An Inestimable Safeguard Gives Way to Practicality: Eliminating the Juror Who "'Refuses to Deliberate' Under Federal Rule of Criminal Procedure 23(b)(3)

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Repository Citation
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An Inestimable Safeguard Gives Way to Practicality: Eliminating the Juror Who “Refuses to Deliberate” Under Federal Rule of Criminal Procedure 23(b)(3)

JEFFREY BELLIN*

I. INTRODUCTION

As recent high profile trials have demonstrated, the jury deliberation process, like the process for producing legislation or sausage, is best appreciated from a distance. Given the virtually unlimited pool from which potential jurors are drawn and the random jury selection process, it should not be surprising that jury deliberations in particular cases range from inspirational to scandalous. Despite its inherent unpredictability, trial by jury enjoys a sacred place in American culture. As the United States Supreme
Court has written, the right to a jury trial in a criminal case presents "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."\footnote{Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Not every criminal prosecution implicates the right to a jury trial. The Supreme Court has ruled that the Constitution mandates a jury trial only for criminal offenses that are punishable by imprisonment for more than six months. See Lewis v. United States, 518 U.S. 322, 327, 330 (1996).}

In a small but significant number of trials, however, this safeguard, in the form of an unmoving individual juror can frustrate not only the will of the "overzealous" prosecutor and "eccentric" judge, but alternatively the wills of the defense counsel, the participants (witnesses, defendants, and victims), and the vast majority of fellow jurors, necessitating a retrial in an otherwise clear case.

Given the fabled power of one individual juror to frustrate the will of the other jurors—celebrated, for example, in the 1957 movie classic 	extit{Twelve Angry Men}—most Americans would be surprised to learn that the lone holdout juror is dischargeable. In federal court, if a judge determines that there is "good cause," the holdout juror can be dismissed from the jury, even after deliberations have begun, allowing a "unanimous" verdict of eleven.\footnote{See FED. R. CRIM. P. 23(b)(3) ("After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.").}

This essay discusses the application and implications of "good cause" dismissal under Federal Rule of Criminal Procedure 23(b)(3), specifically with respect to the dismissal of a "non-deliberating" juror.\footnote{Of course, the “primary mechanism” to “ensure that the seated jurors are capable of participating effectively in deliberations” is a probing and thorough voir dire process. United States v. Symington, 195 F.3d 1080, 1088 n.9 (9th Cir. 1999). Unfortunately, due to the volume of criminal cases, there is often not enough time for (and many courts will not permit) anything but the most perfunctory voir dire.}

The following discussion delineates the constitutional limitations on the use of this procedure, and describes the ways in which courts have, with mixed results, attempted to structure the process for eliminating a juror without running afoul

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of cherished jury trial traditions. The analysis highlights the tension between the ideal of verdicts rendered independently by lay juries, and the day-to-day requirements of the administration of justice by courts.

II. CONSTITUTIONAL LIMITATIONS ON INTERFERENCE WITH JURY DELIBERATIONS

The jury trial right in criminal cases is enshrined in the United States Constitution in two places. The Sixth Amendment requires that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Article III similarly mandates that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." These references are devoid of specifics. Hence, the precise contours of the jury trial right are flexible and have evolved over time.

The removal of a juror and a verdict by the remainder of the jury implicates two traditionally accepted prerequisites of a jury trial: (i) that the jury must consist of twelve persons, and (ii) that the jury's verdict must be unanimous. The final arbiter of federal constitutional law, the United States Supreme Court, has spoken with respect to both of these prerequisites.

A. Permissibility of a Jury of Fewer Than Twelve Jurors

In the 1970s, the Supreme Court grappled with the constitutional requirements for the minimum number of jurors on a criminal jury. The operative cases arose in challenges to state court criminal petit juries consisting of as few as six jurors. Determin-
ing the scope of the "jury trial" right imposed upon the states by
the Federal Constitution through the Fourteenth Amendment, the
Court in Williams v. Florida\textsuperscript{6} ruled that a six-person jury was con-
stitutionally permissible in state court, and, the Court announced,
in federal court as well.\textsuperscript{7} The Court found that the number of ju-
rors had become fixed at twelve by "historical accident," and held
that a twelve-person jury "cannot be regarded as an indispensable
component of the Sixth Amendment."\textsuperscript{8}

The expansive opinion in Williams made it possible for the
rules of procedure in federal court to allow the removal of a recal-
citrant juror, and a resulting verdict of fewer than twelve jurors.\textsuperscript{9}
Apart from this situation, however, Congress and the Court have
not moved to diminish the number of jurors seated in federal
criminal cases. The federal criminal rules continue to mandate
that, as a general principle, "[a] jury consists of 12 persons."\textsuperscript{10}

\textbf{B. Permissibility of a Non-Unanimous Verdict}

The removal of a "non-deliberating" juror and a verdict ren-
dered by the eleven remaining jurors also implicates the traditional
requirement that a verdict be unanimous. Despite some loosening
by the Supreme Court, this requirement still exists in federal court.

