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An Argument for the Abandonment of the Allen Charge in California

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The *Allen* charge, a supplemental jury instruction designed to elicit a verdict from a deadlocked jury, was approved in 1896 by the United States Supreme Court in *Allen v. United States*. The Supreme Court, faced with a murder case which it had reviewed and remanded twice before, rejected eighteen new allegations of error, affirmed the conviction, and approved use of a controversial charge to the jury. It described the charge as quite lengthy, and . . . 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.

The *Allen* charge was quickly adopted in many of the states of the Union, often in expanded form. Its popularity was based

1. 164 U.S. 492 (1896).
2. *Id.* at 501.
3. The following states adopted a similar instruction shortly after its approval by the Supreme Court: Garret v. State, 171 Ark. 297, 284 S.W. 734 (1926); Seville v. People, 65 Colo. 437, 177 P. 135 (1918); State v. Mosca, 90 Conn. 381, 97 A. 340 (1916); State v. Richardson, 137 Iowa 591, 115 N.W. 220 (1908); State v. Rieman, 118 Kan. 577, 235 P. 1050 (1925); People v. Coulon, 151 Mich. 200, 114 N.W. 1013 (1908); State v. Friend, 154 Minn. 428, 191 N.W. 926 (1923); Territory v. Donahue, 16 N.M. 17, 113 P. 601 (1911); State v. Bolen, 142 Wash. 653, 254 P. 445 (1927); Nicholson v. State, 24 Wyo. 347, 157 P. 1013 (1916). A few of the above cited cases credit Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1 (1851), which approved the progenitor of the *Allen* charge, as their source for the instruction.

For federal and state courts that more recently have approved use of an *Allen* instruction see Annot. 100 A.L.R.2d 177-217 at § 3 (Later Case Service, Supp. 1975).
4. A common addition to the instruction was the phrase "the case must at
upon the fact that it was an efficacious means of urging a stalemated jury to render a verdict. As the Fifth Circuit Court of Appeals observed in 1972, "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."  

The instruction appeared to be well balanced, asking only that the jurors reconsider their views, and not that they abandon a conscientiously held opinion. However, since only dissenting jurors were asked to reconsider their opinions, it effectively coerced the minority into joining the majority. The charge suggested that the dissenters should doubt the reasonableness of their belief since a majority of equally honest and intelligent jurors had come to the opposite conclusion. This bias has led many states subsequently to re-examine the instruction, and since 1969 eleven jurisdictions across the nation have discarded the Allen instruction.  

California belatedly adopted the charge in 1958, when the court of appeal for the Third District approved an expanded version of the Allen instruction in People v. Baumgartner.  


In a large proportion of cases and perhaps strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the 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, yet, in order to bring twelve minds to a unan-
first and second districts followed,8 and in 1968, in People v. Carter,9 the California Supreme Court gave tacit approval to the charge in dictum favorably commenting on certain statements normally made in the charge. The supreme court, however, has not specifically reviewed and approved the version of the Allen charge first adopted in Baumgartner.

California thus stands betwixt and between, having joined those states making use of the Allen charge, but without a clear ruling from its highest court on the propriety of the charge. In view of the trend against the charge, California’s commitment to the instruction seems ripe for reconsideration.

This comment will examine the four major criticisms leveled at the charge, will detail California’s position on the Allen charge, and will conclude with an evaluation of alternative instructions.

CRITICISM OF THE ALLEN INSTRUCTION

In 1969, the Third and Seventh Circuits proscribed future use
of the Allen charge because of its potential for coercion, and because it caused administrative difficulties. Two years later, in 1971, the District of Columbia Court of Appeals, in United States v. Thomas, found use of the charge contrary to efficient judicial administration and prospectively forbade its use in that circuit.

These three decisions stimulated several state courts to abandon the charge. Between 1970 and 1974, Alaska, Illinois, Michigan, Maine, Minnesota, Oregon, Pennsylvania, South Dakota, and Wyoming prohibited further use of the Allen charge. All of the jurisdictions rejecting the Allen instruction, with the exception of South Dakota, have adopted section 5.4 of the American Bar Association's Standards Relating to Trial by Jury. The ABA

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> We predicate our decision on the basis of the potential for prejudice ... future use [of the charge] may generate and the profound difficulty in confining its use within just and equitable bounds.

412 F.2d at 420. *See also discussion note 37 infra.*

11. 449 F.2d 1177, 1184-87 (D.C. Cir. 1971).

12. *See note 6 supra.*

13. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 5.4 (App. Draft 1968) [hereinafter cited as ABA instruction], provides this illustrative model charge:

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

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


In United States v. Angiulo, 485 F.2d 37, 40 (1st Cir. 1973), the First Circuit expanded the ABA instruction and approved an illustrative version for use as a supplemental instruction.

