Supplemental Jury Charges Urging a Verdit--The Answer is Yet to be Found

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Note: Supplemental Jury Charges Urging A Verdict—
The Answer is Yet to be Found

I. INTRODUCTION: THE PROBLEM

In recent years there has been growing debate over
the extent to which a trial judge in a criminal trial should be
permitted to encourage jurors to avoid deadlock and agree on
a verdict. The danger is that the judge may use his authority
to coerce the jury and interfere with their factfinding function.1
This problem is particularly acute when prolonged deliberation
has resulted in seeming deadlock and the judge chooses to give
a supplemental charge urging agreement.

Although it is clear that outside influences should play no
part in a jury's deliberation,2 it is equally clear that in federal
criminal courts trial judges have the power to urge the jury
to agree.3 Where a supplemental charge is issued the danger
of judicial coercion4 is especially acute, because the very pur-

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1. A criminal jury may be improperly instructed and thus coerced
in many ways. For example, it is improper for a court to order a guilty
United States, 22 F.2d 468 (1927); or for a court to order a deadlocked
must be allowed to express an "independent judgment in the prem-
of the trial judge on the jury is necessarily and properly of great weight
and his lightest word or intimation is received with deference and
may prove controlling. Id.

2. Parker v. Gladden, 385 U.S. 363, 364 (1966); Turner v. Louisi-
ana, 379 U.S. 466, 472-73 (1965); Allison v. United States, 160 U.S. 203,
217 (1895).

3. "The Court may admonish the jury as to the importance of
agreeing on a verdict, and may urge them to make every effort to
agree, but it must not give instructions which will have a tendency to
coerce the jury." 23A C.J.S. Trial, § 1187 at 468. See United States v.
Thomas, 449 F.2d 1177 (D.C. Cir. 1971); United States v. Betancourt,
427 F.2d 651 (5th Cir.1970); Billeci v. United States, 184 F.2d 394
(D.C. Cir. 1950); Claiborne v. United States, 77 F.2d 683 (8th Cir. 1935);
Shaffman v. United States, 289 F. 370 (3d Cir. 1923); Note, On In-
structing Deadlocked Juries, 78 YALE L.J. 100, 101 (1968); Comment,
Criminal Law—Instructions By Trial Court Urging Agreement Among

4. A jury is coerced by a supplemental instruction urging agree-
ment when that instruction causes a verdict which is against the con-
scientiously held beliefs of any juror. In that event the jury has not
properly performed its function. In reaching a verdict it is widely
accepted that the jury's major function is to reflect the sentiments of
the community. In McGautha v. California, 402 U.S. 183 (1971), the
pose of the supplemental charge is to produce agreement when none appears in sight. Defendants convicted after such a charge often argue that it was coercive, either because of its wording or the timing of issuance. The issue before a reviewing court usually is framed in terms of whether the judge was simply advising or persuading the jury and thus acting properly, or whether he was commanding or unduly influencing them, in which event the charge was coercive and thus improper. However, in most cases involving supplementary instructions urging agreement, the line between the permissible and the impermissible is extremely fine.

This note analyzes the use in federal criminal courts of two supplemental instructions urging agreement: the Allen charge, which is the traditional federal charge, and a recommended charge published by the American Bar Association (hereinafter the ABA). The note also investigates the need for any supplemental instructions urging agreement and the role of the court in dealing with seemingly deadlocked juries.

Supreme Court spoke approvingly of this function (id., at 201) and quoted from Witherspoon v. Illinois, 391 U.S. 510 (1968), that juries in capital cases "do little more—and must do nothing less—than express the conscience of the community..." Id. at 519. The jury must maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

Id. at n.15. See J. Frank, Courts on Trial 129-30 (1948); Broeder, Memorandum Regarding Jury Systems in Hearings on the Recording of Jury Deliberations Before the Subcommittee on Internal Security of the Senate Judiciary Committee, 84th Cong., 1st Sess. 63 (1955); Holmes, Law in Science and Science in Law, 12 Harv. L. Rev. 443, 460 (1899); Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 18-19 (1910); Note, The Changing Role of the Jury in the Nineteenth Century, 74 Yale L.J. 170 (1964). See also Karcdeky v. Laria, 382 Pa. 227, 114 A.2d 150 (1955). This delicate function cannot be performed if the court is directly or impliedly ordering the jury to break their deadlock and return a verdict. A coerced jury may reflect the sentiment of the majority of the jury but the requirement of a unanimous verdict demands that the sentiment reflected in the verdict be that of every juror. A properly functioning jury either reaches a unanimous verdict based on community sentiment or none at all.


II. TWO INSTRUCTIONS

Although various supplemental instructions urging agreement have been suggested and tried\(^8\) by trial courts, the *Allen* charge and the ABA charge are presently the two most frequently used charges. The *Allen* charge is generally regarded as the more potentially coercive\(^9\) although both charges are intended to convey the same idea: a deadlocked jury should return to the juryroom and attempt again to reach a verdict.

A. THE *Allen* CHARGE: THE TRADITIONAL SOLUTION

The supplemental charge urging agreement which historically has been used in federal courts is the *Allen* charge. The charge was first allowed by the Supreme Court in 1896 in a murder case\(^10\) from which the charge takes its name. The Court approved the instruction which, in substance, stated:

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

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9. It is implicit in the decisions of the Supreme Court dealing with the *Allen* case, *e.g.*, Burton v. United States, 196 U.S. 283, and Brasfield v. United States, 272 U.S. 448 (1926), that the Fourth Circuit was correct in its recent holding [in United States v. Rogers, 289 F.2d 433, 435–37 (4th Cir. 1961)] "that the *Allen* charge itself approaches the ultimate permissible limits . . ." in handling situations similar to that facing the court below.

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 reasonably doubt the correctness of a judgment which was not concurred in by the majority.\textsuperscript{11}

The Court reasoned that although a jury’s decision must be based on the individual opinions of each juror, “it by no means follows that opinions may not be changed by conference in the juryroom. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.”\textsuperscript{12}

Despite this offered justification, the \textit{Allen} charge, from its inception,\textsuperscript{13} has been the subject of severe criticism.\textsuperscript{14} The many states\textsuperscript{15} and the majority of federal courts\textsuperscript{16} which have

\begin{itemize}
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} Id.
  \item \textsuperscript{13} Territory v. King, 6 Dak. 131, 50 N.W. 623 (1889); Holland v. People, 36 Colo. 94, 69 P. 519 (1902); State v. Garrett, 57 Kan. 132, 45 P. 93 (1896); State v. Howell, 26 Mont. 3, 66 P. 291 (1901). In some cases the criticism is directed toward Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1 (1851), which the Supreme Court specifically adopted in \textit{Allen}.
  \item \textsuperscript{15} Cases cited in note 8 supra.
  \item \textsuperscript{16} United States v. Williams, 444 F.2d 108 (9th Cir. 1971); Munroe
adopted the charge often have done so over strong dissents. The recent trend in both state and federal courts appears to be toward rejection of the charge. In addition, although the Supreme Court has reaffirmed its approval of the charge, it has never done so enthusiastically. Allen is the only case in which the Court directly discussed the precise issue, and the Court has not granted certiorari on an Allen charge case since 1951, even though it has had many opportunities to do so.

As with all supplemental charges urging agreement, the goal of the Allen charge is to prod the jury into fruitful deliber-

v. United States, 424 F.2d 243 (10th Cir. 1970); United States v. Sawyers, 423 F.2d 1335 (4th Cir. 1970); Hodges v. United States, 408 F.2d 543 (8th Cir. 1969); Sanders v. United States, 415 F.2d 621 (5th Cir. 1969); United States v. Harris, 391 F.2d 348 (6th Cir. 1968); United States v. Kahaner, 317 F.2d 459 (2d Cir. 1963); Boston & M.R.R. v. Stewart, 254 F. 14 (1st Cir. 1918).


19. Kawakita v. United States, 343 U.S. 717 (1951), aff'g 190 F.2d 506 (9th Cir. 1951); Lias et al. v. United States, 284 U.S. 584 (1931), aff'g 51 F.2d 215 (4th Cir. 1931).

