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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 modern law 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 that law today is not 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 held to be unduly coercive.

This Article will trace the legal development of the hung jury 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.¹ Our example will be the law governing the instructions that judges are permitted to give juries when

* Distinguished Professor of Law & Judge Alexander P. Waugh, Sr. Distinguished Scholar, Rutgers University, Newark. It is common for a professor to have an idea for an article and then recruit a student or former student to help execute the idea. In this case, however, Mark Greenbaum, while a student at Rutgers, both recognized the problem with *Allen* charges and developed the solution we propose in this Article. He thus deserves the credit for the solution. I thank the Dean's Research Fund at Rutgers University School of Law, Newark, for partial support for my research. Any errors are solely our own.

** J.D., Rutgers Law School, 2005; A.B., Cornell University, 2002. 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.

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.

We argue that the Story era manifested more wisdom on this issue than the modern doctrine. While we do not advocate imprisoning juries in unheated rooms without food or drink—as was routinely done during Blackstone's era²—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 it 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 ground 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

By A.D. 200, criminal juries had disappeared from Roman criminal procedure and would not appear in Western law again until the eleventh century.³ 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.⁴ 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 pounds weight; or else by walking, barefoot, and blindfold, over nine redhot plowshares,

² See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 375 (Univ. of Chicago Press, photo. reprint 1979) (1768) (discussing the measures that a judge could undertake to force jurors to reach a verdict, such as being “kept without meat, drink, fire, or candle . . . till they are all unanimously agreed”).

³ 2 JAMES LEIGH STRACHAN-DAVIDSON, PROBLEMS OF THE ROMAN CRIMINAL LAW 158 (1912). Inquests were used during part of this period as fact-finders or grand juries but not, typically, to seek final proof of guilt. See 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 140–41 (Lawyers' Literary Club 1959) (2d ed. 1898).

⁴ GEORGE CRABB, A HISTORY OF ENGLISH LAW 27 (1829).

laid lengthwise at unequal distances: and if the party escaped being hurt, he was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty.⁵

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.⁶ As long as one were willing to 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 twelfth century, a requirement of unanimity quickly took hold. For the jury was replacing a mechanism that, in theory, was perfect. As Pollock 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.⁷

A jury verdict of seven-to-five would hardly have seemed beyond question.

Moreover, the English jury was viewed as speaking for the community, and the English community of the thirteenth and fourteenth centuries had but one voice.⁸ 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 eight-to-four today produces a conviction.⁹ But in thirteenth century England, “as yet men had not accepted the dogma that the voice of a majority binds the community.”¹⁰ 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.”¹¹ In sum, “[t]he parties to the litigation have ‘put themselves’ upon a certain test. That test is the voice of

⁵ 4 BLACKSTONE, *supra* note 2, at 337.

⁶ *Id.* at 336.

⁷ 2 POLLOCK & MAITLAND, *supra* note 3, at 627.

⁸ *See id.* at 626.

⁹ CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 359 (Fr.), available at http://www.legifrance.gouv.fr/html/codes_traduits/CpptestA.htm (follow “Deliberations of the Assize Court” hyperlink) (“Any decision unfavorable to the accused is taken by a majority of at least eight votes . . . in the first instance. . .”).

¹⁰ 2 POLLOCK & MAITLAND, *supra* note 3, at 626.

¹¹ *Id.* at 624.

the country. Just as a corporation can have but one will, so a country can have but one voice.”¹²

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.¹³ 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.¹⁴ A later and more gruesome example is *peine forte et dure* in which the “defendant was placed on the ground and stones were piled on his chest until he either expired or groaned, ‘[c]ountry, country,’ indicating his acceptance of the jury of verdict.”¹⁵

By the mid-fourteenth century, juries had become the normal and accepted way to determine guilt, “and defendants were no longer asked to put themselves on the country.”¹⁶ 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.¹⁷

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.¹⁸ Article III required juries in federal criminal cases, to be sure, but the trial could be held, and thus the jury empaneled, in any court in the state.¹⁹ The strong feelings of the Anti-Federalists about the important role of the jury can be seen in a speech Patrick Henry made when opposing ratification of the Constitution:

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 Americans 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 at it. This gives me comfort—that, as long as I have existence, my

¹² *Id.* at 626.

¹³ *Id.* at 599.

¹⁴ Statute of Westminster the First, 1275, 3 Edw., c. 12 (Eng.).

¹⁵ NORMAN F. CANTOR, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM* 129 (1997).

¹⁶ *Id.* at 130.

¹⁷ 2 POLLOCK & MAITLAND, *supra* note 3, at 624–26.

¹⁸ AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 233–35 (2005).

¹⁹ U.S. CONST. art. III, § 2, cl. 3.

neighbors will protect me. Old as I am, it is probable 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.²⁰

The Anti-Federalists believed juries could reach more just outcomes than judges.²¹ 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 1749–57.²² This is not surprising 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."²³ We suspect not many juries would refuse 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 1807.²⁴ As late as 1824, Justice Story could declare, for a unanimous Supreme 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."²⁵

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

²⁰ THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 438 (Neil H. Cogan ed., 1997).

²¹ GEORGE C. THOMAS III, BETRAYAL OF INNOCENCE: HOW THE SUPREME COURT SACRIFICES INNOCENT DEFENDANTS (forthcoming 2007) (manuscript at 164–66, on file with author). This belief was based at least in part on the Anti-Federalists' experiences during the Stamp Act Crisis of 1765, when trials for colonists who had not paid their taxes were conducted without juries. See Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 NW. U. L. REV. 144, 153 (1996).

²² See George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749-57*, 1 N.Y.U. J. L. & LIBERTY 671, 703-04 tbl.1 (2005). While we have not researched other colonies, nothing suggests a different approach because all colonies followed the common law of England.

²³ 3 BLACKSTONE, *supra* note 2, at 376; see also CRABB, *supra* note 4, at 287.

²⁴ *United States v. Workman*, 28 F. Cas. 771, 773 (D. La. 1807) (No. 16,764) (holding "that the general doctrine prohibiting the discharge of a jury in all cases was erroneous and obsolete" and that a jury could be discharged "when it is necessary to justice").

²⁵ 22 U.S. (9 Wheat.) 579, 580 (1824).

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 reprosecute. 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 a 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 at 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."²⁶ 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 even when the evidence of guilt is manifest. The ultimate question, for the criminal justice system as well as for this Article, is the extent to which judges can 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*.²⁷

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 through unlawful assembly and disturbing the peace.²⁸ Penn and his associate William Mead had addressed a small group of fellow Quakers in London.²⁹ In 1670, English persecution of Quakers was near its peak, and Penn's peaceful speech was merely a pretext to pursue a high-profile Quaker.³⁰

²⁶ BLACK'S LAW DICTIONARY 860 (7th ed. 1999).

²⁷ (1670) 124 Eng. Rep. 1006 (C.P.D.); see also JEFFREY ABRAMSON, *WETHE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 68 (1994).

²⁸ ABRAMSON, *supra* note 27, at 68–69 (noting that 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").

