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Comment

"Chipping Away" at *Chip Smith*: Reforming Anti-Deadlock Instructions

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A jury "hangs" or results in impasse or deadlock when the jury cannot reach a unanimous verdict. This results in the judge declaring a mistrial, where the double jeopardy bar is lifted in criminal trials, and the defendant may be retried. Oftentimes, jury deadlock results from a majority voting block who cannot sway a lone dissenter, also known as the "holdout juror." When faced with the potential of deadlock, judges across the country routinely administer an impasse charge, commonly known as a "Dynamite Charge," for its ability to blast a jury out of deadlock and into a unanimous verdict.

*With the United States Supreme Court silent on the charge in recent years, some jurisdictions have abandoned the charge altogether or reformed the language of the charge administered to omit coercive language of "minority" and "majority" or "dissenting" jurors. Connecticut's "*Chip Smith*" Charge has been consistently upheld by the Connecticut Supreme Court and is considered settled jurisprudence. Despite many criminal defendants arguing to end the practice of administering the charge, the court has declined to do so. Though the state's courts have, in recent years, altered the language of the model charge to include "balancing principles" to counteract the language targeting "dissenting" jurors, judicial discretion looms large in this area, and there are few checks on a trial judge's ability to tell dissenting jurors to reconsider their view. Because the demise of* Chip Smith *is highly unlikely, this Comment argues instead that Connecticut should take a more middle ground approach and constrain judicial discretion in this area by limiting the number of times the charge may be read to a jury, eliminating the pressure placed on dissent, and establishing a higher degree of judicial scrutiny when a trial judge strays from approved language. These changes will help protect a criminal defendant's due process right to an uncoerced jury verdict.*

COMMENT CONTENTS

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INTRODUCTION

Jury instructions serve a crucial function in criminal trials. They are designed to convey to the jury the guiding legal principles which must be applied in rendering a verdict.[1] Most of the instructions given to jurors now arise from books that set out approved language of patterned jury instructions.[2] Though in some jurisdictions preliminary jury instructions are given before the start of evidence,[3] in all jurisdictions the bulk of instructions come at a point before the jury begins to deliberate.[4] One legal scholar posits that these instructions are so influential, that "the wording of even a single instruction could dictate the jury's ultimate verdict."[5] Despite the fact that jury instructions are replete with complex legalese,[6] studies have demonstrated that jurors do, in fact, listen to and are affected by the judge's instructions.[7]

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* J.D. Candidate, University of Connecticut School of Law, 2026. I am deeply grateful to my family and friends for their unwavering support, inspiration, and encouragement. I would also like to extend my sincerest thanks to the staff of the *Connecticut Law Review* for their thoughtful and diligent work on this Comment. Mistakes are my own.

[1] *See, e.g.*, Michael D. Cicchini, *Criminal Jury Instructions: A Case Study*, 84 ALB. L. REV. 579, 580 (2021) ("Among other things, the [jury] instructions (a) convey to the jury the elements of the charged crime, (b) define key legal terminology, (c) guide the jury in evaluating the evidence, and especially (d) explain the state's burden of proof."); J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 74 (1990) ("The most important instructions are those that make up the jury charge. Charging instructions explain the jury's role, describe relevant procedural and substantive law, and provide suggestions on how to organize deliberations and evaluate evidence.").

[2] Tanford, *supra* note 1, at 74.

[3] Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 688 (2000) ("[These instructions] may occur shortly after the jury is sworn. Often these early instructions deal with basic legal principles and housekeeping matters; they are rarely case-specific. Sometimes they are conceptualized as 'orientation' lessons . . . .").

[4] Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309, 321–22 (2020) (explaining that these instructions may occur before or after the presentation of closing arguments). Instructions are also given during the trial, as evidence progresses, and may include admonitions (for example, where the judge instructs the jury not to discuss the case with anyone), and instructions on evidentiary matters (for example, limiting instructions). Cohen, *supra* note 3, at 693.

[5] Cicchini, *supra* note 1, at 580.

[6] For a discussion on the difficulty jurors have in understanding jury instructions, see generally Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449 (2006).

[7] Robin Reed, *Jury Simulation: The Impact of Judge's Instructions and Attorney Tactics on*

One such jury instruction, the *Allen* Charge,[8] has amassed considerable debate. This form of instruction is one that the judge administers after the jury has already begun its deliberations.[9] The *Allen* Charge, sanctioned by the Supreme Court in 1896, belongs to a class of juror impasse instructions.[10] When juries reach an impasse in deliberations, they report to the court that they are unable to reach a verdict.[11] This may result in the court sending the jury back to continue its deliberations, and giving specific instructions that encourage the jury to reach a verdict (an impasse instruction).[12]

In their most benign form, these impasse instructions may simply encourage the jury to try again; at the other end of the spectrum, this kind of charge may coerce jurors in the minority to abandon their beliefs for the sake of unanimity.[13] Justified for judicial economy reasons[14] (mainly, avoiding the declaration of a mistrial and subsequent retrial), these impasse charges vary in language across the different state and federal systems.[15] These kinds of charges are frequently criticized for their tendency to coerce jurors in the minority to abandon their deeply held convictions.[16] Moreover, some scholars argue that no matter how sterilized the language the judge uses, the charges are still rife with coercion.[17] Although the literature on *Allen* Charges is robust, Connecticut's version of the *Allen* Charge—the *Chip Smith* Charge—has for the most part stayed outside the fray of legal scholarship and legal reform work. As such, Connecticut's *Chip Smith* Charge has been described as "in the distinct minority in [its] support of *Allen*."[18]

Decisionmaking, 71 J. CRIM. L. & CRIMINOLOGY 68, 68, 71 (1980). *But cf.* Johnson, *supra* note 4, at 321 (explaining that jury instructions are "notoriously misunderstood by jurors," sometimes to the disadvantage of the criminal defendant).

[8] Allen v. United States, 164 U.S. 492 (1896).

[9] *See* Cohen, *supra* note 3, at 696 (referring to the *Allen* Charge as a "dynamite charge" given when a jury is unable to reach an agreement).

[10] See discussion *infra* Part II.A regarding the development of *Allen*-type impasse instructions.

[11] Sarah Thimsen, Brian H. Bornstein & Monica K. Miller, *The Dynamite Charge: Too Explosive for Its Own Good?*, 44 VAL. U. L. REV. 93, 101 (2009).

