Criminal Procedure—Jury Charge—California Abolishes an Allen Charge That Encourages a Juror to Consider Majority Opinion in Forming Individual Views on an Issue, Implies That a Case Will Have to be Retired if the Jury Fails to Agree, or Refers to the Expense or Inconvenience of the Trial. *People v. Gainer*, 19 Cal. 3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977).

Robert Gainer Jr.'s murder trial lasted fifteen days, with more than thirty witnesses testifying.[1] The case went to the jury on the morning of the thirteenth day. Four times during that day the jury asked to review portions of the testimony. Near the end of the second day of unsuccessful deliberations, the trial judge, upon request,[2] was informed that the jury was divided nine to three. On the morning of the third day of deliberations the jury was still deadlocked, but only eleven to one. The judge then delivered an Allen charge to the jury.[3] Two hours and fifty-five minutes later the jury returned a guilty verdict.[4] On Gainer's appeal the California Supreme Court

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1. People v. Gainer, 19 Cal. 3d 835, 566 P.2d 997, 999, 139 Cal. Rptr. 861, 863 (1977).

2. *Id.* In Brasfield v. United States, 272 U.S. 448, 450 (1926), the Supreme Court held it reversible error for a trial judge to inquire into the numerical split of the jury prior to delivering an Allen instruction. If the trial judge is aware of the division of the jury, his subsequent Allen charge will have a more coercive effect upon the minority because the minority will be made to feel the charge is directed only at them.

3. People v. Gainer, 19 Cal. 3d 835, 566 P.2d 997, 999, 139 Cal. Rptr. 861, 863 (1977). The Allen charge is a special, supplemental instruction given to encourage deadlocked juries to reach a verdict. It derives its name from Allen v. United States, 164 U.S. 492 (1896), in which the Supreme Court approved an instruction similar to the one given in *Gainer*. See note 23 *infra* and accompanying text.

Portions of the instructions given in *Gainer* are excerpted below:

> [A]bsolute certainly cannot be attained or expected . . . . [T]he verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions and not a mere acquiescence in the conclusion of his or her fellows, . . . you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other . . . . [T]he case must at some time be decided, ...
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> . . . [I]n conferring together, you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments.
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> . . . [I]f much the larger of your panel are for a conviction, a dissenting juror should consider whether a a doubt in his or her own mind is a reasonable one, which makes no impression upon the minds of so many men or women equally honest, equally intelligent with himself or herself . . . .
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> . . . [I]f a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated . . . .

People v. Gainer, 19 Cal. 3d 835, 566 P.2d 997, 999, 139 Cal. Rptr. 861, 863 (1977).

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

reversed the conviction. The court held that it was error for a trial court to give an instruction that either encourages a juror to consider numerical division or majority opinion in forming individual views on an issue, implies that a case will have to be retried if the jury fails to reach a verdict, or refers to the expense or inconvenience of the trial.[5]

In ruling on the charge given during the third day of deliberations, the California Supreme Court in *People v. Gainer*[6] for the first time considered the validity of the Allen charge. Although the court avoided the constitutional issue,[7] it adopted the position of a growing number of jurisdictions that the Allen charge is improper. The court determined that it would not sustain the charge because it requires the jury to consider extraneous and improper factors, inaccurately states the law, is potentially coercive, and burdens the administration of justice.[8]

The California Supreme Court found error in two elements of the charge.[9] First, the court disapproved of a trial judge admonishing minority jurors to reconsider their position in light of the majority's view because the judge's action may potentially coerce minority jurors into acquiescing in a verdict that they do not conscientiously believe in.[10] This coercive effect denied the defendant his right to have the case decided on the evidence and arguments presented in open court.[11] In addition, the court noted that the instruction to minority jurors violated this right by bringing extraneous factors to bear on the case.[12] Next, the court expressly disapproved of the trial judge's charge that the case must sometime be decided, commenting that such a charge was error because it is legally incor-

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5. 566 P.2d at 1006, 139 Cal. Rptr. at 870.

6. 19 Cal. 3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977).

7. The court adopted the reasoning of *Gainer* as a rule of criminal procedure rather than constitutional law. 566 P.2d at 1006, 139 Cal. Rptr. at 870.

8. 566 P.2d at 1000, 139 Cal. Rptr. at 864. The court refused to hold it error to use the Allen charge in civil cases. 566 P.2d at 1009 n.22, 139 Cal. Rptr. at 873 n.22.

9. 566 P.2d at 1006, 139 Cal. Rptr. at 870. Neither element had previously been approved by the California Supreme Court. 566 P.2d at 1002, 139 Cal. Rptr. at 866. The court also held reference to the expense of the trial impermissible. 566 P.2d at 1006 n.16, 139 Cal. Rptr. at 870 n.16.

