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Constitutional Propriety of State Judges' Inquiries into the Numerical Division of Deadlocked Juries: Ellis v. Reed

Bruce Ellis was convicted of embezzlement by a North Carolina trial court.1 During the jury deliberations, the judge had asked the jury to reveal its numerical division.2 After Ellis' direct appeals failed,3 he sought a writ of habeas corpus4 in federal district court, alleging as errors both the trial judge's inquiry into the numerical division of the jury and the judge's use of a modified Allen charge as a supplemental jury instruction.5 Finding no error, the federal district court denied the

1. The trial court found Ellis guilty of embezzling $18,799.50 from a finance company. Ellis v. Reed, 596 F.2d 1195, 1196 (4th Cir.), cert. denied, 100 S. Ct. 468 (1979).
2. Id. See note 5 infra.
4. The writ of habeas corpus tests "the legality of the detention of one in the custody of another." McNally v. Hill, 293 U.S. 131, 136 (1934). A federal judge may grant the writ, 28 U.S.C. § 2241(a) (1976), "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (1976).
5. The Allen charge received its name from Allen v. United States, 164 U.S. 492 (1896). In that case, the Supreme Court approved a supplemental instruction given to a deadlocked jury, an instruction that urged the jury to decide the case if possible and emphasized the duty of the minority jurors to reconsider their position in light of the majority's viewpoint. Id. at 501-02.

Following the three-day trial in Ellis, the jury deliberated for approximately one hour before returning to the courtroom for additional instructions. After a second hour of deliberation, the jury again returned to the courtroom, and the following dialogue 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 convic-
The Court of Appeals for the Fourth Circuit affirmed, holding that judicial inquiry into the division of the jury is not constitutionally prohibited and that the totality of the circumstances, including the judicial inquiry, did not violate the defendant's right to a fair trial. Ellis v. Reed, 596 F.2d 1195 (4th Cir.), cert. denied, 100 S. Ct. 468 (1979).

Under the sixth amendment, defendants in federal criminal cases enjoy a right to trial by an impartial jury. In Duncan v. Louisiana, the Supreme Court held that the due process clause of the fourteenth amendment extends the right to a trial by jury to defendants in state criminal cases. Even before Duncan, the Court interpreted the due process clause to require that any state jury trial be a fair trial before an impartial jury. The Court, however, has never determined whether an inquiry into the division of a jury violates this constitutional right. In the 1905 case of Burton v. United States, the Court condemned the practice of inquiring into the numerical divisions; 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 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.

Ellis v. Reed, 596 F.2d 1195, 1196 (4th Cir.), cert. denied, 100 S. Ct. 468 (1979). The jury then reached a verdict of guilty within eight minutes. Id.


7. 596 F.2d at 1197. The court was apparently referring to the due process clause of the fifth amendment, as applied to the states by the fourteenth amendment.

8. 596 F.2d at 1200. If the inquiry or the totality of the circumstances co-erces a juror, the defendant would not receive an impartial trial, guaranteed by the sixth amendment, as applied to the states by the due process clause of the fourteenth amendment. See note 51 infra.

9. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.


11. Id. at 149.


sion of a federal jury, since "cases may easily be imagined where a practice of this kind might lead to improper influences."14 Twenty years later, the Court ended the disagreement over the significance of the Burton language15 by holding in Brasfield v. United States16 that any such inquiry constituted reversible error:

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 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.17

The Brasfield Court did not indicate whether the rule it was adopting was a constitutional prohibition or an exercise of its supervisory powers over the federal courts,18 nor has the Court subsequently clarified the basis of its decision in Brasfield.19

Although federal courts are bound by the result in Brasfield (even if that result derives from the Supreme Court's supervisory powers), application of the holding in Brasfield has sometimes been difficult because of the ambiguity in that opin-

