdicts are no longer required in some jurisdictions. See Charles E. Moylan, Jr. & John Sonsteng, Constitutional Constraints on Proving "Whodunnit?", 16 WM. MITCHELL L. REV. 171, 195 (1990). The Supreme Court has upheld a conviction of guilt beyond a reasonable doubt rendered on a vote as disparate as 9-3. See Johnson v. Louisiana, 406 U.S. 356, 362 (1972); see also Apodaca v. Oregon, 406 U.S. 404, 411 (1972) (noting that juries may convict or acquit by votes of 10-2 or 11-1). Thus, the mere fact that a jury is hung by a few recalcitrant jurors does not mean that the prosecution has not proven guilt by a standard that would have satisfied constitutional requirements.

Double jeopardy should not be implicated even by jury splits so large that the jury verdict would not have been constitutionally supportable. Also, if double jeopardy does not militate against a retrial after one hung jury, it would be difficult to find a principled justification for using double jeopardy as the springboard from which to dismiss successive prosecutions—perhaps due process, which is essentially a fairness standard, but not double jeopardy. Therefore, we do not rely on double jeopardy as the basis from which the court's power to prevent a retrial springs.

Two other reasons lead to the preference that the power be inherent. First, the inherent power doctrine presents no federalism concerns and therefore is preferable to finding a constitutional violation that requires the bar. Second, due process does not take into account the systemic interests of the judiciary, while the inherent power doctrine does.


32. Thus far, the Supreme Court has consistently required the unanimous vote of twelve jurors in federal prosecutions. See Jeremy Osher, Comment, Jury Unanimity in California: Should It Stay or Should It Go?, 29 LOY. L.A. L. REV. 1319, 1328 (1996).
primarily to protect the defendant's interest in having his or her fate determined by the first impaneled jury and to prevent the State from acquiring a second chance to convict. The defendant's supposed interest in having the first impaneled jury determine his or her fate—the crux of those decisions barring retrial where the prosecutor deliberately injects error into the proceedings to goad the defendant into moving for a mistrial—does not apply in the deadlocked jury situation because the jury has not determined the defendant's fate. Assuming that the jury's inability to decide the case has occurred through no fault of the prosecution, the Perez ruling is perfectly sound.

III. THE JUDICIARY POSSESSES THE INHERENT POWER, SUBJECT TO CONSTITUTIONALLY IMPOSED STATUTORY AND RULE MAKING LIMITATIONS, TO DETER REPEATED ATTEMPTS TO OBTAIN A VERDICT

The mere fact that double jeopardy does not bar successive prosecutions does not mean that the court must permit, under all

33. As the United States Supreme Court noted:
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. Green v. United States, 355 U.S. 184, 187-88 (1957) (emphasis added).

For a further discussion of this idea and the related doctrine of manifest necessity, see infra note 35.


35. Perez specifically held that a deadlocked jury presents a case of manifest necessity. See Perez, 22 U.S. (9 Wheat.) at 580. Unless a defendant consents to a retrial, in order to invoke the manifest necessity principle and allow reprosecution, the trial judge must take all reasonable steps to assure a jury verdict. See Winston v. Moore, 452 U.S. 944 (1981). Only when these measures fail to produce a verdict will discharging the jury not raise double jeopardy concerns. See id. at 946. The death of a trial judge during the proceedings presents a clear case of manifest necessity. See United States v. Holley, 986 F.2d 100, 104 (5th Cir. 1993); see also Illinois v. Somerville, 410 U.S. 458 (1973) (stating that a judge's determination to declare mistrial based on defective indictment presents a case of manifest necessity where defective indictment would have been grounds to overturn the conviction on appeal); Wade v. Hunter, 336 U.S. 684 (1949) (finding that judicial officers are needed in the battlefield to assist the invasion); United States v. Jaramillo, 745 F.2d 1245 (9th Cir. 1984) (stating that an indictment of a judge during trial constituted manifest necessity warranting declaration of mistrial). But see Downum v. United States, 372 U.S. 734 (1963) (stating that a retrial is prohibited where jury dismissed because of absence of prosecutor's witness).
circumstances, retrials after one or more hung juries. Fifty years ago in *McNabb v. United States*, the United States Supreme Court declared its "supervisory authority over the administration of criminal justice in the federal courts." This power formed an independent basis for the Court's authority to exclude a confession induced by an unreasonable delay in bringing the defendant before a magistrate. The Court specifically concluded that "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence," even when the evidentiary and procedural rules have the result of thwarting or aborting prosecutions.

Although *McNabb* discussed only the Supreme Court's supervisory power over lower federal courts, lower federal courts have also quite logically embraced the doctrine. One commentator has stated that the "principal impact [of the supervisory powers doctrine] has been felt in federal criminal cases in which the federal courts have employed [the doctrine] to establish rules of evidence and judicial procedure and to devise sanctions for misconduct by prosecutors and government investigators." *McNabb*, other Supreme Court cases, and an analysis of several lower court opinions addressing the precise issue should sufficiently dispel any notion that the federal courts lack the power to bar repeated attempts to obtain a conviction. And while the principle use of supervisory power has ordinarily involved cases in which there has been prosecutorial misconduct or violations of statutes and rules, it is not so restricted.

36. 318 U.S. 332 (1943).
37. *Id.* at 341.
38. *See id.* at 341-42.
39. *Id.* at 340.
41. *Id.* at 1434.
43. *See, e.g.*, United States v. Gunter, 546 F.2d 861 (10th Cir. 1976) (finding that court had the power to act, but that the breaking point had not been reached); United States v. Ingram, 412 F. Supp. 384 (D.D.C. 1976).
Although generalizations about state court systems are always somewhat dangerous, few state systems are encumbered with the limitations that bind the federal judiciary. The text and history of Article III of the United States Constitution, the early years of the relationship between the federal courts and the legislative branch, and the recognition by the Court of inherent limitations upon the judiciary have cast the federal courts in a posture quite different from that of their state counterparts. Thus many state systems, as a general rule, would recognize their inherent power to abort prosecutions.45

The doctrine this Article discusses poses neither obvious federalism nor significant separation of powers concerns. Since federal constitutional law does not compel the inherent powers doctrine,46 state courts are free to accept or reject it. Furthermore, it is assumed that federal and state legislatures are free to overrule prospectively, or expand or limit decisions to abort prosecution after several hung juries. In fact, these court decisions, unlike those based upon constitutional adjudication, invite dialogue with other branches of government. But a decision initially based on supervisory power47 may presage a future decision based upon the Constitution. Such a course would raise federalism and separation of powers concerns.

