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Justice Story Cuts the Gordian Knot of Hung  
Jury Instructions

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# Justice Story Cuts the Gordian Knot of Hung Jury Instructions

George C. Thomas III and Mark Greenbaum

## Abstract

Constitutional law grows more complex over time. The complexity is due, in large part, to the rule of stare decisis. When faced with precedents that it does not wish to follow, the Court usually distinguishes the case before it. Thus, the constitutional landscape is littered with cases that do not fit well together. Navigating past these shoals is often difficult for courts following the Supreme Court's lead. One example is the law governing instructions that a trial judge can give a deadlocked jury in a criminal case. The right to a jury trial entails the right to have the jury reach a verdict without pressure from the judge, but giving voice to that principle has resulted in a bewildering array of approved instructions. This article argues that the law of 1824, manifested in Justice Story's opinion in *United States v. Perez*, was superior to today's morass. In 1824, judges had virtually uncontrolled discretion to decide when to declare a hung jury. We argue for a return to 1824 with one twist: that judges give deadlocked juries the instruction: "Please continue to deliberate." This simple change will result in fewer hung juries and far fewer appeals about whether the instructions were too coercive.

# Justice Story Cuts the Gordian Knot of Hung Jury Instructions

George C. Thomas III†  
Mark Greenbaum†

## INTRODUCTION

One persistent form of hubris is to think that law in 2006 has evolved to be more advanced, and thus better, than law in the past. The Bill of Rights is a brilliant document, so the argument goes, but two hundred years of case law have developed a more sophisticated, thoughtful, and better understanding of the rights created by the Framers. The ultimate purpose of this article is to demonstrate the falsity of the notion that law today is always better than law in the past. We will make the argument in the context of jury verdicts, with an emphasis on the law of hung juries. Judges in Justice Joseph Story's day viewed hung juries in criminal cases as a highly disfavored outcome. Today, judges routinely accept hung juries in criminal cases as the "cost of doing business," in large part because of a fear that instructions designed to encourage verdicts might be unduly coercive.

This article will trace the legal development of this issue from Justice Story's day to the present. In the process, we will highlight a little-noticed problem with the case-by-case method of creating constitutional law. Law constructed this way has a tendency to become more complex and less coherent as later cases try to fit within prior precedents without overruling ones that do not fit very well. Over time, this process can produce what we will call the "common law Gordian knot": a doctrine so complex and inconsistent that it provides little guidance to judges and often blinds them to the perversity of the way the doctrine works.<sup>1</sup> Our example will be the law governing the instructions that judges are permitted to give juries when panels announce a failure to reach a verdict. In our view, judges of Justice Story's generation followed a far more salutary, and simpler, approach to hung juries.

We argue that the Story era manifested more wisdom on this issue than the

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† J.D., 2005, Rutgers Law School; A.B., 2002, Cornell University. I would like to dedicate this article to Lauren Gilbert for her friendship, warmth, good humor, and love.

1. We understand, of course, that constitutional law is not derived from the common law. As we will argue in Part II, however, constitutional interpretation employs a common law methodology.

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modern doctrine. While we do not advocate imprisoning juries in unheated rooms without food or drink – as was routinely done during Blackstone’s era<sup>2</sup> – we do advocate a paradigm shift in the attitude of judges. The right response to a deadlocked panel should not be “mistrial” but rather, a simple instruction, “please continue to deliberate.” We advocate, in sum, a return to the days of yesteryear when a mistrial was a rare and disfavored outcome and juries were expected to return a verdict.

Part I briefly explains why it was critical in the early days of juries for the jury to return a unanimous verdict. It begins with the thirteenth century view that juries deliver perfect justice, and brings most of the story as far as Blackstone. Part II pauses to inquire into the problem of judicial coercion, beginning with the William Penn case from the seventeenth century, and then explores how modern courts have emphasized fear of judicial coercion in deciding what instructions may be given to juries to encourage a verdict. The modern doctrine is a textbook example of how the case-by-case method of constructing law can produce a maddeningly complex and unsatisfactory legal doctrine. This part also briefly considers the frequency of hung juries to better conceptualize the problem. Part III proposes a novel way to cut the Gordian knot of current law on instructing hung juries, a solution that returns us to the elegance of Justice Story’s opinion for the Supreme Court in 1824.

## I. JURIES REPLACE GOD

After the fall of Rome, criminal juries disappeared for over five hundred years.<sup>3</sup> This left various forms of “the ordeal” as the only mechanism for determining guilt in the Western world. Apparently developed by the Germanic tribes of central Europe, the ordeal functioned to obtain God’s view. One example Blackstone gives is of the fire ordeal

Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron, of one, two, or three points weight; or else by walking, barefoot, and blindfold, over nine red-hot plowshares, laid lengthwise at unequal distances: and if the party escaped being hurt, he adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was condemned as guilty.<sup>4</sup>

We need not describe other forms of the ordeal for they shared the same premise important to our point about juries: the ordeal was viewed as infallible because it relied on the judgment of God. As long as one were willing to

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2. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 375 (William S. Hein & Co., Inc., reprint of 1st ed. 1992) (1768) (in discussing the measures that a judge could undertake to force jurors to reach a verdict, Blackstone noted that jurors were often “kept without meat, drink, fire or candle . . . till they were all unanimously agreed.”).

3. Inquests were used during this period as fact-finders or grand juries but not, typically, to seek final proof of guilt. See 1 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 141 (2d ed. 1898).

4. *Id.* at 337.



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believe that God would intervene and that the priests who “judged” the order could perfectly ascertain God’s judgment, the ordeal never produced an incorrect or an ambiguous outcome.

Little wonder, then, that when English juries began to supplant the ordeal in the thirteenth century, a requirement of unanimity quickly took hold. For the jury was replacing a mechanism that, in theory, was perfect. As Pollack and Maitland put it: “Nor must it escape us that the justices are pursuing a course which puts the verdict of the country on a level with the older modes of proof. If a man came clean from the ordeal . . . , the due proof would have been given; no one could have questioned the dictum of Omniscience.”<sup>5</sup> A jury verdict of 7-to-5 would hardly have seemed beyond question.

Moreover, the English jury was viewed as speaking for the community, and the English community of the thirteenth century had but one voice. Indeed, had the jury arisen later, a majority vote might have been sufficient to convict. In France, where Voltaire was instrumental in the institution of juries, a vote of 8-to-4 in a modern trial produces a conviction.<sup>6</sup> But in thirteenth century England, “as yet men had not accepted the dogma that the voice of a majority binds the community.”<sup>7</sup> Whether it was the king, the grand jury, or the criminal jury, each institution had only one voice. Again in the words of Pollock and Maitland, “[T]he voice of the twelve men is deemed to be the voice of the country-side, often the voice of some . . . district which is more than a district, which is a community.”<sup>8</sup> In sum, “the parties to the litigation have ‘put themselves’ upon a certain test. That test is the voice of the country. Just as a corporation can have but one will, so a country can have but one voice.”<sup>9</sup>

For a time, defendants tended to resist juries, preferring the remnants of the ordeal system that survived the Lateran Council’s prohibition of clerics participating in the ordeal. Parliament and the judges, however, preferred juries and they reacted by seeking to coerce defendants to choose juries. By 1275, a statute ordered “strong and hard imprisonment” of those who refused to answer an indictment by putting themselves on the country.<sup>10</sup> A later and more gruesome example is *peine forte et dure* where the “defendant was placed on the ground and stones were piled on his chest until he either expired or groaned ‘country, country,’ indicating his acceptance of the jury of verdict.”<sup>11</sup>

By the mid-fourteenth century, juries had become the normal and accepted

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5. 2 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 627 (2d ed. 1898).

6. French Rules of Criminal Procedure, art. 359 (2003).

7. POLLOCK AND MAITLAND, *supra* note 5, at 626.

8. *Id.* at 624.

9. *Id.* at 626.

10. Edward I c. 12.

11. *Id.*

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way to determine guilt, “and defendants were not longer asked to put themselves on the country.”<sup>12</sup> The law about the role of jurors was, for a time settled. Criminal defendants were tried by juries, composed of twelve men, who were required to render a verdict unanimously.

Very little changed over the next four hundred years. In 1791, Americans had so much faith in the wisdom of local criminal juries that the initial failure to require local juries threatened to doom the Constitution before its ultimate passage. Article III required juries in federal criminal cases, to be sure, but the trial could be held, and thus the jury empanelled, in any court in the state. Patrick Henry stated the pervasive feelings at the time

Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off. They may call any thing rebellion, and deprive you of a fair trial by an impartial jury of your neighbors. Has not your mother country magnanimously preserved this noble privilege upwards of a thousand years? . . . That country had juries of hundredors [local citizens] for many generations. And shall America give up that which nothing could induce the English people to relinquish? The idea is abhorrent to my mind. There was a time when we should have spurned it. This gives me comfort - -that as long as I have existence, my neighbors shall protect me. Old as I am, it is probable that I may yet have the appellation of rebel. I trust that I shall see congressional oppression crushed in embryo. As this government stands, I despise and abhor it . . . [I]t takes away the trial by jury in civil cases, and does worse than take it away in criminal cases. It is gone unless you preserve it now.<sup>13</sup>

The Anti-Federalists believed juries could reach more just outcomes than judges. To reach those outcomes of course, juries must return a verdict. And the evidence from the colonies is that juries always did return a verdict. We know, for example, that no mistrials appeared in New Jersey criminal cases from 1749-57.<sup>14</sup> This is not surprising, of course, because mistrials were not a recognized outcome in Blackstone’s Commentaries.

If an eighteenth century English jury did not reach a unanimous verdict before the judge had to leave for the next town on his circuit, he could “carry them round the circuit from town to town in a cart.”<sup>15</sup> We suspect not many juries would fail to reach a unanimous verdict if the alternative was to be kept together and transported by cart from town to town. Occasionally, as we will see, a brave jury would refuse to reach a verdict, but these were outliers in the common law system.

The first report of a mistrial for failure to reach a verdict in an American court was 1807.<sup>16</sup> As late as 1824, Justice Story could declare, for a unanimous

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12. POLLACK AND MAITLAND, *supra* note 5, at 130.

13. NEIL H. COGAN, *THE COMPLETE BILL OF RIGHTS* 439 (1998).

14. While we have not researched this thoroughly, it is probable that the other colonies reflected these numbers.

15. BLACKSTONE, *supra* note 2, at 376. *See also* GEORGE CRABB, *HISTORY OF ENGLISH LAW* 299-300 (1831).

16. *United States v. Workman*, 28 F. Cas. 771, 773 (D. New Orleans 1807) (federal district court held “that the general doctrine prohibiting the discharge of a jury in all cases was erroneous and

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Court in *United States v. Perez*, that the power to declare a mistrial when the jury could not reach a verdict “ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner.”<sup>17</sup>

The next hundred years would see a gradual evolution in the conception of the jury’s role. By the time we get to the middle of the twentieth century, Justice Story’s concern in *Perez* that mistrials would interfere with the possibility of a favorable outcome for the defendant – an acquittal – had been turned on its head. A mistrial based on a hung jury had become a favorable outcome, one that potentially protected innocent defendants from being convicted. The theory was that, faced with a hung jury, prosecutors would often concede defeat and not re-prosecute. Hung jury mistrials were no longer outliers and judges were discouraged from exhorting juries to continue deliberating.

