Arkansas Law Review

Volume 75 | Number 1 Article 6

May 2022

The Future of the Allen Charge in the New Millennium

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THE FUTURE OF THE *ALLEN* CHARGE IN THE NEW MILLENNIUM

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I. INTRODUCTION

In matters of truth and justice, there is no difference between large and small problems, for issues concerning the treatment of people are all the same.[1]

Following the death of George Floyd on May 25, 2020, social and political movements grew rapidly nationwide to combat the prevalence of police brutality against African-American communities.[2] The impact of the ongoing Black Lives Matter movement has been observed in both cities across the United States and in related movements internationally.[3] This movement highlights the necessity for police reform and catalyzes the public's growing call for greater criminal justice reform. To achieve the goals of a fundamental reform of

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1. KENJI SUGIMOTO, ALBERT EINSTEIN: A PHOTOGRAPHIC BIOGRAPHY, 166 (Astrid Amelungse et al. eds., Schocken Books, Inc. 1989) (1987).

2. *See* Tim Arango et al., *How George Floyd Died, and What Happened Next*, N.Y. TIMES (Nov. 1, 2021), [https://perma.cc/4HZY-GJS8]; *see also* Elaine Godfrey, *The Enormous Scale of This Movement*, ATL. (June 7, 2020, 7:58 AM), [https://perma.cc/4ULB-AUBD].

3. Sophia Ankel, *30 Days that Shook America: Since the Death of George Floyd, the Black Lives Matter Movement Has Already Changed the Country*, BUS. INSIDER (June 24, 2020), [https://perma.cc/G77X-2WBE]; *see also* Daniel Odin Shaw & Saman Ayesha Kidwai, *The Global Impact of the Black Lives Matter (BLM) Movement*, GEOPOLITICS (Aug. 21, 2020), [https://perma.cc/4ZVN-BJUQ] (explaining the rise and ongoing prevalence of Black Lives Matter in England, France, and Belgium).

predatory judicial practices, every aspect of the judicial process—from arrest, trial, sentencing, and appeal—requires review.

Jury instructions are easily overlooked by the general public during judicial reform campaigns. However, these very instructions threaten the reliable administration of justice if intentionally or ignorantly misused. After attorneys rest their cases and deliver their closing arguments, jury instructions are the final true opportunity for either party to impact the jury's perception of the case.[4] The instructions that a jury hears outlines how it is to apply the given facts to the applicable legal standard.[5]

One such jury instruction that has led to over a century of controversy is the *Allen* Charge. The Supreme Court created the *Allen* Charge in its 1896 ruling Allen v. United States.[6] After over a century of use, the *Allen* Charge has created controversy through its ability to empower presiding judges to force a hung jury back into deliberations after a discordant return.[7] At the heart of the *Allen* Charge debate lies a single core issue—a presiding judge's ability to coerce jurors into agreeing to a ruling that they do not believe is proper.[8] Further, the issuance of an *Allen* Charge risks depriving a criminal defendant of the tactical use of a hung jury.[9] A hung jury consists of two parties of jurors—the majority and the minority.[10] If a jury is unable to provide a unanimous decision, the presiding judge declares a mistrial, and there are three potential outcomes: (1) a new jury is selected and a new trial proceeds; (2) the prosecution and defense reach an agreement

4. *How Courts Work: Instructions to the Jury*, AM. BAR ASS'N (Sept. 9, 2019), [https://perma.cc/RRF4-X8U2] [hereinafter *ABA: Instructions to the Jury*].

5. *Id.*

6. *See generally* Allen v. United States, 164 U.S. 492 (1896).

7. Samantha P. Bateman, Comment, *Blast It All:* Allen *Charges and the Dangers of Playing with Dynamite*, 32 U. HAW. L. REV. 323, 324 (2010).

8. *See id.*; Comment, *Deadlocked Juries and Dynamite: A Critical Look at the "*Allen *Charge"*, 31 U. CHI. L. REV. 386, 386-87 (1963) [hereinafter *Deadlocked Juries and Dynamite*].

9. *How Courts Work: Mistrials*, AM. BAR ASS'N (Sept. 9, 2019), [https://perma.cc/5JHC-7NFJ].

10. *See* David M. Stanton, United States v. Arpan*: How Does the Dynamite Charge Affect Jury Determinations?*, 35 S.D. L. REV. 461, 472 (1990).

outside of court; or (3) the prosecution simply decides to drop the charges.[11]

Given that the 125th anniversary of the *Allen* ruling passed in December 2021, it is far past time to conclusively address the consequences of the *Allen* Charge.[12] Almost every federal and state judicial system has created a unique approach to the *Allen* Charge, with the widest variety of approaches being at the state level.[13] This discrepancy of practices creates an inconsistent application of legal protections. Depending on where a defendant faces criminal charges, the protection he or she receives is likely different from those that a similarly situated defendant receives in an adjacent state.[14] The American Bar Association ("ABA") hoped to remedy these concerns upon release of its model jury instructions in 1968.[15] The ABA believed that this new model instruction addressed the coercive aspects of the *Allen* Charge.[16] However, while some states adopted the ABA model instructions, not enough did so to trigger an overwhelming change in *Allen* Charge practices.

To combat the prevalence of coercive *Allen* Charge practices, this Comment introduces what the author has deemed the "Post-Millennium *Allen* Charge."[17] This newly created *Allen*-type instruction seeks to revitalize this withered practice to accord with the modern legal landscape. Creating this new charge requires a single admission; an *Allen*-type charge in any form carries the risk of undue coercion. The Post-Millennium *Allen* Charge seeks to limit the potential for undue coercion by gathering beneficial elements from *Allen* Charge practices in the

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11. *How Courts Work: Jury Deliberations*, AM. BAR Ass'n (Sept. 9, 2019), [https://perma.cc/873Q-QHJF].

12. Current as of April 2022. The Supreme Court declared its ruling on December 7, 1896. Allen v. United States, 164 U.S. 492 (1896).

13. This Comment will focus specifically on the discrepancy of *Allen* Charge practices among state judicial systems. A number of states recognize the use of *Allen* Charges for both civil and criminal cases; however, this Comment will focus solely on case law and statutory language that affects criminal cases.

14. *See infra* Appendices I-V.

15. AM. BAR ASS'N: ADVISORY COMM. ON THE CRIM. TRIAL, STANDARDS RELATING TO TRIAL BY JURY § 5.4 (1968).

16. *Id.*

17. "Post-Millennium *Allen* Charge" is a term of art created by the author for purposes of identifying a new model instruction.

fifty states. For this new model instruction to gain traction, it must contain features that appeal to the vast majority of state judiciaries and provide coherent instructions that leave little discrepancy in its implementation. With this necessity for reform in mind, this Comment seeks to accomplish two fundamental goals. First, it categorizes and examines the *Allen* Charge practices of all fifty states.[18] Second, these state practices are dissected and used to construct the newly proposed Post-Millennium *Allen* Charge.[19]

Part II begins the substantive discussions of this Comment by outlining the development of the *Allen* Charge. First, it examines the history of *Allen* and its key predecessor case, Commonwealth v. Tuey. Next, it highlights the most heavily recognized—and scrutinized—features of the *Allen* Charge. Part III dissects the controlling *Allen* Charge practices in all fifty states. The first subsection focuses on Massachusetts and Connecticut, states that have never formally adopted the *Allen* Charge but have implemented *Allen*-type practices. Next, the Comment examines the ABA's model *Allen* Charge instruction and the implementation of the instruction into state practice. Third, the discussion turns to those states that have banned the *Allen* Charge completely or in part. The final examination is of states that have placed no limitations—or only partial limitations—on the use of *Allen* Charges. Part IV concludes the Comment with the proposed Post-Millennium *Allen* Charge.

II. DEVELOPMENT OF THE *ALLEN* CHARGE

The purpose of this background section is to offer two supporting layers of information for the analysis that follows. First, the creation of the *Allen* charge is examined through an analysis of the procedural and factual history of both *Tuey*[20] and *Allen*.[21] Second, the *Allen* Charge's coercive areas, as identified

18. Current through 2021. This Comment recognizes the debates regarding the *Allen* Charge in the jurisdictions of Washington D.C. and other U.S. territories but has chosen to not include them in the present discussion.

19. *See infra* Part IV.

20. Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1, 3 (1851).

21. Allen v. United States, 164 U.S. 492, 501-02 (1896).

by both scholars and practitioners, are examined to outline the systemic problems within *Allen*-type charges. This background knowledge serves as the skeleton frame of the analysis to follow.

A. History of the *Allen* Charge

The Supreme Judicial Court of Massachusetts unknowingly laid the groundwork for the *Allen* Charge in 1851.[22] In *Tuey*, the Supreme Judicial Court of Massachusetts found that the wording and application of a set of proto-*Allen* instructions did not have an undue coercive effect on the jurors.[23] Specifically, the court ruled that the presiding judge properly instructed the jurors in the minority to reassess their perspectives after the jury returned deadlocked.[24] The court supported that minority jurors who find that their perspectives of the case are in opposition to the majority should use that as a hint to review the evidence.[25] In his appeal, Tuey argued that the given instructions represented an action "equivalent to a direction."[26] Despite his best efforts, the court upheld Tuey's guilty verdict and laid the groundwork for the introduction of the *Allen* Charge four decades later.[27]

By 1896, Alexander Allen had successfully appealed two convictions for the murder of Phillip Henson.[28] With the murder taking place in Cherokee Territory, Allen's trials took place before the infamous "Hanging Judge" Isaac C. Parker of the Western District of Arkansas.[29] Allen's appeals of his first two

22. *Tuey*, 62 Mass. (8 Cush.) at 1.

23. *Id.* at 3-4. "Proto" prefix is used here to represent the origin of the set of instructions that would later become known as "*Allen* Charges." *Proto-*, DICTIONARY.COM, [https://perma.cc/Y2DV-TGBW] (last visited Feb. 26, 2021).

24. *Tuey*, 62 Mass. (8 Cush.) at 3-4.

25. *Id.*

26. *Id.* at 3.

27. *Id.* at 3-4.

28. Allen v. United States, 150 U.S. 551, 561-62 (1893) (describing reversal and remand of Allen's first conviction); *see also* Allen v. United States, 157 U.S. 675, 681 (1895) (describing reversal and remand of Allen's second conviction).

29. David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293, 313-15 (2000). Judge Isaac C. Parker received the moniker the "Hanging Judge" based on his affinity for the use of capital punishment. *Judge Isaac C. Parker*, NAT'L PARK SERV., [https://perma.cc/8LT6-TZ5K] (last visited Nov. 12, 2021).

convictions brought into dispute the facts regarding who initiated the confrontation, if Allen had a duty to retreat, and whether Allen admitted guilt when he fled the scene.[30] However, Allen's appeal of his third murder conviction is the scene where the cornerstone of over a century of controversy has laid.[31] In this appeal, Allen brought into dispute whether Judge Parker's jury instruction was unduly coercive over the minority.[32] Unfortunately for Allen, the United States Supreme Court found little merit in his claim.[33]

In his opinion, Justice Henry B. Brown spent little time evaluating the merits of the instruction given by Judge Parker.[34] The language of the instruction approved by the Supreme Court in *Allen* came almost verbatim from *Tuey*.[35] The relevant portions of the instruction included:

> But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves, whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated; and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.[36]

Summarizing the instruction, Justice Brown acknowledged that the charge placed pressure on the minority out of an interest

30. *Allen*, 150 U.S. at 560-61; *Allen*, 157 U.S. at 678-80; Allen v. United States, 164 U.S. 492, 498-99 (1896).

31. *Allen*, 164 U.S. at 501.

32. *Id.*

33. *Id.* at 501-02.

34. *Id.* at 501.