14. Id. at 307-08 (dictum).
15. After the decision in Burton, the circuit courts of appeals disagreed as to whether the condemnation of the inquiry was mandatory or hortatory. See Jordan v. United States, 22 F.2d 966, 967-68 (9th Cir. 1927) (Gilbert, J., dissenting), and cases cited therein.
17. Id. at 450. In Brasfield, after the jury had deliberated several hours without reaching a verdict, the trial judge inquired about its numerical division. The foreman reported that the division was nine to three, without indicating whether the majority or minority favored conviction. Id. at 449.
ion. With few exceptions, federal courts prohibit inquiries. Occasionally these courts extend Brasfield beyond its facts to require reversal when the trial judge merely asks for the approximate division of the jury. Other federal courts, distinguishing Brasfield, find no error when the jury voluntarily reveals its numerical division to the trial judge. Even the sta-

20. The Court of Appeals for the Eighth Circuit has held that an inquiry that revealed the jurors to be "pretty evenly divided" was permissible because without a minority to coerce there could be no coercive effect. Anderson v. United States, 262 F.2d 764, 773 (8th Cir.), cert. denied, 360 U.S. 929 (1959). On two occasions, the Fifth Circuit Court of Appeals has held that inquiry for the purpose of arranging a suitable recess for a meal for the jurors was not reversible error since the error did not affect substantial rights. Beale v. United States, 263 F.2d 215, 217 (5th Cir. 1959); Butler v. United States, 254 F.2d 875, 876 (5th Cir. 1958). Both opinions applied the harmless error rule from the Federal Rules of Criminal Procedure: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 52(a).

21. See Virgin Islands v. Romain, 600 F.2d 435, 436 (3d Cir. 1979); United States v. Noah, 594 F.2d 1303, 1304 (9th Cir. 1979); United States v. Hayes, 446 F.2d 309, 312 (5th Cir. 1971); Jacobs v. United States, 279 F.2d 826, 832 (8th Cir. 1960); Cook v. United States, 254 F.2d 871, 873 (5th Cir. 1955); United States v. Samuel Dinkel & Co., 173 F.2d 506, 510-11 (2d Cir. 1949); Spaugh v. United States, 77 F.2d 720, 722-23 (9th Cir. 1935); Berger v. United States, 62 F.2d 438, 439 (10th Cir. 1932); Jordan v. United States, 22 F.2d 966, 967 (9th Cir. 1927). Other courts have recognized the rule, but distinguished on its facts the case under consideration. United States v. Cheramie, 520 F.2d 325, 331 n.8 (5th Cir. 1975); United States v. Smoot, 463 F.2d 1221, 1223 (D.C. Cir. 1972); United States v. Mack, 249 F.2d 321, 323-24 (7th Cir. 1957), cert. denied, 356 U.S. 920 (1958); Cenedella v. United States, 224 F.2d 776, 784 (1st Cir. 1955); State v. Collins, 10 F. Supp. 1007, 1010 (S.D. Tex. 1935). Interpreting Brasfield, Devitt and Blackmar state, "[I]t is a cardinal rule that the court should not ask the jury as to their numerical division. This is ground for reversal." J. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 5.22, at 161-62 (3d ed. 1977).

Commentators have criticized the Brasfield rule. See L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 467 (1947); J. WIGMORE, EVIDENCE § 2350, at 692 (McNaughton rev. ed. 1961); 16 CAL. L. REV. 325, 327 (1928); 27 COLUM. L. REV. 756, 757 (1927); 41 HARV. L. REV., 797, 797-98 (1928); 25 MICH. L. REV. 687, 687 (1927); 76 U. PA. L. REV. 622, 623 (1928); 3 VAND. L. REV. 123, 123-25 (1949). Even federal judges who have followed the rule have expressed their dislike of it:

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 that deliberation. 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. The defendants, out on bail, have already had the benefit of extreme delay in making up the record and preparing the appeal. This case does not make for seemly law administration. But the federal precedents are compelling.


22. Jacobs v. United States, 279 F.2d 826, 827, 832 (8th Cir. 1960) (judicial inquiry whether division is equal or largely one-sided); United States v. Samuel Dinkel & Co., 173 F.2d 506, 507, 510 (2d Cir. 1949) (judicial inquiry whether there is a majority and a minority); Jordan v. United States, 22 F.2d 966, 966-67 (8th Cir. 1927) (judicial inquiry whether jury is about evenly divided).