The story of that evolution is largely a story of judges developing exquisite concern about coercing juries to reach a verdict. Judges in Blackstone’s day were willing to cart jurors from town to town until they reached a verdict. Modern judges flinch from the prospect of asking jurors merely to continue deliberation.

## II. THE FEAR OF JUDICIAL COERCION

The “hung jury” is a fairly straightforward concept. It is defined as “[a] jury that cannot reach a verdict by the required voting margin.”<sup>18</sup> At common law, and in almost all states today, criminal juries must reach their verdicts by a unanimous verdict. Thus, a single stubborn or misinformed juror can “hang” a criminal jury. The ultimate question, for the criminal justice system as well as this article, is the extent to which judges can go to encourage a hung jury to continue deliberating. One approach is that of the common law of Blackstone’s day: simply keep the jury together until it reaches a verdict. A variation on that theme can be found in the famous *Bushel’s Case*.

### A. Seventeenth Century Judicial Coercion

*Bushel’s Case* stemmed from another proceeding, the trial of the eventual founder of Pennsylvania, William Penn, who was charged with sedition and attempting to plant the seeds of rebellion against the English Crown by committing unlawful assembly and disturbance of the peace.<sup>19</sup> Penn and his

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obsolete” and that a jury could be discharged only “when necessary to justice.”).

17. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

18. BLACK’S LAW DICTIONARY 860 (7th ed. 1999).

19. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 68-

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associate William Mead had addressed a small group of fellow Quakers in London.<sup>20</sup> In 1670, English persecution of Quakers was near its apex, and Penn's peaceful speech was merely a pretext for the Crown to pursue a high-profile Quaker.<sup>21</sup>

At Penn's trial, three witnesses testified that they had seen Penn preaching in the street, in violation of the law, but none of them had been able to hear what he had said.<sup>22</sup> Much of the other evidence presented was equally non-compelling. Nevertheless, the case was submitted to the jury, and the court did not mince words in expressing what verdict it expected. In summing up the case, the judge told the jury

You have heard what the Indictment is, It is for preaching to the people . . . there are three or four witnesses that have proved this, that he did preach there. . . now we are upon the matter of fact, which you are to keep to, and observe, as what hath been fully sworn *at your peril*.<sup>23</sup>

The jury then retired and deliberated for ninety minutes before returning to court and declaring that it was deadlocked eight-to-four in favor of conviction on the most serious charge of unlawful assembly.<sup>24</sup> One alderman in the audience screamed at a juror he knew, Edward Bushel, ranting that Bushel "deserve[d] to be indicted more than any man that hath been brought to the bar this day," and the judge threatened Bushel that he would be branded unless the jury promptly found Penn and Mead guilty of unlawful assembly.<sup>25</sup> The judge sent the jury back to deliberate, and the panel returned, finding Penn and Mead guilty of the lesser charge of preaching, but not guilty of unlawful assembly.<sup>26</sup> It repeated these findings thirty minutes later after being forced to reconsider.

Nearly berserk with anger at this announcement, the court Recorder ordered that the jury be locked in the jury room without "eat, drink, fire, and tobacco," or a chamber pot, until they reached a proper verdict on the unlawful assembly charge.<sup>27</sup> The next day, the jury refused to relent, and this time, the judge threatened to cut Bushel's throat.<sup>28</sup> Finally, on the day after that, the judge accepted the jury's not guilty verdict as to the unlawful assembly charge, but fined each juror forty marks.<sup>29</sup> Led by Bushel, eight of the jurors refused to pay the fine. The court promptly sent them to Newgate Prison, ironically

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69 (1994) (The exact charge was "preaching seditiously and causing a great tumult of people on the royal street to be there gathered together riotously and routously.").

20. *Id.*

21. JOHN GUNTHER, *THE JURY IN AMERICA* 24-25 (1988).

22. ABRAMSON, *supra* note 19, at 68-69.

23. *Id.* at 71 (emphasis added).

24. *Id.*

25. GUNTHER, *supra* note 21, at 26.

26. *Id.*

27. *Id.* (the Recorder further told the jury that "[y]ou shall not . . . thus . . . abuse the court, we will have a verdict by the help of God, or you shall starve for it.").

28. *Id.*

29. *Id.* at 27.





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where both Penn and Mead had been sent.<sup>30</sup> Bushel and his peers appealed their fines to the Court of Common Pleas, which, nearly a year after Penn's trial had ended, invalidated the fines.<sup>31</sup> Speaking through Chief Justice John Vaughan, the court found that a trial court could never punish a juror for his verdict.<sup>32</sup>

While *Bushel's Case* teaches about the need for limits on judicial coercion, it imparts no lesson about the proper limits on a judge's ability to insist that the jury continue deliberating. We turn now to that issue.

## B. The Common Law Gordian Knot

The grandeur of the common law is that it is an evolving judicial creation, almost a living thing. No case falls outside the purview of the common law. Common law judges can rely on moral philosophy, on prior cases, on logic, and on common sense to decide any issue that comes before them. Past cases demonstrate this flexibility. In 1682, the House of Lords established a rule permitting land to be made inalienable for the lifetime of someone who inherited the property – the beginning of the Rule Against Perpetuities.<sup>33</sup> The court was so lacking authority for its holding that when asked “where will you stop” in permitting land to be kept inalienable, Lord Nottingham responded: “I will tell you where I will stop: I will stop where-ever any visible Inconvenience doth appear.”<sup>34</sup> The House of Lords ruled in 1884 that the imminent death of four shipwrecked sailors would not justify killing the weakest sailor so the others could feed on his body and live.<sup>35</sup> Because there was no precedent, Chief Justice Coleridge relied on Lord Hale, Bracton, and other legal authorities in finding that necessity to save one's life could never be a defense to murder.<sup>36</sup>

In the famous American case of *Pierson v. Post*,<sup>37</sup> an early New York court had to decide whether pursuing a fox reduced it to the possession of the pursuer. There were no American precedents and all the English precedents relied on English statutes. With legal precedents thus unavailable, the common law court could turn to sources as exotic and diverse as Justinian, Puffendorf, Fleta, Bynkershock, Grotius, and treatise writers of the seventeenth and

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30. *Id.*

31. *Id.*

32. *Id.*; 124 Eng.Rep. 1006 (C.P. 1670).

33. *The Duke of Norfolk's Case*, 22 Eng. Rep. 931 (Ch. 1682).

34. *Id.* at 960.

35. *The Queen v. Dudley and Stephens*, 14 Q.B.D. 273 (1884).

36. *Id.* at 282-88 (the court cites to Lord Hale, Bracton, Sir Michael Foster, Serjeant Hawkins, Dalton, and Staundforde, while rejecting Lord Bacon's possible contention that necessity was a legal defense to murder).

37. 3 Cai. R. 175, 2 Am.Dec. 264 (N.Y.Sup. 1805). Available at 1805 N.Y. Lexis 311.



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eighteenth centuries to decide that pursuit is not possession.<sup>38</sup>

But the very flexibility of the common law approach can be its own worst enemy. Judges seek to decide new cases consistently with the precedents, rather than overrule them, and this can create a doctrine of ever finer distinctions. This tradition was necessary, of course, in an age when the law came only from judges. If later judges decide the same issue differently from earlier judges, then one does not have “law” in any coherent sense. One has random chance. Ronald Dworkin has given a name to this tradition: law as “integrity.”<sup>39</sup> Dworkin envisions judges deciding each new case consistently with “the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”<sup>40</sup> Those principles, of course, include all the relevant case law. Law as integrity thus requires judges to attempt to fit the prior cases into the decision they reach and the opinion they write.

Dworkin’s arresting metaphor for this process is a chain novel. Each of the prior chapters in the novel has been written by a different judge. Each successive judge “must try to make this the best novel it can be,” one that will be “construed as the work of a single author rather than, as is the fact, the product of many different hands.”<sup>41</sup> This interpretive enterprise requires a series of judgments about how best to understand what has come before. If possible, the judge must make her chapter fit the preceding chapters. It is only when that proves impossible that she will abandon the effort. Then the judge must begin a new novel. At that juncture she must overrule precedent, but only after she has considered every interpretation that might make the novel – the law – coherent.<sup>42</sup>

Dworkin’s theory has great explanatory power. It explains why law grows ever more complex. Supreme Court justices have, on occasion, noted and criticized this trend. Justice Clarence Thomas called the ever-growing complexity of constitutional law in the late twentieth century, “a regrettable development, for the law draws force from the clarity of its command and the certainty of its application. As the complexity of legal doctrines increases, moreover, so too does the danger that their foundational principles will become obscured.”<sup>43</sup> Somewhat more colorful is Justice Antonin Scalia’s description of a recent development in the Supreme Court’s confessions doctrine: “[T]he latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restrictions upon law

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38. *See id.* at 176-80.

39. *See* RONALD DWORKIN, *LAW’S EMPIRE* 176-275 (1986).

40. *Id.* at 225.

41. *Id.* at 229.

42. *Id.* at 230.

43. *Doggett v. United States*, 505 U.S. 647, 669 (1992) (Thomas, J., dissenting).

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enforcement.”<sup>44</sup> Castles, fairyland and otherwise, are in danger of collapsing if built too tall, as Justice Robert Jackson wisely observed in *Douglas v. City of Jeannette*: “This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.”<sup>45</sup>

Constitutional law is not, of course, technically common law because it is based on a text. But it is uncontroversial to assert that constitutional interpretation is based on the common law method.<sup>46</sup> The Court is led to “new temples” in constitutional law because the text is usually sufficiently expansive that it answers only a small, and often trivial, subset of questions, thus inviting reliance on the “common law” of constitutional precedents. The prohibition of unreasonable searches and seizures answers zero questions, in the absence of some further definition of “reasonable,” and this is the reason Fourth Amendment law teeters on the verge of incoherence. The Eighth Amendment prohibition of cruel and unusual punishments answers a small number of questions. It would not permit convicted defendants to be drawn and quartered or their body parts cut off. Beyond that, however, the Eighth Amendment tells us almost nothing. And however punitive modern legislatures have become, it is doubtful that any legislature would mandate drawing and quartering as a punishment. So that leaves the difficult real-life Eighth Amendment issues without a useful text.