20. The Court has only dealt with the general area once since 1941 and at that time carefully avoided the exact Allen charge issue. Jenkins v. United States, 380 U.S. 445 (1965). Even in 1951 the Court did not discuss the Allen issue but simply stated that the issue was covered well by the circuit opinion. Kawakita v. United States, 343 U.S. 717, 744 (1951), aff'g 190 F.2d 506 (9th Cir. 1951). The Court has not even cited the Allen case in dealing with supplemental charges since Lias et al. v. United States, 284 U.S. 584 (1931).

ation leading to a verdict.\textsuperscript{22} Over the years, however, the charge has become known as the “dynamite charge”\textsuperscript{23} or, less frequently, the “nitroglycerine charge,”\textsuperscript{24} the “third degree instruction,”\textsuperscript{25} or the “shotgun instruction,”\textsuperscript{26} suggesting that at least in the view of some judges, the prodding is not always gentle. The primary criticism centers around the fact that the Allen charge tells only the minority to re-examine their position and not the majority,\textsuperscript{27} and that the charge easily can be understood as a demand by the court that the jury reach a verdict.\textsuperscript{28}

B. THE ABA CHARGE: A RECENT ALTERNATIVE

In 1968, the ABA, through its Project on Minimum Standards for Criminal Justice, published a modification of the Allen charge.\textsuperscript{29} The Commentary accompanying the text indicates that the new charge is designed to be less coercive because it tells all jurors to “consult with one another” in reaching a ver-

\begin{itemize}
\item \textsuperscript{22} Allen v. United States, 164 U.S. 492, 501 (1896).
\item \textsuperscript{23} Green v. United States, 309 F.2d 852, 853 (5th Cir. 1962).
\item \textsuperscript{24} Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting).
\item \textsuperscript{25} Leech v. People, 112 Colo. 120, 123, 146 P.2d 346, 347 (1944).
\item \textsuperscript{26} State v. Nelson, 63 N.M. 428, 431, 321 P.2d 202, 204 (1958).
\item \textsuperscript{27} Burroughs v. United States, 365 F.2d 431 (10th Cir. 1966). “[T]he very real treachery of the Allen Charge [is that it] contains no admonition that the majority reexamine its position; it cautions only the minority to see the error of its ways.” United States v. Fioravanti, 412 F.2d 407, 417 (3d Cir. 1969). In State v. Parker the court explained this criticism:
\begin{quote}
[A] juror who is admonished that he must vote according to his own conscience and at the same time is told that if he disagrees with the majority he must doubt his own wisdom, is thrust upon the horns of a dilemma. In escaping that dilemma, he cannot ignore the fact that the judge has indicated that he considers the majority to be right. Furthermore, the juror’s attention, rather than being directed to the objective determination of the guilt or innocence of the accused, is turned upon himself in an agonizing appraisal of his own motives. It should not be surprising if a juror concludes that the law prefers that he be agreeable rather than that he be intellectually honest.
\end{quote}
\item \textsuperscript{28} E.g., Thaggard v. United States, 354 F.2d 735, 739 (5th Cir. 1965) (Coleman, J., concurring specially). Most courts do not find that Allen itself demands a verdict although variations of it may do so. United States v. Bowles, 428 F.2d 592, 595-97 (2d Cir. 1970).
\item \textsuperscript{29} AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 145-105 (Approved Draft 1968) [hereinafter referred to as ABA PROJECT].
\end{itemize}
dict rather than singling out the minority alone. The Commentary explicitly demands that the Allen charge no longer be used.

The suggested ABA instruction is in the form of directions to the trial court, which that court may paraphrase in delivery to the jury.

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 reach 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 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.

The charge generally has been well received. It represents a welcome alternative for those circuits which had reluctantly allowed the Allen charge, but had devoted much judicial time and energy to scrutinizing cases in which the charge was given, and had frequently reversed or threatened to reverse on variations of the charge. Rather than simply holding that the charge in the case before them was improper, or demanding that trial courts follow Allen closely, appellate courts are

30. Id. at 147. See Kelley v. State, 51 Wis. 2d 641, 645, 187 N.W.2d 810, 812 (1971).
31. ABA PROJECT, supra note 29, at 146, 156.
32. Id. at 146-47, where an example of an acceptable paraphrase is given. See Mathes, Jury Instructions and Forms For Federal Criminal Cases, 27 F.R.D. 39, 97-98 (1961) (Instruction 8.11).
33. ABA PROJECT, supra note 29, at 145-46.
34. See note 18 supra, and text accompanying notes 37-52 infra.
now able to suggest a reasonably flexible affirmative standard for a trial court confronted with a deadlocked jury.

Three circuits expressly have adopted the ABA standards and at least two others recommend them.\(^{35}\) Only one circuit has specifically stated a continued preference for the *Allen* charge.\(^{36}\) In 1969, two circuits discarded the *Allen* charge and replaced it with the ABA charge. First, the Seventh Circuit, while refusing to declare the *Allen* charge unconstitutional, decided that its potential for coercion was so great that it should no longer be used.\(^{37}\) Next, the Third Circuit intensely criticized the *Allen* charge's demand that only the minority reexamine its thinking.\(^{38}\) The court held this one-sided order to be an unwarranted judicial invasion into the exclusive province of the jury\(^{39}\) based on the false premise that the majority is more likely to be right than the minority.\(^{40}\) The court felt that the *Allen* charge jeopardizes the principles underlying the requirement of a unanimous jury verdict.\(^{41}\) However, neither opinion explicitly described why the ABA charge represents an improvement over the *Allen* charge.

Most recently, the District of Columbia Circuit Court of Appeals in *United States v. Thomas*\(^{42}\) ruled that trial judges within the circuit must use the ABA charge if they wish to give supplemental instructions urging agreement. The court refused to say that the *Allen* charge was coercive *per se*,\(^{43}\) but felt that there was actual coercion in view of the facts before it. In any case, the court felt that the difficulties of judicial administration\(^{44}\) which the *Allen* charge had created required that

\(^{35}\) The Fourth and Tenth Circuits recommend the ABA charge but have not disavowed the *Allen* charge. *United States v. Sawyers*, 423 F.2d 1335, 1343 & n.7 (4th Cir. 1970); *Munroe v. United States*, 424 F.2d 243, 246 (10th Cir. 1970).

\(^{36}\) *United States v. Hynes*, 424 F.2d 754, 757 (2d Cir. 1970), cert. denied, 399 U.S. 933 (1970), where the court noted that other circuits had adopted the ABA charge but reiterated its support for the *Allen* charge. See also *United States v. Sawyers*, 423 F.2d 1335 (4th Cir. 1970).


\(^{39}\) *Id.* at 417.

\(^{40}\) *Id.* at 416.

\(^{41}\) *Id.* at 417-19.

\(^{42}\) 449 F.2d 1177 (D.C. Cir. 1971).

\(^{43}\) *Id.* at 1187.

\(^{44}\) *Id.*
JURY CHARGES

as an exercise of its supervisory power the court instruct lower courts to use the ABA charge. The court emphasized the great amount of judicial time spent scrutinizing cases in which an *Allen* type charge was issued, and felt that it had to establish a basic presumption that a certain charge was proper. For the first time a court adopting the ABA charge not only reversed on the basis of the *Allen* charge, but also discussed why the new charge was an improvement. The court adopted the reasoning used in a previous case, stating that the new charge is relatively free of potentially coercive influences, does not tend to place proponents of a minority view in a vulnerable position, and does not perpetuate the unfortunate view that in case of a mistrial, another jury will inevitably be assembled to decide the case.

*Thomas* was decided *en banc* with a four man dissent. The dissent, leaning heavily on a 1966 opinion written by then Judge Burger, stated that the ABA charge is simply an invitation to a stubborn juror to persist in blind adherence to his position. Instead of ending deadlocks it will only solidify them. The dissent also stated that until the Supreme Court overrules itself it is not for the circuit courts to do so.

Other circuits continue to allow the *Allen* charge, but no circuit has specifically disallowed the ABA charge. The cases which have considered the issue seem to view the ABA charge as simply a diluted *Allen* charge. However, the crucial issue is whether it is a significant improvement.

45. *Id.* at 1184.
46. The Court makes it clear that the evidence in the case was very close, thus implying that the *Allen* charge may well have been the difference between a hung jury and the guilty verdict. *Id.* at 1179-80, 83.
47. *United States v. Johnson*, 432 F.2d 626 (D.C. Cir.), cert. denied, 400 U.S. 949 (1970). In this case the court recommended the ABA charge but stated that it would postpone the issue of the acceptability of the *Allen* charge until the court was convened *en banc*. *Id.* at 639.
48. *Id.* at 631-32. The third criticism does not apply to the *Allen* charge itself. It is directed to the many variations of the charge which imply, or state, that another jury must be convened if the sitting one deadlocks. *Cf.* *Fulwood v. United States*, 369 F.2d 960, 963 (D.C. Cir. 1966), cert. denied, 387 U.S. 934 (1967).
51. *Id.* at 1191-92.
52. Cases cited in note 16 *supra*.
III. THE ALLEN CHARGE VS. THE ABA CHARGE: WHICH IS BETTER?

The Allen charge and the ABA charge can be compared with regard to at least five factors: coerciveness of wording, vulnerability to additions and deletions, timing of issuance, constitutionality and reviewability. Although it is not superior in all areas, the ABA charge appears preferable to the Allen charge in most respects.

A. COERCIVENESS OF WORDING

It is possible that even the mildest supplemental charge urging agreement is, inherently, coercive. Whenever the jury is precariously balanced, the likelihood that a supplemental charge will have a coercive effect is great. Furthermore, this effect, though coercive in fact, is often incapable of discovery since the coercion takes place in the individual juror's mind or in the closed juryroom.

The circumstances in which these charges are given tend to create the impression that the judge is demanding a verdict. Supplemental charges typically are issued after there have been lengthy deliberations. Thus when the court returns the jury to the juryroom, jurors may interpret this alone as a demand for a verdict. The act itself places psychological pressure on the jury. Almost any instruction may only increase this pressure.