The South Dakota Supreme Court indicated disapproval of all verdict-urging instructions in State v. Ferguson, 84 S.D. 607, 175 N.W.2d 57 (1970).
instruction reminds the jurors of their duty to deliberate conscientiously, but unlike the Allen charge the instruction is directed to all jurors, and not to the minority element alone.\textsuperscript{14}

These courts relied upon four principal reasons for rejecting the Allen instruction. Their chief bases for rejection are first, that the instruction is potentially coercive; second, that it results in inefficient judicial administration; third, but less compelling in their view, that the charge is possibly unconstitutional; and fourth, that the commonly included phrase "this case must be decided at some time" is an inaccurate statement of law.

The Allen Charge is Potentially Coercive

By far the most frequent complaint is the potential the Allen charge carries for coercion of the minority jurors.\textsuperscript{15} This danger derives from the following language found, for example, in the California version of the charge:

[A] dissenting juror should consider \textit{whether 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 and who have heard the same evidence with the same attention and with an equal desire to arrive at the truth and under the sanction of the same oath. . . . And the minority ought seriously to ask themselves whether they may not reasonably and ought not to \textit{doubt the correctness of a judgment}, which is not concurred in by most of those with whom they are associated and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows . . . .\textsuperscript{16}
No similar request is made of the majority jurors. Only the minority are asked to doubt the reasonableness and correctness of their judgment, and to look to the opposition for direction. From this instruction, a minority juror may conclude that the judge wants a verdict and favors the majority position; and that the juror is to base his decision not on his view of the law and evidence as presented at trial, but upon the view favored by the majority. Otherwise, he may feel, a request to reconsider would be made of the majority. These conclusions easily follow from the language of the instruction, and, in light of the purpose of the Allen charge, they logically should follow.

The instruction is intended to secure a verdict by stimulating and shaping continued deliberations. Showing favor to one faction, or pressuring the other, is an effective, though unfair, method of achieving that goal. If the court's request for reconsideration were directed equally to all jurors, the court would have to rely upon their good faith efforts. But by applying pressure and indicating preference, the court effectively injects its own interests into the jury's deliberations.

17. The Third Circuit Court of Appeals found this to be the basic defect in the instruction:

Thus is revealed the very real treachery of the Allen Charge. It contains no admonition that the majority reexamine its position; it cautions only the minority to see the error of its ways.


By our interpretation, this [failure to instruct the majority to reconsider] is in effect a tacit suggestion to the unsophisticated members of the jury that the charge is addressed to the minority alone, the connotation being that the views of the majority are correct and should be regarded with deference simply because they prevail in number.


18. The Montana Supreme Court, when abandoning the Allen charge, found that the inevitable effect of the instruction would be to suggest to the minority members of the jury that they ought to surrender their own convictions and follow the majority.

State v. Randall, 137 Mont. 534, __, 353 P.2d 1054, 1058 (1960); see State v. Martin, 297 Minn. 359, 211 N.W.2d 765 (1973).

19. The instruction causes the jury to depart from the sole legitimate purpose of a jury, to bring back a verdict based on the law and the evidence received in open court and substitutes therefor, a direction that they be influenced by some sort of Gallup Poll conducted in the deliberation room.

United States v. Fioravanti, 412 F.2d 407, 417 (3rd Cir.), cert. denied, 396 U.S. 387 (1969). This direction violates the rule set forth in Brasfield v. United States, 272 U.S. 448, 450 (1926), that every consideration other than that of the evidence and the law should be kept out of the jury's deliberations.

20. See note 5 and accompanying text supra.

21. See text accompanying note 23 infra. In a dissenting opinion in Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962), Judge Brown remarked that the Allen instruction results in "an intrusion by the Judge into the exclusive domain of fact finding by the jury."
Judge Coleman, in a concurring opinion in *Thaggard v. United States*, candidly commented upon this problem:

> [E]very juror, not being trained in the law, understands from the Allen charge that what the judge wants 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.

This coercive impact also was noted by the District of Columbia Court of Appeals in *United States v. Thomas*. The court emphatically stated that a defendant in a criminal case has a right to a unanimous determination of his guilt or innocence by a jury; that any intrusion into this exclusive province of the jury is error of the first magnitude; and that the jury's province is invaded and unanimity destroyed when the court's urging causes a juror to surrender a conscientiously held opinion.

Similarly, to focus the attention of the jury on the jury ballot is equally destructive of conscientious deliberation. The minority juror is instructed that honest and intelligent jurors make up the majority position and that he should distrust any evidence not found convincing by the majority. The majority jurors are not asked to reconsider their judgment, and their views receive reinforcement from this judicial silence.