[12] *Id.* at 95. Although this Comment discusses the use of impasse charges in the criminal law context, it is worth noting that impasse charges apply and are administered in the civil context as well. *See, e.g.*, Williams v. Fermenta Animal Health Co., 984 F.2d 261, 266–67 (8th Cir. 1993) (reviewing the issuance of an impasse charge in a civil case); Vichare v. AMBAC Inc., 106 F.3d 457, 465 (2d Cir. 1996) (same).

[13] See discussion *infra* Part II.B for a more detailed explanation of an *Allen* Charge's negative effects.

[14] Caleb Epperson, Comment, *The Future of the* Allen *Charge in the New Millennium*, 75 ARK. L. REV. 109, 116 (2022).

[15] *Id.* at 111 ("Almost every federal and state judicial system has created a unique approach to the [impasse] [c]harge, with the widest variety of approaches being at the state level.").

[16] See discussion *infra* Part III.A for critiques of impasse instructions among states.

[17] *See infra* note 114.

[18] George C. Thomas III & Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 WM. & MARY BILL RTS. J. 893, 916 (2007); *see also* Epperson, *supra* note 14, at 124 (advocating for change to the *Allen* instruction and commenting that a new and improved charge "must not mirror the mistakes of the *Chip Smith* Charge").

This Comment focuses on Connecticut's impasse charge—the *Chip Smith* Charge[19]—and argues the state's courts should constrain judicial discretion in issuing the *Chip Smith* Charge through slight alterations to the language of the charge, limiting the number of times the charge may be read to a deadlocked jury, and establishing heightened judicial scrutiny when a judge strays from the model language of the court's approved charge. Part I begins with an overview of the principles of juror unanimity, and the social and legal treatments of the "holdout juror." Part II proceeds with the advent of these impasse charges, and the road to the seminal *Allen* decision. Part III focuses on state specific developments and approaches to the *Allen* Charge, including Connecticut's *Chip Smith* Charge. Part IV concludes this Comment with proposed changes to the *Chip Smith* Charge.

I. JUROR UNANIMITY AND THE HOLDOUT JUROR

In 2020, abrogating earlier Supreme Court jurisprudence,[20] the Court held in *Ramos v. Louisiana* that the Sixth Amendment's unanimity requirement of jury verdicts applies to both state and federal criminal trials, as the right is "'fundamental to the American scheme of justice' and 'incorporated against the States under the Fourteenth Amendment.'"[21] Early historical treatment of the issue guided Justice Gorsuch's opinion. He noted the requirement that a jury be unanimous to convict "emerged in 14th century England," and he cited Blackstone's commentaries on juror unanimity.[22]

Despite the long-standing tradition of juror unanimity at common law, protections against juror coercion did not emerge until much later.[23] Rather, the importance of reaching a unanimous decision was placed at the forefront, above that of the integrity of the verdict.[24] The first known mistrial declared

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[19] State v. Smith, 49 Conn. 376 (1881).

[20] *See* Apodaca v. Oregon, 406 U.S. 404 (1972) (holding that the Sixth Amendment does not require a unanimous jury).

[21] Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020). The Supreme Court held that the Sixth Amendment right to a trial by jury encompasses the right to a unanimous jury verdict when a defendant is convicted of a "serious offense." *Id.* at 1394. Prior to *Ramos*, forty-eight states and federal courts held that unanimity was required to convict; yet Louisiana and Oregon remained states that had "long punished people based on 10-to-2 verdicts," rather than declaring a mistrial. *Id.*

[22] *Id.* at 1395 ("As Blackstone explained, no person could be found guilty of a serious crime unless 'the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.'") (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 204 (1769), https://lonang.com/wp-content/download/Blackstone-CommentariesBk4.pdf).

[23] *See* Emil J. Bove III, Note, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 GEO. L.J. 251, 255 (2008) ("Although today we believe that juror coercion should be avoided, that has not always been the case. Dissenting jurors in medieval times were thought to have committed perjury, and the law threatened severe punishment[.]").

[24] *See, e.g.*, Renico v. Lett, 559 U.S. 766, 780 (2010) (Stevens, J., dissenting) ("At common law, courts went to great lengths to ensure the jury reached a verdict. Fourteenth-century English judges reportedly loaded hung juries into oxcarts and carried them from town to town until a judgment 'bounced out.' Less enterprising colleagues kept jurors as *de facto* 'prisoners' until they achieved unanimity. The

for juror impasse in an American court came in 1807,[25] and courts would later announce that discharging a jury on the ground of juror impasse lifted the double jeopardy bar,[26] so long as "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."[27]

Demonstrated by both American pop culture,[28] and the protections afforded to criminal defendants regarding unanimity in jury verdicts,[29] American society has now recognized that the holdout juror is worthy of some protection.[30] Despite the prevalence of the holdout juror in social science literature, the rate of mistrials declared on the ground of juror impasse is relatively low. In a study of state trial dispositions, researchers found that 5.6% resulted in a hung jury, with higher deadlock rates arising in metropolitan areas.[31] When juries cannot reach a verdict, quality of the evidence is a significant factor; in fact, when jurors do not view the evidence "clearly in favor of the prosecution or the defense," they were found to be much more likely to hang on at least one charge.[32] Other variables such as

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notion of a mistrial based on jury deadlock did not appear in Blackstone's Commentaries; it is no surprise, then, that colonial juries virtually always returned a verdict. Well into the 19th and even the 20th century, some American judges continued to coax unresolved juries toward consensus by threatening to deprive them of heat, sleep, or sustenance or to lock them in a room for a prolonged period of time.").

[25] Thomas & Greenbaum, *supra* note 18, at 897 (citing United States v. Workman, 28 F. Cas. 771, 773 (D. La. 1807) (No. 16,764)).

[26] However, in about fifty-three percent of hung jury cases, the defendant is not retried. Thimsen, Bornstein & Miller, *supra* note 11, at 100 (describing that 31.8% of cases are resolved by plea agreement, and 21.6% of cases are dismissed).

[27] United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); *see also* Warren M. Klinger, Case Note, *"I'll Take Form Over Substance for $800, Trebek": Why* Blueford *Was Too Rigid and How States Can Properly Provide Double Jeopardy Protection*, 162 U. PA. L. REV. ONLINE 165, 168 (2014) (explaining that "[d]emonstrating manifest necessity has become such a low burden that, except in rare instances, mistrials do not bar retrial").