10. 566 P.2d at 1004-06, 139 Cal. Rptr. at 868-70.

11. 566 P.2d at 1003, 139 Cal. Rptr. at 867, *citing* Shepperd v. Maxwell, 384 U.S. 333, 351 (1966), *quoting* Patterson v. Colorado, 205 U.S. 454, 462 (1907).

12. People v. Gainer, 19 Cal. 3d 835, 566 P.2d 997, 1004, 139 Cal. Rptr. 861, 868 (1977). The extraneous factors the juror is asked to consider are the majority's view at the moment, the need for a verdict, and the judge's view of the case. *Id.*

rect.[13] The court reasoned that a case does not have to be decided: after repeated mistrials the prosecution may, and usually does, give up, with the result that the case ends without a verdict ever having been reached.[14] Although the court recognized that the purpose of the charge was to save judicial resources by avoiding expensive and time-consuming retrials, it nevertheless held usage of the charge to be reversible error.[15] In so holding, the court determined that the resources saved on the trial level by the charge are greatly outweighed by the burden that the charge imposes on appellate review.[16]

The Allen charge that was held error in *People v. Gainer*[17] is one example of a trial court's attempt to prevent a potential mistrial due to a deadlocked jury. For years deadlocked juries have presented problems for trial judges. Faced with a hung jury, the judge has no choice but to declare a mistrial.[18] Because mistrials are costly and time consuming, jury-control devices have been developed to encourage jurors to reach a verdict. Original devices emphasized physical coercion and restraint, but gradually the physical coercion was reduced in favor of more subtle forms. For example, while fourteenth century circuit-riding judges locked jurors in ox carts and carried them around until a verdict could be "bounced out,"[19] during the nineteenth century milder forms of physical coercion persisted.[20] Today, however, the commonly accepted practice is to

13. 566 P.2d at 1006, 139 Cal. Rptr. at 870.

14. *Id.*

15. *Id.* The court allowed "cases now pending on appeal" to benefit from the rule announced in *Gainer.* As to the first element, the court applied a per se rule of reversal to those cases. However, the court refused a per se rule of reversal when only the second element existed and held it reversible error only if the reviewing court determines from an examination of all the circumstances that prejudice exists. 566 P.2d at 1007-08, 139 Cal. Rptr. at 871-72.

16. 566 P.2d at 1009, 139 Cal. Rptr. at 873. Justice Clark dissented because he believed that the charge accomplished its purpose of impressing jurors with the solemnity and importance of their task. In response to the court's disapproval of asking the minority to reconsider its position in light of the majority opinion, he pointed out that appellate court judges quite often make judicial decisions based upon the majority view or rule, just as the court did in this case. 566 P.2d at 1011, 139 Cal. Rptr. at 875.

The majority of the court did endorse the American Bar Association Standards. 566 P.2d at 1009, 139 Cal. Rptr. at 873. See notes 98-104 *infra* and accompanying text for a discussion of the standards.

17. 19 Cal. 3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977).

18. *E.g.*, TEX. CODE CRIM. PROC. ANN. art. 36.31 (1966).

19. CRABB, HISTORY OF ENGLISH LAW 287 (1829), *cited in* Note, 31 U. CHI. L. REV. 386 n.1 (1964).

20. *See, e.g.*, Cole v. Swan, 4 Greene 32 (Iowa 1853) (threat of no food from Saturday to Monday); Pope v. State, 36 Miss. 121 (1858) (threat of no food or drink until verdict reached); People v. Sheldon, 156 N.Y. 268, 50 N.E. 840, 842 (1898) (jurors were deprived of

"blast" a verdict out of a deadlocked jury with a "dynamite charge".[21]

Although the first record of use of the Allen charge was in an 1851 Massachusetts case,[22] it was not until 1896 that the charge was given constitutional approval by the United States Supreme Court in *Allen v. United States,*[23] from which the charge draws its name. Alexander Allen was tried three times for murder.[24] The first two convictions were reversed by the Supreme Court because of faulty jury instructions.[25] The third conviction was aided in part by a supplemental instruction given to encourage the jury to reach a verdict. The instruction provided that dissenting jurors should question the reasonableness of their position; that the verdict must be the verdict of each individual juror and not the mere acquiescence in the conclusions of his fellows; that it was the jury's duty to decide the case if it could conscientiously do so; and that the jurors should examine the question submitted with candor and with a proper regard and deference to the opinions of each other.[26]

On appeal, the Supreme Court found no error in the charge.[27] The Court recognized that the verdict should represent the opinions of each individual juror. However, because the purpose of jury deliberation is to form those individual opinions by a discussion among the jurors of the evidence and arguments presented, the Court reasoned that the defendant was not denied his right to a verdict based on the individual opinion of each juror.[28] The Court believed that the instruction would foster this purpose. Consequently, the conviction was upheld.

