The Unanimous Jury Verdict: Its Valediction in Some Criminal Cases

> The jury, passing on the prisoner's life,
> May in the sworn twelve have a thief or two
> Guiltier than him they try.[1]

Since most American jurisdictions have required unanimous jury verdicts,[2] each juror—regardless of his integrity and judgment—has had

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1. W. SHAKESPEARE, MEASURE FOR MEASURE Act 2, Scene 1, lines 19-21.

2. Many states require unanimous verdicts and the constitutions of some states only permit a non-unanimous verdict by an act of the legislature or by a stipulation of the parties. *Cf.* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 25 (1968) [hereinafter cited as ABA PROJECT]. And some states authorize non-unanimous jury verdicts by a constitutional provision and statutory law. *See* 1 F. BUSCH, LAW AND TACTICS IN JURY TRIALS §§ 28, 29 (encyl. ed. 1959); 33 J. AM. JUD. SOC'Y 111 (1949).

The following states have a provision for non-unanimous criminal jury verdicts: Idaho, IDAHO CONST. art. 1, § 7 (Legislature may provide for a verdict of not less than five-sixths); Louisiana, LA. CONST. art. 7, § 41 (nine of twelve in cases in which the punishment must be hard labor); Montana, MONT. CONST. art. III, § 23 (two-thirds of the jury for offenses below a felony); Oklahoma, OKLA. CONST. art. 2, § 19 (three-fourths for an offense less than a felony); Oregon, ORE. CONST. art. I, § 11 (ten votes except in first degree murder cases); Texas, TEX. CONST. art. V, § 13 (three-fourths if offense not a felony).

And the following states have some provision for a non-unanimous civil verdict: Arizona, ARIZ. CONST. art. 2, § 23 (verdict of nine or more); Arkansas, ARK. CONST. art. II, § 7 (verdict of nine or more); California, CAL. CONST. art. 1, § 7 (three-fourths vote); Colorado, COLO. R. CIV. P. 48 (parties may stipulate that verdict will be rendered by a stated number that constitutes a majority); Delaware, DEL. R. CIV. P. 48 (parties may stipulate that verdict acceptable if by a stated number constituting a majority); Hawaii, HAWAII REV. LAWS § 635-20 (1968) (verdict of five-sixths); Idaho, IDAHO CONST. art. 1, § 7 (verdict of three-fourths of any number of jurors that the parties stipulate); Iowa, IOWA R. CIV. P. 203(a) (parties may stipulate that verdict will be rendered by a stated number which constitutes a majority); Kentucky, KY. CONST. § 248 (Assembly may provide for a verdict of three-fourths in circuit court cases); Louisiana, LA. REV. STAT. ANN. § 3050 (1961) (nine-man verdict); Maryland, MD. R. CIV. P. 544 (parties may stipulate that the verdict will be rendered by a stated number that is a majority); Minnesota, MINN. CONST. art. 1, § 4 (Legislature may provide for a verdict of five-sixths); Mississippi, MISS. CONST. art. 3, § 31 (Legislature may provide for verdict of nine or more); Missouri, MO. CONST. art. 1, § 22(a) (two-thirds in courts not of record and three-fourths in courts of record); Montana, MONT. CONST. art. III, § 23 (two-thirds); Nebraska, NEB. CONST. art. 1, § 6 (Legislature may authorize verdict of not less than five-sixths); Nevada, NEV. CONST. art. 1, § 3 (three-fourths but Legislature may, by a two-thirds vote, require unanimity); New Jersey, N.J. CONST. art. 1, ¶ 9 (Legislature may authorize five-sixths vote); New Mexico, N.M. CONST. art. 2, § 12 (Legislature may provide for less than a unanimous verdict); New York, N.Y. CONST. art. 1, § 2 (five-sixths); Ohio, OHIO CONST. art. I, § 5 (may pass law allowing three-fourths vote); Oklahoma, OKLA. CONST. art. 2, § 19 (three-fourths); South Dakota, S.D. CONST. art. VI, § 6 (Legislature may provide for three-fourths vote); Texas, TEX. CONST. art. V, § 13 (verdict of nine); Utah, UTAH CONST. art. I, § 10 (three-fourths); Virginia, VA. CODE ANN. § 8-193 (1950) (parties may consent to three-man jury and two-thirds