\textsuperscript{6} 399 U.S. 78 (1970).
\textsuperscript{7} Id. at 98–103.
\textsuperscript{8} Id. at 89, 100. Subsequently, in Ballew v. Georgia, the Supreme
Court held that a jury consisting of any less than six jurors is unconstitutional in
\textsuperscript{9} See, e.g., United States v. Stratton, 779 F.2d 820, 830–35 (2d Cir.
1985) (citing Williams as enabling Congress to "legislate as to jury size" and,
therefore, "the Supreme Court [to] prescribe [same] by rule, pursuant to the
\textsuperscript{10} FED. R. CRIM. P. 23(b)(1). By contrast, the federal rules of civil pro-
cedure allow a civil jury to consist of anywhere from six to twelve jurors. FED.
R. CIV. P. 48.
In *Apodaca v. Oregon*, the Supreme Court ruled that the Federal Constitution does not require juries in state court to render unanimous verdicts. The plurality opinion in *Apodaca* reasoned that unanimity is not required by the Sixth Amendment, and therefore not a prerequisite to conviction in state or federal court. This was not the holding of the Court, however. Justice Powell, in an opinion not joined by any other Justice, concurred in the judgment, but not in the reasoning of the plurality opinion. Justice Powell wrote that unanimity was required by the Sixth Amendment, but that this requirement was not sufficiently “fundamental” to the jury trial right to be imposed upon the states by the Fourteenth Amendment. In Justice Powell’s view, and more significantly, the view shared by the four dissenting members of the Court, “unanimity is one of the indispensable features of the federal jury trial,” and, therefore, “the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial.” Thus, five Justices in *Apodaca* determined that a unanimous jury is required in federal trials. That determination has not been revisited by the Court.

As discussed below, the continuing requirement of unanimity exhibited in *Apodaca*, and now part of the federal rules, animates the most significant constraint on the application of Rule 23(b)(3). Neither the fractured holding in *Apodaca*, nor the Federal Rules’ general requirement of unanimity, however, has been utilized to

11. 406 U.S. 404 (1972) (plurality opinion) (upholding state criminal convictions based on jury votes of 11-1 and 10-2 for conviction of codefendants).
12. *Id.* at 413–14.
13. *Id.* at 411–12.
15. *Id.* at 369, 371.
17. *See FED. R. CRIM. P.* 31(a) (requiring that a jury “verdict must be unanimous”).
successfully challenge Rule 23(b)(3) itself (as opposed to particular applications of the rule).\textsuperscript{18} In fact, the Advisory Committee Notes to Rule 23(b) state:

Though the alignment of the Court and especially the separate opinion by Justice Powell in \textit{Apodaca v. Oregon} makes it at best uncertain whether less-than-unanimous verdicts would be constitutionally permissible in federal trials, it hardly follows that a requirement of unanimity of a group slightly less than 12 is similarly suspect.\textsuperscript{19}

\section*{III. A Delicate Balance: Federal Rule of Criminal Procedure 23(b)(3)}

The drafters of Rule 23(b)(3) intended the rule to remedy the situation where, after a lengthy trial, a juror’s death or illness during deliberations necessitated a mistrial, resulting in “a second expenditure of substantial prosecution, defense and court resources.”\textsuperscript{20} As the Advisory Committee Notes acknowledge, however, the Rule reaches beyond this situation requiring only that “good cause” be shown to justify excusing a juror.\textsuperscript{21} No further

\textsuperscript{18} Facial challenges to the constitutionality of Rule 23(b) have consistently been rejected at the appellate level. \textit{See, e.g.}, United States v. Ahmad, 974 F.2d 1163, 1164 (9th Cir. 1992) (holding that \textit{Williams v. Florida} “commands the conclusion that Rule 23(b) is constitutionally valid”); United States v. Gabay, 923 F.2d 1536, 1544 (11th Cir. 1991) (citing \textit{Williams} in holding rule constitutional); cases cited infra note 19.

\textsuperscript{19} FED. R. CRIM. P. 23(b) advisory committee’s notes to 1983 Amendments (citation omitted); \textit{see also} United States v. Walsh, 75 F.3d 1, 6 (1st Cir. 1996) (holding without analysis that “rendition of a verdict agreed to by all jurors, after one juror with unknown views has been dismissed for cause, is a unanimous verdict”); United States v. Smith, 789 F.2d 196, 205 (3d Cir. 1986) (holding without analysis that “[c]ontrary to the defendant’s contention, Rule 23(b) does not allow a less than unanimous verdict”).

\textsuperscript{20} FED. R. CRIM. P. 23(b) advisory committee’s notes to 1983 Amendments.