53. If a charge is interpreted by the jury to be a demand for a verdict it improperly influences them to vote in a way they would not do otherwise. It impinges upon their function as the sole fact finders. Starr v. United States, 153 U.S. 614, 626 (1894). Almost any supplemental charge would be misinterpreted in this way.
56. If there is a right to a mistrial this would infringe upon that right. Some judges feel that to deny the defendant a chance for a mistrial is improper. United States v. Fioravanti, 412 F.2d 407, 414-20 (3d Cir. 1969); United States v. Brown, 411 F.2d 930, 932 (7th Cir. 1969); United States v. Harris, 391 F.2d 348, 355 (6th Cir. 1968); Williams v. United States, 338 F.2d 530, 553 (D.C. Cir. 1964); Huffman v. United States, 297 F.2d 754, 758-60 (5th Cir. 1962) (Brown, J., dissenting). But see United States v. Sawyers, 423 F.2d 1335, 1341 (4th Cir. 1970): "A defendant has no 'right' to either an irrational verdict or a hung jury." Professor Zeisel has evidence which indicates that if the unanimous jury verdict principle is dropped, the number of hung juries would fall drastically. Zeisel, The Waning of the American Jury, 58 A.B.A.J. 367, 369 (1972).
The pressure generally will be greatest on the minority. The question typically is no longer whether the minority or the majority will prevail, but whether the majority will win or the jury will hang. In this context a minority juror may view his refusal to agree as the lone obstacle to a verdict and thus may change his vote solely to accommodate the majority.\(^5\) In addition, the majority will use even the mildest charge as a rhetorical device to persuade the minority that they must reverse their position in order to obtain a verdict.

Nevertheless, it is generally agreed that a carefully worded supplemental charge urging agreement need not be coercive or unfair.\(^5\) Though some psychological pressure may be unavoidable, a number of factors suggest that this should not be considered decisive when balanced against the broad benefits to efficient judicial administration. First, careful wording of the charge can minimize the chance that a juror will interpret the judge's act of returning the jury to the juryroom to mean that he is demanding a verdict. The minority is less likely to assume that they are to sacrifice conscientiously held convictions if the judge clearly states that they should not do so than if he simply says "Please try again" and then returns them for deliberation. Also, the judge's encouragement may be the only way that stubborn jurors can be persuaded to rethink their positions.\(^5\)

Despite the trial judge's unique ability to influence the jury and the danger that his actions will have unwarranted or coercive impact,\(^6\) it is not clear as an empirical matter that jurors will allow themselves to be coerced into returning an unfair verdict. A supplemental instruction urging agreement

\(^5\) "We think that carefully worded and timed supplemental instructions are not necessarily unfair." United States v. Brown, 411 F.2d 930, 932 (7th Cir. 1969).
\(^5\) In addition to occupying the major position of respect in the courtroom (see Note, supra note 14, at 126) the trial judge in federal courts is allowed to aid the jury with advice. Thus the jury has the benefit of an impartial lawyer to aid them in deliberation. Querica v. United States, 289 U.S. 466, 469-70 (1933).
\(^6\) In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court indicated that the major function of the jury was to preclude the existence of plenary power in the judge. Id. at 156.
is not self-enforcing,\textsuperscript{61} and the jury may, and often does,\textsuperscript{62} disregard it. One juror, by refusing to assent, can have the last word and dictate a hung jury. Moreover, studies indicate that what the judge tells the jury probably will not be accepted if the advice is inconsistent with their concept of the evidence.\textsuperscript{63} Furthermore, if the instruction clearly is improper the court will be reversed on appeal.

For these reasons the real issue is not whether any form of supplemental instruction urging agreement is proper, but rather what form the instruction should take. Many cases have clearly defined the \textit{Allen} charge to be the outer limit within which all variations must lie.\textsuperscript{64} With the ABA alternative available the question now is whether the courts should ban the use of the \textit{Allen} charge completely.

The most frequently criticized part of the \textit{Allen} charge is the wording singling out the minority and directing them alone to reexamine their thinking.\textsuperscript{65} This places unnecessary psychological pressure on them to concur with the majority because it is possible that either side may be wrong.\textsuperscript{66} The minority is indirectly told to look beyond the evidence for its decision and to be influenced “by some sort of Gallup Poll in the juryroom.”\textsuperscript{67} Furthermore, the \textit{Allen} charge’s emphasis on minority reexamination equips the majority with a formidable forensic weapon. Majority jurors may well assert that the court has indicated that it believes the minority is acting unreasonably and minority jurors unskilled in argument may meekly acquiesce. Thus the charge may discourage free and open discussion and inhibit rather than promote deliberation.\textsuperscript{68} More importantly, critics

\begin{footnotes}
\item[61] F. \textsc{JAMES}, \textsc{Civil Procedure} § 7.4, at 243 (1965).
\item[62] See \textsc{Seiden v. United States}, 16 F.2d 197, 198 (2d Cir. 1926); \textit{cf.} \textsc{Karcesky v. Laria}, 382 Pa. 227, 114 A.2d 150 (1955).
\item[63] H. \textsc{Kalven} \& H. \textsc{Zeisel}, \textsc{The American Jury} 427 (1966); \textsc{Note, supra note 55}, at 136 \& n.111. \textit{Cf.} \textsc{Karcesky v. Laria}, 382 Pa. 227, 114 A.2d 150 (1955).
\item[64] See cases cited in note 9 \textit{supra}.
\item[65] See cases cited in note 27 \textit{supra}.
\item[66] \textsc{Green v. United States}, 309 F.2d 852, 855 (5th Cir. 1963). \textit{See Note, supra note 55}, at 140.
\item[67] United States v. \textsc{Fioravanti}, 412 F.2d 407, 417 (3d Cir. 1969). \textit{See also} \textsc{Burroughs v. United States}, 365 F.2d 431 (10th Cir. 1966).
\item[68] See \textsc{Green v. United States}, 309 F.2d 852, 855 (5th Cir. 1962); \textsc{State v. Parker}, 79 Wash. 2d 326, 465 P.2d 60, 66 (1971).
\end{footnotes}
argue that a minority juror may reasonably feel from the court's actions and statements that the court itself agrees with the majority. Since the court is the impartial expert, and the juror the rank amateur, a juror may feel he should acquiesce.

This thrust of the Allen charge has been defended as simply common sense advice. Reexamination when heavily outnumbered is exactly what reasonable men should do. Any group in a heated discussion would profit from this advice. However, the underlying premise of this argument is weak. A reasonable juror immediately reexamines his thinking when he finds himself in the minority. A supplemental instruction urging him to reexamine his position again is simply a redundancy which can be interpreted to mean that the court wants a majority verdict. "Common sense" advice at this point becomes highly coercive. "Even patent truths are objectionable . . . if they seem to the jury to be coercive, and if their effect is to induce jurors to surrender their own conscientious convictions for the sake of acquiescence with their fellows."

A major change made by the ABA charge, and some critics say the only change, is to direct every juror to reexamine his position rather than the minority alone. The obvious purpose of this modification is to place less pressure on the minority while encouraging the majority also to reexamine their position. The basic thinking behind the Allen charge, that the minority should reexamine their views solely because they are the minority, is discarded. The ABA feels that if each juror reassesses his views it will lead to more fruitful deliberation.

However, the question arises whether this slight verbal

made group decisions more than just a pooling of individuals without the give-and-take of deliberation.


70. See Farley, Instructions to Juries—Their Role in the Judicial Process, 42 YALE L.J. 194, 212 (1932); Soper, The Charge To the Jury, 1 F.R.D. 540.


73. United States v. Johnson, 432 F.2d 626, 633 (D.C. Cir. 1970). The court felt that the ABA changes had not "in any meaningful sense, recommended abandonment of the Allen charge."

74. ABA PROJECT, supra note 29, at 147.
change will make any real difference. Of course the weapon for argument which the ABA gives the majority is less formidable than that given by the *Allen* charge. Indeed, the minority now may argue that the majority has been directed to reconsider. Yet due to the remote chance of the majority capitulating, the fact remains that the jury may believe that the court is speaking to the minority alone.

A second difference between the *Allen* and the ABA charges is in their treatment of the individual juror's opinion. Although its major emphasis is on minority reexamination, the *Allen* charge, on close reading, *impliedly* warns jurors that they should not surrender conscientiously held convictions. It informs the jury that the “verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows,” implying that the court is not demanding a verdict. The ABA charge, however, gives greater emphasis to this point. It *specifically* tells jurors not to surrender conscientiously held convictions, and states that jurors should not return a verdict unless it is the independent judgement of all of them.

Since the charges are delivered to the jury orally, this difference in degree of emphasis may be crucial. Jurors usually

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75. Since the ABA charge encourages each juror not to hesitate to reexamine his thinking the minority may argue that both the majority and minority position should be rethought. This device makes it as clear as possible that the court is not favoring majority thinking solely because it is majority thinking.

76. The charge does not directly state that each juror should only vote his conscientiously held beliefs. It does say that the juror's vote should not be a “mere acquiescence in the conclusions of his fellows.” *Allen v. United States*, 164 U.S. 492, 501 (1896). The ABA charge specifically states 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.” ABA PROJECT, supra note 29, at 145 (§ 5.4(a) (v)).


78. Subsections (i) and (iii) of the ABA charge demand, first, that to return a verdict each juror must agree thereto, and second, that after an impartial consideration of the evidence with his fellow jurors each juror must decide the case for himself. ABA PROJECT, supra note 29, at 145.