a crucial vote. Jury verdicts in federal criminal cases must still be unanimous.[3] But remarkably,[4] the Supreme Court in deciding jointly *Apodaca v. Oregon*[5] and *Johnson v. Louisiana*,[6] held that every juror's vote is not constitutionally essential for a conviction in state criminal cases.[7]

The Court's recent decision in *Apodaca* and an earlier decision in *Williams v. Florida*,[8] which allows less than a twelve-man jury in state criminal trials, contrast with some historic characteristics of the American jury.[9] A knowledge of the evolution of the jury system may foster an appreciation of its present role and may also help illuminate the following discussion of the constitutional issues and policy considerations inherent in the unanimity controversy.[10]

HISTORY

Researchers do not agree about the origin of the jury.[11] Its origin is disputed because the judicial procedures of many early civilizations resembled the modern jury and some historians acknowledge the similarities in some procedures but not in others.[12] Nevertheless, the Norman inquisitions are generally agreed to be a precursor of our modern

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verdict); Washington, WASH. CONST. art. 1, § 21 (Legislature may provide that courts of record may allow verdicts by nine or more); Wisconsin, WIS. CONST. art. 1, § 5 (Legislature may provide for five-sixths). And in the federal courts the parties may consent to having a verdict rendered by a number in excess of the majority. FED. R. CIV. P. 48.

3. Johnson v. Louisiana, 406 U.S. 356, 371 (1972) (concurring opinion); FED. R. CRIM. P. 31(a). States can allow non-unanimous civil verdicts since the seventh amendment right to a civil jury trial has not been incorporated into the fourteenth amendment. And although the Apodaca v. Oregon, 406 U.S. 404 (1972), decision does not expressly allow non-unanimous verdicts in capital punishment cases, this is of minor significance since capital punishment has been severely limited. Furman v. Georgia, 92 S. Ct. 2726 (1972).

4. Prior to the decision, many assumed that the Constitution required a unanimous jury verdict. Johnson v. Louisiana, 406 U.S. 356, 381 (1972) (dissenting opinion); T. NORTON, THE CONSTITUTION OF THE UNITED STATES 146 (1956); S. ORTH & R. CUSHMAN, AMERICAN NATIONAL GOVERNMENT 132 (1932).

5. 406 U.S. 404 (1972).

6. 406 U.S. 356 (1972).

7. *Id.*; Apodaca v. Oregon, 406 U.S. 404 (1972).

8. 399 U.S. 78 (1970).

9. Before these decisions, many writers assumed that the right to jury trial meant a unanimous verdict by a twelve-man jury. *Supra* note 4.

10. Justice Douglas was so concerned about the controversial decision that he later criticized it in a speech. Address by Justice Douglas, 90th Convention of the Texas Bar Association, July 6, 1972.

11. 1 F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 2 (encyl. ed. 1959).

12. *Id.*

jury.[13] Some historians maintain that the first true juries were found in ancient Greece.[14]

The origin of the unanimity rule is also uncertain. Its source was probably the system of afforcement.[15] In that system, a unanimous verdict was not required but twelve jurors did have to agree.[16] If the jury verdict was not unanimous, then new members were added until twelve were of the same opinion.[17] Others maintain that the unanimous verdict is derived from the early requirement that twelve men must agree before charges could be brought against a person.[18] Still another theory suggests that the rule is connected with a predecessor of juries: bodies of witnesses. Verdicts were thought to be more reliable if there were a number of compurgators and a great quantum of evidence and thus only a unanimous verdict was considered trustworthy.[19] Jury unanimity may also have arisen out of the medieval concept of consent because that word connoted unanimity.[20] The concepts of consent and unanimity were so interwoven and pervasive that even the decisions of the English Parliament were unanimous until the 15th century.[21] In addition, unanimity might have developed because medieval minds assumed there could only be one correct view of the facts.[22] Those jurors declaring the facts erroneously were guilty of criminal perjury.[23] "Given a view that minority jurors were guilty of criminal perjury, the development of a practice of unanimity would not be surprising."[24]