When the common law Gordian knot becomes fully complete, law becomes so complex, inconsistent, and opaque that each case becomes its own self-contained rule. As law twists itself closer and closer into a fully complete Gordian knot, it begins to lose generalizable rules that have “bite,” though courts will surely trot out platitudinous verbiage and claim that it is following some rule or other. No better example of this phenomenon exists than the Fourth Amendment. One rule seems to exist, the one governing searches and seizures inside the home. The rule is that a warrant is required. But a moment’s reflection discloses so many exceptions to the rule that even it has little “bite.” Evidence found and seized in a home is admissible without a valid search warrant if (1) the owner consented;<sup>47</sup> (2) the police reasonably believe that the owner consents;<sup>48</sup> (3) the police reasonably believe that the entry and search is justified by exigent circumstances;<sup>49</sup> (4) the police made a good faith

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44. *Minnick v. Mississippi*, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting).

45. 319 U.S. 157, 181 (1943) (Jackson, J., separate opinion).

46. See DWORKIN, *supra* note 39, at 355-99 (applying law as integrity to constitutional interpretation).

47. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

48. *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

49. There are a host of situations that fit the exigent circumstances exception to the warrant requirement. See, e.g., *Schmerber v. California*, 384 U.S. 757 (1966); *Warden v. Hayden*, 387 U.S. 294 (1967); *Cupp v. Murphy*, 412 U.S. 291 (1973).

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effort to obtain a valid warrant;<sup>50</sup> (5) the evidence would have been inevitably found if the police had not searched and seized when they did;<sup>51</sup> (6) the person seeking to have the evidence suppressed was not the owner of the home or an overnight occupant;<sup>52</sup> or (7) the search is not conducted by or on behalf of a state or federal actor.<sup>53</sup> Similar exceptions exist for arrests made inside the home without a warrant. Indeed, the police can search a person arrested in the home, without a warrant, if they simply take him outside his home before searching him.<sup>54</sup>

So the “rule” about warrants being necessary for searches and seizures in a home is pretty porous. But at least it can be articulated as a rule. What can we say about searches outside the home? For decades, the Supreme Court’s approach here was that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.<sup>55</sup> This platitude has been ridiculed in dissents over the last decade. Justice Scalia has noted that there are “at least twenty exceptions to this rule.”<sup>56</sup> The Court, perhaps embarrassed by the criticisms from its own members as well as many commentators,<sup>57</sup> has stopped claiming that a search warrant preference is the rule outside the home. But then what is the rule? Is it merely that a search or seizure must be reasonable? That is Justice Scalia’s explicit position, one that would be a completed Gordian knot, but so far the Court has not embraced it. Instead, the Court examines each case to see how it fits with precedent. As each precedent gets hemmed in on all sides by later cases, it becomes narrower and narrower. Soon, perhaps the Fourth Amendment outside the home will become a complete Gordian knot with courts asking only whether the search or seizure was reasonable. In the meantime, it is close enough to prompt commentators to compare Fourth Amendment law to a tar-baby,<sup>58</sup> or an ocean liner that is rudderless and badly off course.<sup>59</sup> The same

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50. *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

51. *Nix v. Williams*, 467 U.S. 431 (1984).

52. *Minnesota v. Olson*, 495 U.S. 91 (1990); *Minnesota v. Carter*, 525 U.S. 83 (1999). *See also Rakas v. Illinois*, 439 U.S. 128 (1978) (one can contest a search or seizure only where it violated her own reasonable expectation of privacy).

53. *Burdeau v. McDowell*, 256 U.S. 465 (1921).

54. *United States v. Robinson*, 414 U.S. 218 (1973).

55. *Katz v. United States*, 389 U.S. 347, 357 (1967).

56. *California v. Acevedo*, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring in judgment).

57. *See, e.g., Craig M. Bradley, Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985).

58. *Id.* at 1468 (“The fourth amendment is the Supreme Court’s tar baby: a mass of contradictions and obscurities that has ensnared the ‘Brethren’ in such a way that every effort to extract themselves only finds them more profoundly struck.”).

59. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (“Fourth Amendment case law is a sinking ocean liner -- rudderless and badly off course -- yet most scholarship contents itself with rearranging the deck chairs.”).



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could be said of modern hung jury instructions.

And what of the right to a jury trial, which is the constitutional text at issue in the hung jury cases? The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .”<sup>60</sup> This right, unlike the prohibition of unreasonable searches and seizures and cruel and unusual punishments, is at one level about as determinate as words can be. Defendants must be tried by a panel of people who are not judges. But what does the right to trial by jury say about the content of instructions given to juries who cannot reach agreement? The answer: nothing. So courts have had to create a doctrine from nothing. And the result is roughly on par with the Court’s doctrine of unreasonable search and seizure. It is a Gordian knot that can be generously characterized as complex and inconsistent. It can be less charitably described as incoherent.

### C. Modern Judicial Coercion in Charging Juries to Continue Deliberations

The days of overt coercion in the mold of *Bushel’s Case* have long since passed. In their place remains the so-called “dynamite charge” from the *Allen v. United States*<sup>61</sup> line of cases, a charge that is given to hung juries as a supplemental instruction in hopes of untangling deadlock. While the central aim of the charge has not changed substantially since it was first enunciated by the U.S. Supreme Court in 1896, *Allen* is in need of replacement because it has twisted itself into a Gordian knot. Reflecting on this dilemma, the American Bar Association wrote, with only a bit of hyperbole, “There is not merely one Allen charge, but an infinite number of variations of the charge, in current use.”<sup>62</sup> These variations are heavily watered-down, long-winded versions of the original 1896 charge, often based on the ABA standards. Thus, trial courts face a seemingly endless sea of confusing supplemental charges that often provide more fodder for appeals than guidance to deadlocked jury panels.<sup>63</sup>

While some concerns about general supplemental instructions began to appear not long after *Allen’s* creation,<sup>64</sup> many state and federal courts continued

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60. U.S. CONST. amend. VI.

61. The charge is derived from *Allen v. United States (Allen III)*, 164 U.S. 492 (1896).

62. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY (1968) cited in 2A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CRIM. § 502, at 3 n. 24 (3d ed. 2000). See also Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 VA. L. REV. 123, 125 (1967) (“The progeny of Allen have displayed endless permutations.”).

63. For a history of Allen’s development, see *State v. Marsh*, 490 P.2d 491, 494-97 (Or. 1971) and *State v. Fields*, 487 P.2d 831, 835-39 (Alaska 1971).

64. Cf. *Peterson v. United States*, 213 F. 920, 924 (9th Cir. 1914) (court of appeals make no mention of Allen, but invalidates use of an unduly coercive deadlock charge). See also *Stewart v. United States*, 300 F. 769, 782-88 (8th Cir. 1924); *State v. Pyle*, 57 P.2d 93, 99 (Kan. 1936); *Eikmeier v. Bennett*, 57 P.2d 87 (Kan. 1936); Note, *An Argument for the Abandonment of the Allen Charge in California*, 15 SANTA CLARA L. REV. 939, 939 n.3 (1975).

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to use it.<sup>65</sup> However, the legal landscape changed when widespread complaints about *Allen* began to appear.<sup>66</sup> For the most part, the complaints consisted of the same general objection: that *Allen* is inherently coercive. Amid this groundswell, dozens of courts began to modify or ban the *Allen* charge.<sup>67</sup> The ABA even joined the fray, formally recommending that “the Allen charge should not be used,”<sup>68</sup> and then writing standards for modified supplemental instructions that many courts have since adopted in place of *Allen*.<sup>69</sup>

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65. See *People v. Gainer*, 566 P.2d 997, 1001 (Cal. 1977) (“Nevertheless, the Allen charge won relatively quick adoption in some 10 states . . . Undoubtedly the popularity of the instruction stemmed from its perceived efficiency as a means of ‘blasting’ a verdict out of a deadlocked jury in a manner which had the imprimatur of the highest court in the land.”) (citations omitted). See also *Huffman v. United States*, 297 F.2d 754, 756-59 (5th Cir.) (Brown, J., dissenting), cert. denied 370 U.S. 955 (1962).

66. Many of the Articles exploring *Allen* came out in the early 1970s, mostly student-written. Most of them condemn *Allen* to one degree or another, and support the ABA standards. See, e.g., Note, *Deadlocked Juries and Dynamite: A Critical Look at the “Allen Charge,”* 31 U. CHI. L. REV. 386 (1964); Note, *Supplemental Charge to a Deadlocked Jury in a Criminal Case*, 4 HOUSTON L. REV. 292 (1966); Note, *supra* note 62; Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100 (1968); Note, *Defusing the Allen Charge: A Critique of Allen and its Progeny*, 36 TENN. L. REV. 749 (1969); Note, *The Faltering Allen Charge and Its Proposed Replacement*, 16 ST. LOUIS L. REV. 619 (1972); Comment, *The Allen Charge: Dead Law a Long Time Dying*, 6 U. SAN FRANCISCO L. REV. 326 (1972); Note, *The Allen Charge Dilemma*, 10 AMER. CRIM. L. REV. 637 (1972); Comment, *Supplemental Jury Charges urging a Verdict – the Answer is Yet to Be Found*, 56 MINN. L. REV. 1199 (1972); Note, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y.U. L. REV. 296 (1972); Comment, *Instructing Deadlocked Juries: The Present State of the Allen Charge*, 3 TEXAS TECH. L. REV. 313 (1972); Comment, *ABA Jury Instructions Adopted as Preferable to Allen Charge*, 25 VAND L. REV. 246 (1972); Comment, *The Allen Charge: The Propriety of Giving Supplemental Instructions to a Deadlocked Jury*, 22 LOY. L. REV. 667 (1976); Paul Marcus, *The Allen Instruction in Criminal Cases: Is the Dynamite Charge About To Be Permanently Defused?*, 43 MO. L. REV. 613 (1978); Matthew Barasch, *Criminal Procedure: Antideadlock Jury Instructions in the District of Columbia*, 35 CATH. U. L. REV. 1179 (1986); Michael J. Crowley, *Jury Coercion in Capital Cases: How Much Risk Are We Willing to Take?*, 57 U. CIN. L. REV. 1073 (1989); David M. Stanton, Note, *United States v. Arpen: How Does the Dynamite Charge Affect Jury Determinations?*, 35 S.D. L. REV. 461 (1990).

67. See 2A FED. PRAC. & PROC. CRIM. § 502, at 3 nn.21-30.

68. ABA STANDARDS FOR CRIMINAL JUSTICE, 2d ed. (1979), at 15-43.

69. *Id.* For a summary of many of the ABA’s prior recommendations as to the *Allen* charge, see Note, *Deadlocked Juries and the Allen Charge*, 37 ME. L. REV. 167, 171-72 (1985).

The standards set out by the ABA are as follows:

“5.4 Length of Deliberations: deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

- (i) that in order to return a verdict, each juror must agree thereto;
- (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
- (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
- (iv) that in the course of deliberations, a juror should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous; and
- (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is

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We first describe the *Allen* Gordian knot in state and federal law before recommending a way to cut through the knot and begin anew.