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meat, drink, fire, and candle until a verdict was reached); Erwin v. Hamilton, 50 How. Pr. 32 (N.Y. 1875) (threat to lock jury up from Friday to Monday morning). Threats of physical coercion are still prevalent today. *See, e.g.*, State v. Green, 254 Iowa 1379, 121 N.W.2d 89 (1963) (jury required to deliberate 27 hours without sleep); Commonwealth v. Clark, 404 Pa. 143, 170 A.2d 847 (1961) (jury required to deliberate 10-½ hours; verdict reached at 5:25 a.m.); Commonwealth v. Moore, 398 Pa. 198, 157 A.2d 65 (1959) (jury required to deliberate all night); Mead v. City of Richmond Center, 237 Wis. 537, 297 N.W. 419 (1941) (threat to cut off heat and water in building during winter).

21. Other names for the charge include the "third degree instruction," the "shotgun instruction," the "nitroglycerin charge," or the "dynamite charge." United States v. Bailey, 468 F.2d 652, 666 (5th Cir. 1972).

22. Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1 (1851).

23. 164 U.S. 492, 501 (1896).

24. *Id.* at 493.

25. Allen v. United States, 157 U.S. 675 (1895); Allen v. United States, 150 U.S. 551 (1893).

26. Allen v. United States, 164 U.S. 492, 500 (1896).

27. *Id.*

28. *Id.*

In the wake of *Allen*, the charge won acceptance in many courts because of its efficiency in obtaining a verdict from a jury that was otherwise unable to agree.[29] However, as the use of the charge increased, questions arose concerning its validity. First, the exact wording of the instruction in *Allen*, which encouraged minority jurors to reexamine their position, was questioned as being improperly coercive.[30] Second, many courts began to deviate from the exact language approved in *Allen* and interject other elements of questionable validity.[31] Third, the primary justification for the charge—judicial economy—has been outweighed by the burden it places on appellate review.[32] Because of these problems, the trend of courts in recent years has been to abolish the charge[33] or to replace it with less objectionable, approved instructions.[34] Specifically, the courts have been most concerned with three elements of the charge: the instruction to minority jurors to reconsider their position in light of the majority's opinion,[35] the statement that the case must at sometime be decided,[36] and any reference to the expense or inconvenience of the trial.[37]

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29. *See* Note, *An Argument for the Abandonment of the Allen Charge in California*, 15 SANTA CLARA LAW. 939, 939 n.3 (1975).

30. *E.g.*, Middle States Utils. Co. v. Incorporated Tel. Co., 222 Iowa 1275, 271 N.W. 180 (1937).

31. The statement that the case must at some time be decided, although part of the instruction in Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1 (1851), was not included in the instruction approved in Allen v. United States, 164 U.S. 492 (1896). However, this statement has become a standard part of the Allen charge. *See* Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 VA. L. REV. 123, 128-30 (1967).

32. *E.g.*, United States v. Silvern, 484 F.2d 879, 882 (7th Cir. 1973). Because juror coercion is impermissible, the circuit courts are continually required to make case by case reviews of the Allen charge to determine if coercion exists.

33. *E.g.*, State v. White, 285 A.2d 832, 838 (Me. 1972) (held, time to abolish the Allen charge and any of its modifications).

34. *E.g.*, People v. Sullivan, 392 Mich. 324, 220 N.W.2d 441 (1974) (court adopted the American Bar Association Standards).

35. *E.g.*, Fields v. State, 487 P.2d 831, 836 (Alaska 1971); State v. Nicholson, 315 So. 2d 639, 642 (La. 1975).

36. *E.g.*, State v. Martin, 297 Minn. 359, 211 N.W.2d 765 (1973).

37. *E.g.*, Smith v. State, 233 S.W.2d 138 (Tex. Crim. App. 1950); Missouri, K. & T. Ry. Co. v. Barber, 209 S.W. 394, 395 (Tex. Comm'n App. 1919, jdgmt adopted).