Judicial precedents involving the inherent or supervisory power of the courts in the federal and state systems invite the conclusion that courts need not automatically defer to a prosecutor's decision to retry a defendant.

A. Analysis of McNabb

*McNabb v. United States*,48 generally regarded as the United States Supreme Court's first supervisory power decision,49 involved the defendants' prosecution for murdering a federal officer.50

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46. See Beale, supra note 40, at 1434. The Supremacy Clause does not operate unless the proposition of law is based upon the Constitution, laws, or treaties of the United States. See Nowak & Rotunda, supra note 22, § 1.6, at 17. A principle of law governing the court system and emanating from inherent power binds only courts within the system that has adopted it. See Beale, supra note 40, at 1434.
47. See Beale, supra note 40, at 1451.
49. See Beale, supra note 40, at 1435.
50. See McNabb, 318 U.S. at 333. The defendants sold whiskey on which federal
Following several sessions of intense questioning, the defendants made incriminating statements, which were subsequently admitted at the murder trial. The defendants were convicted of second-degree murder, and the Court of Appeals for the Sixth Circuit upheld the convictions on appeal.

The Supreme Court sua sponte raised the question whether the trial court properly admitted the defendants' incriminating statements. Focusing on various federal and state statutes requiring that arrested persons be taken promptly before a judicial officer, the Court found that Congress intended to outlaw "third-degree" and "secret interrogation[s]." The Court concluded that the arresting officers' conduct was incompatible with the duties of officers of the government and tended to undermine the integrity of criminal proceedings. Delaying the defendants' arraignment until officers had obtained confessions flagrantly violated the federal statutory requirements, and therefore the defendants' statements were inadmissible. The Court found that allowing a conviction to rest on evidence secured in such a manner "would stultify the policy which Congress had enacted into law." Although Congress had not explicitly forbidden the use of such evidence, the Court opined that the admission of unlawfully secured evidence would make "the courts themselves accomplices in willful disobedience of the law."
The Court found that its power to review federal court convictions is "not confined to ascertainment of Constitutional validity." From its inception the Court has exercised supervisory authority over the administration of criminal justice in the federal courts by formulating rules of evidence to be applied in federal criminal prosecutions. "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence," which are not satisfied merely by observing minimal safeguards for securing trial. From this observation sprang the recognition of the Court's supervisory power.

B. Analysis of Post-McNabb Cases

Since its McNabb decision the Supreme Court has used the supervisory power doctrine in various contexts. Some decisions apply supervisory power to help ensure accuracy and fairness and to preserve the integrity of the criminal process. For example, in Ballard v. United States the Court used its supervisory power to protect the integrity of the judicial system. The Court prohibited exclusion of women from juries on the grounds that exclusion causes "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." Focusing on considerations of fairness to a criminal defendant, the Court in Jencks v. United States exercised its supervisory power to require the government to produce for the defendant's inspection all reports made by two government witnesses regarding activities to which the witnesses

61. Id. at 340.
62. See id. at 341.
63. Id. at 340.
64. See Beale, supra note 40, at 1449-50; see also United States v. Nobles, 422 U.S. 225, 231 (1975) (supervisory power justified to preserve integrity of judicial system and public confidence); Roviaro v. United States, 353 U.S. 53, 60-61 (1957) (supervisory power justified by fundamental requirements of fairness); Mesarosh v. United States, 352 U.S. 1, 14 (1956) (supervisory authority used "to see that the waters of justice are not polluted").
66. Id. at 195.
67. 353 U.S. 657 (1957). Although this opinion does not expressly refer to supervisory power, subsequent Supreme Court decisions have identified Jencks as a supervisory power decision. See, e.g., Palermo v. United States, 360 U.S. 343, 362 (1959).
testified at trial. The Court rejected the prevailing rule, which required a preliminary showing of inconsistency, as "incompatible with our standards for the administration of criminal justice in the federal courts."

The Supreme Court also has used its supervisory power to remedy violations of individual rights and to impose sanctions where extrajudicial government conduct has violated the Constitution, federal statutes, or procedural rules. For example, in *Elkins v. United States* the Court invoked its supervisory power over the administration of criminal justice to preserve the constitutional principles underlying the Fourth Amendment's search and seizure requirements. Considerations of reason, experience, and judicial integrity persuaded the Court to overrule the "silver platter" doctrine, which allowed fruits of an unreasonable state search or seizure to be admitted in a federal criminal trial, if federal officers were not involved in the search or seizure. The Court reasoned that federal courts should not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold."

Just three years before *Elkins*, the Court had applied the *McNabb* reasoning to a pre-arraignment confession given by a defendant who was not taken before a magistrate within a reasonable time, in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. To safeguard individual rights and preserve the policies underlying Rule 5(a), the Court held the confession inadmissible.

Recently the Supreme Court used its supervisory power as a basis for sanctioning attorney misconduct. In *Chambers v. Nasco, Inc.*, a civil case, the Court held that federal courts may, in the exercise of their supervisory power, award attorneys' fees as a

68. See Jencks, 353 U.S. at 668.
69. Id.
70. See Beale, supra note 40, at 1451, 1455.
72. See id. at 222.
73. See id. at 206-08.
74. Id. at 223.
75. See Mallory v. United States, 354 U.S. 449, 452-53 (1957). If officers make a warrantless arrest, they must "take the arrested person without unnecessary delay before the nearest available commissioner or other nearby officer empowered to commit persons charged with offenses against the laws of the United States." Id. at 451-52; FED. R. CRIM. P. 5(a).
76. See Mallory, 354 U.S. at 449-56.
sanction for bad-faith conduct. The Court stated that its inherent power extends to a full range of litigation abuses and exists to fill in the interstices created by statutes and rules.\(^7\)

Although the inherent power principle has usually involved cases of misconduct by the parties or a vindication of statutory principles, the doctrine is not so limited. For example, in \textit{Gulf Oil Corp. v. Gilbert}\(^8\) the Court affirmed the lower court's decision to dismiss a case on the grounds of forum non conveniens, a doctrine which, at that time, did not have constitutional or statutory roots. The dismissal was based on principles of fairness to the defendant and the interests of the public in the effective administration of justice.\(^9\) Indeed, the Court has recognized the salutary purposes underlying the doctrine: to prevent abuses, oppression, and injustices.\(^5\) In \textit{Seattle Times Co. v. Rhinehart}\(^6\) the Court cited with approval Judge Friendly's observation that "[w]hether or not the Rule itself authorizes [a particular protective order], . . . we have no question as to the court's jurisdiction to do this under the inherent 'equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices."

