

March 1972

Trial Procedure - Bombshell Instruction for Deadlocked Juries: ABA Standard Replaces Allen Charge in District of Columbia. United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971)

J. Grant Corboy

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Criminal Procedure Commons](#)

Repository Citation

J. Grant Corboy, *Trial Procedure - Bombshell Instruction for Deadlocked Juries: ABA Standard Replaces Allen Charge in District of Columbia. United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971)*, 13 Wm. & Mary L. Rev. 672 (1972), <https://scholarship.law.wm.edu/wmlr/vol13/iss3/9>

Copyright c 1972 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

result in intangible benefits. Thus it is the *Troppi-Coleman* approach which seems best suited to weigh these various factors as they arise.

If the submission of the damage issue to the jury illustrates a judicial conformance with a previous or coincident shift in social perception of the ethics of family planning, the question of how well the plaintiff-parents fare with the jury remains unsettled. The only reported case illustrating a jury verdict in an unwanted child situation is *Ball v. Mudge*,²⁰ decided in 1964. There a jury determined, and an appellate court affirmed that the plaintiff-parents suffered no damage from the birth of a normal child.

Under the *Troppi* analysis of benefits, it may well be that the *Ball* jury would award damages where the controlling facts are sufficiently compelling, as in the case of the unwed mother. It is conceivable that a jury finding that benefits outweigh injury is now capable of being reversed as clearly erroneous. If this is so, then the *Troppi* court has indeed reversed the roles of court and public perception. For now the courts will have power to insist that standard rules of law regarding malpractice, and legal concepts of benefit and burden resulting from wrongful conduct, be applied in birth control cases. That power will prohibit the imposition of social perceptions which do not coincide with legal principles, and should lead to frequent success for plaintiffs seeking compensation for unwanted births.

ROBERT L. WINIKOFF

Trial Procedure—BOMBSHELL INSTRUCTION FOR DEADLOCKED JURIES: ABA STANDARD REPLACES *Allen* CHARGE IN DISTRICT OF COLUMBIA. *United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971)

In the past, trial judges employed various devices in order to prod a deadlocked jury into reaching a verdict.¹ However, the feasibility of

20. 64 Wash. 2d 247, 391 P.2d 201 (1964).

1. By the ancient common law, jurors were kept together as prisoners of the court until they had agreed upon their verdict. [This required that they be] [K]ept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed.

People v. Sheldon, 156 N.Y. 268, 275, 50 N.E. 840, 842 (1898)

The reasons commonly given for such action are that a hung jury results in considerable loss of time and money, and represents a failure of the jury system. Comment, *Defusing the Dynamite Charge: A Critique of Allen and its Progeny*, 36 TENN. L. REV. 749 (1969). See *Andrews v. United States*, 309 F.2d 127, 130 (5th Cir. 1962) (dissenting opinion), cert. denied, 372 U.S. 946 (1963); AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO TRIAL BY JURY 154 (1968) [hereinafter cited as ABA STANDARDS].

bringing extreme pressure to bear on the deadlocked jury has diminished in more recent years due to the advent of the rule that a coerced verdict constitutes reversible error.² One device, involving the use of a supplemental instruction given when the jury reports its inability to agree or when the trial judge decides that the jury has had sufficient time to reach a verdict, continues to be widely used. The vast majority of these instructions are based, at times quite tenuously, on the instruction approved by the Supreme Court in *Allen v. United States*.³ The language approved by the Court was

[T]hat in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, 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 majority⁴

While the *Allen* charge itself has not been held unconstitutional,⁵ it is generally recognized as establishing the limits of permissible jury prompting.⁶ Appellate court reversal of convictions involving jury

2. *United States v. Thomas*, 449 F.2d 1177, 1181 (D.C. Cir. 1971); *United States v. Fioravanti*, 412 F.2d 407, 416 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969); *Wissel v. United States*, 22 F.2d 468, 471 (2d Cir. 1927); Comment, *supra* note 1, at 755. See also *State v. Green*, 254 Iowa 1379, 121 N.W.2d 89 (1963), reversing a conviction because jurors had not slept for over twenty-six hours before returning the verdict. Affidavits from the three jurors in the minority stated that they acquiesced in the verdict because of their exhausted mental condition. 121 N.W.2d at 93-95.

3. 164 U.S. 492 (1896).

4. *Id.* at 501. This instruction had previously been approved by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Tuey*, 62 Mass. 1 (1851).

