Criminal Procedure -- Ellis v. Reed: 
Constitutionality and Coerciveness of Judicial 
Inquiry into the Numerical Division of a Jury 

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In *Brasfield v. United States*,¹ the United States Supreme Court held that it is reversible error for a federal district court judge to inquire into the numerical division of a jury unable to agree on a verdict.² The Court found reversal “essential to the fair and impartial conduct of the trial,”³ because such an inquiry generally tends to be coercive.⁴ Although many state courts have addressed the issue of judicial inquiry into the numerical division of a jury,⁵ very few have considered the possible constitutional implications of the *Brasfield* decision. Even these few have split on the question whether *Brasfield* laid down a constitutional prohibition against such a judicial inquiry.⁶ In *Ellis v. Reed*,⁷ the United States Court of Appeals for the Fourth Circuit, in a case of first impression for that court, rejected the view that *Brasfield* established a due process rule of constitutional interpretation applicable to the states by reason of the fourteenth amendment,⁸ and instead held that the *Brasfield* rule is “one of judicial administration based on the supervisory powers of the Supreme Court over the federal court system.”⁹ The appropriate question for determining whether a state court defendant is entitled to relief, therefore, is not simply whether the judge inquires into the numerical division of the jury, but whether, under the totality of applicable circumstances, the inquiry and any accompanying charge by the judge have a coercive effect on the jury.¹⁰

*Ellis v. Reed* arose out of a 1976 North Carolina state court conviction of appellant Ellis for embezzlement.¹¹ On direct appeal, the North

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¹. 272 U.S. 448 (1926).
². Id. at 449-50.
³. Id. at 450.
⁴. Id.
⁵. See generally Annot., 77 A.L.R.3d 769 (1977) and cases collected therein. This Note does not attempt to collect all of the numerous decisions involving judicial inquiry into the numerical division of a jury.
⁶. See cases cited notes 40, 41 & 47 infra.
⁷. 596 F.2d 1195 (4th Cir.), cert. denied, 100 S. Ct. 468 (1979).
⁸. Id. at 1197.
⁹. Id.
¹⁰. See id. at 1200.
¹¹. Following a jury trial, appellant was convicted and sentenced to imprisonment for not less than three nor more than five years. Brief for Appellant at 2.
The United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court. The primary issue addressed by the court was whether Brasfield's per se prohibition of numerical inquiry was based on the Constitution or on the Court's supervisory powers over the administration of justice in the federal courts. After a three day trial, the jury was instructed and it retired to deliberate. After a period of time, the jury returned to the courtroom for additional instructions and then retired again. On their second return, the following colloquy, which resulted in the controversy, occurred:

COURT: Mr. Foreman, have you reached a verdict?
JURY FOREMAN: No, Your Honor, we have not.
COURT: Will you tell me numerically what is the division; not what each of you were, but the numerical division.
JURY FOREMAN: Eleven to one.
COURT: Well, I presume, ladies and gentlemen, that you realize what a disagreement means; that the time of the Court will again have to be consumed in the trial of this action. I don't want to force you or coerce you or attempt to do so in any way to reach a verdict but it is your duty to try to reconcile your differences and to reach a verdict if it can be done without the surrender of anyone's conscientious convictions; and you heard the evidence in this case, and a mistrial will mean that another jury will have to be selected to hear this case and the evidence again; and it's long and complicated. The Court recognizes sometimes that there are reasons why jurors cannot agree, but I want to emphasize the fact that it is your duty to do whatever you can do to reason this matter over as reasonable men and women and attempt to reconcile your differences if it is possible without the surrender of any conscientious convictions on the part of any member of the jury. I will let you resume your deliberations and see if you can reach a verdict.

The jury then retired again to deliberate, and returned a guilty verdict within eight minutes. 596 F.2d at 1196.
reviewing the history of the rule and the split of opinion it had produced in the state courts, the court held that the *Brasfield* decision promulgated only a rule of procedure for the federal court system, and, therefore, was not applicable per se to the state courts. The court based its holding on a combination of factors including the lack of constitutional citation in *Brasfield*, the language employed by the Supreme Court in disapproving of the practice in a pre-*Brasfield* decision, the Supreme Court’s interpretation of the relationship between constitutional requirements and state jury trials, and principles of federalism. Having disposed of the *Brasfield* rule, the court went on to find that, even viewed within the totality of the circumstances, the verdict of the jury in *Ellis* was not a product of coercion, and that habeas corpus relief was thus improper.

In a strong dissent, Circuit Judge Winter disagreed with the majority on the applicability of the *Brasfield* rule to state criminal trials. Relying on the language of the *Brasfield* Court, he concluded that the trial judge twice told the members of the jury it was their duty to attempt to reconcile their differences “if it was possible without the surrender of any conscientious convictions on the part of any member of the jury.” 596 F.2d at 1196-97.

The *Allen* charge, or a modification of it, frequently accompanies a judicial inquiry into the numerical division of a deadlocked jury. This instruction originated in *Allen v. United States*, 164 U.S. 492 (1896), in which the United States Supreme Court upheld an instruction paraphrased by the Court as follows:

> that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other’s arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

rule of that case "is a rule of constitutional interpretation of the due process clause of the Fifth Amendment and it is therefore applicable to the states under the Fourteenth Amendment." He therefore would have invalidated the conviction and granted the writ unless North Carolina decided to try the appellant again.

Traditionally, the trial judge has been given a great amount of flexibility and discretion in dealing with the conduct of a criminal trial and the participants involved in the proceeding. This is especially true of the judge's relationship with the jury. But problems may arise when the jury has trouble reaching a verdict. It has been held proper for a trial judge to recall a deliberating jury in order to ascertain what difficulties its members are having in considering a case, and to make proper efforts to aid in the solution of those difficulties. "A judge may advise, and he may persuade, but he may not command, unduly influence or coerce." Jurors can be very receptive and responsive to the actions of the judge and any suggestion that may be made concerning their conduct. Therefore, interrogation of the jurors pertaining to their difficulties must be carried out with the utmost care and circumspection to avoid any improper pressure upon the jury or even reflection upon the abilities of the jurors themselves. Actions of the trial judge, such as inquiry into the numerical division of a jury, must be examined closely, and sometimes a fine line must be drawn between practices that may be proper in assisting the jury and those that are improper as adversely affecting defendants' rights.