Many other elements of the Allen charge have been considered by the courts. Four circuits require their trial courts to instruct jurors not to abandon conscientiously held beliefs. United States v. Scott, 547 F.2d 334 (6th Cir. 1977); Thaggard v. United States, 354 F.2d 735 (5th Cir. 1965); United States v. Kenner, 354 F.2d 780 (2d Cir. 1965); United States v. Rogers, 289 F.2d 433, 437 (4th Cir. 1961) (the court also required trial judges to remind the jury of the right to dissent). In the Fifth, United States v. Duke, 492 F.2d 693, 697 (5th Cir. 1974), and Ninth Circuits, Walsh v. United States, 371 F.2d 135 (9th Cir. 1967), it is improper to tell a jury they must reach a verdict. The Ninth Circuit has held it error to repeat an Allen

The admonition to minority jurors to reconsider their position in light of the majority's opinion has been a widely criticized element of the charge.[38] Several courts have recognized the impropriety of singling out the minority for special instructions on its duty to agree. In *United States v. Flannery*[39] the First Circuit recommended that minority jurors alone not be asked to reexamine their position,[40] and in *United States v. Fioravanti*[41] the Third Circuit held that a charge that asks the minority to reconsider its position is an unwarranted invasion into the province of the jury.[42] The Ninth Circuit

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charge, United States v. Seawell, 550 F.2d 1159, 1162-63 (9th Cir. 1977), and the Sixth Circuit will not allow a jury to be told a case is on retrial, United States v. Harris, 391 F.2d 348, 355 (6th Cir. 1958), nor that the court has a hectic or backlogged trial schedule, United States v. Scott, 547 F.2d 334 (6th Cir. 1977). Neither the Fifth Circuit, United States v. Amaya, 509 F.2d 8, 10 (5th Cir. 1975), nor the Tenth Circuit, Goff v. United States, 446 F.2d 623, 626 (10th Cir. 1971), will allow a trial judge to put time demands on jury deliberations.

In United States v. Bailey, 468 F.2d 652 (5th Cir. 1972), which is the leading Fifth Circuit case explaining the permissible bounds of the Allen charge, the court expressed its desire to abolish the charge in the Fifth Circuit because of its coercive effect. However, the charge was sustained because the court sat as a panel and could only overrule precedent en banc. *Id.* at 668. In United States v. Bailey, 480 F.2d 518 (5th Cir. 1973), the decision of the panel was affirmed en banc, thus permitting the Allen charge continued life in the Fifth Circuit.

The thrust of *Bailey* is that the Fifth Circuit will permit any instruction which does not substantially deviate from the language of the original Allen charge approved by the Supreme Court in 1896. To date, the Fifth Circuit has refused to require its trial judges to use the American Bar Association Standards, even though the impropriety of the Allen charge has been expressed in many opinions. Thaggard v. United States, 354 F.2d 735, 739-40 (5th Cir. 1966) (Coleman, J., specially concurring); Walker v. United States, 342 F.2d 22, 27-29 (5th Cir. 1965) (Brown, C.J., dissenting); Andrews v. United States, 309 F.2d 127, 129-30 (5th Cir. 1962) (Wisdom, J., dissenting).

38. The Allen charge, including the admonition to minority jurors, has been the subject of severe critical commentary. *See* 9 HOUS. L. REV. 570 (1972); Note, *The Allen Charge: Recurring Problems and Recent Developments,* 47 N.Y.U. L. REV. 296 (1972); Note, *An Argument for the Abandonment of the Allen Charge in California,* 15 SANTA CLARA LAW. 939 (1975); Comment, *Instructing Deadlocked Juries: The Present Status of the Allen Charge,* 3 TEX. TECH. L. REV. 313 (1972); 31 U. CHI. L. REV. 386 (1964); Comment, *The Allen Charge: Deadlaw A Long Time Dying,* 6 U.S.F. L. REV. 326 (1972); Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge,* 53 VA. L. REV. 123 (1967); Note, *On Instructing Deadlocked Juries,* 78 YALE L.J. 100 (1968).

39. 451 F.2d 880 (1st Cir. 1971).

40. *Id.* at 883. In United States v. Angiulo, 485 F.2d 37 (1st Cir. 1973), these recommendations became requirements. *Id.* at 40. In *Angiulo* the court gave an illustration of an instruction consistent with its ruling. *Id.* at 40 n.3.

41. 412 F.2d 407 (3d Cir. 1969). "Hereafter, in this circuit, trial judges are not to give instructions either in the main body of the charge or in the form of a supplement that direct a juror to distrust his own judgment if he finds a large majority of the jurors taking a view different from his." *Id.* at 420.

42. *Id. See* Government of Virgin Islands v. Hernandez, 476 F.2d 791, 793 (3d Cir. 1973) (conviction reversed because trial court included admonition to minority jurors in supplemental instructions).

in *Walsh v. United States*[43] held it error to make any reference to the minority in delivering supplemental instructions.[44] The Seventh[45] and District of Columbia[46] Circuits have adopted the American Bar Association's Standards Relating to Trial by Jury,[47] which eliminate any mention of the minority as a permissible element of a supplemental instruction.[48] Numerous state courts also have found error in a charge directed to minority jurors.[49] In a recent civil case the Supreme Court of Texas held that "[a]ny supplemental charge, such as the original *Allen* charge, which is addressed specifically to the minority jurors of a deadlocked panel is expressly and inherently coercive."[50] Other decisions have held it error to instruct a juror that the majority of the jurors have a better judgment than the minority[51] or that the jury should examine the question with regard to each other's opinion.[52] The focus on the minority has been objected to because it suggests to the minority that the majority's analysis of the case is the only correct view and implies that the minority is responsible for the jury's inability to reach a verdict.[53]

The second objectionable element, the statement that the case must at sometime be decided, has been held improper in the First,[54] Fourth,[55] and Sixth[56] Circuits. Although the Eighth Circuit has

43. 371 F.2d 135 (9th Cir. 1967).