#### D. Origins and Development of the Dynamite Charge

*Allen v. United States* represented the U.S. Supreme Court's first substantive attempt to craft an instruction to be given to juries unable to reach a unanimous verdict. In *Allen*, the defendant was charged with murder. His first and second trials in the federal court for the Western District of Arkansas ended in conviction, but both convictions were reversed by the Supreme Court.<sup>70</sup> A third murder trial was commenced against Allen in 1895. At that proceeding, after the case was submitted to the jury, the panel reported to the court that it was deadlocked, and requested instructions.<sup>71</sup> Eager to help the panel reach a verdict, the trial judge issued the following instruction to the jury, taken nearly verbatim from *Commonwealth v. Tuey*,<sup>72</sup> an 1851 Massachusetts state court decision that examined a similar supplemental jury instruction:

[I]n a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so, that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.<sup>73</sup>

The jury thereafter continued deliberations and promptly convicted Allen.

The Supreme Court affirmed Allen's murder conviction, holding that the trial court's instruction was not impermissible:

While undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments, and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment,

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nor reasonable probability of agreement.”

ABA STANDARDS RELATING TO TRIAL BY JURY § 5.4 (1968).

70. *Allen v. United States (Allen I)*, 150 U.S. 551 (1893); *Allen v. United States (Allen II)*, 157 U.S. 675 (1895).

71. *Allen III*, 164 U.S. at 501.

72. 62 Mass. (8 Cush.) 1 (1851).

73. *Allen III*, 164 U.S. at 501.

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or that he should close his ears to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions.<sup>74</sup>

In the 108 years since *Allen* was handed down, the Court has made very few other statements on the permissibility of supplemental jury instructions to deadlocked panels, and none as broad in scope as *Allen*. In a brief, one-page opinion, the Court held in *Jenkins v. United States* that a judge could not tell a deadlocked jury, “You have got to reach a decision in this case.”<sup>75</sup> The Court reasoned that this instruction was overly coercive and could have forced the jury into reaching a unanimous verdict.<sup>76</sup> Similarly, in *Brasfield v. United States*, the Court ruled that the trial judge could not ask a deadlocked jury of its numerical split, holding that such an inquiry would “be regarded as ground for reversal.”<sup>77</sup> The Court concluded that if a judge ascertained the breakdown of a deadlocked jury, it would place undue coercion on those in the minority.<sup>78</sup>

In *Lowenfield v. Phelps*, the Court expressly upheld *Allen*, noting that “[t]he continuing validity of this Court’s observations in *Allen* are beyond dispute.”<sup>79</sup> *Lowenfield* upheld the use of an *Allen* charge, in conjunction with two jury polls by the trial judge inquiring if further deliberations would be useful during the sentencing phase of a capital murder trial.<sup>80</sup> The Court declined to apply *Jenkins*, finding that the language the trial judge had used in *Jenkins* was much stronger than that which the judge used in his supplemental instruction in *Lowenfield*.<sup>81</sup> The Court also rejected the defendant’s reliance on *Brasfield*, noting that the jury polls were not of the panel’s vote on the ultimate issue – the defendant’s sentence – but merely of each juror’s *belief* of whether further deliberations would be useful in helping reach a unanimous verdict.<sup>82</sup>

Thus, *Allen* charges are constitutional. But long before *Lowenfield*, courts had begun to retreat from *Allen* for fear that even the relatively mild *Allen* charge was coercive.<sup>83</sup>

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74. *Id.* at 501-02.

75. 380 U.S. 445 (1965) (per curiam). For a transcript of the trial judge’s instruction, see *Jenkins v. United States*, 330 F.2d 220, 221 n.2 (C.A.D.C. 1964) (Wright, J., dissenting).

76. *Id.* at 446.

77. 272 U.S. 448, 450 (1926). After the jury indicated it was deadlocked, the judge inquired as to the numerical breakdown of the split, and the jury reported it was nine-to-three. Soon thereafter, the jury found the defendant guilty.

78. *Id.* See also Note, *supra* note 62, at 131 n.43. The issue of whether the trial court may inquire into the numerical breakdown of a deadlocked jury is itself an important issue. For a breakdown of the relevant case law, see George R. Priest, Annotation, *Propriety and Prejudicial Effect of Trial Court’s Inquiry as to Numerical Division of Jury*, 77 A.L.R.3d 769, §§ 3-5 (1977).

79. 484 U.S. 231, 237 (1988). The Court has reinforced this view at other times. See *Jones v. United States*, 527 U.S. 373, 382 & n.5 (1999).

80. *Id.*

81. *Id.* at 239 (“The difference between the language used there and the language used in the present case is sufficiently obvious to show the fallacy of petitioner’s request.”).

82. *Id.* at 239-40.

83. See *United States v. Seawell*, 550 F.2d 1159, 1163 (9th Cir. 1977) (“A single *Allen* charge, without more, stands at the brink of impermissible coercion. . . . We conclude that as a sound rule of





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## E. The Modern Law of Dynamite Charges

Probably because the Supreme Court has provided little guidance, many jurisdictions have adopted different sets of guidelines for deadlock charges.<sup>84</sup> While some of the procedures are quite similar to each other, all of them are filled with intricacies. As a result, each trial court is left to give its own different charge and hope that it conforms to whatever variation the particular court of appeals decides to apply. This is made quite apparent when one examines the landscape of the federal circuit courts.<sup>85</sup>

### *i. Allen in the Federal Circuits*<sup>86</sup>

By the 1960s, several judges on the U.S. courts of appeals were openly wondering whether *Allen*'s language might force jurors to abandon their beliefs to come to a unanimous verdict.<sup>87</sup> Over time, federal appeals courts began to approve heavily modified dynamite charges that were filled with "balancing language."<sup>88</sup> The new charges addressed all members of a panel, and did not

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practice it is reversible error to repeat an Allen charge. . .").

84. The tremendous outgrowth of Allen modifications and alternative versions was apparent as early as the 1960s. See *Kent v. United States*, 343 F.2d 247, 261 n.22 (D.C. Cir. 1965) *rev'd on other grounds*, 383 U.S. 541 (1966) ("The designation of 'an Allen charge' has tended to become an oversimplification since, as might be expected, the express words before the Supreme Court in the Allen case have, in the intervening years, been frequently rearranged or altered, with resulting variations in emphasis or impact."). See also *State v. Thomas*, 342 P.2d 197 (Ariz. 1959); *State v. Randall*, 353 P.2d 1054, 1057-58 (Mont. 1960). In its early rejection of Allen, the Arizona Supreme Court made a prescient observation:

It now appears that [Allen's] continued use will result in an endless chain of designs, each link thereof tempered and forged with varying facts and circumstances welded with the everchanging personalities of the appellate court. This is not in keeping with sound justice. . . . We are convinced that the evils far outweigh the benefits, and decree that its use shall no longer be tolerated and approved by this court.

342 P.2d at 200.

85. See generally 1A KEVIN F. O'MALLEY, JAY E. GRENIG, & WILLIAM C. LEE, *JURY PRAC. AND INST. CRIM.* § 20.08 (5th ed. 2000).

86. For a fuller discussion of the case law in each of the circuits, see Wayne F. Foster, Annotation, *Instructions Urging Dissenting Jurors in Federal Criminal Case to Given Due Consideration to Opinion of Majority (Allen Charge) – Modern Cases*, 44 A.L.R.Fed. 468, §§ 3-7 (1964).

87. See *Speak v. United States*, 161 F.2d 562, 565 (10th Cir. 1947) ("The propriety of an instruction such as we have under consideration must be determined from whether it had a tendency to coerce the jurors in their deliberations so that the verdict which they ultimately reached and returned into court was not truly their own, but was brought about in part by coercion from the court."); *Huffman*, 297 F.2d at 759 (Brown, J., dissenting) ("The fact is that in many phases of criminal law we have come a long way since 1896. There is no longer any place for the Allen charge."); *Jenkins*, 330 F.2d at 222 (Wright, J., dissenting) (argued that the Allen charge was "condemned" and advocated for its abolition). See also *United States v. Kenner*, 354 F.2d 780, 783-84 (2d Cir. 1965) (court possessed "grave doubts whether the charge as given was not unduly coercive."); *Thaggard v. United States*, 354 F.2d 735, 739-41 (5th Cir. 1965) (Coleman, J., dissenting) ("I cannot see that the qualifications, reservations, and escape clauses customarily used in modern versions of the [Allen] charge save it from being what it is, and what the jury believes it to be, a direct appeal from the Bench for a verdict."); *Green v. United States*, 309 F.2d 852, 854-57 (5th Cir. 1968).

88. See Note, *supra* note 62, at 129; *Thaggard*, 354 F.2d at 739. But see *Fulwood v. United States*, 369 F.2d 960, 962 (D.C. Cir. 1966) (holding that an unbalanced instruction to deadlocked jury was not

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implore jurors in the minority to reconsider their views. By doing so, many courts believed, the trial judge would not give jurors in the minority the impression that the court was singling only them out. Failure to include balancing language to this effect in a charge was gradually found to constitute per se coercion by many courts.<sup>89</sup> Today, many of the different supplemental charges used by the federal circuits reflect these feelings about *Allen*.

The United States Court of Appeals for the First Circuit uses a cautious approach in dealing with deadlocked juries. In *United States v. Nichols* the First Circuit articulated a three-prong test for determining whether a district court's dynamite charge was proper.<sup>90</sup> The court has held that the "district court should instruct jurors in substance that (1) members of both the majority and minority should reexamine their position, (2) a jury has the right to fail to agree, and (3) the burden of providing guilt beyond a reasonable doubt remains with the government."<sup>91</sup> Failure to follow these three requirements, the First Circuit found, would require reversal of a defendant's conviction.<sup>92</sup> Further, where the jury indicates that it is deadlocked, the judge must tell the jurors that they will not be expected to deliberate indefinitely until a unanimous verdict is reached.<sup>93</sup> This watered-down method seeks to ensure that no undue pressure is ever placed on a deadlocked jury.

The Eighth Circuit has endorsed a similar balanced instruction, urging that supplemental charges be given to deadlocked panels with "great care."<sup>94</sup> The Eighth Circuit defined five factors that are examined to determine if a charge is permissible: "a recognition that a majority of jurors may favor acquittal, that the government has the burden of proof beyond a reasonable doubt, that both the majority and minority should reexamine their views, that the jurors should not abandon conscientiously held views, and that the jury was free to deliberate as long as necessary."<sup>95</sup> Later, the court created another test for coerciveness which examines four factors: "(1) the content of the challenged instruction, (2) the length of the period of deliberations following the *Allen* charge, (3) the total

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per se coercive).

89. See *Powell v. United States*, 297 F.2d 318 (5th Cir. 1961).

90. 820 F.2d 508, 511-12 (1st Cir. 1987). The elements of the test were first described in *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971).

91. *United States v. Manning*, 79 F.3d 212, 222 (1st Cir.), *cert. denied*, 519 U.S. 853 (1996).

92. See *United States v. Paniagua-Ramos*, 135 F.3d 193, 197-98 (1st Cir. 1998) ("In situations where the substance of these elements was not communicated to the jury, the court has found reversible error without further inquiry.").