35. *Id.*

36. Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1, 2-3 (1851).

to reach a unanimous verdict.[37] However, in this acknowledgment, Justice Brown found that there was no reversible fault with the instruction.[38] The deliberation process is described by Justice Brown as an opportunity to achieve "unanimity by a comparison of views . . . [among] equally honest, equally intelligent" jurors.[39] The opinion in *Allen* seems to praise the instruction for applying pressure on those in the minority to not "close [their] ears" from the arguments of their fellow jurors.[40] Effectively, Justice Brown argued that the deliberation room's purpose was to host an exchange of ideas and emotions in an effort to obtain solidarity among the jurors.[41] Despite outlining the importance of these principles, the Justice failed to mark the extent to which a judge may reasonably instruct jurors. Although Justice Brown's opinion only considered the validity of Judge Parker's instruction for two paragraphs, *Allen* has become the principal case for this classification of jury instructions.[42]

B. Coercive Effects of the *Allen* Charge

Throughout the 1900s, a number of state judiciaries have turned their backs on the *Allen* Charge, with many notably adopting the ABA's model instruction.[43] The cited reasons why these courts have chosen to abandon the precedent set in *Allen* stems from a wariness of the *Allen* Charge's inherent coerciveness.[44] When speaking of the "coercive effects" of the *Allen* Charge, the focus is specifically on the ability of a presiding judge to pressure a juror in the minority to "substitute the majority's opinion for his own."[45] The charge's reputation for

37. *Allen*, 164 U.S. at 501-02.
38. *Id.* at 502.
39. *Id.* at 501.
40. *Id*. at 501-02.
41. *Id*. at 501.
42. *Allen*, 164 U.S. at 501-02; *see also Deadlocked Juries and Dynamite*, *supra* note 8, at 386.
43. J. Grant Corboy, *Trial Procedure – Bombshell Instruction for Deadlocked Juries: A.B.A Standard Replaces Allen Charge in District of Columbia*, 13 WM. & MARY L. REV. 672, 676-80 (1972); Karen P. O'Sullivan, *Deadlocked Juries and the Allen Charge*, 37 ME. L. REV. 167, 168 (1985); *see also infra* Appendix II.
44. *Deadlocked Juries and Dynamite*, *supra* note 8, at 386.
45. *Id.* at 386-87.

overcoming the most resilient of jurors has earned it the common epithet as the "dynamite charge."[46] To overcome this negative characterization, *Allen* Charge supporters heavily rely on the argument that the instructions are necessary for the sake of judicial economy.[47] In essence, presiding judges must consider the cost of conducting a new trial when determining whether giving an *Allen* Charge is proper.[48] In an effort to overcome the argument of the charge's supporters, *Allen* Charge dissenters have focused on various elements within the *Allen* Charge that they view as the primary roots of the coercive threat. The two broad categories that this Comment is focused on are: (1) the undue pressure placed on the minority; and (2) the coercive actions of presiding judges during presentation of the charge.

1. Pressure on the Minority

The modern jury deliberation room is likely not as captivating as it is made out to be in the hit 1957 film *Twelve Angry Men*. Throughout the film, through the use of logic and passionate speeches, the stoic hero aids his fellow jurors in recognizing that they, the majority, were wrong in their assumption of the defendant's guilt.[49] While these scenes may inspire legal experts and laypeople alike, they do not represent the reality of the dynamic between jurors.

One of the most significant threats against jury independence is an *Allen* Charge that places direct pressure on the minority.[50] Upon receiving an *Allen* instruction, jurors in the minority are

46. Paul Marcus, *The Allen Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused?*, 43 MO. L. REV. 613, 615 (1978); Bateman, *supra* note 7, at 325.

47. *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 VA. L. REV. 123, 125 (1967).

48. *Judicial Economy*, BLACK'S LAW DICTIONARY (11th ed. 2019).

49. 12 ANGRY MEN (Orion-Nova Productions 1957).

50. Green v. State, 569 S.E.2d 318, 323 (S.C. 2002) (explaining South Carolina's ban on any *Allen*-type instructions that mention either the minority or majority); *see also Deadlocked Juries—The "Allen Charge" is Defused*—United States v. Thomas, 6 U. RICH. L. REV. 370, 375 (1972) (describing the threat an *Allen* Charge poses to an independent jury ruling) [hereinafter *Deadlocked Juries: Thomas*].

more likely to change their stance than those in the majority.[51] Further, the use of an *Allen* Charge has shown to "short-circuit the usual leniency bias" of a jury.[52] In essence, upon issuance of an *Allen* Charge, jurors become more likely to shift their perception of the case to favor a guilty verdict.[53] The use of the *Allen* Charge serves only to boost the majority's morale and allows for this party to apply undue pressure on the minority.[54]

The importance of protecting the minority from undue coercion is seen once again in the discussion of hung juries. The right to a mistrial without a unanimous verdict is crucial in the pursuit of justice.[55] While both the prosecutorial and defense teams may indicate that a decisive ruling is preferable, to imply that a hung jury has no place in the legal system is dangerous. As previously discussed, those leaning towards an acquittal break under the pressure of a majority that believes the defendant is guilty.[56] By not allowing for deadlocked juries to occur, a judge is—in essence—depriving a defendant of a tactical tool to secure lesser charges, have the charges against them dropped, or an opportunity to obtain a more sympathetic jury pool.[57]

2. Presentation of the Allen *Charge*

Criticisms of the *Allen* Charge focus heavily on specific aspects of the presentation of the charge that lend power to the presiding judge to sway the deliberation process. A number of these criticisms serve as the basis of judgments made by state courts and legislatures nationwide. The most frequent of these

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51. Vicki L. Smith & Saul M. Kassin, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries*, 17 L. & HUM. BEHAV. 625, 632 (1993).

52. *Id.* at 640.

53. *Id.*

54. Corboy, *supra* note 43, at 679 (explaining that the use of the *Allen* Charge has the greatest effects on jurors in the minority); *see also* Smith & Kassin, *supra* note 51, at 639.

55. *See* Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J. L. REFORM 569, 581-83 (2007).

56. Corboy, *supra* note 43, at 679; *see also* Smith & Kassin, *supra* note 51, at 639-40.

57. *When a Tie is Really a Win: Hung Juries and Mistrials*, SCROFANO L. (Mar. 31, 2017), [https://perma.cc/K4GK-6MWQ] (describing the possible outcomes following a hung jury).

criticisms are: (1) the use of "final test" language;[58] (2) the presiding judge's knowledge of the numerical split of the jury;[59] (3) the specific language used during the delivery of the instruction;[60] (4) when the presiding judge chooses to deliver the charge;[61] and (5) if the presiding judge repeats the charge after it is first issued.[62]

The "final test" criticism references multiple issues regarding the duties of the jury.[63] A presiding judge who uses "final test" language often misrepresents the duties of the jury in order to illicit a unanimous decision.[64] The presiding judge informs jurors that they must reach a final verdict and that their duties as jurors only end upon reaching said verdict.[65] This is at the very least a misrepresentation of the law and at most an intentional attempt to coerce the jury into reaching a verdict endorsed by the judge. A presiding judge takes further coercive actions if he or she inquires about the numerical split of the jury and uses the given information to determine if an *Allen* Charge is necessary.[66] However, the likelihood of coercion is lower if the jury approaches the presiding judge regarding the split vote

58. State v. Norquay, 2011 MT 34, 359 Mont. 257, 264-69, 248 P.3d 817, 822-25 (defining and barring use of "final test" language).

59. Desmond v. State, 654 A.2d 821, 826-28 (Del. 1994) (ruling that a presiding judge should not inquire into the numerical split of a hung jury prior to delivering an *Allen* Charge).

60. Kelly v. State, 310 A.2d 538, 542 (Md. 1973) (stating that an instruction that strays from ABA model language and given after a jury has started deliberation will face higher scrutiny upon appeal); *see also* Maxwell v. State, 828 So. 2d 347, 365 (Ala. Crim. App. 2000) (ruling that the coerciveness of a given charge can be determined based on the specific language used during delivery).

61. State v. Whitaker, 872 P.2d 278, 285-86 (Kan. 1994) (finding that it is less prejudicial to deliver an *Allen* Charge prior to deliberations).

62. Elmer v. State, 463 P.2d 14, 21-22 (Wyo. 1969) (instructing that an *Allen* Charge should not be given after jury deliberations begin and that a repeated charge should be read alongside all other relevant jury instructions); *see also* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE § 15-5.4 (3d ed. 1996) [hereinafter ABA MODEL INSTRUCTION]; *cf.* Almeida v. State, 157 So. 3d 412, 415-16 (Fla. Dist. Ct. App. 2015) (ruling that presiding judges in Florida state courts may not repeat an *Allen* Charge more than once).

63. *Norquay*, 2011 MT 34 at ¶¶ 38-42.

64. *See id.*

65. *Id.*

66. Desmond v. State, 654 A.2d 821, 827 (Del. 1994); *see also* People v. Saltray, 969 P.2d 729, 733 (Colo. App. 1998) (ruling that presiding judges in Colorado may not directly inquire about the numerical split of a hung jury).

without prompt.[67] Many jurisdictions have also limited the language that a presiding judge uses when issuing an *Allen* Charge.[68] Any charge that uses different language than an approved example—or simply uses language that is widely accepted as unduly coercive—faces higher scrutiny and is at a higher risk of being overturned.[69]

The final criticisms levied seek to restrict when a presiding judge can issue an *Allen* Charge. Many jurisdictions state a preference for the presentation of an *Allen* Charge in the pre-deliberation period.[70] These jurisdictions require (or strongly recommend) presiding judges to issue the charge alongside all other jury instructions.[71] In doing so, it is thought that the coercive language of the *Allen* Charge is lessened due to it not being singled out.[72] This further lessens the impact of the charge on individual jurors since clear groupings of the majority and minority are not yet set. However, if a jurisdiction chooses to allow for the reissuance of the charge, it often limits the number of times a presiding judge may do so.[73] A totality of the circumstances test is often implemented to determine whether the choice to repeat the given charge is unduly coercive in a given case.[74]

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67. *Desmond*, 654 A.2d at 827.

68. Kelly v. State, 310 A.2d 538, 542 (Md. 1973) (stating that an instruction that strays from ABA model language and given after a jury has initiated deliberations will face higher scrutiny upon appeal).

69. *Id.*

70. *See, e.g.*, State v. Whitaker, 872 P.2d 278, 286 (Kan. 1994).

71. *Id.*; *see also* Elmer v. State, 463 P.2d 14, 22 (Wyo. 1969).

72. *See Whitaker*, 872 P.2d at 286; *Elmer*, 463 P.2d at 22.

73. ABA MODEL INSTRUCTION, *supra* note 62, § 15-5.4; *see also* Almeida v. State, 157 So. 3d 412, 415-16 (Fla. Dist. Ct. App. 2015) (ruling that presiding judges in Florida state courts may not repeat an *Allen* Charge more than once).

74. *See* State v. Souza, 425 A.2d 893, 900 (R.I. 1981) (ruling that a presiding judge must consider case-specific circumstances when considering whether to issue an *Allen*-type instruction); *see also* Maxwell v. State, 828 So. 2d 347, 365 (Ala. Crim. App. 2000) (quoting Miller v. State, 645 So. 2d 363, 366 (Ala. Crim. App. 1994)) (stating that the "whole context" of a given case must be used to determine the coerciveness of a given charge).

III. *ALLEN* CHARGE PRACTICES IN THE FIFTY STATES

Justice consists not in being neutral between right and wrong, but in finding out the right and upholding it, wherever found, against the wrong.[75]

Whether or not one agrees or disagrees with the Supreme Court's ruling in *Allen*, ignoring that the ruling has resulted in a mosaic of case law and statutes across the state judicial systems promotes the unequal treatment of criminal defendants nationwide. This outcome undermines the necessity for uniformity for legal concepts and practices of this caliber. Unfortunately, the simple solution of an outright ban of *Allen*-type charges does not provide the necessary solution to the coercive question. The *Allen* Charge has proven to be a hydra; a killing blow may seemingly be struck, but new *Allen*-type charges rise in its place. Instead—if the *Allen* Charge is to be effectively implemented—the proposed *Post-Millennium Allen Charge* must limit the specific weaknesses of the base charge. The following analysis does not seek to outline the *Allen* Charge practices of every state to the fullest extent but rather classifies states based on (1) their historical treatment of the *Allen* Charge and (2) specific features in a state's practice that address the concerns discussed in Section II.B. of this Comment. The broad sub-categories explored are: (A) the outliers; (B) states that have adopted the ABA model instruction; (C) states that have implemented *Allen* Charge bans; and (D) those states that still allow the use of the *Allen* Charge.

A. The Outliers

An appropriate place to begin our examination of the *Allen* Charge is by examining those states that have never taken part in the *Allen* Charge debate. These outliers, Massachusetts and Connecticut, have implemented *Allen*-type charges, but have

75. QUOTATIONS OF THEODORE ROOSEVELT 30 (2004).

done so outside the parameters of the *Allen* decision.[76] In doing so, they have avoided the last century of national debate and instead nurtured the growth of their own *Allen*-type charges within the boundaries of their states. Understanding the outcomes of these debates will set the stage for what to expect as the practices of various *Allen* Charge jurisdictions are later discussed. The following discussion centers on the (1) *Tuey* Charge of Massachusetts and (2) the *Chip Smith* Charge of Connecticut.

1. Massachusetts

The first state in the spotlight is Massachusetts. Instead of adopting the *Allen* Charge, the state adopted the guidelines of *Allen*'s predecessor, *Tuey*.[77] The *Tuey* Charge, now known as the *Tuey-Rodriquez* Charge, is still an accepted practice in Massachusetts but has seen limited use.[78] However, in recent decades the Judiciary of Massachusetts has imposed a series of limitations on the charge that seeks to limit the probability of undue coercive acts. Notably, a *Tuey* Charge in Massachusetts may no longer use language that places undue pressure on the minority of the jury.[79] The Supreme Judicial Court of Massachusetts recognized this weakness in *Commonwealth v. Rodriquez* and chose to end the practice affirmatively.[80] In its decision, the court corrected the model jury instruction by removing any mention of the minority versus majority distinction and changed the wording to emphasize that all parties within the jury are to reconsider whether their views are reconcilable with those on the opposing side.[81]

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76. Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1, 2-3 (1851) (establishing the practice of the "*Tuey* Charge" as the appropriate jury instruction to give to deadlocked juries in Massachusetts); *see also* State v. Smith, 49 Conn. 376, 386 (1881) (creating the *Chip Smith* charge).

