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## THE DYNAMITE CHARGE: TOO EXPLOSIVE FOR ITS OWN GOOD?

Sarah Thimsen, Brian H. Bornstein, & Monica K. Miller\*

### I. INTRODUCTION

In December 2007, John White stood trial for shooting a teenage boy he feared was part of a mob intent on attacking him.<sup>1</sup> The jury retired after hearing the case to determine whether to convict White of manslaughter, convict him of lesser charges, or not to convict him at all.<sup>2</sup> With a possible sentence of fifteen years in prison, the jury faced the unenviable task of profoundly affecting White's future.<sup>3</sup> Indeed, reports emerged indicating that tension reached a point where "a juror punched a wall and another slammed a bathroom door so hard the courtroom walls shook."<sup>4</sup> After four days of deliberation, including eleven hours that day, the jury informed the judge that it could not reach a decision in the case.<sup>5</sup> The judge informed the jury that if it failed to reach a decision, it might have to return the next day, a Sunday, just two days before Christmas.<sup>6</sup> François Larché, one of the two jurors reluctant to convict on the manslaughter charge, later told reporters he considered the process "'a joke.' That's when I said 'I'm out of here.' It was a joke. There's nothing further I can say then, 'Okay, it's a mockery, let's go home.'"<sup>7</sup> Forty-five minutes after the judge informed the jury it might have to return the next day, the jury found White guilty of second-degree manslaughter.<sup>8</sup>

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<sup>1</sup> *John White Trial Goes to Jury*, ABC 7 EYEWITNESS NEWS, Dec. 19, 2007, <http://abclocal.go.com/wabc/story?section=news/local&id=5844519>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Patrick Whittle & Erik German, *Jury in John White Trial Boiled with Tension*, NEWSDAY.COM, Jan. 5, 2008, <http://www.newsday.com/news/local/ny-lijury0106,0,6471802.story>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

John White's case provides an illustration of a problem facing some courts: When juries cannot reach a decision, in an effort to save time and money, judges can issue instructions that pressure jurors (intentionally or unintentionally) to reach a decision in the case at hand.<sup>9</sup> Although such instructions might in fact result in decisions and therefore help avoid the costs of retrial, the decisions resulting from these instructions might result from suboptimal decision strategies.<sup>10</sup> As the juror's quote above indicates,<sup>11</sup> in the face of judicial instructions jurors sometimes decide that agreeing with the majority of jurors is easier than holding to their own position. This can create problems for all involved with the trial process, from the defendant to the juror himself.

The American jury's duty is to attend to evidence presented at trial and to make a decision regarding guilt and (sometimes) sentencing (in criminal proceedings) or liability and damages (in civil proceedings) through the process of deliberation. The jury has considerable freedom from court interference in performing this task. As one court noted, a jury acts "as the finder of fact because it is designed to be a deliberative body, charged with the responsibility of exchanging ideas, and with the concomitant practices of arguing and influencing. A judicial barrier should not be erected in the jury room to discourage free and open discussion."<sup>12</sup> Given the potential far-reaching effects of a jury's verdict, it is important that it reach the best conclusion it can based on a rational analysis of the available evidence. Oftentimes, however, juries (and individual jurors) fail to utilize a complete, rational analysis methodology.<sup>13</sup> Instead, normal psychological processes cause them to rely on mental shortcuts, or heuristics, to help them reach a decision.<sup>14</sup> These mental shortcuts are useful, but they are often suboptimal, meaning that the final verdict might not be the "best" decision.<sup>15</sup> Jurors

<sup>9</sup> See discussion *infra* notes 12, 22, 23.

<sup>10</sup> See discussion *infra* note 48.

<sup>11</sup> See *supra* text accompanying note 7.

<sup>12</sup> *United States v. Fioravanti*, 412 F.2d 407, 417 (1969).

<sup>13</sup> See, e.g., Ehud Kalai, *A Rational Game Theory Framework for the Analysis of Legal and Criminal Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JURY DECISION MAKING* 235 (Reid Hastie ed., 1993).

<sup>14</sup> See *infra* Part IV.

<sup>15</sup> By "best decision" we are not referring to the verdict the jury reaches, *per se*. Instead, we mean to imply that juries reach the "best decision" when they arrive at a decision by employing rational decision strategies, utilizing the information they have available to them via evidence and testimony and attending to it, and applying the law correctly. Juries can make poor decisions when they rely on the use of extralegal factors or fail to consider legally relevant variables in reaching their decision. Group dynamics can also exert an influence on decision-making ability. As we discuss *infra* Part IV.B, people often succumb to group pressure in order to reach a decision. This can occur because one does not want to

are also susceptible to the influence of other jurors or even the judge, making their decision a result of pressure from other jurors<sup>16</sup> or the desire to please authority figures.<sup>17</sup> In fact, people conform to commands given by experts quite readily, which is exacerbated when people are under high cognitive load.<sup>18</sup> Certain actions by the court can exacerbate the natural tendency to rely on these suboptimal heuristics.

As the opening paragraph illustrates, one instance which can increase jurors' susceptibility to heuristics and group influence is when they face a deadline for reaching a decision. As illustrated in the John White case discussed above, this can happen when a judge issues jurors an *Allen* charge,<sup>19</sup> otherwise known as the *dynamite* charge. In essence the court is encouraging the deadlocked jury to try to reach a verdict. Meant to "blast" deadlocked jurors into making a decision, the dynamite charge creates stress and time pressure, both of which can result in jurors' over-reliance on heuristics and an excessive influence of the majority in making a final decision. In one case, for example, the jury returned a verdict only thirty minutes after receiving a charge from the judge instructing them to "reexamine [their] own views and to change [their] opinion if [they are] convinced [they] are wrong."<sup>20</sup> It was possible that, even before receiving a dynamite charge, the jury was close to a verdict and the dynamite charge simply gave it the nudge it needed;<sup>21</sup> but the speed with which the jury, previously unable to reach a decision, returned a verdict after receiving this instruction from the

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upset the group dynamic by, for example, being the sole juror not agreeing with the majority, or one might go along with the majority in order to reach a quicker decision.

<sup>16</sup> For a discussion of the influence on group members' decision making and individual conformity, see *infra* note 20 and accompanying text.

<sup>17</sup> See *infra* note 60, 99 and accompanying text.

<sup>18</sup> Lucian Gideon Conway & Mark Schaller, *When Authorities' Commands Backfire: Attributions about Consensus and Effects on Deviant Decision Making*, 89 J. PERS. & SOC. PSYCHOL. 311 (2005); C. Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERS. & SOC. PSYCHOL. 808 (1994) (demonstrating that stereotypes are useful to impression-formation, and activation and use can occur without the perceiver's explicit instigation).

<sup>19</sup> *Allen v. United States*, 164 U.S. 492 (1896). Although different forms of the charge exist, all trace back to the original *Allen* charge. Throughout this paper, when referring to the *Allen* charge or dynamite charge, we are referring to any instruction to the jury to try to come to a decision and are not referring specifically to the original *Allen* charge.

<sup>20</sup> *Lowenfield v. Phelps*, 484 U.S. 231, 235 (1988).

<sup>21</sup> We liken this phenomenon to being easily able to open a previously recalcitrant jar lid after someone else has already loosened it.

judge suggests that it might have relied on suboptimal strategies to reach a verdict.<sup>22</sup>

The purpose of this Article is to discuss the various aspects of the *Allen* charge with respect to the psychology of jury decision making.<sup>23</sup> Part II sets out a basic outline of the jury deliberation process.<sup>24</sup> Part III focuses on hung juries, especially their frequency and their effects on the trial process.<sup>25</sup> Part IV examines, in depth, psychological research on the effects of both time pressure and social pressure (from the judge and other jurors) on jurors' decision-making ability.<sup>26</sup> Part IV also reviews suggested ways to avoid negative effects of the dynamite charge. Finally, Part V discusses future research on the effects of the *Allen* charge.<sup>27</sup>

## II. THE PSYCHOLOGY OF JURY DELIBERATIONS

During deliberation, juries typically move through a three-stage process.<sup>28</sup> In the first stage, the so-called *orientation stage*, juries take care of procedural requirements, such as electing a foreperson and discussing relevant procedural issues, such as how and when to take votes.<sup>29</sup> This stage helps jurors familiarize themselves with what will happen during the subsequent deliberations by establishing roles (e.g., electing a foreperson) and methods (e.g., procedures on how and when to vote).<sup>30</sup> It is in this stage that the jury's deliberation style usually emerges. Research identifies juries as either "verdict driven" or "evidence driven," and the particular style they adopt influences how a jury carries out deliberations.<sup>31</sup> After the orientation stage, juries enter the *open conflict*

<sup>22</sup> In fact, one of the indicators that the use of the *Allen* charge is not appropriate is the speed with which the jury returns the verdict after receiving the instruction from the judge. For example, see *Tucker v. Catoe*, 221 F.3d 600, 612 (2000).

<sup>23</sup> For a more concise overview of the dynamite charge and its effect on deliberations, see Monica K. Miller & Brian H. Bornstein, *Do Juror Pressures Lead to Unfair Verdicts?*, 39 MONITOR ON PSYCHOL., Mar. 2008, at 18.

<sup>24</sup> See *infra* Part II.

<sup>25</sup> See *infra* Part III.

<sup>26</sup> See *infra* Part IV.

<sup>27</sup> See *infra* Part V.

<sup>28</sup> MARK COSTANZO, PSYCHOLOGY APPLIED TO LAW 152-54 (2004); Garold Stasser, *Information Salience and the Discovery of Hidden Profiles by Decision-Making Groups: A "Thought Experiment,"* 52 ORG'L. BEHAV. & HUM. DECISION PROCESSES 156-57 (1992).

<sup>29</sup> See COSTANZO, *supra* note 28, at 152.

<sup>30</sup> *Id.*

<sup>31</sup> See REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 163 (1983). Verdict-driven juries begin deliberation by taking an initial poll and centering subsequent deliberations around that poll. *Id.* at 163. When a jury is verdict-driven it sorts evidence into categories supporting each position. *Id.* Evidence-driven juries, on the other hand, begin, not with a poll, but rather with a discussion of the evidence presented at trial.

stage, which comprises the actual deliberation stage.<sup>32</sup> During this stage, jurors attempt to persuade those with whom they do not agree. In this second stage, the jurors take their stance and argue for their side. Finally, juries (sometimes) reach the *reconciliation stage*, which occurs after a jury has reached a verdict and seeks to ensure that every juror is satisfied with the outcome.<sup>33</sup> Group dynamics can affect all of these stages, especially the open conflict and reconciliation stages.