DEADLOCKED JURIES

The use of Brasfield as a per se rule against inquiries, however, is not beyond question. Many appellate courts have discussed the coercive effect of a circumstance other than the inquiry before reversing the conviction. This broad analysis makes it difficult to ascertain whether these courts would hold that an inquiry by itself constitutes reversible error. Brasfield provides no guidance on this issue, because it involved both an inquiry and a possibly coercive Allen charge.

State courts have been less willing than federal courts to follow the Brasfield rule and have taken three different approaches to the issue of judicial inquiries. Courts of three jurisdictions treat an inquiry alone as a ground for reversal, and


24. See, e.g., United States v. Noah, 594 F.2d 1303, 1304 (9th Cir. 1979) (discussing the fact that during the first of two inquiries, defendants and attorneys were not present); Cook v. United States, 254 F.2d 871, 873-75 (5th Cir. 1959) (discussing the aggravation of the inquiry by the suggestion that the jury might be held together over the weekend).

25. Although the trial judge in the Brasfield case gave an Allen charge after inquiring into the division of the jury, Brasfield v. United States, 8 F.2d 472, 472 (9th Cir. 1925), rev'd, 272 U.S. 448 (1926), the Supreme Court opinion does not discuss that charge. In each of the cases cited in Brasfield, an instruction on the duty to reach agreement followed the inquiry. For a discussion of those cases, see Jordan v. United States, 22 F.2d 966, 967-68 (9th Cir. 1927) (Gilbert, J., dissenting).


The Ellis opinion also cites Taylor v. State, 17 Md. App. 41, 299 A.2d 841 (1973), and Kersey v. State, 525 S.W.2d 139 (Tenn. 1975), as cases in which state courts have adhered to Brasfield. 596 F.2d at 1198. It would be more accurate, however, to describe these cases as having considered the totality of the circumstances. While Taylor suggests that Brasfield is a constitutional rule, 17 Md. App. at 49 n.8, 299 A.2d at 845 n.8, the judicial conduct in Taylor did not include an inquiry. Part of the coercive conduct was the agreement of the judge with one juror, after a voluntary disclosure that the division was eleven to one, that "[i]t's up to the one to change." Id. at 44, 299 A.2d at 844. See also Smoot v. State, 31 Md. App. 138, 355 A.2d 495 (1976) (no inquiry; judicial conduct coercive in totality of circumstances). In Kersey, the court held that the inquiry was error, 525 S.W.2d at 141, but also held that the accompanying Allen
thus apparently prefer a per se rule because of the potential coercive effect of inquiries and the difficulty of distinguishing between degrees of coercion in different factual settings. Of these three jurisdictions, only New Mexico adopts *Brasfield* as a constitutional rule.\(^{27}\) The remaining states that have considered the propriety of an inquiry into the numerical division of the jury\(^{28}\) form two groups. One group permits disclosure of the numerical division so long as the judge does not ask whether the majority is for conviction or acquittal.\(^{29}\) The courts of the other group consider the totality of the circumstances, and hold that even though inquiry into the jury's division is improper, it is not reversible error in the absence of coercion.\(^{30}\)

Prior to *Ellis*, only two federal courts had considered the issue of whether the basis of the *Brasfield* rule is supervisory or charge was prejudicial error, *id.* at 145. Although these alternative holdings were discussed independently, it is not certain that inquiry alone would have constituted reversible error. For a discussion of *Kersey*, see 42 TENN. L. REV. 803, 811 (1975).


28. Fewer than half the states have considered the *Brasfield* issue. See Annot., 77 A.L.R.3d 769 (1977).


constitutional. Both of the cases, *Marsh v. Cupp* and *Jones v. Norvell*, were habeas corpus proceedings arising from state court convictions. In *Marsh*, a federal district court held that the *Brasfield* rule was based on the supervisory powers of the Supreme Court. In *Jones*, the Court of Appeals for the Sixth Circuit held that the totality of the circumstances had violated the defendant’s constitutional right to a fair and impartial jury trial under the sixth and fourteenth amendments. The circumstances in *Jones* included an invasion of jury secrecy, an inquiry into the numerical division of the jury, a coercive jury charge, and a speedy return of a verdict subsequent to the charge.