\textsuperscript{21} \textit{Id.} (noting need to address situation where “one of the jurors is seriously incapacitated or otherwise found to be unable to continue service upon the jury”) (emphasis added); \textit{see} United States v. Beard, 161 F.3d 1190, 1193 (9th
definition of "good cause" is included, and consequently, it has fallen to the courts to define the contours of the phrase.\(^{22}\)

"Good cause" could potentially encompass a wide range of behaviors from a juror's death at one extreme to a juror's unwillingness to accept the verdict of the majority at the other. The easiest cases of "good cause" disqualification fall within the category of serious incapacitation, such as death, or an unanticipated lengthy absence, where a juror is simply unable to continue with deliberations. Appellate courts rarely reverse district courts that dismiss an incapacitated or absent juror.\(^{23}\) Reversals occur only when jurors are dismissed for absences that are exceedingly brief, or where no inquiry is made into the potential duration of the juror's absence.\(^{24}\)

Another subset of disqualifications arises when, during deliberations, it becomes apparent that a juror is not qualified for service (e.g., has a felony conviction), has violated her juror's oath by speaking to non-jurors about the case, or has had something happen (e.g., a confrontation with a trial participant) that jeopardizes

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\(^{22}\) See, e.g., United States v. Armijo, 834 F.2d 132, 135 (8th Cir. 1987) (finding no abuse of discretion where trial court dismissed juror who had been in automobile accident and would not be available to resume deliberations until at least the following week); United States v. Stratton, 779 F.2d 820, 830–35 (2d Cir. 1985) ("[T]he trial judge was entitled to conclude that an adjournment of 4 ½ days [due to religious observance] would be less desirable than an eleven-juror verdict.").

\(^{23}\) See, e.g., United States v. Patterson, 26 F.3d 1127, 1129 (D.C. Cir. 1994) (reversing eleven-member jury conviction where trial court dismissed absent juror without determining likely extent of absence); United States v. Tabacc, 924 F.2d 906, 913–15 (9th Cir. 1991) (ruling the same where trial court dismissed juror whose wife had taken his car keys and so was not available to deliberate that day, but would be available the next day).
the juror's ability to be impartial. Again, such dismissals, while creating tactical issues for the counsel involved, are relatively non-controversial.

The more difficult and most controversial cases of "good cause" disqualification arise under the rubric of a so-called "refusal to deliberate." Perhaps due to the difficulty of doing so coherently, courts that dismiss jurors for "refusing to deliberate" rarely define the concept—except to say that it has occurred on the particular facts then before them. The most comprehensive discussion of the phenomenon is found in a California Supreme Court opinion. In the words of that court:

A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury.

While the practical problems with a juror exhibiting the above characteristics are clear, it is not immediately obvious that such a juror is disqualified from serving. In the leading federal case for removal of a non-deliberating juror, United States v. Thomas, the

25. E.g., United States v. Casamento, 887 F.2d 1141, 1186 (2d Cir. 1989) (upholding trial court's dismissal of juror who received threatening phone call); United States v. McFerren, 907 F. Supp. 266, 269 (W.D. Tenn. 1995) (using Rule 23(b)(3) to remove juror revealed to be a convicted felon, and therefore ineligible for service under 28 U.S.C. § 1865(b)(5)).

26. Juror removal is allowed in California state court, as in the recent highly publicized trial of Scott Peterson, under CAL. PENAL CODE § 1089 ("If at any time . . . a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place . . . as though the alternate juror had been selected as one of the original jurors.").


28. 116 F.3d 606 (2d Cir. 1997).
Second Circuit explained that where a juror is able to deliberate impartially, but refuses to do so, that juror is “purposefully disregarding the court’s instructions on the law,” and failing to follow his oath as a juror.29 Thus, in Thomas, where the trial court found that a juror believed “that the defendants had ‘a right to deal drugs,’” and acted “in purposeful disregard of the evidence, defying the court’s instructions on the law,” that juror was properly dismissed for refusing to engage in the deliberative process.30 The Second Circuit recognized that this holding treads closely upon the broad powers of the American jury.31 It acknowledged that throughout American history, jurors have had the power to acquit for any reason. The court argued, however, that they did not have the right to do so.32 To the contrary, the court stated, jurors have in fact a “sworn duty to follow the law.”33 Thus, the Second Circuit ruled that courts have a related duty to “forestall or prevent” refusals to impartially deliberate “by dismissal of the offending juror from the venire or the jury.”34

A. Jury Notes: The First Sign of a Potential Disqualification

Most reported cases involving a refusal to deliberate occur in the context of a lone holdout juror.35 When such a situation arises,
trial courts proceed cautiously down the path to juror disqualification as that path is rarely taken\(^{36}\) and inevitably intrudes upon the sanctity of jury deliberations.

The first step toward juror disqualification is generally a note from the jury indicating a problem reaching a verdict. A sampling of such notes indicates the wide variety of potential scenarios:

- "We cannot come to a unanimous agreement . . . for reasons unrelated to debate about the evidence."\(^{37}\)

holdouts for conviction are removed and the jury acquits cannot be appealed, and would therefore not result in an appellate opinion. This should not be interpreted, however, to mean that Rule 23(b)(3) is only beneficial to the prosecution. The Supreme Court has noted that "[t]he most complete statistical study of jury behavior has come to the conclusion that when juries are required to be unanimous, 'the probability that an acquittal minority will hang the jury is about as great as that a guilty minority will hang it.'" Apodaca v. Oregon, 406 U.S. 404, 411 n.5 (1972) (quoting H. Kalven & H. Zeisel, The American Jury 461 (1966)); see also United States v. Stratton, 779 F.2d 820, 834 n.15 (2d Cir. 1985) (citing this study and others for similar contention).