Various types of social dynamics can influence the open conflict and, ultimately, the reconciliation stages. Jurors face what researchers refer to as *normative influence* and *informational influence*.<sup>34</sup> Normative influence refers to an individual publicly complying with group pressure, while still maintaining his or her initial beliefs. A juror, for example, might outwardly go along with the group's "guilty" verdict, while still believing the defendant to be not guilty. In other words, the rest of the group has established a "norm" of guilt, and the holdout juror conforms to that norm. Informational influence, on the other hand, results when people are genuinely persuaded by the arguments of others. In that case, the rest of the group changes the holdout juror's opinion about the defendant's guilt.<sup>35</sup> When discussing the negative effects of the *Allen* charge, a great deal of criticism focuses on implied normative influence,

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*Id.* In this instance the jury sorts the evidence that seems to best fit together, without regard to the verdict. *Id.* After sorting the evidence the jury then decides on a verdict which is the best fit. *Id.* at 163–64. Aside from the different approaches for reaching a verdict, research indicates that evidence-driven juries examine all the evidence more closely, while verdict-driven juries tend to only thoroughly examine evidence as it relates to the potential verdict and also reach their verdicts more quickly than do evidence-driven juries, although no relationship exists between deliberation style and final verdict. *Id.* at 165. Verdict-driven juries also lead to less overall satisfaction with the process than to evidence-driven juries. Jurors who are part of a verdict-driven jury reported lower evaluations of their own, as well as other jurors' contributions to the process, leading the authors to conclude that verdict-driven juries concern themselves less with others' opinions and persuasiveness. *Id.* An analysis of actual juries found a negative relationship between initial voting time and evidence review, such that, the earlier the jury voted, the less likely it was to have agreed with indicators of evidence review. Dennis Devine et al., *Deliberation Quality: A Preliminary Examination in Criminal Juries*, 4 J. EMP. LEGAL STUD. 273, 295 (2007). Indicators of evidence review included, "(1) We went over the evidence in detail during the course of deliberation; (2) We went over each exhibit and the testimony of each witness in detail; and (3) I was satisfied with how thoroughly my jury reviewed the evidence." *Id.* at 280.

<sup>32</sup> See COSTANZO, *supra* note 28, at 153.

<sup>33</sup> *Id.*

<sup>34</sup> See generally, Solomon E. Asch, *Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN. AND APPLIED, No. 9, 1 (1956); Morton Deutsch & Harold B. Gerard, *A Study of Normative and Informational Social Influences Upon Individual Judgment*, 51 J. ABNORMAL & SOC. PSYCHOL. 629 (1955).

<sup>35</sup> See generally, Asch, *supra* note 34; Deutsch & Gerard, *supra* note 34.

with opinions emphasizing the danger of focusing on minority jury members and asking them to give greater weight to the majority's opinions.<sup>36</sup>

### III. HUNG JURIES

Despite their best efforts, and in spite of various forms of social influence, jurors sometimes fail to reach a decision, resulting in a hung jury. Hung juries are an essential consideration in a discussion of the dynamite charge, as the charge is only used with juries that have difficulty reaching a verdict and are at risk of hanging. This section will address this important question: How often do juries hang, and what can be done about them?

#### A. Rates of Hung Juries

In many (possibly most) cases, the outcome is in little doubt and the jury quickly returns a verdict. In other cases, however, juries have a more difficult time making a decision. Whether due to the amount of evidence, complex testimony, personal factors affecting jurors' feelings about a particular case, or the decision rule, in some instances juries simply cannot reach a decision.<sup>37</sup> The decision rule is especially important. Unanimity requirements can make reaching a decision more difficult for juries. Not surprisingly, juries are more likely to hang if the court requires a unanimous verdict. Unanimity is a double-edged sword. By allowing non-unanimous verdicts (e.g., nine of the twelve must agree), courts are (theoretically) acting in a more efficient manner by assuring that the jury is more likely to reach a verdict. Unanimity

<sup>36</sup> See *infra* notes 59, 60.

<sup>37</sup> Valerie Hans and her colleagues have done a considerable amount of research analyzing the rate at which juries hang. See Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT. L. REV. 1249 (2003); Paula L. Hannaford-Agor et al., *Are Hung Juries A Problem?*, NATIONAL CENTER FOR STATE COURTS, Sept. 30, 2002, [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_HungJuriesProblemPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf) [hereinafter *Are Hung Juries A Problem?*]; Paula L. Hannaford, Valerie P. Hans & G. Thomas Munsterman, *How Much Justice Hangs in the Balance? A New Look at Hung Jury Rates*, 83 JUDICATURE, 59 (1999); Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott & G. Thomas Munsterman, *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 1 (2003). See also CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, NON-UNANIMOUS JURY VERDICTS: A NECESSARY CRIMINAL JUSTICE REFORM 6 (May 1995); PLANNING & MANAGEMENT CONSULTING CORPORATION, EMPIRICAL STUDY OF FREQUENCY OF OCCURRENCE CASES EFFECTS AND AMOUNT OF TIME CONSUMED BY HUNG JURIES 4-30 to 4-37 (1975).

requirements, however, ensure that each juror agrees with the verdict.<sup>38</sup> Requiring a unanimous verdict increases the pressures on jurors to reach a consensus, and can lead to greater reliance on normative influence and acquiescence to other social influences.

Valerie Hans and her colleagues conducted a study of hung juries in both federal and state courts throughout the United States. Administering questionnaires to courts hearing non-capital felony jury cases,<sup>39</sup> the researchers were able to obtain reports from judges, attorneys, and jurors. With this information, they could attempt to establish the rates of hung juries and their causes.

One difficulty with determining the frequency of hung juries, however, is that no clear consensus exists to define a hung jury. According to *Black's Law Dictionary*, a hung jury is simply "a jury that cannot reach a verdict by the required voting margin."<sup>40</sup> As Hans and colleagues pointed out,<sup>41</sup> however, jurisdictions vary in their interpretation of what constitutes a hung jury. Some jurisdictions consider a jury hung "if it failed to reach a verdict on any charge or on any defendant. In other jurisdictions, a hung jury was only counted if it hung on the most serious charge. Some only counted a hung jury if it hung on all counts or on all defendants."<sup>42</sup> Despite varying definitions, these authors examined the rates of hung juries from 1980 to 1997 in a variety of state and federal courts. Overall, their findings indicate that, in federal courts, rates of hung juries remained relatively stable over the course of their investigation, with rates of hung juries in federal courts ranging from 1.2% to 2%.<sup>43</sup> State courts had a higher overall percentage of hung juries (6.2%), with considerably more variability, ranging from 0.1% in Pierce County, Washington, to 14.8% in Los Angeles County, California.<sup>44</sup> This study established that hung juries, while not common in every jurisdiction, do present a challenge for many jurisdictions.

<sup>38</sup> As we explain in our discussion of normative influence, voting a certain way by no means guarantees that a juror genuinely agrees with that verdict. See *infra* Part I & Part IV (discussing the time and social pressures on jurors). Nonetheless, a unanimous decision rule is more likely to produce minority jurors who agree with the majority than a non-unanimous decision rule, where there is not even the pretense of agreement.

<sup>39</sup> See *Are Hung Juries A Problem?*, *supra* note 37. The authors concerned themselves with this particular arena because policymakers are often more concerned with this type of case than with a misdemeanor, for example.

<sup>40</sup> BLACK'S LAW DICTIONARY 398 (3d pocket ed. 1996).

<sup>41</sup> *Are Hung Juries A Problem?*, *supra* note 37, at 2.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 22. The highest instance of hung juries occurred in 1991, with a rate of 2.0%, while the lowest point in their analysis was in 1985, with a rate of 1.2%. *Id.*

<sup>44</sup> See *Are Hung Juries A Problem?*, *supra* note 37. The authors attribute this difference to geographical characteristics, noting that the statistics from the state courts involve smaller



B. *Why Hung Juries Matter*

When a jury hangs, the parties involved (i.e., judge, lawyers, clients) must determine how to proceed. In some instances, the case will not even return to the courtroom. In fact, the research by Hans and colleagues indicated that over half (53.4%) of the cases in which the jury hung were not retried, with 31.8% being resolved by plea agreements and 21.6% being dismissed.<sup>45</sup> Just over one-third of the cases returned to the courtroom.<sup>46</sup>

Given the infrequency of hung juries, it is reasonable to ask why the legal system should be concerned about them. There are several reasons. First, they are inefficient. They consume legal system resources without producing a clear-cut outcome.<sup>47</sup> Hung juries, almost by definition, consume more than their fair share of those resources, inasmuch as the jurors have to deliberate a long time before achieving hung status, and such trials require an additional investment of resources if they are retried.<sup>48</sup> In an era when court dockets are severely strained and overburdened,<sup>49</sup> the failure to resolve even a small percentage of cases compounds the problem. Retrials, even in the small percentage of cases in which they occur, necessarily add to the inefficiency.

Second, the non-outcome of a hung jury is likely to leave a sour taste in the mouths of some, if not all, of the parties. Many civil plaintiffs, in particular, pursue litigation for reasons other than compensation, such as

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geographic areas than the federal courts. *Id.* They go on to suggest that complete data from all of the jurisdictions would most likely lower the states' reported 6.2% hung jury rate. *Id.*

<sup>45</sup> *Id.* These data, although informative, came from only nine of the original thirty counties surveyed. *Id.*

<sup>46</sup> *Id.* at 26. Of the cases that went to retrial, the majority (32%) went to a jury and the remaining 2.4% were bench trials. *Id.*

<sup>47</sup> One estimate is that trials cost approximately \$10,000 a day. George C. Thomas III & Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 WM. & MARY BILL RTS. J. 893, 917 (2007) (citing Dwayne Bray, *Prosecutors Seek Change in Jury Voting*, L.A. TIMES, June 11, 1995, at B1).