Despite its seeming breadth, the inherent power doctrine does contain significant built-in limitations. In \textit{United States v. Mitchell},\(^7\) for example, the Court refused to suppress the confession of an accused who was illegally detained for eight days before being taken before a magistrate.\(^8\) The Court recognized that \textit{McNabb} involved an exercise of the Court's power to formulate appropriate policies for federal criminal trials;\(^9\) however, the Court found that supervisory power should not be used "as a punitive measure against unrelated wrongdoing by the police"\(^5\) or as

\(^{78}\) See id. at 45-47.
\(^{79}\) See id. at 46.
\(^{81}\) See id. at 509, 512.
\(^{82}\) See id. at 508-12.
\(^{83}\) See id. at 504, 508.
\(^{85}\) Id. at 35 (alteration in original) (citing International Prods. Corp. v. Koons, 325 F.2d 403, 407-08 (2d Cir. 1963)).
\(^{86}\) 322 U.S. 65 (1944).
\(^{87}\) See id. at 70-71. The Court distinguished the facts from those in \textit{McNabb} by noting that in \textit{Mitchell} the accused confessed immediately, rather than after a prolonged illegal detention. See id. at 70.
\(^{88}\) See id. at 68.
\(^{89}\) Id. at 70.
an "indirect mode of disciplining misconduct."90

In later cases the Court restricted lower courts' use of supervisory power91 and required that lower courts comply with all limitations set forth in the Federal Rules of Criminal Procedure.92

The foregoing cases support the proposition that a federal court may properly dismiss a prosecution when doing so will serve the ends of justice and the effective administration of the court's business.93 After all, management of the court's docket is the ju-

90. Id. at 71.
92. See, e.g., Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988) (stating that supervisory power does not permit the court to circumvent the harmless-error inquiry required by Rule 52(a) of the Federal Rules of Criminal Procedure). But see Chambers, 501 U.S. at 32 (stating that the court's inherent power is not displaced by statute and rules).

Not surprisingly, the Court has specifically limited the reach of supervisory power in Fourth Amendment cases. In United States v. Payner, 447 U.S. 727 (1980), the Court found that "the interest in deterring illegal searches does not justify" excluding tainted evidence if the evidence was "seized unlawfully from a third party not before the Court." Id. at 735. The Court reasoned that supervisory power does not extend so far as to give the judiciary "discretionary power to disregard the considered limitations of the law it is charged with enforcing." Id. at 737.

The Court has also stressed the importance of sparingly exercising the inherent power to refuse material evidence. See Lopez v. United States, 373 U.S. 427, 440 (1963). In Lopez the Court found that where federal officials have not engaged in manifestly improper conduct, the use of supervisory power is unwarranted. See id. Unless the manner in which the officers obtain the evidence compels a court to exclude it, the court must admit all relevant competent evidence. See id.

93. This Article considers the power to dismiss after several hung juries as arising from the inherent power of the court. Another possibility, however, is ostensibly based upon rule rather than common law. Rule 57 of the Federal Rules of Criminal Procedure provides two avenues of local rulemaking. First, the district court by majority vote and in accordance with the process outlined in the Rule may make any rule governing practice not inconsistent with the Federal Rules of Criminal Procedure. See Fed. R. Crim. P. 57. Second, "[i]n all cases not provided for by rule, the district judges and magistrate judges may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act." Id. The question becomes whether the power to dismiss after several hung juries can be predicated on the Rule. We think not. Although the "district courts have broad rule-making powers both by reason of the inherent nature of the judicial process, ex-statute, and pursuant to powers statutorily vested in the courts," United States v. Klubock, 832 F.2d 649, 652 (1st Cir. 1987) (en banc), there are common sense limitations. In Miner v. Atlas, 363 U.S. 641 (1960), the Court invalidated a local rule allowing discovery in admiralty cases at a time when the admiralty rules were silent on the issue. See id. at 651-52. The Court stated that more mature consideration was needed for adoption of a rule relating to discovery that was of such significance to the parties. See id. at 643-50. Dismissing prosecutions has even greater significance to the parties.
diciary's responsibility. Cases that clog the calendar and have little chance of being resolved through a verdict should be considered likely candidates for dismissal.94

The subjects covered by the district court under Rule 57 may generally be classified as housekeeping rules such as: terms of court, hours of court, regulation of conduct of attorneys, regulation of the calendar, continuances, filing and service of motions and other papers, methods of impaneling a jury, ... stipulations, preparation and service of subpoenas, order of opening and closing arguments, requests to charge, regulation of court reporters, [conduct of sentencing hearing] and regulation of bail bonds and bondsmen.

8C JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 57.02 (2d ed. 1996). Clearly the power to dismiss is qualitatively different and cannot be classified as housekeeping. Although other decisions upholding Rule 57 orders such as allowing questioning by jurors and inspection of premises owned by a nongovernment party rise slightly above housekeeping rules, they still do not rise to the significance of a rule allowing dismissal of a case after several hung juries.

Although it would be comforting to find that Rule 57 gives courts such a power, thus aborting the separation of powers problems that inhere in the inherent powers doctrine, such an approach seems disingenuous and simplistic.