In *Ellis*, the Court of Appeals for the Fourth Circuit considered two possible theories under which Ellis’ conviction would have been unconstitutional. The court considered, first, whether *Brasfield* establishes a per se constitutional rule prohibiting inquiry into the numerical division of the jury.

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32. 472 F.2d 1185 (6th Cir. 1973).
33. 392 F. Supp. at 1063. On appeal, the Ninth Circuit affirmed the decision, but erroneously concluded that no *Brasfield* issue was presented since the trial judge had inquired about the numerical standing of the jury but not whether the jurors favored conviction or acquittal. Hence, the circuit court did not address the issue of the basis for the *Brasfield* rule. See *Marsh v. Cupp*, 536 F.2d 1287, 1291 n.9 (9th Cir.), cert. denied, 429 U.S. 981 (1976).
34. 472 F.2d at 1186.
35. Id.
36. 596 F.2d at 1200. Both the majority and dissent in *Ellis* assume that if the federal courts are constitutionally prohibited from inquiring into the numerical division of the jury, this rule also applies to the states through the due process clause of the fourteenth amendment. *Id.* at 1197, 1200; *id.* at 1201 (Winter, J., dissenting). Such an assumption is not necessarily accurate given differing views of incorporation. Those who adhere to the traditional view of incorporation believe that when a right is incorporated from the Bill of Rights into the fourteenth amendment, the guarantee is “to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” Malloy v. Hogan, 378 U.S. 1, 10 (1964), quoted in *Pointer v. Texas*, 380 U.S. 400, 406 (1965). See *Miranda v. Arizona*, 384 U.S. 436, 463-64 (1966). Others holding the view that one writer entitles “neo-incorporation,” Cord, *Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment*, 44 FORDHAM L. REV. 215 (1975), believe that a procedural right incorporated from the Bill of Rights into the fourteenth amendment may have a different effect on procedures in state criminal cases than the original right has on procedures in federal criminal prosecutions. *Id.* at 237-38. Proponents of this position reject the interpretation that the fourteenth amendment requires following “not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings.” Duncan v. Louisiana, 391 U.S. 145, 213 (1968) (Fortas, J., concurring). Justice White, speaking for the Court, expressed this view in *Apodaca v. Oregon*, 406
and second, whether the totality of the circumstances, including the inquiry into the numerical division of the jury, violated Ellis' right to a fair trial guaranteed by the due process clause of the fourteenth amendment. In refuting the first possibility, the court reasoned that Brasfield's reference to avoidance of inquiries as "essential to the fair and impartial conduct of the trial" does not compel a constitutional interpretation. The court supported its opposition to interpreting Brasfield as a per se rule by noting that the Brasfield opinion cites no provisions of the Constitution, and that many of the states that have considered the issue have interpreted Brasfield as an expression of the Supreme Court's supervisory power.

In considering the second constitutional challenge, the court recognized that although the sixth amendment right to an impartial jury trial has been incorporated into the due process clause of the fourteenth amendment, due process does not require a state to adopt all the characteristics of a federal jury trial. According to the court, a judicial inquiry into the numerical division of the jury is most closely analogous to the circumstances in Cupp v. Naughten. In that case, in which the defendant did not testify, the Supreme Court held that the jury instruction, "Every witness is presumed to speak the truth,"
did not deny due process. Recognizing the constitutional constraints placed on federal courts’ review of state court convictions, the Ellis court held that the totality of the circumstances had not violated due process.

As the majority in Ellis correctly observed, the Brasfield opinion is ambiguous on the question of constitutionality. Although the Court’s assertion that it is “essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal” could be interpreted as based on the sixth amendment guarantee of an impartial jury, only New Mexico has interpreted that language as requiring a constitutional rule. In contrast, an interpretation of Brasfield