<sup>48</sup> In fact, courts sometimes note the expense of a trial as a reason for issuing the charge. See, e.g., *United States v. Clinton*, 338 F.3d 483, 485 (6th Cir. 2003) ("The trial has been expensive . . ."); *United States v. Chigbo*, 38 F.3d 543, 544-45 (11th Cir. 1994) ("The trial has been expensive in time, effort, money and emotional strain to both the defense and prosecution. If you should fail to agree upon a verdict, the case will be left open and may have to be tried again. Obviously, another trial will only serve to increase the cost to both sides."). But see *United States v. McElhiney*, 275 F.3d 928, 945 (10th Cir. 2001) (concluding that emphasizing the cost of a retrial contributed to the coercive impact of the charge).

<sup>49</sup> One estimate is that it can take up to two years for civil cases to reach trial in federal courts. Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, DISP. RESOL. J., Nov. 2003/Jan. 2004, at 56, 57-58.

obtaining closure.<sup>50</sup> For criminal defendants, a failure to convict through a hung jury is undoubtedly preferable to a conviction, but it nonetheless lacks the vindication of an acquittal. Attorneys, judges, and jurors in hung juries are likely to feel, in the absence of a verdict, that they have wasted their time. Thus, hung juries are likely to leave most trial participants dissatisfied, not necessarily with the outcome of the case, but with the process.<sup>51</sup>

Third, when a jury hangs and the case is not retried, justice is not necessarily being served. Plea bargains and dismissals might lessen some of the inefficiencies associated with hung juries, but they are not necessarily optimal outcomes. Most likely, they reflect the wearing down of the parties and concerns about further investments of time and money more than they do a concern about reaching the just outcome.

### C. *The Dynamite Charge*

As a means to avoid the costs and inefficiencies of a retrial, courts sometimes employ a technique referred to as an *Allen* charge (also known as a *dynamite charge*), utilized when juries report to the court that they cannot reach a decision.<sup>52</sup> The *Allen* charge receives its name from the case of *Allen v. United States*,<sup>53</sup> in which the United States Supreme Court upheld the use of instructions intended to keep the jury from

<sup>50</sup> See, e.g., Gillian K. Hadfield, *Framing the Choice between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOCIETY REV. 645 (2008); Charles Vincent, Magi Young & Angela Phillips, *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 50 OBSTETRICAL & GYNECOLOGICAL SURV. 103 (1995).

<sup>51</sup> The concern here is that holdout jurors might be making the “right” decision but for the wrong reasons. A lone juror might go along with the majority and correctly convict (or acquit) an individual, but if the process is distorted one might wonder if justice was truly served. For example, even if the jury reaches a decision, knowing that one gave in to group pressure in order to reach that decision might lead to an overall negative view of the deliberation process.

<sup>52</sup> It is impossible to determine the incidence of the dynamite charge, because most cases in which it is used—whether the jury ultimately hangs or not—do not become part of the appellate record. However, the substantial number of cases discussed in this section and the statement on its implementation by the American Bar Association suggest that its use is far from rare. See *supra* note 42; *infra* notes 60–61 and accompanying text.

<sup>53</sup> See 164 U.S. 492 (1896). Interestingly, this was Allen’s third time in front of the Supreme Court. His first appearance before the Court arose after his first conviction, which the Court then set aside, finding reversible error in the court’s expression of self-defense. 150 U.S. 551, 516 (1893). After a retrial and a second conviction, the Court reversed Allen’s case, finding the withdrawal of the claim of self-defense from the jury’s consideration erroneous, along with informing the jury that Allen’s arming himself with a pistol, even in the case of self-defense, would constitute murder. 157 U.S. 675, 681 (1895).

deadlock.<sup>54</sup> Included in the instructions were the judge's comments that, because it was unlikely that jurors would ever have "absolute certainty," they should resume deliberations "with a proper regard and deference to the opinions of each other."<sup>55</sup> The judge specifically singled out jurors in the minority, noting that "they should listen, with a disposition to be convinced."<sup>56</sup>

As its nickname implies, the purpose of the dynamite charge is to "blast deadlocked juries into a verdict."<sup>57</sup> In simpler terms, the *Allen* charge tells those in the minority to pay more attention to what those in the majority have to say. The Court recognized that jurors have the right to express their opinions, but also recognized the ultimate goal of the

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<sup>54</sup> Although the charge takes its name from the Supreme Court's case, the use of the charge had been upheld previously. See *Commonwealth v. Tuey*, 62 Mass. (8 Cush.) 1 (1851); *State v. Smith*, 49 Conn. 376 (1881).

<sup>55</sup> *Allen*, 164 U.S. at 501.

<sup>56</sup> *Id.* The original *Allen* language came from a supplemental instruction in *Tuey*. *Id.* See *Tuey*, 62 Mass. at 1-3. In its original language, the instruction read:

[T]hat in 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, u[p]on the other hand the majority were 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.

*Allen*, 164 U.S. at 501. See also *United States v. Fioravanti*, 412 F.2d 407, 415 n.18 (3d Cir. 1969) (paraphrasing the *Allen* charge from *Tuey*). In upholding the charge, the Supreme Court recognized:

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.

*Allen*, 164 U.S. at 501-02.

<sup>57</sup> Saul M. Kassin, Vicki L. Smith & William F. Tulloch, *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors*, 14 L. & HUM. BEHAV. 537, 538 (1990).

jury is to reach a decision.<sup>58</sup> Although the actual language involved with the *Allen* charge might not seem all that forceful in itself, it can have a powerful impact on jurors and deliberations. By singling out minority jurors, judges can create an inherent amount of pressure for them to surrender their own views in favor of the majority position.<sup>59</sup> Indeed, although *Allen* has never been overruled, a number of courts have recognized the inherent coercive power of the charge by singling out minority jurors and have adapted modified instructions to address the jury as a whole and not identify any specific person or persons.<sup>60</sup> Additionally, some courts now disallow the use of *Allen* altogether.<sup>61</sup>

<sup>58</sup> *Allen*, 164 U.S. at 501.

<sup>59</sup> See, e.g., *State v. Voeckell*, 210 P.2d 972, 979 (Ariz. 1949) (dissenting opinion). The judge acknowledged the coercive impact of the dynamite charge:

The majority think he is guilty; the Court thinks I ought to agree with the majority so the Court must think he is guilty. While the Court did tell me not to surrender my conscientious convictions, he told me to doubt *seriously* the correctness of my own judgment. The Court was talking directly to me, since I am the one who is keeping everyone from going home. So I will just have to change my vote.'

*Id.* at 980 (internal quotations omitted). See also *United States v. Burgos*, 55 F.3d 933, 937 (4th Cir. 1995) (reversing a conviction based on a coercive *Allen* charge); *United States v. Cortez*, 935 F.2d 135 (8th Cir. 1991); *Hodges v. United States*, 408 F.2d 543 (8th Cir. 1969); *United States v. Harris*, 391 F.2d 348 (6th Cir. 1968) (courts must address both the majority and minority jurors). As the *Burgos* court stated, "An evaluation of a suspect *Allen* charge must be conducted, in part, from the perspective of a juror in the minority, because '[t]hey always know their minority status, and if fearfully inclined, may presumably suspect a disgruntled judge can find them out.'" 55 F.3d at 940 (quoting *United States v. Sawyers*, 423 F.2d 1335, 1340 (4th Cir. 1970)).

For a comprehensive review on conformity and coercion, see Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569 (2007).

<sup>60</sup> The American Bar Association has also offered suggestions for the modification of the *Allen* charge. One of the modifications suggests that judges not single out jurors in the minority and suggest that they reconsider their own opinions in terms of the majority decision. Committee on Model Criminal Jury Instructions for the Eighth Circuit No. 10.02 (rev. ed. 1989); *United States v. Silvern*, 484 F.2d 879 (7th Cir. 1973).

In *Fioravanti*, for example, even though the court looked upon the *Allen* charge with a harsh eye, one of the reasons it declined to overrule the use of the charge was that it was given within the main body of the instructions (addressing all of the jurors, not just those disagreeing with the majority) and therefore not likely to be as coercive as when issued as its own supplemental charge. 412 F.2d at 419. See also *United States v. Wiebold*, 507 F.2d 932 (8th Cir. 1974) (holding no improper use of the *Allen* charge, but recognizing that if given as a supplement rather than in the main body of the instructions tipped the balance in terms of coerciveness).

It is also important to recognize that pressure can come from the judge as well as other jurors. Psychological research shows that people are susceptible to pressure from authority figures and can be extremely obedient to them. See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* 20-22 (1974). In cases such as *Lowenfield v. Phelps*, then, when a judge admonishes a jury "to go back to the jury room and deliberate and arrive at a verdict,"

Although the *Allen* charge is a promising technique to avoid a hung jury, critics have raised a number of issues related to its use. The remaining sections of this Article discuss some of the criticisms raised and examine them from a psychological perspective. In particular, psychological research shows that the stress and time pressure induced by a dynamite charge can lead to suboptimal decision making.

#### IV. SITUATIONAL EFFECTS ON (RISKY) DECISION MAKING: STRESS AND TIME PRESSURE

The following subsections discuss forms of pressure jurors are likely to face when making decisions, such as the pressures that are exacerbated by the *Allen* charge. We first discuss the effects of stress on decision making, followed by an explanation of the effect of time pressure on decision making.

##### A. Stress

In psychological research, stress is defined in various ways, to encompass both features of an event and an observer's physiological and subjective response to that event.<sup>62</sup> As some define it, stress is "a negative reaction to the environment caused by too much pressure on the individual."<sup>63</sup> Within the context of decision making, there are several sources of stress, including people's acknowledgment that they do not have all of the necessary knowledge to make an informed

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jurors feel they have little choice but to comply. 484 U.S. 231, 245 (1988) (finding the charge not coercive). *But cf.* *Jenkins v. United States*, 380 U.S. 445, 445 (1965) (per curiam) (reversing a conviction, holding the charge issued in the case was coercive). The charge stated: "You have got to reach a decision in this case." *Id.*

For a review of the status of the dynamite charge in state and federal courts, see Thomas & Greenbaum, *supra* note 47.

<sup>61</sup> See, e.g., *Fioravanti*, 412 F.2d at 417 (referring to the charge as discredited). Even the ABA has joined the cause, suggesting that courts modify the original charge. AMERICAN BAR ASSOCIATION, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (A.B.A. Standards, 1968) [hereinafter A.B.A. Standards]; American Bar Association, A.B.A. Standards for Criminal Justice §15-5.4 (3d ed. 1996). *But cf.*, *United States v. Crispo*, 306 F.3d 71 (2d Cir. 2002) (upholding use of *Allen* despite its being read twice in court and the identity of the lone holdout juror being revealed to the court); *United States v. Melendez*, 60 F.3d 41 (2d Cir. 1995) (upholding use of the *Allen* charge). See also Thomas & Greenbaum, *supra* note 47.