The minority juror feels pressured by the judge, who has made it obvious that he wishes a verdict, and by the majority, who can point to the instruction for tacit approval of their position and of their efforts to attain unanimity. The logical result of this pressure, given time, is that the minority will accept the views of the majority. This would appear to be especially likely when the minority consists of only a few jurors.

The *Allen* charge, however, not only causes problems for the minority jurors trying to reach a conscientious verdict, but, as the following discussion will show, it also creates difficulties for the appellate courts.

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23.  *Id.* at 741.
25.  *Id.* at 1181.
26.  *See* People v. Richards, 95 Ill. App. 2d 430, 237 N.E.2d 848 (1968), and note 19 *supra*.
27.  *See* instruction note 7 *supra*.
29.  *See* text accompanying note 23 *supra*.
30.  *See* note 18 *supra*. 
The Allen Instruction is Judicially Inefficient

One of the greatest problems presented by the Allen instruction is the sheer number and complexity of the appeals generated by its use. The District of Columbia Circuit and the state courts of Arizona, Maine, Oregon and Wyoming have stated explicitly that their decisions to abandon the instruction were based upon this defect. The Third Circuit stressed the same concern and by implication based its decision on the instruction's inefficiency. Judge Wisdom, in a dissenting opinion in Andrew v. United States, noted that the Allen charge's "time saving merits in the District Court are more than nullified by the complications it causes on appeal."

These appellate courts recognized that the instruction invites appeal because lack of uniformity in the text and delivery of the complex instruction furnishes an additional ground for allegations of coercion. Since the Allen instruction at best falls just short of being coercive, almost any change in its form requires specific judicial review. As a result, the appellate courts are forced to examine each permutation of the original Allen instruction in the context of the particular facts of each case.

31. The Thomas court indicated that its decision to abandon the instruction was based in part upon the volume and complexity of litigation generated by the Allen charge. Its continued unrestricted use is incompatible with sound judicial administration.


34. See note 35 infra.

35. In United States v. Fioravanti, 412 F.2d 407, 419-20 (3rd Cir.), cert. denied, 396 U.S. 387 (1969), the Third Circuit observed, [W]e know from experience in this circuit and from an examination of the experience in others that the use of the Allen Charge is an invitation for perennial appellate review. The District of Columbia Circuit court concluded, after examining the problems caused by the Allen instruction, that the drain on appellate resources made by Allen-charge controversies leads us to focus upon means whereby the seemingly inevitable aberrations of the charge can be reduced or eradicated.


The test for coercion is whether the instruction and the remarks of the court,
Most of the federal circuits have recognized this problem and have attempted to correct it by finding a judge in error whenever he strays from the approved language. Chief Justice Burger, writing while Circuit Judge of the District of Columbia Court of Appeals, vented his exasperation in *Fulwood v. United States*:

> While we have considered the slight variations in the *Allen* charge and found them nonprejudicial and noncoercive, we note that considerable work for this court would be eliminated if District Judges would consistently use a form of instruction plainly within *Allen*.

The District of Columbia Circuit eventually concluded that these variations were "inevitable aberrations," necessitating elimination of the entire instruction in order to end the drain upon appellate resources.

In an attempt to remedy this problem, eight of the jurisdictions which have discarded the *Allen* instruction have replaced it with an instruction recommended by the ABA Project On Minimum Standards for Criminal Justice. Unfortunately, the problem of variations was not to be so easily solved. Faced once again with an appeal based on a trial court's improvisation, the Seventh Circuit explicitly set forth the *only* version of the ABA instruction that it would permit.

Since the entire purpose of the *Allen* instruction is to conserve judicial time and energy, it is ironic that the instruction should founder because of its own wastefulness.
The Allen Charge is Unconstitutional

A third criticism of the instruction often raised by a defendant on appeal is that it unconstitutionally forces the jurors to consider matters other than the evidence and the law, and thus it deprives the defendant of trial by an impartial jury.\textsuperscript{44} It is understandable, if undesirable, that the \textit{Allen} instruction, should cause confusion and difficulty on this issue. The charge, which is the most extreme measure a judge properly may use in urging a verdict,\textsuperscript{45} easily slips from “instruction” into “coercion.” Nevertheless, the United States Supreme Court said in \textit{Jenkins v. United States}, “[T]he principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration.”\textsuperscript{46}

Whether coercion actually occurred, however, is not so easily determined. Because the test for coercion is vague,\textsuperscript{47} trial and appellate courts have had difficulty in determining whether a statement from the bench was coercive, or merely proper guidance.\textsuperscript{48} The Supreme Court of Alaska, in prohibiting the \textit{Allen} instruction, stated:

When the coercive impact of a questionable practice cannot be assessed accurately, pragmatic concern for defendants’ rights, impartial trial and the integrity of the jury process dictates that the use of a questionable charge be proscribed. There is danger that where proof of prejudice is difficult, a defendant’s right to a fair trial by an impartial jury will be violated with a consequent denial of due process.\textsuperscript{49}

Other courts have discussed a possible violation of the sixth amendment right to an impartial jury trial in terms of the emphasis placed on the jury balloting in the \textit{Allen} instruction.\textsuperscript{50}

No court, however, has gone so far as to declare the instruc-

\textsuperscript{44} See note 19 supra.
\textsuperscript{46} 380 U.S. 445, 446 (1965). For similar statements, see Brasfield v. United States, 272 U.S. 448, 450 (1926), and cases cited note 15 supra.
\textsuperscript{47} See note 37 supra.
\textsuperscript{49} Fields v. State, 487 P.2d 831, 839 (Alas. 1971).
\textsuperscript{50} In Brasfield v. United States, 272 U.S. 448, 450 (1926), the Supreme Court, acting in its supervisory role, proscribed judicial inquiry into the numerical division of a jury:
It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded.

tion, or any part of it, unconstitutional. Perhaps because the United States Supreme Court has refused to hear any cases based on the coercive nature of the Allen instruction, courts not fully convinced of the unconstitutionality of the instruction have eliminated its use on grounds that it is potentially coercive and contrary to efficient judicial administration, and have based their decisions on their supervisory power to regulate judicial process.

The Allen Charge Inaccurately States the Law

A fourth, though somewhat less significant, complaint registered against the instruction is that it is inaccurate to instruct the jury that a case must be decided at some time. Since the Supreme Court in Jenkins held reversible error a judge's instruction that the jury must reach a verdict, at least one judge has argued that Jenkins requires reversal of any conviction influenced by such a statement. The Supreme Judicial Court of Massachusetts partially reformed the original instruction that had served as a model for the Allen charge, by striking the phrase "that the case must at some time be decided" and substituting "it is desirable that the case be decided."

The coercive impact of the statement that "the case must at some time be decided" is determined by the same vague test applied to the other questionable portions of the instruction, thus, it is understandable that courts generally have been satisfied simply to label the phrase error. One might suspect, however, that the courts' frequent disapproving references to it are prompted by concern that its use is coercive. Nonetheless, whether coercive or not,

52. See notes 10, 31 & 35 supra.
54. United States v. Thomas, 449 F.2d 1177, 1183-84 (D.C. Cir. 1971); United States v. Brown, 411 F.2d 930, 933 (7th Cir. 1969); Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (concurring and dissenting opinion).
55. 380 U.S. 445, 446 (1965). The holding was predicated on the principle that no juror may be coerced into surrendering a view conscientiously held.
56. In State v. Martin, 297 Minn. 359, —, 211 N.W.2d 765, 769 (1973), Justice Otis of the Minnesota Supreme Court wrote,
   As a logical extension of that decision, there is no doctrine which requires a case to be decided "at some time" since, presumably, it would be error for any judge in any subsequent case to direct the jury to reach a decision.
58. See note 37 supra.
59. See note 54 supra.
the phrase should be eliminated for the simple reason that it is misleading.\textsuperscript{60} A hung jury is a legitimate end to a jury trial, and is the occasional inevitable result of requiring a unanimous verdict beyond a reasonable doubt.\textsuperscript{61}

Following a hung jury and the resulting mistrial, the prosecution is forced to re-examine its case before deciding to retry the matter. During its re-examination the prosecution may decide not to attempt a retrial.\textsuperscript{62} Since this decision is a legitimate possibility, the instruction that "the case must be decided at some time" is totally inaccurate.\textsuperscript{63}

\textbf{The Allen Instruction in California}

The Allen instruction first gained appellate court approval in California in the case of \textit{People v. Baumgartner.}\textsuperscript{64} After six hours of deliberation the foreman of the \textit{Baumgartner} jury informed the court that they were eleven for conviction. The judge then gave the jury an expanded version of the original \textit{Allen} instruction. A verdict of guilty was returned by the jury after 40 minutes of further deliberation.