36. See Fed. R. CRIM. P. 23(b)(3) advisory committee’s notes to 1983 Amendments (noting that this is "a situation which does not occur with great frequency"). While the Advisory Committee Notes may be underestimating the frequency of this occurrence (at least at present), there are two major reasons why Rule 23(b)(3) is not invoked as often as it could be:

(1) In many cases, neither the parties nor the court will be aware that a holdout juror exists. In fact, it is only when the majority or minority juror(s), on their own initiative, identify this issue that the trial court will be able to take action. Jurors are unlikely to be aware that a mechanism exists for removing a recalcitrant juror, and therefore, may not bring such a circumstance to the attention of the court. Thus, it is likely that most cases of holdout jurors are only discovered (if at all) after a mistrial is declared and the jury has been discharged.

(2) Even if the jurors self-identify their collective dysfunction, prosecutors and especially courts may be reluctant to generate an appellate issue by pushing for an eleven-person conviction. From the court’s perspective especially, a declaration of a mistrial is simpler and safer, as it is essentially immune from appeal. From the prosecutor’s perspective, if eleven jurors are convinced of the defendant’s guilt, it is likely that a second trial or a plea agreement will result in a conviction.

"We request an alternate to replace one juror. One juror does not agree with the charge and does not show a willingness to apply the law . . . . Please provide direction in this matter."\(^{38}\)

"Your Honor, we respectfully request direction. One juror has stated their final opinion prior to review of all counts."\(^{39}\)

"Juror No. Four . . . has a prejudice and lacks the rational common sense to deliberate in a logical way."\(^{40}\)

"A juror doesn’t want to participate in arriving at a verdict. What do we do?"\(^{41}\)

"I Bernard Spriggs, am not able to discharge my duties as a member of this jury."\(^{42}\)

As these notes suggest, the cases generally hinge upon a jury note that signals to the judge that one juror is detrimental to the jury’s deliberations. Often, these notes will follow on the heels of more general notes, such as "we are deadlocked" or "we cannot reach a verdict."\(^{43}\)

39. United States v. Symington, 195 F.3d 1080, 1083 (9th Cir. 1999).
43. A note stating that a jury cannot reach a verdict is fairly common early in the deliberation process. Most judges simply respond with an oral or written exhortation that the jurors continue their deliberations. Cleveland, 21 P.3d at 1234 ("[I]t often is appropriate for a trial court that questions whether all of the jurors are participating in deliberations to reinstruct the jurors regarding their duty to deliberate and to permit the jury to continue deliberations before making further inquiries that could intrude upon the sanctity of deliberations."). At this point, the jury is left to try to resolve their issue internally through persuasion or, in rare cases, improper threats of force. Shotikare v. United States, 779 A.2d 335, 346 (D.C. 2001) (finding a threat of physical violence just cause for removal). Generally, if internal resolution is unsuccessful, a subsequent note will appear, either repeating the earlier note, adding more description, or signaling a worsening of the situation. For purposes of completeness, it is worth noting the existence of another weapon in the district court’s arsenal, so-called anti-deadlock charges. These charges, themselves the subject of great controversy, contain various elements designed to exhort the jury to reach a verdict, informing the jurors, inter alia, that in a large proportion of cases absolute certainty cannot be achieved, that a mistrial will subject the parties to the strain and ex-
B. Role Reversal: Questioning of the Jurors

Once the potential for a "good cause" disqualification has been brought to the trial court's attention, it becomes the court's prerogative, or in some jurisdictions, duty, to investigate the issue. As the Second Circuit Court of Appeals has stated:

[I]t would be a dereliction of duty for a judge to remain indifferent to reports that a juror is intent on violating his oath [by refusing to properly deliberate] . . . . A federal judge, whose own oath of office requires the judge to "faithfully and impartially discharge and perform all the duties incumbent upon [the judge] . . . under the Constitution and laws of the United States," may not ignore colorable claims that a juror is acting on the basis of such improper considerations.44

While Rule 23(b)(3) provides the authority to eliminate a non-deliberating juror, it does not suggest any mechanism for doing so. This allows courts discretion in tailoring their own procedures for determining whether "good cause" exists. Generally, courts proceed by speaking to each juror individually, with counsel present.45 The most common practice is to begin with the jury foreperson, or the individual juror who signed the note that initiated the process.

The court's inquiry into the jurors' deliberations is of necessity highly circumscribed. Unscripted court questioning of deliberating jurors can easily lead to, at the very least, the appearance of


45. In Thomas, however, the district court inquired of each juror in camera without counsel present (but on the record), and then summarized its findings for counsel. 116 F.3d at 610; see also United States v. Ruggiero, 928 F.2d 1289, 1295 (2d Cir. 1991) (noting that the district court interviewed the juror with only law clerks and court reporter present "[t]o achieve maximum candor and comfort").
undue judicial influence upon jury deliberations. A typical inquiry proceeds as follows:

COURT: Juror number four, we have received the jury's notes, and I am now going to ask you some questions. I would like to caution you that in your responses, please do not reveal to us: the direction the jury is leaning, the numerical jury split, or anything about the content of your deliberations. Do you understand?46
JUROR: Yes.
COURT: In your opinion, are all of the jurors participating in deliberations?
JUROR: No.
COURT: Which juror or jurors are not participating?
JUROR: The juror sitting in the first row at the end of the row.
COURT: What makes you say that the juror is not participating?
JUROR: He simply announced his opinion when we went in, and said his mind is set. He doesn’t respond to any of the other jurors when they ask him questions; he just sits in the corner.