<sup>62</sup> See generally ROBERT E. FRANKEN, HUMAN MOTIVATION 266-300 (Brooks/Cole Publishing, 3d ed. 1994); HANDBOOK OF STRESS: THEORETICAL AND CLINICAL ASPECTS (Leo Goldberger & Shlomo Breznitz eds., 1982) (discussing decision-making under stress).

<sup>63</sup> Jonathan L. Freedman & Donald R. Edwards, *Time Pressure, Task Performance, and Enjoyment*, in THE SOCIAL PSYCHOLOGY OF TIME: NEW PERSPECTIVES 113 (Joseph E. McGrath ed., 1988).

decision, the “fear of suffering from various losses that would occur no matter which alternative were [sic] chosen, worry about unknown things that could go wrong when vital consequences are at stake, concern about making a fool of oneself in the eyes of others, and losing self-esteem if the decision works out badly.”<sup>64</sup>

Jury duty is a situation with extreme potential to cause stress. When deciding on a verdict, jurors are undoubtedly under a certain amount of stress. Indeed, they are affecting the course of at least one person’s life. A jury voting to convict a man accused of rape, for example, affects not only his life, but the lives of his family and friends, as well as the lives of the victim and her family. Having the ability to so alter a person’s life would be a stressful situation for most people. Of course not all cases are so dire or have such serious outcomes, but it is unquestionably true that the decisions handed down by juries do have consequences for all involved. Consistent with this supposition, research has consistently shown that jurors do indeed experience some level of stress, which deliberation may exacerbate.

Several empirical studies indicate that jurors do report feelings of stress, starting with the summons<sup>65</sup> to jury duty and sometimes lasting even after the trial is concluded.<sup>66</sup> In its report on juror stress, the National Center for State Courts (“NCSC”) reported that one of the main reasons people try to avoid jury duty involves the perceived stress associated with the task.<sup>67</sup> The report identified four main reasons why people reported stress with their jury experience. First, jurors face unpredictable situations, as they do not know how long the trial will last, the evidence to which they will be exposed, or if they will even fulfill their duty (if, for example, the case is settled mid-trial).<sup>68</sup> Second, jurors reported that the process seemed like an inefficient use of time.<sup>69</sup> A third

<sup>64</sup> Irving L. Janis, *Decisionmaking under Stress*, in HANDBOOK OF STRESS: THEORETICAL AND CLINICAL ASPECTS 56, 69-70 (Leo Goldberger & Shlomo Breznitz eds., 1982).

<sup>65</sup> According to the NCSC study, summons can create stress because they often do not include straightforward information, such as directions to the courthouse, parking facilities, and what will be expected of them when they report for jury duty. NAT’L CENTER FOR STATE COURTS, THROUGH THE EYES OF THE JUROR: A MANUAL FOR ADDRESSING JUROR STRESS 7 (1998), available at [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_JurorStressPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_JurorStressPub.pdf) [hereinafter NCSC]. Other stressors involve missing work, being kept in uncomfortable surroundings and being treated as a member of an “assembly-line” of jurors. *Id.*

<sup>66</sup> *Id.* at 47; Brian H. Bornstein et al., *Juror Reactions to Jury Duty: Perceptions of the System and Potential Stressors*, 23 BEHAV. SCI. & L. 321, 321-22, 339 (2005); Theodore B. Feldmann & Roger A. Bell, *Juror Stress: Identification and Intervention*, 21 BULL. AM. ACAD. PSYCHIATRY L. 409 (1993); Thomas L. Hafemeister, *Juror Stress*, 8 VIOLENCE & VICTIMS 177 (1993).

<sup>67</sup> NCSC, *supra* note 65, at 2.

<sup>68</sup> *Id.* at 5.

<sup>69</sup> *Id.*

source of stress involves the actors within the system, with jurors reporting “discourteous, insensitive and unhelpful staff.”<sup>70</sup> Finally, jurors find their surroundings (e.g., courtroom, jury room, possibly hotel) uncomfortable.<sup>71</sup> Taken together, these circumstances would be stressful for most people and are possibly more so for jurors charged with making potentially life-changing decisions. Similarly, other factors inducing tension include complex legal instructions, sequestration, unproductive and disorganized deliberations, and uncomfortable surroundings.<sup>72</sup> Further, according to the NCSC report, jurors report general anxiety about the deliberation process itself, particularly about making a mistake when reaching a verdict.<sup>73</sup>

Another study found that, from a sample of actual jurors, approximately 40% reported feeling stress at some point.<sup>74</sup> The most stressful events jurors reported involved reaching the actual decision itself.<sup>75</sup> Respondents indicated that, while attempting to reach a decision, they focused on the potential effects their verdict could have for the interested parties. Other factors contributing to jurors’ stress involved the complexity of the trial<sup>76</sup> and the perceived effect jury duty would have on their daily lives.<sup>77</sup> Feldmann and Bell<sup>78</sup> also provided evidence that stress comes into play even after jurors have reached a verdict. They noted that jurors can experience “intrusive thoughts of the trial, feelings of restlessness and agitation, sleep difficulties, and disturbing dreams,”<sup>79</sup> particularly if the trial included graphic evidence.

What effect does this stress have on jurors’ ability to make decisions? According to rational choice theory, when making a decision, people gather information about all of the possible solutions and then judge the available information they have against these solutions, ultimately leading to what they perceive to be the best decision regarding the

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* The study also provides useful recommendations about how to reduce levels of stress among jurors. *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Bornstein et al., *supra* note 66, at 335.

<sup>75</sup> *Id.* at 335–36.

<sup>76</sup> Factors involved with the complexity of the trial included things such as difficulty understanding the law, difficulty deciding guilt, and difficulty understanding the testimony. *Id.* at 332.

<sup>77</sup> Factors involved with disruption to daily life included elements such as long days in court, lengthy trials, disruption of a normal routine, length of deliberations, and trial interruptions. *Id.* See also Hafemeister, *supra* note 66, at 178.

<sup>78</sup> Hafemeister, *supra* note 66, at 178.

<sup>79</sup> *Id.* at 412.

problem.<sup>80</sup> This would obviously be the preferred method of how juries reach verdicts. Under stressful conditions, however, it is likely that juries often do not rely fully on rational processes to reach a verdict. Under conditions of high stress, for example, decision makers often exhibit premature closure, which occurs when one makes a decision without fully examining all of the possible alternatives.<sup>81</sup> This can result in people “narrowing the range of perceived alternatives, overlooking long-term consequences, inefficient searching for information, erroneous assessing of expected outcomes, and using oversimplified decision rules that fail to take account of the full range of values implicated by the choice.”<sup>82</sup> People also face what Janis identified as *decisional conflict*, which arises when decision makers feel additional stress when they perceive their anticipated losses as being high. These losses include harm to one’s image of being a competent decision maker.<sup>83</sup>

Under some circumstances, stress can increase performance, but only up to a point.<sup>84</sup> This is captured by the Yerkes-Dodson law, according to which extremely low or extremely high levels of stress inhibit performance, but a moderate amount of stress can actually improve performance.<sup>85</sup> The question remains, however, as to how much stress jurors actually face. If the stress is moderate, it may help them reach the best possible decision, but extreme levels of stress might result in reliance on less-than-ideal judgment strategies.

<sup>80</sup> For some classic literature in this area, see GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976); JAMES M. BUCHANAN, *COST AND CHOICE: AN INQUIRY IN ECONOMIC THEORY* (University of Chicago Press 1969); Herbert A. Simon, *Theories of Decision-Making in Economics and Behavioral Science*, 49 *AM. ECON. REV.* 253 (1959).

<sup>81</sup> See Janis, *supra* note 64.

<sup>82</sup> *Id.* at 70. Janis also provided a list of seven criteria deemed essential for effective decision making. *Id.* According to Janis, failing to meet any one of the criteria leads to deficient decision making. *Id.* Use of the dynamite charge might inhibit any one of the steps outlined and therefore result in inefficient decision making. *Id.* at 71-72. Janis contended that the greatest threat to effective decision making is hyper-vigilance, in which “the decisionmaker, in a paniclike state, searches frantically for a way out of the dilemma, rapidly shifts back and forth between alternatives, and impulsively seizes upon a hastily contrived solution that seems to promise immediate relief.” *Id.* at 72.

<sup>83</sup> See Janis, *supra* note 64 and accompanying text. A juror in the minority, faced with a majority supporting another decision, might feel that his or her competence as a decision maker is being questioned and go along with the majority in order to avoid having this negative image. *Id.* at 72. Further, as trials become more accessible to the public at large via television, the internet and newspapers, jurors feel additional stress to demonstrate that they can effectively reach a “good” decision. Edie Greene & Leslie Ellis, *Decision Making in Criminal Justice*, in *APPLYING PSYCHOLOGY TO CRIMINAL JUSTICE* 183, 185 (David Carson et al. eds., 2007).

<sup>84</sup> See Freedman & Edwards, *supra* note 63, at 127.

<sup>85</sup> *Id.*



## B. Group Dynamics

Although criticism of the *Allen* charge has not focused on stress, *per se*, it has focused on the pitfalls of singling out certain (minority) jurors to re-examine their views in light of the views of other (majority) jurors.<sup>86</sup> Psychological literature is replete with evidence about the negative effects of being in a minority group,<sup>87</sup> and since the majority of the criticisms of *Allen* focus on group dynamics, it seems a safe assumption that judges using an *Allen* charge are (inadvertently) adding to jurors' stress.<sup>88</sup> According to the *Allen* instructions, jurors in the minority should listen to other jurors "with a disposition to be convinced."<sup>89</sup> It seems the Court was encouraging informational influence; it wanted jurors to actually become persuaded that the majority was "right" and be willing to open themselves up to the majority's persuasive powers. Unfortunately, research shows that when juries receive the *Allen* charge, they are actually more susceptible to normative influence.<sup>90</sup>

The fact is, when people are in the minority in a group, they often succumb to pressure from the majority to behave in a certain way,<sup>91</sup> even

<sup>86</sup> See, e.g., *United States v. Cortez*, 935 F.2d 135, 141-42 (8th Cir. 1991); *United States v. Chigbo*, 38 F.3d 543, 545 (11th Cir. 1994). Courts in both cases held the *Allen* charge was not unduly coercive given the fact that the judge ceased polling the jury after the first non-unanimous juror was identified. *Chigbo*, 38 F.3d at 546. Furthermore, the court was unaware of the numeric split of the jury when it issued the charge. *Cortez*, 935 F.2d at 141. In *Tucker v. Catoe*, the court found the *Allen* charge coercive, partially because the court knew how the jury was divided. 221 F.3d 600, 611 (4th Cir. 2000).