[28] *See* Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569, 569 (2007) ("The lone dissenter—sometimes referred to as the 'voice of reason'—is held in high esteem in American culture.") (quoting Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1746 (2005)). Reichelt uses the film 12 ANGRY MEN (United Artists 1957) and its critical and social reception to demonstrate the "value placed on dissent." *Id.* at 570; *see also* Jeff Nilsson, *The Rockwell Files: The Holdout*, THE SATURDAY EVENING POST (June 10, 2019), https://www.saturdayeveningpost.com/2019/06/the-rockwell-files-the-holdout (surmising that Norman Rockwell's painting *The Holdout*, which depicts a dissenting juror, was inspired by the film 12 Angry Men).

[29] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (establishing the right to a unanimous verdict).

[30] *See, e.g.*, Jenkins v. United States, 380 U.S. 445, 446 (1965) (per curiam) (holding the trial judge's statement to a deadlocked jury that they "ha[d] . . . to reach a decision" was too coercive).

[31] HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 461, 508 (1966); *see also* Reichelt, *supra* note 28, at 582 ("The widely accepted statistical average for the number of criminal trial juries in the United States unable to reach unanimous verdicts is just over five percent, approximately the same as it was over three decades ago."). Federal felony dispositions tend to result in lower rates of hung juries, with researchers finding mistrials based on juror deadlock in two to three percent of cases. William S. Neilson & Harold Winter, *The Elimination of Hung Juries: Retrials and Nonunanimous Verdicts*, 25 INT'L REV. L. & ECON. 1, 2 (2005).

[32] Paula Hannaford-Agor, Valerie P. Hans, Nicole L. Mott & G. Thomas Munsterman, *Why Do Hung Juries Hang?*, 251 NAT'L INST. JUST. J. 25, 26 (2004); *see also* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1317 (2000) ("[J]ury division in cases of this sort often reflects genuine disagreement over the weight of the evidence.").

the quantity of the evidence, the length of the trial, and the size of the jury do not appear to affect the likelihood that a jury will hang.[33] Moreover, jury deadlocks that result from one or two holdout jurors who do not agree with the majority block "usually" result from a deliberation process where there was a "larger number of dissenters at the outset of deliberations."[34] And when a deadlock does result from an eleven to one vote, researchers found that juries "break two-to-one for conviction every time."[35] Even still, when a jury hangs due to a lone dissenter, legal scholars have referred to the holdout juror as stubborn, or "irrational."[36] Thus, the concern for protecting the voices of dissenting jurors is well founded, based on available literature.[37]

II. THE ADVENT OF IMPASSE CHARGES

This Part begins with a brief historical exploration of the road to the seminal *Allen* decision that would ultimately lay the foundation for the adoption of impasse charges nationwide. Section B then turns to the reasons that *Allen* Charges and similar instructions have been condemned in many states.

A. *The Road to* Allen

The first juror impasse charge in the United States "was first used and approved in Massachusetts in 1851,"[38] in the early case of *Commonwealth v. Tuey*.[39] Connecticut's high court quickly followed in 1881, in its decision *State v. Smith*.[40] The defendant in *Smith*—charged with murder—advanced many arguments on appeal, including his complaint that the trial judge failed

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[33] Hannaford-Agor, *supra* note 32, at 26 ("Quantity of evidence and length of trial did not appear to affect the likelihood of a hung jury."); Barbara Luppi & Francesco Parisi, *Jury Size and the Hung-Jury Paradox*, 42 J. LEGAL STUDS. 399, 403 (2013) ("Most [empirical studies] conclude that there are no detectable differences between six-person and 12-person juries with respect to mistrial rates.").

[34] Taylor-Thompson, *supra* note 32, at 1317; *see also* Hans Zeisel, *. . . And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 719 (1971) ("Hung juries almost always arise from situations in which there were originally several dissenters. Even if only one holds out, his having once been the member of a group is essential in sustaining him against the majority's efforts to make the verdict unanimous.").

[35] Reichelt, *supra* note 28, at 582–83 n.78 (citing KALVEN & ZEISEL *supra* note 31, at 460).

[36] Reichelt, *supra* note 28, at 570–71.

[37] Reichelt, *supra* note 28, at 582.

[38] Samantha P. Bateman, Comment, *Blast It All:* Allen *Charges and the Dangers of Playing with Dynamite*, 32 U. HAW. L. REV. 323, 327 (2010).

[39] In *Commonwealth v. Tuey*, the trial judge instructed the jury with the following: "if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men . . . under the sanction of the same oath." Commonwealth v. Tuey, 62 Mass. (1 Cush.) 1, 2 (1851). The defendant was convicted after the jury deliberated further; the defendant excepted to the charge, arguing that it was "equivalent to a direction, on the part of the court, to a minority of the jury to yield their own opinions and judgment to the views of the majority." *Id.* at 3. Sanctioning the language, the court held that the trial court "did nothing more than to present to the minds of the dissenting jurors a strong motive to unanimity." *Id.*

[40] State v. Smith, 49 Conn. 376 (1881).

to charge that "each juror . . . must be governed by his own judgment."[41] In response, the court fashioned the language that is now known as the *Chip Smith* Charge, holding that its language was "substantially what was stated to the jury" and sanctioned in *Tuey*.[42] Thus, Connecticut's *Chip Smith* Charge, and Massachusetts' charge (now known as the *Tuey-Rodriquez* Charge, after subsequent modifications), [43] are the only two charges that predate the federal *Allen* Charge.[44]

In *Allen v. United States*, the Supreme Court authorized the use of impasse instructions in a death penalty murder case.[45] The *Allen* Charge, sometimes called the "dynamite charge" because of its ability to "blast [a jury] out of their impasse,"[46] was taken nearly "verbatim" from its predecessor, *Tuey*.[47] Though the accused in a criminal case possesses a due process right to an uncoerced jury verdict,[48] the Supreme Court has never held *Allen* Charges to be per se coercive.[49] Since *Allen* was decided, the Supreme Court has given very little subsequent guidance on the issue of instructing deadlocked juries.[50] Thus, the federal circuits and states have developed their own guidelines for the proper issuance of the charge, resulting in a nuanced picture.[51]

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[41] *Id.* at 377, 386.

[42] *Id.* See discussion *infra* Part III.B, for examination of the *Chip Smith* Charge's language.

[43] See discussion *infra* Part III.A for more regarding the *Tuey-Rodriquez* Charge.

[44] Allen v. United States, 164 U.S. 492 (1896).

[45] *Id.* at 501–02. The defendant—fourteen-year-old Alexander Allen—had already been in front of the Supreme Court twice on the issue of jury instructions, before the Court ruled upon the issuance of the impasse charge. Allen v. United States, 150 U.S. 551 (1893); Allen v. United States, 157 U.S. 675, 681 (1895).