In addition to scripting its own colloquy, the court must determine which of the jurors to examine. In at least one reported case, the court spoke to jurors selected at random.47 A more common procedure is to speak to each of the remaining jurors (i.e., those not yet questioned) in order, by seat number, until either all jurors have been queried, or it becomes clear that further inquiry is unnecessary. By speaking to all of the jurors, the court garners the maximum information from which to make its final determination, and by involving all of the jurors, does not create artificial divi-

46. See Brown, 823 F.2d at 594 (colloquy: “COURT: Now, I don’t want to know how you have voted, or the jury has voted, on anything with respect to any defendant. But can you tell us just generally what the nature of the problem is. Could it be a personality problem between you and other members, or any one or more members of the jury, or is it something else?”); see also Shotikare, 779 A.2d at 345 (“The jurors’ views of the case, the back and forth among them concerning the evidence . . . their numerical division on the merits—all such things are off limits.”).
sions within the jury room. With each additional colloquy, however, the court risks placing undue influence on jurors and increases the potential for reversal on appeal.

While this role reversal, the questioning of jurors about their deliberations, is highly unusual and places great strain on the traditional prerogatives of the jury, it is inevitable in any system that allows dismissal for "good cause." Without this inquiry (or something else like it), there would be no basis on which to argue, or for a court to rule on, the dismissal of a juror. In many cases it would not even be clear which juror to dismiss.

After the examination of the jurors, counsel have a record from which to argue, and the courts upon which to rule, for or against disqualification. In weighing the responses of the jurors, the court must first consider the threshold question of whether the jurors, with the likely exception of the holdout, are in agreement that a juror is deliberating in an aberrant manner or not deliberating at all. Equivocation and dissent among the jurors as to the behavior of the holdout juror will significantly weaken the case for removal. As the Second Circuit has stated, a court confronted with "anything but unambiguous evidence" of a refusal to deliberate need not pursue dismissal any further than this step. Assuming, however, that a relatively consistent factual basis for aberrant juror behavior arises from the individual juror colloquies, the court resumes its traditional role of arbiter rather than investigator and must determine whether the behavior identified constitutes "good cause" for disqualification.

C. The Decision to Disqualify: Whether Good Cause Exists

Once the court interviews the jurors and creates a record of the jurors' deliberations, it can determine whether "good cause" under Rule 23(b)(3) exists for dismissal of a particular juror. In practice,
there are two parts to this inquiry: (i) is the juror in fact refusing to deliberate; and (ii) is this "refusal" related in any way to the juror's view of the evidence.

The reason for the first part is obvious. The jury system is sufficiently flexible to allow eccentric behavior; only a purposeful refusal to follow the court's instructions or engage in the jury process can justify removal under Rule 23.50 The second part of the inquiry is predicated on the federal right to a unanimous verdict.51

The federal courts recognize that the principle of unanimity is the touchstone of the constitutionality of a dismissal under Rule 23(b)(3).52 As a result, the courts have fashioned removal standards that factor in unanimity concerns. The most common of these requires that a juror may not be dismissed "if the record evidence discloses any possibility that the ... discharge stems from the juror's view of the sufficiency of the government's evidence."53 This "any possibility" standard appears quite stringent.54 The pur-
pose of the standard is to diminish the possibility that a juror is removed because of the juror’s dissenting views, rather than disqualifying conduct.

For example, in United States v. Brown, after a thirteen week trial and five weeks of deliberations, a juror sent out a note indicating that he was “not able to discharge [his] duties as a member of th[e] jury.” The court engaged in a colloquy with the juror, in which the juror stated that he had a problem with “the way the R.I.C.O. conspiracy act reads”; “I can’t go along with that act”; “I disagree with it”; “It’s the way it’s written and the way the evidence has been presented.” The trial court dismissed the juror. Three weeks later, the eleven-member jury convicted the defendants.

While noting the “length and cost of the trial” and the “apparent strength of the government’s case,” the Court of Appeals for the D.C. Circuit reversed the convictions because the record disclosed “a possibility” that the dismissed juror simply “believe[d] that the government ha[d] failed to present sufficient evidence to support a conviction.” The court focused on the juror’s statement in the colloquy that he could not render a verdict because of “the way [the law was] written and the way the evidence ha[d] been presented.” In the court’s view, the juror’s statement could just as easily have reflected dissatisfaction with the government’s evidence as with the RICO law. Because the juror’s “desire to quit

able possibility that the impetus for a juror’s dismissal stems from the juror’s view on the merits of the case”). It noted that an “any possibility” standard if literally applied would be meaningless, because “anything is possible.” Id. at 1087 n.5. The courts applying the “any possibility” standard have not interpreted that statement literally, however. See, e.g., United States v. Ruggiero, 928 F.2d 1289 (2d Cir. 1991), discussed infra in text accompanying notes 78–88. Both of the above-referenced federal standards are more stringent than that in California state courts. See Cleveland, 21 P.3d at 1237 (distinguishing federal standard from that in California of discretion to discharge the juror “if it appears as a ‘demonstrable reality’ that the juror is unable or unwilling to deliberate”).