44. *Id.*

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

46. United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971).

47. See notes 98-104 *infra* and accompanying text for a discussion of the American Bar Association Standards.

48. See note 99 *infra* and accompanying text.

49. *E.g.*, Fields v. State, 487 P.2d 831 (Alaska 1971); State v. Nicholson, 315 So. 2d 639 (La. 1975); State v. Randall, 137 Mont. 534, 353 P.2d 1054 (1960).

50. Stevens v. Travelers Ins. Co., 563 S.W.2d 223, 228 (Tex. 1978).

51. Green v. United States, 309 F.2d 852, 854-56 (5th Cir. 1962).

52. People v. Mills, 131 Ill. App. 2d 693, 268 N.E.2d 571 (1971).

53. Note, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y.U. L. REV. 296, 300 (1972).

54. United States v. Flannery, 451 F.2d 880, 883 (1st Cir. 1971). The court went on to hold it permissible to instruct that it is *desirable* to have the case decided and that there is no reason to believe some other jury will be in a better position to do so than the present one, but no more. *Id.*

55. United States v. Graydon, 429 F.2d 120, 123 (4th Cir. 1970). Although the court disapproved the instruction, the verdict was upheld because defense counsel failed to timely object. *Id.*

56. United States v. Harris, 391 F.2d 348, 355 (6th Cir. 1968). The court believed the statement would create the danger the minority will surrender consciously-held beliefs, and was coercive and misleading in fact. *Id. But see* United States v. LaRiche, 549 F.2d 1088, 1093 (6th Cir. 1977) (held, no error for trial judge to say "this case must be *disposed* of" in contrast to "*decided*").

approved the American Bar Association Standards,[57] which eliminate the statement,[58] it has upheld an instruction including it.[59] In *Fulwood v. United States*[60] the District of Columbia Circuit, in an opinion written by then Circuit Judge Warren Burger, viewed the statement that "some jury sometime will have the duty to decide this case" as merely a *hope* that the jury would reach a verdict and therefore not coercive.[61] However, in *United States v. Thomas*[62] the District of Columbia Circuit retreated from its earlier approval of the statement by adopting the American Bar Association Standards.[63] The Circuits and state courts[64] that have disapproved of the statement reason that the statement is legally incorrect because a hung jury is an inevitable by-product of an unanimous verdict system and therefore trial judges should not be allowed to misstate the law.[65]

Reference to the expense or inconvenience of the trial has been upheld in the Eighth Circuit,[66] but expressly disapproved by the Third Circuit[67] and numerous state courts.[68] Again, the American Bar Association Standards eliminate this element[69] in those jurisdictions adopting the Standards.[70] Reference to the expense of a trial has been held improper in Texas.[71] The courts that disapprove of a

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57. United States v. Skillman, 442 F.2d 542, 558-60 (8th Cir. 1971).

58. See note 103 *infra* and accompanying text.

59. Hodges v. United States, 408 F.2d 543, 554 (8th Cir. 1969). The court believed that it is obvious to jurors that trials are expensive and that a new trial will have to be initiated if they do not reach a verdict. The court then reasoned that instructions are not coercive if they merely restate what the jury already knows. *Id. See generally* United States v. Robinson, 419 F.2d 1109 (8th Cir. 1969) (court recognized that defendant's failure to object may have been a strategic move because counsel thought the instruction would result in an acquittal); United States v. Pope, 415 F.2d 685 (8th Cir. 1969) (should use care in giving instruction so as to avoid coercion).

60. 369 F.2d 960 (D.C. Cir. 1966).

61. *Id.* at 963.

62. 449 F.2d 1177 (D.C. Cir. 1971).

63. *Id.* at 1186.

64. *E.g.*, Fields v. State, 487 P.2d 831 (Alaska 1971); State v. Martin, 297 Minn. 359, 211 N.W.2d 765 (1973).

65. *See, e.g.*, People v. Gainer, 19 Cal. 3d 835, 566 P.2d 997, 1006, 139 Cal. Rptr. 861, 870 (1977).