On appeal, the California Court of Appeal approved the instruction for use when a jury appears to be deadlocked, but only if the jury could not discern from the instruction that the judge favored one verdict over another.\textsuperscript{65} Since the judge in \textit{Baumgartner} gave the instruction after learning of the jury's position on the issue of guilt, the appellate court concluded that the jury saw this as an indication of the judge's belief that a guilty verdict should be returned.\textsuperscript{66} The verdict, therefore, was reversed, and use of the \textit{Allen} instruction under such circumstances was found to be prejudicial error.\textsuperscript{67}

After quoting the portion of the \textit{Allen} charge which suggests that the minority jurors should doubt the reasonableness of their opinion, the \textit{Baumgartner} court observed:

\begin{itemize}
  \item \textsuperscript{60} The Supreme Court did not approve the phrase in the original \textit{Allen} charge. See \textit{Allen v. United States}, 164 U.S. 492, 501 (1896); \textit{United States v. Thomas}, 449 F.2d 1177, 1187 n.71 (D.C. Cir. 1971), and text accompanying note 2 supra.
  \item \textsuperscript{61} \textit{Fields v. State}, 487 P.2d 831, 837 (Alas. 1971).
  \item \textsuperscript{62} See, e.g., \textit{United States v. Thomas}, 449 F.2d 1177, 1184 (D.C. Cir. 1971).
  \item \textsuperscript{63} By defining "decided" so that it includes a decision by the prosecutor not to retry the case after a mistrial there would be no untruth. However, the jury, sitting as the decision-maker, most probably would conclude that the case will be re-tried until some jury does reach a unanimous verdict.
  \item \textsuperscript{64} 166 Cal. App. 2d 103, 108, 332 P.2d 366, 369 (1958).
  \item \textsuperscript{65} \textit{Id.} at 106-07, 332 P.2d at 369.
  \item \textsuperscript{66} \textit{Id.} at 107, 332 P.2d at 369-70.
  \item \textsuperscript{67} \textit{Id.} at 109, 332 P.2d at 370.
\end{itemize}
These admonitions must have appeared to the hold-out juror, and to the others for that matter, to have been leveled at him. There was an implication that in achieving that hold-out status the recalcitrant juror had not paid proper respect to the opinions of the others, had not listened to their arguments with a disposition to be convinced, and that he ought to have done so. Under the circumstances, the 11 might well have returned to the jury room, not minded to reason further with, but to attack, the recalcitrant one.68

However, the court ruled that the instruction itself was proper. In its view, the coercion occurred because the jury knew the judge knew their position on the issue of guilt; but the danger the court described is present even when the judge is without this knowledge. It is not the judge’s knowledge of the jury’s position on the guilt or innocence of the defendant that causes coercion of the minority jurors, but the instruction itself. The “implication” that the minority has not listened with proper respect to the majority is inherent in the charge, not in the fact that the judge knows one unknown juror is voting for acquittal and the remainder for conviction. If the Baumgartner court had given further consideration to its own observation, and followed it to its logical conclusion, the Allen instruction might have made only that single, fateful appearance in California appellate courts. Instead, like a stray cat fed once, it continues to reappear. Since Baumgartner, use of the Allen instruction has become more prevalent, and appeals more frequent.69

**Criticism of The Baumgartner-Allen Instruction**

The Baumgartner instruction has been heavily criticized for the same defects noted by courts in other jurisdictions, and because of these defects, has been the subject of frequent appellate review.70 Essentially, it instructs the minority to doubt the correctness of their judgment; it directs them to reconsider their opinion (with no admonition to the majority to do likewise); and it informs them that the case must at some time be decided.71 The Baumgartner version is identical in all pertinent respects to the instructions proscribed elsewhere.72

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68. *Id.* at 108, 332 P.2d at 370.
70. It made its latest appellate appearance in People v. Smith, 38 Cal. App. 3d 401, 113 Cal. Rptr. 409 (1974). The Smith court found no coercion occurred in that the instruction was given to an evenly divided jury, and therefore no minority existed.
71. See note 7 supra.
72. See cases cited note 6 supra.
California courts have recognized that the instruction is not to be given lightly.\(^{73}\) In making their case-by-case review, the appellate courts assess any embellishments added by the trial judge, the timing of the charge, and the judge's knowledge of the jurors' position on the issue of guilt.\(^{74}\)

But even though the appellate courts have recognized that the instruction has a potential for coercion, and that review of its use is entirely dependent upon the particular facts of individual cases, they have continued generally to approve it.\(^{75}\) The major reason for this approval was described by the California Supreme Court in \textit{People v. Carter} as

the fact that the law of California, like the law of other jurisdictions, intimately involves the court in the matter of obtaining a verdict upon the evidence. Once a cause has been submitted to the jury, and absent a discharge by consent, the court bears the statutory responsibility of assuring that a verdict is rendered "unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."\(^{76}\)

The \textit{Carter} opinion, however, merely complicated the problem. In discussing the means available to a judge to aid in securing a verdict, the supreme court, without conferring explicit approval, made a statement which sometimes is cited as supporting use of the \textit{Allen} charge in California.