²⁹ *Id.*

³⁰ JOHN GUINER, *THE JURY IN AMERICA* 24–25 (1988).

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.³¹ 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*.³²

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.³³ 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.³⁴ 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.³⁵ It repeated these findings thirty minutes later after being forced to reconsider.³⁶

Nearly berserk with anger at this announcement, the court recorder ordered that the jury be locked in the jury room "without meat, drink, fire and tobacco," until they reached a proper verdict on the unlawful assembly charge.³⁷ The next day, the jury refused to relent, and this time, the judge threatened to cut Bushel's throat.³⁸ 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.³⁹ All of the jurors initially refused to pay the fine. The court promptly sent them to Newgate Prison, ironically where both Penn and Mead had been sent.⁴⁰ Bushel and three others remained steadfast and appealed their fines to the Court of Common Pleas, which, nearly a year after

³¹ ABRAMSON, *supra* note 27, at 69.

³² *Id.* at 71 (emphasis added).

³³ *Id.*

³⁴ GUINThER, *supra* note 30, at 26.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* (noting that 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" (omissions in original)).

³⁸ *Id.*

³⁹ *Id.* at 27.

⁴⁰ *Id.*

Penn's trial had ended, invalidated the fines.⁴¹ Speaking through Chief Justice Sir John Vaughan, the court found that a trial court could never punish a juror for his verdict.⁴²

While *Bushel's Case* demonstrates the need for limits on judicial coercion, it imparts no lesson about the precise line to be drawn between appropriate encouragement and judicial coercion. We turn now to this 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 Chancery 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.⁴³ The court lacked authority for its holding. When asked “[w]here will you stop” in permitting land to be kept inalienable, the best Lord Nottingham could do was say, “I will tell you where I will stop: I will stop where-ever any visible Inconvenience doth appear.”⁴⁴

For another example, consider *The Queen v. Dudley and Stephens*.⁴⁵ In 1884, the Queen's Bench ruled that the imminent death of three shipwrecked sailors would not justify killing the weakest sailor so the others could feed on his body and live.⁴⁶ Because there was no precedent, Chief Justice Coleridge relied on Bracton, Lord Hale, and other legal authorities in finding that necessity to save one's life could never be a defense to murder.⁴⁷

In the famous American case of *Pierson v. Post*,⁴⁸ 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.⁴⁹ With legal precedents thus unavailable, the common law court could turn to sources as exotic and diverse as Justinian, Puffendorf, Fleta, Bynkershoek, Grotius, and treatise writers of the seventeenth and eighteenth centuries to decide that pursuit is not possession.⁵⁰

⁴¹ *Id.*

⁴² *Id.*

⁴³ The Duke of Norfolk's Case, (1682) 22 Eng. Rep. 931 (Ch.).

⁴⁴ *Id.* at 960.

⁴⁵ (1884) 14 Q.B.D. 273, 288.

⁴⁶ *Id.*

⁴⁷ *Id.* at 281–88 (citing 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).

⁴⁸ 3 Cai. 175 (N.Y. Sup. Ct. 1805).

⁴⁹ *Id.* at 177–78.

⁵⁰ See *id.* at 177–80.

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, which tends to 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 are free to decide the same issue differently from earlier judges, then one does not have "law" in any coherent sense. Judges would be acting as mini-legislatures.

Ronald Dworkin has given a name to the way judges use precedent: law as "integrity."⁵¹ 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."⁵² 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.⁵³ Each of the prior chapters in the novel has been written by a different judge.⁵⁴ 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."⁵⁵ The 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.⁵⁶ 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.⁵⁷

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."⁵⁸ Somewhat more colorful is Justice Antonin Scalia's description of a recent development in the Supreme Court's confessions doctrine as "the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement."⁵⁹ 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

⁵¹ See RONALD DWORKIN, *LAW'S EMPIRE* 176–275 (1986).

⁵² *Id.* at 225.

⁵³ *Id.* at 229.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 230–31.

⁵⁷ *Id.* at 230.

⁵⁸ *Doggett v. United States*, 505 U.S. 647, 669 (1992) (Thomas, J., dissenting).

⁵⁹ *Minnick v. Mississippi*, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting).

adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.”⁶⁰

Constitutional law is not, of course, technically common law because it is based on a text, but constitutional interpretation is based on the common law method.⁶¹ The Court is led to “new stories to the 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. For example, the prohibition of unreasonable searches and seizures⁶² 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 punishments⁶³ answers a small number of questions. It would not permit convicted defendants to be drawn and quartered or have their body parts cut off. Beyond that, however, the Eighth Amendment tells us almost nothing. Consequently, as modern legislatures are not likely to mandate drawing and quartering or mutilation as a punishment, the difficult real-life Eighth Amendment issues are left without a useful text to provide guidance.

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.⁶⁴ 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 any one of the following exceptions can be made out: (1) the owner consented,⁶⁵ (2) the police reasonably believed that the owner consented,⁶⁶ (3) the police reasonably believed that the entry and search was justified by exigent circumstances,⁶⁷ (4) the police made a good faith effort to obtain a valid warrant,⁶⁸ (5) the evidence

⁶⁰ 319 U.S. 157, 181 (1943) (Jackson, J., concurring).

⁶¹ See DWORKIN, *supra* note 51, at 355–99 (applying law as integral to constitutional interpretation).

⁶² U.S. CONST. amend. IV (“The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . .”)

⁶³ U.S. CONST. amend. VIII.

⁶⁴ See U.S. CONST. amend. IV.

⁶⁵ *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

⁶⁶ *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

⁶⁷ There are a host of situations that fit the exigent circumstances exception to the warrant requirement. See, e.g., *Cupp v. Murphy*, 412 U.S. 291 (1973); *Warden v. Hayden*, 387 U.S. 294 (1967); *Schmerber v. California*, 384 U.S. 757 (1966).

⁶⁸ *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Leon*, 468 U.S. 897 (1984).

would have been inevitably found if the police had not searched and seized when they did,⁶⁹ (6) the person seeking to have the evidence suppressed was not the owner of the home or an overnight occupant,⁷⁰ or (7) the search was not conducted by or on behalf of a state or federal actor.⁷¹ 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 first take him outside the home and then search him “incident to arrest” under the “search incident to a lawful arrest” exception.⁷²

While the “rule” about warrants being necessary for searches and seizures in a home is pretty porous, 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 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.”⁷³ This platitude has been criticized as vacuous over the last decade. Justice Scalia, for example, has noted that the “few” exceptions actually amount to almost twenty.⁷⁴ The Court, perhaps embarrassed by the criticisms from its own members as well as many commentators,⁷⁵ 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.⁷⁶ This approach 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 a complete Gordian knot to prompt commentators to compare Fourth Amendment law to a tarbaby⁷⁷ or an ocean liner that is “rudderless and badly off course.”⁷⁸

⁶⁹ *Nix v. Williams*, 467 U.S. 431 (1984).

⁷⁰ *Minnesota v. Carter*, 525 U.S. 83 (1998); *Minnesota v. Olson*, 495 U.S. 91 (1990); *see also Rakas v. Illinois*, 439 U.S. 128 (1978) (holding that one can contest a search or seizure only when it violated her own reasonable expectation of privacy).