79. The degree of emphasis in any instruction is important because jurors probably cannot scrutinize every word or act on the basis of subtle distinctions in a charge's wording. Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 63 & n.1 (1933). Appellate courts have recognized this idea by labelling some errors in instruction as “harmless” when they do not upset the general impression which the charge as a whole conveys. “A defendant is entitled to a fair trial but not a perfect one.” *Lutwak v. United States*,
will only hear the supplemental charge once. They may not give proper weight to the Allen charge's fleeting admonition against surrendering their beliefs. By contrast, four of the five parts of the ABA charge indicate in one way or another that it is the individual juror's opinion which should control his vote.\textsuperscript{60}

The ABA wording also better communicates the idea that the court is not demanding a verdict. In its one excursion into the supplemental charge area in recent years, the Supreme Court held that trial judges may not demand a verdict.\textsuperscript{81} The Allen charge comes close to doing so by implying that there is a duty to decide the case.\textsuperscript{82} It states that it is the jury's duty to decide the case if they can "conscientiously do so," and that they "should listen with a disposition to be convinced."\textsuperscript{83} The ABA charge specifically rejects this idea and instead tells the jury that their only duty is to "deliberate."\textsuperscript{84}

The Allen charge also tells the jury that "complete certainty cannot be expected" in all cases.\textsuperscript{85} This statement is deleted in the ABA charge. Criticism of the statement is proper since it is obviously incomplete\textsuperscript{86} as a statement of the reasonable doubt standard,\textsuperscript{87} and thus could create at least two misconceptions in the minds of jurors. First, although an accurate instruction in reasonable doubt will inform each juror that

\begin{align}
344 \text{ U.S.} & 604, 619 (1952); \text{ United States v. Porter, 386 F.2d} 270, 276 (6th Cir. 1967); \text{ Billeci v. United States, 184 F.2d} 394, 402-03 (D.C. Cir. 1950). \text{ Cf. FED. R. CRIM. P., Rule 52A.} \text{ 80. ABA PROJECT, supra note 29, at 145 (§ 5.4(a)(i)-(iii) & (v)).} \\
82. \text{ The Allen charge states that it is the jury's duty to decide the} \\
\text{case if they could conscientiously do so. . . .} \text{ Allen v. United States,} \\
164 \text{ U.S.} & 492, 501 (1896). \text{ This wording is confusing. The limiting phrase} \\
\text{in the "duty" is so broad that there really is no duty to decide at all.} \\
\text{However, a juror who hears the phrase just once might lay emphasis} \\
\text{solely on the words "duty" and "decide" and thus take a mistaken} \\
\text{impression of what the court is saying. Cf. Note, supra note 55, at 136.} \\
83. \text{ Allen v. United States, 164 U.S.} & 492, 501 (1896). \\
84. \text{ ABA PROJECT, supra note 29, at 145 (§ 5.4(a)(ii)).} \text{ The last} \\
\text{statement in the ABA charge reminds each juror that he should not} \\
\text{sacrifice conscientiously held convictions solely for the purpose of re-} \\
\text{turning a verdict.} \\
85. \text{ Allen v. United States, 164 U.S.} & 492, 501 (1896). \\
86. \text{ See Mathes, Jury Instructions and Forms for Federal Criminal Cases,} \\
27 \text{ F.R.D.} & 39, 48 (1961) (Instruction 2.01), where a good example of a complete reasonable doubt instruction is given. \\
87. \text{ This may be seen as an independent reason why trial judges} \\
\text{should avoid the Allen charge. It does little good to have a supple-} \\
\text{mental charge that, regardless of its other merits, is unacceptable be-} \\
\text{cause of a one sided reference to the reasonable doubt standard. This} \\
\text{alone may disqualify the Allen charge in the minds of some judges.}
complete certainty is not required, it will balance that standard by reminding jurors that a very careful and cautious analysis of the evidence is required before a person votes for conviction. If jurors apply the abbreviated standard of the Allen charge to their individual opinions it may seem to favor conviction. A juror who is not absolutely certain may decide his doubt is not a legally reasonable one. Second, a jury may interpret this statement as applying to the jury as a whole, not to each juror individually, and thus infer that when most of the jurors are certain, a verdict may be returned. Either interpretation is dangerous and the ABA deletion is an improvement.

Although the ABA wording seems preferable to the Allen wording, this change may cause the new charge to be a less effective tool for reducing the number of hung juries. The ABA charge does not emphasize the point that a juror should change his opinion if he becomes convinced it is erroneous. Instead, by emphasizing the importance of retaining conscientious convictions, the charge may leave the juror exactly where he was before it was issued. In fact, a juror who is close to changing his mind could understand the ABA charge to mean that he should continue to vote his original position. A juror who feels the defendant has been proven guilty but seeks to avoid the unpleasant task of so adjuging him will find it comparatively easier to hang the jury after an ABA charge.

However, there are two reasons why the increased possibility of hung juries should not justify rejection of the ABA charge. First, it is a distinct possibility that such an increase would represent, at least in part, those juries which were being improperly coerced by the Allen charge. In other words, although the price may be substantial in terms of judicial time and efficiency it is the necessary price of justice. Second, no jurisdiction which has adopted instructions similar to the ABA charge has found it necessary to return to a stronger supplemental instruction. This suggests that any increase in hung juries has not been found to be especially overburdening.

88. See note 86 supra.
89. The ABA charge also deletes the Allen statement about "equally honest, equally intelligent" jurors. This too is an improvement because these statements, which jurors realize are not accurate, may serve to make the rest of the charge less credible by implication.
Careful examination of the wording of both charges shows that each one asks the juror to perform a difficult feat: he must seriously reexamine his thinking with a predisposition to be convinced by his fellow jurors and yet retain conscientiously held convictions. The ABA charge's wording is an improvement because it tells the entire jury, not just the minority, to reexamine their thinking. A further and perhaps more significant improvement in the ABA charge is the shift in emphasis from minority reexamination to retention of conscientiously held beliefs, thus minimizing the fear that a juror might not vote his conscience because he feels the court wants a majority verdict.

B. ADDITION AND DELETIONS

Any model supplemental charge urging agreement will be subject to additions and perhaps deletions by trial courts. Additions are certainly necessary so that a court can tailor its comments to the peculiar problems of particular cases. This means that the circuits will have to develop guidelines for what is or is not a proper addition through case law. Experience with the Allen charge has provided some general guidelines.

and Montana, in State v. Randall, 137 Mont. 534, 353 P.2d 1054 (1960), rejected the Allen charge because of its potential for coercion.


93. It will also be subject to paraphrases which may or may not communicate the ideas of the model charge. Each paraphrase will call for a review by the appellate court to determine if it is a permissible one. The ABA Commentary specifically allows paraphrases and even gives an example. ABA Project, supra note 29, at 146. The Thomas court implied at one point that it would not allow paraphrasing of the ABA charge because it was "through just such a process that the courts were led into ... increasing difficulties ... ." United States v. Thomas, 449 F.2d 1177, 1188 (D.C. Cir. 1971). And it indicated that any changes in the charge's wording must receive approbation. Id. at 1192.

94. For example, there have been reversals where, in addition to reading the instruction approved in Allen, the trial court read the Allen reasoning to the jury, which was stated in Allen as follows: [T]he 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 into the jury-room with a blind
Most Allen charge reversals do not result from the basic charge itself, but rather from improper additions. Although it does not make sense to fault the basic charge for cases where trial courts have improperly added to it, the fact remains that the Allen charge has shown itself to be a springboard for many improper instructions. For example, some trial courts have tried to read the Supreme Court's reasoning in Allen to the jury in addition to the charge the Court approved. One case shows thirteen additions to the basic Allen wording. Although the ABA charge makes it very clear that the entire charge is to be given, thus minimizing the problem of improper deletions, it is just as amenable as the Allen charge to abuses from improper additions. Circuits which imply that they will not allow additions may find their position untenable because trial courts must be able to make appropriate comments to deal with particular jury problems.

One desirable addition to the ABA charge, or any model supplemental instruction, would be a complete reinstruction on the reasonable doubt standard. One of the major failures of the Allen charge is that it could be interpreted by the jury to modify the reasonable doubt standard. If the jury is deadlocked properly, not over emotions or personalities, a slight shift in the jury's understanding of this standard for conviction determination that the verdict shall represent his opinion of the case at that moment.

Allen v. United States, 164 U.S. 492, 501 (1896). See Nigro v. United States, 4 F.2d 781, 783-84 (8th Cir. 1925); Stewart v. United States, 300 F. 769, 785-87 (8th Cir. 1924). The cases cited in note 154 infra give examples of added phrases which have been held coercive.