55. 823 F.2d 591, 594 (D.C. Cir. 1987).
56. Id.
57. Id. at 595.
58. Id. at 599–600.
59. Id. at 597.
60. Id. at 597.
deliberations" possibly "stemmed from his belief that the evidence was inadequate to support a conviction," the appellate court reversed.\(^6\)

In *United States v. Hernandez*,\(^6\) the Second Circuit encountered an analogous scenario and came to a similar result. The jury\(^6\) sent out a note after beginning deliberations signaling a problem with one particular juror: "We the jury in the case feel that Juror No. Four . . . has a prejudice and lacks the rational common sense to deliberate in a logical way. The individual wants to start a case against the government . . . ."\(^6\) After conducting a colloquy with the juror in question, the judge allowed deliberations to continue.\(^6\) Problems continued, and on day two of deliberations, questions arose about the juror's mental health.\(^6\) The judge stated that he would postpone any action with respect to the juror until it was clear that "there [was] a hung jury."\(^6\) The jury sent out another note at the end of that day, "Please bear with us as we don't want a mistrial. We are working hard with Juror No. 4."\(^6\) When the difficulties continued, the judge appeared on the verge of declaring a mistrial.\(^6\) He instructed the jury that "thousands of dollars are lost on a mistrial," and commended their efforts to "try to convince Juror No. 4, in order to prevent the loss of so much time and money."\(^6\) He then engaged in one last colloquy with juror four, where more details about the juror's "neurosis" emerged.\(^6\)

At that point, the court dismissed the juror.\(^6\)

The Second Circuit found the dismissal improper for three reasons:

\(^{61}\) *Id.*

\(^{62}\) 862 F.2d 17 (2d Cir. 1988).

\(^{63}\) The note was signed by all the jurors except juror number four. *Id.* at 20.

\(^{64}\) *Id.*

\(^{65}\) *Id.*

\(^{66}\) *Id.* at 20–21.

\(^{67}\) *Id.* at 21 (alteration in original).

\(^{68}\) *Id.*

\(^{69}\) *Id.*

\(^{70}\) *Id.*

\(^{71}\) *Id.* at 22.

\(^{72}\) *Id.*
(i) it is not clear in the record that the removal was because of mental incompetence rather than to avoid a hung jury; (ii) if removal for mental incompetence was justified, it should have occurred at the latest on the second day of deliberations; and (iii) the statements of the district judge just prior to the removal of No. Four prevented the remaining jurors from reaching a properly considered verdict.  

The appellate court thus reversed the conviction and remanded for a new trial.  

Although the Second Circuit in Hernandez did not cite any authority in coming to its determination, its analysis is akin to that in Brown. As the record indicated (from the timing of the dismissal and the judge's comments), there was a real possibility that the juror was dismissed as much for failing to agree with the majority as for failing to participate in deliberations.

One background circumstance that tainted the removal of the jurors in Hernandez and Brown was that the trial court was aware prior to dismissing the jurors that those jurors favored acquittal. The jury's note in Hernandez stated that rather than deliberate, juror four "want[ed] to start a case against the government." In Brown, the juror stressed that he disagreed with the expansive scope of the RICO statute. Thus, the trial courts in these cases knowingly removed holdout jurors in favor of acquittal, resulting in a guilty verdict of the remaining eleven jurors. This type of dismissal exhibits maximum tension with the defendant's right to a unanimous verdict.

The fluidity of Rule 23(b)(3) determinations is highlighted, however, by another Second Circuit case, United States v. Ruggiero. In Ruggiero, the jury sent out a note stating that it had reached "informal" agreement for a guilty verdict, but could not

73. Id. at 23.
74. Id. at 24.
75. Id. at 20.
77. See Hernandez, 862 F.2d at 23 ("[R]emoval of the sole holdout for acquittal is an issue at the heart of the trial process and must be meticulously scrutinized.").
78. 928 F.2d 1289 (2d Cir. 1991).
reach a "formal" verdict "due to the fears of one juror." A colloquy with that juror revealed that during deliberations, the juror had encountered two "well built" men who asked him if he was on the jury for one of the defendants, but had not said anything further. Under questioning from the court, the juror admitted that his vote was motivated in part by "fear," presumably related to this incident, but the juror made other statements that suggested another possibility for his being singled out by the majority. The juror stated that he "had questioned some of the testimony along the way, the various counts and whatever"; "I wasn't one hundred percent sure . . . of each of the counts and the accusation and things that they actually did happen." In addition, the juror had earlier indicated that the majority had pressured him, saying, "there was talk in the juror room concerning the fact that I could (go) to jail . . . Tollerence [sic], and patience is [sic] not prevailing in the juror room. . . . I simply can't be persuaded or forced to vote against my belief and conscience." The court dismissed the juror. Shortly thereafter, the eleven-member jury informed the court that it had reached a unanimous verdict for conviction.