5. *United States v. Brown*, 411 F.2d 930, 933 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970); ABA STANDARD, *supra* note 1, at 149; Comment, *supra* note 1, at 750.

6. *United States v. Rogers*, 289 F.2d 433, 435 (4th Cir. 1961); Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 Va. L. Rev. 123, 134 (1967); Comment, *supra* note 1, at 755.

charges which differ from those approved in *Allen* are occurring with increasing regularity.⁷ These courts are forced to determine whether a defendant's rights have been prejudiced by jury coercion resulting from the trial judge's defective instructions or from the circumstances under which the instructions were delivered.⁸ Factors to be considered on appeal include: the amount of time between the giving of an *Allen* charge and the rendition of a verdict;⁹ whether the trial judge was informed by the jury, either voluntarily or upon inquiry, as to the numerical breakdown of the jury;¹⁰ and, the wording of the trial judge's instruction.¹¹

In *United States v. Rogers*,¹² a verdict was returned within 17 minutes after the jury had reported its inability to agree and the trial judge had

7. Although the *Allen* charge is employed in both civil and criminal cases, attacks upon its use arise primarily in criminal cases, and it is in that context that this comment considers the charge.

8. *United States v. Johnson*, 432 F.2d 626, 633 (D.C. Cir.), *cert. denied*, 400 U.S. 949 (1970); *United States v. Fioravanti*, 412 F.2d 407, 419-20 (3d Cir. 1969); *Andrews v. United States*, 309 F.2d 127, 129 (5th Cir. 1962) (dissenting opinion); *Powell v. United States*, 297 F.2d 318, 322 (5th Cir. 1961); *State v. Thomas*, 86 Ariz. 161, 342 P.2d 197, 200 (1959); ABA STANDARD, *supra* note 1, at 155; Comment, *supra* note 1, at 759; 34 TUL. L. REV. 214, 215-16 (1959). Thus any time and expense saved at the trial level by use of the *Allen* charge is nullified on appeal. See *United States v. Johnson*, 432 F.2d 626, 632 (D.C. Cir. 1970); *United States v. Brown*, 411 F.2d 930, 933 (7th Cir. 1969); *Fulwood v. United States*, 369 F.2d 960, 963 (D.C. Cir. 1966); *Andrews v. United States*, 309 F.2d 127, 129 (5th Cir. 1962) (dissenting opinion); ABA STANDARD, *supra* note 1, at 155; Note, *supra* note 6, at 149. For statements to the effect that the *Allen* charge is growing in use, see *Thaggard v. United States*, 354 F.2d 735, 741 (5th Cir. 1965) (concurring opinion), *cert. denied*, 383 U.S. 958 (1966); *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir.) (concurring in part, dissenting in part), *cert. denied*, 370 U.S. 955 (1962).

Inquiry into the coercive effect of the trial judge's language and the circumstances surrounding the instruction is necessarily superficial since the issue of whether a juror was coerced is so subjective that a definitive finding is impossible. *United States v. Brown*, 411 F.2d 930, 933 (7th Cir. 1969); ABA STANDARD, *supra* note 1, at 153; Note, *supra* note 6, at 135. Hence reversals based on factors traditionally considered by the appellate courts occur only under the most flagrant violations. Comment, *supra* note 1, at 760.

9. *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961); *State v. Pierce*, 178 Iowa 417, 159 N.W. 1050 (1916). For a discussion of the inconsistencies in applying this factor see Comment, *supra* note 1, at 758.

10. *Williams v. United States*, 338 F.2d 530 (D.C. Cir. 1964); *Anderson v. United States*, 262 F.2d 764 (8th Cir.), *cert. denied*, 360 U.S. 929 (1959); *Bowen v. United States*, 153 F.2d 747 (8th Cir.), *cert. denied*, 328 U.S. 835 (1946).

11. *Thaggard v. United States*, 354 F.2d 735 (5th Cir. 1965); *Williams v. United States*, 338 F.2d 530 (D.C. Cir. 1964); *Powell v. United States*, 297 F.2d 318 (5th Cir. 1961).