94. Lower federal courts have used supervisory power in a wide variety of situations. However, unlike the Supreme Court, which often anticipates subsequent constitutional rulings, many lower federal courts use their supervisory powers to impose conditions or reach results that the Supreme Court already declared were not required by the Constitution. For example, in In re Grand Jury Proceedings, 507 F.2d 963 (3d Cir. 1975) (Schofield II), and In re Grand Jury Proceedings, 486 F.2d 85 (3d Cir. 1973) (Schofield I), the Third Circuit Court of Appeals used its supervisory power to impose a preliminary showing requirement on federal prosecutors before it would enforce a grand jury subpoena. See Schofield II, 507 F.2d at 966; Schofield I, 486 F.2d at 93. The Third Circuit issued the Schofield rulings despite the Supreme Court's decisions that the Fourth Amendment does not require a preliminary showing of probable cause. See Schofield II, 507 F.2d at 968 (citing United States v. Dionisio, 410 U.S. 1 (1973) (involving voice exemplars)); see also United States v. Mara, 410 U.S. 19 (1973) (regarding handwriting exemplars). This end-run approach should be rejected.

In the past federal courts had often used supervisory power to protect the grand jury process through methods such as the dismissal of grand jury indictments. See United States v. DiBernardo, 552 F. Supp. 1315, 1328 (S.D. Fla. 1982), aff'd in part and vacated in part on other grounds, 880 F.2d 1216 (11th Cir. 1989). For example, in DiBernardo the Florida District Court exercised its supervisory power to dismiss indictments for distribution of sexually explicit films and magazines. See id. at 1328. Because the FBI agent who posed as a pornographer in the investigation had a propensity to lie, the court found an abuse of the grand jury process and declared the grand jury proceedings tainted. See id. at 1327.

Courts have also dismissed grand jury indictments to punish government misconduct. See, e.g., United States v. Vetere, 663 F. Supp. 381, 386, 387 (S.D.N.Y. 1987) (dismissing indictment because of prosecutorial misconduct in presenting evidence to grand jury); United States v. Allen, 539 F. Supp. 296, 319-20 (C.D. Cal. 1982) (dismissing indictment because defendant's prosecution would be manifestly unjust); see also United States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978) (discussing but not ordering dismissal of indictment to punish governmental misconduct).

The Supreme Court's recent decision in United States v. Williams, 504 U.S. 36
C. Analysis of State Court Decisions Recognizing the Inherent Power and Supervisory Role Doctrines

As suggested, state courts have recognized and employed inherent and supervisory powers in a wide variety of civil and criminal matters. Like federal courts, state courts may exercise these powers to ensure the overall integrity of the judicial system as

(1992), casts doubt on the continuing validity of these cases. However, some federal courts have limited the drastic dismissal remedy to situations in which the government has seriously, flagrantly, or repeatedly abused the grand jury process. See, e.g., United States v. Noriega, 746 F. Supp. 1506, 1535 (S.D. Fla. 1990) (stating that a dismissal should lie “only for flagrant or repeated abuses [that] are outrageous or shock the conscience”); United States v. Beele, 500 F. Supp. 426, 428 (D. Nev. 1980) (asserting that improprieties must be serious and flagrant to justify dismissing a grand jury indictment).


In addition to protecting judicial integrity and controlling attorney conduct, lower federal courts have used supervisory power to address evidentiary issues such as recognizing a priest-penitent privilege, see Mullen v. United States, 263 F.2d 275, 277 (D.C. Cir. 1958), and creating special evidentiary rules for prosecutions of consensual sodomy cases, see Kelly v. United States, 194 F.2d 150, 153-55 (D.C. Cir. 1952).

Lower courts have also used supervisory power to formulate judicial procedure in the district courts. For example, the Sixth Circuit Court of Appeals created a five-step procedure that a court must follow before it may dismiss a complaint sua sponte. See Tingler v. Marshall, 716 F.2d 1109, 1112 (6th Cir. 1983). The Third Circuit Court of Appeals formulated a procedure for closing the courtroom and restraining publication of potentially prejudicial material during the trial. See United States v. Schiavo, 504 F.2d 1, 7-8 (3d Cir. 1974). A district court set forth a two-part test for determining when a court may exercise its inherent power to sanction a non-party. See Helmac Prods. Corp. v. Roth (Plastics) Corp., 150 F.R.D. 563, 568 (E.D. Mich. 1993). A Ninth Circuit panel approved the use of inherent power to issue an order protecting a witness. See Wheeler v. United States, 640 F.2d 1116 (9th Cir. 1981). Furthermore, directly on point are several lower court decisions recognizing the inherent power of the court to bar reprosecution after several hung juries. See United States v. Günter, 546 F.2d 861 (10th Cir. 1976); United States v. Ingram, 412 F. Supp. 384 (D.D.C. 1976). Clearly, the inherent power doctrine is a potent source of power for a lower court to override a prosecutor’s decision to retry a criminal defendant after several hung juries.

95. See supra notes 65-94 and accompanying text. The effect of the use of supervisory power is different in civil and criminal cases because civil cases affect only the litigating parties whereas criminal cases affect society as a whole. See State v. Braunsdorf, 297 N.W.2d 808, 816 (Wis. 1980).

96. See, e.g., Pena v. District Ct. of Second Jud. Dist., 681 P.2d 953, 956 (Colo. 1984) (inherent power consists of all powers reasonably required to protect dignity, independence, and integrity of court); Clark v. Austin, 101 S.W.2d 977, 988 (Mo. January 1997] [DISCRETION TO BAR REPROSECUTION 551
well as the efficiency of the court.\textsuperscript{97} Some state courts have held expansively that the inherent power is a general power of the court to protect itself.\textsuperscript{98} As a result, it includes the power to do everything necessary to carry out the underlying purpose for which the court was created.\textsuperscript{99}

Some state courts reason that a court’s inherent power derives from the separation of powers doctrine.\textsuperscript{100} In other states the power comes directly from state constitutional provisions that specifically grant supervisory authority to the state courts.\textsuperscript{101} Where supervisory power stems from an express constitutional grant, state courts have recognized the power as a distinct and separate grant of jurisdiction, independent of any other power.

1937) (inherent power is that which is necessary to the existence and functioning of the courts in the exercise of powers granted to them).


98. See \textit{Clark}, 101 S.W.2d at 988 (stating that inherent power is “essentially a protective power”).

99. See, e.g., Knox County Council v. State \textit{ex rel.} McCormick, 29 N.E.2d 405, 408 (Ind. 1940); \textit{In re Bruen}, 172 P. 1152, 1153 (Wash. 1918).


