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THE ALLEN INSTRUCTION IN CRIMINAL CASES: IS THE DYNAMITE CHARGE ABOUT TO BE PERMANENTLY DEFUSED?*

PAUL MARCUS**

THE PROBLEM

Let us begin with a none too hypothetical trial situation. The defendant is charged with murder, and after twelve full days of hearing evidence, the jury is finally instructed and directed to consider a verdict.¹ The jurors deliberate and they deliberate still further. They ask for certain portions of the testimony to be read to them and they retire to the jury room once again. Still, after a full day with the case they cannot agree. They go home and come back fresh the next morning to begin anew. Still they reach no verdict. A third day of discussion comes and no verdict is yet before the trial judge. Indeed, the only communication from the jurors is a statement by the jury foreman to the effect that the jury is having a difficult time reaching a verdict and it might be deadlocked.

At this time, should the judge do nothing and simply hope that the jury will soon reach a verdict? Or, should the court, on the other hand, take some more direct action in the hope of getting the jurors to agree to a verdict? Certainly the situation poses a dilemma for the trial judge, yet it is one which has existed for centuries. Indeed some scholars trace

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1. The fact situation here is taken from *People v. Gainer*, 19 Cal. 3d. 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977). See discussion accompanying notes 29-35 *infra*.

it as far back as fourteenth century England.² In the early days direct and forceful action was the guiding light. Load the jurors onto oxcarts and have them bounce around until a verdict was reached,³ or perhaps keep the jurors without food or drink until a verdict came forth.⁴ Such drastic steps soon became unpopular, yet direct action was still taken by trial judges. Some ordered that food rations to deadlocked jurors be cut back⁵ or that the jurors be forced to pay for their own food.⁶ Other judges preferred somewhat different methods such as not providing heat to the jury room during the middle of winter,⁷ or simply requiring the jury to deliberate all night without offering the jurors the option of getting some sleep.⁸ One trial judge took perhaps the most direct action of all; he informed the jurors that if he found any juror to have "stubbornly refused to do his duty" he would send that juror to jail for contempt of court.⁹

These actions by trial judges clearly produced results, normally a quick conference by the jurors and a guilty verdict. Yet, even in the early part of the nineteenth century some judges, particularly appeals judges, found such practices too forceful and attempts were made to take less stringent action which would lead to jury verdicts.¹⁰ What developed from this troubled history was the supplemental instruction, the direction to the deadlocked jury to reconsider and perhaps come up with a unanimous verdict. The earliest attempt at such an instruction, relied on heavily by the United States Supreme Court, was used by a Massachusetts trial judge and reviewed by the Massachusetts Supreme Court

2. G. CRABB, *HISTORY OF ENGLISH LAW; OR AN ATTEMPT TO TRACE THE RISE, PROGRESS, AND SUCCESSIVE CHANGES OF THE COMMON LAW; FROM THE EARLIEST PERIOD TO THE PRESENT TIME* 287 (1829). For a general discussion of the historical dimension of this problem, see Comment, *Instructing Deadlocked Juries in Light of the Trial of Juan Corona*, 53 ORE. L. REV. 213 (1974); Comment, *Instructing the Deadlocked Jury: Some Practical Considerations*, 8 J. MAR. J. PRAC. & PROC. 169 (1974) [hereinafter cited as Comment, *Practical Considerations*].

3. *State v. Jeffers*, 64 Mo. 376, 381 (1877).

4. 3 W. BLACKSTONE, *COMMENTARIES* * 375; *Pope & Jacobs v. State*, 36 Miss. 121 (1858).

5. *Fairbanks, Morse, & Co. v. Weeber*, 15 Colo. App. 268, 62 P. 368 (1900).

6. *Henderson v. Reynolds*, 84 Ga. 159, 10 S.E. 734 (1889).

7. *Mead v. City of Richland Center*, 237 Wis. 537, 297 N.W. 419 (1941).

8. *Commonwealth v. Moore*, 398 Pa. 198, 157 A.2d 65 (1959). Justice Musmanno filed a vigorous dissent. Nevertheless, the conviction for voluntary manslaughter was affirmed, despite the action of the trial court.

9. *Liveley v. Sexton*, 35 Ill. App. 417 (1890).

10. Such techniques are not relegated to a place in ancient history as very vigorous efforts have been utilized by trial judges even in recent years. See, e.g., *United States v. Parks*, 411 F.2d 1171, 1173 (1st Cir. 1969), where the jury deliberated from one in the afternoon until one in the morning. The jurors informed the judge that they were tired and were deadlocked yet the judge did not allow them to go home. Predictably, a guilty verdict was returned less than two hours later.

in the case of *Commonwealth v. Tuey*.¹¹ The instruction was reviewed favorably by the higher court and soon began to spread throughout the nation. Why was it so popular? There are two reasons for its rapid popularity as well as for the United States Supreme Court's quick validation of the supplemental instruction. First, it was not as harsh as earlier methods. Second, and more importantly, it worked. Deadlocked juries, after hearing the instruction, returned verdicts.¹² It worked so well, in fact, that lawyers began to describe it—probably accurately—as the “third-degree instruction,”¹³ the “shotgun instruction,”¹⁴ the “nitro-glycerin charge,”¹⁵ the “dynamite charge,”¹⁶ the “hammer instruction,”¹⁷ and finally, the “hanging instruction.”¹⁸ Of course, its most popular name is, simply, the *Allen* instruction.

THE ALLEN INSTRUCTION

While there is no single or uniform supplemental jury instruction to deal with the problem of the deadlocked jury¹⁹ in criminal cases,²⁰ most such instructions trace their roots, at least, back to the famous 1896 Supreme Court decision in *Allen v. United States*.²¹ The decision is an odd one, odd certainly in the fact that Allen was not represented by counsel and no brief was presented on his behalf, and odd also in the fact that for such a major trial dilemma²² so little consideration was given to the issue by the Court.²³ Of the eighteen assigned errors in the case, the

11. 62 Mass. 1 (1851).

12. “The charge is used precisely because it works, because it can blast ‘a verdict out of a jury otherwise unable to agree that a person is guilty.” *United States v. Bailey*, 468 F.2d 652, 666 (5th Cir. 1972). *But see* Comment, *Practical Considerations*, *supra* note 2, at 185.

13. Comment, *ABA Jury Instructions Adopted as Preferable to Allen Charge*, 25 VAND. L. REV. 246 n.2 (1972).

14. *Id.*

15. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 151 (1968) [hereinafter cited as ABA STANDARDS].

16. *People v. Gainer*, 19 Cal. 3d 835, 836, 566 P.2d 997, 1000, 139 Cal. Rptr. 861, 864 (1977).

17. *State v. Cook*, 512 S.W.2d 907 (Mo. App., D. St. L. 1974).

18. *Levine v. Headlee*, 148 W.Va. 323, 134 S.E.2d 892 (1964).

19. “There is not merely one *Allen* charge, but an infinite number of variations of the charge, in current use.” ABA STANDARDS, *supra* note 15, at 155.

20. Because of the different considerations present in civil actions, only the criminal trial problem will be addressed here. No doubt, however, the problem is present in civil cases as well. *See People v. Gainer*, 19 Cal. 3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977).

21. 164 U.S. 492 (1896).

22. *Cf. Thaggard v. United States*, 354 F.2d 735, 741 (5th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966) (Coleman, J., specially concurring).

23. The case had twice been before the Court previously because of erroneous instructions. 150 U.S. 551 (1893) and 157 U.S. 675 (1895). The third time around the supplemental instruction discussion took barely one page of space.

last two raised the problem for discussion here. As the Supreme Court indicated, after the jury began its deliberations it came back into the court room and received additional instructions. The Court paraphrased the instructions as follows:

These instructions were quite lengthy and were, in substance, that 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, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.²⁴

While it could be argued that such an instruction was unduly coercive, particularly in its direction only to dissenting jurors,²⁵ the Court took little time before strongly supporting the instruction.

While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself.²⁶

Considering the broad problems with deadlocked juries and the need for a uniform strategy for dealing with the problems, the Court's virtually summary affirmance of the instruction is surprising. Not nearly as surprising, however, as the Court's refusal to consider ever again the merits

24. 164 U.S. at 501. The Court said that the instruction was taken from *Commonwealth v. Tuey*, 62 Mass. 1 (1851).

25. See text accompanying notes 70-83, *infra*.

26. 164 U.S. at 501.

of the instruction.²⁷ The Fifth Circuit noted this well. "That it should have become the foundationstone of all modern law regarding deadlocked juries is perhaps the greatest anomaly of the *Allen* case."²⁸

But *Allen* did swiftly capture the hearts and minds of trial judges across the country and an *Allen*, or *Allen*-type, instruction began to be used in most jurisdictions as a matter of course. This state of affairs proceeded apace for approximately half a century. Then, beginning in the early 1950's, criticism of the *Allen* charge surfaced and became increasingly palatable to appellate judges. As we shall see, several states and federal circuits have expressly rejected *Allen*. At this juncture, though, it would be well to look at the attacks on *Allen*, and there have been none as direct and well-considered as that by the California Supreme Court in the latter part of 1977.