[46] Bateman, *supra* note 38, at 325; *see also* Adam H. Fleischer, *Poisoning the Deliberations: Jury Issues That Open After the Closing*, 86 ILL. BAR J. 544, 548 (1998) (describing charge as the "dynamite charge" for its "ability to blow apart deadlock").

[47] Epperson, *supra* note 14, at 114.

[48] *See, e.g.*, Smalls v. Batista, 191 F.3d 272, 276, 278 (2d Cir. 1999) (holding the *Allen* Charge at issue in the case was "unconstitutionally coercive because it *both* (1) obligated jurors to convince one another that one view was superior to another, *and* (2) failed to remind those jurors not to relinquish their own conscientiously held beliefs").

[49] Lowenfield v. Phelps, 484 U.S. 231, 237 (1988) ("The continuing validity of this Court's observations in *Allen* are beyond dispute[.]").

[50] Thomas & Greenbaum, *supra* note 18, at 907–08. What we do know is that courts may not instruct the jury that they "have . . . to reach a decision," because the effect of that language is too coercive. Jenkins v. United States, 380 U.S. 445, 446 (1965) (per curiam). Moreover, the Court has held it reversible error for the trial judge to inquire into the numerical split of a deadlocked jury, because the practice is "never useful" and "generally harmful." Brasfield v. United States, 272 U.S. 448, 449–50 (1926).

[51] *See, e.g.*, United States v. Vargas-Cordon, 733 F.3d 366, 377 (2d Cir. 2013) ("Our case law has accordingly considered a number of different factors when determining a charge's coercive effect. . . . For example, although we have stressed the importance of reminding jurors in an *Allen* charge not to abandon their conscientiously held views, we have also upheld instructions that lacked such a warning[.]" (citations omitted)); United States v. Johnson, 114 F.3d 808, 814–15 (8th Cir. 1997) ("Our court has consistently rejected the argument that the *Allen* charge is inherently coercive and has established a four-element test for determining whether a particular *Allen* charge was impermissibly coercive: (1) the

B. *Centering the Debate: The Pitfalls of* Allen

In 1963, regarding *Allen*, Justice Clark stated, "[n]or do we circulate the '*Allen* charge' to the new judges as I used to do when heading up the criminal division in the Department of Justice. *Allen* is dead and we do not believe in dead law."[52] Justice Clark's "eulogy" to the *Allen* Charge turned out to be "premature,"[53] and, a decade later, a court in Maryland observed that, "on the contrary, *Allen* is alive and well in many jurisdictions."[54] Despite its continuing vitality in many jurisdictions, research developments in the 1990s and early 2000s have called into question both the coercive effect of these impasse instructions, and the perceived efficiency gains of the charge by avoiding declaration of a mistrial.[55]

First, a 1990 study examined a mock jury considering a criminal case, charging the defendant with attempted tax evasion for failing to file federal income tax returns.[56] The mock jurors received a summary of the case and were placed in individual cubicles.[57] They were "led to believe" that they were part of a mock jury that would pass notes back and forth with one another containing their verdict and explanation; in reality, however, each juror participated individually.[58] The subjects were randomly classified as jurors in the "majority" and jurors in the "minority," and they received notes with verdicts to reflect this distinction.[59] For example, jurors assigned to the "majority" condition received two notes agreeing with their verdict, and one that did not; on the other hand, jurors assigned to the "minority" condition

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content of the instruction, (2) the length of deliberation after the *Allen* charge, (3) the total length of deliberations, and (4) any indicia in the record of coercion or pressure upon the jury."); People v. Ali, 409 N.Y.S.2d 12, 13 (N.Y. App. Div. 1978) ("[T]he court erred when it failed to . . . stress[] that 'the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion' of the others." (quoting Allen v. United States, 164 U.S. 492, 501 (1896))), *aff'd*, 393 N.E.2d 481 (N.Y. 1979); Thomas v. State, 748 So. 2d 970, 978, 979 (Fla. 1999) (considering "prevailing circumstances," such as the "length of the deliberations, the lateness of the hour, the condition of the jurors, and the jury's disclosure of their numerical split," to determine whether the instruction presented a "serious risk of coercion").

[52] Tom C. Clark, *Progress of Project Effective Justice—A Report on the Joint Committee*, 47 J. AM. JUDICATURE SOC'Y 88, 90 (1963) (alteration to the original).

[53] Bateman, *supra* note 38, at 323.

[54] Kelly v. State, 298 A.2d 470, 474 (Md. Ct. Spec. App. 1973) ("We observe little support for Mr. Justice Clark's assertion that '*Allen* is dead.'" (alteration to the original)), *aff'd*, 310 A.2d 538 (Md. 1973).

[55] Further studies that suggest the decreased utility of impasse instructions involve the findings that holdout jurors generally do not side with the majority because they have *genuine disagreements* about the weight of the evidence, not because they are being obstinate. For a discussion of these studies see *supra* note 32 and accompanying text.

[56] Saul M. Kassin, Vicki L. Smith & William F. Tulloch, *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors*, 14 LAW & HUM. BEHAV. 537, 539 (1990). The hypothetical presented to the mock jurors elicited a forty-four percent conviction rate when pretested. *Id.* at 540.

[57] *Id.* at 539–540. This tactic allowed the experimenters to "examine the decision-making process without the bias inherent in face-to-face interaction." *Id.* at 540.

[58] *Id.*

[59] *Id.* at 537, 540.

received three notes, all disagreeing with their verdict.[60] Thus, all jurors in the study believed they were in a three to one split, irrespective of whether their original verdict had been "guilty" or "not guilty."[61] A sample of jurors were then read an instruction modeled after the *Allen* Charge, while others remained in a control group.[62] The research revealed that "[a]mong subjects who were subjected to the dynamite charge, . . . those in the minority were more likely to capitulate than those in the majority."[63] Thus, although every mock juror received the exact same notes in deliberation, those in the minority group who received the impasse instruction "imagined they were under more pressure from the other jurors," and reported that they felt "heightened pressure from the judge."[64]

Second, promoting judicial economy and avoiding a mistrial arguably justifies the use of the *Allen* Charge and other impasse instructions.[65] However, research from 2000 reveals that this contention has been diluted due to the sheer number of appeals the issuance of *Allen* Charges invoke; in their article, Lanier and Miller found a total of 566 cases in which an *Allen* Charge was at issue on a federal appeal following conviction from January 1964 through March 1999.[66] Thus, impasse instructions introduce coercion to the jury deliberation process without "any real offsetting gain in the efficiency of the justice system."[67]

III. IMPASSE INSTRUCTIONS TODAY: DEVELOPMENTS AMONG THE STATES

I begin this Part with a discussion of how various states across the country have responded to these research developments by either amending the language of their impasse instructions or outright abandoning the issuance of the charge. Section B turns its focus solely to Connecticut's *Chip Smith* Charge to demonstrate the changes that have been made since *State v. Smith* was decided in 1881.