100. See, e.g., \textit{In re Doe}, 407 S.E.2d 798, 803 (N.C. 1991) (“By virtue of being one of three, separate, coordinate branches of the government, the courts have the inherent power and authority to do what is reasonably necessary for the proper administration of justice within the scope of their jurisdiction.”); \textit{In re E.C.}, 387 N.W.2d 72, 76 (Wis. 1986).

101. \textit{See, e.g., N.M. Const. art. VI, § 3} (giving the New Mexico Supreme Court “a superintending control over all inferior courts”).
DISCRETION TO BAR REPROSECUTION

granted to the court. But even where state constitutions do not expressly grant supervisory powers, state courts may nonetheless find that they have such powers. These courts assert that state constitutional provisions regarding the judicial branch are really limitations on, rather than grants of, jurisdiction. Thus, all powers not expressly withheld from the state courts in the constitution are retained by the state courts, including the inherent supervisory power.

There are, however, ill-defined limitations on this power. Some state courts view supervisory power as an extraordinary power—to be used only in situations in which no other form of relief is available and a gross injustice would result if the court did not act. Other courts have found that the exercise of inherent power must be related to the orderly, efficient exercise of the court’s jurisdiction and must neither extend the jurisdiction of the court nor abridge or negate individual constitutional rights.

In sum, most state courts do recognize, subject to constitutional and statutory limitations, an inherent power in the judiciary to control court dockets and administer justice. Courts have the power to abort reprosecution after several hung juries.

IV. THE COURT SHOULD BAR PROSECUTION IF IT IS UNLIKELY THAT THE JURY WILL RENDER A VERDICT

The principal justification for aborting repeated attempts to convict should be the probability that the jury will not be able to render a verdict. But the power to dismiss prosecutions is also supported by subsidiary reasons, such as the desire to prevent anxiety to and harassment of the defendant, to dispense justice, and to balance the interests of society against fairness to defendants. In examining these justifications, the court should consider

102. See, e.g., State ex rel. Shores v. District Ct. of Second Jud. Dist., 71 P. 159, 160 (Mont. 1903).
104. See id.
107. But see Hoskins v. Commonwealth, 154 S.W. 919 (Ky. Ct. App. 1913), which may be read as denying a power in the courts to bar repeated prosecution. As noted earlier, Mississippi may be another such aberrant jurisdiction. See supra note 29 and accompanying text.
several factors, including the following: 108
1. the difference, if any, in the evidence likely to be admitted at the retrial;
2. the number of previous deadlocked juries;
3. the balance in the number of jurors voting for acquittal or conviction;
4. the reason for the jury disagreement;
5. the fairness of the previous trials;
6. the seriousness of the underlying charges;
7. the character of the defendant;
8. the likelihood of repeated offenses;
9. the passage of time since the offense and the retrial;
10. the effect of further prosecution on the justice system's ability to handle other cases.

The above factors should be considered in light of (1) the fairness to the defendant in having to bear the expense and emotional upheaval of another trial when considered against the chance that a verdict will or will not be reached; (2) the costs to society in retrying these cases, at times to the detriment of other litigants; and (3) the public perception of the justice system.

The court must be aware of the appearance to the public even if a verdict is rendered. Public confidence in the jury system,

108. Many of the cases discuss, usually in a cursory fashion, one or more of the factors that a court should consider in the exercise of its discretion. See Failure of Jury to Agree, supra note 15. For a somewhat more extended discussion of several of these factors and the impact of the doctrine on separation of powers concerns, see State v. Abbati, 493 A.2d 513, 521 (N.J. 1985).

In State v. Moriwake, 647 P.2d 705, 712 (Haw. 1982), the court stated:
But speaking generally, the "inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy has been granted or not; the power to promulgate rules for its practice; and the power to provide process where none exists."

That aspect of the judicial power which seeks to "administer justice" is properly invoked when a trial court sua sponte dismisses an indictment with prejudice following the declaration of one or more mistrials because of genuinely deadlocked juries, even though the defendant's constitutional rights are not yet implicated. In so stating, we are cognizant of the deference to be accorded the prosecuting attorney with regard to criminal proceedings, but such deference is not without bounds. As stated elsewhere:

Society has a strong interest in punishing criminal conduct. But society also has an interest in protecting the integrity of the judicial process and in ensuring fairness to defendants in judicial proceedings. Where those fundamental interests are threatened, the "discretion" of the prosecutor must be subject to the power and responsibility of the court.

Id. (citations omitted).
tenuous at best in the past decade, should not be further undermined. This public perception concern should properly be a factor in the court’s determination whether to abort prosecution.

A. Differences in Evidence

Differing evidence is the most critical factor when evaluating the likelihood of reaching a verdict. If the court believes that the evidence at the retrial is likely to be different—whether because of newly discovered evidence, a change in tactics, or the court’s rulings on the admission of evidence—then it may not be confident that a retrial will be futile. On the other hand, in many cases the evidence will be virtually the same on retrial. When the evidence is similar, a court may more confidently predict the likely outcome of a retrial, especially after the court reviews the reasons for the previous hung juries.

B. Number of Deadlocked Juries

The number of prior deadlocked juries should inform the exercise of the court’s discretion to bar reprosecution. One hung jury should not trigger the bar. At the other extreme, three deadlocked juries should presumptively mandate a bar order, subject to an examination of the other factors mentioned in this Article.

Many cases present situations in which courts have reversed

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110. The trial judge in Knapp noted that the evidence on retrial would be the same, that he would adhere to every evidentiary ruling previously made, and that a verdict in the fourth retrial was unlikely. Cf. Parloff, supra note 1, at 394-96 (indicating that despite the fact that the fourth trial would have expert testimony, the jury will still hang in the fourth trial since the prior trials hung even though expert testimony was presented). Nevertheless he refused to dismiss. Cf. id. at 394-402 (stating that the case resolution came from a no contest plea and not a dismissal). Although parties often change tactics after hung juries so as to avoid weak points and accentuate strong ones, a total change of direction amounting to adopting inconsistent positions does raise serious fairness concerns. See Jacobs v. Scott, 115 S. Ct. 711, 711-12 (1995) (Stevens, J., and Ginsberg, J., dissenting from denial of stay of execution); see also supra note 10, infra note 142 and accompanying texts (discussing inconsistent positions).