46. Id. at 149-50.
47. 596 F.2d at 1199-1200. The court cites with approval Rochin v. California, 342 U.S. 165 (1952), see 596 F.2d at 1200, in which the level of due process review is “conduct that shocks the conscience.” 342 U.S. at 172.
48. 596 F.2d at 1200. The court found that the modified Allen charge in Ellis was not error, since it was a balanced instruction with no tendency to coerce the jury. Id. at 1196-97. See note 92 infra and accompanying text.
49. See 596 F.2d at 1197.
50. 272 U.S. at 450.
51. “In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .” U.S. Const. amend. VI.
52. State v. Aragon, 89 N.M. 91, 97, 547 P.2d 574, 580 (Ct. App.), cert. denied,
as a clarification of the earlier language of *Burton v. United States* suggests that the rule is supervisory rather than constitutional. The Court in *Burton* stated that an inquiry was inconsistent with the "proper administration of the law." Similarly, in *Brasfield*, the Court said that an inquiry "affects the proper relations of the court to the jury." Both statements support a supervisory interpretation. In view of the conflicting interpretations, the Supreme Court's language in *Brasfield* is too ambiguous to characterize the rule definitively as either constitutional or supervisory.

The *Ellis* majority and dissent agree that if an inquiry coerces the jurors to reach a verdict against their will, the defendant's right to an impartial trial is violated. Although it is an established rule that a judge may not coerce a jury into reaching a verdict, there is disagreement as to what actions have a coercive effect. Coercion, in this context, presumably means that the judicial inquiry causes a minority juror to substitute the majority's opinion for his own—not that he is persuaded to agree to a different decision, but that he submits to the majority view in spite of his own opinion of the defendant's guilt or innocence.

The per se nature of the *Brasfield* rule suggests that the inquiry itself has a coercive effect. Indeed, the cases distinguish between asking the division and merely knowing the

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54. "[W]e 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." 196 U.S. at 308 (emphasis added).

55. 272 U.S. at 450.

56. Judge Kilkenny suggested the latter interpretation in his dissenting opinion in *United States v. Noah*, 594 F.2d 1303, 1306-07 (9th Cir. 1979) (Kilkenny, J., dissenting).

57. 596 F.2d at 1199; id. at 1202 (Winter, J., dissenting).


59. Early cases involved physical coercion and restraint. People v. Sheldon, 156 N.Y. 268, 50 N.E. 840 (1898), presents an interesting summary of the coercive methods that nineteenth century trial judges used to obtain unanimous verdicts. Milder forms of physical coercion persisted into this century. See cases cited in Note, supra note 12, at 123 n.3. Modern forms of coercion are more subtle. For a discussion of the possibly coercive effects of an *Allen* charge, see Note, The *Allen Charge Dilemma*, 10 AM. CRIM. L. REV. 637, 655-62 (1972).

60. The Michigan Supreme Court, in adhering to *Brasfield*, reasoned that the inquiry "has the doubly coercive effect of melting the resistance of the mi-
division: no coercion occurs if the jury voluntarily discloses its numerical division to the judge. The danger of coercion presumably exists because jurors tend to view the judge as a person of authority, and thus are likely to be influenced by his actions during the trial. An individual juror might believe that the judge’s inquiry into the division reflects a desire that the jury reach a verdict. The juror may then feel that he should change his vote in order to conform with his perception of the judge’s wishes.

The inquiry, however, seems potentially less coercive than an Allen charge. An Allen charge typically reminds the jury of the cost in time and money of a retrial, should it be necessary, and of the jurors’ duty to try to reconcile their differences and reach a verdict, if possible, without surrendering their conscientious convictions. Such a supplemental instruction has a much greater potential for coercing a juror than merely asking how the jury is numerically divided. Despite fierce criticism, minority and freezing the determination of the majority.” People v. Wilson, 390 Mich. 689, 692, 213 N.W.2d 193, 195 (1973).


62. See Thaggard v. United States, 354 F.2d 735, 741 (5th Cir.), cert. denied, 383 U.S. 958, 959 (1966) (Coleman, J., concurring) (“It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.”) (quoting Starr v. United States, 153 U.S. 614, 626 (1894)). See also Huffman v. United States, 297 F.2d 754, 758-59 (5th Cir. 1962) (Brown, J., dissenting); Taylor v. State, 17 Md. App. 41, 44, 299 A.2d 841, 844 (1973).

63. Judge Kilkenny makes this argument persuasively in his dissenting opinion in United States v. Noah, 594 F.2d 1303, 1305-06 (9th Cir. 1979) (Kilkenny, J., dissenting).