\textbf{Tacit Approval of the Baumgartner-Allen Charge by the Supreme Court}

In the nearly twenty years that the instruction has been used in California, it has not received specific approval or disapproval by the California Supreme Court.\(^{77}\) In 1968, the court considered


\(^{74}\) These factors have been found to be coercive in certain circumstances. \textit{People v. Crossland}, 182 Cal. App. 2d 117, 5 Cal. Rptr. 781 (1960) (judge's emphasis on simplicity of the case could well have been interpreted by the jurors to refer to the evidence, and thus to be an argument by the judge against the views of the minority jurors); \textit{People v. Baumgartner}, 166 Cal. App. 2d 103, 332 P.2d 366 (1958) (judge gave \textit{Allen} charge when he knew the jury's numerical division on the issue of guilt); cf. \textit{People v. Crowley}, 101 Cal. App. 2d 71, 224 P.2d 748 (1950) (judge threatened to lock up the jury).

\(^{75}\) See text accompanying notes 69 & 73 supra.


\(^{77}\) In 1939, the California Supreme Court, in \textit{Cook v. Los Angeles Ry.}, 13 Cal. 2d 591, 91 P.2d 118 (1939) ruled that a "judge may not tell [the jurors] that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks." \textit{Id.} at 594, 91 P.2d at 119. The court went on to say that
certain remarks made by a judge to an apparently deadlocked jury in *People v. Carter,* but it ruled only that

if the court determines that a reasonable probability of agreement does exist, it may, generally speaking, undertake certain measures calculated to encourage agreement. These include impressing the jury with the solemnity and importance of its task and reminding it that in the event of a mistrial the case will have to be retried, with attendant expenditure of money and time, and decided upon similar if not identical evidence by a jury of persons having qualifications equal to those of the present jury.

The *Carter* court conspicuously omitted from its summary of the *Allen* instruction the minority-majority distinction emphasized in *Allen.* This portion of the instruction, it should be recalled, is responsible for most of the opposition to the charge. Reflection suggests that the supreme court's failure to include this much-criticized language in its summary is notable, and possibly intentional, in light of an 1895 supreme court ruling on minority coercion in civil trials.

**The Minority-Majority Problem in Civil Cases**

Although the California Supreme Court has not passed specifically upon the minority-majority distinction in the *Allen* charge, it has held, in a civil case, that singling out either faction in an effort to secure a verdict is prejudicial error. In *Mahoney v. San Francisco & San Mateo Railway,* a wrongful death action, the supreme court reversed a verdict for the plaintiff because it appeared to the court that the trial judge had addressed his remarks to the three minority members of the deadlocked jury only, though the entire panel was present.

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78. 68 Cal. 2d 810, 442 P.2d 353, 69 Cal. Rptr. 297 (1968).
79.  Id. at 815-16, 442 P.2d at 357, 69 Cal. Rptr. at 301. In support of this general statement, the court cited, among other decisions, People v. Baumgartner, 166 Cal. App. 2d 103, 322 P.2d 366 (1958).
80. Compare the California Supreme Court's language in *Carter* with the instruction set forth at note 7 supra.
81. See, e.g., notes 15-17 supra.
82. 110 Cal. 471, 42 P. 968 (1895), as modified, 43 P. 518 (1896).
83.  Id. at 476-79, 42 P. at 968-70. Only one of the three jurors had to adopt the majority position for the plaintiff to recover. *Cal. Civ. Pro. Code* § 613 (West 1955) (enacted 1875) provides in relevant part:

When the case is finally submitted to the jury, they may decide in
The trial judge, upon learning that the jurors were eight to three, told them that the trial had been expensive, that a retrial would be necessary if no verdict were reached, and that the plaintiffs (a widow and six children) were not financially well off. The supreme court offered the following rationale for its finding that such remarks prejudicially affected the defendant's right to a fair trial:

It will be seen that, after finding out that the jury stood eight to three, the court called attention to the fact that all the expense would fall on the plaintiff, who was not well off. The judge then said: "If the jurors who cannot agree upon a verdict differ," etc. Who were these jurors? For, evidently, certain jurors were meant, and not all. But the judge made this matter evident, for when a juror said: "We do not understand what this gentleman wants to get at; he wanted to have your charge reread," the court asked, "What do the other two say about it?" Why did he not say "the other eight," for they were as much failing to agree as the two. Evidently, it must have appeared to the jury that the court was insisting that the three, or one of them, should yield to the eight, for he proceeds to say that plaintiff requires nine jurors. He only had eight, it seems; for why did he say plaintiff requires nine? Why not the defendant, or why specify either party? He finally said: "I am going to send you out once more, and give you a chance to try to agree. I think that when you appreciate the circumstances and situation of the parties you will make one more effort to do it." The affidavit shows that the jury then returned a verdict of ten thousand dollars for plaintiff, in from ten to twenty minutes.