77. *Tuey*, 62 Mass. (8 Cush.) at 2-3. *See generally* EDWARD M. SWARTZ, TRIAL HANDBOOK FOR MASSACHUSETTS LAWYERS § 35:9 (3d ed. 2020).

78. *Tuey*, 62 Mass. (8 Cush.) at 2-3; *see also* Commonwealth v. Rodriquez, 300 N.E.2d 192, 200-03 (Mass. 1973) (controlling case that served as catalyst of revision of *Tuey* Charge practices).

79. *See Rodriquez*, 300 N.E.2d at 201, 203.

80. *Id.* at 201-03.

81. *Id.* at 203.

The court in *Rodriquez* also chose to limit the ability of judges to give a *Tuey* Charge that states, "the case must at some time be decided."[82] This stricken-out language unduly stated that the jury had to reach a unanimous verdict.[83] Simply put, whether it be a conviction or acquittal, it is improper to state that a decision is required. In its dismissal of this language, the court decries any slight material change to an instruction that has a coercive effect.[84] Any instructions that reference the monetary or time cost of the ongoing proceedings—or future proceedings—are also unduly coercive.[85]

The Supreme Judicial Court has addressed limitations on how the charge is presented as well. In *Commonwealth v. Rollins*, the court banned the use of the charge in an indiscriminate or premature manner.[86] However, a presiding judge has the discretion to give a *Tuey* Charge based on the length of deliberations and the overall complexity of the given case.[87] What is not in the presiding judge's discretion, however, is the language of the charge.[88] When a judge announces a *Tuey* Charge, the charge is read in its entirety, and the judge cannot stray from the approved language.[89] A presiding judge who strays from the approved language jeopardizes the efforts of the higher courts to limit the coercive effects of the charge, and thus, the presiding judge's actions are found to be unduly coercive.[90]

The *Tuey* Charge has been thoroughly vetted by the Massachusetts courts. In doing so, the *Tuey* Charge has become a model of what a limited *Allen*-type charge should strive to achieve. The specific areas that the courts have addressed are the same areas that *the Post-Millennium Allen Charge* must limit if it hopes to overcome the inherently coercive nature of the *Allen* Charge.

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82. *Id.* at 201 (quoting *Tuey*, 62 Mass. (8 Cush.) at 1) (internal quotation marks omitted).

83. *Id.* at 200-01.

84. *Rodriquez*, 300 N.E.2d at 202.

85. Commonwealth v. Brown, 323 N.E.2d 902, 906, 907 (Mass. 1975).

86. 241 N.E.2d 809, 814 (Mass. 1968).

87. Commonwealth v. Haley, 604 N.E.2d 682, 688 (Mass. 1992).

88. Commonwealth v. O'Brien, 839 N.E.2d 845, 848 (Mass. App. Ct. 2005).

89. *Id.*

90. *Id.*

2. Connecticut

The second outlier to discuss is Connecticut. Like the *Tuey* Charge of Massachusetts, the *Chip Smith* Charge of Connecticut predates the *Allen* Charge.[91] The *Chip Smith* Charge derives its name from the 1881 case *State v. Smith*.[92] In what proves to be a long list of arguments upon appeal, the creation of the *Chip Smith* Charge comes in a single paragraph.[93] In its conclusion of issue eleven brought forth by Smith, the Supreme Court of Errors of Connecticut alluded to the *Tuey* decision in concluding that it is proper for a presiding judge to give an instruction that urges jurors in the minority to reconsider their position.[94] In a divergence from the Supreme Judicial Court of Massachusetts, the Supreme Court of Connecticut has instead chosen to uphold a number of the coercive aspects of the *Chip Smith* Charge.[95]

Unlike its relative in Massachusetts, the *Chip Smith* Charge's adopted language allows presiding judges to place pressure on "dissenting jurors" to consider if their votes are reasonable.[96] The Supreme Court of Connecticut argues that the use of "balancing language" counteracts the coercive effects of singling out dissenting jurors.[97] This "balancing language" instructs jurors to "express [their] own conclusion[s]" and that it is improper for them to "merely . . . acquiesc[e] in the conclusion[s] of [their] fellow jurors."[98] The court confidently states that, even if the language directed at the minority is improper, the balancing language nullifies this effect.[99] This line of argument is prevalent in many jurisdictions that have done little to limit the *Allen* Charge's coercive nature.[100]

In *State v. Feliciano*, the court allows the reading of the *Chip Smith* Charge multiple times.[101] The state courts of Connecticut

91. *See* State v. Smith, 49 Conn. 376, 381, 386 (1881).
92. *Id.* at 381.
93. *Id.* at 386.
94. *Id.*
95. State v. O'Neil, 207 A.2d 730, 746 (Conn. 2002).
96. *Id.* at 745-46.
97. *Id.* at 746.
98. *Id.*
99. *Id.*
100. *See, e.g.*, State v. McArthur, 899 A.2d 691, 706-07 (Conn. App. Ct. 2006).
101. 778 A.2d 812, 821 (Conn. 2001).

argue that if a presiding judge appropriately issues a charge the first time, there is no fault with the same instruction being repeated multiple times.[102] Comments by presiding judges that place pressure on jurors to reach a conclusive decision have also been approved.[103] While Connecticut courts discourage the mention of the costs associated with a mistrial, they have affirmed the use of such instructions upon appeal.[104] To support these rulings, they state that the potential coercive effects of the additional language are nullified if the presiding judge accurately states the commonly accepted language of the *Chip Smith* Charge.[105]

The *Chip Smith* Charge practice in Connecticut is exactly what the Post-Millennium *Allen* Charge seeks to overcome. Essentially, presiding judges are given free rein to use the charge at their discretion. This practice inappropriately increases the threat of an unduly coercive act of a presiding judge. For the Post-Millennium Allen Charge to be successful, it must not mirror the mistakes of the *Chip Smith* Charge.

B. American Bar Association Recommended Instruction

Decades after the first approval of the *Allen* Charge, the ABA created a model *Allen*-type instruction that addressed the rampant coercive issues relating to the charge.[106] The creation of the ABA model instruction served as a hopeful counter against the wild landscape of *Allen* Charge practices in state courts. This model *Allen* Charge was carried into the twenty-first century within Section 15-5.4 of the *Trial by Jury Standards*.[107] Section 15-5.4's model instruction states that:

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

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102. *Id.*

103. *McArthur*, 899 A.2d at 705-07.

104. *Id.* at 706, 708.

105. *Id.* at 707.

106. AM. BAR ASS'N: ADVISORY COMM. ON THE CRIM. TRIAL, STANDARDS RELATING TO TRIAL BY JURY § 5.4 (1968).

107. ABA MODEL INSTRUCTION, *supra* note 62, § 15-5.4.

> (1) that in order to return a verdict, each juror must agree thereto;
>
> (2) 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;
>
> (3) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;
>
> (4) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and
>
> (5) that no juror should surrender his or her honest belief as to the weight or effect of the evidence solely because of the opinion of the other 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 section (a). The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.[108]

As seen in the model language above, the ABA's greatest concern regarding *Allen* Charges seems to be the abuse of the minority.[109] Specifically, sections 5.4(a)(3)-(5) outline the duty of the jurors to balance the need for independent conclusions with the necessary considerations of the views of their fellow jurors.[110] This approach to handling the minority issue reflects the efforts of Massachusetts to limit the coercive effort of the *Tuey* Charge.[111] If one desires to take pressure off those in the minority, the simple solution seems to be to limit the mention of any party within given instructions. The model ABA instruction also addresses the issues of giving an *Allen* Charge multiple times

108. *Id.*
109. *Id.*
110. *Id.* § 15-5.4(a)(3)-(5).
111. Commonwealth v. Rodriquez, 300 N.E.2d 192, 201 (Mass. 1973).

to the same jury.[112] Section 5.4(b) allows for a presiding judge to repeat the charge multiple times if he or she deems it necessary.[113] However, Section 5.4(b) limits the use of repeat charges that threaten a jury into reaching a unanimous verdict or force deliberations to extend for an unreasonable amount of time.[114]

The ABA model *Allen* Charge provides a necessary and strong foundation for the *Post-Millennium Allen Charge*. However, as is the case with many recommended practices, the ABA model instruction's effectiveness is limited by the number of states that adopt it. Studying the states that have adopted the ABA model instruction provides information on the strengths and weaknesses of this category of charges. In the following discussion, the focus will shift to states that have (1) adopted the ABA model instruction; (2) co-opted language from the ABA model; or (3) performed a "soft adoption" of the ABA model instruction.

1. Adopted ABA Model Instruction

Very few states have adopted the ABA model instruction in its entirety. The only states to have fully adopted the use of the ABA instruction thus far are (1) Illinois; (2) Maine; (3) Minnesota; (4) Vermont; (5) Tennessee; (6) New Jersey; and (7) Michigan.[115] While the ABA model instruction requires fine-tuning, the Supreme Court of Illinois describes the model instruction as being the current best option to "resolve the many questions created by the uncertainty . . . [of] instructing a jury that is in disagreement."[116] In its adoption of the ABA model instruction, the Supreme Judicial Court of Maine decried the use of any *Allen* Charge or any modified charge that achieved the same purpose.[117] This adoption of the ABA instruction is less of an acknowledgment of the strength of the ABA recommendations and is more likely a preventive action to avoid future abuse of

112. ABA MODEL INSTRUCTION, *supra* note 62, § 15-5.4(b).
113. *Id.*
114. *Id.*
115. *See infra* Appendix II.A.
116. People v. Prim, 298 N.E.2d 601, 609 (Ill. 1972).
117. State v. White, 285 A.2d 832, 838 (Me. 1972).

Allen Charges.[118] The Supreme Judicial Court of Maine seems more inclined to an outright ban of the use of *Allen*-type charges and adopted the ABA standards as a stepping stone towards this goal.[119] This distinction of a preference for the outright elimination of *Allen*-type charges brings a thought-provoking debacle to the surface. Despite their seemingly best efforts, states that have banned the use of *Allen* Charges have simply replaced the charge with a pseudo-*Allen* Charge that carries with it the same potential for coercion.[120] As discovered by the Supreme Judicial Court of Maine, the best option to overcoming the challenges posed by *Allen* is to choose the least threatening option.

The Supreme Court of Minnesota gave a resounding rebuttal of the use of the *Allen* Charge in *State v. Martin*.[121] In its ruling, the court outlined the specific coercive features of the *Allen* Charge that are overcome by the ABA model instruction.[122] Like the courts in Massachusetts, the feature of the *Allen* Charge that the Supreme Court of Minnesota found to be the most egregious was the undue pressure that it placed on the minority.[123] The egregiousness of this aspect of the instruction intensified upon consideration that the base *Allen* Charge seemingly takes the side of the majority.[124] Further, the court found error in the practice of instructing juries that "a case must at some time be decided."[125] To end its blitz of the *Allen* Charge, the Supreme Court of Minnesota rebuked the common argument of judicial economy.[126] The court found that "[h]ung juries are not a serious problem in . . . criminal cases" and that allowing coercive instructions to overcome such a trivial problem is "too dear a price to pay for relieving court congestion."[127] In this final refutation, the Supreme Court of Minnesota cemented the death of the *Allen*

118. *Id.*
119. *See id.*
120. *See infra* Appendix III.B.
121. *See* 211 N.W.2d 765, 765, 769-71 (Minn. 1973).
122. *See generally id.*
123. *Id.* at 771.
124. *See id.*
125. *Id.* at 769.
126. *Martin*, 211 N.W.2d at 770-71.
127. *Id.* at 771.

Charge in the state and provided a key counterargument to *Allen* Charge dissenters.