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[60] *Id.* at 540–41.

[61] *Id.*

[62] *Id.* at 541.

[63] *Id.* at 543.

[64] *Id.* at 547.

[65] *See, e.g.*, Joseph Ward, *The Danger of Deadlock: Coercion in the Courtroom*, 74 FLA. BAR J. 10, 14 (2000) ("These *Allen* charge instructions promote judicial economy by decreasing the chance that an initially hung jury will require a mistrial." (alteration to the original)).

[66] Mark M. Lanier & Cloud Miller III, *The* Allen *Charge: Expedient Justice or Coercion?*, 25 AM. J. CRIM. JUST. 31, 36 (2000).

[67] Brief of the Northern California Innocence Project as *Amicus Curiae* in Support of Petitioner at 12, Stinn v. United States, 2010 U.S. LEXIS 9231 (2010) (No. 10-554); *see also* State v. Martin, 211 N.W.2d 765, 771 (Minn. 1973) ("Hung juries are not a serious problem in either civil or criminal cases, and the potential for coercion by the intrusion of the court into the functions of the jury is too dear a price to pay for relieving court congestion.").

A. *Developments Outside of Connecticut*

Several states have taken the opportunity to institute a complete ban on *Allen* Charges and *Allen*-type instructions. In 1975, for example, the Supreme Court of Louisiana cited to numerous cases and works of legal scholarship disapproving of the use of *Allen* instructions for their coercive tendencies.[68] Persuaded by the criticisms, the court reversed the defendant's conviction because of the use of the *Allen* Charge and declared that it "henceforth ban[ned] the use of the '*Allen* charge' and of *any coercive modification thereof* in the courts of Louisiana."[69] Likewise, South Dakota has condemned the use of the *Allen* Charge or similar "get-together instructions."[70] The Arizona Supreme Court came to a similar conclusion,[71] and Hawaii[72] and Idaho[73] later followed.

As these developments played out in the states, the American Bar Association (ABA) created a model impasse instruction that addressed the arguments about *Allen*'s propensity to coerce jurors.[74] Notably, the model instructions omit any mention of jurors in the "minority" or "dissenting" views, which is included in the standard *Allen* instruction.[75] Rather, the instruction includes a statement that "a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous."[76] As of 2022, seven states fully adopted these model instructions.[77] Likewise, North Carolina codified instructions for deadlocked

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[68] State v. Nicholson, 315 So. 2d 639, 641 (La. 1975).

[69] *Id.* (alteration to the original) (emphasis added).

[70] State v. Ferguson, 175 N.W.2d 57, 61 (S.D. 1970) ("To assure the integrity and independence of criminal jury verdicts in the future the use of supplemental get-together instructions is not commended."); State v. Fool Bull, 766 N.W.2d 159, 170 (S.D. 2009) ("An '*Allen* charge' or 'get-together instruction' is not to be used in South Dakota state court criminal trials.").

[71] State v. Thomas, 342 P.2d 197, 200 (Ariz. 1959) ("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.").

[72] State v. Fajardo, 699 P.2d 20, 25 (Haw. 1985) ("[T]oday we choose to adopt the position taken by states that have abandoned the *Allen* instruction.").

[73] State v. Flint, 761 P.2d 1158, 1164 (Idaho 1988) ("Our review of applicable case law, sound policy considerations, and personal experiences from the perspective of both bench and bar, convinces us that the future use of dynamite instructions is not consistent with the orderly administration of criminal justice. . . . Only a blanket prohibition against dynamite instructions will sufficiently protect the deadlocked jurors from coercion."); *see also* State v. Anderson, 487 P.3d 350, 364 (Idaho 2021) (concluding the jury instruction at issue did not violate the *Flint* rule because it instructed jurors to "reach their decision 'without disturbing [their] individual judgment,'" and "crucially . . . was not delivered to influence an ostensibly deadlocked jury to reach a verdict.").

[74] AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY § 15-5.4, at 255–256 (3d ed. 1996) [hereinafter ABA INSTRUCTION].

[75] *Id.* at 256; *see also* Epperson, *supra* note 14, at 125 ("As seen in the model language . . . , the ABA's greatest concern regarding *Allen* Charges seems to be the abuse of the minority. Specifically, sections 5.4(a)(3)-(5) outline the duty of the jurors to balance the need for independent conclusions with the necessary considerations of the views of their fellow jurors.").

[76] ABA INSTRUCTION, *supra* note 74 at 255.

[77] Epperson, *supra* note 14, at 126. These states include Illinois, Maine, Minnesota, Vermont, Tennessee, New Jersey, and Michigan. *Id.*

juries that echo the language of the ABA instruction, though it did not adopt the model instruction in full.[78] Moreover, seven states "'soft[ly] adopt[ed]'" the ABA instructions, whereby they support the use of the ABA language, but still allow for *Allen* Charges to be used "on a case-by-case basis."[79]

Finally, recall that the *Tuey* Charge of Massachusetts, along with the *Chip Smith* Charge of Connecticut, are the only two that predate *Allen*.[80] As such, these two states have stayed outside the spotlight of the *Allen* debate. However, since *Tuey* was decided,[81] Massachusetts has undertaken large revisions to the *Tuey* Charge, such that it is now called "*Tuey-Rodriquez*," based off the more recent seminal case. In *Commonwealth v. Rodriquez*, the court modified the charge to omit language referencing "dissenting" or "majority" and "minority" jurors.[82] In so deciding, the court explained it "ha[d] been troubled with a number of cases questioning whether . . . the charge ha[d] . . . resulted in undue coercion."[83] In revamping the old *Tuey* Charge, the court noted that it "expected" the revisions to present questions of coercion "less often."[84] Moreover, as later appellate court decisions make clear, trial judges in Massachusetts must adhere to the guidelines set forth in *Rodriquez*, and straying from the approved language is discouraged.[85] The effect of this is to limit judicial discretion when administering the instruction.