The fact that Mahoney was a civil action should not reduce its significance. Although the Allen charge is used most frequently in criminal trials, the instruction is equally effective—at least, equally coercive—in a civil setting, and various state courts have adopted it for use in their civil forums.

Court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court.

84. 110 Cal. 471, 476-77, 42 P. 968, 969 (1895).
85. Id. at 479-80, 42 P. at 970 (emphasis added).
86. The instruction now given by California judges in civil cases to remind the jurors of their duty to deliberate provides in relevant part:

Each of you must decide the case for yourself; but should do so only after a consideration of the case with the other jurors.

You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way simply because a majority of the jurors, or any of them favor such a decision.

BAJI No. 15.30 (5th rev. ed. 1969) (emphasis added).

For jurisdictions recently adopting the Allen charge, see Annot., 100 A.L.R.2d 177-217, at § 3 (Later Case Service, Supp. 1975).
deadlock, and its function is not dependent on distinctions between
civil and criminal trial procedure. The Mahoney court recognized
this common denominator by focusing on the coercive impact of
the judge’s plea for reconsideration, which, it ruled could be
eliminated only if the remarks were directed to all jurors. 87

The Carter decision conspicuously avoided discussing this as-
pect of the Allen instruction, and it would appear that approval of
the minority-majority emphasis would be directly contrary to the
ruling in Mahoney. The Mahoney holding should have been con-
sidered in every California appellate hearing on the Allen charge,
and yet not one of them has mentioned it. 88

The fact that Mahoney was decided one year before the Allen
case requires consideration, but its pre-Allen status in no way
weakens its holding or renders it less binding on California courts.
The Supreme Court decision in Allen simply held that the instruc-
tion used by the trial court did not violate any of a defendant’s
rights under the United States Constitution. 89 It did not require the
instruction. 90 Therefore, the California court’s decision in Mahoney
was not invalidated by Allen. California could choose in 1895—as
many jurisdictions are choosing now—to proscribe use of any
language which has a coercive effect on minority jurors.

Nor has the passage of time noticeably affected the validity of
Mahoney. Mahoney has been cited in several current legal publica-
tions as standing for the rule that a court may not influence a jury’s
verdict. 91 It has not been cited, however, in any recent cases for its

87. Though eighty years old, the court’s observations and conclusions in Ma-
hay is still valid today. No reported California decision has contradicted or
disparaged this ruling. See notes 90 & 91 and accompanying text.
88. See, e.g., People v. Smith, 38 Cal. App. 3d 401, 113 Cal. Rptr. 409
(1974); People v. Ortega, 2 Cal. App. 3d 884, 83 Cal. Rptr. 260 (1969); People
90. A recent application of this principle in California is found in People v.
Brisendine, 15 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975), wherein
the California Supreme Court prohibited application of the Supreme Court’s deci-
In Robinson, the Supreme Court held that police officers could conduct a
search incident to a custodial arrest without violating the constitutional proscrip-
tion against unreasonable searches and seizures. 414 U.S. at 236. The California
Supreme Court found that Robinson was decided
under the Supreme Court’s view of the minimum standards required in
order to satisfy the Fourth Amendment’s proscription of unreasonable
searches. Our holding today is based exclusively on article I, section
13, of the California Constitution, which requires a more exacting stand-
ard for cases arising within this state.
13 Cal. 3d 528, 545, 531 P.2d 1099, 1110, 119 Cal. Rptr. 315, 326 (1975).
The California Supreme Court could also find that the Allen charge, though
valid under the United States Constitution, is unconstitutional under article I, sec-
tion 13, of the California Constitution, which provides that a defendant may not
be deprived of life, liberty or property without due process of law.
91. See CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL
ruling on coercion of minority jurors. This can be attributed to the fact that *Mahoney* was a civil case and that the approved civil jury instructions specifically instruct the jurors, on the authority of *Mahoney*, not to decide a question in a particular way merely because the majority jurors favor that decision.  

Absence of any reference to *Mahoney* in criminal cases is not so easily explained. In *People v. Carter*, the supreme court did not approve any language emphasizing the minority's duty to reconsider, and *Mahoney* was not on point. In *People v. Baumgartner*, the court of appeal approved the entire *Allen* charge, including the minority-majority language, but never considered *Mahoney*. However, the *Baumgartner* court made the same observation that Justice Temple did in *Mahoney*: that instructing only the minority to reconsider would bolster the majority position and thereby place the minority jurors at a great disadvantage. Unlike the *Mahoney* court, the court in *Baumgartner* did not work out the logic of its own observation and conclude that coercion did occur.