CRITICS OF THE DYNAMITE CHARGE

Making reference to an "*Allen* instruction" or "*Allen*-type instruction" is a risky proposition.²⁹ Many trial judges begin with the basic formulation as presented in *Allen* but move on to give the jury further statements. Such a situation confronted the California court in *People v. Gainer*.³⁰ The trial court there gave the "basic" *Allen* instruction to the jury after the jury reported it was deadlocked. In addition to this basic instruction, however, the jury was informed that "the case must at some time be decided" and that "there is no reason to suppose the case will ever be submitted to twelve men or women more intelligent, more impartial or more competent to decide it. . . ." ³¹ The court, thus, was called upon to evaluate the traditional, basic *Allen* charge as well as the embellishments added by the trial court in the actual case.

"Collateral" Attacks on the Instruction

Before exploring the two major arguments which the *Gainer* court utilized in striking down the *Allen* charge and the modified instruction, it should be noted that far more than two arguments have been used for decades in questioning the propriety of such a supplemental instruction. Preliminarily, the fact that there is no single *Allen* instruction ³² itself serves as an important argument against the rule.³³ The language dif-

27. See text accompanying notes 124-31, *infra*.

28. *United States v. Bailey*, 468 F.2d 652, 666 (5th Cir. 1972).

29. See note 19, *supra*.

30. 19 Cal.3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977).

31. *Id.* at 841, 566 P.2d at 999, 139 Cal. Rptr. at 863.

32. "Second, the *Allen* charge has resulted in a multitude of variations which have in turn bred and proliferated appellate review." *State v. Martin*, 297 Minn. 359, 365, 211 N.W.2d 765, 769 (1973).

33. "Each new paraphrase of the charge brings up its own questions of propriety, and courts have differed widely in their tolerance for added or substi-

fers from case to case, and the reliance on any one particular element is fleeting at best. In banning the use of such supplemental instructions, the Arizona Supreme Court perhaps stated the complaint best:

It now appears that its continued use will result in an endless chain of designs, each link thereof tempered and forged with varying facts and circumstances and welded with the ever-changing personalities of the appellate court. This is not in keeping with sound justice. . . . We are convinced that the evils far outweigh the benefits, and decree that its use shall no longer be tolerated and approved by this court.³⁴

Moreover, the attempt to use different language to assuage the critics of *Allen* has sometimes led to almost comical results. Consider the statement of the Louisiana Supreme Court:

In the course of giving its instruction, the trial court admonished the jurors that if a majority favor conviction, the minority should consider whether their doubts are reasonable, since they make no effective impression upon the minds of " * * * so many equally honest, equally intelligent fellow jurors. * * *" Likewise, the court instructed that if a majority or a lesser number favor acquittal, the other jurors should ask themselves whether they do not have reason to doubt the correctness of a judgment not concurred in " * * * by many of their fellow jurors. * * *" (Emphasis here and elsewhere supplied). . . . [S]uch a charge virtually insures jury confusion; it urges those favoring conviction or acquittal to discount their views if they are in the minority or in a bare majority. Thus, the instruction is clearly an attempt to avoid the coercive effect of admonition of only the minority and to achieve a balanced charge. Such a charge is so difficult to comprehend that . . . it is " * * * an invitation to a frolic with Alice in Wonderland."³⁵

Many other problems have arisen in connection with the use of a supplemental instruction generally. For instance, as discussed in *Gainer*, there is the problem of defense objections to the *Allen* instruction. In many situations the defense counsel may be unable to object prior to the giving of the instruction; has he waived his claim by such inactivity? The *Gainer* court said no.³⁶ There is also the continuing question of the

tuted language." Comment, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge,"* 31 U. CHI. L. REV. 386, 391 (1964).

34. *State v. Thomas*, 86 Ariz. 161, 166, 342 P.2d 197, 200 (1959). See generally Comment, *Criminal Procedure—Jury Instructions—ABA Standard Adopted for Instructing Deadlocked Juries*, 42 TENN. L. REV. 803 (1975).

35. *State v. Nicholson*, 315 So.2d 639, 642 (La. 1975).

36. Clearly defendants cannot be required to anticipate supplemental instructions a judge might give, upon pain of inviting error. Nor was the defense counsel required to interrupt the judge's charge at every controversial phrase, thereby courting the animosity of the jury and implying that the charge hurt his client's case. Indeed

judge giving the supplemental instruction after he has found out the numerical division of the deadlocked jury. While it is well established that the judge may not make inquiry of the jury to find out the division of its members after an apparent deadlock,³⁷ in many cases such information is volunteered by the jury. Is it error then to give the supplemental instruction? Some judges say no, so long as the information was in fact voluntarily given.³⁸ Others, such as Judge Sobeloff, take a different view. He has argued that such a practice is error, as "the implications of *Brasfield* would seem to apply equally whether the information was promoted by the judge's inquiry or was thrust upon him. The pressure on the minority jurors is the same in both instances."³⁹ This reasoning was adopted by then Judge Warren Burger in *Mullin v. United States*.⁴⁰ The trial court there had declared a mistrial after the jury informed the court that it was deadlocked and further informed the court that the split was seven guilty, four not guilty and one undecided. The Chief Justice agreed that the declaration of mistrial was proper because "[i]t would have been a precarious undertaking for the Judge to give a supplemental charge to consider each other's views when he was already advised that only 4 of 12 jurors voted for acquittal."⁴¹

Quite apart from the general propriety of giving the instruction after receiving the information concerning division, there is the question of the judge doing so once he hears there are very few minority jurors. Although allowing continued use of the *Allen* charge in other circumstances, one court did reverse a conviction in which the supplemental instruction was given after the trial judge inadvertently learned that the jury stood 11 to 1 for conviction,⁴² while another court in the same situation affirmed a conviction.⁴³ Perhaps the answer is to instruct the jury very early in the trial never to reveal how its votes are progressing. This was the remedy suggested by the Chief Justice in *Mullin*:

While it is probably rare for jurors to reveal the standing of their vote to anyone before verdict or deadlock is found we commend to the District Court a fixed practice of admonishing every jury at the time it retires that it must not reveal the stand-

common courtesy, and respect for the dignity of judicial proceedings, caution against interruption of a judge who is advising the jury.

19 Cal.3d at 842 n.2, 566 P.2d at 1000 n.2, 139 Cal. Rptr. at 864 n.2.

37. *Brasfield v. United States*, 272 U.S. 448 (1926).

38. *United States v. Williams*, 444 F.2d 108 (9th Cir. 1971); *United States v. Sawyers*, 423 F.2d 1335 (4th Cir. 1970).

39. *United States v. Sawyers*, 423 F.2d 1335, 1348 (dissenting opinion).

40. 356 F.2d 368 (D.C. Cir. 1966).

41. *Id.* at 370.

42. *People v. Baumgartner*, 166 Cal. App.2d 103, 332 P.2d 366 (1958). See discussion in *People v. Gainer*, 19 Cal.3d at 845, 566 P.2d at 1002, 139 Cal. Rptr. at 866.

43. *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977).

ing of its vote at any time to anyone, including the Trial Judge, but to report only a verdict or inability to reach one.⁴⁴

A more recent problem has now surfaced to make life even more difficult for appeals judges, the giving of the supplemental instruction more than once. Some courts have allowed the giving of the instruction more than once when the jury requested it.⁴⁵ In *United States v. Seawell*⁴⁶ the far more difficult question was put at issue. After deliberating for some hours in connection with an apparently difficult armed robbery case, the jury informed the judge that it was "at a ten-to-two impasse."⁴⁷ The judge gave the supplemental instruction and the jury retired again. Three and one-half hours later the jury again informed the judge of the impasse. The judge reread the instruction and less than one hour later a guilty verdict was returned. While continuing to uphold *Allen*,⁴⁸ the court concluded that the circumstances here dictated reversal.

Ordinarily, the general test of whether a supplemental jury instruction is in error is to consider all the circumstances to determine if the instruction was coercive. Pragmatic considerations weigh against the application of this test when an *Allen* charge is given more than once. A case-by-case determination would provide little, if any, guidance for a trial judge. Defendants would also face insurmountable difficulties in attempting to show prejudice. A single *Allen* charge, without more, stands at the brink of impermissible coercion. We believe that the protection of a defendant's right to an impartial jury compels a per se rule. Such a rule is not at odds with prior decisions of this court or other courts of appeals. We conclude that as a sound rule of practice it is reversible error to repeat an *Allen* charge in a federal prosecution in this circuit after a jury has reported itself deadlocked and has not itself requested a repetition of the instruction.⁴⁹

44. 356 F.2d at 370.