95. See note 94 supra and note 154 infra for examples.
96. Note, supra note 55, at 104-05.
97. See note 94 supra.
99. See note 93 supra. The Thomas court's statements as to "variations" of the ABA charge may be read to encompass additions and deletions as well as paraphrases.
100. For example, in United States v. Kahaner, 317 F.2d 459 (2d Cir. 1963), the court reassured a confused jury that the time it had spent was not inordinate in view of the great mass of evidence in the case. Id. at 483. The court also recalled the jury on one occasion to re-emphasize the necessity of each juror voting his conscientiously held convictions. All requests by the jury were fulfilled by the court (e.g., a second Allen charge) and the court emphasized that there was no need for haste in arriving at a verdict. Id. at 484.
101. A good example of a proper reasonable doubt instruction is found in Mathes, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39, 48 (1961) (Instruction 2.01).
102. See text accompanying notes 85-89 supra.
could prove decisive. Because any supplemental instruction urging agreement is likely to have some subtle impact on the jury’s comprehension of the reasonable doubt standard, complete redefinition of the standard seems desirable.\(^1\)

This reinstruction will be especially helpful because the standard is really so ambiguous,\(^2\) although it appears simple. Applying the standard to close facts is a difficult task. Moreover, it is one thing for a juror to hear the definition in the initial charge when it is just an abstract concept, and it is another for him to hear the same thing later and apply it after he has heard his colleagues’ arguments in the juryroom. Also, there may be a danger that factions within the jury have developed a reasonable doubt standard which, as a matter of law, is inaccurate.\(^3\) A reinstruction may make it easier for a juror to decide for himself how the real standard should be applied, rather than simply accepting the standard as it has evolved during deliberation.\(^4\)

From the standpoint of additions and deletions the ABA charge has failed adequately to solve the problems experienced with the Allen charge. The only difference between the two is the fact that the ABA charge is explicit in not allowing deletions. However, this was impliedly the case with the Allen charge.\(^5\) Both charges will have to be scrutinized carefully

\(^{103}\) By implication a complete redefinition of the reasonable doubt standard will also redefine the burden of proof.

\(^{104}\) It has been called "undefinable" because the words are so basic. H. Kalven & H. Zeisel, The American Jury 189 & n.5 (1966). See also C. McCormick, Evidence § 321, at 682 (1954); 9 L. Wigmore, Evidence § 2497, at 317-20 (1940); Annot., 147 A.L.R. 1047 (1943); Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 63-64 (1933). But when the jury asks for further definition it is usually given in spite of the difficulty. Annot., 147 A.L.R. 1047 (1943). Kalven and Zeisel further state: "Given the ambiguity of the reasonable doubt formula it is likely that it is not understood in exactly the same way by all jurors." H. Kalven & H. Zeisel, supra, at n.5.

\(^{105}\) It appears that after any appreciable deliberation time the factions which have formed within the jury may distort legal principles in order to persuade other jurors. Note, supra note 55, at 110-11 & n.36.

\(^{106}\) This suggestion has been rejected in at least one case. Buder v. Bell, 306 F.2d 71, 76 (6th Cir. 1962). The circuit court felt the trial court had adequately charged on reasonable doubt and presumption of innocence in the original charge. The court felt the essential goal of supplemental instructions is to get jurors to reason together and not reemphasize legal rules which were given originally. But a more recent case has indicated that the proposed reinstruction may be useful. United States v. Winn, 411 F.2d 415, 417 (10th Cir. 1969).

\(^{107}\) The Allen charge has often been defended as a "carefully bal-
by appellate courts in individual cases in order to prevent improper additions or deletions.

C. Timing Problems

A major problem with any supplemental charge urging agreement is determining when during deliberations the charge should be given. The timing of supplemental instructions is a discretionary matter for the trial court and is not normally reviewable unless the charge is clearly premature, in the sense that the jury has not been given a reasonable time to agree. Even now the limits of what is a reasonable time have not been defined. Overall deference to the discretion of the trial court is almost invariably the controlling factor.

The ABA charge specifically approves the use of trial court discretion in timing of issuance and it thus seems unlikely that appellate courts will show any great propensity to reverse on grounds of premature timing. The issue of whether a charge

anced" method of reminding jurors of their elementary obligations. Fulwood v. United States, 369 F.2d 960, 962 (D.C. Cir. 1966) (Burger, J.). If any key phrase is removed this balance no longer exists, and thus deletion would seem to be improper. Also, the Supreme Court approved only one wording and nowhere implied that there should be deletions.

108. Although courts pay lip service to this principle, Green v. United States, 309 F.2d 852, 854 n.3 (5th Cir. 1962), there has been no federal case where a reversal was posited solely on the premature nature of the supplemental charge. See Miller v. State, 10 Md. App. 157, 268 A.2d 596 (1970).

109. The problem of establishing timing standards is discussed in Note, Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge," 31 U. Chi. L. Rev. 386, 391-92 (1964); Note, supra note 90, at 132-33; Comment, Defusing the Dynamite Charge: A Critique of Allen and Its Progeny, 36 Tenn. L. Rev. 749, 758-59 (1969). Examples of what has been considered a "reasonable time" are legion. E.g., Mills v. Tinsley, 314 F.2d 311 (10th Cir.), cert. denied, 374 U.S. 847 (1963) (supplemental charge given after more than a day of deliberation); United States v. Furlong, 194 F.2d 1 (7th Cir.), cert. denied, 343 U.S. 950 (1952) (supplemental charge given after more than three hours of deliberation). Cf. Andrews v. United States, 309 F.2d 127 (5th Cir. 1962) (supplemental charge given after 1 hour and 5 minutes of deliberation).

110. For example, in Walker v. United States, 342 F.2d 22 (5th Cir. 1962), even though the foreman had stated that the jury was close to agreement, the court issued an Allen charge. The Fifth Circuit, a circuit usually critical of the Allen charge, refused to reverse, saying timing was within the discretion of the trial judge. Id. at 26. Besides showing great deference to trial judges on timing, the circuits have been erratic in applying even the liberal reversal standards. Comment, supra note 108, at 737; Annot., 100 A.L.R.2d 177, 208-10 (1965).

111. ABA Project, supra note 29, at 148 (§ 8.4(b)(v)).
is premature is also less likely to arise inasmuch as the ABA charge has already been given as part of the court’s initial instruction to the jury. Also, since all the factors concerning a charge interrelate, the improved wording of the ABA charge may make it less conducive to coercion even if premature.

However, while retaining trial court discretion, the appellate courts should establish a guideline to aid trial courts in deciding when to give a supplemental instruction. Otherwise the fact that the appellate courts so eagerly embrace the ABA standards while rejecting the *Allen* charge might be misinterpreted as encouragement to issue the new supplemental charge. Accordingly, it would be an improvement if the circuit courts using the ABA charge instructed their trial courts that the charge should not be used except in cases of clear necessity. For instance, they might demand that trial courts not issue supplemental instructions unless the jury indicates its disagreement in some external way. The mere fact that a jury spends a great deal of time on what the court considers a simple case should not be grounds for the issuance of a supplemental charge.

In addition to ingraining a healthy distrust for supplemental charges urging agreement, the circuit courts should encourage trial judges to use their other powers for initially dealing with jury deadlock. For instance, in the *Thomas* case, the court was asked by the jury to read back certain testimony. The court acquiesced, and while the jury was in the courtroom encouraged them to reach a verdict. Shortly thereafter, the jury returned with a verdict of guilty. As the dissent points out, it is unclear whether the jury was persuaded by the evidence readback, the *Allen* charge, or both. However, it is quite possible that the evidence readback alone would have persuaded the jury to return a guilty verdict, and a reversal would have been avoided. If the jury did not respond to the readback perhaps the judge then could have used a supplemental charge urging agreement.

Other powers are also available to the trial judge. He can summarize the evidence, comment on the evidence, and instruct on the law. In addition to providing for a stenographic

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113. In fact, in the federal system it is clear that the court has a duty to use these powers to aid the jury in its fact finding function. United States v. Sawyers, 423 F.2d 1335, 1340 (4th Cir. 1970). While some states have restricted the powers which the court historically has
readback of evidence the judge may make his own fair explanation of what the jury has seen to aid them in remembering.\textsuperscript{114} He can even comment on the evidence if the comments are fair and the jurors are told that they may disregard them if they choose.\textsuperscript{115} The judge can do this before or after the jury has retired.\textsuperscript{116} Although these powers may be misused it is probably easier for appellate courts to identify and remedy a misuse of them than to perceive whether a supplemental charge has been coercive in fact.

Perhaps the most potent weapon the court has for ending jury disagreement is simply the power to instruct on the law.\textsuperscript{117} By reminding the jury what its function is, the judge may be able to stop personality contests from dominating the jury's deliberation. As has been mentioned,\textsuperscript{118} a reinstruction on the reasonable doubt standard may aid jurors significantly. In addition, anytime the judge feels that the jury does not understand a legal point he may reinstruct on that point.\textsuperscript{119} He may also inquire as to whether the jury understands various points.\textsuperscript{120}

Encouraging trial courts to deal with deadlocked juries through other means than the supplemental charge urging agreement should reduce significantly the workload at the ap-
pellite level. Appellate courts will find fewer supplemental charge cases to scrutinize, which will be a saving of appellate time, and when they do have to review communications to the jury such communications will be in forms easier for them to evaluate than the supplemental charge urging agreement.

Once the trial judge's other powers are exhausted he then should consider whether it is a proper time to issue a supplemental charge. But even then trial judges should be wary of issuing a supplemental charge. Appellate courts should encourage a healthy distrust for even the ABA charge and demand that it be used solely as a last resort.