⁷¹ *Burdeau v. McDowell*, 256 U.S. 465 (1921).

⁷² *See New York v. Harris*, 495 U.S. 14 (1990) (holding that failure to have warrant to arrest Harris inside his home did not taint otherwise lawful investigation techniques conducted after leaving the home because Fourth Amendment violation ends when privacy of home is no longer violated).

⁷³ *Katz v. United States*, 389 U.S. 347, 357 (1967).

⁷⁴ *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in the judgment).

⁷⁵ *See, e.g., Craig M. Bradley, Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985).

⁷⁶ *See Acevedo*, 500 U.S. at 583.

⁷⁷ Bradley, *supra* note 75, at 1468 (“The fourth amendment is the Supreme Court’s tarbaby: 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 stuck.”).

⁷⁸ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759

Now, 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"⁷⁹ 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. However, what does the right to trial by jury say about the content of instructions given to juries who cannot reach agreement? The answer: nothing. As a result, 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*⁸⁰ 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 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: "[T]here is not merely one *Allen* charge, but an infinite number of variations of the charge, in current use."⁸¹ These variations are heavily watered-down, long-winded versions of the original 1896 charge. 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.⁸²

While some concerns about general supplemental instructions began to appear not long after *Allen's* creation,⁸³ many state and federal courts continued to use

(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.").

⁷⁹ U.S. CONST. amend. VI.

⁸⁰ The charge is derived from *Allen v. United States (Allen III)*, 164 U.S. 492 (1896).

⁸¹ ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 155 (1968) cited in 2A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 502, at 538 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) [hereinafter *Due Process*] ("The progeny of *Allen* have displayed endless permutations . . .").

⁸² For a history of *Allen's* development, see *Fields v. State*, 487 P.2d 831, 835–39 (Alaska 1971), overruled by *State v. Patterson*, 740 P.2d 944 (Alaska 1987), and *State v. Marsh*, 490 P.2d 491, 494–97 (Or. 1971), cert. denied, 406 U.S. 974 (1972).

⁸³ Cf. *Peterson v. United States*, 213 F. 920, 924 (9th Cir. 1914) (making no mention of *Allen* but invalidating 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

it.⁸⁴ However, the legal landscape changed when widespread complaints about *Allen* began to appear.⁸⁵ 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.⁸⁶ The ABA even joined the fray, formally recommending that "the *Allen* charge should not be used"⁸⁷ and then writing standards for modified supplemental instructions that many courts have since adopted in place of *Allen*.⁸⁸

v. Bennett, 57 P.2d 87 (Kan. 1936); Gary B. Ferguson, Comment, *An Argument for the Abandonment of the Allen Charge in California*, 15 SANTA CLARA LAW. 939, 939 n.3 (1975).

⁸⁴ 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."); see also *Huffman v. United States*, 297 F.2d 754, 756–59 (5th Cir. 1962) (Brown, J., dissenting), cert. denied, 370 U.S. 955 (1962).

⁸⁵ 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., Matthew M. Barasch, *Criminal Procedure: Antideadlock Jury Instructions in the District of Columbia*, 35 CATH. U.L. REV. 1179 (1986); Paul Marcus, *The Allen Instruction in Criminal Cases: Is the Dynamite Charge About to Be Permanently Defused?*, 43 MO. L. REV. 613 (1978); Note, *The Allen Charge Dilemma*, 10 AMER. CRIM. L. REV. 637 (1972); Note, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y.U. L. REV. 296 (1972); James R. Chadderdon, Note, *Supplemental Charge to a Deadlocked Jury in a Criminal Trial Urging Dissenters to Reevaluate Their Position in Light of the Majority's View Is Proper if the Charge Contains No Biased Comments and Warns Jurors to Make Their Own Decision*, 4 HOUS. L. REV. 292 (1966); Comment, *Criminal Law—Jury Instructions—ABA Jury Instruction Adopted as Preferable to Allen Charge*, 25 VAND. L. REV. 246 (1972); Michael J. Crowley, Comment, *Jury Coercion in Capital Cases: How Much Risk Are We Willing to Take?*, 57 U. CIN. L. REV. 1073 (1989); Note, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge,"* 31 U. CHI. L. REV. 386 (1964) [hereinafter *Deadlocked Juries*]; *Due Process*, supra note 81; Raymond C. Groneman, Comment, *The Faltering Allen Charge and Its Proposed Replacement*, 16 ST. LOUIS U.L.J. 619 (1972); Mike Hennessey, Comment, *The Allen Charge: Dead Law a Long Time Dying*, 6 U.S.F. L. REV. 326 (1972); Earl Ledford, Comment, *Defusing the Dynamite Charge: A Critique of Allen and Its Progeny*, 36 TENN. L. REV. 749 (1969); Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100 (1968); B. Newal Squyres, Jr. & Arliss M. Champlin, Comment, *Instructing Deadlocked Juries: The Present Status of the Allen Charge*, 3 TEX. TECH. L. REV. 313 (1972); David M. Stanton, Note, *United States v. Arpan: How Does the Dynamite Charge Affect Jury Determinations?*, 35 S.D. L. REV. 461 (1990); Note, *Supplemental Jury Charges Urging a Verdict—The Answer Is Yet to Be Found*, 56 MINN. L. REV. 1199 (1972); Judith A. Warshawsky, Case Comment, *The Allen Charge: The Propriety of Giving Supplemental Instructions to a Deadlocked Jury*, 22 LOY. L. REV. 667 (1975).

⁸⁶ See 2A WRIGHT, supra note 81, § 502, at 537–43 nn.21–30.

⁸⁷ 3 ABA STANDARDS FOR CRIMINAL JUSTICE §15-4.4, at 15–143 (2d ed. 1980).

⁸⁸ *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:

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 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.⁸⁹ His first and second federal trials ended in conviction, but both convictions were reversed by the Supreme Court.⁹⁰ 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.⁹¹ Eager to help the panel reach a verdict because this was, after all, the third trial of Allen, the trial judge issued an instruction to the jury that was taken nearly verbatim from *Commonwealth v. Tuey*,⁹² an 1851 Massachusetts state court decision that examined a similar supplemental jury instruction:

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 reexamine 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 to require 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 no reasonable probability of agreement.

ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 81, § 5.4, at 145–46.

⁸⁹ *Allen v. United States (Allen I)*, 150 U.S. 551, 551 (1893).

⁹⁰ *Id.*; *Allen v. United States (Allen II)*, 157 U.S. 675 (1895).

⁹¹ *Allen v. United States (Allen III)*, 164 U.S. 492, 501 (1896).

⁹² 62 Mass. (8 Cush.) 1 (1851).

[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.⁹³

The jury thereafter continued deliberations and promptly convicted Allen.⁹⁴

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 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.⁹⁵

In the century since *Allen* was handed down, the Court has said very little about the permissibility of supplemental jury instructions to deadlocked panels. In a brief, one-page opinion, the Court held in *Jenkins v. United States* that a judge could not

⁹³ *Allen III*, 164 U.S. at 501; see also *Tuey*, 62 Mass. (8 Cush.) 1.