93. See *Manning*, 79 F.3d at 223. The court of appeals has also held that while giving multiple modified *Allen* charges is not forbidden, the court should strongly avoid doing so. *United States v. Barone*, 114 F.3d 1284, 1304 (1st Cir. 1997) ("A successive charge tends to create a greater degree of pressure" on jurors). See also *Flannery*, 451 F.2d at 883 ("This charge has been called the dynamite charge. Like dynamite, it should be used with great caution, and only when absolutely necessary.").

94. *United States v. Young*, 702 F.2d 133, 136 (8th Cir. 1983).

95. *United States v. Robinson*, 953 F.2d 433, 436 (8th Cir. 1992). See also *United States v. Webb*, 816 F.2d 1263, 1266 (8th Cir. 1987).

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time of deliberation, and (4) any indicia in the record of coercion or pressure upon the jury.”<sup>96</sup> Like the Eighth Circuit, the Tenth Circuit allows a modified *Allen* charge, but strongly advises its district courts to give supplemental instructions as part of the final instructions to the jury and not when the jury first becomes deadlocked.<sup>97</sup> Further, in examining a charge for coerciveness, the Tenth Circuit looks at the language of the instruction, its timing, whether it was given with other instructions, and how long the jury deliberated after hearing the instruction before rendering a verdict.<sup>98</sup>

The Fourth Circuit has also defined numerous factors that are relevant in a coercion inquiry, including “the charge in its entirety and in context; suggestions or threats that the jury would be kept until unanimity is reached; suggestions or commands that the jury must agree; indications that the trial court knew the numerical division of the jury; indications that the charge was directed at the minority; the length of deliberations following the charge; the total length of deliberations; whether the jury requested additional instruction; and other indications of coercion.”<sup>99</sup>

Other circuits have rejected *Allen*. Both the Third Circuit and the District of Columbia Circuit have banned the *Allen* charge outright. In *United States v. Fioravanti*, the Third Circuit called the *Allen* charge discredited and fraught with “treachery,”<sup>100</sup> and held that any *Allen* instructions given to a jury would be automatic grounds for reversal.<sup>101</sup> It reasoned that the dynamite charge violated the jury’s “exclusive providence” of determining guilt or innocence by coercing a verdict.<sup>102</sup> The court of appeals further held that any supplemental charge must be carefully crafted and avoid any language which encourages specific jurors to reconsider their views during deliberations.<sup>103</sup> In place of the *Allen* charge, the Third Circuit allowed the use of a supplemental instruction with innocuous language that merely urged jurors to “consult with each other” but never “surrender [their] honest conviction as to the weight . . . of evidence.”<sup>104</sup>

In *United States v. Thomas*, the D.C. Circuit replaced the *Allen* charge,

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96. Webb, 816 F.2d at 1266 (quoting *United States v. Smith*, 635 F.2d 716, 721 (8th Cir. 1980)).

97. *United States v. Alcorn*, 329 F.3d 759, 767 (10th Cir. 2003).

98. *Id.* at 765; *Gilbert v. Mullin*, 302 F.3d 1166, 1173 (10th Cir. 2002).

99. *Tucker v. Catoe*, 221 F.3d 600, 611 (4th Cir. 2000). See also *United States v. Burgos*, 55 F.3d 933, 936-37 (4th Cir. 1995).

100. 412 F.2d 407, 417 (3d Cir. 1969).

101. *Id.* at 420 (“But hereafter this court will not let a verdict stand which may have been influenced in any way by an Allen Charge.”). See also *United States v. Burley*, 460 F.2d 998, 999 (3d Cir. 1972) (holding that a supplemental instruction to deadlocked jury which made mention of the expense of a new trial was coercive). But see *United States v. West*, 877 F.2d 281, 291 (4th Cir. 1989) (court of appeals held trial judge’s reference to the expense of a retrial was improper but not grounds for reversal of conviction).

102. *Fioravanti*, 412 F.2d at 417.

103. *Id.* at 420.

104. *Id.*



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which had been the standard supplemental instruction in the District, with the standards crafted by the ABA<sup>105</sup> The new instruction made no mention of jurors in the minority or majority and urged jurors to weigh the evidence presented at trial, but never surrender their honestly held beliefs.<sup>106</sup> Like the charge instituted by the Third Circuit, the D.C. Circuit's instruction retains little of the language from the original *Allen* charge. It illustrates how over time, courts have gone to considerable lengths to sanitize supplemental instructions given to hung juries. As a result, guidelines have been crafted that do nothing to help break deadlock in criminal trials, while their many exceptions, caveats, restrictions, and requirements only further litter the jurisprudence with confusing case law.

At the other extreme, some circuits continue to use the dynamite charge in a form very close to the original approved by the Supreme Court in 1896. The Second Circuit has issued opinions in the last decade reaffirming dedication to the original *Allen* charge. In *United States v. Melendez*, the Second Circuit held that *Allen* was still applicable, despite vociferous objections by the defendant.<sup>107</sup> Recently, the Second Circuit expanded on its reading in *Melendez*, ruling that an *Allen* charge would only be grounds for reversal where it was coercive, with coercion being determined by a "totality of circumstances" test.<sup>108</sup>

Similarly, the Fifth Circuit has approved a version very close to the original *Allen* charge for use by its courts. One approved charge tells a deadlocked jury that "[t]he trial has been expensive in time, effort, and money to both the defense and the prosecution."<sup>109</sup> It then notes that if the jury cannot come to a

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105. 449 F.2d 1177 (D.C. Cir. 1971).

106. See *United States v. Dorsey*, 865 F.2d 1275, 1276 (D.C. Cir. 1989). In *Dorsey*, the court of appeals found that the given supplemental instruction was not coercive, and borrowed from the ABA's own suggested instruction:

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges – judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

*Id.* at 1276.

107. 60 F.3d 41, 52 (2d Cir. 1995).

108. *United States v. Crispo*, 306 F.3d 71, 77 (2d Cir. 2002). The Second Circuit's view is in seeming accordance with the Supreme Court's test established in *Jenkins*. See *Jenkins*, 380 U.S. at 446 (the Court held that trial court actions would be judged in "[their] context and under all the circumstances" to determine if coercion was present).

109. Pattern Jury Instructions of the Fifth Circuit, Criminal Cases, Instruction No. 1.45 (2001).



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verdict, the matter “[would be] left open and must be tr[ie]d again.”<sup>110</sup> While most circuits would surely find this language coercive because it makes jurors feel as though they must come to a verdict, the Fifth Circuit has upheld these instructions on several occasions.<sup>111</sup> In fact, one Fifth Circuit opinion even spoke of “Allen’s age-old wisdom.”<sup>112</sup>

The wildly varying approaches of the federal courts of appeal suggest that there is no federal law about how to charge deadlocked juries. The states are equally twisted in their approaches.

*ii. State Courts and Dynamite*

Like the federal circuits, some states have banned the charge outright, others have crafted their own modified charges, and some retain the dynamite charge in its nearly original language from 1896. For the most part, however, the states have stopped using *Allen* for the same reasons many of the federal circuits have abandoned it. There has been a pronounced drive in many states to adopt the ABA’s suggested standards for supplemental instructions and scrap the old *Allen* charge. By one commentator’s count, almost half of the states have integrated the ABA standards either partially or completely into their own hung jury instructions.<sup>113</sup>

The standards suggested by the ABA make several changes to the *Allen* charge. They advocate a supplemental charge that does not specifically address any particular jurors – whether they are in the minority or majority of the deadlocked panel – but rather speaks to the panel generally. They emphasize that no juror should abandon his or her “honest conviction[s].”<sup>114</sup> Finally, and perhaps most importantly, the ABA instruction is to be given not when deadlock is first encountered, but instead right before the start of deliberations. This last requirement ensures, at least in the ABA’s eyes, that there is no coercion by making jury members think that they must come to a verdict.

There are a large number of permutations to the charges given to deadlocked juries today. This includes differences not only in the language and structure of the charge, but the time that it is given,<sup>115</sup> the number of times that it can be given,<sup>116</sup> whether it can be given if the jury informs the judge of its

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110. *Id.* See also *United States v. Diggs*, 522 F.2d 1310, 1321 n.24 (D.C. Cir. 1975).

111. See *United States v. Winters*, 105 F.3d 200, 203-04 (5th Cir. 1997); *Boyd v. Scott*, 45 F.3d 876, 883 (5th Cir. 1994); *United States v. Redd*, 355 F.3d 866, 877 (5th Cir. 2003).

112. *United States v. Straach*, 987 F.2d 232, 243 (5th Cir. 1993).

113. Wayne F. Foster, Annotation, *Instructions Urging Dissenting Jurors in State Criminal Cases to Give Due Consideration to Opinion of Majority (Allen Charge) – Modern Cases*, 97 A.L.R.3d 96, § 5 (a) (1980).

114. *Id.*

115. See *People v. Morrison*, 532 N.E.2d 1077, 1090 (Ill.App. 1988).

116. See *Palanti v. Dillon Enterprises, Ltd.*, 707 N.E.2d 695, 701-02 (Ill. App. 1st Dist. 1999) (holding that the giving of multiple instructions to the jury was not error per se); *United States v.*

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exact numerical breakdown,<sup>117</sup> and even if it can be given without counsel present at the time.<sup>118</sup> These variations are just some of the more prominent modifications state courts have made to their deadlock supplemental instructions. It is impossible to precisely catalogue all of them.

Alaska has rejected the use of the dynamite charge, replacing it with the ABA standards.<sup>119</sup> California,<sup>120</sup> Colorado,<sup>121</sup> Hawaii,<sup>122</sup> Illinois,<sup>123</sup> Louisiana,<sup>124</sup> New Jersey,<sup>125</sup> Ohio,<sup>126</sup> and others have banned the *Allen* charge, replacing it with a heavily modified version or a model molded after the ABA's suggested elements.<sup>127</sup> Each of these states has abandoned *Allen* out of concern

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Ruggiero, 928 F.2d 1289, 1299 (2d Cir. 1991).

117. See *United States v. Armstrong*, 654 F.2d 1328, 1333 (9th Cir. 1981) ("Mere revelation of the numerical division of a jury, although to be discouraged, does not compel a mistrial."); *State v. Fowler*, 322 S.E.2d 389, 392-93 (N.C. 1984) (finding that it was not error for the judge to know the numerical breakdown of the deadlocked jury); *United States v. Gambino*, 951 F.2d 498, 500-02 (2d Cir. 1991); *United States v. Parsons*, 993 F.2d 38, 41-42 (4th Cir. 1993). But see *United States v. Samuel Dunkel & Co.*, 173 F.2d 506, 510-11 (2d Cir. 1949) (holding that inquiry into the jury's division was per se error); *People v. Talkington*, 47 P.2d 368, 372-76 (Cal.App. 3d Dist. 1935) (holding that it is per se error for the judge to inquire of the deadlocked jury's numerical breakdown). See generally 75B AM. JUR. 2d Trial § 1583 (2d ed. 2004).