England did not settle[25] upon the unanimous verdict until 1367.[26] It has been asserted that the unanimous verdict was adopted there because criminal penalties were harsh and the accused was not protected

13. Comment, *Less Than Unanimous Jury Verdicts in Criminal Trials*, 58 J. CRIM. L.C. & P.S. 211 (1967).

14. Haralson, *Unanimous Jury Verdicts In Criminal Cases*, 21 MISS. L.J. 185, 186 (1950).

15. R. MOSCHZISKER, TRIAL BY JURY § 407 (2d ed. 1930); ABA PROJECT, *supra* note 2, at 28.

16. *Supra* note 15; *supra* note 13, at 212-13; *accord*, Apodaca v. Oregon, 406 U.S. 404, 407 n.2 (1972).

17. *Supra* note 16.

18. *Supra* note 14, at 190.

19. R. MOSCHZISKER, TRIAL BY JURY § 407 (2d ed. 1930).

20. Apodaca v. Oregon, 406 U.S. 404, 407 n.2 (1972).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. But for the last few years England has permitted non-unanimous jury verdicts. Criminal Justice Act of 1967, § 13.

26. Apodaca v. Oregon, 406 U.S. 404, 407 n.2 (1972); *supra* note 14, at 191.

by all the safeguards now considered necessary for a fair trial.[27] Humane and enlightened judges thus framed rules giving the accused the advantage of a unanimous verdict.[28]

Even those that dispute its history agree that the jury system was an established institution in England when the colonization of America began.[29] This institution came to America with the English colonists,[30] and by 1776 the jury system was a cherished right.[31]

This right to a jury trial was embodied in our Constitution and Bill of Rights.[32] A unanimous verdict was one of the common law attributes of the jury and the constitutional right to a jury trial might have been interpreted as preserving this feature.[33] But the *Apodaca* Court rejected this interpretation.[34] Its decision seems sound since the vicinage requirement and the twelve-man requirement were also attributes of the common law jury and the Constitution has not been interpreted to include those requirements.[35] In addition, an original version of the sixth amendment which would have provided for a unanimous jury verdict was rejected.[36] This version probably was not rejected on the ground that a unanimous verdict was implicit in the Constitution.[37] Rather, the framers left the specification of the requisites for a jury trial to the future;[38] when Congress wanted to leave no doubt that it was incorporating common law features it could do so by express language.[39] The framers, moreover, had probably given little thought to

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27. *Supra* note 26.

28. *Supra* note 26.

29. *Supra* note 11, § 16.

30. *Id.*

31. *Id.*; *see, e.g.*, W. FORSYTH, HISTORY OF TRIAL BY JURY (1852) and Thayer, *The Jury And Its Development* (pts. 1-2), 5 HARV. L. REV. 249, 295 (1892) for detailed discussions of the history of the jury.

32. Article III, section 2, clause 3 of the Constitution states that all crimes except impeachment shall be tried by a jury. The fifth amendment protects a person from answering for a capital or other infamous crime unless he is first indicted by a grand jury. The sixth amendment guarantees the accused in a criminal proceeding a trial by an impartial jury from the district in which the crime was allegedly committed. And the seventh amendment preserves a right to trial by jury in suits at common law where the value in controversy exceeds twenty dollars.

33. *See* Apodaca v. Oregon, 406 U.S. 404, 408-09 (1972).

34. *Id.* at 410.

35. Williams v. Florida, 399 U.S. 78, 96 (1970).

36. Apodaca v. Oregon, 406 U.S. 404, 409 (1972).

37. *Id.* at 410.