*Baumgartner* set a trend that other California courts considering the *Allen* charge have followed. No court sanctioning the use of the charge has specifically considered it in light of the *Mahoney* decision, and the supreme court's failure to do so should not be assumed to constitute a tacit determination that the *Mahoney* rule is inapplicable. The coercive language in the *Allen* charge is too controversial to be approved by silence. The supreme court, if it ever reviews the charge, should take cognizance of the holding in *Mahoney* and state why it is or is not applicable to the language in *Allen*. To continue to ignore *Mahoney* is to suggest that Justice Temple's conclusion was correct and cannot justifiably be overruled.

**THE ALTERNATIVE INSTRUCTIONS**

The ABA instruction used by ten of the eleven jurisdictions which have abandoned the *Allen* charge is outlined by the ABA in its *Standards Relating to Trial by Jury* as follows:

92. See text accompanying note 86 supra.
93. See text accompanying note 80 supra.
94. See text accompanying notes 65-69 supra.
95. Id.
96. Id.
97. The most popular instruction is the ABA instruction. See note 13 supra. However, several states have so rephrased the *Allen* instruction that it is effective without being coercive.

The instruction used in Alabama makes no reference to a minority-majority split, nor does it direct the minority to doubt the correctness of their judgment. The instruction also includes the statement that no compromise of conscience is
(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. Following this outline, the ABA prepared a model instruction. The instruction supplied to the federal courts also conforms to this outline. While the ABA guidelines and instruction serve the same purpose as the Allen instruction, the ABA version does not attempt to achieve its objective by subtly chiding the minority and supporting the majority. Nor does it state that the case must at some time be decided. Instead, it urges conscientious reconsideration. In effect, the instruction reminds all the jurors that their primary duty is to discover the truth, and not simply to return a verdict. The ABA instruction is so worded that no pressure is directed toward any faction or person. The highly criticized minority-majority distinction made in the Allen charge has been left out, along with the statement that the case must be decided. This has been done without appreciably diminishing the usefulness of the instruction. Moreover, because the potential for coercion has been substantially reduced, appellate courts would no longer be required to make a minutely detailed examination of the particular facts and circumstances surrounding the use of the instruction in each case. Perhaps this instruction cannot be as effective as the Allen

charge in converting a deadlocked jury into an unanimous jury, since the potentially coercive elements are missing. However, for that same reason, it should result in fewer appeals and fairer trials.

As between a potentially coerced verdict and a deadlock based on the honest convictions of the jurors, it is hoped that the latter would be preferred. A mistrial is judicially inefficient, but injustice is hardly a fair price to pay for efficiency.

CONCLUSION AND RECOMMENDATION

The *Allen* instruction’s disadvantages far outweigh its advantages. Conscientious jurors are intimidated by it; defendants receive verdicts by majority rule instead of by true unanimity; and the appellate courts are burdened by the numerous appeals generated by its application.\(^{101}\)

Rather than adhere to a practice whose evil far exceeds its value, the California Supreme Court should proscribe, at its earliest opportunity, future use of the *Allen* charge and all its permutations. As a replacement for the charge, the supreme court could adopt the ABA model instruction, and admonish lower courts that no additional comments, embellishments or variations will be tolerated. In order to reduce further the potential for coercion of dissenting jurors, the approved instruction should be read to the jury before it retires for deliberation, and again when the court has reason to believe that the jurors have reached an impasse.

Since the line between proper guidance and impermissible coercion is so finely drawn, only a set policy, firmly applied, will keep a verdict-urging instruction non-coercive and the appellate courts free from the need to expend increasing amounts of time and energy attempting to supervise the dynamite charge.

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101. For example, the *Allen* instruction was recently used in the famous Little-Remiro murder trial held in Sacramento, California. The defendants were accused of the murder of Marcus Foster, superintendent of the Oakland school system. The trial lasted nine weeks and the jury deliberated eleven days before arriving at verdicts. On the eleventh day of deliberation, the foreman informed the court that the jury had reached a verdict as to one of the defendants, but were at an impasse as to the other. The judge then read the *Baumgartner* version of the *Allen* instruction to the jurors. Nine and one half hours later, the jurors rendered guilty verdicts for both defendants. Los Angeles Times, June 10, 1975, at 1, col. 1.

In the appeal that the defendants intend to take, it is probable that the *Allen* instruction will be cited as prejudicial error, and the appellate court again will be required to sift through the facts and circumstances surrounding its use. Thus, a complex appeal will be made more difficult. One wonders if it is really worth it.