111. It is assumed that the defendant's motion for judgment of acquittal was properly denied. Otherwise, the case should have been dismissed and a judgment of acquittal entered as a matter of law.
convictions on appeal, followed or preceded by hung juries. In these cases the grounds of a court's reversal of a conviction must be considered.  For example, assume a verdict of conviction is overturned on appeal only for a technical point having nothing to do with the sufficiency or weight of the evidence, such as improper venue. In that situation the court should not consider the reversal as equivalent to a hung jury. Indeed, the conviction itself dispels a finding that a jury could not render a verdict.

The second retrial of the *Knapp* case presents an interesting variation. The defense argued that the overturning of the conviction in the second trial was tantamount to a hung jury. In overturning that conviction twelve years later, the state court relied upon newly discovered scientific evidence that "would 'probably' change a jury's verdict." In light of the judge's observation, the second trial certainly could not be considered as establishing that a reasonable jury could agree on the verdict. It was, for all practical purposes, the equivalent of a hung jury.

C. Breakdown of Jurors' Votes in Previous Deliberations

Closely tied to the number of hung juries as a factor in reaching a decision on retrial is the numeric breakdown of the jurors' votes. Consider the following situations: A single juror holdout at trial in favor of acquittal should not prompt judicial intervention. In fact, in some states such a verdict could constitutionally suffice

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112. See State v. Witt, 572 S.W.2d 913 (Tenn. 1978) (refusing to allow fourth retrial after three deadlocked juries).

113. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Court noted in passing without approval or disapproval that Manning, another defendant in a different case and the main prosecuting witness in Barker's trial, had been tried four times previously before being finally convicted in the fifth trial of murdering one victim and in the sixth trial of murdering another. See id. at 516-17. The four previous trials ended in two hung juries and two convictions. See id. The two convictions were reversed on appeal. See id.

114. See State v. Knapp, 562 P.2d 704, 709 (Ariz. 1977); see also PARLOFF, supra note 1, at 161 (noting that the defense argued that the first deadlocked jury constituted double jeopardy).

115. See PARLOFF, supra note 1, at 241-42. "In Arizona, to grant a defendant's motion for a new trial based on newly discovered evidence, a judge must find that the new evidence would probably have changed the verdict." Id. at 233-34.

116. Interestingly, the Los Angeles statistics reflect that of the 21 cases retried after hanging 11-1 in favor of guilt, 5 defendants were found innocent, 10 were found guilty, and 6 juries hung again. See Base Totals, supra note 13. Of the 29 cases ending in 11-1 splits in favor of innocence, 22 were dismissed by the prosecutor, 6 were set for retrial, and 2 were actually retried with one ending in a conviction and the other in a verdict of not guilty. See Base Totals, supra note 13.
as a judgment of conviction. Nor should an isolated minority of jurors clinging to idiosyncratic beliefs despite clear majority determinations for conviction bar a second trial. On the other hand, should the minority juror holdouts in two or more hung juries be in favor of conviction, a bar order may serve the interests of justice and efficiency since it takes unanimity, or near unanimity, to convict. Finally, where three hung juries are equally or nearly equally divided, a bar order seems appropriate, again subject to consideration of the other factors discussed in this Article.

D. Qualitative Nature of the Previous Proceedings

The court should examine the quality and nature of the earlier proceedings in determining whether the government should be allowed to retry a defendant. In making the inquiry the court should consider several subissues: Was the evidence fully and fairly presented? Did the jury seem attentive? Did the hung jury result from a reason that, in the opinion of the court, would not recur in the retrial? Did the court take sufficient steps in the previous proceedings to prevent the hung jury?

In other contexts courts consider whether previous proceedings were fully and fairly conducted. In habeas corpus proceedings, for example, the fairness issue predominates. Moreover,

117. See Tim A. Thomas, Annotation, Requirement of Jury Unanimity as to Mode of Committing Crime Under Statute Setting Forth the Various Modes by Which Offense may be Committed, 75 A.L.R.4th 91 (1990); see also supra notes 30-32 and accompanying text.

118. In this situation the defendant may prefer to be vindicated by a jury verdict of acquittal. The court should consider the defendant's interest in obtaining such a result as a factor, although not a controlling one. In fact, if the judge grants the bar order to retrial sua sponte over the defendant's objection, it must be entered with prejudice. See Oregon v. Kennedy, 456 U.S. 667, 678-79 (1982); see also United States v. Jorn, 400 U.S. 470, 485 n.12 (1971) (stating that "where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred").

119. See supra Part IV.

120. Such steps might entail not only an examination of the number of days of deadlock, but also the additional steps taken in the trial, including further instructions to the jury, to break the impasse. In Knapp, for example, the trial court took the unprecedented step of asking the jurors to specifically identify the issues that divided them. See PARLOFF, supra note 1, at 389-91. "It amounted to a laundry list of every major issue in the case. . . ." Id. at 391. The court then ordered additional closing arguments by counsel on these issues. See id. at 389-90. Notwithstanding these innovative procedures, the third jury hung. See id. at 393.

lower courts are required under *Parklane Hosiery Co. v. Shore*\textsuperscript{122} to consider the question in the case of offensive use of collateral estoppel by strangers to the previous litigation.\textsuperscript{123} Because courts are familiar with examining the fairness of prior proceedings in other contexts, superimposition of this factor should cause little difficulty.

### E. Substantive Nature of Juror Disagreement

In most cases the court can only surmise the nature of the jury disagreement.\textsuperscript{124} At other times, either through the court’s contemporaneous probing of the jury or through juror affidavits after the discharge of the jury, the court can identify the nature of the disagreement. In deciding whether to bar further retrials, the court should consider the number of issues that divide the jury and the nature of the issues. Some issues may be more correctable on retrial than others.\textsuperscript{125} The court will have to make an informed estimate of how likely it is that these divisions will recur in a subsequent trial.

### F. Jury Composition

A probe into jury composition may factor into whether a judge should allow a retrial. Although in other settings such an inquiry might implicate equal protection concerns, this examination should be allowed in determining the likelihood that another jury will reach a verdict. Judges can discern whether the jury was composed of exceptionally qualified persons. The court can revisit the voir dire and the steps taken to assure a fair jury. It should con-

\textsuperscript{122} 439 U.S. 322 (1979).