12. 289 F.2d 433 (4th Cir. 1961).

given a deficient *Allen*-type instruction. Although the instruction had correctly stated that individual jurors could consider the opinions of their fellow jurors, it neglected to caution that the verdict should not represent a mere acquiescence in the majority opinion. Since this instruction was followed promptly by a verdict, the court concluded that the result could represent an acceptance by the minority of the majority's view.¹³

In *Burton v. United States*,¹⁴ the Supreme Court enunciated the principle that a trial judge may not inquire into the numerical division of the jury, even though he does not ask and is not informed which position either side is taking. The Court held that such inquiries tended to be coercive and therefore necessitated reversal per se.¹⁵ While *Burton* is still viable, the Court of Appeals for the Eighth Circuit has found no error when a trial judge inquired and was told that the jury was "pretty evenly divided," so long as the revelation was followed only by a carefully worded instruction.¹⁶

Deviations from the language of the original *Allen* charge have caused appellate courts to find minority juror coercion in reaching a verdict, but the distinction between acceptable and prohibited alterations is at times imperceptible. Thus, while the following deviations have been permitted: "Your failure to agree upon a verdict will necessitate another trial equally as expensive;"¹⁷ "I want you to go and decide this case for me. [A]nd return a verdict;"¹⁸ "It is a case that must be decided;"¹⁹ these have led to reversal: "[I]t is no credit to a juror to stand out in a pure spirit of stubbornness because he has taken a position,"²⁰ "[T]he rule is that the majority will have better judgment

13. *Id.* at 436-37

14. 196 U.S. 283 (1905) The Court's inquiry was followed by delivery of the *Allen* charge. *Id.* at 305.

15. *Brasfield v. United States*, 272 U.S. 448 (1926), *rev'g* 8 F.2d 472 (9th Cir. 1925). While the Supreme Court made no reference to the *Allen* charge, that such an instruction was given and raised on appeal is evidenced by the decision of the circuit court of appeals. *Brasfield v. United States*, 8 F.2d 472 (9th Cir. 1925).

16. *Anderson v. United States*, 262 F.2d 764 (8th Cir. 1959).

17. *Thaggard v. United States*, 354 F.2d 735, 738-39 n.2 (5th Cir. 1965).

18. *Sandefur v. Commonwealth*, 143 Ky 655, 137 S.W 504, 508 (1911).

19. *Silverman v. Travelers Ins. Co.*, 277 F.2d 257, 264 (5th Cir. 1960).

20. *Powell v. United States*, 297 F.2d 318, 320 (5th Cir. 1961). The trial judge also informed the jury "If you follow the principles of law given you by the Court and if you recall the evidence in this case you ought to be able to agree upon a verdict." *Id.* at 320. These two statements combined to place the charge beyond permissible limits.

than a mere minority " 21 "A jury may arbitrarily set at defiance law and reason, and refuse to convict the accused by returning a verdict of not guilty " 22

Due to the possible prejudice of defendants' rights²³ caused by deviations from the original *Allen* instruction and because of the resulting number of appeals, appellate courts have urged trial judges to stay within the bounds of the original *Allen* charge when delivering a supplemental instruction.²⁴ However, there has been mounting criticism of the *Allen* charge itself, based upon the theory that even in its original form, the *Allen* statement is coercive.²⁵ It is argued that the innumerable instances of review, often turning on subtle differences of fact, do not result in the efficient and just administration of law²⁶ In 1959, the Arizona Supreme Court stated:

It now appears that its continued use will result in an endless chain of decisions, each link thereof tempered and forged with varying facts and circumstances and welded with ever-changing personalities of the appellate court. This is not in keeping with sound justice and the preservation of human liberties and security We are convinced that the evils far outweigh the benefits, and decree that its use shall no longer be tolerated and approved by this court.²⁷

The lead of the Arizona Supreme Court has been followed by four other courts.²⁸

Several alternatives to the *Allen* charge have been suggested in lieu of complete abandonment of any supplemental charge aimed at promoting jury unanimity These alternatives include: altering the language of the charge so that it addresses the majority as well as the

21. *Green v. United States*, 309 F.2d 852, 854 (5th Cir. 1962).

22. *Wissel v. United States*, 22 F.2d 468, 470 (2d Cir. 1927).

23. It has been observed that employment of the *Allen* charge is more likely to result in a conviction than an acquittal. *Williams v. United States*, 338 F.2d 530, 531 n.2 (D.C. Cir. 1964); Comment, *supra* note 1, at 761-62. *But cf.* *United States v. Thomas*, 449 F.2d 1177, 1192 (D.C. Cir. 1971) (dissenting opinion).