118. See *United States v. Cowan*, 819 F.2d 89, 93 (5th Cir. 1987); *United States v. Neff*, 10 F.3d 1321, 1324 (7th Cir. 1993); *State v. Estrada*, 738 P.2d 812, 828 (Haw. 1987); *United States v. Ronder*, 639 F.2d 931, 934 (2d Cir. 1981). But see *United States v. Hernandez*, 146 F.3d 30, 35 (1st Cir. 1998).

119. *Fields*, 487 P.2d 831. Alaska formally embraced *Allen* in *Chase v. State*, 369 P.2d 997, 1005 (Alaska 1962). See also 75B AM. JUR. 2d Trial § 1589 (2004).

120. *Gainer*, 566 P.2d at 1009 (stipulating that the *Allen* charge "should never again be read in a California courtroom.").

121. *People v. Schwartz*, 678 P.2d 1000, 1012 (Colo. 1984) (court endorses modified supplemental charge which urges jurors not to give up honest opinion); *People v. Watson*, 53 P.3d 707, 713 (Colo.App. 2001) (modified instruction instructs jurors that (1) they should try to reach a unanimous verdict; (2) each juror should consider the evidence impartially and consider it with other panelists; (3) should not hesitate to re-examine views if necessary; (4) and should not surrender their honest beliefs just to return a verdict).

122. *State v. Fajardo*, 699 P.2d 20, 25 (Haw. 1985) ("We are convinced that the evils far outweigh the benefits, and decree that [the use of the *Allen* instruction] shall no longer be tolerated and approved by this court.").

123. *People v. Prim*, 289 N.E.2d 601, 606-10 (Ill. 1972). See generally 14B Ill. Law & Prac. Criminal Law § 770 (2003); 6 Ill. Prac., Criminal Practice and Procedure § 26.93; John F. Decker, *Post-Instruction Issues: Jury Deliberations and Verdict*, 34 LOY. U. CHI. L.J. 569, 587-95 (2003).

124. *State v. Nicholson*, 315 So.2d 639, 641 (La. 1975) ("[W]e henceforth ban the use of the 'Allen charge' and of any coercive modification thereof in the courts of Louisiana.").

125. *State v. Czachor*, 413 A.2d 593, 598 (N.J. 1980) ("We come to the conclusion that the *Allen* charge conveys both blunt and subtle pressure upon the jury, pressure which is inconsistent with jury freedom and responsibility. Such a charge does not permit jurors to deliberate objectively, freely, and with an untrammelled mind. We accordingly hold that such a charge containing coercive features should not be given to a jury in the trial of a criminal case.").

126. *State v. Howard*, 537 N.E.2d 188, 192-95 (Ohio 1989).

127. Several states have expressly scrapped the *Allen* charge. See *Lewis v. State*, 424 N.E.2d 107, 111 (Ind. 1987) (requires that when deadlock is encountered, the judge can order further deliberations, but must also reread all of the final instructions to the jury); *State v. Flint*, 761 P.2d 1158, 1162-65 (Idaho 1988); *State v. White*, 285 A.2d 832, 837-38 (Me. 1972) (ABA standards and charge are recommended for Maine courts); *People v. Sullivan*, 220 N.W.2d 441, 450 (Mich. 1974) (any supplemental instructions to deadlocked jury must be in accordance with the ABA instruction); *State v. Martin*, 211 N.W.2d 765, 772 (Minn. 1973) ("We hold now that use of the *Allen* charge shall be discontinued in Minnesota and the procedures set forth in ABA Standards. . . are adopted for the trial

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that it coerces jurors into reaching a unanimous verdict. This mass rejection of *Allen* is well illustrated by the courts in California and Michigan. The California Supreme Court scrapped *Allen* and any variations of it, finding that the decision was a relic that inherently coerced jurors.<sup>128</sup> Similarly, the Michigan Supreme Court held that any substantial variation from the ABA instruction would be automatic grounds for reversal.<sup>129</sup>

Other states allow more leeway. In Alabama, for example, the dynamite charge can be used by criminal trial judges so long as the language of the instruction is not threatening.<sup>130</sup> In Arkansas, judges can administer an *Allen* charge and even make reference to the potential cost of a retrial,<sup>131</sup> as well as inquire of the foreperson as to the deadlocked jury's numerical breakdown.<sup>132</sup> Similarly, Connecticut's version of the *Allen* charge, the "Chip Smith" charge, has been upheld despite its urgings to jurors in the minority to reconsider their views.<sup>133</sup> Texas has done the same.<sup>134</sup> Giving the charge multiple times is also fair game in several jurisdictions.<sup>135</sup> But these states are in the distinct minority in their qualified support of *Allen*.

Perhaps the only thing that all of the states have in common is that each of their instructions includes language which cautions jurors not to acquiesce during deliberations. Finding your way through the modern *Allen* forest is exceedingly difficult. Nor have the ABA standards helped. When first created, these standards were seen as a solution to *Allen's* perceived deficiencies. However, as we have demonstrated, the ABA standards have only further clouded the *Allen* issue. Deadlock instructions are still routinely challenged as coercive by defendants. These federal and state charges are just the veritable tip of the iceberg. They represent only a tiny portion of the different instructions

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courts in this state."); *Sharplin v. State*, 330 So.2d 591, 596 (Miss. 1976) ("[t]he 'Allen Charge' in any of its various forms should not given."); *State v. Garza*, 176 N.W.2d 664, 666-67 (Neb. 1970); *Wilkins v. State*, 609 P.2d 309, 312-13 (Nev. 1980); *State v. Blake*, 305 A.2d 300, 306 (N.H. 1973); *State v. Alston*, 243 S.E.2d 354, 364-67 (N.C. 1978); *Commonwealth v. Spencer*, 275 A.2d 299, 303-05 (Pa. 1971); *State v. Patriarca*, 308 A.2d 300, 320-23 (R.I. 1973); *State v. Ferguson*, 175 N.W.2d 57, 59-61 (S.D. 1970); *Kersey v. State*, 525 S.W.2d 139 (Tenn. 1975); *Hoskins v. State*, 552 P.2d 342 (Wyo. 1976). Others states have merely recommended the use of the ABA charge. *See Commonwealth v. Rodriguez*, 300 N.E.2d 192, 200-02 (Mass. 1973); *State v. Perry*, 306 A.2d 110, 112 (Vt. 1973); *Winters v. United States*, 317 A.2d 530, 532-34 (D.C. 1974).

128. *Gainer*, 566 P.2d at 1004-05, 1009.

129. *Sullivan*, 220 N.W.2d at 450 (Mich. 1974). Maryland adopted a similar approach, finding that a trial court committed reversible error where it gave a modified version of the *Allen* charge instead of the preferred ABA instruction. *See Burnette v. State*, 371 A.2d 663, 666-69 (Md. 1977).

130. *Maxwell v. State*, 828 So.2d 347, 365 (Ala. Crim. App. 2000).

131. *Griffin v. State*, 617 S.W.2d 21, 23 (Ark.App. 1981). *See also Wright v. State*, 553 S.E.2d 787, 789 (Ga. 2001); *Freeman v. State*, 115 S.W.3d 183, 186 (Tex. App. Texarkana 2003).

132. *Davis v. State*, 892 S.W.2d 472, 474-75 (Ark. 1995).

133. *State v. O'Neill*, 511 A.2d 321 (Conn. 1986).

134. *See* 8 Tex. Prac., Criminal Forms and Trial Manual § 96.31 (10th ed. 2004).

135. *See Jones v. State*, 505 S.E.2d 749, 753-54 (Ga. 1998). *But see Washington v. State*, 758 So.2d 1148, 1154 (Fla.App.4.Dist. 2000) (holding that it is per se reversible error to give a supplemental instruction twice to a deadlocked jury).

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state criminal courts use in instructing deadlocked juries today.

Confusing? Undoubtedly. A Gordian knot? Considering the law in the United States as a whole, it is certainly twisted quite thoroughly. Of course, in any individual jurisdiction, as long as the judge sticks to the charge that the highest court has approved, he or she can follow a rule as to the content of the charge. The difficulty is that the state and federal courts have no clear law about how many times the charge can be given, whether it may be varied if it is given again, and how long a jury may be held before a mistrial is the only, or the best, option. Thus, even trial judges who give the prescribed instruction face a Gordian knot if the first charge does not work. Judges do not like to be reversed, of course, and the net effect of the Gordian knot in this context is that judges usually don't give the charge more than once or twice. The judicial reluctance to keep juries deliberating results in more mistrials. How much do these additional mistrials harm the system?

#### F. Assessing the Hung Jury Problem

While there are scant studies on the frequency of hung juries in American courts today, the existing data do not reveal a crisis.<sup>136</sup> The data do show, however, sufficient hung juries in state and federal courts to justify seeking a remedy to reduce the number. Hung jury rates in many states are quite high. Moreover, while the Double Jeopardy Clause permits a retrial,<sup>137</sup> retrials are expensive. In many jurisdictions, a trial can run close to \$10,000 per day, with many cases running even higher.<sup>138</sup> One must also take into account the emotional toll that retrials pose for criminal victims as well as their families. It is therefore not surprising that one study found that only one-third of hung jury mistrial cases are retried.<sup>139</sup> Thus, relying on a state's ability to initiate a retrial is a poor solution. A better solution would be to reduce the number of mistrials.

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136. Nevertheless, in recent years, in the wake of several high-profile mistrials, hung juries have received considerable coverage by the news media. See, e.g., Jeffrey Rosen, *One Angry Woman*, THE NEW YORKER, 55 (Feb. 24 & March 3, 1997) (discusses the trend of black women on juries deadlocking criminal trials of young black defendants in the District of Columbia); Joan Biskupic, *In Jury Rooms, Form of Civil Protest Grows*, WASH. POST, Feb. 8, 1999, at A1; Seth Mydans, *The Other Menendez Trial, Too, Ends with the Jury Deadlock*, N.Y. TIMES, Jan. 29, 1994, at A1; Carrie Johnson, *Judge Declares Mistrial in Tyco Case*, WASH. POST., April 3, 2004, at A1.

137. *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824), is understood today to stand for the proposition that double jeopardy is not violated when a mistrial is granted because of a hung jury. One of us has argued that Justice Story's opinion in *Perez* has been misunderstood. See George C. Thomas III, *Solving the Double Jeopardy Mistrial Riddle*, 69 S. CAL. L. REV. 1551 (1996). But the understanding, or misunderstanding, is settled law today.

138. Dwayne Bray, *Prosecutors Seek a Change in Jury-Voting System*, L.A. TIMES, June 11, 1995, at B8. Similarly, in Santa Clara County, it was estimated that trials cost nearly \$3,000 per day. Sandra Gonzales, *Movement Afoot to Reform Juries*, SAN JOSE MERCURY NEWS, May 8, 1995, at 1A.

139. PLANNING AND MANAGEMENT CONSULTING CORPORATION, *EMPIRICAL STUDY OF OCCURRENCE CASE EFFECTS AND AMOUNT OF TIME CONSUMED BY HUNG JURIES*, 4-30 to 4-37 (1975).