<sup>87</sup> Minority status can greatly exacerbate stress for individuals. People often engage in the behavior of the majority in order to achieve some sort of in-group status. This happens even when the majority behavior is detrimental to one's well-being. See, for example, Christian S. Crandall, *Social Contagion of Binge Eating*, 55 J. PERSONALITY & SOC. PSYCHOL. 588 (1988), showing that women in a sorority engaged in more binge eating when that was the behavior of the majority. It is no stretch, then, to suggest that jurors in the minority might be more likely to vote with the majority so they are not in a group unto themselves. As Asch put it, "Mindful of the social rejection that often attends deviance, individuals strategically choose to go along with the crowd—at least in public—even if they do not privately endorse the popular opinion." See Asch, *supra* note 34, at 70. See also Deutsch & Gerard, *supra* note 34; Reichelt, *supra* note 59.

<sup>88</sup> See *supra* Part IV.A (discussing juror stress).

<sup>89</sup> 164 U.S. 492, 501 (1896).

<sup>90</sup> See e.g., Kassin et al., *supra* note 57, at 547.

<sup>91</sup> See generally Asch, *supra* note 34 (focusing on normative influences). In his classic experiment on conformity, Solomon Asch had participants come into a room and look at lines presented on large white cards. *Id.* at 3, 5. On one card participants saw one line; the other card contained three lines. *Id.* at 3. The participant's task was to choose which of the three lines was the same length as the line presented on the first card. *Id.* The line lengths were different enough to make the correct answer fairly obvious. See *id.* (discussing the line lengths). In groups of seven to nine, participants (in reality there was only one participant, all other members of the group were trained confederates of the researcher) went around the table one at a time and stated which line they thought was the closest to

if that behavior is inconsistent with what they (as individual jurors) believe. Thus, even without explicit pressure from others, people will often succumb to implicit pressure from other group members. Indeed, it has been suggested<sup>92</sup> that the *Allen* charge unfairly targets jurors in the minority and these jurors are often subject to greater normative influence than their counterparts in the majority. As one court stated, "The [*Allen*] charge 'places the sanction of the court behind the views of the majority, whatever they may be, and tempts the minority juror to relinquish his position simply because he has been the subject of a particular instruction.'"<sup>93</sup> This singling out of the minority makes its status more salient<sup>94</sup> and might make it more susceptible to pressure from the majority. Psychological researchers have obtained results supporting this position, studying the effect of the dynamite charge on mock juries.<sup>95</sup> Their research showed that mock jurors initially in the minority changed their vote more often in favor of the majority after they had received the dynamite charge.<sup>96</sup> On the other hand, mock jurors in the minority who did *not* receive the dynamite charge showed no change in their voting preferences.<sup>97</sup> Also, within groups receiving a dynamite charge, the

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the original line. *Id.* However, one of the participants did not know that that the majority had been instructed to choose a wrong line. *Id.* at 1, 3. At first, the unknowing participant seemed puzzled, but later on the same participant either was tempted to or actually did agree with the majority. *Id.* at 10, 27, 69-70. The effect of clearly being in the minority, and being so publicly, led a number (36.8%) of naïve participants to actually conform to the majority decision. *Id.* at 10, 27-50 (providing data indicating the errors and interviews indicating why the participants behaved as they did). In other words, even though these naïve participants *knew* the answer they were giving was wrong, they still gave it in order not to be in the minority. *Id.* at 32-33 nn.21, 22 & 34. Other explanations included that the participant thought everyone was just "following along" with the leader or that they had been subjected to optical illusions, or that the participant had not wanted to ruin the researcher's results. *Id.* at 28, nn. 18, 21, 31 & 32-33. Another factor which influenced conformity was the number of people involved in the decision making task. *See id.* at 39-40 (describing one participant's viewpoint on social pressure). When faced with one other person, participants stood their ground the majority of the time. *See id.* at 39-40 (describing one participant's viewpoint on social pressure). However, when faced with two opposing viewpoints, Asch noticed more people starting to conform, a trend which only got stronger as the number of confederates increased. *Id.* Similarly, if those in the minority had at least one person "on their side," they tended to yield less frequently than if they were in the minority on their own. *See supra* note 34.

<sup>92</sup> AMY J. POSEY & LAWRENCE S. WRIGHTSMAN, TRIAL CONSULTING 147 (2005).

<sup>93</sup> *People v. Gainer*, 566 P.2d 997, 1005 (Cal. 1977) (quoting *United States v. Bailey*, 468 F.2d 652, 662).

<sup>94</sup> *See* Feldmann & Bell, *supra* note 66, at 414.

<sup>95</sup> Kasson et al., *supra* note 57, at 547; *see also* Vicki L. Smith & Saul M. Kasson, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries*, 17 L. & HUM. BEHAV. 625, 640 (1993).

<sup>96</sup> *Id.*

<sup>97</sup> Kasson et al., *supra* note 57, at 547.

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researchers observed that participants in the majority actually applied more social pressure, while participants in the minority “imagined pressures that did not exist.”<sup>98</sup>

Another social factor influencing jury behavior is the (implied) pressure from the judge. Because judges are in a position of power, jurors are likely to do exactly what the judge instructs. While this is generally desirable, studies abound showing that people are willing to listen to authority figures, even if it leads them to act in a manner in which they are uncomfortable or to reach an undesirable outcome.<sup>99</sup> In cases involving the dynamite charge, then, it seems clear that jurors would feel pressure from an authority figure (i.e., the judge) and comply with his request, even if compliance does not gel with the juror’s individual preference.<sup>100</sup> In line with this,<sup>101</sup> research shows that mock jurors in minority positions reported feeling more pressure from the judge to reach a decision than did those in the majority. Indeed, even though juries have a right to hang, research indicates that the majority of jurors (even those who had previous jury experience) are not aware of this, and when they receive the *Allen* charge from the judge they take it as an indication that a verdict is required (91% in the dynamite charge condition v. 55% in a control condition).<sup>102</sup> Social influences, then,

<sup>98</sup> *Id.* at 548; Smith & Kassin, *supra* note 95, at 641.

<sup>99</sup> A classic study in the realm of obedience to authority is that of Stanley Milgram. *See* MILGRAM, *supra* note 60, at 20–22. Through a series of trials, Milgram found that he could get participants to shock another participant to the point of serious injury or even possible death. *Id.* at 23. Although the participants administering the shocks expressed discomfort with their actions, they continued to listen to the researcher, who simply instructed that the research must continue. *Id.* at 21. This study illustrates that, even if it is something with which people are uncomfortable, most will comply with what an authority figure tells them to do because that person “must know best.” *Id.* at 20–22.

<sup>100</sup> Interestingly, the judge is not the only authority figure jurors face. Often the foreperson of the jury is seen as having an authoritative role and his/her stance can influence holdout jurors’ ultimate decisions. *See* Devine et al., *supra* note 27, at 296. The relationship with the authority figure can be uncertain at times, however. For example, when people feel they are being told what to do, psychological reactance can occur. Psychological reactance refers to the tendency of people to establish their free will in the face of an order and do the opposite of what is being ordered. Why reactance does not occur more often, then, is likely due to several factors. First of all, as Conway and Schaller suggested, if people are still under an authority figure’s rule (as jurors likely perceive themselves to be), they are less likely to deviate. Conway & Schaller, *supra* note 18, at 311. Second, when under cognitive load, a reactance effect was unlikely to occur. *Id.* at 322. Finally, the perceived expertise of the authority figure moderates the effect: people demonstrate greater obedience to commands from ‘expert’ authority figures, a category into which judges (likely) fall. *See id.* at 315 (stating that people are likely to obey commands from expert authorities).

<sup>101</sup> *See* Kassin et al., *supra* note 57, at 547; Smith & Kassin, *supra* note 95, at 648.

<sup>102</sup> *See* Kassin et al., *supra* note 57, at 548.

whether overt or implied, can play a large part in the dynamics of jury (and juror) decision making.

### C. *Time Pressure*

Stress and social influence can increase the pressure on a holdout juror to reach a decision quickly, so as not to inconvenience the other jurors, the judge, or the court. These factors place the juror under pressure to reach a decision in a limited amount of time.<sup>103</sup> Like stress, when faced with time pressure, people often use less-than-ideal strategies to help them make a decision. Courts recognize that time, unlike stress, plays a role in decision making. In fact, the time it takes to return a verdict is one of the factors courts look at in order to determine whether the *Allen* charge is coercive. As one author observed, “the degree of coerciveness behind a supplemental *Allen* charge [is] inversely proportional to the length of time the jury spent deliberating after the charge was given.”<sup>104</sup>

The adage that “time is relative” seems to apply here as well – what kind of time limit qualifies as coercive? Thirty minutes, one hour, a day?

<sup>103</sup> Jurors might feel the effect of time pressure from a variety of sources. See, e.g., Whittle & German, *supra* note 4, at 1 (discussing that the judge noted the proximity of the case to Christmas, perhaps indicating to the jurors that they should reach a decision soon so as to be able to conclude the trial in time for the holiday). See also *infra* notes 104-08 and accompanying text (discussing the effects of imposing definite and indefinite time limits on jury deliberations).

Similarly, since most jurors do not know of their right to hang, once they are at a standstill, holdout jurors might feel more pressure to quickly cast their verdicts in accord with the rest of the jury to avoid the stressful situation of jury deliberations. See Smith & Kassin, *supra* note 95, at 548 (stating that most jurors do not know they have a right to hang). It is also possible that if the jury indicates it cannot reach a decision, requiring the jurors to continue deliberations might cause them greater feelings of stress and frustration because they have mentally prepared for the conclusion of their service. Having the judge inform them that they are to resume deliberations might create more stress and also increase jurors’ feelings of having to reach a decision in a timely manner in order to alleviate that stress.