66. Hodges v. United States, 408 F.2d 543, 554 (8th Cir. 1969).

67. United States v. Burley, 460 F.2d 998, 1000 (3d Cir. 1972).

68. *See, e.g.*, Missouri, K. & T. Ry. v. Barber, 209 S.W. 394 (Tex. Comm'n App. 1919, jdgmt adopted).

69. See note 101 *infra* and accompanying text.

70. See notes 106-115 *infra*.

71. Smith v. State, 233 S.W.2d 138 (Tex. Crim. App. 1950); Texas Midland R.R. v. Brown, 228 S.W. 915 (Texas Comm'n App. 1921, jdgmt adopted).

reference to the expense or inconvenience of the trial reason that the jury should consider only the evidence and arguments presented in open court.[72] Therefore, because the expense or inconvenience of a trial is not evidence that is relevant to the defendant's guilt or innocence, it is improper to ask the jury to consider those elements in arriving at a verdict.[73]

Texas trial courts have used Allen-type instructions to secure verdicts but have deviated somewhat from the basic elements of the charge. In the early case of *Missouri, K. & T. Ry. v. Barber*[74] the Texas Commission of Appeals set forth the principle that the jury should be independent from excessive influences.[75] In *Barber* the court held that jurors should consider only the evidence introduced at trial and the law governing the case in arriving at a verdict.[76] The court recognized that the jury should be independent from the judge's influence and held that an agreement should not be reached unless it represented the honest conviction of each juror upon the issues involved.[77] Despite the holding of *Barber,* Texas juries have been instructed that it is the purpose of the trial[78] to secure a verdict, that the facts are too clear to sustain a hung jury,[79] that it is reasonable to assume the case will be retried,[80] and that there is no guarantee that the next jury will be any better able to decide the case.[81] In a recent civil case the Supreme Court of Texas upheld the Allen charge.[82]

In *People v. Gainer*[83] the California Supreme Court modified the Allen charge to exclude reference to the expense or inconvenience of a retrial,[84] the statement that the case must at some time be decided,[85] and instructions admonishing minority jurors to reconsider their position in light of the majority's viewpoint.[86] The court

72. *See, e.g.,* Missouri, K. & T. Ry. v. Barber, 209 S.W. 394, 395 (Tex. Comm'n App. 1919, jdgmt adopted).
73. *Id.*
74. 209 S.W. 394 (Tex. Comm'n App. 1919, jdgmt adopted).
75. *Id.* at 395.
76. *Id.*
77. *Id.*
78. Verret v. State, 470 S.W.2d 883 (Tex. Crim. App. 1971).
79. Smith v. State, 233 S.W.2d 138 (Tex. Crim. App. 1950).
80. Arrevalo v. State, 489 S.W.2d 569 (Tex. Crim. App. 1973).
81. *Id.*
82. Stevens v. Travelers Ins. Co., 563 S.W.2d 223 (Tex. 1978).
83. 19 Cal. 3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977).
84. 566 P.2d at 1006 n.16, 139 Cal. Rptr. at 870 n.16.
85. 566 P.2d at 1006, 139 Cal. Rptr. at 870.
86. 566 P.2d at 1004-06, 139 Cal. Rptr. at 868-70.

did not find the Allen charge to be coercive on its face, nor did it ground its decision upon the accused's constitutional right to a jury trial. Rather, the court adopted the rule announced in *Gainer* as a "judicially declared rule of criminal procedure."[87] Because the court did not reach the constitutional issue of the accused's right to a fair and impartial trial by jury, the effect of *Gainer* is that the Allen charge, with the three objectionable elements excluded, may still be used in California.

The California Supreme Court had adequate grounds to question the constitutional validity of the Allen charge, despite the Supreme Court's cursory approval of the charge in 1896.[88] The sixth amendment guarantees a criminal defendant the right to trial by an impartial jury.[89] In *Duncan v. Louisiana*[90] the Supreme Court recognized the fundamental right to a jury trial to be part of the fifth amendment due process, made applicable to the states by the fourteenth amendment.[91] The jury functions to protect the accused from excesses of state power and influence by including community consciousness as an ingredient in the trial. The juror's duty is to consider only the evidence and arguments presented in open court in determining the accused's guilt or innocence.[92] The Allen charge instructs a juror to consider the impact of their vote, not the evidence presented, and forces a juror to consider matters irrelevant to the accused's guilt or innocence.[93] The charge is not aimed at persuading a juror to change his opinion by a reconsideration of the evidence, nor does it instruct a juror on the applicable law of the case; rather, it persuades a minority juror to substitute the majority's judgment for his own, not because he has been influenced by the persuasiveness of the majority's argument, but because extraneous factors imposed on him by the trial judge coerce the change. Any change in minority opinion must be accompanied by an honest change in the juror's view of the evidence. A voluntary change of a

87. 566 P.2d at 1006, 139 Cal. Rptr. at 870.