24. *E.g.*, *Fulwood v. United States*, 369 F.2d 960, 963 (D.C. Cir. 1966).

25. Note 6 *supra*.

26. *See United States v. Brown*, 411 F.2d 930, 933 (7th Cir. 1969); ABA STANDARD, *supra* note 1, at 150; 34 TUL. L. REV. 214, 217 (1959).

27. *State v. Thomas*, 86 ARIZ. 161, 342 P.2d 197, 200 (1959).

28. *United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971); *United States v. Fioravanti*, 412 F.2d 407 (3d Cir. 1969); *United States v. Brown*, 411 F.2d 930 (7th Cir. 1969); *State v. Randall*, 137 Mont. 534, 353 P.2d 1054 (1960).

minority;²⁹ giving the charge before the jury has begun its deliberations;³⁰ and, framing the instruction in such a way that the jury is merely informed of its duty to reason together, omitting any emphasis on the necessity of a verdict.³¹

After a comprehensive inquiry into the problems created by the *Allen* charge and possible alternatives, the American Bar Association's Committee on the Criminal Trial recommended that the following standard be adopted:

Length of Deliberations: deadlocked jury

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

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

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

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

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

(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 the subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

29. Note, *supra* note 6, at 146.

30. *Burruv v. United States*, 371 F.2d 556, 558 (10th Cir.), *cert. denied*, 386 U.S. 1033 (1967); *Burroughs v. United States*, 365 F.2d 431, 434 (10th Cir. 1966); Note, *supra* note 6, at 147; 34 *TUL. L. REV.* 214, 217 (1959). *But see* *Burruv v. United States*, 371 F.2d 556, 559 (10th Cir. 1967) (Phillips, J., concurring), concluding that the *Allen* charge has such a potential for coercion that it should not be given until it appears necessary

31. *Burroughs v. United States*, 365 F.2d 431, 434 (10th Cir. 1966); Note, *supra* note 6, at 146-47; Comment, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge"*, 31 *U. CHI. L. REV.* 386, 393-94 (1964); 34 *TUL. L. REV.* 214, 217 (1959).

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.³²

In *United States v. Thomas*,³³ the most recent case to prohibit use of the *Allen* charge, it was decreed that trial courts in the District of Columbia must comply with the ABA standard,³⁴ and adopt the instruction approved by the ABA Committee.³⁵

The Court of Appeals for the District of Columbia has frequently encountered deviations from the original *Allen* charge, and the transition to an alternate instruction was inevitable. In 1966, the court had noted the considerable amount of work occasioned by these deviations from the *Allen* language and had urged trial judges to "[c]onsistently use a form of instruction plainly within *Allen*."³⁶ Four years later the court entertained yet another appeal based upon alterations of *Allen's* original language.³⁷ While affirming the conviction, the court recommended future compliance with the ABA standard, but, due to the absence of a full court, failed to make the ABA standard mandatory.³⁸ One year later, the court in *Thomas* mandated future compliance with the ABA proposal.

32. ABA STANDARD, *supra* note 1, at 145-46.

33. 449 F.2d 1177 (D.C. Cir. 1971) (en banc, under supervisory power).

34. The seventh circuit has also made compliance with the ABA standard mandatory on its district courts. *United States v. Brown*, 411 F.2d 930, 933-34 (7th Cir. 1969).

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

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

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

ABA STANDARD, *supra* note 1, at 146-47. The third circuit has adopted this instruction, omitting the first and last paragraphs. *United States v. Fioravanti*, 412 F.2d 407, 420 n.32 (3d Cir. 1969).

36. *Fulwood v. United States*, 369 F.2d 960, 963 (D.C. Cir. 1966).

37. *United States v. Johnson*, 432 F.2d 626 (D.C. Cir. 1970).

38. *Id.* at 633-34.