In *State v. Perry*, the Supreme Court of Vermont made the final determination to remove the base *Allen* Charge from regular use and instead chose to use the ABA model instruction as its new standard moving forward.[128] In its argument, the court cited the commonly referenced issue regarding the unequal pressure placed on those jurors in the minority.[129] The court's condemnation of the charge mirrored the arguments of the presiding courts in Maine and Minnesota. However, the Supreme Court of Vermont provided insight into another potential issue: that the burden of proof can shift during jury deliberations after the issuance of an *Allen* Charge.[130] Criminal trials mandate that the prosecution has the burden of proof during proceedings.[131] The *Perry* court implied that the jurors take on the responsibility of the prosecution upon the commission of a non-facially neutral *Allen* Charge.[132] Tennessee followed suit in 1975 in *Kersey v. State*.[133] In its opinion, the Supreme Court of Tennessee recognized that the *Allen* Charge unduly pressured the minority to abandon its view and give in to those of the majority.[134]

In its decision in *State v. Czachor*, the New Jersey Supreme Court banned the use of the conventional *Allen* Charge and endorsed the use of the ABA model instruction.[135] Similarly, Michigan banned the use of conventional *Allen* Charges in 1974.[136] Both states' supreme courts referenced rulings in other states and in federal appellate courts that banned the use, or repeated use, of the *Allen* Charge as they made their rulings.[137] While their reasonings for abandoning the base *Allen* Charge reflect the arguments offered in other jurisdictions, the examples

128. *See* 306 A.2d 110, 112 (Vt. 1973).
129. *Id.*
130. *Id.*
131. *See id.*
132. *See id.*
133. 525 S.W.2d 139, 144 (Tenn. 1975).
134. *Id.*
135. 413 A.2d 593, 600 (N.J. 1980).
136. People v. Sullivan, 220 N.W.2d 441, 450 (Mich. 1974).
137. *See Czachor*, 413 A.2d at 599-600; *see also Sullivan*, 220 N.W.2d at 447, 449.

they provide are used for a greater purpose.[138] These debates offer insight into the implementation of the Post-Millennium *Allen* Charge on the national scale. Simply put, a revisionary wave is required. As an increasing number of jurisdictions adopt the use of the new model instruction, jurisdictions that have not done so face mounting pressure to consider adoption as well. Winning victories state by state in the drive to implement the Post-Millennium *Allen* Charge builds the force required to break through the most draconian of *Allen* Charge jurisdictions.

2. Co-opted ABA Language

The second classification to discuss is those states that have never adopted the use of the ABA model instruction but have instead co-opted its language. These states have approved new instructions that rely on guidelines included in the ABA model instruction. Co-opted instructions based on the ABA model instruction are used in (1) Colorado and (2) North Carolina.[139]

The Chief Justice of the Colorado Supreme Court released a directive on September 22, 1971, that outlines the use of a new series of model charges.[140] This directive forbids the use of the *Allen* Charge and instead inserts new guidelines that mirror the ABA model instruction.[141] However, the Colorado courts have refined these guidelines in a series of cases since the 1970s.[142] Specifically, presiding judges should not abuse their discretion by giving an *Allen*-type instruction if there are clear signs that the jurors are past the point of being able to agree.[143] When deciding whether it is appropriate to give an additional jury instruction, presiding judges should consider the length of the deliberations prior to the return of a split verdict.[144] Further, a presiding judge should make an inquiry to determine whether the jurors believe that there still exists a "likelihood of [achieving] a unanimous

138. *See Czachor*, 413 A.2d at 599-600; *see also Sullivan*, 220 N.W.2d at 447-50.

139. *See infra* Appendix II.B.

140. People v. Schwartz, 678 P.2d 1000, 1012 (Colo. 1984).

141. *Id.*; *cf.* ABA MODEL INSTRUCTION, *supra* note 62.

142. *See* People v. Gonzales, 565 P.2d 945, 947 (Colo. App. 1977); *see also* People v. Saltray, 969 P.2d 729, 732-33 (Colo. App. 1998).

143. *Schwartz*, 678 P.2d at 1012.

144. *Id.* at 1011; *see also Gonzales*, 565 P.2d at 947.

verdict."[145] However, this inquiry is limited to the jurors' opinions of potential agreement and cannot seek the numerical split of the minority and majority.[146] North Carolina has also codified a modified *Allen* Charge that relies heavily on the language of the ABA model instruction.[147] The Criminal Code Commission of North Carolina describes the language of its new charge as the "'weak' charge set out in [ABA] Standards."[148] An interesting feature included in North Carolina is that presiding judges are instructed to state to the jury that they do not favor a specific ruling in a given case.[149] Having language that reaffirms the presiding judge's effective neutrality in the given case makes it clear to judges and jurors alike that a given instruction is not an endorsement of any one verdict.

The additional features present in the model instructions of Colorado and North Carolina expose weaknesses present in the ABA model instruction. While the ABA model instruction provides clear guidelines of what a presiding judge may express to the jury in an instruction, it leaves questions of how to do so effectively from a procedural standpoint. Further, the type of language included in North Carolina reaffirms the judiciary's drive for complete neutrality. For the Post-Millennium *Allen* Charge to be effective, it must include clear guidelines that address these common conflicts.

3. Soft Adoption of ABA Standards

The final sub-category of the states that have recognized the ABA model instruction is those that performed a "soft adoption" of the standards.[150] Soft adoptions of the ABA standards offer scant recommendations for the body of the Post-Millennium *Allen* Charge but instead provide examples of how to achieve implementation on a national scale. The "revisionary wave" addressed in earlier discussion is not a process that happens

145. *Saltray*, 969 P.2d at 733.

146. *Id.*

147. N.C. GEN. STAT. ANN. § 15A-1235 (2021).

148. § 15A-1235 cmt. (Criminal Code Commission 1977).

149. State v. Alston, 243 S.E.2d 354, 364 (N.C. 1978).

150. "Soft adoption" is a term of art created by the author for the purposes of this Comment.

quickly. To ensure the full implementation of the Post-Millennium *Allen* Charge, soft adoptions offer a compelling strategy. States are more likely to accept the new model instruction if they can see the success it brings in neighboring jurisdictions.[151] While the need for change is urgent, it is more important to ensure the effective implementation of the new instruction rather than provide a hurried relief effort. The states that have conducted soft adoptions are (1) Oregon; (2) Alaska; (3) New Hampshire; (4) North Dakota; (5) Maryland; (6) Nebraska; and (7) Rhode Island.[152] These states support using the ABA model instruction, but do not enforce its use and allow for other *Allen*-type charges to be used on a case-by-case basis.

Oregon offers a simple example of the "soft adoption" approach. In its opinion in *State v. Marsh*, the Supreme Court of Oregon "disapproved the future use" of any supplemental *Allen*-type charge, but recommended the use of the ABA model instruction when necessary, moving forward.[153] This is a theme that occurs time and time again. The ABA model instruction receives approval not only for its substance but also because it is the least harmful alternative. As expressed by the court in *Marsh*, the ABA instruction is recommended but is "not to be regarded as 'graven in stone.'"[154]

The ruling of the Alaskan Supreme Court in *Fields v. State* recommends that judges refer to the ABA model instruction for future use.[155] It does not mandate the use of the ABA model instruction but instead offers guidance by stating that those judges who follow the model instruction are effectively minimizing the coercive nature of the *Allen* Charge.[156] The Supreme Courts of New Hampshire and North Dakota have followed suit.[157] In its ruling in *State v. Blake*, the New Hampshire Supreme Court

151. *See* Gérard Roland, *Understanding Institutional Change: Fast-Moving and Slow-Moving Institutions*, 38 STUD. IN COMPAR. INT'L DEV. 109, 126 (Winter 2004) (discussing the importance of gradualism within the context of institutional reform).

152. *See infra* Appendix II.C.

153. 490 P.2d 491, 503 (Or. 1971).

154. *Id.* (quoting United States v. Thomas, 449 F.2d 1177, 1188 (D.C. Cir. 1971)).

155. 487 P.2d 831, 840-43 (Alaska 1971).

156. *Id.* at 842.

157. *See* State v. Blake, 305 A.2d 300, 306 (N.H. 1973); *see also* State v. Champagne, 198 N.W.2d 218, 238-39 (N.D. 1972).

recommended that presiding judges make use of "more circumscribed instructions recommended in the *ABA Standards*."[158] However, the opinion does not provide additional commentary, as seen in the Alaskan ruling.[159] In its recommendation of the ABA model instruction, the Supreme Court of North Dakota focuses specifically on the model instruction's emphasis on limiting minority coercion and limiting the time frame for issuing the instruction.[160]

In its ruling in *Kelly v. State*, the Maryland Court of Appeals stated that the use of the ABA model instruction will always be proper, but other instructions may also be used.[161] Further, presiding judges may personalize a given charge if they issue one prior to the deliberation period.[162] A similar practice has been adopted in Nebraska. The Nebraskan Supreme Court in *State v. Garza* acknowledged that presiding judges may use the ABA model instruction, but the use of the instruction is heavily scrutinized with a preference towards no charge whatsoever.[163] Rhode Island has also taken a unique approach to the soft adoption theory. After recommending the use of the ABA model instruction, the Supreme Court of Rhode Island admitted that it would not heavily enforce the use of the instruction.[164] Instead, it recognized that "[i]n Rhode Island [it is not] require[d] that a trial justice read a patterned instruction."[165] In the place of a strict enforcement protocol, the court established a totality of the circumstances test.[166] For any future *Allen*-type charge, Rhode Island courts would determine the validity of a given charge based

158. 305 A.2d at 306.

159. *Compare id.*, *with* Fields v. State, 487 P.2d 831, 840-43 (Alaska 1971).

160. *Champagne*, 198 N.W.2d at 238-39.

161. 310 A.2d 538, 541 (Md. 1973).

162. *Id.* at 542.

163. 176 N.W.2d 664, 666 (Neb. 1970); *see also* Potard v. State, 299 N.W. 362, 364-65 (Neb. 1941) (ruling that the only purpose of using an *Allen*-type instruction was to "encourage or coerce the jury").

164. State v. Patriarca, 308 A.2d 300, 322-23 (R.I. 1973) (recommending the use of ABA model instructions in future trials); *see also* State v. Souza, 425 A.2d 893, 899-901 (R.I. 1981).

165. *Souza*, 425 A.2d at 900.

166. *Id.*

on the circumstances of the case and the specific language of the given instruction.[167]

C. Strong Disapproval of *Allen* Charges

One of the largest categorizations of states is those that have, in theory, implemented a near-complete ban of *Allen* Charges. The states that have done so are (1) Arizona; (2) California; (3) Hawaii; (4) Idaho; (5) Indiana; (6) Kentucky; (7) Louisiana; (8) New Mexico; (9) Ohio; (10) South Dakota; (11) Tennessee; and (12) Washington.[168] Despite what first assumptions imply, the majority of these states have only banned the use of the charge as outlined in *Allen*. The following discussion will focus on how states have implemented either (1) a total ban of the *Allen* Charge; or (2) modified instructions.

1. Total Ban

An intriguing sub-category to analyze first are those states that have implemented a total ban of any type of *Allen* Charge. The states included in this sub-category are (1) Louisiana; (2) South Dakota; (3) Arizona; (4) Hawaii; and (5) Idaho.[169] Of these states, Louisiana offers the clearest ruling regarding the *Allen* Charge. Louisiana bans the use of both the base *Allen* Charge and any *Allen*-type variations.[170] This ban applies to any acts by presiding judges that have a coercive effect, and any violation of this ban is met with heavy scrutiny.[171] This total ban is also in place in South Dakota.[172]

Arizona initially implemented a ban on the *Allen* Charge in *State v. Thomas*.[173] In its decision, the court struck down the "Voeckell [Charge]."[174] The Supreme Court of Arizona found

167. *Id.*
168. *See infra* Appendix III.
169. *See infra* Appendix III.A.
170. State v. Nicholson, 315 So. 2d 639, 641 (La. 1975).
171. *Id.* at 641-43.
172. State v. Fool Bull, 2009 SD 36, 766 N.W.2d 159, 170 (indicating ban of *Allen* Charge in criminal cases).
173. 342 P.2d 197, 200 (Ariz. 1959).
174. *Id.*

that this charge mirrored the language of the base *Allen* Charge and unduly: (1) placed pressure on jurors in the minority; and (2) implicitly implied that a hung jury is a waste of state resources.[175] The Arizona court later reaffirmed this ban of *Allen*-type charges in *State v. Smith*.[176] The court found that any form of an *Allen* Charge contained "potentially objectionable material" and that any future use of the charge would be grounds for appeal in future matters.[177] Agreeing with the Arizona Supreme Court, the Supreme Court of Hawaii barred future use of *Allen*-type instructions.[178] In its decision to ban the use of the charge, the court found that the use of *Allen* Charges is detrimental to the pursuit of equal justice since the "evils [of the *Allen* Charge] far outweigh the benefits . . . ."[179]

Idaho provides a clear example of how a total ban on *Allen* Charges has been implemented. Following its ruling in *State v. Flint*, the Idaho Supreme Court barred any future form of the "dynamite instruction."[180] It took this ruling one step further when it provided a new practice for presiding judges to follow.[181] Instead of forcing jurors back into deliberation through the use of an *Allen* Charge, presiding judges are to take polls of split juries.[182] If the polling indicates that jurors still believed that they are capable of reaching an agreement, then they will enter back into deliberation.[183] The choice to provide this alternative practice is interesting in light of how other states have chosen to direct presiding judges during the deliberation period. Diverging from the customary course of action, the Idaho Supreme Court instructs presiding judges on what they may do instead of limiting what they may not do. A beneficial limiting factor to acknowledge is that presiding judges may not reference the

175. *Id.*
176. 493 P.2d 904, 907 (Ariz. 1972).
177. *Id.*
178. State v. Fajardo, 699 P.2d 20, 25 (Haw. 1985).
179. *Id.* (quoting State v. Thomas, 342 P.2d 197, 200 (Ariz. 1959)).
180. 761 P.2d 1158, 1162-65 (Idaho 1988).
181. *Id.* at 1165.
182. *Id.*
183. *Id.*

necessity of the "efficient administration of criminal justice."[184] This practice coincides with the Minnesota judiciary's decision to adopt the ABA model instruction.[185] The decisions of these courts directly attack what is likely the strongest argument in favor of the *Allen* Charge—judicial economy.