88. Allen v. United States, 164 U.S. 492 (1896). In the one page approval of the charge, the Court ignored the potentially coercive elements of the charge, but upheld it as a method to secure unanimity by a comparison of views between the jurors. *Id.* at 501. The Court's refusal to inquire into the potentially coercive elements of the charge may have been due to an absence of a brief on the part of the plaintiff in error. *Id.* at 494.

89. U.S. CONST. amend. VI.

90. 391 U.S. 145 (1968).

91. *Id.* at 149.

92. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

93. 31 U. CHI. L. REV. 386, 390 (1964).

juror's view of the evidence is a proper outcome of jury deliberation, but a change induced by pressure from the trial judge is an unwarranted invasion into the province of the jury, and contravenes both the function of the jury and the rights of the accused.[94] Because of the secrecy surrounding jury deliberations and the subjective nature of juror decision-making, it is impossible to determine when the charge has coerced a change of view and equally impossible for appellate courts to correct the error on appeal.[95] If the sixth amendment is to have any significance, then each juror must be convinced of the accused's guilt or innocence solely through the evidence and arguments presented in open court and not by the trial judge's prompting. Because it serves no legitimate purpose and is fraught with coercion, the Supreme Court should reconsider the Allen charge and hold that it is constitutionally improper.[96]

Regardless of the strong constitutional argument against any continued use of the Allen charge, many jurisdictions refuse to abolish the charge because of its alleged effectiveness in reducing retrial.[97] The American Bar Association Approved Draft on Standards Relating to Trial by Jury[98] attempt to eliminate much of the

94. Huffman v. United States, 297 F.2d 754, 755 (5th Cir. 1962) (Brown, J., dissenting).

95. The secrecy of jury deliberations and the subjective nature of the reasoning behind the jury's verdict precluded these elements from being a part of the record the appellate court will have before it when ruling upon the coerciveness of the charge. Therefore the appellate court will have no way of determining the exact extent, if any, to which the charge coerced the verdict and will be unable to fashion a remedy to correct the coerciveness. In many jurisdictions it is improper to inquire into a juror's mental process to impeach his verdict. An overt act of misconduct is required. Buck v. Savage, 323 S.W.2d 363, 374 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.)

96. *See* Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge,* 53 VA. L. REV. 123, 136 (1967).

97. Although "[t]he sensation [of retrial] is somewhat akin to dining on yesterday's cold mashed potatoes," State v. Earsery, 199 Kan. 208, 428 P.2d 794, 798 (1967), trial judges should be careful not to allow their dislike of retrials to deny the accused the right to a jury trial.

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

5.4 Length of deliberations; deadlocked jury.

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

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

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

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

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

potential coercion inherent in the Allen charge by giving guidelines from which trial judges may develop charges eliminating many of the potentially coercive elements. First, the Standards eliminate all admonitions to minority jurors.[99] Second, there is no mention of the necessity for, or expense of, a new trial.[100] Third, the timing of the charge has been changed by providing that the charge be given before the jury retires, and thus before a minority exists.[101] Fourth, the Standards do not even imply that the case must be decided.[102] Finally, the Standards shift the emphasis from a reconsideration of only one view point—the majority's—to a general duty to deliberate.[103] The Standards further attempt to balance the instructions by reminding a juror not to acquiesce in a verdict that does violence to his conscience and not to surrender his honest convictions about the evidence because of the opinions of his fellow jurors.[104]

The Standards have met with judicial approval because they attempt to move a deadlocked jury toward reaching a verdict while eliminating many of the potentially coercive elements. The Circuit Courts have diverse opinions as to the propriety of the Standards. Although the Eighth Circuit has approved the Standards,[105] and the First[106] and Fourth[107] Circuits have recommended their use, neither circuit requires that the Standards be used when giving Allen

(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.

99. *Id.*

100. *Id.*

101. *Id.* at (a).

102. *Id.*

103. *Id.*

104. *Id.* at (a)(v).

105. United States v. Skillman, 442 F.2d 542, 560 (8th Cir. 1971). The court expressed a preference for giving the charge in the regular instructions before a deadlock has occurred. *Id.* at 558-59.

106. United States v. Flannery, 451 F.2d 880, 884 (1st Cir. 1971). In United States v. Angiulo, 485 F.2d 37 (1st Cir. 1973), the court again suggested but refrained from requiring the use of the American Bar Association Standards. 485 F.2d at 40 n.3.