The practice of inquiring into the numerical division of a federal

23. Id. at 1201 (Winter, J., dissenting).
24. Id. (Winter, J., dissenting).
27. Taylor v. State, 17 Md. App. 41, —, 299 A.2d 841, 844 (1973); see State v. Sanders, 552 S.W.2d 39, 40 (Mo. App. 1977) ("Basic principles of jury trial require jurors to perform their role free from extraneous factors. In the eyes of many jurors the trial judge can do no wrong; his word is law and jurors are sensitive to what he says and does.").
29. A juror's decision should not be influenced by personal considerations. A judge should not make remarks which could be interpreted as reflecting upon a juror's honesty, integrity or intelligence if the juror fails to follow the suggestions of the judge. See State v. Bybee, 17 Kan. 462, 466 (1877); In re Henderson, 4 N.C. App. 56, 60, 165 S.E.2d 784, 788 (1969).
30. "The basic question . . . is whether the remarks of the court, viewed in the totality of applicable circumstances, operate to displace the independent judgment of the jury in favor of considerations of compromise and expediency." People v. Carter, 68 Cal. 2d 810, 817, 442 P.2d 353, 356, 69 Cal. Rptr. 297, 302 (1968) (en banc).
The jury was first condemned by the United States Supreme Court in *Burton v. United States.*[^31] The Court found that the knowledge of the proportion of the division of the jury is not needed by the trial judge in order to deliver a proper supplemental charge, and, furthermore, that the practice might lead to improper influences.[^32] The conviction in *Burton,* however, was reversed on other grounds, and subsequent federal court decisions split on the issue whether the condemnation of numerical inquiries in *Burton* was merely hortatory or constituted a finding of reversible error.[^33] In 1926, the Supreme Court settled the issue in *Brasfield v. United States*[^34] by holding such inquiries to be reversible error per se.[^35] After noting the conflict among the circuits, the *Brasfield* Court concluded:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations

[^31]: 196 U.S. 283 (1905). In *Burton,* the trial judge asked the members of the jury how they were divided numerically, but not whether they stood for conviction or acquittal. The jury foreman responded that they were divided eleven to one. The judge then proceeded to give a supplemental instruction and sent the jury back into deliberations. *Id.* at 305.

[^32]: Specifically, the Court stated:

> [A] practice ought not to grow up of inquiring of a jury, when brought into court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended, because we cannot see how it may be material for the court to understand the proportion of division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division; and we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge. Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain.

*Id.* at 307-08.

[^33]: Compare *Quong Duck v. United States,* 293 F. 563 (9th Cir. 1923) and *Bernal v. United States,* 241 F. 339 (5th Cir. 1917), cert. denied, 245 U.S. 672 (1918) (not prejudicial error) with *Nigro v. United States,* 4 F.2d 781 (8th Cir. 1925); *Stewart v. United States,* 300 F. 769 (8th Cir. 1924) and *Saint Louis & S.F.R.R. v. Bishard,* 147 F. 496 (8th Cir. 1906) (reversible error).

[^34]: 272 U.S. 448 (1926).

[^35]: *Id.* at 450. In *Brasfield,* the trial judge recalled the jury and inquired into the numerical division after the jury had been deliberating a few hours. The foreman informed the court that the jury was divided nine to three, but did not indicate their division on the issue of conviction or acquittal. *Id.* at 449.
every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.36

Although Brasfield's prohibition of numerical inquiries has become firmly established as the rule in the federal courts,37 there is a sharp division among the state courts over the basis for the Brasfield decision and the coerciveness of the numerical inquiry. Brasfield left open the question whether the Supreme Court intended the rule to be a constitutional rule, based upon the right to a fair trial by an impartial jury,38 and thus applicable to the states through the fourteenth amendment, or whether the Court was only exercising its supervisory powers over the administration of justice in the federal court system.39

Some state courts, faced with the issue of judicial inquiry into the numerical division of a jury, have followed Brasfield and condemned the practice per se.40 A few of these courts have viewed Brasfield in a

36. Id. at 450.
39. The Supreme Court has the power to supervise the lower federal courts, and it can develop rules for these courts that are not mandated by the Constitution. The Court discussed this power in McNabb v. United States, 318 U.S. 332 (1943), in which it stated:

[W]hile the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice," . . . which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" . . . .

Id. at 340.

Thus the Supreme Court, through its inherent supervisory powers, can develop rules of administration for the federal courts that are not constitutionally required and therefore not applicable to the states. Indeed, the Supreme Court cannot develop a rule of procedure for the state courts unless the rule is constitutionally required. See Barker v. Wingo, 407 U.S. 514, 523 (1972). For this reason, the Court cannot exercise the same corrective power over state courts that it exercises over federal courts. See Hoag v. New Jersey, 356 U.S. 464, 471 (1958). The Supreme Court must respect the laws of the individual states, and its only authority over state trials is to determine whether the Constitution has been violated. See Rochin v. California, 342 U.S. 165, 168 (1952); United States v. Mitchell, 322 U.S. 65, 68 (1944).

The Ellis court thought a judicial inquiry into the numerical division of the jury was analogous to the supplemental instruction given by the state court judge in Cupp v. Naughten, 414 U.S. 141 (1973). 596 F.2d at 1200. The Cupp Court found that the instruction, though condemned in the federal courts, did not violate due process. The Court ruled that even if the federal courts unanimously condemned the instruction, a state court conviction could be overturned only if the instruction violated a fourteenth amendment right. 414 U.S. at 146.

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1. Introduction

The Brasfield rule, named after the case Brasfield v. United States (1927), is a principle in criminal procedure that requires judges to inquire into the division of the jury when there is a hung jury. The rule was first applied by the U.S. Supreme Court in Brasfield, where the Court held that where the division of the jury is revealed, the trial judge should conduct an inquiry into the reason for the division. Since then, the rule has been adopted by a number of state courts and has been the subject of much debate and analysis. This entry provides an overview of the Brasfield rule, its history, and its current status in the legal system.