45. *White v. United States*, 279 F.2d 740, 750 (4th Cir.), cert. denied, 364 U.S. 850 (1960).

46. 550 F.2d 1159 (9th Cir. 1977).

47. *Id.* at 1160.

48. Problems arising from the inherently coercive effect of the *Allen* charge have caused other courts of appeals and state courts to prohibit or to restrict severely its use. Nevertheless, the content, timing and circumstances surrounding the *Allen* charges given here have been upheld by this circuit and we do not undertake to reexamine those decisions.

Id. at 1162.

49. *Id.* at 1163. The court went on to note, in footnote 8:

A per se rule, such as the one we have adopted here, always poses the risk that it may sweep within its embrace cases which do not warrant its protection. We believe, however, that this "cost" of adopting a per se rule is outweighed by the importance of a defendant's right to an impartial jury trial and the insurmountable prob-

The timing of the *Allen* charge raises a related and complex question: Before the judge can give the instruction does the jury have to inform him that it is "hopelessly deadlocked"? The usual rule is no, it is in the trial judge's discretion as to the timing.⁵⁰ Still, faced with an uncertain situation some courts are willing to focus on both the time element and the nature of the communications from the jury. See, for instance, *United States v. Contreras*,⁵¹ where the trial judge gave the instruction on the jury's second day of deliberations, but before there was any indication that the jury was deadlocked. The court reversed the conviction finding that the instruction had a coercive impact on the jury.

Within the circumstances of this case, the *Allen* charge was premature. We have a profound feeling that it was coercive upon the jury. The *Allen* instruction "certainly should be given only when it is apparent to the district judge from the jury's conduct or the length of its deliberations that it is clearly warranted." Here, although the jury had deliberated for nearly eight hours, there was no indication that it was deadlocked. In seeking clarification of the judge's instructions, the jury did not indicate that it was having trouble reaching a unanimous verdict.⁵²

In connection with the timing of the instruction, two additional points should be made. First, regardless of the rule in any single case, "there is no uniformity among courts as to the length of time which must elapse after the jury retires before the charge is appropriate."⁵³ Of more concern is the second point, as expressed in 1962 by Judge Brown in voting to invalidate the *Allen* charge.

What is worse, it is becoming more and more commonplace. Nearly every hard-fought criminal case coming to this Court reveals the Judge sooner or later giving this charge or some embellishment of it. Too often, as in these two cases, it was but a matter of a few hours after the jury had retired to deliberate. And not infrequently, as we were led to believe on oral argument in both of these cases, it occurs with the last jury in the last case at that Division point for that particular term. To the other pressures which are irrelevant is the other and natural one of a personal consideration for the Judge who, like jurors, also wants to go home. The charge pointedly reminds them that to hold out disrupts the plans of all.⁵⁴

lems of proof and appellate review that a less definite rule would occasion.

Compare with *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977).

50. *People v. Newby*, 66 Mich. App. 400, 239 N.W.2d 387 (1976).

51. 463 F.2d 773 (9th Cir. 1972).

52. *Id.* at 774.

53. *State v. Martin*, 297 Minn. 359, 366, 211 N.W.2d 765, 769 (1973).

54. *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir.) (dissenting opinion), *cert. denied*, 370 U.S. 955 (1962). ABA STANDARDS, *supra* note 15, at 147-48.

The final collateral question relates to the practical value in having an *Allen* or *Allen*-type supplemental instruction. Considering the relatively small number of cases which ever progress to the felony jury trial deadlock,⁵⁵ and the seriousness that most jurors attach to their assignments,⁵⁶ substantial doubt must be raised as to the real need for the supplemental instruction. Moreover, even assuming that there are some true savings at the trial level in time and cost with the supplemental instruction, doubtless those savings are more than balanced by the costs at the appeals level. Numerous courts and commentators have lamented the time and energy spent by appeals courts on the *Allen* instruction generally—along with timing problems, harmless error questions⁵⁷ and other issues—and some have even concluded that “any judicial expense saved at the trial level is resurrected at the appellate level.”⁵⁸ To be sure, when the Arizona Supreme Court finally had enough of the numerous *Allen* issue appeals one of the main reasons cited for the invalidation of the instruction was the time and effort wasted because of it.

This instruction has been before us four times. When and wherever its use is called into question it must stand or fall upon the facts and circumstances of each particular case. It has given, and we believe each use will give us, harassment and distress in the administration of justice. No rule of thumb can circumscribe definite bounds of when and where, or under what circumstances it should be given or refused.

It now appears that its continued use will result in an endless chain of decisions, each link thereof tempered and forged with varying facts and circumstances and welded with everchanging personalities of the appellate court. This is not in keeping with sound justice and the preservation of human liberties and sec-

Other time limit problems have been created as well. See, e.g., *Goff v. United States*, 446 F.2d 623 (10th Cir. 1971), where the judge informed the jury that he would give them one more hour of deliberation or he would declare a mistrial. The court on appeal held this to be error. “It was impermissibly suggestive and coercive for the Court to place a time fuse on the period of deliberation. Such constitutes reversible error.” *Id.* at 626.

55. See Comment, *Practical Considerations*, supra note 2, at 170.

56. See ABA STANDARDS, supra note 15, at 151-52:

While some say that the *Allen* charge is only intended to induce jurors to join in conscientious collective deliberation in an honest effort to reach a verdict, there is not evidence that any significant number of American jurors fail to approach their task in this manner (citations omitted). Indeed, what evidence is available on why juries fail to agree indicates that it is not the result of one or two stubborn jurors, but rather the result of a truly substantial division on the first ballot.

57. See *People v. Gainer*, 19 Cal.3d at 854, 566 P.2d at 1007, 139 Cal. Rptr. at 871.

58. Comment, *ABA Jury Instructions Adopted as Preferable to Allen Charge*, 25 VAND. L. REV. 246, 251 (1972). See also Comment, *An Argument for the Abandonment of the Allen Charge in California*, 15 SANTA CLARA LAW. 939, 946 (1975).

urity. We are convinced that the evils far outweigh the benefits, and decree that its use shall no longer be tolerated and approved by this court.⁵⁹

A Misstatement of the Law

The above arguments could truly be utilized to mount a devastating attack against *Allen* and its progeny. In a sense they may demonstrate that *Allen* created far more difficult problems than it solved. Nevertheless, these arguments are only collateral to the three major attacks which have been made against the supplemental instruction: First, that the instruction does not correctly state the law. Second, that the charge unduly coerces the minority of jurors. And, third, the instruction as given is unconstitutional.

In *Redeford v. State*⁶⁰ the trial judge instructed the jury as follows:

Ladies and gentlemen of the jury, you are now into your second day of deliberation. I don't have to tell you that, you're well aware of it. You've heard all the evidence in this case for approximately two and half [sic] to three days. Really, *there is nothing decided unless the jury comes in with a verdict.* You're an intelligent jury, and if this case had to be tried over because of *your failure to reach a verdict*, another jury of twelve people no more intelligent would hear the same evidence and attempt to reach a verdict. *So you don't accomplish anything by not reaching a verdict* in this case. So would you continue your deliberations, please, and *put your collective minds together, and reach a verdict in this case.*⁶¹

While perhaps cruder in tone than most, this sort of statement has for decades been attached to the usual *Allen* instruction.⁶² In essence, the jury is instructed, either explicitly or implicitly, that "the case must at some time be decided."⁶³ And such a direction is wrong. The court in *Gainer* properly stated that—aside from the coercive impact of such a statement⁶⁴—"such statements are legally inaccurate. It is simply not true that a criminal case 'must at some time be decided.'"⁶⁵ The re-

59. *State v. Thomas*, 86 Ariz. 161, 166, 342 P.2d 197, 200 (1959). See also note 132 and accompanying text, *infra*.

60. 572 P.2d 219 (1977).

61. *Id.* at 220 (emphasis in original). The Nevada Supreme Court reversed the conviction, finding that such an instruction might have forced the jury to reach a compromise verdict.

62. See generally *State v. Martin*, 297 Minn. 359, 211 N.W.2d 765 (1973); *Huffman v. United States*, 297 F.2d 754 (5th Cir.), cert. denied, 370 U.S. 955 (1962).

63. *People v. Gainer*, 19 Cal.3d at 851, 566 P.2d at 1006, 139 Cal. Rptr. at 870.