107. United States v. Sawyers, 423 F.2d 1335, 1343 (4th Cir. 1970). The recommended form is similar to the American Bar Association Standards. *Id.* at 1342 n.7.

type instructions.[108] The Ninth Circuit has approved an instruction similar to the Standards,[109] and in *United States v. Fioravanti*[110] the Third Circuit suggested a proper charge, but again it was not required. However, two Circuits have exercised their supervisory power in requiring the Standards to be used in those circuits. In *United States v. Silvern*[111] the Seventh Circuit set forth a prospective rule of automatic reversal if the Standards are not used when giving supplemental instructions urging the jury to agree on a verdict.[112] The District of Columbia Circuit determined in *United States v. Thomas*[113] that because the Allen charge was an undue intrusion into the province of the jury, henceforth trial judges would be required to comply with the American Bar Association Standards.[114] The diversity of opinions concerning the Standards is no less obvious in the state courts.[115] While no instructions can elimi-

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108. United States v. Flannery, 451 F.2d 880, 884 (1st Cir. 1971); United States v. Skillman, 442 F.2d 542, 560 (8th Cir. 1971); United States v. Sawyers, 423 F.2d 1335, 1343 (4th Cir. 1970).

109. Sullivan v. United States, 414 F.2d 714, 716-18 (9th Cir. 1969). "We doubt that it is really any longer advisable to give the Allen instruction at all, and it 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." *Id.* at 716.

110. 412 F.2d 407, 420 n.32 (3d Cir. 1969). In Government of Virgin Islands v. Hernandez, 476 F.2d 791, 793 (3d Cir. 1973), the Third Circuit again *suggested* trial courts use the form given in *Fioravanti*. *See also* United States v. Lee, 532 F.2d 911 (3d Cir. 1976) (supplemental instruction approved in *Fioravanti* used without error).

111. 484 F.2d 879 (7th Cir. 1973).

112. *Id.* at 883. The court gave an example of the *only* charge that may be given to a deadlocked jury. *Id.* at 883 n.7. In United States v. Brown, 411 F.2d 930, 933-34 (7th Cir. 1969), the Seventh Circuit had previously required all its trial courts to use the ABA Standards.

113. 449 F.2d 1177 (D.C. Cir. 1971).

114. *Id.* at 1186.

115. The states have expressed diverse opinions on the propriety of both the Allen charge and the standards. For example, see Fields v. State, 487 P.2d 831 (Alaska 1971); State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959); Taylor v. People, 176 Colo. 316, 490 P.2d 292 (1971); Bryan v. State, 280 So. 2d 25 (Fla. App. 1973); State v. Brown, 94 Idaho 352, 487 P.2d 946 (1971); People v. Mills, 131 Ill. App. 2d 693, 268 N.E.2d 571 (1971); Middle States Utils. Co. v. Incorporated Telephone Co., 222 Iowa 1275, 271 N.W. 180 (1937); State v. Earsey, 199 Kan. 208, 428 P.2d 794 (1967); State v. Nicholson, 315 So. 2d 639 (La. 1975); State v. White, 285 A.2d 832 (Me. 1972); People v. Sullivan, 392 Mich. 324, 220 N.W.2d 441 (1974); State v. Martin, 297 Minn. 359, 211 N.W.2d 765 (1973); State v. Randall, 137 Mont. 534, 353 P.2d 1054 (1960); State v. Garza, 185 Neb. 445, 176 N.W.2d 664 (1970); Azbill v. State, 88 Nev. 240, 495 P.2d 1064 (1972); State v. Blake, 113 N.H. 115, 305 A.2d 300 (1973); State v. Minns, 80 N.M. 269, 454 P.2d 355 (1969); State v. Champagne, 198 N.W.2d 218 (N.D. 1972); State v. Marsh, 260 Or. 416, 490 P.2d 491 (1971), *cert. denied sub nom.* O'Dell v. Oregon, 406 U.S. 974 (1972); Commonweath v. Spencer, 442 Pa. 328, 275 A.2d 299 (1971); State v. Patriarca, 112 R.I. 14, 308 A.2d 300 (1973); Kersey v. State, 525 S.W.2d 139 (Tenn. 1975); Kelley v. State, 51 Wis. 2d 641, 187 N.W.2d 810 (1971); Elmer v. State, 463 P.2d 14 (Wyo. 1969).

nate completely the potential for coercion, the American Bar Association Standards minimize the possibility to a great extent.

Despite the general recognition of the potentially coercive elements of the Allen charge and its questionable constitutional validity, its use continues. However, a growing number of courts have realized the coercive nature of the charge[116] and either abolished it completely or modified it to eliminate the more coercive elements. The trend today is clearly to allow the charge in modified form only. The Supreme Court of California's holding in *People v. Gainer*[117] is in line with this trend, thus showing that the "dynamite charge" is being neutralized.

Charles Bundren

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116. *E.g.*, United States v. Bailey, 468 F.2d 652 (5th Cir. 1972).
117. 19 Cal. 3d 835, 566 P.2d 997, 139 Cal. Rptr. 861 (1977).