2. Historical Background

The Brasfield rule was first introduced in 1927 in the case of Brasfield v. United States. The case involved a jury that was deadlocked on a criminal charge, and the Court held that the judge should conduct an inquiry into the division of the jury to determine the reason for the deadlock. The Court explained that the inquiry is necessary to ensure a fair and impartial trial and to prevent any prejudice to the defendant.

3. Current Legal Framework

The Brasfield rule has been adopted by a number of state courts and has been the subject of much debate and analysis. The rule has been applied in a variety of cases, including those involving jury division, jury instructions, and jury selection. The rule is generally applied in situations where the jury is deadlocked or divided, and the judge is required to inquire into the reason for the division.

4. Analysis

The Brasfield rule has been the subject of much debate and analysis in the legal community. Some argue that the rule is essential to a fair and impartial trial, while others argue that it is unnecessary and can lead to unfair results.

5. Conclusion

In conclusion, the Brasfield rule is a principle in criminal procedure that requires judges to inquire into the division of the jury when there is a hung jury. The rule was first applied by the U.S. Supreme Court in Brasfield, where the Court held that where the division of the jury is revealed, the trial judge should conduct an inquiry into the reason for the division. Since then, the rule has been adopted by a number of state courts and has been the subject of much debate and analysis. The rule is generally applied in situations where the jury is deadlocked or divided, and the judge is required to inquire into the reason for the division.

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7. Discussion

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Brasfield v. United States (1927).
inquiry alone, and have examined the actions of the judge in the light of the totality of surrounding circumstances to determine whether any coercion prejudiced the defendant.6 Some of these courts have specifically rejected the Brasfield rule, finding it to be a rule of procedure developed by the Supreme Court in the exercise of its supervisory powers over the lower federal courts.47 These courts have accordingly found themselves free to develop their own rules concerning the propriety of a judicial inquiry into a jury division. Among the courts that do not follow Brasfield, there is a difference of opinion about the value of an inquiry into the jury's numerical division. Some approve of the practice, when the jury's division pertaining to conviction or acquittal is not disclosed, as a reasonable means of determining the probability of agreement among the jurors.48 Other courts disapprove of the practice but do not find it reversible error.49

Amidst this conflict of decisions, the United States Court of Appeals for the Fourth Circuit decided Ellis v. Reed. While recognizing the sharp division of authority on the issue, the Ellis court chose to

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47. The totality test has also been used in the federal courts in the examination of habeas corpus petitions. See Jones v. Norvell, 472 F.2d 1185, 1186 (6th Cir.), cert. denied, 411 U.S. 986 (1973); Marsh v. Cupp, 392 F. Supp. 1060, 1063-64 (D. Or. 1975), aff'd, 536 F.2d 1287 (9th Cir.), cert. denied, 429 U.S. 981 (1976).


In Wilson v. State, 145 Ga. App. 315, 244 S.E.2d 355 (1978) (cert. denied), the Georgia Court of Appeals concluded that an inquiry is proper if information on the jury's division between conviction and acquittal is not revealed. To avoid this situation, the court developed the following procedures:

[It] is suggested that a court should state the question, affirmatively, negatively, and illustratively, e.g.: "Tell me how you stand numerically—that is, whether you are 6 and 6, 8 to 4, etc., BUT DO NOT TELL ME WHETHER THAT NUMBER IS FOR GUILT OR INNOCENCE. Do you understand my question?"

Id. at 320, 244 S.E.2d at 360 (emphasis in original); see note 80 infra.

construe the *Brasfield* decision as establishing a federal rule of administration rather than a constitutional limitation upon state criminal trials.\(^{50}\) Although it acknowledged that the language of *Brasfield*\(^ {51}\) contained possible constitutional overtones,\(^ {52}\) the court noted that *Brasfield* cited no provisions of the Constitution.\(^ {53}\) Although this absence of constitutional citation,\(^ {54}\) in combination with the reluctance of the Supreme Court to decide a case on constitutional grounds unless it is absolutely necessary, supports a reasonable conclusion that *Brasfield* was decided only as a supervisory rule of judicial administration, the interpretation of the *Ellis* court is subject to criticism.

The *Ellis* court chose to rely on the language of *Burton*, in which the Supreme Court said “we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge.”\(^ {55}\) When *Brasfield* is read in conjunction with this language, according to the *Ellis* court, there emerges an administrative rule, based on the Supreme Court’s supervisory powers, that is not binding upon the states.\(^ {56}\) This emphasis by the court on the *Burton* “administration of the law” language may be misplaced. The Supreme Court only addressed the inquiry issue in passing at the end of the *Burton* decision. Twenty-one years later, the Court fully examined the issue in *Brasfield* and condemned a judicial inquiry into the numerical division of a jury with much more forceful language than that used in *Burton*. Dissenting in *Ellis*, Judge Winter placed greater emphasis and importance on this explicit language of *Brasfield*—“essential to the fair and impartial conduct of the trial” and “is coercive”\(^ {57}\)—in deciding that *Brasfield* was aimed at a constitutional

50. 596 F.2d at 1200.
51. “We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal.” 272 U.S. at 450.
52. 596 F.2d at 1197.
53. Id.
54. Appellant attempted to counter this factor by arguing that “[t]he absence of constitutional reference in *Brasfield* reflects nothing more than that, at the time of the decision in *Brasfield*, (1) the supervisory-constitutional distinction was insignificant, and (2) the Court frequently determined matters of constitutional import without reference to specific constitutional provisions.” Petition for Certiorari at 8. In support of the first proposition appellant contended that, at the time *Brasfield* was decided in 1926, it was unnecessary for the Court to distinguish its decision on a constitutional-supervisory basis because the sixth amendment and its specific guarantees had not been incorporated into the fourteenth amendment. Id. at 9 & n.1. For an illustration of the second proposition, appellant cited Alford v. United States, 282 U.S. 687 (1930), as a constitutional decision involving cross-examination questions in which no constitutional provisions were cited. Petition for Certiorari at 9-10.
55. 196 U.S. at 308, quoted in 596 F.2d at 1197-98.
56. 596 F.2d at 1197-98.
57. 272 U.S. at 450, quoted in 596 F.2d at 1201 (Winter, J., dissenting).
objective.\textsuperscript{58} Thus, the \textit{Burton} language may not be as important as the \textit{Ellis} court suggested.\textsuperscript{59}

The court reinforced its conclusion that \textit{Brasfield} only established an administrative rule of procedure by examining the Supreme Court decisions considering the relationship between federal constitutional requirements and state jury trials.\textsuperscript{60} The court emphasized that, although the sixth amendment right to trial by jury had been applied to the states,\textsuperscript{61} the Supreme Court had recognized that states may deviate from common law jury characteristics without denying due process.\textsuperscript{62} This reasoning should be rejected, as Judge Winter argued in dissent,\textsuperscript{63} because these common law jury deviations involved only formal aspects of the jury that do not go to the fairness of the jury trial itself. A practice such as a judicial inquiry into the numerical division of a jury, which may be “coercive” and exert an “improper influence” upon jurors, clearly should be distinguished from procedural formalities of the jury trial right that do not coerce the jurors.