A full analysis of each state's current practice regarding the use of *Allen* is outside the scope of this Comment;[86] however, it is worth pointing out the trend that many states either (a) disallow impasse instructions in their entirety; (b) adopt the tempered ABA instructions; or (c) encourage and suggest the use of the ABA instructions, rather than *Allen* and its minority/majority language.[87] Despite this trend, there are many states that still allow the original *Allen* Charge or allow it with "some form of limiting factor."[88]

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[78] *Compare* N.C. GEN. STAT. § 15A-1235 (West 2025) (adopting ABA language with slight modifications), *with* ABA INSTRUCTION, *supra* note 74, at 255 (providing ABA model).

[79] Epperson, *supra* note 14, at 130–31. These states include Oregon, Alaska, New Hampshire, North Dakota, Maryland, Nebraska, and Rhode Island. *Id.* at 131.

[80] *See supra* Part II.A (discussing the cases that led to the *Allen* decision).

[81] Commonwealth v. Tuey, 62 Mass. (1 Cush.) 1 (1851).

[82] Commonwealth v. Rodriquez, 300 N.E.2d 192, 201–03 (Mass. 1973).

[83] *Id.* at 202.

[84] *Id.* Still, the court noted that the charge "has a sting" and emphasized that the court's approval of using the charge ought "not to be taken as an indication that it may be used prematurely or without evident cause." *Id.*

[85] *See, e.g.*, Commonwealth v. O'Brien, 839 N.E.2d 845, 848 (Mass. App. Ct. 2005) (discouraging digression from *Tuey-Rodriquez*'s recommended language); Commonwealth v. Sosnowski, 682 N.E.2d 944, 949 (Mass. App. Ct. 1997) ("Judges are urged not to stray from the language recommended for use when juries express difficulty in reaching unanimity. We hold, however, that the challenged language does not amount to a form of coercion that would require reversal.").

[86] For a more in-depth treatment on state-by-state *Allen* Charge practices, see generally Epperson, *supra* note 14 at 120–46.

[87] Epperson, *supra* note 14, at 126, 131, 133.

[88] *Id.* at 137–38.

B. *Connecticut Practice: From* State v. Smith *to* State v. O'Neil

As addressed above, the *Chip Smith* Charge predated *Allen* and was modeled after the *Tuey* Charge in Massachusetts. The defendant in the case, James "Chip" Smith, was drinking and causing a disturbance when his father obtained assistance from the Chief of Police of Ansonia, Daniel J. Hayes.[89] When Chief Hayes "found [Smith] in a downtown street[,] [a] struggle ensued, and Smith shot Hayes," resulting in his death.[90] In response to Smith's argument on appeal that the judge should have charged the jury that each juror "'must be governed by his own judgment,'"[91] the invention of the "*Chip Smith*" Charge comes from the following paragraph:

> Although the verdict to which each juror agrees must, of course, be his own conclusion and not a mere acquiescence in the conclusions of his fellows, yet in order to bring twelve minds to a unanimous result, the jurors should examine with candor the questions submitted to them and with due regard and deference to the opinions of each other. In conferring together the jury ought to pay proper respect to each other's opinions, and listen with candor to each other's arguments. If much the larger number of the panel are for a conviction, a dissenting juror should consider whether the doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, and with equal desire to arrive at the truth, and under the sanction of the same oath. And on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the conclusions of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.[92]

Unlike its sibling charge, *Tuey*, the *Chip Smith* Charge has survived with "a number of [its] coercive aspects" still intact.[93] Connecticut courts have consistently upheld the use of the "'*Chip Smith*' charge as an acceptable method of assisting the jury to achieve unanimity."[94]

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[89] *The "Chip Smith" Charge*, STATE OF CONN. JUD. BRANCH L. LIBR. SERVS., https://www.jud.ct.gov/lawlib/history/ChipSmith.htm (last visited Jan. 24, 2025).

[90] *Id.*

[91] State v. Smith, 49 Conn. 376, 386 (1881).

[92] *Id.*

[93] Epperson, *supra* note 14, at 123.

[94] State v. Wooten, 631 A.2d 271, 286 (Conn. 1993).

In a flurry of early twenty-first century decisions, the state's higher courts considered again the limitations it would place on judges administering the charge. In *State v. Feliciano*, the court considered the number of times it would allow a *Chip Smith* Charge to be administered to the jury.[95] Once deliberations had begun, the jury requested a play-back of four witnesses' testimony and "to rehear the court's charge on reasonable doubt, intent and 'lack of evidence.'"[96] The jury then requested to rehear additional testimony.[97] "That same day, the jury reported that it was unable to come to a unanimous decision," to which the judge suggested continuing deliberations.[98] The following day, at 2:00 P.M., the jury again reported deadlock, and the *Chip Smith* Charge was administered.[99] The jury later requested and received a written copy of the *Chip Smith* Charge, then, they again reported deadlock and revealed an eleven-to-one vote.[100] The court administered yet another *Chip Smith* Charge.[101]

In total, the court administered three *Chip Smith* Charges; after the final deliverance of the charge, the jury returned a verdict of guilty.[102] The defendant argued that the *Chip Smith* Charge was unfairly coercive and violative of his due process rights because the court knew the impasse resulted from an eleven-to-one vote for conviction and knew the deliberations were "heated."[103] In affirming the defendant's conviction, the court allowed for the charge to be read multiple times, explaining it is "the language used and not the number of times a *Chip Smith* charge is given that determines whether the instruction is improper."[104]

One year later, the Connecticut Supreme Court heard *State v. O'Neil* and reworked portions of the old *Chip Smith* language.[105] The court again reaffirmed the logic of the *Chip Smith* instruction,[106] but adopted a new version of the charge for trial courts to use in the future.[107] The court's new model language reads:

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[95] State v. Feliciano, 778 A.2d 812, 816 (Conn. 2001).

[96] *Id.* at 816–17.

[97] *Id.* at 817.

[98] *Id.*

[99] *Id.* at 817–18.

[100] *Id.* at 818.

[101] State v. Feliciano, 778 A.2d 812, 818–10 (Conn. 2001).

[102] *Id.* at 819.

[103] *Id.* at 820.

[104] *Id.* at 821 ("If the words are not coercive, then the fact that they are uttered more than once does not change their character.") (alteration in original); *see also* State v. Wright, 818 A.2d 824, 839–41 (Conn. App. Ct. 2003) (concluding that there was no error in administering the *Chip Smith* Charge twice when the court knew the jury was deadlocked ten-to-two in favor of conviction).

[105] State v. O'Neil, 801 A.2d 730, 745 (Conn. 2002) (adopting a revised version of the *Chip Smith* instruction for use in future cases).