64. See discussion in text accompanying notes 70-83 *infra*.

65. 19 Cal.3d at 852, 566 P.2d at 1006, 139 Cal. Rptr. at 870.

quirement of a verdict has never been a part of the law,⁶⁶ and for good reason. As the Third Circuit so aptly showed, in a jury trial there always have been and will continue to be three possible decisions of the jury: not guilty, guilty, and no verdict due to lack of unanimity.⁶⁷ All three options are open to the jury, and it is not in the province of the judge to indicate that either of two of these options is better or more accurate than the third.⁶⁸ Judge Brown stated the principle behind this rule effectively:

I think a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise. In the final analysis the Allen charge itself does not make sense. All it may rightfully say is that there is a duty to consider the views of others but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more it is a superfluous lecture in citizenship. If it says more to declare that there is a duty to *decide*, it is legally incorrect as an interference with that rightful independence.

The time has come, I think, to forbid this practice. Like the silver platter, this is too dear to keep. The cost in fundamental fairness is too great.⁶⁹

Because the inclusion of the "this case must be decided" language is erroneous and may well be weighed heavily by the jury, the *Gainer* court was clearly correct in striking down this portion of the instruction.

Coercion of the Minority Jurors

Suppose we do not have to be concerned with collateral matters such as timing, or a charge directed too clearly to a known, small minority of jurors, and so forth. Suppose also that the judge has not told the jury that the case must at some time be decided. Suppose, therefore, we have

66. *State v. Martin*, 297 Minn. 359, 365, 211 N.W.2d 765, 769 (1973). See also Comment, *An Argument for the Abandonment of the Allen Charge in California*, 15 SANTA CLARA LAW. 939, 948 (1975).

67. *United States v. Fioravanti*, 412 F.2d 407, 416 (3d Cir.), cert. denied, 396 U.S. 837 (1969).

68. See Comment, *The Allen Charge Dilemma*, 10 AM. CRIM. L. REV. 637, 652, 663 (1972).

69. *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir.) (dissenting opinion), cert. denied, 370 U.S. 955 (1962). In their classic study of the jury system, Kalven and Zeisel stated much the same rationale:

The hung jury is, in a way, the jury system's most interesting phenomenon. In one sense it marks a failure of the system, since it necessarily brings a declaration of mistrial in its wake. In another sense, it is a valued assurance of integrity, since it can serve to protect the dissent of a minority.

H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 453 (1966).

the original *Allen* instruction. Is *this* instruction invalid? Yes, said the court in *Gainer*, for aside from all else it unfairly coerces the minority of jurors to reach a verdict in accordance with the majority. The Court raised two primary objections to the instruction that

a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one, which makes no impression on the minds of so many men or women equally honest, equally intelligent with himself or herself. . . .⁷⁰

The first objection is that with the instruction the jurors are told not to be concerned, exclusively, with the evidence presented against the accused. Instead, they must also consider the nature of the deliberations in determining guilt or innocence.

The one or more "holdout" jurors are told that in reaching their independent conclusions as to whether or not a reasonable doubt of the defendant's guilt exists, they are to weigh not only the arguments and evidence but also their own status as dissenters—a consideration both rationally and legally irrelevant to the issue of guilt. They are thus deflected from their proper role as triers of fact, as effectively as if they had been instructed to consider their doubts as to guilt in light of their own prejudices or desire to go home.⁷¹

Wholly apart from the constitutional claims which can be raised in connection with such a procedure,⁷² the inclusion of such thinking on the juror's part is error. In essence, the minority jurors—whichever way the jurors are voting—⁷³ are instructed to assume that they are wrong, that the majority jurors are right, and that they should reconsider their views accordingly.⁷⁴ When the instruction is broken down in this fashion, the direction to the jury approaches a shocking change of the basic jury function in our system. To prevail, the state must, beyond a reasonable

70. *People v. Gainer*, 19 Cal.3d at 848, 566 P.2d at 1004, 139 Cal. Rptr. at 868.

71. *Id.*

72. See discussion at text accompanying notes 85-104 *infra*.

73. As the *Gainer* court forcefully wrote, the error is not eliminated if the majority is preliminarily voting for acquittal:

Nor need we speculate that in the majority of cases the giving of an *Allen* instruction will aid the prosecution rather than the defense: an even distribution of risk between prosecution and defense over a multitude of cases is not the measure of justice. Our jury system aspires to produce fair and accurate factual determinations in each case. An improper instruction should not be tolerated simply because statistically it may help defendants as much as prosecutors. Whichever adversary it favors, in urging minority jurors to reconsider their votes the *Allen* charge places excessive and illegitimate pressures on the deliberating jury. For this reason the giving of the charge is error.

19 Cal. 3d at 851, 566 P.2d at 1006, 139 Cal. Rptr. at 870.

74. *United States v. Fioravanti*, 412 F.2d 407, 416 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).

doubt, prove guilt to the satisfaction of each individual juror on the evidence and the evidence alone.⁷⁵ With this instruction, that requirement is substantially defeated.

The second objection is no less serious. The *Gainer* court noted that regardless of the extraneous evidence to be considered the trial court was simply exerting overwhelming and unfair pressure on the dissenting jurors.

The 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. No similar request is made of the majority. It matters little that the judge does not know the identity of the particular dissenters; their fellow jurors know, and the danger immediately arises that "the *Allen* charge can compound the inevitable pressure to agree felt by minority jurors." The 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.'" ⁷⁶

There can be little question that the instruction works, the dissenters are quickly disposed to change their votes and to join the majority.⁷⁷ Justice Udall set out the inevitable view almost thirty years ago:

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.⁷⁸

Few persons would challenge the contention that the *Allen* charge greatly influences the minority jurors. Hence, it has been suggested that the way to eliminate the problem is to influence both the minority and

75. See *People v. Superior Court*, 67 Cal.2d 929, 434 P.2d 623, 64 Cal. Rptr. 327 (1967).

76. *People v. Gainer*, 19 Cal.3d at 850, 566 P.2d at 1005, 139 Cal. Rptr. at 869 (citations omitted).

77. *Id.*; *State v. Martin*, 297 Minn. 359, 211 N.W.2d 765 (1973); ABA STANDARDS, *supra* note 15, at 147; Comment, *An Argument For the Abandonment of the Allen Charge in California*, 15 SANTA CLARA LAW. 939, 943 (1975); Comment, *The Allen Charge: Dead Law a Long Time Dying*, 6 U.S.F. L. REV. 326, 329 (1972); Comment, *Deadlocked Juries and Dynamite: A Critical Look at the Allen Charge*, 31 U. CHI. L. REV. 386, 389-90 (1964). For a general discussion of the impact of instructions on juries and the manner in which jurors decide cases, as seen in the experimental jury project at the law school of the University of Chicago, see James, *Status and Competence of Jurors*, 64 AM. J. SOC. 563 (1959).

78. *State v. Voekall*, 69 Ariz. 145, 157, 210 P.2d 972, 980 (1949) (dissenting opinion). See also *State v. Randall*, 137 Mont. 534, 353 P.2d 1054 (1960).

the majority jurors.⁷⁹ Such a suggestion has not been broadly adopted and for good reason. As the court in *Gainer* showed, any reference to a majority or minority faction on the jury is irrelevant to the issue of guilt, so on that ground alone it would be erroneous.⁸⁰ It would also be ludicrous as shown by the Third Circuit in *United States v. Fioravanti*.⁸¹ To avoid the coercion of the minority the instruction would have to be the bizarre sort of charge the court imagined in *Fioravanti*.

A Juror should listen with deference to his fellow jurors and with distrust of his own judgment if he finds that a large majority of jurors take a different view from that which he or she takes. Similarly, in such circumstances, one in the majority should distrust his own judgment if he finds a minority of jurors taking a different view from that which he or she takes.⁸²

Such an instruction no doubt merely advises all sides in the jury to be good citizens, behave themselves and listen to others. If it does only that it is of no value at all. If it does more than that (i.e. if it succeeds in instructing both the majority and the minority to listen to each other and to distrust their own judgment because *both* sides are probably wrong!) it "would be an invitation to a frolic with Alice in Wonderland."⁸³

Constitutional Arguments

Despite the problems with the *Allen* charge and the many rejections of it,⁸⁴ most courts in turning away from *Allen* have done so on other than constitutional grounds. In some cases the courts merely say such an instruction was error and give no ground for the decision.⁸⁵ In other cases, such as *Gainer*, the court expressly refuses to use constitutional arguments and instead decides that *Allen* should be rejected "as a judicially declared rule of criminal procedure."⁸⁶ Lest there be any doubt, however, strong constitutional arguments against *Allen* can be and have been marshalled.

Basically, the constitutional arguments center around the due process requirements inherent in any criminal trial and the way in which *Allen* abridges those requirements. The threshold point to be made here is that the due process clause—either by itself or with support of the Sixth Amendment right to counsel and right to trial—requires that a trial be conducted fairly.