<sup>104</sup> David M. Stanton, Note, *United States v. Arpan: How Does the Dynamite Charge Affect Jury Determinations?*, 35 S.D. L. REV. 461, 471 (1990). See, e.g., *United States v. Cortez*, 935 F.2d 135, 142 (8th Cir. 1991) (finding the *Allen* charge uncoercive because the jury continued deliberating for four-and-a-half hours after receiving the charge). *But cf.* *Tucker v. Catoe*, 221 F.3d 600, 612 (2000) (finding that a deliberation of one-and-a-half hours after receiving the *Allen* charge and after an initial ten hours of deliberation indicated potential coercion). Contrast *Tucker* with *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971), where the court found the use of the *Allen* charge was coercive and noted that when giving the charge to the jurors the trial judge pointed out to the jury that it was a Friday afternoon, which the appellate court recognized as possibly indicating to the jury that it should reach a decision before the end of the day. Similarly, in *United States v. Chaney*, 559 F.2d 1094, 1097 (7th Cir. 1977), the judge implied to the jury that it would be locked up all night if it failed to reach a verdict.

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According to Ben Zur and Breznitz, time pressure “can be defined in terms of the amount of information that has to be considered and processed during one time unit or in terms of the time allotted for processing a fixed amount of information.”<sup>105</sup> Juries often seek help from the judge only after deliberating for a length of time. When the judge instructs the jury to resume deliberations, it is reasonable to expect that certain jurors (especially those in the minority) feel that they should reach a decision<sup>106</sup> in a timely manner.

Research<sup>107</sup> consistently shows, however, that making decisions under time pressure has adverse effects on decision making, such as reducing a decision maker’s accuracy threshold.<sup>108</sup> Another effect of time pressure on decision making is that those under pressure attend less to certain information deemed unimportant. This step possibly leads to an overuse of heuristics,<sup>109</sup> with the jury focusing only on

<sup>105</sup> Hasida Ben Zur & Shlomo J. Breznitz, *The Effect of Time Pressure on Risky Choice Behavior*, 47 ACTA PSYCHOLOGICA 89, 89-90 (1981).

<sup>106</sup> In fact, in the control group (where mock jurors received no dynamite charge), 55% believed a verdict was required. See Kassin et. al., *supra* note 57, at 547-48. In the condition in which mock jurors received a dynamite charge, the number of participants believing the judge required a verdict jumped to 91%. *Id.*

<sup>107</sup> See, e.g., Ben Zur & Breznitz, *supra* note 105; Itiel E. Dror ET AL., *Decision Making Under Time Pressure: An Independent Test of Sequential Sampling Models*, 27 MEMORY & COGNITION 713 (1999); Dan Zakay, *The Impact of Time Perception Processes on Decision Making Under Time Stress*, in TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING 59-69 (Ola Svenson & John A. Maule eds., 1993).

<sup>108</sup> When making a decision, one has a subjective “sufficiency threshold,” which lets the decision maker know how much information is required to make a “good enough” decision. If a person is out hiking in the woods, for example, is it “good enough” for the person to know that the four-legged furry creature approaching is an animal, or is the threshold higher, leading the person to distinguish that creature as a bear rather than a dog? When the judge charges the jury to hurry up and make a decision already, jurors might lower their sufficiency threshold. They may revert to the use of heuristics and abandon a detailed examination of the evidence in order to facilitate decision making. Although not personally convinced of the defendant’s guilt, a juror might lower her threshold (and become more susceptible to normative influence) and decide the evidence is “good enough” to justify a vote for conviction.

In early research demonstrating the effects of time pressure on decision making, Ben Zur and Breznitz illustrate that under significant time pressure, participants chose less risky alternatives. See Ben Zur & Breznitz, *supra* note 105, at 101-02. The authors suggest that choosing a less risky alternative is a way to reduce one’s apprehension about a certain situation. *Id.* They went on to note that, if given enough time to fully consider and appraise information and evidence, people reported feeling less cognitive strain and were less concerned with their potential inadequate performance. *Id.* at 102. Further, when not faced with time pressure, after making an initial judgment, decision makers have the ability to reconsider all facts and base their decision on all of the available information and perhaps reevaluate their initial decision. *Id.* at 103. See also Dror et. al., *supra* note 107, at 722.

<sup>109</sup> See *supra* Part IV.C (discussing overreliance on heuristics).

information that is central to the issue involved and ignoring less central (though still legally relevant) information.

A jury faced with an inferred time limit, however, does not always enjoy the luxury of a rational (i.e., timely) choice. In terms of jury behavior, one could suggest that jurors in the minority choose a less “risky” alternative, when they feel time pressure, by agreeing to side with the majority. The charge states “if the much 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.”<sup>110</sup> If “so many men” chose one alternative, it might seem less risky for holdout jurors to go with the majority. After all, if there is “safety in numbers,” one should side with the majority for safety’s sake. The risk they are avoiding in this case is being the lone holdout on a jury, an adverse social position.

Time pressure also promotes feelings of helplessness, which leads a decision maker to disregard information he feels is important simply because there is not enough time to evaluate it adequately. Giving an *Allen* charge would likely cause juries to shift their approach from being evidence driven to verdict driven.<sup>111</sup> Under conditions of “time stress,” decision makers often exhibit a reduction in information search and processing.<sup>112</sup> With the implied pressure to reach a verdict in a timely manner, juries initially focused on thoroughly examining the evidence might suspend this process and adopt a process of searching for information that can conveniently fit into one verdict category or another. Similarly, jurors might exhibit the “tendency to use a strategy of information filtration, that is, information that is perceived as most important is processed first, and then processing is continued until time is up.”<sup>113</sup> By switching strategies jurors again might focus on the evidence that is deemed most “important” to reach a certain verdict, to the exclusion of other relevant but less “important” information. Indeed one common reason for objection to the *Allen* charge is that juries sometimes reach verdicts within a short amount of time after receiving instructions from the judge.<sup>114</sup> Nevertheless, courts retain a large

<sup>110</sup> *Allen v. United States*, 164 U.S. 492, 501 (1896).

<sup>111</sup> See Hastie et al., *supra* note 31 and accompanying text.

<sup>112</sup> See Zakay, *supra* note 107, at 60.

<sup>113</sup> *Id.*

<sup>114</sup> For example, in *United States v. Chigbo*, 38 F.3d 543, 545 (11th Cir. 1994), after receiving a charge from the judge a deadlocked jury returned a verdict within fifteen minutes. Furthermore, the judge explicitly informed the jury that it had no time limit to reach a decision. *Id.* The judge instructed the jury: “You may be as leisurely as you wish in your deliberations and should take all the time which you may feel is necessary.” *Id.* The appellate court upheld the use of the charge because polling ended after the judge

amount of discretion in determining an “appropriate” length of time for deliberations.<sup>115</sup>

*D. The Effects of Stress and Time Pressure: Over-reliance on Heuristics*

Due to the effects of stress and time pressure on decision making, jury deliberations are prime situations for the use of heuristics or “rules of thumb” meant to help people make decisions in certain circumstances. The goal of heuristics is to “reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations.”<sup>116</sup> Although helpful in a number of situations, heuristics can lead to erroneous conclusions.<sup>117</sup>

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determined there was no unanimity, which diminished the charge’s potential coercive impact, and noted that the speed of the returned verdict did not influence their decision about the coerciveness of the charge. *Id.* at 546.

<sup>115</sup> In *United States v. Pope*, 415 F.2d 685, 690 (8th Cir. 1969), *cert. denied*, 397 U.S. 950 (1970), the jury received an *Allen* charge after eleven hours of deliberation. *Id.* Four hours after receiving the charge the jury returned a verdict. *Id.* In *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971), however, the court found the use of the *Allen* charge was coercive and reasoned that in giving the charge to the jurors the trial judge pointed out to the jury that it was a Friday afternoon, which the appellate court recognized as possibly indicating to the jury that it should reach a decision before the end of the day. Stanton observed that “the degree of coerciveness behind a supplemental *Allen* charge [is] inversely proportional to the length of time the jury spent deliberating after the charge was given.” Stanton, *supra* note 104, at 471.

In *United States v. Graham*, 758 F.2d 879, 884 (3d Cir. 1985) (quoting *U.S. v. Grosso*, 358 F.2d 154, 159 (3d Cir. 1966)), *rev’d. on other grounds*, 390 U.S. 62 (1968)) the court stated: “The length of time a jury may be kept together for the purpose of deliberation is a matter within the discretion of the trial judge, and his action in requiring further deliberation after the jury has reported a disagreement does not, without more, constitute coercion.”

*United States v. Walrath*, 324 F.3d 966, 970 (8th Cir. 2003) offered four indicators of coercion: “Jury coercion is determined by (1) the content of the instruction, (2) the length of the deliberation after the instruction, (3) the total length of deliberations, and (4) any indicia in the record of coercion.”

<sup>116</sup> Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124 (1974).

<sup>117</sup> For an interesting defense of the use of heuristics, see Gerd Gigerenzer, *Heuristics, in HEURISTICS AND THE LAW* (Gerd Gigerenzer & Chris Engel eds., 2006). In addition to noting their usefulness, Gigerenzer claims that it is unfair to accuse heuristics of leading to biased judgments. *Id.* This is due to the fact that “heuristics are evaluated against divine ideals, which makes them appear to be all-to-human failures.” *Id.* at 21. The argument might be made, therefore, that jurors must rely on heuristics because, in most cases some ambiguity exists and there is no “divine ideal,” or clearly correct answer. *But cf.* Russell Korobkin, *The Problems with Heuristics for Law, in HEURISTICS AND THE LAW* 47 (Gerd Gigerenzer & Chris Engel eds., 2006) (noting that using heuristics can produce and over- or under-reliance on previously held beliefs and stereotypes).