38. *Id.*

39. Williams v. Florida, 399 U.S. 78, 99 (1970) (the Constitution should not necessarily be equated with the common law attributes of the jury).

the meaning of the jury.[40] And even though a unanimous jury trial existed when the Constitution was adopted, only the essential parts of the jury were preserved.[41] The unanimous verdict was not an essential part—especially since our Constitution is flexible and should not unduly bind the future.[42] After determining that history was not a crucial consideration, the Court accordingly turned to other elements in determining the constitutional meaning of a jury trial.[43]

The Court faced a concept of jury trial which has evolved since our Constitution was enacted; unanimity is but one segment of this evolution. Another change has been the right of the parties to question veniremen; in federal trials, the federal rules give judges the discretion to conduct these interrogations.[44] Since federal judges now almost always conduct these examinations, the accused is thus limited in his right to attempt to obtain an impartial jury through voir dire.[45] This rule marked the first step in recent jury changes which, especially when coupled with a non-unanimous verdict, have infringed on the protection afforded an accused.

Yet an accused received some protection when the sixth amendment right to a jury trial in criminal cases eventually was, through the due process clause of the fourteenth amendment, applied to the states in *Duncan v. Louisiana*.[46] This right does not extend, however, to cases concerning petty crimes which carry a penalty of less than 6 months imprisonment.[47]

After the *Duncan* decision, it seemed, on the basis of an earlier decision in *Maxwell v. Dow*,[48] that all juries in criminal cases had to be composed of twelve members. In *Dow*, the Court said that "it seems quite plain" and "there can be no doubt" that the sixth amendment was intended to provide for a jury of twelve.[49] But, at the time of that decision, the sixth amendment had not been applicable.[50]

Any uncertainty raised by *Duncan* was soon eliminated by the

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40. *Id.* at 98-99.
41. *Id.* at 91; ABA PROJECT, *supra* note 2, at 19.
42. *Cf.* Apodaca v. Oregon, 406 U.S. 404, 410 (1972); *see* Williams v. Florida, 399 U.S. 78, 91, 124-25 (1970); *supra* note 13, at 215 n.70.
43. Apodaca v. Oregon, 406 U.S. 404, 410 (1972).
44. FED. R. CRIM. P. 24(a); FED. R. CIV. P. 47(a).
45. N.Y. Times, June 24, 1972, at 31, cols. 3-6 (rule termed an attack on the jury system).
46. 391 U.S. 145 (1968).
47. *Id.* at 159; Baldwin v. New York, 399 U.S. 66 (1970).
48. 176 U.S. 581 (1900).
49. *Id.* at 586.
50. *Id.* at 603.

Williams decision. There, the Court held that in state criminal trials a jury does not have to consist of twelve men.[51]

FUNDAMENTAL UNANIMITY CONSIDERATIONS

A. Due Process and Reasonable Doubt

In considering whether to supplement *Williams* with the allowance of a non-unanimous jury verdict, the Court had to consider two constitutional contentions. The paramount one was the argument that due process requires a unanimous verdict because an accused must be convicted beyond a reasonable doubt.[52] According to this approach, a split jury indicates reasonable doubt, especially when at first merely a few jurors vote for conviction and a non-unanimous verdict is only obtained after other jurors join them.[53] By this rationale, the due process an accused receives under the *Williams* decision—in which a nine-man jury can convict—can be contrasted with the instant decision which allows a conviction over the expressed doubt of three jurors.[54] Under *Williams*, the absent jurors might have joined the majority, but when *Apodaca* jurors are demonstrably not persuaded to reach a unanimous verdict, the proof is less likely to be clear-cut.[55]

The *Apodaca* Court, however, held that the sixth amendment does not mandate unanimity because that amendment does not require proof beyond a reasonable doubt.[56] It also noted that it had never held unanimity to be a requisite of due process.[57] Concurring Justice Powell added that unanimity was not one of the fundamental elements which was incorporated in the due process clause.[58]

But in reaching its decision, the Court's language seems to differ from its holding in *In re Winship*[59] that due process "protects the accused against conviction except upon proof beyond a reasonable doubt

51. 399 U.S. at 86. The decision was expressly applicable to the states and concurring Justice Harlan felt that the decision implies that twelve-man juries are also not constitutionally required in federal criminal trials. *Id.* at 118.