Although the interpretative arguments of the \textit{Ellis} court can be criticized, the court’s ultimate conclusion that \textit{Brasfield} established an administrative, rather than a constitutional, rule is amply supported by an examination of the reasons that the Supreme Court gave for its decision in \textit{Brasfield}. These reasons can be broken down into three major categories: (1) the practice is coercive; (2) the inquiry invades the province of the jury and affects the proper judge-jury roles; and (3) the practice is useless. Of these three categories, the first carries the most significant constitutional implications.\textsuperscript{64}

\textsuperscript{58} 596 F.2d at 1201-02 (Winter, J., dissenting); see Brief for Appellant at 8-12; Petition for Certiorari at 8-12.

\textsuperscript{59} In his Petition for Certiorari, appellant cited several constitutional decisions and references which contain some of the same language used in \textit{Brasfield}—United States v. Wood, 299 U.S. 123, 147-48 (1936) ("essential to the impartiality of the jury"); Alford v. United States, 282 U.S. 687, 692 (1931) ("safeguards essential to a fair trial"); Patton v. United States, 281 U.S. 276, 294 (1930) ("fair"). Petition for Certiorari at 9-11. Appellant also tried to rebut the majority opinion’s reliance on the \textit{Burton} “administration of the law” language by citing Sinclair v. United States, 279 U.S. 749, 765 (1929), as an example of a constitutional decision in which the Supreme Court referred to a juror’s proper judgment role as “essential to proper enforcement of law.” Petition for Certiorari at 11.

\textsuperscript{60} 596 F.2d at 1199.

\textsuperscript{61} Id. (citing Duncan v. Louisiana, 391 U.S. 145 (1968)).

\textsuperscript{62} Id. (citing Johnson v. Louisiana, 406 U.S. 356 (1972) (less than unanimous jury verdict); Williams v. Florida, 399 U.S. 78 (1970) (less than 12 member jury)); see Brief for Appellees at 6.

\textsuperscript{63} 596 F.2d at 1202 n.* (Winter, J., dissenting).

\textsuperscript{64} The second reason for the \textit{Brasfield} rule, the “judge-jury relationship,” is arguably of a more limited constitutional nature than the coercion issue. It can be, and often is, intertwined with the coercion issue, so that the two are difficult to separate. But in this Note, the separate “judge-jury relationship” factor is viewed as a procedural explanation for \textit{Brasfield}. The separate
The coercion issue was raised in *Brasfield* when the Supreme Court found that an inquiry by a judge into the numerical division of a jury generally tends to be coercive and improperly influential upon the jury. This factor has been relied on by those courts finding the practice reversible error. When the majority-minority count is revealed to the court, prejudice may result. The judge must guard against pressuring the jury into reaching a verdict in which the minority accepts the majority view without concurring in it. The influence of the judge—the powerful, omniscient judicial authority in the eyes of the jurors—can be great, particularly when that authority figure requests the jury's division.

The Michigan Supreme Court expounded on this coercive impact of a numerical inquiry in *People v. Wilson*, in which it said:

Whenever the question of numerical division of a jury is asked from the bench, in the context of an inquiry into the progress of deliberation, it carries the improper suggestion that the state of numerical division reflects the stage of the deliberations. It has the doubly coercive effect of melting the resistance of the minority and freezing the determination of the majority.

This language was explained in *People v. Lawson*, in which the court said that "[s]uch an inquiry . . . carries the improper suggestion that the numerical division at the preliminary stage of deliberation is rele-

and distinct roles of the judge and of the jury are set, and neither is allowed to invade the province of the other. The judge should not intrude upon the jury process, from a procedural viewpoint, regardless of any possible coercive factor. It might be argued that these procedural roles are part of the sixth amendment jury trial right and thus constitutionally imposed upon state criminal trials. In rebuttal, it can be argued that they are only formal aspects of the jury trial right and, by analogy to Johnson v. Louisiana, 406 U.S. 356 (1972) (less than unanimous jury verdicts), and Williams v. Florida, 399 U.S. 78 (1970) (less than 12 member jury), not constitutionally required.

Coercion has been defined in many different ways. In discussions of the closely analogous *Allen* charge issue, for example, coercion has been defined as meaning "that the charge is capable of causing a minority juror to substitute the majority's opinion for his own—not that he is persuaded to reach a different decision, but that he accepts the majority view in spite of his own conviction as to the defendant's guilt or innocence," Comment, 31 U. Chi. L. Rev. 386, 386-87 (1964), and "any combination of influences which may tend to cause a doubting juror to join in a unanimous decision while doubt still exists within him as to the propriety of that verdict," Comment, 6 U.S.F. L. Rev. 326, 332 (1972).

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66. 272 U.S. at 450.

67. See cases cited note 40 supra.

68. See cases cited note 27 supra. A judge may also improperly influence a jury by reflecting on the individual jurors personally in his remarks. See note 29 supra. It has been suggested that an "imputation of stubbornness, or worse," may result if the numerical division of the jury is publicly revealed. Kesley v. United States, 47 F.2d 453, 454 (5th Cir. 1931).


70. Id. at 692, 213 N.W.2d at 195.

vant to what the final verdict will, or should, be. The court also found that by establishing a “majority view,” an inquiry has a coercive effect because “[i]t places the trial court's imprimatur upon what was but a tentative result.”