2. Modified Instructions

The following states have banned the use of the base *Allen* Charge but still allow the use of modified instructions: (1) California; (2) New Mexico; (3) Indiana; (4) Mississippi; (5) Ohio; (6) Montana; (7) Wisconsin; (8) Kentucky; and (9) Washington.[186] States that have chosen to introduce modified instructions have either created new *Allen*-type charges themselves or have modified the original charge.

California originally banned the use of any *Allen* Charge in 1977.[187] In the Supreme Court of California's decision, it cited the coercive practice of placing undue pressure on the minority.[188] However, this ruling was overturned in 2012.[189] Following the decision in *People v. Valdez*, courts in California now give *Allen*-type instructions if the instructions equally encourage the majority and minority to reconsider their views.[190] The Court of Appeals of Indiana and the Supreme Court of Ohio have reached similar conclusions.[191] *Allen* Charges face careful scrutiny in Indiana.[192] The language of a given *Allen* Charge must strive to remain neutral, and a second reading of the charge must be accompanied by all other instructions that are given before

184. State v. Martinez, 832 P.2d 331, 335 (Idaho Ct. App. 1992); D. CRAIG LEWIS, IDAHO TRIAL HANDBOOK § 30:23 (2d ed. 2020).

185. *Martinez*, 832 P.2d at 335; *cf.* State v. Martin, 211 N.W.2d 765, 771-73 (Minn. 1973).

186. *See infra* Appendix III.B.

187. People v. Gainer, 566 P.2d 997, 1003-06 (Cal. 1977).

188. *Id.* at 1005.

189. People v. Valdez, 281 P.3d 924, 984-85 (Cal. 2012).

190. *Id.*

191. *See* Fultz v. State, 473 N.E.2d 624, 629-30 (Ind. Ct. App. 1985) (citing Lewis v. State, 424 N.E.2d 107, 109 (Ind. 1981)); State v. Howard, 537 N.E.2d 188, 194-95 (Ohio 1989) (describing the Ohio courts use of a neutrally structured *Allen* Charge).

192. Clark v. State, 597 N.E.2d 4, 7 (Ind. Ct. App. 1992).

deliberations begin.[193] This theme of neutrality continues in Mississippi's model charge. There, the shortened charge that survived the state court's ban on *Allen* Charges instructs all jurors to equally weigh the evidence before them and the arguments of their peers.[194]

The Supreme Courts of Montana and Wisconsin refined their model *Allen* Charge instructions for similar reasons. Both state courts took issue specifically with the lack of neutrality regarding how presiding judges address the jurors.[195] However, a unique feature that the Montana Supreme Court chose to focus on is what is referred to as "final test" language.[196] This "final test" language mandates that jurors "make a determination of guilt or innocence . . . ."[197] The court found that this language misrepresents the law and places undue pressure on the jurors.[198] Kentucky's model *Allen* Charge follows a similar practice. Presiding judges cannot give an instruction that explains the "desirability of reaching a verdict."[199] Further, presiding judges cannot poll the jury prior to the return of a verdict.[200] Matching the requirements outlined by Kentucky, presiding judges in Washington cannot "instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate."[201]

Finally, New Mexico offers a unique alternative. After banning the use of the "shotgun [charge]," it instituted a three factor test that determines whether a given instruction is coercive.[202] In the first step, the court determines whether the presiding judge read "any additional instruction" to the jury.[203] Next, the court determines whether the given instruction both

193. *Fultz*, 473 N.E.2d at 629-30.

194. MISS. R. CRIM. P. 23.4; *see also* Sharplin v. State, 330 So. 2d 591, 596 (Miss. 1976) (barring use of the base *Allen* Charge).

195. *See* State v. Norquay, 2011 MT 34, ¶¶ 29-33, 38-40, 42-43, 359 Mont. 257, 264-69, 248 P.3d 817, 822-25; *see also* Quarles v. State, 233 N.W.2d 401, 402 (Wis. 1975).

196. *Norquay*, 2011 MT 34 at ¶¶ 29-33, 38-43.

197. *Id.* at ¶¶ 38-43.

198. *Id.* at ¶¶ 32, 38, 42-43.

199. KY. R. CRIM. P. 9.57(1).

200. KY. R. CRIM. P. 9.57(2).

201. WASH. SUP. COURT CRIM. R. 6.15(f)(2).

202. State v. Salas, 2017-NMCA-057, ¶¶ 24-25, 400 P.3d 251, 261.

203. *Id.*

"failed to caution a jury not to surrender [its] honest convictions" and whether the presiding judge "established time limits on further deliberations . . . ."[204] This is an interesting approach to the alternative instruction theory. Instead of creating a strict instruction, the courts have instead created a test to determine the validity of any future instructions. While this practice is not used in the Post-Millennium *Allen* Charge, it reflects the ever-present threat of presiding judges going outside of accepted model language. For the new model instruction to succeed, it must address this threat directly.

The practices previously discussed address many of the concerns outlined at the outset of this Comment. Once again, the concern regarding undue pressure on the minority is at the forefront. No matter how strictly a jurisdiction limits the use of *Allen*-type charges, it will always agree that the minority party issue must be addressed. This is a clear indicator that the substantive language of the Post-Millennium *Allen* Charge must also address this concern. Further steps taken by the states previously discussed are also vital as the proposed instruction is shaped. While many of these aspects may not find a home in the body of the presented charge, they may still be implemented as sub-elements that direct presiding judges as they issue the instruction.

D. Allows Use of the *Allen* Charge

For every state that has implemented some form of ban on the *Allen* Charge, another has upheld its use. However, these two opposing groups often share similar sentiments and worries regarding the *Allen* Charge's potential coerciveness. As these groups tackle the coercion issue, a variety of tactics have arisen. To begin, the states that allow the use of the *Allen* Charge are (1) Alabama; (2) Arkansas; (3) Delaware; (4) Florida; (5) Georgia; (6) Kansas; (7) Missouri; (8) Nevada; (9) New York; (10) Oklahoma; (11) South Carolina; (12) Texas; (13) Utah; (14) Virginia; (15) West Virginia; and (16) Wyoming.[205] The ensuing

204. *Id.*
205. *See infra* Appendix IV.

discussion will focus on (1) states that have preserved the original charge; and (2) states that allow the use of the *Allen* Charge but have introduced some form of limiting factor.

1. Preserve Original Charge

The simplest sub-category to discuss is the states that have not implemented any significant changes to their *Allen* Charge practices. These states are (1) Arkansas; (2) Georgia; and (3) Oklahoma.[206] The Arkansas Supreme Court definitively upheld the use of *Allen* Charges in its 1982 ruling *Walker v. State*.[207] Its dismissal of the appellant's arguments against the use of the *Allen* Charge indicates a clear dismissal of the critical coercive arguments recognized by other states.[208] Most notably, the court allows a judge to describe the potential expenses related to the current proceedings and any future trials on the same matter.[209] Further, presiding judges who use differing language from the recommended instruction face less scrutiny when compared to judges in other jurisdictions.[210] These judges are given free rein to indicate that no future jurors are better suited to reach a decision than the current jurors.[211] The Arkansas Supreme Court acknowledged that these practices allow a presiding judge to misrepresent the regular proceedings of the judicial process.[212] The court finalized its rebuttal of the appellant's argument, stating that "the statement itself does not encourage the jury to find the accused guilty; therefore, [the] appellant cannot show any resulting prejudice . . . ."[213]

The Georgia Supreme Court followed suit in its approval of the *Allen* Charge. Falling in line with prior precedent, the court decided that—despite the controversy—the *Allen* Charge's base language was not "extreme or improper" and thus preserved the

206. *See infra* Appendix IV.

207. 276 Ark. 434, 435-37, 637 S.W.2d 528, 529 (1982).

208. *Id.*

209. *Id.*

210. *Id.*; *cf.* Kelly v. State, 310 A.2d 538, 542 (Md. 1973) (stating that any instruction that strays from ABA model language will face higher scrutiny upon appeal).

211. *Walker*, 276 Ark. at 435-37, 637 S.W.2d at 529.

212. *Id.*

213. *Id.*

charge for future use.[214] The Oklahoma judiciary has approved the use of *Allen* Charges in a similar fashion.[215] In *Miles v. State*, the Court of Criminal Appeals found that an *Allen* Charge is proper if the jurors have been told "that they are not being forced to agree . . . ."[216] This language seems to indicate a preference for subduing language relating to the minority or majority of the jury, but in practice, this limitation has not been implemented.[217] The recommended supplemental *Allen* Charge instruction still includes language that asks the minority to consider the arguments and views of the majority.[218] The use of the original *Allen* Charge is still alive and well in Oklahoman and Georgian courts.

These three jurisdictions provide a unique perspective in the *Allen* Charge debate. Despite recognizing the potential coercive harm of *Allen* Charges, Arkansas, Georgia, and Oklahoma have decided that the potential benefits outweigh any danger to future defendants.[219] When addressing the advocacy of these jurisdictions regarding the *Allen* Charge, the arguments seem to rely solely on the ideal of judicial economy.[220] Even if harm occurs, if the courts are able to keep efficiently processing cases, then that justifies the harm suffered. These actions accrue a greater cost beyond harm suffered by individual defendants; it erodes the reliability and faith in the judicial process. As recognized by the Arkansas Supreme Court, the actual process of administering an *Allen* Charge requires a presiding judge to misrepresent the judicial process.[221] The costs associated with this line of thinking are far too great.

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214. Anderson v. State, 276 S.E.2d 603, 606-07 (Ga. 1981).

215. Miles v. State, 1979 OK CR 116, 602 P.2d 227, 228-29.

216. *Id.*

217. STEPHEN JONES ET AL., VERNON'S OKLAHOMA FORMS § 23.58 (2d ed. 2020).

218. *Id.* As of the August 2020 update.

219. Walker v. State, 276 Ark. 434, 435-37, 637 S.W.2d 528, 529 (1982); *Anderson*, 276 S.E.2d at 606-07; *Miles*, 602 P.2d at 228-29.

220. *See Walker*, 276 Ark. at 435-37, 637 S.W.2d at 529; *Anderson*, 276 S.E.2d at 606-07; *Miles*, 602 P.2d at 228-29.

221. *Walker*, 276 Ark. at 435-37, 637 S.W.2d at 529.

2. Implemented Limiting Factors

The second sub-category of approved *Allen* Charges attempts to address the coercive nature of the charge. States have taken various measures to limit the coercive effects of the *Allen* Charge, including (a) limiting references to the minority; (b) implementing a totality of the circumstances test; and (c) limiting how an *Allen* Charge is presented.[222] Many state jurisdictions have implemented many of these measures.

a. Restrictions on Minority Pressure

As seen in the previous discussion of states that have adopted the ABA model instruction and states that have implemented a ban on *Allen* Charges, the most commonly referenced concern is that the *Allen* Charge places undue pressure on the minority. With this in mind, it is little surprise that even those states who wish to retain the use of the *Allen* charge have shared this sentiment. The states that have not banned the *Allen* Charge but have taken steps to remedy the minority issue are: (1) Pennsylvania; (2) South Carolina; (3) Virginia; (4) Iowa; (5) New York; (6) Nevada; and (7) Florida.[223] The Superior Court of Pennsylvania provides a base understanding of the concerns in this category. Approaching the issue from the perspective of criminal defendants, the court found that calling for the minority to reconsider its view tips the scale of justice by "impl[ying] that only those who entertain a reasonable doubt as to guilt should reconsider."[224]

The practices approved by the South Carolina judiciary provide an interesting example of how a model instruction addresses the minority issue. In South Carolina, not only is it improper to emphasize the minority in a supplemental instruction, but the guidelines provided by the South Carolina Supreme Court mandate that a presiding judge address a jury with complete neutrality.[225] Language approved by the Virginian Supreme Court bolsters this push for neutrality. In *Poindexter v.*

222. *See infra* Appendix IV.
223. *See infra* Appendix IV.
224. Commonwealth v. Spencer, 263 A.2d 923, 926 (Pa. 1970).
225. Green v. State, 569 S.E.2d 318, 323-24 (S.C. 2002).