⁹⁴ *Allen III*, 164 U.S. at 493.

⁹⁵ *Id.* at 501–02.

tell a deadlocked jury, ““You have got to reach a decision in this case.””⁹⁶ The Court reasoned that this instruction was overly coercive and could have forced the jury into reaching a unanimous verdict.⁹⁷ 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.”⁹⁸ The Court concluded that disclosing the breakdown of a deadlocked jury would place undue coercion on those in the minority.⁹⁹

In *Lowenfield v. Phelps*, the Court in 1988 expressly reaffirmed *Allen*, noting that “[t]he continuing validity of this Court’s observations in *Allen* are beyond dispute.”¹⁰⁰ *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.¹⁰¹ 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*.¹⁰² 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.¹⁰³

Thus, *Allen* charges are still constitutional. But long before *Lowenfield*, courts had begun to retreat from *Allen* for fear that even the relatively mild *Allen* charge was coercive.¹⁰⁴

⁹⁶ 380 U.S. 445, 446 (1965) (per curiam). For a transcript of the trial judge’s instruction, see *Jenkins v. United States*, 330 F.2d 220, 221 n.2 (D.C. Cir. 1964) (Wright, J., dissenting), *rev’d*, 380 U.S. 445 (1965).

⁹⁷ *Jenkins*, 380 U.S. at 446.

⁹⁸ 272 U.S. 448, 449–50 (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. *Id.* at 449. Soon thereafter, the jury found the defendant guilty. *Id.*

⁹⁹ *Id.*; see also *Due Process*, *supra* note 81, 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, 777–94 (1977).

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

¹⁰¹ *Lowenfield*, 484 U.S. at 241.

¹⁰² *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 reliance.”).

¹⁰³ *Id.* at 239–40.

¹⁰⁴ See *United States v. Seawell*, 550 F.2d 1159, 1163 (9th Cir. 1977), *cert. denied*, 439 U.S. 991 (1978) (“A single *Allen* charge, without more, stands at the brink of impermissible coercion. . . . We conclude that as a sound rule of practice it is reversible error to repeat an *Allen* charge . . .”).

E. The Modern Law of Dynamite Charges

Lacking effective guidance from the Supreme Court, many jurisdictions have adopted different sets of guidelines for deadlock charges.¹⁰⁵ While some of the procedures are quite similar to each other, all of them are intricate. As a result, each trial court is left to give its own different charge and hope that it conforms to whatever variation the court of appeals decides to apply. An examination of the landscape of the federal circuit courts discloses the vagaries in the law of *Allen* charges.¹⁰⁶

1. *Allen* Dynamite in the Federal Circuits¹⁰⁷

By the 1960s, several judges on the federal Courts of Appeals were openly wondering whether *Allen*'s language might force jurors to abandon their beliefs to come to a unanimous verdict.¹⁰⁸ Over time, federal appeals courts began to approve modified

¹⁰⁵ 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. 1964), *rev'd on other grounds*, 383 U.S. 541 (1966) ("The designation of 'an *Allen* charge' has tended to become an over-simplification 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 decisions, each link thereof tempered and forged with varying facts and circumstances and welded with ever-changing 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.

Thomas, 342 P.2d at 200.

¹⁰⁶ See generally 1A KEVIN F. O'MALLEY, *FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL* § 20.08 (5th ed. 2000) (providing supplemental instructions for juries that do not reach a timely agreement).

¹⁰⁷ For a fuller discussion of the case law in each of the circuits, see Wayne F. Foster, Annotation, *Modern Status of Rule that Court May Instruct Dissenting Jurors in Federal Criminal Case to Give Due Consideration to Opinion of Majority (Allen Charge)*, 44 A.L.R. Fed. 468, 475–79 (1979).

¹⁰⁸ See *Jenkins v. United States*, 330 F.2d 220, 222 (D.C. Cir. 1964) (Wright, J., dissenting) (arguing that the *Allen* charge was "condemned" and advocating for its abolition); *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting) ("The fact is that in many phases of criminal law we have come a long, long way since 1896. There is no longer any place for the *Allen* charge."); *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."); see also *United States v. Kenner*, 354 F.2d 780,

dynamite charges that were filled with “balancing language.”¹⁰⁹ The new charges addressed all members of a panel and did not implore jurors in the minority to reconsider their views.¹¹⁰ By addressing the entire panel, many courts believed, the trial judge would not give jurors in the minority the impression that the court was singling out only them.¹¹¹ Failure to include balancing language to this effect was gradually found to constitute per se coercion by many courts.¹¹²

The First Circuit uses this cautious approach in dealing with deadlocked juries. In *United States v. Nichols*, the First Circuit articulated a three-prong standard for determining whether a district court’s dynamite charge was proper.¹¹³ Later, the court of appeals held that the “district court should instruct jurors in substance that (1) members of both the majority and the minority should reexamine their positions, (2) a jury has the right to fail to agree, and (3) the burden of proving guilt beyond a reasonable doubt remains with the government.”¹¹⁴ Failure to follow these three requirements, the First Circuit noted, would require reversal of a defendant’s conviction.¹¹⁵ Further, when 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.¹¹⁶ This watered-down *Allen* charge seeks to ensure that no undue pressure is ever placed on a deadlocked jury.

783–84 (2d Cir. 1965) (“We have had grave doubt as to whether the charge thus given was not unduly coercive.”), *cert. denied*, 383 U.S. 958 (1966); *Thaggard v. United States*, 354 F.2d 735, 739–41 (5th Cir. 1965) (Coleman, J., concurring) (“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.”), *cert. denied*, 383 U.S. 958 (1966); *Green v. United States*, 309 F.2d 852, 854–56 (5th Cir. 1962) (“There is small, if any, justification for its use.”).

¹⁰⁹ See *Due Process*, *supra* note 81, at 129; see also *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 per se coercive), *cert. denied*, 387 U.S. 934 (1967).

¹¹⁰ *Fulwood*, 369 F.2d at 962.

¹¹¹ See, e.g., *United States v. Manning*, 79 F.3d 212 (1st Cir. 1996), *cert. denied*, 519 U.S. 853 (1996).

¹¹² See *Powell v. United States*, 297 F.2d 318 (5th Cir. 1961).

¹¹³ 820 F.2d 508, 512 (1st Cir. 1987). The elements of the test were first described in *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971).

¹¹⁴ *Manning*, 79 F.3d at 222 (citing *United States v. Angiulo*, 485 F.2d 37, 39 (1st Cir. 1973)).

¹¹⁵ 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, this court has found reversible error without further inquiry.”).

¹¹⁶ 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) (warning that “[a] successive charge tends to create a greater degree of pressure” on jurors), *cert. denied*, 522 U.S. 1021 (1997); 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.”).