64. See Allen v. United States, 164 U.S. 492, 501 (1896).

however, *Allen* charges have never been ruled unconstitutional by a federal court.\(^6\) If *Allen* charges are constitutionally permissible, inquiries must a fortiori also be permitted.

In suggesting that an inquiry is "essentially procedural in nature"\(^6\) and that, "[i]n any event, the jury knew how it was divided,"\(^6\) the *Ellis* court appeared to doubt that judicial inquiries have any coercive effect at all. In fact, the difficulty of imagining a minority juror interpreting a mere inquiry as judicial pressure to change his vote suggests that inquiries might not have a coercive effect. The judicial conduct that courts have generally found to be coercive in other contexts is conduct giving jurors the impression that they *must* reach a verdict.\(^6\) Since an inquiry lacks that degree of compulsion, there is apparently no reason to treat cases in which the judge inquires into the division differently from those cases in which


\(^\) See Jenkins v. United States, 380 U.S. 445, 446 (1965), rev'd per curiam 330 F.2d 220, 221 (D.C. Cir. 1964) (Wright, J., dissenting) (Judge said to the jury, without knowing the division, "Now, I am not going to accept this. You have got to reach a decision in this case."); *Lowe v. People*, 175 Colo. 491, 493-94, 448 P.2d 559, 560-61 (1971) (Judge implicitly authorized one juror to sacrifice his conscientious opinions merely for the sake of reaching agreement.); *Taylor v. State*, 17 Md. App. 41, 44, 289 A.2d 841, 844 (1973) (Judge, after learning that division was eleven to one, continued to inquire of each juror concerning the probability of agreeing. When one juror commented, "It's up to the [one]." the judge replied, "I agree. It's up to the one to change."); *State v. Boogaard*, 90 Wash. 2d 733, 735-36, 585 P.2d 789, 791-93 (1978) (Judge, knowing division was ten to two, inquired of each juror whether or not he believed the jury could reach a verdict in a half hour.).
the judge inadvertently learns of the numerical division.\textsuperscript{70}

Even if the inquiry does not cause a minority juror to substitute another opinion for his own, the coercion may nevertheless subtly alter the required standard of proof.\textsuperscript{71} The Supreme Court has held that the due process clause of the fourteenth amendment\textsuperscript{72} requires the state to prove its case against the defendant beyond a reasonable doubt.\textsuperscript{73} If the judge's inquiry causes one or more jurors to impermissibly alter this standard, a subsequent conviction would arguably not be based on proof beyond a reasonable doubt. The Court's holding in \textit{Cupp v. Naughten},\textsuperscript{74} however, suggests that the \textit{Brasfield} rule against inquiries does not rise to constitutional dimensions. In \textit{Cupp}, a state criminal prosecution in which the defendant neither testified nor called witnesses on his behalf, the trial judge instructed the jury that "[e]very witness is presumed to speak the truth."\textsuperscript{75} Although the presumption-of-truthfulness instruction was considered "confusing, of little positive value to the jury, or simply undesirable,"\textsuperscript{76} the Court held that it did not deny the defendant due process.\textsuperscript{77} The circumstances in \textit{Cupp} are remarkably similar to those in \textit{Ellis}. The trial judge in \textit{Cupp} twice gave explicit instructions affirming the presumption of innocence and the standard of guilt beyond a reasonable

\textsuperscript{70} See Yale Comment, supra note 65, at 133. See also Chicago Comment, supra note 65, at 392.

\textsuperscript{71} The minority juror may interpret the judicial inquiry as a reflection of the judge's belief that the jury should reach a verdict. While a juror does not interpret this as a command to capitulate to the majority position, he may begin to question his own evaluation. He may reason, "If the judge thinks we should be agreeing, and I'm the one with a differing view, I must have misinterpreted the judge's instructions. The other jurors must have the correct standard of proof in mind. Therefore, I will now vote with them."

\textsuperscript{72} "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV, § 1.


\textsuperscript{74} 414 U.S. 141 (1973). See text accompanying notes 44-46 supra.

\textsuperscript{75} \textit{Id.} at 142. In seeking a writ of habeas corpus, the defendant argued that such an instruction shifted from the state its burden to prove a defendant's guilt beyond a reasonable doubt. \textit{Id.} at 143.