The Ruggiero court upheld the conviction, citing the great deference owed to the district court "in view of [the judge's] personal observations of the jurors and the parties." The court did not address the suggestions in the record that the juror did not share his colleagues' view of the government's case. Rather it focused on the fact that: "The juror expressed a continuing state of fearfulness, told the judge that he had broken down in the course of apprising his fellow jurors of his situation, and had at one juncture refused to render any vote at all on the counts of the indictment." The court saw no conflict with its ruling in the Hernandez case discussed above:

79. Id. at 1295.
80. Id.
81. Id. at 1296–97.
82. Id. at 1296.
83. Id. at 1294.
84. Id. at 1297.
85. Id. at 1298.
86. Id. at 1300.
87. Id.
We reversed and remanded for a new trial in Hernandez because we could "not be confident that [a removed juror's] disagreement with his colleagues was not the cause of his removal." Here, by contrast, the record is clear that Juror No. 9 was dismissed because the district court determined, on more than ample evidence, that the juror had been intimidated. Further, the dismissal followed promptly upon the court's conclusion that intimidation had occurred and was affecting the juror's deliberations.88

Contrasting Ruggiero with Brown and Hernandez reveals that the determination of what constitutes "any possibility" of removal based on a juror's views of the evidence can be seen differently by different courts, and even different panels of the same court.

D. Post-Disqualification Choices: Replacement with an Alternate or Deliberation with Eleven

Until 1999, the decision to remove a juror left a district court with only one choice: a jury of eleven. The option of replacing a deliberating juror with an alternate was explicitly disfavored by the advisory committee notes to Rule 23(b)(3)89 and appeared foreclosed by Rule 24(c). Rule 24(c), at that time, required the discharge of alternate jurors when the jury retired for its deliberations.90 Rule 24(c) was amended in 1999 to allow the trial courts to retain alternate jurors after jury deliberations, and then replace a juror who has been removed during deliberations with an alternate

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88. Id. at 1302 (alteration in original) (quoting United States v. Hernandez, 862 F.2d 17, 23 (2d Cir. 1988)).
89. FED. R. CRIM. P. 23(b) advisory committee's notes to 1983 Amendments.
90. FED. R. CRIM. P. 24(c); see also United States v. Beard, 161 F.3d 1190, 1194 (9th Cir. 1998) (reversing dismissal of two jurors and replacement with alternates); United States v. McFarland, 34 F.3d 1508, 1513 (9th Cir. 1994) ("In this circuit, it is error for a district court to substitute alternate jurors unless the defendant has given an express waiver of his rights under Rule 24(c).")); United States v. Beasley, 464 F.2d 468, 469 (10th Cir. 1972) (finding that the "inclusion of the alternate in any proceeding commenced by the jury itself after it retires to deliberate is ground for a mistrial").
The jury must then be instructed to begin deliberations anew. The 1999 amendment leaves the trial court with expanded choices, and the potential to remove and replace *up to six jurors*—the number of alternates permitted under Rule 24(c)(1)—during the course of deliberations. Adding this choice to the trial court's menu will no doubt increase challenges to the exercise of its discretion. As the amendment is fairly recent and appears not to have been absorbed into common practice, the federal appellate courts have not yet spoken to the issue. One expects that case law will eventually limit the trial courts' discretion to use (or not to use) alternates after a Rule 23(b)(3) dismissal. Thus, it remains to be seen how the 1999 amendment to Rule 24(c) will affect Rule 23(b)(3) jurisprudence.

At a minimum, the ability to replace dismissed jurors alleviates the conflict that an eleven-member jury verdict creates with the traditional twelve-member jury standard. It does nothing, however, to limit the intrusion that Rule 23(b)(3) authorizes upon the traditional prerogatives of a jury (secrecy and non-accountability), and to eliminate the tension between the broad range of dismissals allowed under the Rule and the otherwise unquestioned requirement that the jury's verdict be unanimous.

IV. IMPLICATIONS OF GOOD CAUSE DISMISSALS FOR REFUSING TO DELIBERATE

The application of Rule 23(b)(3), as discussed above, provides a small window into the difficulties of trying to map a belief in the sanctity of a verdict rendered by twelve impartial citizens, accountable to no one, onto the practical day-to-day administration of

91. FED. R. CRIM. P. 24(c)(3). The rule now reads: "The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew." *Id.*

92. There is little federal case law on this topic. One of the few opinions mentioning the expanded options now available to trial courts is an unpublished opinion from the Second Circuit, *United States v. Dixon*, 79 F. App'x 456, 457 (2d Cir. 2003).
justice. While something is indisputably added to the practical workings of judicial administration by Rule 23(b)(3)’s “good cause” disqualifications, something is taken away as well. Two concerns are most prominent.