\textsuperscript{123} See id. at 330-31; see also United States v. Johnson, 55 F.3d 976, 978 (4th Cir. 1995) (taking notice that a judge in a prior proceeding demonstrated an abundance of fairness).

\textsuperscript{124} Just as a general verdict ordinarily masks the specific grounds of a decision, a hung jury normally hides the areas of disagreement among jurors. Perhaps a rule should be adopted that would give the lower court specific authority to probe the reasons for the jury deadlock. This probe would assist the advocates in presenting the case upon retrial. In addition, this probe would assist the court in determining whether it should find manifest necessity and declare a mistrial and whether there should be a retrial. See discussion infra note 126 and Part VI (discussing proposed Rule).

\textsuperscript{125} Some issues are not likely to ever be resolved. For example, in *Knapp* questioning of the jury revealed that the jurors were divided on every significant issue in the case. See Motion to Dismiss, \textit{supra} note 9, at 14; \textit{Parloff, supra} note 1, at 391; \textit{supra} note 120.
sider any reason indicating that another jury would be different, more attentive, or more fair. In a highly complex case, the court might even consider the educational background of the jurors. It would assist the retrial determination if judges recorded their observations regarding the attentiveness and conscientiousness of the jury.  

G. Seriousness of Charges

As expected, the vast majority of the cases that have examined whether to bar retrial have involved capital crimes or other serious felonies. Although the prosecutor undoubtedly considered the nature of the charges in determining whether to retry the defendant, the interests of justice and efficiency nevertheless impose on the court an independent obligation to consider the question. Political and other extraneous considerations may motivate a prosecutor—considerations divorced from the merits of the case or the systemic impact of a retrial on the disposition of other cases.

H. Speedy Trial Concerns

In some cases the passage of time may have prejudiced the proceedings. Evidence may be lost or destroyed. This loss of evidence and its impact on the jury may support an inference that a reasonable jury could not reach a verdict. Of course, it may also have the effect of rendering a verdict more likely. In the latter case the courts have explored the constitutional ramifications of permitting another trial.

126. The proposed Rule requires the court after the second hung jury to record the reasons for the deadlock. See discussion infra Part VI (discussing proposed Rule).


128. Knapp provides an example of extrinsic concerns that might motivate a prosecutor but would not affect the court: Michael Berch heard rumors that the prosecutor's decision to reprosecute Knapp the third time was motivated, in part, by the fact that the complex case drained funds that would otherwise have been available for other indigent defendants. In addition, although not at issue in the Knapp case, prosecutorial vendettas have been known to occur. See Bruce Fein, Time to Rein in the Prosecution: New Rules are Necessary to Limit Potential Abuse of Power, A.B.A. J., July 1994, at 96.

I. Miscellany

Other factors that reasonably bear on whether further retrials should be allowed may also be considered. Courts may wish to consider such factors as harassment, the defendant's record, the likelihood of repeated offenses, other punishments imposed such as civil suits and loss of licenses, drain of public capital and resources, and staffing at the prosecutor's or defender's office.

V. THE ORDER BARRING REPROSECUTION SHOULD ORDINARILY ISSUE WITH PREJUDICE

The few cases that have barred reprosecution on inherent judicial power grounds have apparently done so with prejudice. Under these circumstances the Double Jeopardy Clause of the United States Constitution bars reprosecution for the same offense. Whether the order should ordinarily issue with or without

130. Several states have statutes permitting the court on its own motion to abort prosecutions in the interests of justice. See, e.g., CAL. PENAL CODE § 1385 (Deering 1992); N.Y. CRIM. PROC. § 170.40 (McKinney 1993). The statutes are, of course, not limited to the hung jury situation, but the factors upon which they rely may be relevant to determining whether to abort further retrials because of hung juries. New York, for example, lists the following ten factors:

(a) the seriousness and circumstances of the offense;
(b) the extent of harm caused by the offense;
(c) the evidence of guilt, whether admissible or inadmissible at trial;
(d) the history, character and condition of the defendant;
(e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
(f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
(g) the impact of a dismissal on the safety or welfare of the community;
(h) the impact of a dismissal on the confidence of the public in the criminal justice system;
(i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
(j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

N.Y. CRIM. PROC. § 170.40.


132. See U.S. CONST. amend V. The Constitution does not prevent an appeal by the government of these orders. For appeal of orders dismissing for failure of prosecution, see United States v. Huntley, 976 F.2d 1287 (9th Cir. 1992) and United States v. Kitzman, 520 F.2d 1400 (8th Cir. 1975). In criminal cases double jeopardy concerns may trump a court's wish to render the dismissal without prejudice. See Downum v. United States, 372 U.S. 734 (1963).

Orders dismissing civil cases with prejudice bar additional transactionally related claims under the doctrine of res judicata. See FLEMING JAMES, JR. ET AL., CIVIL
prejudice depends upon the reasons for the bar. The proper
starting point in determining whether to dismiss with prejudice is
to examine the rule or statute authorizing the dismissal.\footnote{\textsuperscript{135}} Unless
the rule or statute limits the factors to be considered, the court
may properly review the law in related areas.

Rule 5.1 of the Federal Rules of Criminal Procedure requires
a federal magistrate judge to dismiss a complaint and discharge the
defendant if "there is no probable cause to believe that an offense
has been committed or that the defendant committed it."\footnote{\textsuperscript{134}} A
dismissal under Rule 5.1(b) is without prejudice: "[D]ischarge of
the defendant [does] not preclude the government from instituting
a subsequent prosecution for the same offense."\footnote{\textsuperscript{135}}

Rule 48(b) of the Federal Rules of Criminal Procedure basically restates the court’s inherent power to dismiss a case for want