The Eighth Circuit has endorsed a similar balanced instruction, urging that supplemental charges be given to deadlocked panels with “great care.”¹¹⁷ The Eighth Circuit defined five factors that a court should examine 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.¹¹⁸

An earlier panel of the Eighth Circuit had created another test for coerciveness which examined four factors: “(1) the content of the challenged instruction, (2) the length of the period of deliberations following the *Allen* charge, (3) the total time of deliberation, and (4) any indicia in the record of coercion or pressure upon the jury.”¹¹⁹ Like the Eighth Circuit, the Tenth Circuit allows a modified *Allen* charge, but it strongly advises its district courts to give the charge as part of the final instructions to the jury and not when the jury first becomes deadlocked.¹²⁰ In examining a charge for coerciveness, the Tenth Circuit looks at the language of the instruction, its timing, the simultaneous issuance of other instructions, and the length of the time that the jury deliberated after hearing the instruction before rendering a verdict.¹²¹

The Fourth Circuit has also identified 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.¹²²

¹¹⁷ *United States v. Young*, 702 F.2d 133, 136 (8th Cir. 1983).

¹¹⁸ *United States v. Robinson*, 953 F.2d 433, 436 (8th Cir. 1992) (citing *Potter v. United States*, 691 F.2d 1275, 1278 (8th Cir. 1982)).

¹¹⁹ *United States v. Webb*, 816 F.2d 1263, 1266 (8th Cir. 1987) (quoting *United States v. Smith*, 635 F.2d 716, 721 (8th Cir. 1980)).

¹²⁰ *United States v. Alcorn*, 329 F.3d 759, 767 (10th Cir. 2003).

¹²¹ *Id.* at 765; *Gilbert v. Mullin*, 302 F.3d 1166, 1173 (10th Cir. 2002), *cert. denied*, 538 U.S. 1004 (2003).

¹²² *Tucker v. Catoe*, 221 F.3d 600, 611 (4th Cir. 2000), *cert. denied*, 531 U.S. 1054 (2000); *see also* *United States v. Burgos*, 55 F.3d 933, 936–37 (4th Cir. 1995).

Two circuits have rejected *Allen*. In *United States v. Fioravanti*, the Third Circuit called the *Allen* charge discredited and fraught with “treachery,”¹²³ and it held that any *Allen* instructions given to a jury would be automatic grounds for reversal.¹²⁴ It reasoned that the dynamite charge violated the jury’s “exclusive province” of determining guilt or innocence by coercing a verdict.¹²⁵ The court of appeals further held that any supplemental charge must be carefully crafted and must avoid any language that encourages specific jurors to reconsider their views during deliberations.¹²⁶ 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 one another” but never “surrender [their] honest conviction as to the weight . . . of evidence.”¹²⁷

In *United States v. Thomas*, the District of Columbia Circuit replaced the *Allen* charge with the standards crafted by the ABA.¹²⁸ The new instruction makes no mention of jurors in the minority or majority and urges jurors to weigh the evidence presented at trial but never surrender their honestly held beliefs.¹²⁹ Like the Third Circuit’s charge, the D.C. Circuit retains little of the language from the original *Allen* charge.

¹²³ 412 F.2d 407, 417 (3d Cir. 1969), *cert. denied*, 396 U.S. 837 (1969).

¹²⁴ *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), *cert. denied*, 493 U.S. 959 (1989) (holding trial judge’s reference to the expense of a retrial was improper but not grounds for reversal of conviction).

¹²⁵ *Fioravanti*, 412 F.2d at 417.

¹²⁶ *Id.* at 420.

¹²⁷ *Id.* at 420 n.32.

¹²⁸ 449 F.2d 1177, 1184–86 (D.C. Cir. 1971).

¹²⁹ *See* *United States v. Dorsey*, 865 F.2d 1275, 1278 (D.C. Cir. 1989), *cert. denied*, 492 U.S. 924 (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.

In sum, most circuits have gone to considerable lengths to sanitize supplemental instructions given to hung juries. As a result, guidelines have been crafted that do little to help break deadlocks 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.¹³⁰ In *United States v. Melendez*, the Second Circuit held that *Allen* was still applicable, despite vociferous objections by the defendant.¹³¹ Recently, the Second Circuit expanded on its reading in *Melendez*, ruling that an *Allen* charge would only be grounds for reversal when it was coercive, with coercion being determined by a “totality of the circumstances” test.¹³²

Similarly, the Fifth Circuit has approved a version very close to the original *Allen* charge for use by its courts.¹³³ 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.”¹³⁴ It then notes that if the jury cannot come to a verdict, the matter would be “left open and must be tried again.”¹³⁵ 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.¹³⁶ In fact, one Fifth Circuit opinion even spoke of “*Allen*’s age-old wisdom.”¹³⁷

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

¹³⁰ See *United States v. Crispo*, 306 F.3d 71 (2d Cir. 2002); *United States v. Melendez*, 60 F.3d 41 (2d Cir. 1995).

¹³¹ 60 F.3d at 52.

¹³² *Crispo*, 306 F.3d at 77. The Second Circuit’s view is in seeming accordance with the Supreme Court’s test established in *Jenkins*. See *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (holding that trial court actions would be judged “in [their] context and under all the circumstances” to determine if coercion was present).

¹³³ COMM. ON PATTERN JURY INSTRUCTIONS DIST. JUDGES ASS’N FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 1.45 (2001).

¹³⁴ *Id.*

¹³⁵ *Id.*; see also *United States v. Diggs*, 522 F.2d 1310, 1321 n.24 (D.C. Cir. 1975), *cert. denied*, 429 U.S. 852 (1976).

¹³⁶ See *United States v. Redd*, 355 F.3d 866, 877 (5th Cir. 2003), *cert. denied*, 127 S.Ct. 306 (2006); *United States v. Winters*, 105 F.3d 200, 203–04 (5th Cir. 1997), *cert. denied*, 528 U.S. 969 (1999); *Boyd v. Scott*, 45 F.3d 876, 883 (5th Cir. 1994), *cert. denied*, 514 U.S. 1111 (1995).

¹³⁷ *United States v. Straach*, 987 F.2d 232, 243 (5th Cir. 1993).

2. State Courts and *Allen* Dynamite

Like the federal circuits, some states have banned the charge outright, others have crafted their own modified charges, and some have retained 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.¹³⁸

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.¹³⁹ The ABA standards emphasize that no juror should abandon his or her “honest conviction[s].”¹⁴⁰ 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.¹⁴¹ 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. The permutations include differences not only in the language and structure of the charge but also the time that it is given,¹⁴² the number of times that it can be given,¹⁴³ whether it can be given if the jury informs the judge of its exact numerical breakdown,¹⁴⁴ and even if it can be given without counsel present at the

¹³⁸ Wayne F. Foster, Annotation, *Instructions Urging Dissenting Jurors in State Criminal Case to Give Due Consideration to Opinion of Majority (Allen Charge)—Modern Cases*, 97 A.L.R.3d 96, 108–09 (1980).

¹³⁹ *Id.* at 102.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See *People v. Morrison*, 532 N.E.2d 1077, 1090 (Ill. App. Ct. 1988).