People use heuristics under a variety of circumstances.<sup>118</sup> First, people most often use heuristics when they do not have adequate cognitive resources to devote to making a particular decision, if, for example, they are distracted or are under pressure to make a quick decision. People also use heuristics if they are not motivated to devote time and mental energy to making a decision. Evidence suggests that these mental shortcuts are present when juries engage in their decision making tasks. While one hopes that juries are not distracted when deliberating or unmotivated to reach a fair conclusion, when faced with a forceful instruction from the judge to try to make a decision, and with implied time pressure, jurors might revert to the use of heuristics to help them reach a decision.<sup>119</sup> Finally, people often use heuristics in situations of uncertainty.<sup>120</sup> Jurors are often in situations of uncertainty; indeed, it is their verdict that is intended to provide certainty for the court and society by giving a final judgment about a dispute.<sup>121</sup>

People utilize a number of heuristics, even in cases of legal decision making.<sup>122</sup> One of the most common types of heuristic is the *availability* heuristic, employed when people try to determine the likelihood that some event has occurred.<sup>123</sup> The ease with which something comes to mind (i.e., its availability) increases reliance on it.<sup>124</sup> One recent example of how the availability heuristic might affect legal decision making involves the recently decided O.J. Simpson robbery case. Because of Simpson's sensational trial in 1995, which fascinated much of the nation

<sup>118</sup> See *supra* note 115 (discussing cases in which juries were given varying lengths of time for deliberations); Nyla R. Branscombe & Brian M. Cohen, *Motivation and Complexity Levels as Determinants of Heuristic Use in Social Judgment*, in EMOTION AND SOCIAL JUDGMENTS 145-60 (Joseph P. Forgas ed., 1991).

<sup>119</sup> Research shows that people often rely on stereotypes as an adaptive tool to help them efficiently make judgments when under cognitive stress. See, e.g., Macrae et al., *supra* note 18.

<sup>120</sup> See Tversky & Kahneman, *supra* note 116, at 1124.

<sup>121</sup> For a general overview of the most commonly discussed heuristics (availability, representativeness, anchoring, and adjustment), see *infra* Part IV.D. For more thorough discussions of how these heuristics apply to legal settings, see Lori H. Colwell, *Cognitive Heuristics in the Context of Legal Decision Making*, 23 AM J. FOR. PSYCHOL. 17 (2005); HEURISTICS AND THE LAW, *supra* note 117; Greene & Ellis, *supra* note 83.

<sup>122</sup> See Greene & Ellis, *supra* note 83, at 184.

<sup>123</sup> See Tversky & Kahneman, *supra* note 116, at 1127.

<sup>124</sup> *Id.* For example, people might believe that more people die each year in plane crashes than in automobile crashes, which occurs because we hear more about plane crashes that claim a number of lives at one time but when we hear about automobile accidents they usually do not involve the same number of people or generate the same amount of press coverage as plane crashes. The number of people dying in plane crashes is more salient and therefore more accessible, leading people to erroneously conclude that more people die in plane than automobile crashes. See generally *id.* (discussing availability and salience of information and its subsequent effects on decisions).



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and received extensive media coverage, some potential jurors for his 2008 robbery trial reported difficulty separating this case from Simpson's past. For them, the mere mention of Simpson's name or seeing him in person brought to mind the highly available information from his first trial. One potential juror noted, for example, that she felt Simpson got away with murder after his acquittal. Although the two trials were not related, the availability of information about his first trial interfered with the jurors' and the public's ability to focus exclusively on the facts of the case at hand.<sup>125</sup>

Another frequently cited heuristic is the *representativeness* heuristic.<sup>126</sup> Here too, people focus on the probability of some event, focusing on the similarity between two outcomes to determine probability.<sup>127</sup> Jurors frequently use this heuristic to determine whether a criminal defendant is guilty or not. For example, jurors might think that a suburban housewife is not representative of a "typical" drug dealer and must be not guilty when accused of selling drugs.<sup>128</sup> In this fashion, people use stereotypes as a means of making judgments about others. Stereotyping involves "applying to an individual one's cognitive expectancies and association."<sup>129</sup> Hence, stereotypes clearly relate to the representativeness heuristic, as both deal with the expectations one has and how adequately a stimulus fits with those expectations. Reliance on stereotypes is greater when people must make a decision under pressure or high cognitive load.<sup>130</sup> Moreover, if one is aware of a stereotype he holds and tries to suppress it (as a juror might do), it can actually

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<sup>125</sup> See, e.g., Simpson jury selection could take awhile, <http://www.fox5vegas.com/news/17433489/detail.html> (last visited Oct. 28, 2009). Simpson's conviction in his recent robbery trial does not conclusively show that availability of information from his earlier murder trial (and acquittal) exerted an influence, but it is consistent with that interpretation.

<sup>126</sup> See Tversky & Kahneman, *supra* note 116, at 1124.

<sup>127</sup> *Id.*

<sup>128</sup> Jurors sometimes also disregard the base rate of certain events and, instead, focus on whether the accused fits with their preconceived notion of the idea of what one accused of the offense should look like. For example, if jurors know that 85% of people living in a particular town are drug dealers, the odds of a drug-dealing suburban housewife are greater. People ignore such base rate information, however, concluding that since the suburban housewife is not representative of what a "typical" drug dealer looks like, regardless of the odds, she must be the exception rather than the rule.

<sup>129</sup> SUSAN T. FISKE, *SOCIAL BEINGS: A CORE MOTIVES APPROACH TO SOCIAL PSYCHOLOGY* 398 (Wiley 2004).

<sup>130</sup> See Macrae et al., *supra* note 119; Martin F. Kaplan, Tatiana Wanshula & Mark P. Zanna, *Time Pressure and Information Integration in Social Judgment*, in *TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING* (Ola Svenson & A. John Maule eds., Plenum Press 1993).

“rebound” and influence judgment more strongly than it would have in the first place.<sup>131</sup>

Another oft-cited heuristic that can influence jury verdicts is the *anchoring-and-adjustment* heuristic. When making a decision, people use an initial value (the anchor) and adjust upward or downward from that position. Their final decision, then, is based on that initial value. In research examining civil jury awards, jurors often use some initial value provided (e.g., the damage amount sought by the plaintiff) as their anchor and adjust their damage awards accordingly.<sup>132</sup> For example, mock jurors were presented with a re-enactment of a trial involving parents who sued a defendant for the wrongful deaths of their two children.<sup>133</sup> In one re-enactment, the plaintiff’s lawyer requested an award of two million dollars; in the other, twenty million dollars.<sup>134</sup> The results showed that in the first re-enactment, the average award was just over one million dollars.<sup>135</sup> In the second re-enactment, however, the average award was just over nine million dollars.<sup>136</sup> It is important to recognize that jurors are not the only party susceptible to the anchoring and adjustment heuristic. In her research, Birte English<sup>137</sup> found that attorneys’ sentencing recommendations influenced judges’ sentencing decisions.

Thus, evidence for the negative effect of time pressure and stress on decision making is well established in the psychological literature. Overall, the evidence suggests that under conditions of time pressure or stress, people revert to less-than-ideal cognitive strategies to make decisions. These strategies include the use of heuristics, selective

<sup>131</sup> See generally Macrae et al., *supra* note 119.

<sup>132</sup> See generally Bradley D. McAuliff & Brian H. Bornstein, *All Anchors Are Not Created Equal: The Effects of Per Diem versus Lump Sum Requests on Pain and Suffering Awards*, 33 LAW & HUM. BEHAV. (2009); Brian H. Bornstein & Edie Greene, *Consulting on Damage Awards*, in HANDBOOK OF TRIAL CONSULTING (R.L. Wiener & B.H. Bornstein, eds., forthcoming).

<sup>133</sup> Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. APPLIED SOCIAL PSYCHOL. 991, 1002, 1013-16(1995).

<sup>134</sup> *Id.* at 1003, 1010.

<sup>135</sup> *Id.* at 1010.

<sup>136</sup> *Id.* at 1006. Several other studies have yielded comparable findings. See, e.g., Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519 (1996); Birte English et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making*, 32 PERSONAL & SOCIAL PSYCHOL. BULL. 188 (2006); Mollie W. Marti & Rosselle L. Wissler, *Be Careful What You Ask For: The Effect of Anchors on Personal-Injury Damage Awards*, 6 J. EXP. PSYCHOL.: APP. 91 (2000); Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353 (1999).

<sup>137</sup> See *supra* note 136.

information processing, and a lowering of one's decision threshold.<sup>138</sup> Given the fact that juries typically receive the *Allen* charge only after already engaging in a significant amount of deliberation, jurors in the minority almost certainly infer some sort of time pressure for them to make a decision.

*E. Issues in Applying Psychological Research to Jury Behavior*

Before drawing general conclusions, it is important to acknowledge the limitations of applying the results of these studies to jury decision making. First of all, in a number of experimental studies,<sup>139</sup> participants received explicit instructions about the amount of time they had to make a decision, which is unlikely to be the case in a trial. Also, participants in several studies had a relatively short time to make decisions (e.g., seconds or minutes), rather than the additional hours or possibly days that real jurors have to reach a decision. Finally, the research dealing directly with the dynamite charge used mock juries, which might behave in ways different from an actual jury.<sup>140</sup> In a study by Kassin and his colleagues, for example, participants did not engage with others during deliberations, but rather communicated via note passing,<sup>141</sup> with the participant rendering a verdict, offering a one-to-two sentence explanation and then receiving the other participants' verdicts and explanations. Similarly, in another study, the researchers constructed juries based on participants' pre-deliberation verdict preferences.<sup>142</sup> Additionally, they considered juries to be deadlocked after only twenty minutes of deliberation without reaching a verdict, and all juries were disbanded after fifty minutes had elapsed.<sup>143</sup>

Even with these limitations, however, implied time pressure might still exert an influence on jurors and affect their decision making processes. Aside from time pressure constraints, a number of social influences both inside and outside of the jury room can affect a juror's ultimate decision. The case of John White's jury illustrates this point, with two jurors admitting that they ultimately decided to go along with the group consensus due to frustration with the process.<sup>144</sup> Indeed, courts seem to recognize the negative ramifications of imposing a

<sup>138</sup> See *supra* Part IV.C-D.

<sup>139</sup> See, e.g., Ben Zur & Breznitz, *supra* note 105, at 96; Dror et al., *supra* note 107, at 715; Kaplan et al., *supra* note 130, at 262.

<sup>140</sup> See Kassin et al., *supra* note 57, at 548.

<sup>141</sup> In reality participants acted alone; the notes from other "jurors" had been created by the researcher. See Kassin et al., *supra* note 57.

<sup>142</sup> See Smith & Kassin, *supra* note 95, at 602-03.

<sup>143</sup> *Id.*

<sup>144</sup> See *supra* notes 1-2 and accompanying text.

deadline on jury deliberations, as it sometimes serves as a basis for appeal.<sup>145</sup> Although not exactly the same as deliberations in an actual case, the results from the studies above confirm that judges may be correct when they identify the numerous problems associated with the *Allen* charge.