D. CONSTITUTIONALITY

Arguably, if a judge's instruction is found on review to have been coercive in fact, it has infringed upon the defendant's right to a jury decision of his case and is thus a violation of due process. The principle underlying the requirement of a unanimous jury verdict is undermined if that unanimity is not arrived at independently but is coerced by the court. Although many supplemental charges have been held to be error, or have been found to be coercive within the facts of particular cases, none has been declared unconstitutional. However, it seems likely that a court could word a supplemental


122. A unanimous verdict is required because of the magnitude of the consequences, because of the improbability that twelve men of disparate experience and backgrounds could each err in arriving at the same conclusion. As to guilt, only a high degree of certainty can salve the conscience of society (as represented by the judge) and overcome reluctance to impose punishment upon one of its members.

123. Unanimity is a barrier to arbitrary judicial power. Thompson v. Utah, 170 U.S. 343, 349-50 (1898). The verdict is to be based on the evidence alone. Irvin v. Dowd, 366 U.S. 717, 722 (1961). A unanimous verdict which occurs because jurors believe that the judge is demanding a verdict violates both of these principles.
charge urging agreement in such a way that it would violate due process.

The Allen charge has been criticized as unconstitutional under two theories. Neither theory has received credence from any court and one has been specifically rejected. The first theory is simply put by Judge Brown, dissenting in Huffman v. United States.\footnote{297 F.2d 754 (5th Cir. 1962).} He feels that the Allen charge violates fundamental fairness because it demands a verdict by implying that there is a duty to decide the case. His theory was accepted by at least one other dissenter,\footnote{Wisdom, J., dissenting in Andrews v. United States, 309 F.2d 127, 129-31 (5th Cir. 1962).} but no court has adopted it. Judge Brown also feels that a defendant has a constitutional right to a mistrial in the event of a hung jury because that outcome is so obviously a part of our scheme of justice, and he claims that the Allen charge infringes upon that right.\footnote{Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting).}

The second theory has been propounded by commentators.\footnote{Note, supra note 90, at 136-44; Comment, supra note 109, at 750-55.} It is based on recent Supreme Court cases which deal with the integrity of the jury.\footnote{E.g., Bruton v. United States, 391 U.S. 123 (1968); Parker v. Gladden, 356 U.S. 363 (1966); Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Turner v. Louisiana, 379 U.S. 466 (1965); Jackson v. Denno, 378 U.S. 368 (1964).} These cases attempt to limit the outside influence to which a jury is exposed in order that it may decide the case on the evidence alone. For example, in Sheppard v. Maxwell\footnote{384 U.S. 333 (1966).} the Supreme Court decided that pretrial publicity was so intense that the defendant was denied a fair trial. The commentators urge that the theory underlying these decisions is broad enough to reach the case in which judicial instruction encourages jurors to consider factors beyond the evidence and argument in open court. They argue that the Allen charge violates the principle of deciding the case on the evidence alone by telling jurors to look beyond the evidence and consider the way other jurors are voting in deciding the defendant's guilt or innocence. Of course this criticism extends the Supreme Court case law far beyond the facts of the cases and also overlooks the essential conference nature of the American jury system.\footnote{"The proponents of the jury system maintain that a greater de-}
JURY CHARGES

1972] 1223

can consider the arguments of his colleagues without agreeing that he should be able to consider their votes as simply a reflection of how his own arguments are perceived. At least one court has rejected this criticism of the Allen charge.\textsuperscript{131}

Both unconstitutionality theories are weak. Both implicitly rely on the proposition that the Allen charge is necessarily coercive, a proposition for which as yet there is no empirical proof.\textsuperscript{132} The Supreme Court has specifically said that the charge is constitutional.\textsuperscript{133} Circuit courts which have rejected the Allen charge are quite explicit about saying that the issue arises only under their supervisory powers and not as a question of the charge's constitutionality.\textsuperscript{134}

The ABA charge has not been criticized as unconstitutional. Since the charge makes it very clear that it is not demanding a verdict it should pass the test formulated by Judge Brown in Huffman. Arguably the ABA charge protects the right to a mistrial, assuming such a right exists—first, by emphasizing that each juror must vote his convictions, second, by making it clear that no juror should change his vote solely to return a verdict, and third, by telling the jury there is only a duty to "deliberate" and not decide.

The ABA charge also will probably pass the test of constitutionality used by the commentators.\textsuperscript{135} Although the charge does tell jurors to be influenced by the arguments of their fellows and to change their vote if convinced they are wrong, it

\textsuperscript{131} United States v. Brown, 411 F.2d 930, 932-33 (7th Cir. 1969).
\textsuperscript{132} There has been no showing that the Allen charge results in a disproportionately high number of guilty verdicts. United States v. Thomas, 449 F.2d 1177, 1182 (D.C. Cir. 1971) (Robb, J., dissenting); United States v. Sawyers, 423 F.2d 1335 (4th Cir. 1970). This is impossible to gauge without empirical research because acquittals are not reported.

\textsuperscript{133} Allen v. United States, 164 U.S. 492 (1896).
\textsuperscript{134} See, e.g., United States v. Thomas, 449 F.2d 1177, 1187 (D.C. Cir. 1971). Circuit courts have interpreted the Supreme Court's orders here as supervisory. Id. at 1184-86 (discussion); United States v. Brown, 411 F.2d 930, 933 (7th Cir. 1969).

\textsuperscript{135} See note 127 supra. At least one of the commentators who has criticized the Allen charge has indicated that he feels that a charge similar to the ABA charge is not only constitutional but desirable. Comment, supra note 109, at 761.
does not tell them to be influenced by the numerical breakdown of the jury.

The only conclusion that can be drawn from these tests of constitutionality is that it appears the ABA charge is not quite as amenable to the criticisms as the Allen charge. But the criticisms themselves are weak. The fact that the ABA charge may be comparatively less vulnerable to weak constitutional criticisms should not be a factor in deciding whether it is an improvement on the Allen charge. Standing alone both charges are constitutional.

E. Reviewability

One of the major criticisms of the use of supplemental charges urging agreement is that it is all but impossible for appellate courts to decide if such a charge was coercive in fact.\textsuperscript{136} The difficulty lies in the fact that the coercion takes place in the individual juror's mind or behind closed doors in the jury-room. Appellate courts are forced to rely on inferences perceived from external indications and real coercion may never manifest itself in a manner that would appear in the record.\textsuperscript{137} This has led to the use of review standards which cannot really accomplish a proper review.\textsuperscript{138}

A commonly discussed test to discover whether a supplemental charge had a coercive effect upon the jury is whether the charge started a new train of deliberation.\textsuperscript{139} Obviously this test is unworkable because an appellate court cannot discover what actually took place during the deliberations themselves. The test becomes simply a label for an appellate court's con-

\textsuperscript{136} Fields v. State, 487 P.2d 831, 839-40 (Alaska, 1971); Note, supra note 90, at 135-37; Note, supra note 109, at 386-88; Comment, supra note 109, at 759-60.


\textsuperscript{138} In some cases, the standards adopted by reviewing courts are directly inconsistent. For instance, Weathers v. United States, 126 F.2d 118 (5th Cir. 1942), and United States v. Kahaner, 317 F.2d 459 (2d Cir. 1963), indicate that an appreciable time in deliberation after an Allen charge implies lack of coercive impact, while United States v. Samuel Dunkel & Co., 173 F.2d 506, 511 (2d Cir. 1949), and Kawakita v. United States, 190 F.2d 506, 528 (9th Cir. 1951), aff'd, 343 U.S. 717 (1951), have been read to indicate that long deliberation periods after an Allen charge indicate coercion. Annot., 100 A.L.R.2d 177, 209-10 (1965); Comment, supra note 109, at 757 & n.59. See also United States v. Brown, 411 F.2d 930 (7th Cir. 1969); State v. Thomas, 86 Ariz. 161, 165-66, 342 P.2d 197, 200 (1959).

\textsuperscript{139} Such a test was used in State v. Pierce, 178 Iowa 417, 424, 159 N.W. 1050, 1054-55 (1916).
clusions. Another device which appellate courts use may be more constructive: if the jury returns immediately after a supplemental charge, without time for further deliberation, with a guilty verdict the reviewing court will imply coercion because there was no time for renewed deliberation.\textsuperscript{140} However, although this test may prove to be a more accurate method of measuring the likelihood of coercion, it is useful in only a small minority of cases.

Because tests like these have proven ineffective, circuit courts have found themselves independently weighing the evidence to see whether the possibility of coercion can be ignored as harmless error.\textsuperscript{141} That is, if the evidence against the defendant is “overwhelming” the reviewing court will affirm the conviction.\textsuperscript{142} The appellate court’s inquiry is not directed to whether there was coercion in fact, but rather whether it appears to the court that the defendant is guilty. Thus some defendants will be convicted even though their case was never considered by a jury free of coercive influences—a right to which the defendant is constitutionally entitled. Moreover, the

\textsuperscript{140} E.g., Williams v. United States, 338 F.2d 530 (D.C. Cir. 1964); Powell v. United States, 297 F.2d 318 (5th Cir. 1961); United States v. Rogers, 289 F.2d 433, 436 (4th Cir. 1961); Stewart v. United States, 300 F. 769 (8th Cir. 1924); Peterson v. United States, 213 F. 20 (9th Cir. 1914). The application of this theory has been inconsistent. Compare Wissel v. United States, 22 F.2d 468 (2d Cir. 1927) (jury returned 25 minutes after a supplemental charge; reversed), with Andrews v. United States, 309 F.2d 127 (5th Cir. 1962), cert. denied, 372 U.S. 946 (1963) (jury returns 25 minutes after a supplemental charge; affirmed).