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The best and most recent study of hung juries was conducted by the National Center for State Courts (NCSC).<sup>140</sup> The NCSC looked at criminal felony trials in all the federal district courts<sup>141</sup> from 1980 to 1997, using information provided by the Administrative Office of the United States Courts.<sup>142</sup> The NCSC also examined hung jury rates in the states. However, because of the sheer volume of criminal jury trials that are conducted in the states every year, the authors used the thirty most populated counties in the U.S. from 1996 to 1998.<sup>143</sup>

Overall, the NCSC authors found that between 1996 and 1998, mistrials resulting from deadlock in state courts occurred at a rate of 6.2%.<sup>144</sup> The rates varied dramatically in some cases. For example, Los Angeles County had a hung jury rate of almost 15%, and New York County had a 9% rate.<sup>145</sup>

The NCSC found that federal criminal juries hung at a rate of approximately 2.54% between 1980 and 1997.<sup>146</sup> The study showed that the rates were uniformly low among the twelve federal circuits, with one exception: the District of Columbia Circuit.<sup>147</sup> Criminal jury trials that ended in deadlock in federal courts in the D.C. Circuit occurred at a rate of 9.5%.<sup>148</sup> No other circuit exceeded 3.1% during any one year in that three-year period.<sup>149</sup>

Is a mistrial rate that ranges from 2.5% to 15% a significant problem? A fifteen percent hung jury rate must be burdensome to the California court system. Using the state average, 6.2%, about 3,500 hung jury mistrials occur in

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140. In addition to the NCSC study, there have been other notable studies on hung jury rates. The first was *THE AMERICAN JURY*, written in 1966 by Harry Kalven, Jr. and James Zeisel, which found that mistrials resulting from hung juries occurred in approximately 5.5% of all criminal cases in the United States. *Id.* at 56. Another, conducted by the Planning and Management Consulting Corporation, studied the rate of hung juries in California courts. It found that between 1971 and 1973, the average rate of hung juries in California's ten biggest counties was over 12%. *PLANNING AND MANAGEMENT STUDY*, *supra* note 139, at 4-6, 4-30 to 4-37. On the whole, however, there have been few studies which have examined the rate of hung juries in American courtrooms.

141. As of January 2005, there were 665 federal district judges in the United States. *See* <http://www.allianceforjustice.org/judicial/about/frequently.html>.

142. Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, and G. Thomas Munsterman, *Are Hung Juries a Problem?*, (Report of The National Center for State Courts, September 30, 2002). The study is available at: [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_HungJuriesProblemPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf).

143. *Id.* at 24. The authors provide a detailed description of their methodology and how they researched these statistics. For a full list of the counties studied, with their average number of criminal jury trials per year and hung jury rates from 1996 to 1998, see *id.* at 25.

144. *Id.* at 20, 25.

145. *Id.* at 25 fig. 2.5.

146. *Id.* at 22-23 fig. 2.3, 2.4. These statistics are taken straight from a chart of hung jury rates that the NCSC authors provide. We estimated the criminal hung jury rates for each year and averaged them. Therefore, there may be a slight variation between the 2.54% described here and the actual percentage. However, because the study did not provide the exact percentage, an estimation was required.

147. *See* Hannaford-Agor, et al., *supra* note 142, at 23 fig. 2.4.

148. *Id.*

149. *Id.*

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a year. Using the estimate for retrials, about 2,000 state felony trials would end without a verdict. To be candid, if it were difficult to sever the mistrial Gordian knot, it might not be worth the candle. The system can very well tolerate 2,000 felony trials that end without a verdict. But it is so easy to solve the problem that courts should cut the hung jury Gordian knot. We explain how in the next part.

### III. CUTTING THE GORDIAN KNOT

Given the wide disparity in the permitted charges, and the lack of guidance on how many times a charge can be given and how long a jury can be kept in deliberation, judicial coercion may well lurk in the various charges that have grown from the *Allen* weed. No modern system would permit the kind of coercion practiced in *Bushel's Case*. The Supreme Court held that it is coercive to tell a jury it has to reach a verdict and that seems right to us. But what if there were a type of charge that was almost entirely cleansed of coercion? In that case, we believe, judges could be trusted to give it as many times as seemed helpful.

Is there a largely coercion-free charge? We believe the answer is yes and that it is an obvious solution. It first seemed odd that no one had thought of this obvious solution, but the reason is, once again, the Gordian knot. If a legislature took a look at the problem, our solution would quickly occur to someone involved in finding a solution. But as the courts labored in the common law vineyard, they wore blinders that kept them from thinking of a new solution. They took the old cases and pruned and shaped but they didn't think to start over.

One can start over by returning to Justice Story's opinion in *Perez*. Recall his description of what a trial judge should do when faced with a deadlocked jury: a hung jury mistrial "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner."<sup>150</sup> How can judges be both "extremely careful how they interfere" and at the same time grant mistrials only "under urgent circumstances, and for very plain and obvious causes"? The answer, we believe, is to ask the jury to keep trying, not to give up, to keep talking.

We have named the suggested procedure the "Keep Talking Charge." It would accomplish three key objectives. First, it would do more to break deadlocks than the *Allen* charge. Rather than torture jury panels with long-

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150. *Perez*, 22 U.S. at 580.

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winded instructions,<sup>151</sup> the “Keep Talking Charge” would be clearer. Second, the new procedure would cut through the Gordian knot of confusing *Allen* law, thereby helping appeals courts save time and resources. Third, the new charge would not be plagued by accusations that it coerces jurors. If implemented correctly, the Keep Talking Charge is no more than an invitation to continue deliberation. By eliminating court inefficiency and coercion, the Keep Talking Charge would improve criminal justice administration.

Trial courts today have discretion to send deadlocked juries back for further deliberations without any instructions. We believe courts would be much wiser if the judge discharged this discretion by issuing a Keep Talking Charge that asks the jury simply to “please continue your deliberations.” A handful of state and federal courts have spoken to this very issue, albeit briefly and somewhat indirectly. In Alabama, for example, the state’s highest criminal court has held that merely instructing a jury to continue deliberations was not coercive where the jury reported itself deadlocked.<sup>152</sup> Similarly, the Arizona Court of Appeals ruled that “[m]erely advising a deadlocked jury to continue deliberations does not, standing alone, constitute coercion or improper conduct on the part of the trial court.”<sup>153</sup> The Colorado Court of Appeals has held that a judge’s statement to the deadlocked jury to “continue your deliberations” was not coercive,<sup>154</sup> and the Michigan Supreme Court ruled that asking a hung jury to continue deliberating was by its very nature not coercive.<sup>155</sup> Other state courts have followed suit, upholding the trial judge’s ability to order further deliberations without any accompanying supplemental instructions.<sup>156</sup>

There is some case law on point in the federal courts as well. Of all the federal courts of appeals, the Seventh Circuit has spoken most directly to the permissibility of merely ordering further deliberations. In *United States v. Degraffenried*,<sup>157</sup> the court examined a trial court’s instruction that was challenged as coercive. When the jury reported itself deadlocked, the judge told the panel “[m]embers of the jury, I’ve read your note. Please continue

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151. See *infra* note 173.

152. *George v. State*, 717 So.2d 849, 852 (Ala.Crim.App. 1997). See also *Showers v. State*, 407 So.2d 169, 171 (Ala. 1981) (“It is quite clear that under Alabama law a trial judge may urge a jury to resume deliberations and cultivate a spirit of harmony so as to reach a verdict, as long as the court does not suggest which way the verdict should be returned and no duress or coercion is used.”).

153. *State v. Webb*, 793 P.2d 105, 115 (Ariz.App. 1990). The court expanded on this holding in another decision, finding that sending a jury back twice for further deliberations without instruction was not coercive either. *State v. Campbell*, 706 P.2d 741, 744 (Ariz.App. 1985). See also *State v. Long*, 294 S.E.2d 4, 11 (N.C.App. 1982).

154. *People v. Farley*, 712 P.2d 1116, 1120 (Colo.App. 1985).

155. *People v. France*, 461 N.W.2d 621, 632-33 (Mich. 1990).

156. See, e.g., *Cavendish v. State*, 496 N.E.2d 46, 47 (Ind. 1986); *State v. Jones*, 556 N.W.2d 903, 911-12 (Minn. 1996); *McKnight v. State*, 738 So.2d 312, 321 (Miss.App. 1999); *State v. Leroy*, 724 S.W.2d 277, 279 (Mo.App. E.D. 1987); TEX. CODE CRIM. PROC. ANN. art. 36.31 §§ 7-8 (Vernon 2004).

157. 339 F.3d 576 (7th Cir. 2003).



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deliberations.”<sup>158</sup> The court found that the response carried “no plausible potential for coercing the jury to surrender their honest opinions . . .”<sup>159</sup>

The ABA agrees that a court “may require the jury to continue their deliberations” where it is unable to agree.<sup>160</sup> Further, in its published Standard Jury Instructions,<sup>161</sup> the ABA notes that ordering further deliberations is acceptable so long as “the court does not threaten to require the jury to deliberate an unreasonable length of time or for unreasonable periods.”<sup>162</sup>

To be sure, an occasional court<sup>163</sup> or commentator<sup>164</sup> has argued that merely requesting further deliberations can be coercive. But these puzzling objections fail to take note of the historic, thousand-year-old duty of juries to reach a verdict. All that is generally required is that the judge believe that there is still a reasonable probability of the jury reaching a unanimous verdict.<sup>165</sup> As long as a reasonable probability exists, the Keep Talking Charge cannot, in our view, be viewed as coercive.

The question that then remains is how many times a judge can order further deliberations in a given trial? Once is obviously fine, but what about two times, three times, or more? This of course cannot be answered in the abstract.<sup>166</sup> The judge should naturally consider the complexity of the issues presented in the case and the time the jury has spent deliberating prior to declaring itself hung. But we think it unwise to cap the number of times the judge can ask the jury to continue deliberations. Obviously, if a judge sends a jury back for further deliberations a dozen times, the likelihood of reversal is vastly increased. However, it is a matter that should be generally left to the

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158. *Id.* at 580.

159. *Id.* at 580-81 (quoting *United States v. D’Antonio*, 801 F.2d 979, 983-84 (7th Cir. 1986)). *See also* *United States v. Kramer*, 955 F.2d 479, 489 (7th Cir. 1992) (“The relevant inquiry . . . is whether the court’s communications pressured the jury to surrender their honest opinions for the mere purpose of returning a verdict.”) (quoting *United States v. Thibodeaux*, 758 F.2d 199, 203 (7th Cir. 1985)).

160. AMERICAN BAR ASSOCIATION STANDARDS RELATING TO JURY TRIALS STANDARD 15-4.4(b). The commentary to this standard further holds that “a court may send the jury back for additional deliberations even though the jury has indicated once, twice, or several times that it cannot agree or even after jurors have requested that they be discharged.” *See also* *Martin*, 211 N.W.2d at 768-70, 772; *State v. Kelley*, 517 N.W.2d 905, 909 (Minn. 1994). It is important to note that the ABA of course distinguishes between ordering further instructions and giving a hung jury an Allen charge.