79. See *State v. Martin*, 297 Minn. 359, 365, 211 N.W. 2d 765, 769 (1973).

80. *People v. Gainer*, 19 Cal.3d 835, 850 n.12, 566 P.2d 997, 1005 n.12, 139 Cal Rptr. 861, 869 n.12.

81. 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969).

82. *Id.* at 417.

83. *Id.*

84. See note 105 *infra*.

85. See, e.g., *State v. Martin*, 297 Minn. 359, 211 N.W.2d 765 (1973).

86. 19 Cal.3d at 852, 566 P.2d at 1006, 139 Cal. Rptr. at 870.

In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.⁸⁷

As Mr. Justice Black stated so succinctly, "A fair trial in a fair tribunal is a basic requirement of due process."⁸⁸ The arguments that the *Allen* charge violates due process boil down to four contentions: (1) it defeats the unanimity rule, (2) it does violence to the "beyond a reasonable doubt" standard, (3) the jury does not remain impartial, and (4) the jury is instructed to consider matters extraneous to the guilt or innocence of the accused in addition to the evidence offered at trial in making its determination.

1. The Unanimity Requirement

The federal courts, and most state courts, require that a jury verdict be unanimous.⁸⁹ And this requirement has been deemed essential to the fair trial proceeding.

The requirement of a unanimous jury verdict for criminal cases in the federal courts and in all but a handful of states is eloquent testimony that something more than a majority vote is desired. In this respect the jury system is unique. No other deliberative body in the world requires unanimity—be it the Congress of the United States, the College of Cardinals, the Boards of Directors of our great corporations, this court of appeals, or the United States Supreme Court. The proponents of the jury system maintain that a greater degree of accuracy is guaranteed from this process of give and take which is invariably essential to reaching unanimity.⁹⁰

When the jurors, particularly dissenting jurors, are required to rethink their position, some real question is raised as to whether the *effective Allen* charge somehow dilutes the unanimity requirement. Because it discourages jurors from freely holding their views the ultimate verdict may not truly be unanimous; dissenters may join the majority to avoid the wrath of the trial judge. The Third Circuit in *United States v. Fioravanti* stated the concern quite well:

The jury persists 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

87. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

88. *In re Murchison*, 349 U.S. 133, 137 (1955). The Court expressed the same view in *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966): "Due process requires that the accused receive a trial by an impartial jury free from outside influences."

89. See generally *United States v. Fioravanti*, 412 F.2d 407, 417-18 (3d Cir.), cert. denied, 396 U.S. 837 (1969).

90. *Id.* at 418.

and influencing. A judicial barrier should not be erected in the jury room to discourage free and open discussion.

If the validity of the unanimous jury verdict requirement is to persevere, appropriate respect must be extended and due protection afforded to the incidence of group interaction for this is the only justification for a verdict requiring a quantum of agreement in excess of a simple majority.⁹¹

2. *Beyond a Reasonable Doubt Standard*

Related to the unanimity requirement is the standard of proof in criminal cases: the state must prove its case beyond a reasonable doubt.

The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt.⁹²

One must question whether the standard has been met in the *Allen* context. The jury reports a fairly clear deadlock of, say, nine to three after deliberating three days. The *Allen* instruction is given; after two hours of deliberation a unanimous verdict of guilty is reported back. Could anyone in this situation—a not uncommon one—say with any degree of certainty that somehow in that two-hour period each and every juror became convinced of the guilt of the defendant, and convinced beyond a reasonable doubt? It strains credibility to believe that such a miraculous transformation has taken place in such a short time. The more likely explanation is that the dissenters were worn out and felt an obligation to reach a verdict in light of the trial judge's comments. This hardly constitutes unanimity in reaching a verdict beyond a reasonable doubt.

We are convinced that the traditional measure of proof in criminal cases envisions a "subjective standard"—viz, each individual juror must be convinced of the defendant's guilt beyond a reasonable doubt. To maintain that an objective standard governs could nullify the constitutionally mandated requirement of unanimity of verdict. Under any standard other than an individual juror's determination, would not "the doubt of a

91. *Id.* at 417.

92. *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953). *See also* *Bileci v. United States*, 184 F.2d 394, 403 (D.C. Cir. 1950):

An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned.

See generally *United States v. Fioravanti*, 412 F.2d 407, 418-19 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).

single juror in the face of seven votes for conviction [be] * * * per se unreasonable?"

Where a verdict of guilty is generated by the process of being influenced by a preliminary vote of the majority instead of subjective conviction beyond a reasonable doubt, at best we have a situation where two separate portions of the charge are at loggerheads; at worst, we have a serious question that the charge may have become constitutionally delinquent, in derogation of the defendant's traditional right of trial by jury.⁹³

3. An Impartial Jury

Due process requires that the defendant's trial be heard by an impartial jury.⁹⁴ Can the jury truly remain impartial when it is directed by the court to reconsider the entire matter because some minority jurors cannot side with the majority? That, truly, is the question. The answer is no. Such direction by the judge does indeed bias the jury to return a verdict. Those jurors are no longer impartial. Judge Coleman explained the situation with great clarity in his oft-cited opinion in *Thaggard v. United States*.⁹⁵

There is no intention of criticizing the District Judge for using this instruction. It is being done all the time, and it seems to the writer from considerable trial experience that the practice is growing instead of diminishing. It likewise seems from practical experience that after a jury has retired to consider its verdict, has done so for some time, and has indicated that it is in hopeless deadlock, every juror, not being trained in the law, understands from the Allen charge that what the Judge wants

93. *United States v. Fioravanti*, 412 F.2d at 419. See also *State v. Martin*, 297 Minn. 359, 365-66, 211 N.W.2d 765, 769 (1973):

[B]y admonishing that absolute certainty cannot be attained or expected, the Allen Charge tends to erode the universal rule requiring guilt to be proved beyond a reasonable doubt.

One commentator stated the objection quite well.

The imposition of outside evidence also plays havoc with the concept of "reasonable doubt." If unanimity is to have any meaning beyond the theoretical, each juror must be convinced of an accused's guilt beyond a reasonable doubt. Tentative opinions or balance of the jury members should play no role in a dissenting juror's change of position. There is no connection between the majority view and the reasonableness of an individual juror's doubt. Yet, the charge may have the effect of lowering the standard of proof from the necessary concurring views of 12 individuals to what the majority considers sufficient. The state would then not have proved its case beyond the reasonable doubt and the defendant would be denied a fair trial.

Comment, *The Allen Charge: Dead Law a Long Time Dying*, 6 U.S.F. L. REV. 326, 334 (1972).

94. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

95. 354 F.2d 735 (5th Cir. 1965), cert. denied, 383 U.S. 958 (1966).

is a verdict. So, there the previously reluctant juror stands, fancying himself in opposition to the wishes of a United States Judge, which is about the last position in which he ever wanted to find himself. He is only exercising everyday human nature when he gets out of that unhappy predicament just as quickly as he can.

The real burden of what I am saying is that the essential meaning of Constitutionally guaranteed trial by jury is that once the jury has retired to consider of its verdict it should not be subjected to so much as the appearance of any influence from any source for the purpose of producing a verdict. The jurors should be left to the unhampered expression of their own consciences, independently arrived at.⁹⁶

If the judge who gives the *Allen* charge gives the indication that he *might* be exerting undue pressure on members of the jury, at least the strong appearance of partiality has been created. Such a situation violates the right to a fair trial by jury.

4. *Factors Extraneous to the Issue of Guilt*

Perhaps the strongest constitutional argument to be offered against the *Allen* charge, and one relied on heavily by the *Gainer* court, is that the instruction directs the jurors to consider factors extraneous and irrelevant to the issue of guilt, and in addition to the items of evidence which were properly admitted at trial.

Yet in instructing that "a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one, which makes no impression on the minds of so many men or women equally honest, equally intelligent with himself or herself," the trial judge pointedly directs the jurors *to include an extraneous factor in their deliberations, i.e., the position of the majority of jurors at the moment*. The one or more "holdout" jurors are told that in reaching their independent conclusions as to whether or not a reasonable doubt of the defendant's guilt exists, they are to weigh not only the arguments and evidence but also their own status as dissenters—a *consideration both rationally and legally irrelevant to the issue of guilt. They are thus deflected from their proper role as triers of fact*, as effectively as if they had been instructed to consider their doubts as to guilt in light of their own prejudices or desire to go home.⁹⁷

Without question the California court's analysis is correct. Indeed, that result is precisely the point of the supplemental instruction. The judge wants the dissenting jurors to reconsider their views in light of the fact that most of the other jurors do not share such a view. The hope, of

96. *Id.* at 741.

97. 19 Cal.3d at 848, 566 P.2d at 1004, 139 Cal. Rptr. at 868 (emphasis added).

course, is that the dissenting view will be shifted so that the majority verdict will soon become the unanimous verdict.