\textsuperscript{141} ABA PROJECT, supra note 29, at 154. Note, On Instructing Deadlocked Juries, 78 YALE L.J. 100, 142 (1968), states:

In deciding whether an error is harmless judges probably should not consider the nature of the case and the evidence, or at least not the way they do now. Courts are presently inclined to refuse reversal in cases where the evidence was overwhelmingly against the complaining party; any error in the instructions is harmless since the jury would have come out the same way without it.

\textsuperscript{142} For example, in Lias et al. v. United States, 51 F.2d 215 (4th Cir.), aff’d, 284 U.S. 584 (1931) the court, while refusing to reverse, stated:

In this case the evidence so overwhelmingly and conclusively shows the guilt of defendants that, to constitute reversible error, such error must have been of a character as to have been clearly prejudicial to them. Such is not the case here. 51 F.2d at 218. See Boehm v. United States, 123 F.2d 791, 813 (8th Cir. 1941); State v. Muhlollen, 173 Iowa 242, 248, 153 N.W. 252, 254 (1915). On the other hand, where the evidence is largely circumstantial or in sharp conflict it is a factor in reversals. See Nigro v. United States, 4 F.2d 781, 785 (8th Cir. 1925); State v. Voeckell, 69 Ariz. 145, 157, 210 P.2d 972, 980 (1949) (Udall, J., dissenting).
appellate court will not have searched the record for indications of coercion, but will have balanced the evidence itself. In this light, the evidence weighing test is improper.

In most cases, then, the circuits courts are left with the responsibility for simply looking at “all the circumstances” to decide if a supplemental charge urging agreement was in fact coercive or had a “substantial propensity” to be coercive.\textsuperscript{143} Such an examination requires the reviewing court to spend an inordinate amount of time on each case since it must make sure that there is no hint of coercion in the entire record. The problem is compounded by the fact that the use of supplemental charges urging agreement appears to be increasing.\textsuperscript{144} One judge has asserted that these charges are almost certain to be given in any case which has been hard fought and in which the jury stays out for any appreciable time.\textsuperscript{145} The increasing frequency of supplemental charges may save time for trial courts by preventing retrials, but appellate judges have pointed out that these gains are offset by increases in appellate workloads.

Although the “all the circumstances” test is time consuming,\textsuperscript{146} erratic\textsuperscript{147} and difficult to apply,\textsuperscript{148} it is not always ineffective. The many reversals based on supplemental charges urging agreement so attest. Courts reversing these charges frequently point to parts of the transcript\textsuperscript{149} or incidents in the trial\textsuperscript{150} which indicate that the jury was coerced.

However, the unusual amount of appellate time that is spent on Allen charge appeals has been a major reason for

\begin{footnotes}
\footnote{143. See, e.g., United States v. Harris, 391 F.2d 348 (6th Cir. 1968); Powell v. United States, 297 F.2d 318 (5th Cir. 1962). In Powell the court stated that there should be scrutiny of the “facts of each case and the exact words used.” 297 F.2d at 322.}
\footnote{144. United States v. Thomas, 449 F.2d 1177, 1185 (D.C. Cir. 1971); United States v. Johnson, 432 F.2d 626, 632 (D.C. Cir. 1970).}
\footnote{145. Huffman v. United States, 297 F.2d 754, 759 & n.1 (5th Cir. 1962) (Brown, J., dissenting).}
\footnote{146. See note 151 infra.}
\footnote{147. See note 138 supra.}
\footnote{149. E.g., Walker v. United States, 342 F.2d 22, 25-28 (5th Cir. 1965); Powell v. United States, 297 F.2d 318, 319-20 (5th Cir. 1961); Berger v. United States, 62 F.2d 438, 438-39 (10th Cir. 1932).}
\footnote{150. Campbell v. United States, 316 F.2d 681 (D.C. Cir. 1963); United States v. Smith, 303 F.2d 341, 342-43 (4th Cir. 1962); United States v. Rogers, 289 F.2d 433, 435 (4th Cir. 1961); Nigro v. United States, 4 F.2d 781, 785 (8th Cir. 1925); Miller v. State, 10 Md. App. 157, 161, 268 A.2d 596, 598 (1970).}
changing to the ABA charge.\textsuperscript{151} There is evidence that the circuit courts which have adopted the ABA charge will apply a presumption of propriety when that charge is issued\textsuperscript{152} and will not apply the "all the circumstances" test on review. This should significantly reduce the time spent in reviewing these charges. However, the most recent Supreme Court case dealing with supplemental instructions may be read to demand a complete review on all the circumstances of these charges\textsuperscript{153} and it is submitted that any less rigorous review is unwarranted. Although the ABA charge may be an improvement over the Allen charge, it certainly does not contain any magic words which rid the instruction of the potential for coercion. Some juries may still respond improperly. If supplemental instructions urging agreement are allowed in any form they should be scrupulously reviewed on "all the circumstances," even if this does not reduce circuit court workloads.

There is a way, however, that the appellate courts may reduce their workloads somewhat without reducing protection for the defendant. Rather than simply recommending that trial judges use the ABA standards, they should require the new charge. Trial judges have traditionally been allowed great leeway in the wording of supplemental charges urging agreement\textsuperscript{154} and it seems likely that even strongly recommending the use of a particular format may not restrict them. One cir-

\textsuperscript{151} United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971).
Our conclusion that the conviction must be reversed for actual, though undesigned, coercion of the jury is an appraisal we could make only after a very considerable expenditure of judicial time and energy. \textit{Id.} at 1184. See United States v. Brown, 411 F.2d 930, 933 (7th Cir. 1969).

\textsuperscript{152} United States v. Thomas, 449 F.2d 1177, 1184-86 & n.60 (D.C. Cir. 1971); United States v. Fioravanti, 412 F.2d 407, 417-20 (3d Cir. 1969).

\textsuperscript{153} In Jenkins v. United States, 380 U.S. 445 (1965), the Court used the "all the circumstances" test. \textit{Id.} at 446. In Lias \textit{et al.} v. United States, 51 F.2d 315 (4th Cir. 1931), aff'd, 284 U.S. 584 (1931), the court stated that "the giving of special instructions of the character of those given here should not be approved without a careful analysis of them." \textit{Id.} at 218. It can be argued that these precedents demand that the circuits retain this strict scrutiny of the supplemental charge.

\textsuperscript{154} Some examples of improper additions which trial courts used in spite of circuit court rejection of them are: Green \textit{v.} United States, 309 F.2d 852, 855 (5th Cir. 1962) ("the majority will have better judgment"); Powell \textit{v.} United States, 297 F.2d 318, 319 (5th Cir. 1961) ("It is no credit to a juror to stand out in a pure spirit of stubbornness"); Billeci \textit{v.} United States, 184 F.2d 394, 403 (D.C. Cir. 1950) (the court openly indicated that it thought the defendant was guilty).
circuit court already has been faced with a progression of cases where, although its recommendations to use the ABA charge have become stronger and stronger, some trial courts have not yet responded.\textsuperscript{155} Thus circuit courts should demand that when a trial judge issues a supplemental instruction urging agreement it contain all five elements of the ABA charge. This will lower the number of clearly improper charges which are given, and thus should reduce the number of supplementary charge appeals. The penalty for failure to issue the ABA charge must be reversal.

Some circuit courts may be reluctant to apply such an approach in the situation where a trial court issues a verbatim \textit{Allen} charge citing that case.\textsuperscript{156} However, since the Supreme Court only approved the \textit{Allen} charge and did not demand that it be used, a circuit court should be able to use its supervisory power to require that the district courts under it adhere to a different standard. In fact, it can be argued that use of the supervisory power is especially appropriate in an area where the Supreme Court now refuses to take certiorari.\textsuperscript{157} This refusal can be interpreted to mean that the Court intends to let the problem be solved initially by the circuit courts. Especially important is the fact that when some circuits have adopted the ABA charge the Supreme Court has not overruled them.\textsuperscript{158}

\textsuperscript{155} The Tenth Circuit started recommending milder supplemental instructions than the \textit{Allen} charge in Buroughs v. United States, 365 F.2d 431, 434 (10th Cir. 1966). It continued through Burrup v. United States, 371 F.2d 558, 559 (10th Cir. 1967), and in United States v. Wynn, 415 F.2d 135, 137 (10th Cir. 1969), the court indicated extreme displeasure with the failure of district courts to heed its advice, but still refused to reverse. The Circuit is still recommending, the district courts are still not listening, and the Circuit is still not reversing. See Munroe v. United States, 424 F.2d 243 (10th Cir. 1970).

\textsuperscript{156} United States v. Thomas, 449 F.2d 1177, 1191-92 (D.C. Cir. 1971) (Robb, J., dissenting).

\textsuperscript{157} The Court has not taken an \textit{Allen} charge case since 1941, when it affirmed in Kawakita v. United States, 343 U.S. 717 (1951). Even there, the Court, speaking through Douglas, J., concerned itself with other matters and referred to the \textit{Allen} issue, discussed fully in the circuit court's opinion, only indirectly: "Other alleged errors are pressed upon us. But they are either insubstantial or else so adequately disposed of by the Court of Appeals that we give them no notice." \textit{Id.} at 744. See note 21 supra for some examples of cases where the Supreme Court has denied certiorari.