\textsuperscript{76} \textit{Id.} at 146.

\textsuperscript{77} \textit{Id.} at 149-50. The Supreme Court reversed the grant of a writ of habeas corpus by the court of appeals, after the Court examined the instruction in the context of the over-all charge. For a discussion of the presumption-of-truthfulness instruction, see Comment, \textit{Cupp v. Naughten and the Presumption of Truthfulness: Breath of Life for a Vanishing Jury Instruction}, 49 NOTRE DAME LAW. 1101 (1974).
doubt,\textsuperscript{78} and the trial judge in \textit{Ellis} twice warned the jurors not to surrender any conscientious beliefs.\textsuperscript{79} That similarity, as well as the difficulty of measuring the actual impact on the juror, suggests that the \textit{Ellis} inquiry, like the \textit{Cupp} instruction, should be considered to violate neither the reasonable doubt standard nor due process.

The Supreme Court's holding in \textit{Apodaca v. Oregon},\textsuperscript{80} that unanimous jury verdicts are not constitutionally required,\textsuperscript{81} may also be logically inconsistent with the argument that \textit{Brasfield} is of constitutional dimensions. That holding permits convictions even though some jurors remain unconvinced of the guilt of the defendants.\textsuperscript{82} Even if one assumes that a judicial inquiry actually coerces the minority jurors to acquiesce in a guilty verdict, such a result is equivalent to allowing a majority to convict. In both cases, the effect is to reduce the number of jurors who must agree in order to produce a verdict. There would appear to be no constitutional difference between convicting a defendant when eleven (or fewer) jurors are willing to vote for conviction and convicting a defendant by a unanimous verdict when the twelfth juror was persuaded by judicial conduct. Thus, even if the inquiry or accompanying circumstances produce unanimity more rapidly than would occur without the inquiry, the defendant's constitutional right to proof beyond a reasonable doubt would appear to be unaffected.\textsuperscript{83}

Although the Supreme Court stated in \textit{Brasfield} that in-

\textsuperscript{78} 414 U.S. at 147.
\textsuperscript{79} 596 F.2d at 1196, 1200.
\textsuperscript{82} The convictions in \textit{Apodaca} were by eleven-to-one and ten-to-two verdicts. 406 U.S. at 406. In \textit{Johnson} the Court upheld a nine-to-three verdict. 406 U.S. at 363.
\textsuperscript{83} Even in cases in which the procedure plainly violates the defendant's constitutional rights, the Supreme Court has upheld conviction by fashioning the "harmless-constitutional-error rule." Chapman v. California, 386 U.S. 18, 21-22 (1967). The Court views the harmless-error rule as aiding the goal of state harmless error statutes: "[t]o block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." \textit{Id.} at 22. See \textit{Fed. R. Crim. P. 52(a), quoted in note 20 supra}. The North Carolina state rules of criminal procedure contain a codification of the \textit{Chapman v. California} holding: "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C. GEN. STAT. § 15A-1443(b) (1978). The Supreme Court followed the harmless error doctrine in a
quiries are "never useful," many authorities agree with the view of the Ellis court that "there is some value to the inquiry." The trial judge must determine when the jury is deadlocked and a mistrial must be declared. A very unequal jury division may cause ultimate agreement to appear more probable, and thus encourage the judge to request further de-


Judge Kilkenny, dissenting in United States v. Noah, 594 F.2d 1303 (9th Cir. 1979), presented a strong argument that Fed. R. Crim. P. 52(a) on harmless error has already superseded Brasfield. 594 F.2d at 1305-07 (Kilkenny, J., dissenting). A federal statute also provides support: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1976). The Federal Rules of Criminal Procedure were adopted in 1946, Order of Feb. 8, 1946, 327 U.S. 823, and thus were not in existence at the time Brasfield was decided.

272 U.S. at 450. The Court, however, qualified this statement: "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." Id. The Court did not elaborate on the nature of the alternative questions.