\footnote{This rule provides that, unless otherwise ordered by the court, all orders involuntarily dismissing cases should be granted with prejudice, except dismissals based upon jurisdictional grounds. See \textit{Fed. R. Civ. P. 41}. It is important to note the implications of Rule 41. For example, some orders are, by their nature, without prejudice—those dismissing cases for improper venue or lack of jurisdiction. See \textit{Fed. R. Civ. P. 41(b)}; \textit{see also} Costello v. United States, 365 U.S. 265 (1961) (stating that under Rule 41(b), dismissal for lack of jurisdiction does not prohibit subsequent proceedings); Meineke Discount Muffler Shops, Inc. v. Noto, 548 F. Supp. 352 (E.D.N.Y. 1982) (holding that dismissal for improper venue does not bar refiling of the same claim). Other orders are presumptively with prejudice unless the court otherwise orders. See \textit{Fed. R. Civ. P. 41}; \textit{see also} Bowles v. Biberman Bros., Inc., 152 F.2d 700 (3d Cir. 1945) (holding that an unspecified dismissal operates as a dismissal with prejudice). Note, too, that the Rule provides that the plaintiff’s failure to prosecute may serve as the basis of an order dismissing the case, with or without prejudice. See \textit{Fed. R. Civ. P. 41}; \textit{see also} Jonathan M. Purver, Annotation, \textit{Propriety of Dismissal for Failure of Prosecution Under Rule 41(b) of Federal Rules of Civil Procedure}, 20 A.L.R. Fed. 488, 502 (1974) (stating that some courts have inquired into the propriety of dismissals for failure to prosecute under Rule 41(b)). In civil cases orders entered without prejudice are presumptively valid and not subject to constitutional scrutiny. See 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, \textit{FEDERAL PRACTICE & PROCEDURE} § 2364 (2d ed. 1995). For further discussion on this issue, see Annotation, \textit{Construction, as to Terms and Conditions, of Rule or Statute Providing for Voluntary Dismissal Without Prejudice Upon such Terms and Conditions as Court Deems Proper}, 21 A.L.R.2d 627 (1952).

133. For an examination of the proposed Rule on the effect of bar orders, see infra Part V.

134. \textit{Fed. R. Crim. P. 5.1(b)}.

135. \textit{Id.; see also} United States v. Gogarty, 533 F.2d 93, 95 (2d Cir. 1976) (discharge of defendant before indictment or dismissal of indictment is without prejudice to further prosecution); United States v. Kysar, 459 F.2d 422, 423 (10th Cir. 1972) (prosecution on subsequent grand jury indictment not barred by earlier dismissal).
The Rule provides that if the prosecution unnecessarily delays "in presenting the charge to a grand jury or in filing an information against a defendant . . . [or] in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint." Rule 48(b) does not mandate dismissal unless the defendant's Sixth Amendment right to a speedy trial has been denied, in which case further prosecution for the same offense is barred.

The court has the discretion to enter the order with or without prejudice unless overridden by legislative provision or constitutional mandate. The court must examine the reasons for the bar before deciding whether to render it with or without prejudice. The court should accompany the order of dismissal with specific findings. For example, if the judge believes it improbable that a verdict could be rendered at retrial, that judge should state reasons with specificity.Ordinarily these reasons support a dismissal with prejudice. There is no discretion, however, where the court orders the dismissal sua sponte over the objection of the defendant. In that case the bar must be with prejudice.

The court may issue an order without prejudice in those limited circumstances in which the prosecution can establish to the court's satisfaction that it might be able to present a stronger case.
in the future. For example, if the prosecution, although diligent, cannot locate critical witnesses, it may reasonably request additional time to locate them.\textsuperscript{141} This is not to suggest that the prosecution can simply manufacture out of whole cloth a new version of the case. Fairness to the defendant, professional responsibility concerns, and the principle of judicial estoppel should prevent this cavalier approach.\textsuperscript{142}

Of course, if the retrial is barred for reasons that relate to the public’s perception of the fairness of any verdict or to considerations of fairness to the defendant, then the appropriate remedy would be to enter the order with prejudice.

VI. A PROPOSED RULE GOVERNING RETRIALS FOLLOWING SEVERAL HUNG JURIES

Although the courts possess the inherent power to prevent reprosecutions after several hung juries,\textsuperscript{143} there are several reasons that a rule should be adopted. First, an explicit rule would dispel any question whether the court possesses inherent powers. Second, in the federal system it would give the legislative branch the opportunity to engage in the rulemaking process.\textsuperscript{144} Third, it would give the parties notice of the parameters governing attempts to retry the defendant.

The following rule is proposed:

Proposed Rule: Power to Dismiss Prosecution

(a) On motion by the defendant or on its own motion, the court may in the interests of justice and the effective administration of the court’s business dismiss an indictment, information, or complaint, or part thereof, after one or more trials that result in hung juries.

(b) In determining whether to dismiss a prosecution, or

\textsuperscript{141} But see Downum v. United States, 372 U.S. 734 737-38 (1963) (prohibiting retrial because of absence of prosecution witness).

\textsuperscript{142} One wonders whether the prosecution is restricted in presenting mutually inconsistent positions in different trials of the same or different cases relating to the same or related facts. See Jacobs v. Scott, 115 S. Ct. 711, 711-12 (1995) (Stevens, J., and Ginsberg, J., dissenting from denial of stay of execution); supra note 10. See also 1B MOORE, supra note 93, § 0.405[8] (discussing the doctrine of judicial estoppel).

\textsuperscript{143} Congress possesses the ultimate authority to restrict or reject the power of the court to bar reprosecutions after several hung juries unless the power is based upon due process or other constitutional considerations. See supra note 14 (discussing courts’ inherent and supervisory powers).

part thereof, the court shall consider, among others, each of the following factors:

1. the seriousness of the offense;
2. the facts and circumstances of the case that led to the hung juries;
3. the impact of reprosecution on the rights of the defendant; and
4. the impact of reprosecution or dismissal on the administration of justice.

(c) Unless the court directs otherwise, the dismissal shall be with prejudice. A dismissal over the objection of the defendant shall be entered with prejudice.

(d) Any order of dismissal under this Rule shall be supported by findings of fact and conclusions of law.

(e) After the first hung jury the court may, and after successive hung juries the court shall, enter an order setting forth the court's understanding of the reasons for the deadlock. To assist the court in determining whether to dismiss a case, the court may question the jury.

VII. CONCLUSION

Notwithstanding the inapplicability of the double jeopardy or other specific constitutional provisions, courts have the inherent power to dismiss prosecutions after several hung juries. Rather than relying on the amorphous power, however, it should be recognized through the rulemaking process, leaving the courts considerable discretion in implementing it in specific cases. Whatever else may be said, there does come a time when the impact of repeated trials on the defendant's rights and on the administration of justice should cause the court to say, "Enough Is Enough."