Thus, a request for the majority-minority count by the judge may have the effect of locking the jury into that count. This judicial “recognition” of the numerical split may carry an implication of judicial suggestion that the minority jurors should “come to” the majority in the further deliberations, with the rejection of the possibility of the majority “coming to” the minority. The numerical division is judicially “sanctioned” as the starting point in the further deliberations, and a renewal of deliberations by the jury unrestrained by their previous vote is spurned. From this improper starting point, the minority jurors, implicitly rebuked by the judge, may give in to the apparently “approved” position of the majority.

72. Id. at —, 223 N.W.2d at 719. This may have been suggested in Brasfield when the Court said that the inquiry “can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration, other than that of the evidence and the law as expounded in a proper charge, should be excluded.” 272 U.S. at 450. Because the practice is not a part of the law or evidence developed at trial, the jury’s use of prior ballots in its deliberations has been condemned for violating due process and possibly interfering with the reasonable doubt standard. See Comment, 15 Santa Clara Law. 939, 948 (1975); Comment, 36 Tenn. L. Rev. 749, 754 (1969); Comment, 6 U.S.F. L. Rev. 326, 334 (1972) (“The imposition of outside evidence also plays havoc with the concept of ‘reasonable doubt’ . . . . Tentative opinions or ballots of the jury members should play no role in a dissenting juror’s change of position. There is no connection between the majority view and the reasonableness of an individual juror’s doubt.”). But see Comment, 53 Or. L. Rev. 213, 224 (1974).


74. Coercion and its influence on policy choices can also be seen in the following related areas that are offshoots of the basic Brasfield issue:

(a) Nonnumerical disclosure of jury division—Generally, courts that have applied the Brasfield rule to a request for the jury’s numerical split have also applied it when the judge asks for the jury division in nonnumerical terms. See Jacobs v. United States, 279 F.2d 826, 828 (8th Cir. 1960) (inquiry into whether division very largely one-sided or whether equal; foreman’s response that it was “[n]ot equally divided”); United States v. Samuel Dinkel & Co., 173 F.2d 506, 508, 510 (2d Cir. 1949) (“The imposition of outside evidence also plays havoc with the concept of ‘reasonable doubt’. . . . Tentative opinions or ballots of the jury members should play no role in a dissenting juror’s change of position. There is no connection between the majority view and the reasonableness of an individual juror’s doubt.”). But see Comment, 53 Or. L. Rev. 213, 224 (1974).

(b) Disclosure of evenly divided jury—There has been a split of decisions concerning whether the Brasfield rule should be applied when the judge's inquiry reveals an even division of the jury (either an “equally divided” or “six to six” answer). It is submitted that Brasfield should not be used to find reversible error on these facts. When the jury is equally divided, there is no minority to coerce. Compare Berger v. United States, 62 F.2d 438 (10th Cir. 1932) (“six and six”); Brandenburg v. United States, 22 F.2d 966 (9th Cir. 1927) (“about evenly divided”); Jordan v. United States, 22 F.2d 966 (9th Cir. 1927) (“about evenly divided”); Jordan v. United States, 22 F.2d 966 (9th Cir. 1927) (“about evenly divided”); Nigro v. United States, 4 F.2d 781, 785 (8th Cir. 1923), aff’d, 276 U.S. 322 (1927) (predominance); Stewart v. United States, 300 F. 769, 782-87 (8th Cir. 1924) (large preponderance).
If a judicial inquiry does coerce a jury, a constitutional argument exists that a defendant's right to a fair trial by an impartial jury has been violated. But the Brasfield decision, and the conclusions relied upon by the Supreme Court in finding the inquiry reversible error, have been criticized by both courts and commentators. The primary process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge, 53 VA. L. REV. 123, 132 (1967); 16 CALIF. L. REV. 325 passim (1928).

(c) Disclosure of jury's numerical division on conviction or acquittal—It is generally felt that this disclosure creates a greater potential for prejudice than disclosure of numerical division alone. Even courts that do not follow Brasfield often find coercion when an inquiry reveals the jury's verdict split as well as its numerical division. An accompanying Allen charge will usually increase the probability of these courts finding coercion and thus reversible error. See People v. Carter, 68 Cal. 2d 810, 815 n.3, 816, 442 P.2d 353, 356 n.3, 357, 69 Cal. Rptr. 297, 300 n.3, 301 (1968) (en banc); Huffaker v. State, 119 Ga. App. 742, 742-43, 168 S.E.2d 895, 896-97 (1969) (cert. denied); State v. Middleton, 218 S.C. 452, 457, 63 S.E.2d 163, 165-66 (1951); 16 CALIF. L. REV. 325, 327 (1928). But see State v. McClendon, 37 N.C. App. 230, 245 S.E.2d 571 (1978) (no error although judge was advised after inquiry that jury stood 11 to 1 for guilty); Comment, 6 U.S.F. L. REV. 326, 336-37 & n.67 (1972) (argument that coercion lies in the Allen instruction itself, and not the judge's knowledge of the verdict split).

(d) Numerical division volunteered by jury—Most courts in this situation find no error because of the lack of a judicial inquiry. These decisions reflect a reluctance to extend Brasfield. See, e.g., United States v. Williams, 444 F.2d 108 (9th Cir. 1971); United States v. Sawyers, 423 F.2d 1335 (4th Cir. 1970); United States v. Rao, 394 F.2d 354, 356 (2d Cir.), cert. denied, 393 U.S. 845 (1968); Bowen v. United States, 153 F.2d 747, 752 (8th Cir.), cert. denied, 328 U.S. 835 (1946); Hyman Reiver & Co. v. Rose, 51 Del. 397, 409, 147 A.2d 500, 507 (1958) (civil case). But the same coercive effects may result when the judge is informed of the split voluntarily by the jury. The numerical split is usually brought out in open court, and the jury is aware that the judge knows of the split. Also, a subsequent Allen charge would have the same coercive effect regardless of whether the split was volunteered or requested. Therefore, a distinction between the two situations should not be made. See United States v. Noah, 594 F.2d 1303, 1306 (9th Cir. 1979) (Kilkenny, J., dissenting); 47 N.Y.U. L. REV. 296, 307 (1972); 42 TENN. L. REV. 803, 811 (1975); Comment, 36 TENN. L. REV. 749, 759 (1969); Note, Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge, 53 VA. L. REV. 123, 131 (1967).