¹⁴³ See *United States v. Ruggiero*, 928 F.2d 1289, 1299 (2d Cir. 1991), *cert. denied*, 502 U.S. 938 (1991); *Palanti v. Dillon Enters., Ltd.*, 707 N.E.2d 695, 701–02 (Ill. App. Ct. 1999) (holding that the giving of multiple instructions to the jury was not error per se).

¹⁴⁴ See *United States v. Parsons*, 993 F.2d 38, 41–42 (4th Cir. 1993), *cert. denied*, 510 U.S. 898 (1993); *United States v. Gambino*, 951 F.2d 498, 500–02 (2d Cir. 1991), *cert. denied*, 504 U.S. 918 (1992); *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.”), *cert. denied*, 454 U.S. 1157 (1982); *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). 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 (Cal. Ct. App. 1935) (holding that it is per se error for the judge to inquire of the deadlocked jury's numerical breakdown), *overruled by People v.*

time.¹⁴⁵ These variations are just some of the more prominent modifications state courts have made to their deadlocked jury instructions. We will not attempt a precise catalogue of all of them.

Alaska has rejected the use of the dynamite charge, replacing it with the ABA standards.¹⁴⁶ California,¹⁴⁷ Colorado,¹⁴⁸ Hawaii,¹⁴⁹ Illinois,¹⁵⁰ Louisiana,¹⁵¹ New Jersey,¹⁵² and Ohio¹⁵³ have banned the original *Allen* charge, replacing it with a heavily modified version or an instruction patterned after the ABA's suggested elements.¹⁵⁴ Each of these states has abandoned *Allen* out of concern that it coerces

Friend, 327 P.2d 97 (Cal. 1958). *See generally* 75B AM. JUR. 2D *Trial* § 1583 (1992) (explaining that some courts find the inquiry to be permissible while others do not).

¹⁴⁵ *See* United States v. Neff, 10 F.3d 1321, 1324 (7th Cir. 1993); United States v. Cowan, 819 F.2d 89, 93 (5th Cir. 1987); United States v. Ronder, 639 F.2d 931, 934 (2d Cir. 1981); State v. Estrada, 738 P.2d 812, 828 (Haw. 1987). *But see* United States v. Hernandez, 146 F.3d 30, 35 (1st Cir. 1998).

¹⁴⁶ Fields v. State, 487 P.2d 831, 842 (Alaska 1971). Alaska had formally embraced *Allen* in *Chase v. State*, 369 P.2d 997, 1005 (Alaska 1962). *See also* 75B AM. JUR. 2D *Trial* § 1589 (2004).

¹⁴⁷ People v. Gainer, 566 P.2d 997, 1009 (Cal. 1977) (stipulating that the *Allen* charge “‘should never again be read in a California courtroom’”).

¹⁴⁸ People v. Schwartz, 678 P.2d 1000, 1012 (Colo. 1984) (endorsing modified supplemental charge that urges jurors not to give up honest opinion); People v. Watson, 53 P.3d 707, 713 (Colo. Ct. App. 2001) (providing a modified instruction that 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) they should not hesitate to re-examine their views if necessary, and (4) they should not surrender their honest beliefs just to return a verdict).

¹⁴⁹ 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.’” (modification in original)).

¹⁵⁰ People v. Prim, 289 N.E.2d 601, 606–10 (Ill. 1972), *cert. denied*, 412 U.S. 918 (1973). *See generally* 14B ILL. LAW & PRAC. CRIMINAL LAW § 770 (1999) (detailing the “*Prim* instruction”); John F. Decker, *Post-Instruction Issues: Jury Deliberations and Verdict*, 34 LOY. U. CHI. L.J. 569, 591–95 (2003) (explaining the *Prim* instruction).

¹⁵¹ 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.”).

¹⁵² 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.”).

¹⁵³ State v. Howard, 537 N.E.2d 188, 192–95 (Ohio 1989), *cert. denied*, 493 U.S. 873 (1989).

¹⁵⁴ Several states have expressly scrapped the *Allen* charge. *See* State v. Flint, 761 P.2d 1158, 1162–65 (Idaho 1988); Lewis v. State, 424 N.E.2d 107, 111 (Ind. 1987) (requiring 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. White, 285 A.2d 832, 837–38 (Me. 1972) (recommending ABA standards and charge for Maine courts); People v. Sullivan, 220 N.W.2d 441, 450 (Mich. 1974) (holding that any supplemental instructions to deadlocked jury must be in

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.¹⁵⁵ Similarly, the Michigan Supreme Court held that any substantial variation from the ABA instruction would be automatic grounds for reversal.¹⁵⁶

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.¹⁵⁷ In Arkansas, judges can administer an *Allen* charge and even make reference to the potential cost of a retrial,¹⁵⁸ as well as inquire of the foreperson as to the deadlocked jury's numerical breakdown.¹⁵⁹ Similarly, Connecticut's version of the *Allen* charge has been upheld despite its language that urges jurors in the minority to reconsider their views.¹⁶⁰ Texas has done the same.¹⁶¹ Giving the charge multiple times is also fair game in several states.¹⁶² But these states are in the distinct minority in their support of *Allen*.

Perhaps the only thing that all of the states have in common is that each of their instructions includes language that cautions jurors not to acquiesce during deliberations. While finding one's way through the modern *Allen* forest is exceedingly difficult, the ABA standards have not helped. When first created, these standards were

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 A.B.A. Standards . . . are adopted for the trial 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 be 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), *cert. denied*, 430 U.S. 956 (1977). Other states have merely recommended the use of the ABA charge. *See Winters v. United States*, 317 A.2d 530, 532–34 (D.C. 1974); *Commonwealth v. Rodriguez*, 300 N.E.2d 192, 200–02 (Mass. 1973); *State v. Perry*, 306 A.2d 110, 112 (Vt. 1973).

¹⁵⁵ *People v. Gainer*, 566 P.2d 997, 1004–05, 1009 (Cal. 1977).

¹⁵⁶ *Sullivan*, 220 N.W.2d at 450. Maryland adopted a similar approach, finding that a trial court committed reversible error when 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).

¹⁵⁷ *Maxwell v. State*, 828 So. 2d 347, 365 (Ala. Crim. App. 2000), *cert. denied*, 535 U.S. 951 (2002).

¹⁵⁸ *Griffin v. State*, 617 S.W.2d 21, 23 (Ark. Ct. 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. Crim. App. 2003).

¹⁵⁹ *Davis v. State*, 892 S.W.2d 472, 474–75 (Ark. 1995).

¹⁶⁰ *State v. O'Neill*, 511 A.2d 321 (Conn. 1986).

¹⁶¹ *See* 8 TEX. PRAC., CRIMINAL FORMS AND TRIAL MANUAL § 99.33 (11th ed. 2006).