161. ABA STANDARD JURY INSTRUCTION 5.4(b).

162. *People v. Cook*, 342 N.W.2d 628, 630 (Mich.App. 1983).

163. *Goodwin v. State*, 717 So.2d 561, 562 (Fla.App. 2d Dist. 1998).

164. Note, *supra* note 66, at 393 n.37 (“The jurors naturally look to the court for approval and encouragement. Sending a jury back for additional deliberation in silence could be interpreted as an act of impatience or disapproval, and might intimidate a juror as effectively as would an urgent order from the court to come to immediate agreement.”).

165. *See People v. Pride*, 833 P.2d 643, 686 (Cal. 1992); 21 AM. JUR. 2D Criminal Law § 402 (2d ed. 2004).

166. *See People v. Andrews*, 486 N.Y.S.2d 428, 430 (3d Dept. 1985) (“[w]here a trial court is faced with a deadlocked jury, there is no precise formula to determine exactly how many times to send the jury back or how long the jury should deliberate.”).

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judge's discretion.<sup>167</sup> To fully appreciate the breadth of the trial judge's discretion, one need look no further than to the wise words of Justice Story in *United States v. Perez*:

We think . . . the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere.<sup>168</sup>

Following Justice Story, if a jury tells the judge that it is hopelessly deadlocked after an hour of deliberations, or if the case is particularly complex, the judge should be free to ask the deadlocked panel more than once to continue deliberating.<sup>169</sup>

We wish to be clear that the use of the Keep Talking Charge would not preclude other supplemental instructions to a deadlocked jury. Often, juries send notes to the judge during deliberations, asking questions regarding the evidence, the appropriate law, and other matters. A trial court should respond to specific jury questions as it sees fit and the law dictates. But this is another realm of law entirely, and is therefore separate from the considerations raised by *Allen*, its many variations, or the Keep Talking Charge.

We came across only three studies which suggest the same approach to the instruction problem as this article constructs, and all of them reject the idea on grounds that sending the jury back for more deliberation is futile because deadlocked juries need instruction from the trial judge.<sup>170</sup> This argument conflates specific jury questions about the law, which the judge should answer as noted above, with the problem that the jury is deadlocked because its members disagree about whether the accused did what he is charged with doing. No instruction on the law is going to move jurors who simply disagree about whether the accused committed the crime. Therefore, where a jury announces itself deadlocked and “groping”<sup>171</sup> with the questions of factual guilt, the court should just leave it to continue its debate in hopes of ultimately

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167. See generally H.H. Hansen & D.E. Buckner, Annotation, *Time Jury May Be Kept Together on Disagreement in Criminal Case*, 93 A.L.R.2d 627, §§ 4-6, 8 (1964); 75B AM. JUR. 2D Criminal Law § 1648 (2004).

168. *Perez*, 22 U.S. at 580.

169. Indeed, the time necessary to show coercion varies between jurisdictions. See *State v. Burroughs*, 556 S.E.2d 339, 344 (N.C.App. 2001); *Edlin v. State*, 523 So.2d 42, 45 (Miss. 1988); *State v. Keeler*, 316 A.2d 782, 783 (Conn. 1972); *Commonwealth v. Bregnard*, 334 N.E.2d 64, 67 (Mass. App. 1975); *Thirty-Second Annual Review of Criminal Procedure: Influences on the Jury*, 91 GEO. L.J. 513, 527 n.1675 (2003) (reviews case law as to this issue).

170. See Marcus, *supra* note 66, at 638; Comment, *Criminal Procedure – Jury Instructions – ABA Standard Adopted for Instructing Deadlocked Juries*, 42 TENN. L. REV. 803, 814 (1975); Note, *Deadlocked Juries and Dynamite*, *supra* note 66, at 393 n.37.

171. Prim, 289 N.E.2d at 608 (“a jury should not be left to grope in such circumstances without guidance from the court.”). See *supra* note 66 (nearly every article argues that *Allen* is coercive and endorses using the ABA standards).

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coming to a unanimous verdict without resorting to a long-winded instruction.

We believe that the Keep Talking Charge would also be more effective in breaking jury deadlock. Admittedly, there is no empirical evidence to prove this contention.<sup>172</sup> But even a cursory glance at the original *Allen* charge reveals its complex and confusing nature. It encourages jurors to debate and discuss, and never give up their honestly held views, but not much else. At the risk of boring the reader to death, we reprint a typical modern *Allen* charge:

I am going to instruct you to go back and resume your deliberations. I will explain why and give you further instructions.

In trials absolute certainty can be neither expected nor attained. You should consider that you are selected in the same manner and from the same source as any future jury would be selected. There is no reason to suppose that this case would ever be submitted to 12 men and women more intelligent, more impartial or more competent to decide it than you, or that more or clearer evidence would be produced in the future. Thus, it is your duty to decide the case, if you can conscientiously do so without violence to your individual judgment.

The verdict to which a juror agrees must, of course, be his or her own verdict, the result of his or her own convictions, and not a mere acquiescence in the conclusion of his or her fellow jurors. Yet, in order to bring 12 minds to a unanimous result, you must examine the questions submitted to you with an open mind and with proper regard for, and deference to, the opinion of the other jurors.

In conferring together you ought to pay proper respect to each other's opinions and you ought to listen with a mind open to being convinced by each other's arguments. Thus, where there is disagreement, jurors favoring acquittal should consider whether a doubt in their own mind is a reasonable one when it makes no impression upon the minds of the other equally honest and intelligent jurors who have heard the same evidence with the same degree of attention and with the same desire to arrive at the truth under the sanction of the same oath.

On the other hand, jurors favoring conviction ought seriously to ask themselves whether they should not distrust the weight or sufficiency of evidence which fails to dispel reasonable doubt in the minds of the other jurors.

Not only should jurors in the minority re-examine their positions, but jurors in the majority should do so also, to see whether they have given careful consideration and sufficient weight to the evidence that has favorably impressed the persons in disagreement with them.

Burden of proof is a legal tool for helping you decide. The law imposes upon the prosecution a high burden of proof. The prosecution has the burden to establish, with respect to each count, each essential element of the offense, and to establish that essential element beyond a reasonable doubt. And if with respect to any element of any count you are left in reasonable doubt, the defendant is entitled to the benefit of such doubt and must be acquitted.

It is your duty to decide the case, if you can conscientiously do so without violence to your individual judgment. It is also your duty to return a verdict on any counts as to which all of you agree, even if you cannot agree on all counts. But if you cannot agree, it is your right to fail to agree.

I now instruct you to go back and resume your deliberations.<sup>173</sup>

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172. However, the effectiveness of the *Allen* charge itself has been a subject of some examination. One study that examined *Allen*'s effectiveness found that *Allen* is useful in creating jury unanimity, but that it is coercive. Saul M. Kassir, Vicki L. Smith, and William F. Tulloch, *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors*, 14 LAW AND HUMAN BEHAVIOR 537, 540-41, 547-49 (1990). See also Saul M. Kassir, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687, 704-07 (1990); Mark M. Lanier & Cloud Miller, III, *The Allen Charge: Expedient Justice or Coercion?*, 25 AM. J. CRIM. JUST. \_\_\_\_ (2001) (argues that *Allen* is generally effective in helping break hung juries).

173. Paniagua-Ramos, 135 F.3d at 194. See also Seawell, 550 F.2d at 1161 n.2 (court approved supplemental charge of 974 words). See generally 1A KEVIN F. O'MALLEY, et al., FED. JURY PRAC.



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This modified supplemental charge is longer and more confusing than the original *Allen* charge. It is almost living proof of the overgrowth of law that Justice Jackson highlighted in *Douglas* and that we have analyzed in this article. Rather than confuse and bore jurors, how much simpler simply to ask them to keep deliberating. That, they will understand. A deadlocked jury that is sent back once, twice, perhaps three times or more would have an incentive to reach a unanimous verdict.<sup>174</sup> Thus, a Keep Talking Charge would likely be more effective than *Allen*, as well as less coercive.

The power to issue Keep Talking Charges has existed at least since 1824. It did not flourish as did the *Allen* charge, perhaps because it seems too simple. Once the *Allen* idea was firmly planted in the common law soil, it was almost inevitable that it would become a Gordian knot. With so many variables, and so little guidance from the Supreme Court, the strong likelihood was that the law would develop in unplanned and idiosyncratic ways. It has. It is time for courts, or the legislatures, to cut the Gordian knot. Trial judges should be told to ask juries to continue deliberating even when they think they are strongly deadlocked. It is a good idea. It is implicit in Justice Story's *Perez* opinion. It is time to bring back the wisdom of 1824.

#### CONCLUSION

For half a century, *Allen v. United States* has been a lightning rod for criticism. Implementation of the Keep Talking Charge would erase all of the objections that plague *Allen*. The Keep Talking Charge is the best solution to the hung jury Gordian knot because it allows judges to press the jury to continue deliberating without saying anything that might push the jurors towards a verdict one way or the other. The Keep Talking Charge would make the *Allen* charge unnecessary, thus eliminating virtually all arguments that judges coerced verdicts out of deadlocked juries.<sup>175</sup> The Keep Talking Charge recognizes the broad power of trial judges to control jury deliberations. It is not a dramatic change in the law but a return to simpler days of Justice Story.

Even if the Keep Talking Charge does nothing to depress the rate of mistrials, it is a vast improvement over the Gordian knot of current law. Nearly

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AND INSTR. CRIM. § 20.08 (5th ed. 2000).

174. Of course, there are those who think the *Allen* charge is very effective at breaking deadlocks, including prosecutors. See Mark Hansen, *All About Allen: Judges' Charge to Deadlocked Juries Comes Under Scrutiny*, 87-JUN ABA J. 24 (2001).

175. This is an argument that should not be underestimated. Defendants will often challenge any tendered *Allen* charge on coercion grounds in hopes of winning an appeal. The defendant's challenge in *United States v. Sawyers*, 423 F.2d 1335, 1339 (4th Cir. 1970) demonstrates this point. While the Fourth Circuit rejected each of the defendant's contentions, the defendant's arguments are illustrative of how any *Allen* charge can be challenged as coercive, regardless of its language, structure or timing. See also Leslie Shea Riggsbee, *United States v. Burgos: Balanced Blasting for Deadlocked Juries*, 74 N.C. L. REV. 2036, 2041-44 (1996).

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every state and federal circuit has its own *Allen* procedure, with no two being identical. The lack of uniformity combined with the widespread resistance to *Allen* from many in the legal community illustrates that the current procedures are not working. *Allen* creates more harm than good today. The knot should be cut.

It seems likely that, beyond cutting the knot, the Keep Talking Charge can save a few thousand mistrials a year, and reduce the flood of appeals based on coercive *Allen* charge claims. This would be an unalloyed good for the twenty-first century criminal justice world.