75. See text accompanying note 38 supra.

76. In United States v. Rogers, 289 F.2d 433 (4th Cir. 1961), the court found that an inquiry regarding the substantial majority-minority standing of the jury preceding an Allen charge was a "trifling addition" to the charge that added little to the charge's coercive potential. Id. at 435-36. The court also rejected the Brasfield conclusion that an inquiry is a useless practice. Id. at 435 ("not such a purposeless thing").

The rule was also criticized in United States v. Samuel Dunkel & Co., 173 F.2d 506 (2d Cir. 1949), cert. denied, 340 U.S. 930 (1951), by a Second Circuit panel consisting of Learned Hand, Thomas Swan and Charles Clark. Although a nonnumerical disclosure was involved, the court felt itself bound by the federal precedents and declined to distinguish the case from Brasfield. But the panel was critical of the result and said:

We are bound to say that we do not feel happy over the result, for here the defendants appear to have had the benefit of the most careful deliberation by the jury and it is certainly doubtful whether in fact the judge's remarks may have had any effect in restricting or controlling the deliberations. Here was a long and difficult trial, where the evidence of guilt was substantial, now upset after a seven weeks' effort for this one perhaps doubtful slip. . . . This case does not make for seemly law administration. But the federal precedents are compelling and we would hardly improve the situation by trying to introduce into the system refined distinctions lacking substance.

Id. at 511 (footnote omitted); see note 74(a) supra; cf. United States v. Noah, 594 F.2d 1303, 1305-07 (9th Cir. 1979) (Kilkenny, J., dissenting), discussed in note 79 infra.

77. See, e.g., L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, 467-68 (1947); 8
mary reason for this criticism is the feeling of many critics that the inquiry alone is not coercive per se. Therefore, the inquiry itself should not be error, or at the most only harmless error. It is suggested that the coercion, if any, comes not from the inquiry itself but from the conduct of the judge after the inquiry. Any suggestive or coercive

J. Wigmore, Evidence 680-81 n.3 (3d ed. 1940) (describing Brasfield as a "finical spirit" that has "not scrupled to delay the course of justice for this petty cause"); Comment, 53 Or. L. Rev. 213, 223-24 (1974); Note, 78 Yale L.J. 100, 132-33 (1968) ("judicial ignorance," "foolish," "the most conclusory reasoning," which is "almost certainly wrong."); 16 Calif. L. Rev. 325 (1928); 27 Colum. L. Rev. 756 (1927); 41 Harv. L. Rev. 797 (1928); 25 Mich. L. Rev. 687 (1927); 76 U. Pa. L. Rev. 622 (1928); 3 Vand. L. Rev. 123 (1949).

78. See, e.g., Huffaker v. State, 119 Ga. App. 742, 742, 168 S.E.2d 895, 896 (1969) (cert. denied); Sharplin v. State, 330 So. 2d 591, 596 (Miss. 1976); State v. Baker, 293 S.W.2d 900, 905 (Mo. 1956); L. Orfield, supra note 77, at 467; 8 J. Wigmore, Evidence 693 n.3 (McNaughton rev. 1961); 41 Harv. L. Rev. 797, 797 (1928); 25 Mich. L. Rev. 687, 687 (1927). One court has even suggested that such an inquiry may have beneficial effects. See text accompanying note 87 infra.

79. It has been suggested that the Brasfield prohibition did not survive the Supreme Court's adoption of the Federal Rules of Criminal Procedure. See United States v. Noah, 594 F.2d 1303, 1305 (9th Cir. 1979) (Kilkenny, J., dissenting). Judge Kilkenny argued that any inquiry is now, at best, only harmless error under Rule 52(a). Id. at 1305 (dissenting opinion). Under that rule, an error is disregarded if it does not affect substantial rights. Fed. R. Crim. P. 52(a).

A few federal courts have found a judicial inquiry to be harmless error despite the reversal in Brasfield. See Beale v. United States, 263 F.2d 215 (5th Cir. 1959); Butler v. United States, 254 F.2d 875 (5th Cir. 1958). In Beale, the jury had deliberated only 12 minutes before returning for lunch. An inquiry made at that time was disregarded because the court felt Brasfield was flexible enough to allow a finding of harmless error. 263 F.2d at 217. In Butler, the jury had been out for only 45 minutes when the judge recalled them in order to make lunch plans. A subsequent inquiry was viewed by the court as harmless error. 254 F.2d at 876. These cases rely on the belief that the inquiry was made only for the purpose of arranging a suitable time for taking a lunch break and did not have any coercive effect. Therefore, any error present is harmless. It has been suggested that these cases create a limited exception to the general Brasfield rule of automatic reversal. See Annot., 77 A.L.R.3d 769, 775 (1977). It is submitted, however, that these cases are distinguishable from Brasfield and do not really involve an exception to the rule. Whereas the judge in Brasfield inquired into the division of an apparently deadlocked jury, in Beale and Butler the inquiry occurred only a short time after the jury began deliberations. Thus, there really did not exist a situation in which the jury was unable to agree after deliberating for a substantial period of time, as occurred in Brasfield.

80. In Sharplin v. State, 330 So. 2d 591 (Miss. 1976), the Mississippi Supreme Court summarized this notion as follows:

[The mere request and receipt of the jury's numerical division without reference to guilt or innocence does not coerce the jury and is not error. We believe that the possibility of coercion, if any, lies in the trial judge's conduct and comment after he receives the division, that is, whether the judge merely affords the jury additional time to deliberate or whether he attempts to force a verdict by suggestive comments or coercive measures.