This result cannot withstand constitutional scrutiny. Time and time again the Supreme Court has said that the jury "verdict must be based upon the evidence developed at the trial."⁹⁸ "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury."⁹⁹ Quite clearly the *Allen* instruction does not comport with either the letter or the spirit of this principle. The jury is instructed in no uncertain terms to consider not only the evidence but the manner in which the deliberations are taking place and the status of minority jurors vis-a-vis majority jurors. Such a practice is unconstitutional.¹⁰⁰

The constitutional arguments against *Allen* can be substantial, yet most courts generally avoid constitutional determinations in this area. Some courts raise the constitutional issue, but then decide the cases on other grounds.¹⁰¹ Other courts discuss the substantive problems but do not identify them as constitutional questions.¹⁰² Perhaps the courts are loathe to consider the constitutional grounds when the Supreme Court, despite numerous opportunities, has chosen not to invalidate *Allen*.¹⁰³ More likely, courts act this way so as to follow the general rule that cases ought to be decided on non-constitutional grounds if at all possible.¹⁰⁴ Whatever the reason, despite the few constitutional holdings, courts and attorneys should not ignore the fact that substantial constitutional questions arise whenever the supplemental instruction is given.

98. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

99. *Turner v. Louisiana*, 379 U.S. 466, 472 (1964). The Court went further:

In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.

Id. at 472-73.

100. For a good discussion on this point see Comment, *Due Process, Judicial Economy and the Hung Jury: A Re-examination of the Allen Charge*, 53 VA. L. REV. 123 (1967).

101. See, e.g., *People v. Gainer*, 19 Cal.3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977); *United States v. Fioravanti*, 412 F.2d 407, cert. denied, 396 U.S. 837 (1969). See generally ABA STANDARDS, *supra* note 15, at 149.

102. See *People v. Gainer*, 19 Cal. 3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977).

103. A very real possibility; see text accompanying notes 124-131 *infra*.

104. Cf. *United States v. Fioravanti*, 412 F.2d 407, cert. denied, 396 U.S. 837 (1969).

THE ALLEN SUPPORTERS

Most courts considering a substantive appeal of the issue appear skeptical as to the continued validity of *Allen* and either refuse to follow it or limit it considerably.¹⁰⁵ The Fifth Circuit was frank in its evaluation: "The *Allen* charge both deserves and receives a healthy disrespect in our courts."¹⁰⁶ The courts recognize the logical and practical problems with *Allen* and do not wish to invite reversal by its continued use. As the Louisiana Supreme Court remarked, "jurisprudential and scholarly disapproval appears to approach universality."¹⁰⁷ While there is a definite trend to eliminate or cut back on *Allen*¹⁰⁸ many states and federal jurisdictions¹⁰⁹ still retain both the traditional *Allen* charge as well as the embellished supplemental instructions.¹¹⁰

In light of the intense criticism, one might legitimately ask why the instruction remains viable in so many jurisdictions.¹¹¹ If *Allen* is dying, why after so many years is there still a pulse? Four answers can be given to this puzzling question. First, in many states few substantive cases ever seem to reach the higher appellate courts. For instance, in states the size of Texas and New York, very rarely have appellate judges been specifically directed to consider the validity of the *Allen* charge.¹¹² Another answer to the question is that in many jurisdictions when the *Allen* question has arisen the court's attention was focused on collateral matters which disposed of the case. See, for example, *United States v. Seawell*¹¹³

105. For a comprehensive list of these cases see Comment, *The Allen Charge: The Propriety of Giving Supplemental Instructions to a Deadlocked Jury*, 22 LOY. L. REV. 667, 673-75 (1976). See also Annot., 41 A.L.R.3d 1154; Annot., 100 A.L.R.2d 177.

106. *United States v. Amaya*, 509 F.2d 8, 12 (5th Cir. 1975), *aff'd after new trial*, 533 F.2d 188 (5th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977). Nevertheless, the *Allen* charge is still good law in the Fifth Circuit.

107. *State v. Nicholson*, 315 So. 2d 639, 643 (La. 1975).

108. "It is clear, however, that the 'dynamite charge' is being defused." Comment, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y.U. L. REV. 296, 319 (1972); Comment, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100, 103 (1968) ("Hostility to the *Allen* charge has been growing for some time. . .").

109. Indeed, the dissenter in *Nicholson* noted that *Allen* was still the "overwhelming weight of authority in the United States." 315 So.2d at 646.

110. See generally *People v. Gainer*, 19 Cal. 3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977).

111. To be sure, the basic *Allen* instruction was given as a part of the manual on jury instructions in federal criminal cases, 33 F.R.D. 523, 611 (1963), from 1963 until 1969. See discussion in *United States v. Silvern*, 484 F.2d 879 (7th Cir. 1973). See also Devitt and Blackmar, 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 18.14 (1977).

112. See, e.g., *Arrevalo v. Texas*, 489 S.W.2d 569 (1973); *People v. Abdul Karim Al-Kanani*, 33 N.Y.2d 260, 307 N.E.2d 43, 351 N.Y.S.2d 969 (1973), *cert. denied*, 417 U.S. 916 (1974).

113. 550 F.2d 1159 (9th Cir. 1977). See also *United States v. Smith*, 521 F.2d 374 (10th Cir. 1975).

where the Ninth Circuit had its attention directed to the *repeating* of the supplemental instruction rather than to the propriety of any particular supplemental instruction.

The most obvious (and perhaps most important) reason some courts have not rejected *Allen* is that these courts simply do not agree with the prevailing criticism. As the dissenting justice remarked in the *Gainer* case, "The '*Allen* instruction' is an 'appropriate action to encourage agreement.'"¹¹⁴ As another judge pointed out, "The importance of having a jury agree may properly be urged upon their attention. . . . They may properly be warned against stubbornness and self-assertion."¹¹⁵ The most direct attack on the criticism of *Allen* was made by the Fourth Circuit in *United States v. Sawyers*.¹¹⁶ Recognizing the "increasing criticism of *Allen* type charges,"¹¹⁷ the court dealt with the attacks in some detail. The court specifically stated that the assertion "that anyone has the right to hang a jury rather than the right to a true verdict is erroneous."¹¹⁸ The court remarked that the key determination was whether the jury had been coerced into reaching a verdict. If the jury has not been coerced, the defendant cannot complain.

When a defendant occasionally benefits, if he does, from a hung jury, he is getting not what he is entitled to have but something less. Beneath the criticism of verdict inducing instructions is the apparent assumption that such an instruction is always detrimental to defendants. We are unaware of any statistical survey proving or disproving such an assumption. We do know, however, that not infrequently verdicts of acquittal follow *Allen* type instructions. So far as we know, there is no reason to suppose that an *Allen* type instruction is more likely to induce a verdict of guilty than of not guilty. Indeed, the trial judge may not inquire as to how the jury stands, and thus may not knowingly press for a verdict either way except in the rare instance when the jurors disclose to him, without inquiry, their division.¹¹⁹

Similar remarks were made by Judge Pell, dissenting from the Seventh Circuit's adoption of a set rule regarding supplemental instructions.¹²⁰ In addition, though, he contended that appeals judges should not affirmatively direct the giving of jury instructions. They should, perhaps,

114. 19 Cal.3d at 859, 566 P.2d at 1011, 139 Cal. Rptr. at 875. See also *People v. Carter*, 68 Cal.2d 810, 815, 442 P.2d 353, 356, 69 Cal. Rptr. 297, 300 (1968).

115. *People v. Randall*, 9 N.Y.2d 413, 425, 174 N.E.2d 507, 515, 214 N.Y.S.2d 417, 427 (1961). See also *United States v. Sutherland*, 463 F.2d 641 (5th Cir.), cert. denied, 409 U.S. 1078 (1972).

116. 423 F.2d 1335 (4th Cir. 1970).

117. *Id.* at 1340.

118. *Id.* at 1341.

119. *Id.*

120. *United States v. Silvern*, 484 F.2d 879, 884 (7th Cir. 1973).

impose guidelines, but they should not set out the instructions which would or would not be suitable.

My basic feeling is that the matter of writing instructions should remain in the hands of the trial judges. They are the ones at the battle site who are best in the position to judge which instructions are appropriate to the factual issues. Likewise they are best in the position to determine the nature, necessity, and verbiage of instructions to be given in connection with the functional aspects of jury deliberation, including those that may be necessary when it reasonably appears that a jury has reached the status of being deadlocked. If in any instruction the court misstates the law and the effect is prejudicial then, of course, a reversal would ordinarily follow. By prescribing the exact language in which a trial judge may instruct in the deadlocked situation we are, it seems to me, substantially circumscribing the discretionary flexibility needed by the trial judge for effective trial administration. It is one thing to find no error in an instruction which has been given in a trial, thereby putting out tacit approval on it, and an entirely different matter to engage in *a priori* processes of word fixation.¹²¹

A final reason should be given as to why some federal courts are reluctant to cast aside *Allen* even when there is substantial skepticism as to the validity of the instruction. The Supreme Court has only once addressed the issue of the *Allen* instruction, in *Allen*, and it expressly upheld the constitutionality of the instruction. Then Judge John Paul Stevens, sitting on the Seventh Circuit, expressed the obvious concern quite clearly.