¹⁶² *See Jones v. State*, 505 S.E.2d 749, 753–54 (Ga. 1998). *But see Washington v. State*, 758 So. 2d 1148, 1154 (Fla. Dist. Ct. App. 2000) (holding that it is per se reversible error to give a supplemental instruction twice to a deadlocked jury).

seen as a solution to *Allen*'s perceived deficiencies. However, as we have demonstrated, the ABA standards have only further clouded the *Allen* issue. Instructions to deadlocked juries are still routinely challenged as coercive by defendants. The cases we have surveyed are just the veritable tip of the doctrinal iceberg. They represent only some of the different instructions 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 no jurisdiction has clear rules 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 an uncertain fate in the hands of appellate courts if the first charge does not work. Judges do not like to be reversed, of course, and the net effect of the uncertainty here is that judges usually do not 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 on the Ground

Although there are few studies on the frequency of hung juries in American courts today, the existing data do not reveal a crisis.¹⁶³ The data do show, however, sufficient hung juries in state and federal courts to justify seeking a remedy to reduce the number. Moreover, while the Double Jeopardy Clause permits a retrial following a hung jury,¹⁶⁴ retrials are expensive. In many jurisdictions, a trial can cost around \$10,000 per day.¹⁶⁵ One must also take into account the emotional toll that retrials

¹⁶³ 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.,* Joan Biskupic, *In Jury Rooms, a Form of Civil Protest Grows*, WASH. POST, Feb. 8, 1999, at A1; Carrie Johnson, *Judge Declares Mistrial in Tyco Case*, WASH. POST, Apr. 3, 2004, at A1; Seth Mydans, *The Other Menendez Trial, Too, Ends with the Jury Deadlocked*, N.Y. TIMES, Jan. 29, 1994, at A1; Jeffrey Rosen, *One Angry Woman: Why Are Hung Juries on the Rise?*, NEW YORKER, Feb. 24 & March 3, 1997, at 54 (discussing the trend of black women on juries deadlocking criminal trials of young black defendants in the District of Columbia).

¹⁶⁴ *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.

¹⁶⁵ Dwayne Bray, *Prosecutors Seek Change in Jury Voting*, L.A. TIMES, June 11, 1995, at B1.

pose for criminal victims as well as their families. It is therefore not surprising that one study found a retrial rate of only twenty-five percent.¹⁶⁶ Thus, relying on retrials to solve the hung jury problem is a poor solution. A better solution would be to reduce the number of mistrials.

The best and most recent study of hung juries was conducted by the National Center for State Courts (NCSC).¹⁶⁷ The NCSC looked at criminal felony trials in all the federal district courts¹⁶⁸ from 1980 to 1997, using information provided by the Administrative Office of the United States Courts.¹⁶⁹ The NCSC found that federal criminal juries hung at a rate of approximately 2.54% between 1980 and 1997.¹⁷⁰ The study showed that the rates were uniformly low among the twelve federal circuits, with one exception: the District of Columbia Circuit.¹⁷¹ Criminal jury trials that ended in deadlock in federal courts in the D.C. Circuit occurred at a rate of 9.5%.¹⁷² No other circuit exceeded 3.1% during any one year in that three-year period.¹⁷³

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 from 1996 to 1998.¹⁷⁴ The NCSC

¹⁶⁶ PLANNING & MGMT. CONSULTING CORP., EMPIRICAL STUDY OF FREQUENCY OF OCCURRENCE CAUSES EFFECTS AND AMOUNT OF TIME CONSUMED BY HUNG JURIES 4-30 to 4-37 (1975) [hereinafter PLANNING & MGMT. STUDY].

¹⁶⁷ See *infra* note 171. In addition to the NCSC study, there have been other notable studies on hung jury rates. The first was THE AMERICAN JURY, which found that mistrials resulting from hung juries occurred in approximately 5.5% of all criminal cases in the United States. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 56 (1966). 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 twelve percent. PLANNING & MGMT. STUDY, *supra* note 166, at 4-6. On the whole, however, there have been few studies that have examined the rate of hung juries in American courtrooms.

¹⁶⁸ As of January 2005, there were 665 federal district judges in the United States. See Alliance for Justice.org, About Judicial Selection Project—Frequently Asked Questions, <http://www.allianceforjustice.org/judicial/about/frequently.html>.

¹⁶⁹ PAULA L. HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, ARE HUNG JURIES A PROBLEM? (2002), available at http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf.

¹⁷⁰ *Id.* at 22-23 figs. 2.3, 2.4. These statistics are taken 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.

¹⁷¹ See *id.* at 23 fig. 2.4.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 24-25. 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.

authors found that between 1996 and 1998, mistrials resulting from deadlock in state courts occurred at a rate of 6.2%.¹⁷⁵ 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.¹⁷⁶

Is a mistrial rate that ranges from 2.5% to 15% a significant problem? A 15% hung jury rate must be burdensome to the California court system. However burdensome the hung jury rate is to a particular jurisdiction, 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, 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 anything even approaching the kind of coercion practiced in *Bushel's Case*.¹⁷⁷ The Supreme Court has 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 seems 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 them but they did not think to start over.

One can start over by returning to Justice Story's 1824 opinion in *Perez*. Recall his description of what a trial judge should do when faced with a deadlocked jury: an order dismissing a jury because it is hung "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."¹⁷⁸ 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 about the case.

We have named the suggested procedure the "Silent Charge." Of course, the judge would not literally be silent, but she would be silent about the deadlock. It is, in this sense, a "Silent Charge." It would accomplish three key objectives. First, it

¹⁷⁵ *Id.* at 20, 25.

¹⁷⁶ *Id.* at 25 fig.2.5.

¹⁷⁷ See *supra* notes 27–42 and accompanying text.

¹⁷⁸ *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

would do more to break deadlocks than the *Allen* charge. Rather than torture jury panels with long-winded instructions,¹⁷⁹ the Silent Charge would be clearer, and juries would likely respond more positively to “please keep trying” than to the current dynamite charge mush. Second, the new procedure would cut through the Gordian knot of confusing *Allen* law, thereby, saving judicial time and resources, especially on appeals. Third, the new charge would not be plagued by accusations that it coerces jurors. If implemented correctly, the Silent Charge is no more than an invitation to continue deliberation. By eliminating court inefficiency and coercion, the Silent 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 Silent 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 when the jury reported itself deadlocked.¹⁸⁰ 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.”¹⁸¹ The Colorado Court of Appeals has held that a judge’s statement to the deadlocked jury to “continue your deliberations [sic]” was not coercive,¹⁸² and the Michigan Supreme Court ruled that asking a hung jury to continue deliberating was by its very nature not coercive.¹⁸³ Other state courts have followed suit, upholding the trial judge’s ability to order further deliberations without any accompanying supplemental instructions.¹⁸⁴

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*,¹⁸⁵ the court examined a trial court’s instruction that was challenged as coercive. When the

¹⁷⁹ See *infra* note 200 and accompanying text.

¹⁸⁰ *George v. State*, 717 So. 2d 849, 852 (Ala. Crim. App. 1997), *cert. denied*, 525 U.S. 1024 (1998); 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.”).

¹⁸¹ *State v. Webb*, 793 P.2d 105, 115 (Ariz. Ct. App. 1990); see also *State v. Campbell*, 706 P.2d 741, 744 (Ariz. Ct. App. 1985) (finding that sending a jury back twice for further deliberations without instruction was not coercive either).

¹⁸² *People v. Farley*, 712 P.2d 1116, 1120 (Colo. Ct. App. 1985).