[106] See *id.* at 740–45 for the court's discussion of the practice of deadlock charges across the federal circuits as support for reaffirming the logic of the *Chip Smith* Charge.

[107] *Id.* at 745–46.

> The instructions that I shall give you now are only to provide you with additional information so that you may return to your deliberations and see whether you can arrive at a verdict. Along these lines, I would like to state the following to you. The verdict to which each of you agrees must express your own conclusion and not merely the acquiescence in the conclusion of your fellow jurors. Yet, in order to bring your minds to a unanimous result, you should consider the question you have to decide not only carefully but also with due regard and deference to the opinions of each other. In conferring together, you ought to pay proper respect to each other's opinions and listen with an open mind to each other's arguments. If the much greater number of you reach a certain conclusion, dissenting jurors should consider whether their opinion is a reasonable one when the evidence does not lend itself to a similar result in the minds of so many of you who are equally honest and equally intelligent, who have heard the same evidence with an equal desire to arrive at the truth and under the sanctions of the same oath. But please remember this. Do not ever change your mind just because other jurors see things differently or to get the case over with. As I told you before, in the end, your vote must be exactly that—your own vote. As important as it is for you to reach a unanimous agreement, it is just as important that you do so honestly and in good conscience. What I have said to you is not intended to rush you into agreeing on a verdict. Take as much time as you need to discuss the matter. There is no need to hurry.[108]

The court posited that the use of "balancing language" (reminding jurors that they must not abandon "conscientiously held beliefs") serves to counteract the language directed at dissenting jurors.[109] Yet, when courts in Connecticut embellish the charge, convictions are often not disturbed on appeal, so long as the court accurately recited "the rest of the *Chip Smith* charge."[110] Take *State v. McArthur*, for example. At trial, before reading the *Chip Smith* Charge, the court told the jury: "[k]eep in mind how important it is for you to reach [a] unanimous agreement, because if you can't agree, then the case as to the charge that you can't agree on is mistried and the case has to be tried again."[111] Though the appellate court agreed with the

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[108] *Id.*
[109] *Id.* at 746.
[110] State v. McArthur, 899 A.2d 691, 707 (Conn. App. Ct. 2006).
[111] *Id.* at 706.

defendant that this "prefatory instruction" should not have been given,[112] it found the improper instruction was "attenuated" based on the recital of the rest of the approved *Chip Smith* language and upheld the conviction.[113]

IV. REFORMING CHIP SMITH

Though the view that all *Allen*-type charges, regardless of their balancing language, should be dispensed of is not without its support,[114] I argue here that there are steps Connecticut can take to reform, rather than relinquish, *Chip Smith* based off the tried and true practices in other states.[115] These reforms include the following: (1) instructing lower courts to use only the approved language when administering the charge, (2) limiting the number of times the charge may be read to the jury, and (3) modifying the language of the charge to avoid mention of "dissenting" jurors.

First, modeled off the Massachusetts approach,[116] Connecticut can protect variance in the issuance of *Chip Smith* Charges—and avoid arguments on appeal based off small alterations to the language—by instructing lower courts not to stray from the approved language. This suggestion evades the situation posed by *State v. McArthur*,[117] and appellate courts would no longer be faced with the questions of how long the jury deliberated after hearing the unapproved language and whether the issuance of *Chip Smith* was curative. This suggestion works to limit judicial discretion in this area, for which Connecticut's *Chip Smith* practice has been criticized.[118]

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[112] *Id.*

[113] *Id.* at 707. The error was harmless for two reasons: first, the subsequent reading of the *Chip Smith* Charge was viewed as curative, and second, the jury did not come to verdict immediately after hearing the prefatory instruction. *Id.*

[114] *See, e.g.*, Bateman, *supra* note 38, at 323 ("In what follows, I argue that the results of that research reveal a basic truth: no matter how 'neutral' or sanitized judges render their *Allen* charges, those charges nonetheless exert an impermissible form of pressure on deliberating jurors."); 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."); Thaggard v. United States, 354 F.2d 735, 739–40 (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 (5th Cir. 1962) ("There is small, if any, justification for its use.").

[115] I argue here for reform because the *Chip Smith* Charge has been consistently upheld in the state courts. *See* DAVID M. BORDEN, DAVID P. GOLD & LEONARD ORLAND, 5 CONNECTICUT PRACTICE SERIES: CRIMINAL JURY INSTRUCTIONS § 4.4 (4th ed. 2025) (describing *Chip Smith* as a "settled part of Connecticut jurisprudence").

[116] *See* Commonwealth v. O'Brien, 839 N.E.2d 845, 848 (Mass. App. Ct. 2005) (establishing Massachusetts' expectation for trial courts to adhere to the *Tuey-Rodriquez* language).

[117] State v. McArthur, 899 A.2d 691, 707 (Conn. App. Ct. 2006).

[118] *See, e.g.*, Epperson, *supra* note 14, at 124 ("The *Chip Smith* Charge practice in Connecticut is exactly what the [author's proposed *Allen* model instruction] seeks to overcome. Essentially, presiding judges are given free rein to use the charge at their discretion. This practice inappropriately increases the

The second step necessary to reforming *Chip Smith* is limiting the number of times the charge may be presented to the jury. Although the ABA model instruction allows the charge to be read multiple times, with exception,[119] there is some judicial support for limiting the charge's repetition.[120] Moreover, some states that allow for the repetition of the instruction prefer that *all* instructions given to the jury be repeated alongside the impasse instruction, to avoid the appearance of "singling out" the charge to the jury.[121] Allowing the charge to be administered as many as three times, as in *State v. Feliciano*,[122] poses an unjustifiable risk that a minority juror's will to dissent will be overborne for reasons other than genuine agreement with the verdict.[123] Whether the approach taken employs a per se rule (making it reversible error to repeat the *Allen* Charge),[124] or a strong disapproval of repetition,[125] meaningful limits to the charge's repetition should be constructed.

Finally, I suggest a modification to the language of the *Chip Smith* Charge. Although the model instruction suggested in *State v. O'Neil*[126] omits mention of the minority and majority (previously present in *State v. Smith*'s

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threat of an unduly coercive act of a presiding judge. For the [proposed] *Allen* Charge to be successful, it must not mirror the mistakes of the *Chip Smith* Charge.").

[119] Epperson, *supra* note 14, at 126 ("Section 5.4(b) [of the ABA model *Allen* Charge] allows for a presiding judge to repeat the charge multiple times if he or she deems it necessary. However, Section 5.4(b) limits the use of repeat charges that threaten a jury into reaching a unanimous verdict or force deliberations to extend for an unreasonable amount of time.").