Commonwealth, the court approved an *Allen* Charge that asked jurors to consider the views of their peers but instructed that they do not surrender any "conscientious opinion."[226] The model *Allen* Charge in Iowa provides an extension of the language discussed above. Neutrality remains the focus of the charge, but each juror approaches the arguments of their fellow jurors with "a disposition to be convinced . . . ."[227] This principle achieves one of the goals of the Post-Millennium *Allen* Charge. The immediate goal of the new model instruction is to ensure the protection of criminal defendants. By approaching the creation of the new model instruction language with the goal of complete neutrality, the minority coercion issue is directly attacked, thus eliminating the most recognized threat of the base *Allen* Charge.

The state of New York also focused on the minority issue in its modified *Allen* Charge.[228] Specifically, the modifications have been made to avoid attempts by a presiding judge to "shame the jury into reaching [a] verdict . . . ."[229] By banning the mention of the minority in an *Allen* Charge, the New York judiciary is recognizing that the minority faces attacks on multiple fronts. Not only are jurors in the minority facing pressure from their fellow jurors, but with the issuance of an improper *Allen* Charge, they are being told by the presiding judge that they are a burden on the judicial process.[230] The Nevada Supreme Court's ruling in *Azbill v. State* supports the assertions made in New York.[231] Recognizing that the use of an *Allen* Charge gives a presiding judge the ability to interfere with the deliberation process, the Nevada Supreme Court recommends that judges rarely use the *Allen* Charge.[232] However, the rare usage of the instruction must not place any undue pressure on the minority, and the instruction is faulty if it does not "remind . . . jurors . . . to surrender conscientiously . . . ."[233] Once again, like the practices seen in

226. 191 S.E.2d 200, 203 (Va. 1972).
227. State v. Campbell, 294 N.W.2d 803, 808 (Iowa 1980).
228. People v. Aponte, 759 N.Y.S.2d 486, 487-90 (N.Y. App. Div. 2003).
229. *Id.*
230. *Id.*
231. 495 P.2d 1064, 1069 (Nev. 1972).
232. *Id.*
233. Ransey v. State, 594 P.2d 1157, 1158 (Nev. 1979) (citing Redeford v. State, 572 P.2d 219, 220 (Nev. 1977)).

South Carolina, the proper route to ensure jury independence is to take each juror at face value and to express that each individual is responsible for considering the views expressed by their peers.

Florida offers a unique instruction that serves as a final example of the current measures taken to limit undue pressure on the minority. Like the previously discussed states, the Florida model instruction limits any language that refers to the minority or majority and further limits the ability of a presiding judge to re-issue a given charge.[234] What it does offer is a roundtable type of discussion.[235] After the issuance of the charge, the jurors return to the deliberation room and sequentially argue their views of the case.[236] During this time, the jurors are expected to acknowledge the weaknesses in their arguments.[237] After this "roundtable" has concluded, if it seems that the jurors are still unwilling to concede, they return to the judge with a final hung verdict.[238] This approach is an oddity in comparison to the practices of other states but is not without its own merits. While this roundtable style of discussion has not found a new home in the Post-Millennium *Allen* Charge, the Florida judiciary should be commended for its efforts to address the challenges of *Allen*-type charges.

b. Totality-of-the-Circumstances Test

Three states have concluded that the best manner to address the *Allen* Charge is to review the merits of the given charge on a case-by-case basis.[239] In what is commonly referred to as a "totality-of-the-circumstances test," the states that follow this practice judge the use of an *Allen* Charge within the parameters of the case that is currently before the court.[240] Instead of issuing a blanket ban on the practice, these states have found it easier to

234. FLA. STD. CRIM. JURY INSTR. § 4.1 (1981); *see also* Almeida v. State, 157 So. 3d 412, 415 (Fla. Dist. Ct. App. 2015) (ruling that presiding judges in Florida state courts may not repeat an *Allen* Charge more than once).

235. FLA. STD. CRIM. JURY INSTR. § 4.1.

236. *Id.*

237. *Id.*

238. *Id.*

239. *See infra* Appendix IV.

240. "Totality-of-the-Circumstances Test" is a term of art used to collectively reference certain state practices. *Totality-of-the-Circumstances Test*, BLACK'S LAW DICTIONARY (11th ed. 2019).

address issues when they appear. The states that fall within this sub-category are: (1) Alabama; (2) West Virginia; and (3) Utah.[241]

The Court of Criminal Appeals of Alabama has simply stated that the *Allen* Charge is permissible "if the language of the charge is not coercive or threatening."[242] To determine whether the language is improperly coercive, the court judges the given charge based on the "whole context" of the given case.[243] The specific factors that the court considered in *Maxwell v. State* are quite limited.[244] It considered whether the presiding judge gave an indication of how he believed the jury should decide the case and if the specific language used was "coercive or threatening."[245] The West Virginian judiciary follows a similar practice, stating that undue coercion is difficult to "determine[] by any general or definite rule."[246] Instead, the courts have implemented a practice of determining undue coercion on a case-by-case basis.[247] In a similar vein, the Court of Appeals of Utah has indicated that a valid *Allen* Charge is still unduly coercive if the presiding judge acts coercively.[248] This practice of determining coerciveness implements an environment of indecisiveness that will not aid the new model instruction. Instead of relying on various judges' interpretations of what constitutes coercive behavior, the model instruction must provide clear guidelines that keep judges within the allowed parameters. By setting a strict barrier for use, defendants on appeal can effectively argue any undue coercive acts of a presiding judge based on how far the judge strayed from the guidelines of the Post-Millennium *Allen* Charge.

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241. *See infra* Appendix IV.

242. Maxwell v. State, 828 So. 2d 347, 365 (Ala. Crim. App. 2000) (quoting Gwarjanski v. State, 700 So. 2d 357, 360 (Ala. Crim. App. 1996)).

243. *Id.* (quoting Miller v. State, 645 So. 2d 363, 366 (Ala. Crim. App. 1994)).

244. *See id.*

245. *Id.*

246. STEPHEN P. MEYER, TRIAL HANDBOOK FOR WEST VIRGINIA LAWYERS § 37:19 (2021).

247. *Id.*; State v. Spence, 313 S.E.2d 461, 463 (W. Va. 1984).

248. *See* State v. Harry, 2008 UT App 224, ¶¶ 27, 33-34, 189 P.3d 98, 106-08.

c. Presentation of the Allen *Charge*

The final sub-category of approved *Allen* Charge jurisdictions are those states that limit how a presiding judge may present an instruction.[249] These guidelines limit the when and how a presiding judge is to issue a charge, and further serve as indicators to prove that the judge has acted in a coercive manner. The states that have taken limiting measures are: (1) Delaware; (2) Kansas; (3) Wyoming; (4) Texas; and (5) Missouri.[250]

In its steps to limit the coercive effects of the *Allen* Charge, the Delaware judiciary recognizes that when a presiding judge chooses to present an instruction is a determining factor when deciding whether the judge acted coercively.[251] Further, the length of jury deliberations prior to and after the issuance of an *Allen* Charge can reflect the coercive nature of an instruction.[252] The Delaware Supreme Court elaborates further by stating that the likelihood of coercion increases if the presiding judge knows the numerical division of the jury.[253] While it is a reversible error for the judge to inquire about how the jury is split—if the jury informs the judge without prompt—then giving an *Allen* Charge is not automatically improper.[254] This acknowledgment of the potential issues arising out of the presiding judge's knowledge of the numerical split of the jury is a valuable feature. Implementing such a feature into the Post-Millennium *Allen* Charge places a strict barrier between the presiding judge and the jurors during deliberation, thus ensuring that any intentional—or unintentional—coercive acts do not occur.

The standards in Kansas and Wyoming further elaborate on how the timing of an instruction aids in determining whether a presiding judge acted coercively. In Kansas, presiding judges deliver *Allen* Charges before the jurors begin deliberating.[255] Further, it is improper for the presiding judge to emphasize the

249. *See infra* Appendix IV.
250. *See infra* Appendix IV.
251. Desmond v. State, 654 A.2d 821, 826-27 (Del. 1994).
252. *Id.*
253. *Id.* at 827.
254. *Id.* at 827-28.
255. State v. Whitaker, 872 P.2d 278, 286 (Kan. 1994); State v. Roadenbaugh, 673 P.2d 1166, 1174 (Kan. 1983).

instruction as being of higher importance than any other concurrent instructions.[256] To accomplish this, the *Allen* Charge is read alongside other jury instructions.[257] The Wyoming Supreme Court followed suit in its decision in *Elmer v. State*.[258] After providing a harsh rebuke of the use of the charge, the court recommended that the issuance of the charge occur during the delivery of the other jury instructions.[259] Straying from this recommendation increases the likelihood that the presiding judge has acted unduly coercively.[260] Here, this practice limits the potential for undue coerciveness in the Post-Millennium *Allen* Charge. First, it limits the potential coercion of jurors in the minority since the instructions are read prior to these parties being formed. Further, by reading these instructions alongside the other jury instructions present in a given case, some weight is taken off the charge by making it seem no more important than any other instruction. These are vital features in the newly proposed model instruction.

The issue of timing also serves a beneficial purpose. A balancing test allows for a court to understand whether it is appropriate to give an *Allen* Charge or if the charge has coerced a decision out of the jury.[261] In Texas, presiding judges have the discretion of determining whether the jury has deliberated for an appropriate amount of time.[262] The severity of the charges and the overall complexity of the facts are used to determine whether it is proper to issue a charge.[263] For example, in *Andrade v. State*, the court found that the presiding judge properly extended jury deliberations given the complexity of the capital murder charges.[264] After receiving the instruction, the jury deliberated for eight additional hours before reaching a unanimous verdict.[265] Here, since the facts of the case were complex and the alleged

256. *Whitaker*, 872 P.2d at 286.
257. *Id.*
258. 463 P.2d 14, 22 (Wyo. 1969).
259. *Id.* at 21-22.
260. *See id.* at 23 (McIntyre, J., concurring).
261. *See* Montoya v. State, 810 S.W.2d 160, 166 (Tex. Crim. App. 1989).
262. *Id.*
263. *See id.*
264. 700 S.W.2d 585, 589 (Tex. Crim. App. 1985).
265. *Id.* at 588-89.

crime was severe, the presented *Allen* Charge was not coercive.[266] If the jurors had returned a verdict within a shorter time frame, it is more likely that the given instruction coerced them to reach the verdict.[267] The use of the "hammer [charge]" in Missouri carries similarities to the Texas balancing test process.[268] Presiding judges in Missouri are given broad discretion in determining if their actions and the delivery of an *Allen*-type charge is coercive.[269] The balancing test weighs heavily in favor of presiding judges.[270]

The balancing test described by the Texas and Missouri courts aids the development of the Post-Millennium *Allen* Charge. This test can be used to aid a presiding judge as he or she determines whether to issue a subsequent reading of the new instruction. Likewise, if the presiding judge's decision to present the instruction is appealed, the commentary aids the appellate judge in determining if the presiding judge's actions are unduly coercive. Giving a presiding judge this discretion is certainly a risk but it is a necessary feature to build a well-rounded instruction.

IV. THE POST-MILLENNIUM *ALLEN* CHARGE

If we want our criminal justice system, and American society at large, to operate on a higher ethical code, then we have to model that code ourselves.[271]

The Post-Millennium *Allen* Charge does not seek to empower a presiding judge but rather places barriers on judicial discretion to protect the interest of defendants. This new model instruction must address the concerns of the various state judiciaries while simultaneously filling in the gaps of their current practices. In its model language, the Post-Millennium *Allen* Charge seeks to specifically address the issue of undue minority

266. *Id.*

267. *Id.*; Montoya v. State, 810 S.W.2d 160, 166 (Tex. Crim. App. 1989).

268. City of St. Charles v. Hal-Tuc, Inc., 841 S.W.2d 781, 782 (Mo. Ct. App. 1992).

269. *Id.*; *see also* State v. Dewitt, 924 S.W.2d 568, 570 (Mo. Ct. App. 1996).

270. *Hal-Tuc, Inc.*, 841 S.W.2d at 781-82; *see also Dewitt*, 924 S.W.2d at 570.

271. Barack Obama, *How to Make this Moment the Turning Point for Real Change*, MEDIUM (June 1, 2020), [https://perma.cc/9Q2D-CQCD].

coercion and the multiple issues related to the presentation of an *Allen*-type charge. To accomplish this goal, the following discussion contains both (A) the elements of the Post-Millennium *Allen* Charge; and (B) notes of use to aid the implementation of the model instruction.