*F. Avoiding the Negative Effects Associated with the Allen Charge*

Several suggestions are offered in response to criticisms of the *Allen* charge by various sources. For instance, the American Bar Association offered a revised instruction for hung juries, which does not single out the minority,<sup>146</sup> but rather instructs all jurors to examine and re-examine their own views, and not to be afraid of changing their minds, but also to stick with what they believe is the right “answer.”<sup>147</sup> The ABA’s suggested instruction states:

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.<sup>148</sup>

The ABA also suggests including the instruction before deliberations begin, rather than waiting until the jury has trouble reaching a decision. Although it recognizes the judge’s right to issue the charge again when a

<sup>145</sup> See generally notes *supra* 86, 104, 106, 110, 114 and accompanying text.

<sup>146</sup> In fact, singling out the juror(s) in the minority is one of the hallmarks of determining the *Allen* charge’s coerciveness. Nevertheless, even if the judge is unaware of the identity of these jurors, the holdouts are not truly unanimous, as the other jurors are aware of their identity. As one court noted, “[t]he dissenters, struggling to maintain their position in a protracted debate in the jury room, are led into the courtroom and, before their peers, specifically requested by the judge to reconsider their position.” *People v. Gainer*, 566 P.2d 997, 1005 (1977). Even if the judge does not specify any juror in particular, jurors still feel singled out by the charge. See *State v. Voekell*, 210 P.2d 972, 979 (Ariz. 1949) (Udall, J., dissenting) (discussing the coercive effects of the *Allen* charge).

<sup>147</sup> A.B.A. Standards, *supra* note 61, at 5.

<sup>148</sup> *Id.*

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jury is deadlocked, by including the charge in the main body of the instructions, courts can avoid drawing attention to any one juror; instead, the charge applies to every juror.<sup>149</sup> Also, by including the charge in the main body of the instructions the judge is placing equal weight on all of the instructions. Giving the charge on its own could possibly signal to the jury that it is somehow more important than the other instructions provided by the court. Finally, the revised instruction tells jurors not to bend to majority pressure and emphasizes that the jury need not necessarily return a verdict.<sup>150</sup> This can be especially useful as jurors often assume that they must return a verdict in a case.<sup>151</sup>

Arizona has a unique way of dealing with deadlocked juries that helps ameliorate some of the problems associated with the traditional charge.<sup>152</sup> Arizona judges submit a note to the jury asking if the judge or attorneys can provide any assistance with the deliberation process if it appears that the jury is having trouble reaching a verdict. Things such as “giving additional instructions; clarifying earlier instructions; directing attorneys to make additional closing argument; reopening the evidence for limited purposes; or a combination of these measures” are all within the purview of the court.<sup>153</sup> Model instructions also indicate that the judge should emphasize to the jury that the note is in no way intended to force a verdict and that the court’s position is to help the jury, not force it to come to any conclusion.<sup>154</sup> Thus, Arizona seems to understand the necessity of letting jurors know that the court will not interfere with the job they set out to do, but is willing to provide guidance if necessary. This is particularly interesting given the judge’s authoritative position; these instructions do not imply that the juror must fall in line with the judge’s instruction. Instead, jurors might be more inclined to see the judge as someone to guide and clarify, not command.<sup>155</sup>

<sup>149</sup> *United States v. Fioravanti*, 412 F.2d 407, 419 (1969) (finding that the *Allen* charge was not unduly coercive, as it was given as part of the main instruction). *See also* *United States v. Skillman*, 442 F.2d 542 (8th Cir. 1971) (holding there was no error in giving the jury the charge in the main body of the instructions).

<sup>150</sup> A.B.A. Standards, *supra* note 61, at 5. “The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.” *Id.*

<sup>151</sup> *See* *Kassin et al.*, *supra* note 57.

<sup>152</sup> *See* 17 ARIZ. REV. STAT. ANN. § 22.4 (2007) (“If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the presence of counsel, inquire of the jurors to determine whether and how court and counsel can assist them in their deliberative process. After receiving the jurors’ response, if any, the judge may direct that further proceedings occur as appropriate.”).

<sup>153</sup> *Id.* cmt. (1995 Amendment).

<sup>154</sup> *Id.*

<sup>155</sup> Unfortunately, no data is currently available for the hung jury rates of Arizona. A comparison of rates before and after the statute would be informative.

Another possible way to avoid the issues associated with the *Allen* charge is to relax the unanimity requirement for juries.<sup>156</sup> While a thorough discussion of unanimity requirements is beyond the scope of this Article, it is worth noting that allowing non-unanimous verdicts could decrease the rates of hung juries and decrease the use of the *Allen* charge.<sup>157</sup> Not requiring unanimous verdicts, for example, can reduce pressure on holdout jurors, who are allowed to take part in the process and state their position, even if the majority of the jury votes the other way. This might allow for more overall satisfaction with the process; jurors are able to do the job they agreed to do without having to compromise their convictions.

While it is promising that a number of courts have adopted modified *Allen* charges, they still contain some inherent coerciveness and pressure the jury to reach a decision.<sup>158</sup> Recognizing this, some jurisdictions have prohibited the use of these supplemental instructions altogether.<sup>159</sup> Admittedly, this could result in more hung juries and additional costs for courts.<sup>160</sup> Hence, the question remains as to whether these financial costs

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<sup>156</sup> Currently all federal courts require unanimous jury verdicts, as do all state courts, with the exception of Louisiana and Oregon. See FED. R. CRIM. P. 31(a) (requiring a unanimous jury verdict). But see LA. CODE CRIM. PROC. ANN. art. 782 (2004); ORE. REV. STAT. §136.450 (2004) (providing that the state does not require a unanimous jury verdict in a criminal case). In civil cases, the requirement for unanimity has been less fixed. Federal courts require unanimity, but less than half of state courts do. FED. R. CIV. P. 48(1). For a more in-depth discussions see generally, Emil J. Bove, Note, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 GEO. L.J. 251 (2008); Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006); Edward P. Schwartz & Warren F. Schwartz, *And So Say Some of Us . . . What to Do When Jurors Disagree*, 9 S. CAL. INTERDISCIPLINARY L.J. 429 (2000).

<sup>157</sup> For discussions about the unanimity requirement in jury decision making see generally, Lora M. Levett et al., *The Psychology of Jury and Juror Decision Making*, in PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE 365-406 (Neil Brewer & Kipling D. Williams eds., The Guilford Press 2005); Yohsuke Ohtsubo et al., *Effects of Group Decision Rules on Decisions Involving Continuous Alternatives: The Unanimity Rule and Extreme Decisions in Mock Civil Juries*, 40 J. EXP. & SOCIAL PSYCHOL. 320 (2004).

<sup>158</sup> See *supra* notes 152, 153, 156 and accompanying text.

<sup>159</sup> See *United States v. Fioravanti*, 412 F.2d 407, 417 (1969); *United States v. E. Med. Billing, Inc.*, 230 F.3d 600 (3d Cir. 2000) (reaffirming the disallowance of the *Allen* charge).

<sup>160</sup> The *Fioravanti* court noted that hung juries, while not desirable, are still part of the process. In *Fioravanti*, the court emphasized:

The possibility of a hung jury is as much a part of our jury unanimity schema as are verdicts of guilty or not guilty. And although dictates of sound judicial administration tend to encourage the rendition of verdicts rather than suffer the experience of hung juries, nevertheless, it is a cardinal principle of the law that a trial judge may not coerce a jury to the extent of demanding that they return a verdict.

412 F.2d. at 417.

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outweigh the costs (to a defendant and to society) of convictions when a jury is not entirely sure of the defendant's guilt, but some jurors feel coerced to conform to the majority's position.

V. FUTURE DIRECTIONS AND CONCLUSIONS

The changes discussed above are likely a positive step in alleviating some of the problems associated with the *Allen* charge. Even so, it is not safe to assume that these modifications have solved the problems. Researchers can play an important role in determining the future of the *Allen* charge. Specifically, social science research can be conducted to provide the court with information about the effects of the *Allen* charge. A few recommended avenues of research are highlighted here.

First, research is needed to test whether or not the *Allen* charge actually does influence jurors in the ways discussed here. For instance, do jurors receiving an *Allen* charge rely on heuristics and stereotypes? Do they tend to ignore information they feel is less diagnostic (yet may still be legally relevant)? Research should be conducted with mock jurors who are allowed to deliberate in person and for longer periods of time. Such steps not only increase the verisimilitude of the research, they also help ensure that the results are likely to apply to real world trials. Future studies that address the limitations of past studies provide more complete information about the effects of the *Allen* charge. Other studies should survey or interview actual jurors who received the *Allen* charge. Because all studies have strengths and weaknesses, a variety of studies using diverse methodologies should be used to provide more information about the effects of the *Allen* charge on juror decisions.

Second, research should test whether the modified *Allen* charge fixes the problems associated with the original *Allen* charge. As noted above, the ABA suggests a modified instruction, but it has not yet been empirically tested. Research with both mock and real jurors could determine whether the ABA's instruction reaches its potential.

Finally, research is needed to determine how hung juries affect all individuals involved in the trial. Although a hung jury may be dissatisfying to jurors (particularly if they feel that they wasted their time) this Article points out that jurors may also have negative feelings about being pressured to change their verdict. Although some research has investigated juror stress, none has specifically studied the stress and emotional reactions of jurors in hung juries. Others may also later feel

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Interestingly, California likely has more mistrials due to deadlocked juries than any other state. Some suggest that this is due to the fact that California rid itself of the *Allen* charge in 1977. See Reichelt, *supra* note 59; Hannaford-Agor et al., *supra* note 37.

negative emotions as a result of being involved in a trial that hangs. Research is lacking on the effects of hung juries on lawyers, judges, and the parties to the trial (e.g., defendant, plaintiff), who might feel that they wasted their time and effort or that the outcome was unfair. This information would be helpful in determining whether hung juries are a major problem in terms of the satisfaction and emotional reactions of the individuals involved in the trial.

Legal decisions, such as whether to allow the *Allen* charge, can often benefit from social science research. While not all lawmakers and judges consider social science research when making their decisions, some do.<sup>161</sup> Thus, it is important to make such information available. Sound research can help to protect the rights of the parties involved and the integrity of the justice system as a whole.

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<sup>161</sup> See generally John Monahan & Laurens Walker, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS (5th ed. 2002).