¹⁸³ *People v. France*, 461 N.W.2d 621, 632–33 (Mich. 1990).

¹⁸⁴ See, e.g., TEX. CODE CRIM. PROC. ANN. art. 36.31 nn.7–8 (Vernon 2006); *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. Ct. App. 1999); *State v. Leroy*, 724 S.W.2d 277, 279 (Mo. Ct. App. 1987); *State v. Long*, 294 S.E.2d 4, 11 (N.C. Ct. App. 1982).

¹⁸⁵ 339 F.3d 576 (7th Cir. 2003).

jury reported itself deadlocked, the judge told the panel “[m]embers of the jury, I’ve read your note. Please continue deliberations.”¹⁸⁶ The Seventh Circuit found that this instruction carried “no plausible potential for coercing ‘the jury to surrender their honest opinions.’”¹⁸⁷

The ABA standards permit a court to “require the jury to continue their deliberations” when it is unable to agree.¹⁸⁸ 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.”¹⁸⁹

To be sure, an occasional court¹⁹⁰ or commentator¹⁹¹ 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 to keep the jury deliberating is that the judge believe that there is still a reasonable probability of an unanimous verdict.¹⁹² As long as a reasonable probability exists, the Silent 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.¹⁹³ 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.

¹⁸⁶ *Id.* at 580.

¹⁸⁷ *Id.* (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))), *cert. denied*, 506 U.S. 998 (1992).

¹⁸⁸ 3 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 87, § 15-4.4(b), at 15–133. 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.” *Id.* at 15–135; *see also* *State v. Kelley*, 517 N.W.2d 905, 909 (Minn. 1994); *State v. Martin*, 211 N.W.2d 765, 772 (Minn. 1973). It is important to note that the ABA, of course, distinguishes between ordering further instructions and giving a hung jury an *Allen* charge.

¹⁸⁹ *People v. Cook*, 342 N.W.2d 628, 630 (Mich. Ct. App. 1983) (providing section 5.4(b) of the ABA’s standard jury instructions).

¹⁹⁰ *Goodwin v. State*, 717 So. 2d 561, 562 (Fla. Dist. Ct. App. 1998).

¹⁹¹ *Deadlocked Juries*, *supra* note 85, 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.”).

¹⁹² *See* *People v. Pride*, 833 P.2d 643, 686 (Cal. 1992), *cert. denied*, 507 U.S. 935 (1993); 21 AM. JUR. 2D *Criminal Law* § 402 (1998).

¹⁹³ *See* *People v. Andrews*, 486 N.Y.S.2d 428, 430 (App. Div. 1985) (“Where 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.”).

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 judge's discretion.¹⁹⁴ 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.¹⁹⁵

Following Justice Story, if a jury tells the judge that it is hopelessly deadlocked after an hour of deliberation or if the case is particularly complex, the judge should be free to ask the deadlocked panel more than once to continue deliberating.¹⁹⁶

We wish to be clear that the use of the Silent 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, with different considerations from those raised by charges to deadlocked juries.

We came across only three studies that suggest the same approach to the instruction problem as this Article recommends, 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.¹⁹⁷ 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, when

¹⁹⁴ See 75B AM. JUR. 2D *Trial* § 1648, 422–25 (1992); 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).

¹⁹⁵ *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

¹⁹⁶ Indeed, the time necessary to show coercion varies between jurisdictions. See *State v. Keeler*, 316 A.2d 782, 783 (Conn. 1972); *Edlin v. State*, 523 So. 2d 42, 45 (Miss. 1988), *cert. denied*, 489 U.S. 1086 (1989); *State v. Burroughs*, 556 S.E.2d 339, 344 (N.C. Ct. App. 2001); *Trial, Influences on the Jury*, 32 GEO. L.J. ANN. REV. CRIM. PRO. 513, 529–30 n.1675 (2003) (reviewing case law as to this issue).

¹⁹⁷ See Marcus, *supra* note 85, at 638; *Deadlocked Juries*, *supra* note 85, at 393 n.37; H.B.B., Jr., Comment, *Criminal Procedure—Jury Instructions—ABA Standard Adopted for Instructing Deadlocked Juries*, 42 TENN. L. REV. 803, 814 (1975).

a jury announces itself deadlocked and “groping”¹⁹⁸ with the questions of factual guilt, the court should just leave it to continue its debate in hopes of ultimately coming to a unanimous verdict without resorting to a long-winded instruction.

We believe that the Silent Charge would be more effective in breaking jury deadlock than any of the currently used dynamite charges. Admittedly, there is no empirical evidence to prove this contention.¹⁹⁹ 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 it does not encourage much else. The modern versions are worse. 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 your fellow 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

¹⁹⁸ *People v. Prim*, 289 N.E.2d 601, 608 (Ill. 1972) (“[W]e do not feel that a jury should be left to grope in such circumstances without some guidance from the court.”). *See supra* note 85 (nearly every article argues that *Allen* is coercive and endorses using the ABA standards).

¹⁹⁹ 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. Kassin et al., *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors*, 14 LAW & HUM. BEHAV. 537, 547–49 (1990); *see also* Mark M. Lanier & Cloud Miller III, *The Allen Charge: Expedient Justice or Coercion?*, 25 AM. J. CRIM. JUST. 31 (2001) (arguing that *Allen* is generally effective in helping break hung juries).

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 their fellow 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.²⁰⁰

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*²⁰¹ and that we have analyzed in this Article. Rather than confuse and bore jurors, how much simpler 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.²⁰² Thus, a Silent Charge would likely be more effective than *Allen*, as well as less coercive.

²⁰⁰ *United States v. Paniagua-Ramos*, 135 F.3d 193, 194–95 n.2 (1st Cir. 1998); *see also* *United States v. Seawell*, 550 F.2d 1159, 1161 n.2 (9th Cir. 1977) (approving supplemental charge of 974 words), *cert. denied*, 439 U.S. 991 (1978). *See generally* 1A O'MALLEY, *supra* note 106, § 20.08.

²⁰¹ *Douglas v. City of Jeannette*, 319 U.S. 157 (1943).

²⁰² 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 A.B.A.J. 24 (2001).

The power to issue Silent Charges has existed at least since 1824.²⁰³ It did not flourish as did the *Allen* charge, perhaps because it was too simple for the highly formal nineteenth century courts. 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 hopelessly 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 Silent Charge would erase all of the objections that plague *Allen*. The Silent 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 Silent Charge would make the *Allen* charge unnecessary, thus eliminating virtually all arguments that judges coerced verdicts out of deadlocked juries.²⁰⁴ The Silent 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 the simpler days of Justice Story.

It seems likely that, beyond cutting the Gordian knot of current law, the Silent Charge can prevent many mistrials. Moreover, the simplicity of the charge would radically 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.

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

²⁰³ *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824).

²⁰⁴ 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* demonstrates this point. 423 F.2d 1335, 1339 (4th Cir. 1970). Although 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 Leslie Shea Riggsbee, *United States v. Burgos: Balanced Blasting for Deadlocked Juries*, 74 N.C. L. REV. 2036, 2041-44 (1996).