The alternative suggested by the Brasfield court—asking questions that do not require the jury to reveal its division—would not produce the same kind of objective information as asking the jury's numerical division. Presumably, the Court was suggesting that the judge ask the foreman or members of the jury whether they thought a verdict could be reached. For similar suggested procedures, see People v. Luther, 53 Mich. App. 648, 651, 219 N.W.2d 812, 814 (1974), aff'd, 394 Mich. 619, 232 N.W.2d 184 (1975); State v. Hutchins, 43 N.J. 85, 96, 202 A.2d 678, 684-85 (1964). Even if such an alternative had no coercive effect by itself, it would not inform the judge of any fact other than the jurors' opinions, and the jurors do not have the responsibility of declaring a mistrial. Asking the jurors whether any progress has been made toward reaching an agreement and what the likelihood is of future progress, as other courts suggest, see Lowe v. People, 175 Colo. 491, 495-96, 488 P.2d 559, 561 (1971); Kersey v. State, 525 S.W.2d 139, 141 (Tenn. 1975), has similar limitations. The only jurors who are likely to know the possibility of agreement are the minority jurors, and singling them out for questioning seems coercive.

Knowledge of the division may help the judge determine the likelihood of agreement of the jurors under two different group decision theories. According to the tipping point theory, there is a certain critical size of coalition such that a majority greater than that size will usually be able to overcome the minority's resistance, while one less than the critical size will normally fail to do so. Yale Comment, supra note 65, at 123-33; 76 U. PA. L. REV. 622, 622-23 (1928); 3 VAND. L. REV. 123, 124 (1950).


Knowledge of the division may help the judge determine the likelihood of agreement of the jurors under two different group decision theories. According to the tipping point theory, there is a certain critical size of coalition such that a majority greater than that size will usually be able to overcome the minority's resistance, while one less than the critical size will normally fail to do so. Yale Comment, supra note 65, at 110-19. Although the precise location of the tipping point is difficult to specify, one researcher suggests that majorities of eight or nine jurors may be the critical size. C. Hawkins, Interaction & Coalition Realignments in Consensus-Seeking Groups: A Study of Experimental Jury Deliberations 128 (Aug. 17, 1960) (unpublished doctoral thesis in sociology
liberations rather than declare a mistrial. Inquiries, therefore, may serve a legitimate function by assisting the trial judge in determining the advisability of discharging the jury.

Since inquiries by themselves are not harmful and are perhaps even helpful, the Ellis court was correct in finding no per se constitutional prohibition of judicial inquiries. This does not mean, however, that an inquiry could not offend due process in a particular situation. To determine the probable impact of an inquiry, the reviewing court must apply a totality-of-the-circumstances test and examine all relevant circumstances. The typical case in which a judge inquires into the numerical division of a deadlocked jury will likely include, as did Ellis, an Allen charge in the supplemental instruction. The court in Ellis considered the supplemental charge to be acceptable since it was a balanced instruction that had no tendency to coerce the jury. Given this relatively mild Allen charge, the court was clearly correct in concluding that the incremental effect of the judicial inquiry was negligible. The court's summary application of the totality-of-the-circumstances test, however, be-
lies the importance of this examination. Although a judicial inquiry by itself is permissible, there remains the possibility that due process will be violated when the inquiry is combined with other circumstances.

The conclusion that the *Brasfield* rule is not of constitutional dimension leaves unresolved the issue of what appropriate measures a state court may follow in determining the status of jury deliberations. Since a state need not adhere to a rule promulgated through the Supreme Court’s supervisory power over the federal courts,94 states remain free to determine their own policy on the use of judicial inquiries95 if the policy meets the constitutional requirement that the conduct is not coercive in the totality of the circumstances.96

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94. Cupp v. Naughten, 414 U.S. 141, 146 (1973). See Hill, supra note 18, at 193. The arguments that favor a supervisory interpretation of the *Brasfield* rule, especially the Supreme Court’s recent holdings that analogous situations present no constitutional difficulty, see text accompanying notes 74-83 supra, suggest that if the issue in *Brasfield* were to come before the Court today, the Court would not consider such inquiries to be unconstitutional. See notes 20, 83 supra.

95. One proposal gaining rapid acceptance is stated in section 5.4 of American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury (1974). The ABA standard formulates a recommended instruction to replace the *Allen* charge and makes no mention of inquiry into the division as a means for dealing with a deadlocked jury.