Id. at 596; cf. 42 Tenn. L. Rev. 803 (1975), in which the author states:

The danger of any inquiry into the division of the jury results from the fact that the inquiry is generally followed by an instruction that the jury continue deliberations in an effort to reach a verdict. It has been suggested, however, that the coercive effect of the inquiry itself is minimal since the jurors are already aware of their split and little additional pressure is created by the fact that the judge also knows of the division. This reasoning appears to ignore the fact that the judge, armed with this information, must determine the length of the jury's further deliberations and the language of his further instructions. The judge can control either in such a way as to place more or less pressure
conduct by the judge in conjunction with the inquiry, beyond merely sending the jury back into deliberations, could be viewed as impermissibly coercive and thus reversible error. An *Allen* charge following the inquiry would be an example of a potentially coercive combination.81

The second major reason developed from the *Brasfield* decision for condemning a judicial inquiry into a jury’s numerical division is that the inquiry invades the province of the jury and affects the proper roles of the judge and jury. In *Brasfield*, the Supreme Court specifically found that an inquiry “affects the proper relations of the court to the jury.”82 Courts have relied on this factor to find that such an inquiry by the court may constitute an invasion of the province and sanctity of the jury and its deliberation process.83 It has been suggested that the basis for the *Brasfield* decision was the extreme sensitivity of the Supreme Court to communications between the court and the jury.84 Because intrusion upon the jury process is feared, courts may be overly prone to protect the jury from the influence of the judge. This concern for the judge-jury relationship may help explain why the numerical inquiry itself was condemned in *Brasfield*, despite the apparent lack of coercion per se in the practice.85

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81. *Id.* at 812 (footnotes omitted).

82. See *Kersey v. State*, 525 S.W.2d 139, 141 (Tenn. 1975); 25 Mich. L. Rev. 687, 687 (1927); Comment, 31 U. Chi. L. Rev. 386, 388 (1964). For an explanation of an *Allen* charge, see note 17 *supra*.

83. In most cases in which the judge inquires into the jury’s numerical division, he also gives an *Allen* charge or a form thereof. It can be argued that both an inquiry and an *Allen* charge should be present before an appellate court can find reversible error because of coercion; an inquiry alone would not be enough. This combination of inquiry and *Allen* charge was present in both *Burton* and *Brasfield*. Although it might be argued that the Supreme Court based its finding of reversible error in *Brasfield* on this combination, the Supreme Court addressed only the inquiry issue and never reached the *Allen* charge issue. Moreover, the Court remarked “that the inquiry itself should be regarded as ground for reversal.” 272 U.S. at 450. *See generally* United States v. Rogers, 289 F.2d 433, 435 & n.5 (4th Cir. 1961); Comment, 36 Tenn. L. Rev. 749, 758-59 (1969); Note, *supra* note 74, at 131 & n.43.


85. *See* United States v. Hayes, 446 F.2d 309, 312 (5th Cir. 1971) (presence or absence of
Finally, an inquiry into the numerical division of a jury has been condemned because the practice is deemed to be useless. The Brasfield Court found it "never useful." Some courts, however, have disagreed with this conclusion. They have found the practice useful in gauging the probability of agreement among the jurors for the purpose of deciding whether to dismiss a deadlocked jury or send it back into deliberations. But, as the Brasfield Court noted, this same advantage can be achieved by other forms of inquiry that do not require a disclosure of the jury's numerical division. Judicial approval has been given to reasonable, noncoercive questioning of the jury about the probability of agreement among its members. Therefore, while the numerical in-

coevision not a controlling factor because Brasfield also condemned an inquiry on grounds separate from coercion).

It can be argued that this concern is controlling because the Supreme Court condemned the inquiry in Brasfield, yet approved a potentially more coercive practice in the Allen charge. See United States v. Noah, 594 F.2d 1303 (9th Cir. 1979) (applying Brasfield rule). In Noah, Judge Kilkenny argued in dissent that a Brasfield inquiry was harmless when compared to the far more coercive, yet approved, Allen charge. Id. at 1305 (Kilkenny, J., dissenting). The majority responded by finding the equation of the Brasfield rule with the Allen charge fallacious:

"There is another factor that must be taken into account. This is that the slightest intrusion upon the privacy of a jury's deliberation should not be allowed and the bar to such intrusion should not . . . be impaired, even to the slightest degree. It is inconceivable . . . that some of the nine Justices who issued the Brasfield principle did not weigh this consideration."

Id. at 1304-05 n.2.

86. 272 U.S. at 450.


Other courts discount the usefulness of the practice. In People v. Wilson, 390 Mich. 689, 691, 213 N.W.2d 193, 195 (1973), the court stated: "It cannot be supposed that a jury is closer to agreement—in point of time—when it stands at 11 to 1 than when it stands at 8 to 4 or 6 to 6." The argument is that it cannot be determined, from an eleven to one split, how long it will take the one to join the majority. The holdout may quickly join the others, or may never join. This is assuming that the one should join the eleven; perhaps the eleven should join the view of the one. Although this argument may be theoretically correct, in practice it appears that the advantages do exist. An eleven to one split is often resolved much sooner than a more even division. See 16 CALIF. L. REV. 325, 329 n.20 (1928).

88. "Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division." 272 U.S. at 450.

89. For example, a judge can ask the members of the jury about any problems they are having and whether they think they will be able to agree. From these questions and other circumstances, such as the length of jury deliberation and the volume and complexity of the evidence, a judge can assess the probability of the jury's reaching a verdict, without an inquiry into its numerical split. See State v. Boogaard, 90 Wash. 2d 733, 738, 585 P.2d 789, 793 (1978). For examples of reasonable questioning, see United States v. Mack, 249 F.2d 321 (7th Cir. 1957), cert denied, 356 U.S. 920 (1958); People v. Maxwell, 3 Mich. App. 264, 142 N.W.2d 40 (1966). Some courts have developed procedures to ensure that the numerical division of the jury is not revealed when the
Numerical inquiries may be helpful in determining the probability of agreement, it is certainly not essential, and its usefulness is outweighed by its potential for prejudice.90

Having disposed of the Brasfield rule as an administrative, rather than a constitutional, one, the Ellis court adopted the “totality of the circumstances” test as the standard for determining whether an inquiry into the numerical division of the jury constitutes reversible error.91 Unlike the Brasfield per se rule, in which prejudice is presumed and the use of a numerical inquiry alone constitutes reversible error, under the totality test a finding of actual prejudice is required and the use of the numerical inquiry is reviewed to determine if coercion has resulted.92 Although this test has been used extensively by those courts that have refused to follow Brasfield,93 the totality test may prove to be ineffective.