A. Elements[272]

In issuing the given Post-Millennium *Allen* Charge, the presiding judge must adhere to the guidance of the following elements:

> (A) Prior to the jury's retirement for deliberation, the court may present this instruction, informing jurors that:
>
> (1) a unanimous verdict requires that all jurors have independently reached the same conclusion;
>
> (2) during deliberations, individual jurors should be impartial to the facts of the case and should give weight to the views and arguments of their fellow jurors;
>
> (3) while it is the duty of every juror to reach an independent conclusion of innocence or guilt, jurors should partake in a thorough debate to ensure all aspects of the given case have been explored; and
>
> (4) no juror is to surrender an honest belief of guilt or innocence based on threats or pressure of other jurors or court officials, or out of interest of returning a unanimous verdict.[273]
>
> (B) The presiding judge may repeat the present charge a single time after the jury informs the judge that they are unable to reach a verdict.[274]

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272. The following instructions were written by the author of this Comment for the express purpose of proposing a new model *Allen*-type instruction.

273. The language of the presented charge is a modified version of the language in the ABA model instruction. *See* ABA MODEL INSTRUCTION, *supra* note 62, at § 15-5.4(a)(1)-(5).

274. While multiple jurisdictions allow the re-issuance of a given charge multiple times, the Post-Millennium *Allen* Charge follows the example and reasoning referenced by the Florida state courts. *See* Almeida v. State, 157 So. 3d 412, 415-16 (Fla. Dist. Ct. App. 2015) (ruling that presiding judges in Florida state courts may not repeat an *Allen* Charge more than once).

> (1) The presiding judge must repeat all necessary instructions to fully explain the controlling statutory language and duties of the jury; and[275]
>
> (2) the presiding judge is to consider the length of deliberations and the complexity of the given case in deciding whether to repeat the given instruction.[276]
>
> (3) The presiding judge may not inquire into the numerical split of the jury when determining whether to re-issue the language in Section (A)(1)-(4);[277]
>
> (4) however, it is not improper for the presiding judge to repeat the present charge if the judge gained knowledge of the numerical split from an independent act of the jury.[278]
>
> (C) It is improper for presiding judges to use any language that strays from the requirements outlined in Section (A)(1)-(4) of this charge.[279]
>
> (D) Presiding judges are prohibited from referencing any cost associated with the current matter before the court, or

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275. This element adopts the reasoning presented by the Kansas state courts that presenting a charge alongside other relevant instructions aids in combating the undue coercive effects of the instruction. *See* State v. Whitaker, 872 P.2d 278, 286 (Kan. 1994) (finding that it is preferable to repeat an *Allen* Charge alongside all other instructions present in the given case).

276. This element is reminiscent of the manner in which *Allen* Charges are determined to be improperly coercive in Texas. *See* Montoya v. State, 810 S.W.2d 160, 166 (Tex. Crim. App. 1989) (ruling that the context of the given case must be considered when determining whether it was proper to issue an *Allen* Charge); *see also* Andrade v. State, 700 S.W.2d 585, 589 (Tex. Crim. App. 1985) (declaring that the complexity of the given case and the severity of the charges against the defendant are relevant factors when determining whether issuing an *Allen* Charge was proper).

277. As seen in multiple jurisdictions, the inquiry into the numerical split of a hung jury poses multiple threats of coercion. *See* Desmond v. State, 654 A.2d 821, 827 (Del. 1994) (ruling that the likelihood of coercion increases if a presiding judge seeks out the numerical split of a jury before issuing an *Allen* Charge); *see also* People v. Saltray, 969 P.2d 729, 732-33 (Colo. App. 1998) (ruling that presiding judges in Colorado may not directly inquire about the numerical split of a hung jury).

278. This element seeks to avoid unnecessarily limiting presiding judges from presenting the model instruction when they do not improperly learn of the numerical split of the jury. *Desmond*, 654 A.2d at 826-28 (ruling that a presiding judge is not limited from issuing an *Allen* Charge if the jury informs him of its numerical split without prompt).

279. This element implements the standard set by the Maryland state courts in their adoption of the original ABA model instruction. Kelly v. State, 310 A.2d 538, 542 (Md. 1973) (stating that any instruction that strays from ABA model language will face "careful" scrutiny upon appeal).

any other associated costs that may result from an inconclusive verdict.[280]

(1) It is further unacceptable to state that it is improper for an inconclusive verdict to be given.[281]

B. Notes of Use[282]

Dissecting the elements of this new model instruction provides guidance on how this charge combats the coercive nature of the base *Allen* Charge. Elements (A)(1)-(4) contain the base language of the actual charge. This language is what the presiding judge reads to the jurors prior to their retirement for deliberations. The language contained within is a version of the ABA model instruction that is refined by the lessons learned from the studied state practices.[283] Element (A)(1) provides a clear definition of the duty of individual jurors. While jurors should seek a unanimous verdict, their independence is of greater value to the judicial process. Elements (A)(2)-(4) define what an independent verdict means in the context of the current proceedings and provides practical guidance on how the jurors should conduct themselves in the deliberation room. A vital feature of these sub-elements is the reference to individual jurors. Banning the mention of either the majority or minority overcomes the largest hurdle of this debate—the undue coercion of the minority.[284]

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280. As discussed by multiple jurisdictions, the discussion of any costs associated with a proceeding only serve to unduly pressure a jury into reaching a verdict. *See* State v. Martin, 211 N.W.2d 765, 771 (Minn. 1973) (ruling that the coercive nature of informing jurors of the costs of the ongoing proceedings does little to aid the interest of judicial economy).

281. This specific element seeks to combat the improper use of "final test" language. *See* State v. Norquay, 2011 MT 34, ¶¶ 31, 37, 38-41, 43, 359 Mont. 257, 264-69, 248 P.3d 817, 822-25 (defining and barring use of "final test" language).

282. The following information provides guidelines on the use of the proposed Post-Millennium *Allen* Charge.

283. ABA MODEL INSTRUCTION, *supra* note 62, at § 15-5.4(a)(1)-(5).

284. Green v. State, 569 S.E.2d 318, 323 (S.C. 2002) (explaining South Carolina's ban on any *Allen*-type instructions that mention either the minority or majority); *see* Smith & Kassin, *supra* note 51, at 639-41 (finding that the minority faces greater pressure after the issuance of an *Allen* Charge compared to the majority); *see also Deadlocked Juries: Thomas*, *supra* note 50, at 375 (describing the threat an *Allen* Charge poses to an independent jury ruling).

Elements (B)-(D) define and limit the duties of the presiding judge in his or her issuance of the charge. First, Element (B) limits the number of times and the manner in which a presiding judge can repeat the instruction to the jury. A presiding judge risks coercing the jury into reaching an improper ruling if he or she repeatedly insists that the jurors reenter deliberations.[285] To avoid this, the model instruction limits the ability of the presiding judge to re-issue the charge to a single time. Further, Element (B)(1) limits the potential for coercion by mandating that all provided instructions be repeated alongside the model instruction. This practice avoids singling out the model instruction in the eyes of the jury.[286] Element (B)(2) empowers the presiding judge to determine whether issuing the charge a second time is necessary by conducting a totality of the circumstances test. In conducting this test, the presiding judge is to weigh the apparent complexity of the given case with the conduct of the jury. For example, the issuance of a second charge is likely proper if the jury deliberated for a relatively short amount of time in a case with complex facts or statutory requirements.[287] This specific sub-element is the area where coercive acts by the presiding judge offer the greatest threat, thus the limitation of repeating the model instruction a single time. Elements (B)(3)-(4) prevent presiding judges from inquiring about the numerical split of a hung jury when deciding whether to re-issue a second iteration of the language in Elements (A)(1)-(4). However, to avoid unduly punishing a presiding judge who took no improper actions, Element (B)(4) does not prevent the judge from issuing a second charge if he or she gained

285. This practice has repeatedly been found to be unnecessary when weighed against the possible coercive effects of a given charge. *See* Almeida v. State, 157 So. 3d 412, 415-16 (Fla. Dist. Ct. App. 2015) (ruling that presiding judges in Florida state courts may not repeat an *Allen* Charge more than once).

286. *See* State v. Whitaker, 872 P.2d 278, 286 (Kan. 1994) (finding that it is preferable to repeat an *Allen* Charge alongside all other instructions present in the given case).

287. As discussed prior, this process is a modified version of the process established in Texas state courts when determining if a given charge was coercive. *See* Montoya v. State, 810 S.W.2d 160, 166 (Tex. Crim. App. 1989) (ruling that the context of the given case must be considered when determining whether it was proper to issue an *Allen* Charge); *see also* Andrade v. State, 700 S.W.2d 585, 589 (Tex. Crim. App. 1985) (declaring that the complexity of the given case and the severity of the charges against the defendant are relevant factors when determining whether issuing an *Allen* Charge was proper).

knowledge of the numerical split from an independent act of the jury.[288]

Elements (C)-(D) conclude the model instruction by further limiting the presiding judge's ability to coerce the jury into reaching a desired conclusion. Specifically, these elements limit a judge from straying from the stated language in Elements (A)(1)-(4) and from referencing any associated costs with the judicial process.[289] First, Element (C) prevents a presiding judge from unknowingly creating a secondary instruction that improperly coerces a jury. Implementation of this element provides jurisdictions greater control over the language used in the listed instruction and provides a test for an appellate court to judge the actions of the lower court.[290] Element (D) recognizes that the costs associated with trying a case can be unduly coercive over a juror. Presiding judges cannot use the costs of the ongoing proceedings and any future proceedings as a way to guilt the jury into reaching a unanimous ruling. The costs of a trial are not the concerns of the jury and should not distract it in its determination of guilt.

V. CONCLUSION

After 125 years, it is time to put the *Allen* Charge debate to rest. In a social climate focused on reform and guarantees of equal justice, the legal community must examine the weaknesses and areas of potential harm in the judicial process assiduously. The *Allen* Charge is a relic of a bygone legal era that placed judicial efficiency as the highest ideal. In considering the *Allen* Charge's role, it is clear it can serve a beneficial purpose if the inherent coercive nature of the charge can be effectively overcome. The Post-Millennium *Allen* Charge is a collective piece that ties together the best practices of the fifty states and the

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288. *See* Desmond v. State, 654 A.2d 821, 826-28 (Del. 1994) (ruling that a presiding judge is not limited from issuing an *Allen* Charge if the jury informs him or her of its numerical split without prompt).

289. *See* State v. Martin, 211 N.W.2d 765, 771 (Minn. 1973) (ruling that the coercive nature of informing jurors of the costs of the ongoing proceedings does little to aid the interest of judicial economy).

290. *See* Kelly v. State, 310 A.2d 538, 542 (Md. 1973) (stating that any instruction that strays from ABA model language will face higher scrutiny upon appeal).

ABA model instruction. Adopting such a charge takes a step forward towards providing safeguards as criminal defendants traverse the ever-changing legal realm.

APPENDIX I: THE OUTLIERS[291]

State	Cited Materials
A. *Tuey-Rodriquez* Charge	
Massachusetts	Commonwealth v. Tuey, 62 Mass. (8 Cush.) 1 (1851); Commonwealth v. Rodriquez, 300 N.E.2d 192 (Mass. 1973); Commonwealth v. Brown, 323 N.E.2d 902 (Mass. 1975); Commonwealth v. Rollins, 241 N.E.2d 809 (Mass. 1968); Commonwealth v. Haley, 604 N.E.2d 682 (Mass. 1992); Commonwealth v. O'Brien, 839 N.E.2d 845 (Mass. App. Ct. 2005).
B. *Chip Smith* Charge	
Connecticut	State v. Smith, 49 Conn. 376 (Conn. 1881); State v. O'Neil, 207 A.2d 730 (Conn. 2002); State v. Feliciano, 778 A.2d 812 (Conn. 2001); State v. Martinez, 378 A.2d 517 (Conn. 1977); State v. McArthur, 899 A.2d 691 (Conn. App. Ct. 2006).

291. The following materials listed in Appendices I-IV are not the sole controlling authorities in the listed jurisdictions—they are simply the materials that were referenced or cited in the discussion above. While some sources listed in the appendices are not cited in the body of this Comment, they are listed due to the aid they provided in preparing this Comment.

APPENDIX II: ABA MODEL INSTRUCTIONS

State	Cited Materials
A. Adopted ABA Model Instruction	
Illinois	People v. Prim, 298 N.E.2d 601 (Ill. 1972); People v. Branch, 462 N.E.2d 868 (Ill. App. Ct. 1984); People v. Brown, 362 N.E.2d 820 (Ill. App. Ct. 1977).
Maine	State v. White, 285 A.2d 832 (Me. 1972); State v. Cote, 507 A.2d 584 (Me. 1986); State v. Kaler, 1997 ME 62, 691 A.2d 1226.
Michigan	People v. Sullivan, 220 N.W.2d 441 (Mich. 1974); People v. Lawson, 223 N.W.2d 716 (Mich. Ct. App. 1974); People v. Thompson, 265 N.W.2d 632 (Mich. Ct. App. 1978).
Minnesota	State v. Martin, 211 N.W.2d 765 (Minn. 1973); State v. Cox, 820 N.W.2d 540 (Minn. 2012); State v. Danforth, 573 N.W.2d 369 (Minn. Ct. App. 1997).
New Jersey	State v. Czachor, 413 A.2d 593 (N.J. 1980); State v. Boiardo, 268 A.2d 55 (N.J. Super. Ct. App. Div. 1970); State v. Ross, 93 A.3d 739 (N.J. 2014).
Tennessee	Kersey v. State, 525 S.W.2d 139 (Tenn. 1975).