The ABA approved instruction has vastly improved the language of the original *Allen* instruction by omitting reference to minority juror reconsideration of judgment solely on the basis of minority membership.³⁹ Although it has provided a remedy for *Allen's* linguistic problems, the ABA standard does not rectify all of *Allen's* procedural infirmities. While the ABA standard has adopted the frequently encountered suggestion of permitting the trial judge to deliver the instruction before the jury begins deliberations,⁴⁰ regrettably it continues to allow repetition of the instruction should it later appear that the jury is unable to agree. In fact, the instruction may be given for the first time at that juncture. At this stage of the proceedings, a minority juror is likely to view any words indicating the desirability of a verdict as being directed his way. This judicial prodding, even though balanced by the admonition that no juror should surrender his honest conviction, may lead to coercion when coupled with similar entreatments from his fellow jurors.⁴¹ Thus, while the ABA instruction does not contain the potentially coercive language of *Allen*, even its modified phraseology may have a stultifying effect on the free will of minority members of a deadlocked jury.⁴²

Employment of the ABA approved instruction as a supplemental instruction is likely to perpetuate many of the problems appellate courts currently face when considering *Allen*-type charges. Since it appears that the ABA approved instruction is potentially coercive if delivered to a deadlocked jury, appellate courts should continue to consider the time period between delivery of the instruction and rendition of a

39. Because this portion of the original *Allen* charge contains no reference to majority jurors reconsidering their position, and therefore appears to place the trial judge on the side of the majority, it has been the most severely criticized. *United States v. Johnson*, 432 F.2d 626, 633 (D.C. Cir. 1970); *United States v. Fioravanti*, 412 F.2d 407, 417 (3d Cir. 1969); ABA STANDARD, *supra* note 1, at 147; Note, *supra* note 6, at 143; Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100, 139-40 (1968); Comment, *supra* note 1, at 754-56.

40. Note 30 *supra*.

41. Chief Justice Fuller has commented:

It is obvious that under any system of jury trials the influence of the trial judge is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.

Starr v. United States, 153 U.S. 614, 626. See also Comment, *supra* note 1, at 754-56.

42. No matter how blandly phrased, any instruction delivered once the jury is deadlocked will have a tendency to coerce minority jurors into changing their vote in order to produce a verdict. *United States v. Brown*, 411 F.2d 930, 932 (7th Cir. 1969); Note, *supra* note 6, at 148 n.101. See also Comment, *supra* note 1, at 754.

verdict.⁴³ Moreover, it would be naive to assume that the same trial judges who strayed from the language of the original *Allen* instruction will now invariably instruct in conformity with the ABA standard.⁴⁴ Therefore, appellate courts will continue to be plagued by protestations when the ABA instruction is not followed literally. Furthermore, employment of the ABA standard as a supplemental instruction may continue to block trial court inquiries into the numerical division of the deadlocked jury. It will be remembered that this helpful procedure⁴⁵ necessitated reversal per se when coupled with an *Allen*-type charge.⁴⁶

It appears that the average juror approaches his duty with a sense of responsibility and fairness.⁴⁷ If the minority juror begins deliberation in a favorable frame of mind and prior to deliberation is properly instructed of his duty to reason with other jurors, his failure to agree with the majority should be permitted to stand.⁴⁸ Comments from the bench at this psychological low-point in the proceedings are likely to fall on receptive ears and amount to judicial intrusion into the exclusive province of the jury. In adopting the ABA standard and approved instruction, the Court of Appeals for the District of Columbia has lessened the opportunity for prejudice to the defendant. But the possibility for coercion will continue to exist whenever trial judges employ a supplemental instruction geared toward producing a verdict. It is hoped that appellate courts in the future will adopt the ABA standard or similar instructions, but will prohibit the use of any such instruction after the jury has begun deliberations.

J. GRANT CORBOY

43. Note 9 *supra*. The effect of such a standard is to provide that an instruction may be reversible error if something occurs *after* it is given. ABA STANDARD, *supra* note 1, at 154. This supports the position that the problem lies with the use of any supplemental instruction directed toward producing a verdict.

44. *United States v. Thomas*, 449 F.2d 1177, 1192 (D.C. Cir. 1971) (dissenting opinion).

45. If the trial judge is informed that the jury is equally divided after substantial deliberation, declaration of a mistrial will avoid further expenditures of time. Conversely, upon disclosure of a small minority the judge may wish to send the jury back for further deliberations. *United States v. Rogers*, 289 F.2d 433, 435-36 (4th Cir. 1961). *But see* Comment, *supra* note 31, at 393, suggesting that sending the jury back without instruction may be coercive.

46. *Brafield v. United States*, 272 U.S. 448 (1926).

47. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 453-63 (1966).

48. The position has been taken that the hung jury performs a service equally as important as the jury which returns a verdict. *See generally* *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir. 1962); *State v. Randall*, 137 Mont. 534, 353 P.2d 1054, 1058 (1960).