I have not yet been able satisfactorily to explain to myself how this circuit can lawfully announce that an instruction to a jury which the Supreme Court has specifically and squarely held is not reversible error in federal criminal trials shall in the future constitute reversible error when given in such trials conducted in the Seventh Circuit.¹²²

Although a few responses have been given to this concern, they may not be, as Justice Stevens wrote, "completely satisfactory."¹²³ First, it is argued that the Court last considered *Allen* in the 19th century when concerns over criminal defendants' rights were minimal.¹²⁴ While this

121. *Id.*

122. *Id.* at 886.

123. *Id.* See also *United States v. Skillman*, 442 F.2d 542 (8th Cir.), *cert. denied*, 404 U.S. 833 (1971).

124. I realize that as long as *Allen* . . . stands it is our duty to follow it. I entertain the thought that if it were submitted to the Supreme Court today the result might not be the same as it was in 1896. I cannot see that the qualifications, reservations, and escape clauses customarily used in modern versions of the charge save it from

fact is no doubt true, it is not at all clear that the Court would indeed hold to the contrary today. It has had the opportunity to do so in numerous cases in which review has been denied by the Court. It has also chosen not to consider the issue when it was raised in cases disposed of on other grounds by the Court.¹²⁵ A related response is that aside from the binding effect of the earlier *Allen* decision, any charge which today coerces a jury verdict denies due process; usually *Jenkins v. United States*¹²⁶ is cited for this proposition. It is true that the Court there held that a particular supplemental instruction was unduly coercive. The problem is that the Court specifically noted that it was coercive "in its context and under all the circumstances,"¹²⁷ and that the circumstances were especially egregious. After only two hours of deliberation the jury informed the judge that it could not reach a verdict "on both counts because of insufficient evidence." Instead of simply giving a supplemental instruction of the standard form,¹²⁸ the trial judge told the jury, "You have got to reach a decision in this case."¹²⁹ This is hardly a clear precedent for the broad due process claims in opposition to *Allen*.

Perhaps the best reason why the lower federal courts should be able to reject *Allen*—in spite of the Supreme Court's refusal to overrule it—is the most deceptively simple one. The Court held that it was not unconstitutional to give the *Allen* instruction. It did *not* say it was a required instruction, or that alternative instructions were not also valid. Thus, without reaching the constitutional claims regarding *Allen*,¹³⁰ courts should be able to use their own supervisory power to say that other methods of dealing with the problem of the deadlocked juries are preferable. Of course, even this limited rationale is troublesome when the courts (as the Seventh Circuit) declare that continued use of *Allen* will

being what it is, and what the jury believes it to be, a direct appeal from the Bench for a verdict.

Thaggard v. United States, 354 F.2d 735, 739-40 (5th Cir. 1965) (Coleman, J., specially concurring), *cert. denied*, 383 U.S. 985 (1966).

125. See, e.g., *Kawakita v. United States*, 343 U.S. 717 (1952), where the Court held that numerous errors "are either insubstantial or so adequately disposed of by the court of appeals that we give them no notice. . . ." *Id.* at 744. At the court of appeals level, 190 F.2d 506 (9th Cir. 1951), a challenge to *Allen* was raised on broad grounds and was rejected. The *Allen* problem was again raised in appellant's brief before the Supreme Court, Opening Brief on Behalf of Appellant at 160-69. See Comment, *The Allen Charge Dilemma*, 10 AM. CRIM. L. REV. 637, 664 n.109 (1972).

126. 380 U.S. 445 (1965). See discussion in Comment, *The Allen Charge: The Propriety of Giving Supplemental Instructions to a Deadlocked Jury*, 22 LOY. L. REV. 667, 669 (1976).

127. 380 U.S. at 446.

128. Or declaring a mistrial because of the jury's reference to "insufficient evidence."

129. 380 U.S. at 446.

130. None of the federal courts do, at least not in their holdings.

constitute reversible error. Still, the continued emphasis here should be on the discretionary powers of the courts rather than on any formal constitutional determinations by those courts.¹³¹

SOLUTIONS TO THE PROBLEM

The theoretical and logical objections to *Allen* are substantial. The major practical objection, though, would seem to be that the giving of the *Allen* instruction as written wastes the time of so many appellate judges (albeit saving the time of some trial judges).¹³² Thus, one is

131. The question of being bound by *stare decisis* regarding the *Allen* rule is present even with circuit decisions. *See, e.g.*, *United States v. Bailey*, 468 F.2d 652, 669 (5th Cir. 1972) (citations omitted):

We deeply regret being compelled to affirm this conviction. We do so only because we are bound by precedent. Were the choice ours alone to make, we would put an end to the *Allen* charge in a "quick and not too decent burial." It is our fervent hope that when appellant petitions this court for rehearing *en banc* our learned and distinguished brethren will vote for *en banc* consideration. We would also hope that this court will join the jurisdictions that have abolished this abuseable relic. But whatever the outcome of such a hearing, the law cannot help but be vastly improved by our issuing a definitive statement regarding the further use of the dynamite charge.

The court, *en banc*, reaffirmed its support for *Allen*. *United States v. Bailey*, 480 F.2d 518 (5th Cir. 1973).

132. In the 5th Circuit, where an *Allen* charge is not improper—*United States v. Thomas*, 567 F.2d 638, 643 (5th Cir. 1978)—the courts have recently been swamped with literally dozens of *Allen* instruction questions in both civil and criminal cases. *See, e.g.*, *United States v. Solomon*, 565 F.2d 364 (5th Cir. 1978); *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977); *United States v. Skinner*, 535 F.2d 325 (5th Cir. 1976), *cert. denied*, 429 U.S. 1048 (1977); *United States v. Taylor*, 530 F.2d 49 (5th Cir. 1976); *Government of the Canal Zone v. Fears*, 528 F.2d 641 (5th Cir. 1976); *United States v. Cheramie*, 520 F.2d 325 (5th Cir. 1975); *Brooks v. Bay State Abrasive Products, Inc.*, 516 F.2d 1003 (5th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976); *United States v. Howell*, 514 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 914 (1975); *Bryan v. Wainwright*, 511 F.2d 644 (5th Cir.), *cert. denied*, 423 U.S. 837 (1975); *United States v. Amaya*, 509 F.2d 8 (5th Cir. 1975), *aff'd after new trial*, 533 F.2d 188 (5th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977); *United States v. Fonseca*, 490 F.2d 464 (5th Cir.), *cert. denied*, 419 U.S. 1072 (1974); *United States v. Thaxton*, 483 F.2d 1071 (5th Cir. 1973); *United States v. Bailey*, 480 F.2d 518 (5th Cir. 1973); *United States v. Bailey*, 468 F.2d 652 (5th Cir. 1972); *United States v. Sutherland*, 463 F.2d 641 (5th Cir.), *cert. denied*, 409 U.S. 1078 (1972); *United States v. Williams*, 447 F.2d 894 (5th Cir. 1971); *Hale v. United States*, 435 F.2d 737 (5th Cir. 1970), *cert. denied*, 402 U.S. 976 (1971); *Nordmann v. National Hotel Company*, 425 F.2d 1103 (5th Cir. 1970); *Downs v. American Employers Insurance Company*, 423 F.2d 1160 (5th Cir. 1970); *United States v. Hill*, 417 F.2d 279 (5th Cir. 1969); *Posey v. United States*, 416 F.2d 545 (5th Cir. 1969), *cert. denied*, 397 U.S. 946 (1970); *Pennington v. United States*, 392 F.2d 421 (5th Cir. 1968), *cert. denied*, 404 U.S. 854 (1971); *Williamson v. United States*, 365 F.2d 12 (5th Cir. 1966); *Cunningham v. United States*, 356 F.2d 454 (5th Cir.), *cert. denied*, 384 U.S. 952 (1966); *Thaggard v. United States*, 354 F.2d 735 (5th Cir.), *cert. denied*, 383 U.S. 958 (1966); *North*

drawn to the difficult question: Is there a solution to this dilemma? The obvious solution, of course, is simply to avoid using *Allen* and not give any supplemental instruction at all to the jury.¹³³ Few persons have seriously suggested this solution for an all-too-clear reason. When the jury is deadlocked some guidance is needed to assist them in reaching a verdict if reasonably possible. The Illinois Supreme Court expressed the view nicely: "[W]e do not feel that a jury should be left to grope in such circumstances without some guidance from the court."¹³⁴

Other suggestions have also been made. One commentator thought that incorporating the *Allen* charge into the initial voir dire would enable selection of jurors to "be based on a potential juror's capacity to withstand the intimidation inherent in the *Allen* charge."¹³⁵ The problem with any such proposal, as recognized even by the commentator suggesting it, is that it is somewhat naive. "[A] real possibility exists that during voir dire a juror will establish his capacity to resist the coercion of an *Allen* charge and later accede to majority rule under the pressures of the instruction."¹³⁶ Moreover, the type of juror who could completely say that he would definitely not be influenced by the majority's position on a matter may not be the open-minded sort of juror either the prosecution or defense would want.