IV. ABOLISHING OR LIMITING CHARGES
URGING AGREEMENT

Although the ABA charge appears to be an improvement over the Allen charge the question still arises whether any supplemental instruction urging agreement should be permitted. At least one commentator has suggested that in criminal cases judges should not be allowed to urge agreement and that if the jury, after reasonable deliberation, indicates they cannot agree, they should be dismissed.\textsuperscript{159} Although this removes the danger that the judge will infringe upon the right of the defendant to an impartial consideration of his case, there are several reasons why the suggestion has not been well received.\textsuperscript{160}

First, federal trial judges have the power to demand a reasoned attempt at deliberation before the jury is released.\textsuperscript{161} A supplemental instruction urging agreement is an appropriate method of exercising this power. Fiery emotions may be calmed during a short time outside the juryroom in the dignified atmosphere of the courtroom. Calm words from the bench may also help. The charge urging agreement puts the prestige of the court behind further deliberation. In some cases a lecture on citizenship may be exactly what is needed.

Second, the court has a responsibility to assist the jury in reaching agreement.\textsuperscript{162} Before he releases the jury the judge must ensure that disagreement is not based on confusion as to the facts or law, or on irrational emotional considerations.\textsuperscript{163} In conjunction with this duty the court has the power to inquire into the nature of the division to some extent.\textsuperscript{164} In so

\begin{itemize}
\item \textsuperscript{160} All circuit courts retain some supplemental charge. Most still allow the Allen charge (see cases cited in note 16 supra) while a minority do not allow it but do allow the ABA charge (see text accompanying notes 35-51 supra).
\item \textsuperscript{162} United States v. Johnson, 432 F.2d 626, 630-31 (D.C. Cir. 1970).
\item \textsuperscript{163} There is always the danger that strong personality clashes between individual jurors will improperly affect the deliberation. There is also the danger that some jurors may be too proud to retract when they have committed themselves openly to a certain position even after they realize their position is not correct. Jurors may begin to feel they have a proprietary interest in what they have been arguing and thus refuse to change.
\item \textsuperscript{164} Andrews v. United States, 309 F.2d 127, 130 (5th Cir. 1962) (Wisdom, J., dissenting). The ABA recommends that the court question
doing it may find that a disagreement is based on an irrational personality clash among jurors. For example, in Kawakita v. United States\(^{165}\) the foreman and several of the jurors told the judge in open court that there was a serious personality conflict and that the "animosity" which had crept into their deliberations would preclude any possibility of reaching a verdict.\(^{166}\) Had the Kawakita court dismissed the jury on this basis it would have been disregarding its duty. Instead the court gave a supplemental instruction and the jury was able to reach agreement.

Third, there are many practical reasons why trial judges should use their powers to avoid mistrials. In the first place, the defendant is not fully protected by a mistrial because the prosecution may try the case again if the trial is serious or somewhat sensational.\(^{167}\) And in many cases the evidence may be of a type which could never again be presented so well.\(^{168}\)

individual jurors to determine if there is any reasonable probability of agreement. ABA Project, supra note 29, at 157. The court cannot inquire as to the numerical division of the jury. This is viewed as too explicit a pressure on the minority. Brasfield v. United States, 272 U.S. 448 (1926); cf. Burton v. United States, 196 U.S. 283 (1905). These decisions were criticized in Comment, Defusing the Dynamite Charge: A Critique of Allen and Its Progeny, 36 Tenn. L. Rev. 749, 759 (1969). It has even been held reversible error to inquire if there is a "pronounced majority." United States v. Samuel Dunkel & Co., 173 F.2d 506 (2d Cir. 1949); Nigro v. United States, 4 F.2d 781 (8th Cir. 1925). It has also been held that even if the jury's division is revealed inadvertently by the jurors without judicial inquiry there must be a reversal. People v. Baumgartner, 166 Cal. App. 103, 332 F.2d 366 (1959). On the other hand, most courts hold that if the division is inadvertently revealed by the jury this does not preclude the issuance of an otherwise proper supplemental charge urging agreement. United States v. Williams, 444 F.2d 108 (9th Cir. 1971); United States v. Rao, 394 F.2d 354, 356 (2d Cir. 1968); Bowen v. United States, 153 F.2d 747, 751-52 (8th Cir. 1966). The reasoning is that the judge's knowledge of the division is irrelevant even if the jury knows he knows of their division. It is only relevant as to the motivation of the judge in giving the charge. United States v. Sawyers, 423 F.2d 1335, 1340 (4th Cir. 1970).

\(^{165}\) 190 F.2d 506 (9th Cir.), aff'd, 343 U.S. 717 (1951).

\(^{166}\) Kawakita v. United States, 190 F.2d 506, 521 & n.17 (9th Cir.), aff'd, 343 U.S. 717 (1951).

\(^{167}\) But cf. United States v. Jorn, 400 U.S. 470 (1971), in which the Court severely restricted the government's power to retry a criminal case which ended in a mistrial after a jury was impanelled. The Court held that if the defendant did not cause the mistrial double jeopardy would usually prevent a second trial. But the Court seemed to except hung juries from the broad sweep of the rule. Id. at 480-81, 484, 486. See also 400 U.S. at 489 (dissenting opinion).

\(^{168}\) Shea v. United States, 260 F. 807 (9th Cir. 1919); Suslak v. United States, 213 F. 913 (9th Cir. 1914).
Furthermore, refusal to give any supplemental charge urging agreement could have serious consequences for our criminal court system. Presently only five per cent of criminal juries deadlock. This is probably due in part to the use of supplemental charges urging agreement. Since court congestion is a more serious problem now than ever, the possibility of an increase in mistrials must be considered as a factor which supports the giving of some type of supplemental charge. Also, the expense to the defendant and the government in terms of time, effort and money are all too great to allow trial courts simply to ignore the problem.

Finally, the theory that juries should be dismissed whenever they indicate disagreement assumes that juries always will interpret a properly worded plea for agreement as a demand for a verdict by the court—in other words, that the jury hears one thing and interprets it differently from the plain meaning of the words. Yet the evidence that is available indicates that the jury is not always so unsophisticated. Research indicates that juries generally make their decisions according to the evidence and that they may rebel against rules announced by the court if they disagree with them. More important, comments by the judge usually will influence the jury only if adequately supported by the evidence. It seems clear that it is not correct to deny the court the opportunity to aid the jury in reaching agreement simply because the jury may misinterpret any suggestions to that effect by the court.

Another restriction on charges urging agreement also has

171. It is one thing to argue that a milder supplemental instruction will not seriously increase the number of hung juries and quite another to say there will be no increase if all supplemental charges are barred. See note 91 supra and accompanying text. If it became common knowledge among potential jurors that they could avoid what might be an unpleasant duty, and perhaps pass it on to another jury, simply by refusing to agree, it is difficult to say that many would not do so.
173. H. Kalven & H. Zeisel, supra note 169, at 375 et seq.
174. Id. at 427.
been suggested. Most jurisdictions allow such instructions to be given in the initial charge and it has been suggested often that they be restricted to that charge. This suggestion is gaining support on the theory that such a practice will minimize the chance of jury coercion because it does not interrupt deliberation and thus will not be interpreted by the jury as a statement directed to that jury's particular predicament. The basic information that agreement is highly desirable but should not be attained at the sacrifice of conscientiously held beliefs is conveyed in a way least likely to be interpreted as an order from the court to reach a verdict. On the other hand, it can be argued that until there is some indication of disagreement this information is superfluous, and can only be misinterpreted by the jury.

When the advice to agree is given in the original charge there is also a distinct chance that jurors may not consider it worth remembering inasmuch as they are also being asked to remember many complex legal instructions. Jurors may throw off this type of high-sounding and nontechnical advice as no more than a polite admonition to do their duty. Most important, even if all initial instructions contained statements urging agreement, the question of what a trial judge should do when confronted by a jury that appears in danger of deadlocking in spite of the original charge would still occur. Thus the argument that instructions to agree should be given only in the initial charge does little more than ignore the problem.

V. CONCLUSION

It would not be wise either to abolish supplemental charges urging agreement or to retain the Allen charge. It may well be true that the Allen charge suffers unfairly as a result of improper variations in the language of the instruction, but this propensity for misuse is all the more reason why a new ap-

proach should be tried. In any case, the *Allen* charge's potential evils clearly seem to outweigh its benefits. Most of the valid reasons for allowing the *Allen* charge apply to a milder, more balanced supplemental instruction which does not involve so great a risk of coercing the minority.

The ABA charge is probably an improvement on the *Allen* charge because it emphasizes the retention of conscientiously held convictions while telling all jurors, rather than simply the minority, to reexamine their reasoning. However, the difference is not so substantial that a less rigorous review standard should be applied. An ABA charge should be scrupulously reviewed on the basis of all the circumstances to determine whether the charge may have been coercive. In addition, the circuit courts should demand that trial courts issue all five elements of the instruction. However, the ABA charge should serve as a minimum, not a maximum, since to limit trial courts wholly to this language would preclude them from dealing with particular jury problems as they discover them. To further aid a deadlocked jury there should be a complete reinstruction on the reasonable doubt standard accompanying the ABA charge in order to better insure that the supplemental instruction will not distort the jury's conception of this difficult standard.