[120] United States v. Seawell, 550 F.2d 1159, 1163 (9th Cir. 1977) ("A single *Allen* charge, without more, stands at the brink of impermissible coercion. . . . We conclude that as a sound rule of practice it is reversible error to repeat an *Allen* charge."); Tomlinson v. State, 584 So. 2d 43, 45 (Fla. Dist. Ct. App. 1991) ("We adopt the per se approach as correct and express agreement with the rationale in *Seawell*[.]"). The charge may, however, be repeated when the jury requests to rehear the instruction. *Seawell*, 550 F.2d at 1163. Some courts decline to adopt the per se rule that the impasse instruction may not be readministered, yet express disapproval to its repetition. *See* United States v. Barone, 114 F.3d 1284, 1305 (1st Cir. 1997) ("Although we sustain the district court in this case without much difficulty and decline to adopt a *per se* rule, we do think that caution needs to be used before the modified *Allen* charge is given for a second time. At a minimum, there ought normally to be special circumstances, and not merely a continued inability by the jury to decide, to justify a second charge.").

[121] Epperson, *supra* note 14, at 150.

[122] State v. Feliciano, 778 A.2d 812, 816 (Conn. 2001).

[123] *See* Reed, *supra* note 7, at 72 (conjecturing that "demand characteristics exist in the courtroom when the judge instructs the jurors," and that a juror might "chang[e] his vote to behave as a good juror"). Moreover, some worry that these impasse instructions communicate to holdout jurors that the judge delivering the instruction agrees with the majority—resulting in capitulation. *Cf.* Sonali Chakravarti, *Mistaken for Consensus: Hung Juries, the Allen Charge, and the End of Jury Deliberation*, *in* LAW'S MISTAKES 129, 148 (Austin Sarat, Lawrence Douglas & Martha Umphrey eds., 2016) ("[T]he intervention of the judge through the *Allen* charge fortified the majority position and gave the majority the impression that [it] had the support of the judge in moving to consensus." (alteration to original)). Repetition may increase these effects.

[124] *See, e.g.*, *Seawell*, 550 F.2d at 1163 (establishing a per se rule).

[125] *See, e.g.*, *Barone*, 114 F.3d at 1305 (cautioning against an *Allen* charge being given a second time unless special circumstances warrant it).

[126] State v. O'Neil, 801 A.2d 730, 745–46 (Conn. 2002).

instruction),[127] the model charge still singles out "dissenting jurors" to consider whether their opinion is reasonable.[128] It thus remains open to the attack that the charge suggests to the jury that the majority opinion has been deemed correct by the court—whatever the opinion may be.[129] To remedy this, two paths exist: one modeled off the ABA instructions and one modeled off the *Tuey-Rodriquez* Charge. The ABA instructions, for example, do not make any mention of the minority or dissenting jurors; they instruct the jurors to "consult with one another and to deliberate with a view to reaching an agreement . . . ."[130] In a similar vein, the *Tuey-Rodriquez* Charge speaks to both "jurors for acquittal" and "jurors for conviction."[131] Thus, it avoids the language of "dissenting" or "majority/minority" jurors, and asks both sides of the voting block to consider whether their view is reasonable.[132] By removing any call-out of the dissenting jurors, the modified *Chip Smith* Charge could prevent against incidental coercion in jury deliberations, and position Connecticut as a state at the forefront of the ongoing *Allen* debate.

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[127] State v. Smith, 49 Conn. 376, 386 (1881).

[128] *O'Neil*, 801 A.2d at 745–46.

[129] *See, e.g.*, People v. Richards, 237 N.E.2d 848, 852 (Ill. App. Ct. 1968) ("This has been aptly called the 'heed the majority' theme. . . . Significantly no such admonition is directed therein to the majority, who may remain adamant without violating its terms. By our interpretation, this is in effect a tacit suggestion to the unsophisticated members of the jury that the charge is addressed to the minority alone, the connotation being that the views of the majority are correct and should be regarded with deference simply because they prevail in number.").

[130] ABA INSTRUCTION, *supra* note 74. They read:

> (1) that in order to return a verdict, each juror must agree thereto;
> (2) that the 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;
> (3) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;
> (4) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and
> (5) that no juror should surrender his or her honest belief as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Id.

[131] Commonwealth v. Rodriquez, 300 N.E.2d 192, 202–03 (Mass. 1973).

[132] *Id.* at 203. In pertinent part, the charge reads:

> Thus, where there is disagreement, jurors for acquittal should consider whether a doubt in their own minds is a reasonable one, which makes no impression upon the minds of others, equally honest, equally intelligent with themselves, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, jurors for conviction ought seriously to ask themselves, whether they may not reasonably doubt the correctness of a judgment, which is not concurred in by others with whom they are associated.

Id. (the italics (representing additions to the *Tuey* Charge) and brackets (representing deletions) written in the original opinion have been omitted for clarity).

CONCLUSION

With the advent of impasse instructions, and consistent reaffirmation of their principles, the American justice system has taken the view that a hung jury is a problem to be solved.[133] It is worth considering, in conclusion, whether this is, in fact, true. With the relatively small rates of mistrials due to hung juries observed,[134] some judges and scholars have observed that "a mistrial from a hung jury is a safeguard to liberty."[135] The present *Chip Smith* model charge carries with it too many coercive aspects and too many opportunities for judicial discretion to effectively preserve a juror's prerogative to dissent and the accused's right to an uncoerced jury verdict. As more jurisdictions continue to refine their impasse instructions and align them with developments in social science research, Connecticut should follow this lead to modernize *Chip Smith*.

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[133] *See* PAULA L. HANNAFORD-AGOR, VALERIE P, HANS, NICOLE L. MOTT & G. THOMAS MUNSTERMAN, ARE HUNG JURIES A PROBLEM? EXECUTIVE SUMMARY 1, 8 (2002), https://www.ojp.gov/pdffiles1/nij/grants/199372.pdf ("The emerging concept of a hung jury as a fundamental flaw in the jury system spurred a demand for . . . solutions to address high hung jury rates in some jurisdictions."). *But see* Bateman, *supra* note 38, at 358 (indicating that hung juries may not be a "problem" that needs solving).

[134] *See supra* note 31 and accompanying text (discussing studies on hung juries).

[135] Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting) ("I think a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise."); *see also* Zeisel, *supra* note 34, at 719 n.42 ("The hung jury is treasured because it represents the legal system's respect for the minority viewpoint that is held strongly enough to thwart the will of the majority.").