While other suggestions have been made for eliminating the supplemental instructions and using other devices to assist the deadlocked jury,¹³⁷ few of these suggestions are taken very seriously. Most judges and commentators would prefer to utilize some sort of supplemental in-

Texas Producers Association v. Metzger Dairies, Inc., 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966); Walker v. United States, 342 F.2d 22 (5th Cir.), *cert. denied*, 382 U.S. 859 (1965); Estes v. United States, 335 F.2d 609 (5th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965); Green v. United States, 309 F.2d 852 (5th Cir. 1962); Andrews v. United States, 309 F.2d 127 (5th Cir. 1962), *cert. denied*, 372 U.S. 946 (1963); Huffman v. United States, 297 F.2d 754 (5th Cir.), *cert. denied*, 370 U.S. 955 (1962); Powell v. United States, 297 F.2d 318 (5th Cir. 1961); Sikes v. United States, 279 F.2d 561 (5th Cir. 1960); Silverman v. Travelers Insurance Company, 277 F.2d 257 (5th Cir. 1960); Wilson v. Southern Farm Bureau Casualty Company, 275 F.2d 819 (5th Cir.), *cert. denied*, 364 U.S. 817 (1960); Slade v. United States, 267 F.2d 834 (5th Cir. 1959); Harrell v. United States, 220 F.2d 516 (5th Cir. 1955); Burton v. United States, 175 F.2d 960 (5th Cir. 1949), *cert. denied*, 338 U.S. 909 (1950).

133. See Comment, *Criminal Procedure—Jury Instructions—ABA Standard Adopted for Instructing Deadlocked Juries*, 42 TENN. L. REV. 803, 814 (1975).

134. *People v. Prim*, 53 Ill.2d 62, 74, 289 N.E.2d 601, 608 (1972), *cert. denied*, 412 U.S. 918. See also *United States v. Sawyers*, 423 F.2d 1335, 1343 (4th Cir. 1970). But see *People v. Sullivan*, 392 Mich. 324, 220 N.W.2d 441 (1974) (dissenting opinion).

135. Comment, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y.U. L. REV. 296, 317 (1972).

136. *Id.* at 318.

137. For a creative group of suggestions, see Comment, *Instructing Deadlocked Juries in Light of the Trial of Juan Corona*, 53 ORE. L. REV. 213, 223-25 (1974).

struction, while avoiding if possible the kinds of difficulties which *Allen* creates. One alternative for toning down the harshness of *Allen* is to allow the use of the supplemental instruction only if it was given earlier as part of the large block of jury instructions.¹³⁸ Another would be to require, in addition to the *Allen* instruction, a re-reading to the deadlocked jury of the instructions regarding the presumption of innocence and the requirement of proof beyond a reasonable doubt.¹³⁹

The ABA Approach

Most courts, faced with the prospect of dealing with deadlocked juries, have not in recent years retained the *Allen* charge, nor have they adopted the possible proposals discussed above. Instead, a single proposal formulated by a section of the American Bar Association has swept the nation, resulting in strong praise by commentators.¹⁴⁰ More importantly, it has been widely adopted (either as a requirement or a strong suggestion to trial judges) by both federal¹⁴¹ and state courts.¹⁴² In 1968 the American Bar Association Project on Minimum Standards for Criminal Justice reported its Standards Relating to Trial by Jury. Stan-

138. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 502 at 349 (1969). This is the approach apparently taken by the Seventh Circuit. *United States v. Silvern*, 484 F.2d 879 (7th Cir. 1973).

139. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 502 at 349 (1969).

140. See, e.g., the following comments praising the ABA proposal: *Cushioning the Blow of the "Dynamite Charge,"* 6 MEMPHIS ST. L. REV. 553 (1976); Comment, *An Argument for the Abandonment of the Allen Charge in California*, 15 SANTA CLARA LAW. 939 (1975); *Criminal Procedure—Jury Instructions—A.B.A. Standard Adopted for Instructing Deadlocked Juries*, 42 TENN. L. REV. 803 (1975); Comment, *Instructing Deadlocked Juries: The Present Status of the Allen Charge*, 3 TEX. TECH. L. REV. 313 (1972); Comment, *The Faltering Allen Charge and its Proposed Replacement*, 16 ST. LOUIS L.J. 619 (1972); *The Allen Charge Dilemma*, 10 AM. CRIM. L. REV. 637 (1972); *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y.U. L. REV. 296 (1972); *The Allen Charge: Dead Law a Long Time Dying*, 6 U.S.F. L. REV. 326 (1972).

141. For a very limited sample of the federal cases, see these recent cases: *United States v. Silvern*, 484 F.2d 879 (7th Cir. 1973); *United States v. Flannery*, 451 F.2d 880 (1st Cir. 1971); *United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971); *United States v. Sawyers*, 423 F.2d 1335 (4th Cir. 1970); *United States v. Fioravanti*, 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969). The Committee on the Operation of the Jury System of the Judicial Conference of the United States Courts has recommended that the ABA standards, with one addition, be supported. See discussion in *United States v. Sawyers*, 423 F.2d 1335, 1342 n.7 (4th Cir. 1970).

142. For a small sample of the state cases, see *People v. Gainer*, 19 Cal.3d 835, 857, 566 P.2d 997, 1009, 139 Cal. Rptr. 861, 873; *State v. Nicholson*, 315 So. 2d 639 (La. 1975); *People v. Sullivan*, 392 Mich. 324, 220 N.W.2d 441 (1974); *State v. Martin*, 297 Minn. 359, 211 N.W.2d 765 (1973); *People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972), cert. denied, 412 U.S. 918 (1973); *Commonwealth v. Spencer*, 442 Pa. 328, 275 A.2d 299 (1971).

dard 5.4 was designed specifically to deal with the *Allen* charge questions. The standard provides as follows:

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

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

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

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.¹⁴³

Why is the ABA standard superior to the usual supplemental instruction, at least in the minds of the many judges who have adopted it? First, the instruction is given at the conclusion of the trial before any deliberations have been started by the jury. This is a great advantage, as the jury

143. In the comments to the standards the drafters also set forth an example of an instruction which would be consistent with the standards:

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

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

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

is advised at the start how to proceed if there is a split, and the rereading of the instruction later would not be nearly as coercive on the minority jurors as it is in the typical *Allen* situation. Reference should also be made to the obvious fact that there is no mention at all in the standard of majority-minority splits, the jurors are simply advised as to their obligations and rights as jurors. Also, rather than directing the jury to decide the case, the jury is instead told to consult with each other and to reach agreement "if it can be done without violence to individual judgment." In short, by informing the jurors of these responsibilities and rights, and by not telling them that the case must be decided, the judge is simply stressing the importance of their endeavor, yet avoiding virtually all the problems created by *Allen*. It is an instruction which can be given again when the jury is deadlocked. The jury is made to understand in no uncertain terms that it should try its hardest to reach a verdict. Thus, it may well work; as with *Allen* it may have the effect of eliminating petty differences. Still, it does not coerce, it does not threaten, it does not improperly state the law. It is a correct declaration of legal principles, it may work effectively, and it does not unfairly push the jury. As most judges to review it have realized, there is little more that can be asked of any one instruction.¹⁴⁴

CONCLUSION

The California Supreme Court in the *Gainer* case was right: The *Allen* charge is coercive, unfair to defendants, an inaccurate statement of the law, and might well be unconstitutional if the Supreme Court ever chooses to reconsider the matter. Nevertheless, deadlocked juries are a fact of life which cannot be swept aside. Something is needed to assist the deadlocked jury. The jurors may be at loose ends during deliberations, but often they could be persuaded in a legitimate fashion to reach a verdict. What is needed is the instruction based upon the ABA standard. This standard will have the effect of aiding the jury in an evenhanded and lawful way. In addition to the growing legion of courts to adopt it, other courts, including the United States Supreme Court, should take a fresh and favorable look at the ABA standard. The time has come for the dynamite charge to be permanently defused.

144. For an excellent, and favorable, analysis of the ABA Standards, see *State v. Martin*, 297 Minn. 359, 211 N.W.2d 765 (1973).