First, it is impossible to review the case law concerning Rule 23(b)(3) and not be struck by the role that chance plays in these cases. As the interplay between even the few cases discussed above applying Rule 23(b)(3) demonstrates, the question of the removal of a juror who is not “properly” participating in deliberations is complex and entirely fact-dependent. Yet very few facts are available.\(^9\) In the final analysis, the determination depends primarily on the statements of lay jurors in unstructured, but severely limited colloquies with judges. Jurors, no doubt intimidated by individual questioning by a federal judge in the presence of a prosecutor, are unlikely to articulate with clarity the reasons for the deliberative impasse. Thus, the chance statements that come out in the colloquies, and those left unsaid, ultimately determine whether a juror is dismissed. For example, if the juror in *Brown* had not added a passing comment ("and the way the evidence has been presented"),\(^9\) the appellate court would probably have reached the opposite result. It is not clear that such weighty determinations as whether a dissenting juror has been removed from the jury for simply failing to agree with the majority should hinge to such a great degree on chance.

Chance also plays the primary role in determining whether the courts even become aware that a potential for dismissal exists. Only when a jury self-identifies the problem in a way that signals to the court that a minority of jurors are holding up deliberations does the removal process even commence. Many jurors, no doubt, would not think to send out such a note, unaware that such a process exists. Thus, the current rule puzzlingly relies on jurors to draft

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93. *Cf.* United States v. Symington, 195 F.3d 1080, 1088 n.7 (9th Cir. 1999) (acknowledging that the requirement that the court avoid “compromising the secrecy of the jury’s deliberations” necessitates that the “evidence available to the district court” will be “necessarily limited”); United States v. Brown, 823 F.2d 591, 596 (D.C. Cir. 1987) ("[A] court may not delve deeply into a juror’s motivations because it may not intrude on the secrecy of the jury’s deliberations.").

94. *Brown*, 823 F.2d at 597.
a note that hits upon a Rule 23(b)(3) "good cause" formulation, while providing no information to the jurors that "good cause" dismissal is even available, or on what grounds. Moreover, the reliance on chance to initiate and provide a factual basis for a Rule 23(b)(3) "refusal to deliberate" dismissal suggests an ambivalence on the part of the Rule's drafters, and a self-contradictory desire that the Rule exist, but be underutilized.95

Second, it does not appear that courts have adequately considered or resolved the tension that a Rule 23(b)(3) dismissal for refusing to deliberate places on a right to a "unanimous" verdict. Clearly if a juror refuses to vote with the majority and is then removed from the jury, the verdict is only "unanimous" in a Kafkaesque sense. In any case in which the juror would cast a vote, but not the vote of the majority, that juror's dismissal has resulted in a non-unanimous verdict. This is true whatever the reason for the vote, i.e., whether the vote is the result of an opinion about the evidence presented, the validity of the law at issue, or a result of a completely irrational impulse.96 If a jury has the power to vote to convict or acquit without review, it follows that an individual juror may do the same. To dismiss such a juror for refusing to deliberate properly, such as for failing to follow the court's instructions or for refusing to apply the law, is not consistent with this power (just as the court would not have the power to reverse an acquittal if it felt that the jury had failed to follow the court's instructions).97 While a juror who refuses to play by the rules in

95. There are no clear solutions to lessen the role of chance in continued application of Rule 23(b)(3) to refusals to deliberate. Remedies such as a jury instruction that informs jurors of the existence of a mechanism for the removal of a non-deliberating juror, and/or a more structured colloquy process perhaps including standardized written questionnaires, likely would create more problems than they would solve. In addition, jurors who are made aware of a process to eliminate other jurors may attempt to "game" the system by structuring notes and colloquies in a way designed to dismiss a juror who simply disagrees with their assessment of the case. This latter problem will become more pronounced as more jurors inevitably become aware of the rule's existence.

96. A distinction should be drawn between jurors who are dismissed involuntarily by the court and those who willingly step down for reasons of health or fear, etc. In addition, it is worth emphasizing that the alternative to a Rule 23(b)(3) dismissal is not a non-majority verdict, but a mistrial.

97. Burks v. United States, 437 U.S. 1, 16 (1978) ("[W]e necessarily
this manner frustrates the smooth workings of judicial administration, the indulgence of such behavior is a necessary prerequisite of a right to a unanimous verdict—a right which, at least in the federal system, is not contested.

More to the point, efforts to ferret out and remove "non-deliberating" jurors may cause more damage than the behavior itself. It is clear that the federal system, as structured in the Constitution, does not prioritize to the exclusion of all else the following of the court's instructions. If it did, the Constitution would leave the ultimate decision of guilt or innocence to the court itself. To the contrary, the decision to leave this determination to the jury signals an invitation to other factors to enter the equation. As Judge Learned Hand wrote, the unique appeal of trial by jury is that "no one is likely to suffer of whose conduct they [the jury] do not morally disapprove." According to Judge Hand, "this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions." By dismissing individual jurors who do not follow the law as the court commands, this slack is lessened. While such a slack-less system may be desirable from an efficiency standpoint, it is inconsistent with the traditional jury trial right, and chiefly with the requirement that a criminal verdict in federal court be unanimous. This inconsistency, combined with the practical considerations which make Rule 23(b)(3) dismissals problematic—primarily the role of chance in determining such dismissals—calls for a reexamination of the extension of Rule 23(b)(3) to "refusals to deliberate."

afford absolute finality a jury's verdict of acquittal—no matter how erroneous its decision . . . .

98. United States ex rel. McCann v. Adams, 126 F.2d 774, 776 (2d Cir. 1942).
99. Id.