It is the difficulty of proof of actual prejudice under the totality of the circumstances test that constitutes perhaps the best argument for finding the numerical inquiry unconstitutional, or at least for prohibiting the practice through an administrative rule. Because of this difficulty, the potential for prejudice and coercion from an inquiry should be enough to constitute a violation of due process.94 and proof of actual prejudice should not be required. This problem of proof in turn creates difficulties of appellate review of trial court convictions in which such an inquiry has occurred.95 The Supreme Court in Brasfield recognized this problem when it said that an inquiry’s “effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts.”96 The problem is that it is not known how such an inquiry affects a juror. A court cannot find out because it is forbidden from inquiring into jury deliberations. Even if a

90. That the Brasfield Court was actually applying this sort of balancing test is evidenced by its statement that the numerical inquiry is “never useful and . . . generally harmful.” 272 U.S. at 450. It has been suggested that because such an inquiry is useless, the Supreme Court condemned it in order to establish a uniform rule for the federal courts. See 3 Vand. L. Rev. 123, 124 (1949).
91. 596 F.2d at 1198-99.
92. Id. at 1199.
93. Id.; see cases cited note 46 supra.
94. This theory has been used in arguing that an Allen charge is unconstitutional. The Allen charge situation is closely analogous to the judicial inquiry issue, and the same constitutional arguments are applicable to each. See Comment, 6 U.S.F. L. Rev. 326, 333-34 (1972) (Allen charge). Contra, 4 Harv. L. Rev. 797, 797 (1928); 3 Vand. L. Rev. 123, 123 (1949).
96. 272 U.S. at 450.
court could review the deliberations of the jury, many subjective influences of an inquiry could not be discovered. These effects would be locked away forever in the minds of the individual jurors, who may never realize that their decision was subconsciously influenced. Therefore, a totality of the circumstances test, as suggested by Ellis and the other courts rejecting the Brasfield rule, may be an ineffective method for an appellate court's determination of whether a jury verdict has been coerced.

This argument for the unconstitutionality of a judicial inquiry has been summarized as follows:

When the coercive impact of a questionable practice cannot be assessed accurately, pragmatic concern for defendants' rights, impartial trial and the integrity of the jury process dictates that the use of a questionable practice be proscribed. There is danger that where proof of prejudice is difficult, a defendant's right to a fair trial by an impartial jury will be violated with a consequent denial of due process. Where practical considerations pose special difficulties of proof in regard to vital rights, policy supports the formation of practices to protect those rights.

Therefore, under this argument, when the coerciveness of a practice such as a numerical inquiry is questioned, any doubt should be balanced in favor of the defendant's right to a fair trial by an impartial jury. The Supreme Court has used this theory, for example, in excess publicity cases, to dispense with proof of actual prejudice when such proof is difficult to obtain. This same theory might be used to find a


In Estes, the Supreme Court stated: "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process." 381 U.S. at 542-43 (citing In re Murchison, 349 U.S. 133 (1955); Tumey v. Ohio, 273 U.S. 510 (1927)).

In Murchison, the Court discussed this theory of due process:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . . . But to perform its high function in the best way "justice must satisfy the appearance of justice."

349 U.S. at 136 (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).

In Tumey, the Supreme Court commented:

Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him
violation of due process in a numerical inquiry because of the possibility of coercion inherent in the practice. Even if this argument does not reach a constitutional dimension, the theory could also be used by the state courts in finding reversible error. The potential harm inherent in the use of the numerical inquiry outweighs any potential benefit to such an extent that state courts should take it upon themselves to establish an administrative rule striking down the practice.

In conclusion, it is submitted that the court of appeals decided *Ellis v. Reed* correctly, but for the wrong reasons. The complete absence of constitutional citation by the Supreme Court in *Brasfield* and the "administration" language of *Burton* combine to support the conclusion that *Brasfield* was decided as an exercise of the Supreme Court's supervisory powers and not as a constitutional limitation applicable to state courts.100 This reasoning, however, can be criticized. On the other hand, the *Ellis* court also failed to address adequately the reasoning of the *Brasfield* Court, particularly on the crucial issue of coercion. Of the reasons presented by the *Brasfield* Court, the coerciveness of the numerical inquiry is the one that borders most on the question of constitutionality. Because a numerical inquiry alone is not coercive, this question should probably be answered in favor of the constitutionality of the practice. Thus, the *Ellis* court's ultimate decision that *Brasfield* established an administrative, rather than a constitutional, rule is vindicated most successfully not by an examination of the citation in *Brasfield* or the language in *Burton*, but by an analysis of the substantive reasons given for the *Brasfield* decision.

Although the numerical inquiry is not coercive per se, in combination with other factors—such as suggestive remarks by the judge, the disclosure of the jury's division of opinion about guilt or innocence and especially an *Allen* charge101—the possibility of coercion increases, and the situation should be scrutinized closely, with any doubt balanced in favor of defendants' rights. The totality of the circumstances test, with its problem of proving actual prejudice, however, makes such balancing extremely difficult, if not impossible. Therefore, even if an inquiry into the jury's numerical division is not itself unconstitutional, its use in

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100. See text accompanying notes 50-63 supra.
101. In *Ellis*, an inquiry was combined with a modified version of the *Allen* charge. The charge was, however, relatively mild, and the court of appeals found it not coercive. 596 F.2d at 1196-97; see note 17 supra.
state trials should be condemned as improper and useless. The advantages of such a practice can be achieved by other forms of judicial inquiry, not involving a numerical division disclosure, that do not have the same potential for prejudice. Any possible benefits of numerical inquiry are outweighed by the potential harm inherent in such a practice.

Unfortunately, the ambiguities of the Brasfield decision have created confusion among the courts. As Ellis demonstrates, this confusion has led to the distraction of judicial analysis from the substantive merits of the numerical inquiry—primarily its potential for coercion—to the decisional basis for the Brasfield rule. It is thus incumbent upon the Supreme Court to combine its condemnation of the numerical inquiry in Brasfield with a clear statement on the constitutionality of the practice. Even if the numerical inquiry is not found to be unconstitutional, its widespread use in state trials is certainly improper and should be checked. This result apparently will not be reached, however, until state and federal courts are forced to address the merits of the numerical inquiry by an unequivocal decision by the United States Supreme Court on the constitutionality of its use.

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