Vermont	State v. Perry, 306 A.2d 110 (Vt. 1973); State v. Rolls, 2020 VT 18, 229 A.3d 695.
B. Co-opted ABA Language	
Colorado	People v. Schwartz, 678 P.2d 1000 (Colo. 1984); People v. Gonzales, 565 P.2d 945 (Colo. App. 1977); People v. Saltray, 969 P.2d 729 (Colo. App. 1998).
North Carolina	N.C. GEN. STAT. § 15A-1235 (1977); State v. Alston, 243 S.E.2d 354 (N.C. 1978); State v. Blackwell, 747 S.E.2d 137 (N.C. Ct. App. 2013).
C. Soft Adoption of ABA Standards	
Alaska	Fields v. State, 487 P.2d 831 (Alaska 1971); Stapleton v. State, 696 P.2d 180 (Alaska Ct. App. 1985).
Maryland	Kelly v. State, 310 A.2d 538 (Md. 1973); Goodmuth v. State, 490 A.2d 682 (Md. 1985); Hall v. State, 75 A.3d 1055 (Md. Ct. Spec. App. 2013).
Nebraska	State v. Garza, 176 N.W.2d 664 (Neb. 1970); Potard v. State, 299 N.W. 362, 365 (Neb. 1941).
New Hampshire	State v. Blake, 305 A.2d 300 (N.H. 1973)
North Dakota	State v. Champagne, 198 N.W.2d 218 (N.D. 1972).
Oregon	State v. Marsh, 490 P.2d 491 (Or. 1971); State v. Garrett,

	426 P.3d 164 (Or. Ct. App. 2018); State v. Hutchison, 920 P.2d 1105 (Or. Ct. App. 1996).
Rhode Island	State v. Patriarca, 308 A.2d 300 (R.I. 1973); State v. Souza, 425 A.2d 893 (R.I. 1981); State v. Luanglath, 863 A.2d 631 (R.I. 2005).

APPENDIX III: STRONG DISAPPROVAL

State	Cited Materials
A. Total Ban	
Arizona	State v. Thomas, 342 P.2d 197 (Ariz. 1959); State v. Smith, 493 P.2d 904 (Ariz. 1972); State v. Kuhs, 224 P.3d 192 (Ariz. 2010).
Hawaii	State v. Fajardo, 699 P.2d 20 (Haw. 1985).
Idaho	State v. Flint, 761 P.2d 1158 (Idaho 1988); State v. Martinez, 832 P.2d 331 (Idaho Ct. App. 1992).
Louisiana	State v. Nicholson, 315 So. 2d 639 (La. 1975); State v. Bradley, 995 So. 2d 1230 (La. Ct. App. 2008); State v. Caston, 561 So. 2d 941 (La. Ct. App. 1990).
South Dakota	State v. Fool Bull, 2009 SD 36, 766 N.W.2d 159; State v. Ferguson, 175 N.W.2d 57 (S.D. 1970); State v. Hall, 272 N.W.2d 308 (S.D. 1978).

B. Modified Instructions	
California	People v. Gainer, 566 P.2d 997 (Cal. 1977); People v. Valdez, 281 P.3d 924 (Cal. 2012); People v. Butler, 209 P.3d 596 (Cal. 2009).
Indiana	Fultz v. State, 473 N.E.2d 624 (Ind. Ct. App. 1985); Lewis v. State, 424 N.E.2d 107 (Ind. 1981); Clark v. State, 597 N.E.2d 4 (Ind. Ct. App. 1992).
Kentucky	KY. R. CRIM. P. 9.57; Commonwealth v. Mitchell, 943 S.W.2d 625 (Ky. 1997); Gray v. Commonwealth, 480 S.W.3d 253 (Ky. 2016).
Montana	State v. Norquay, 2011 MT 34, 359 Mont. 257, 248 P.3d 817; State v. Randall, 353 P.2d 1054 (Mont. 1960); State v. Santiago, 2018 MT 13, 390 Mont. 154, 415 P.3d 972.
Mississippi	Sharplin v. State, 330 So. 2d 591 (Miss. 1976); Bell v. State, 2015-KA-00643-SCT (Miss. 2016); Gearlson v. State, 482 So. 2d 1141 (Miss. 1986).
New Mexico	State v. Salas, 2017-NMCA-057, 400 P.3d 251; State v. Laney, 81 P.3d 591 (N.M. Ct. App. 2003); State v. Romero, 526 P.2d 816 (N.M. Ct. App. 1974) (Sutin, J., dissenting).
Ohio	State v. Howard, 537 N.E.2d 188 (Ohio 1989); State v. Maupin, 330 N.E.2d 708 (Ohio 1975); State v. May, 2015-Ohio-4275, 49 N.E.3d 736.

Washington	WASH. SUP. COURT CRIM. R. 6.15(2); State v. Parker, 485 P.2d 60 (Wash. 1971).
Wisconsin	Quarles v. State, 233 N.W.2d 401 (Wis. 1975); Kelley v. State, 187 N.W.2d 810 (Wis. 1971).

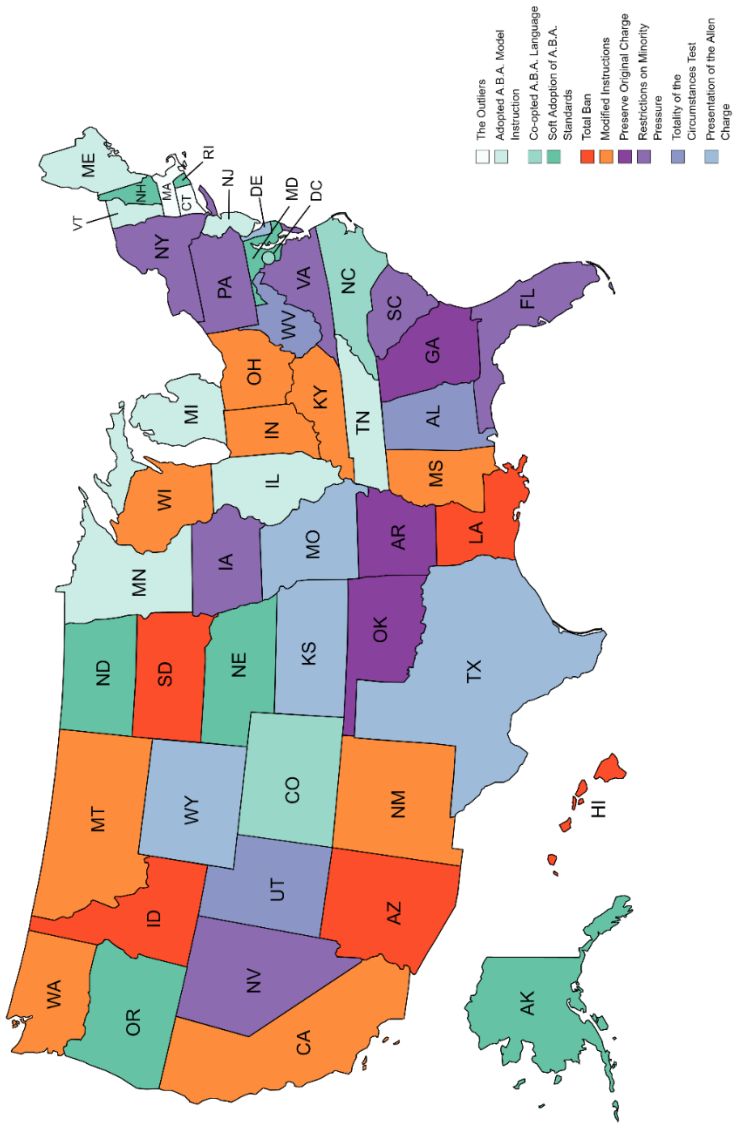
APPENDIX IV: ALLOWS USE OF THE *ALLEN* CHARGE

State	Cited Materials
A. Preserve Original Charge	
Arkansas	Walker v. State, 276 Ark. 434, 637 S.W.2d 528 (1982); Griffin v. State, 2 Ark. App. 145, 617 S.W.2d 21 (1981); Moore v. State, 2015 Ark. App. 480, 469 S.W.3d 801.
Georgia	Anderson v. State, 376 S.E.2d 603 (Ga. 1981); Anglin v. State, 806 S.E.2d 573 (Ga. 2017); Barnes v. State, 266 S.E.2d 212 (Ga. 1980).
Oklahoma	Miles v. State, 602 P.2d 227 (Okla. 1979).
B. Restrictions on Minority Pressure	
Florida	FLORIDA STANDARD JURY INSTRUCTION § 4.1 (1981); Almeida v. State, 157 So. 3d 412 (Fla. Dist. Ct. App. 2015); Peak v. State, 363 So. 2d 1166 (Fla. Dist. Ct. App. 1978); Lebron v. State, 799 So. 2d 997 (Fla. 2001).

Iowa	State v. Campbell, 294 N.W.2d 803 (Iowa 1980); State v. Cornell, 266 N.W.2d 15 (Iowa 1978); State v. Hackett, 200 N.W.2d 493 (Iowa 1972).
Nevada	Azbill v. State, 495 P.2d 1064 (Nev. 1972); Ransey v. State, 594 P.2d 1157 (Nev. 1979); Basurto v. State, 472 P.2d 339 (Nev. 1970).
Pennsylvania	Commonwealth v. Spencer, 263 A.2d 923 (Pa. 1970); Commonwealth v. Gartner, 381 A.2d 114 (Pa. 1977); Commonwealth v. Lambert, 299 A.2d 240 (Pa. 1973).
New York	People v. Aponte, 759 N.Y.S.2d 486 (N.Y. App. Div. 2003); People v. Abston, 645 N.Y.S.2d 690 (N.Y. App. Div. 1996).
South Carolina	Green v. State, 569 S.E.2d 318 (S.C. 2002); State v. Lynn, 284 S.E.2d 786 (S.C. 1981); State v. Singleton, 460 S.E.2d 573 (S.C. 1995).
Virginia	Poindexter v. Commonwealth, 191 S.E.2d 200 (Va. 1972); Prieto v. Commonwealth, 682 S.E.2d 910 (Va. 2009).
C. Totality-of-the-Circumstances Test	
Alabama	Maxwell v. State, 828 So. 2d 347 (Ala. Crim. App. 2000); Daily v. State, 828 So. 2d 344 (Ala. Crim. App. 2002).
Utah	State v. Harry, 2008 UT App 224, 189 P.3d 98; State v. Lactod, 761 P.2d 23 (Utah Ct.

	App. 1988); State v. Cruz, 206 UT App 234, 387 P.3d 618.
West Virginia	State v. Spence, 376 S.E.2d 618 (W. Va. 1988); State v. Waldron, 624 S.E.2d 887 (W. Va. 2005).
D. Presentation of the *Allen* Charge	
Delaware	Desmond v. State, 654 A.2d 821 (Del. 1994); Brown v. State, 369 A.2d 682 (Del. 1976); Collins v. State, 56 A.3d 1012 (Del. 2012).
Kansas	State v. Whitaker, 872 P.2d 278 (Kan. 1994); State v. Roadenbaugh, 673 P.2d 1166 (Kan. 1983); State v. Gomez, 143 P.3d 92 (Kan. Ct. App. 2006).
Missouri	City of St. Charles v. Hal-Tuc, Inc., 841 S.W.2d 781 (Mo. Ct. App. 1992); State v. Dewitt, 924 S.W.2d 568 (Mo. Ct. App. 1996); State v. Carl, 389 S.W.3d 276 (Mo. Ct. App. 2013).
Texas	Montoya v. State, 810 S.W.2d 160 (Tex. Crim. App. 1989); Andrade v. State, 700 S.W.2d 585 (Tex. Crim. App. 1985); Barnett v. State, 189 S.W.3d 272 (Tex. Crim. App. 2006).
Wyoming	Elmer v. State, 463 P.2d 14 (Wyo. 1969); Carter v. State, 2016 WY 36, 369 P.3d 220 (Wyo. 2016); Hoskins v. State, 552 P.2d 342 (Wyo. 1976).

APPENDIX V[292]



292. If included, the decisions of the Washington D.C. circuit create a model instruction that is classified under the "Co-opted ABA Language" sub-grouping. United States v. Thomas, 449 F.2d 1177, 1187-88 (D.C. Cir. 1971); *see also* United States v. Strothers, 77 F.3d 1389, 1391 (D.C. Cir. 1996).