52. Apodaca v. Oregon, 406 U.S. 404, 411 (1972); Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953); *supra* note 13, at 214.

53. Johnson v. Louisiana, 406 U.S. 356, 392 (1972) (dissenting opinion).

54. *Id.* at 401.

55. *Id.*

56. Apodaca v. Oregon, 406 U.S. 404, 412 (1972).

57. Johnson v. Louisiana, 406 U.S. 356, 359 (1972).

58. *Id.* at 369, 373.

59. 397 U.S. 358 (1970).

. . . ."[60] This conflicts with the *Apodaca* Court's statement that the sixth amendment does not require proof beyond a reasonable doubt.[61] It appears that this *Apodaca* statement is tenuous since, under *Winship*, the accused in a state criminal trial is protected unless the proof is beyond a reasonable doubt. That protection should encompass jury verdicts. Hence, sixth amendment jury verdicts should represent a decision that is beyond reasonable doubt. But under this analysis, a unanimous verdict should still not be required since the *Apodaca* Court declared that a verdict does not indicate reasonable doubt when the majority of the jury does not have a reasonable doubt.

The Court further asserted that if the doubt of some jurors really indicates reasonable doubt, then the accused should not be convicted and there should be an acquittal rather than a retrial.[62] Yet this ability to retry an accused after a jury is deadlocked should not affect reasonable doubt. Reasonable doubt only means that the prosecutor shall overcome all the jury's normal uncertainties;[63] on retrial, a contrary decision might be justifiable since the evidence may be substantially different.[64]

In considering whether proof is beyond a reasonable doubt, the Court, in effect, decided that the burden was to convince each individual juror rather than the jury as an entity.[65] Pursuant to the individual approach used by the Court, the burden of proof remains the same as under a non-unanimous verdict: to convince the individual juror beyond a reasonable doubt.[66] But since not as many jurors need to be persuaded, only the burden of persuasion is changed; while, under the entity approach taken by dissenting Justice Douglas, the burden of proof is changed under a non-unanimous verdict system.[67] By the Court's individual approach, a mere lessening of the burden of persuasion is not a violation of due process.[68]

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60. *Id.* at 364.

61. Apodaca v. Oregon, 406 U.S. 404, 412 (1972).

62. Johnson v. Louisiana, 406 U.S. 356, 363 (1972). Commentators feel that this argument is a worthy one. *See* ABA PROJECT, *supra* note 2, at 442; *supra* note 13, at 215.

63. *See* Johnson v. Louisiana, 406 U.S. 351, 401 (1972) (dissenting opinion).

64. *Id.* at 402.

65. *See* ABA PROJECT, *supra* note 2, at 26; Comment, *Waiver Of Jury Unanimity—Some Doubts About Reasonable Doubt*, 21 U. CHI. L. REV. 438, 443 [hereinafter cited as Comment]; *supra* note 13, at 214. *Compare* the *Apodaca* Court's approach *with* Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953).

66. *Supra* note 65; Annot., 137 A.L.R. 394 (1942).

67. Comment, *supra* note 65, at 443 & n.41; *supra* note 13, at 214.

68. *Supra* note 13, at 214.

It seems that the *Apodaca* non-unanimous verdict fulfills the reasonable doubt requirement of safeguarding the accused.[69] Even if some of the jurors are unconvinced, the vote of the majority should still be accepted since the majority does not have a reasonable doubt.[70] A fortiori, due process might not require a unanimous decision since jury verdicts are regularly sustained even though the jury, the trial judge, or the appellate judges might have a reasonable doubt about the guilt of the accused.[71] And retention of the unanimity rule is anomalous because there should never be a question submitted to the jury unless jurors could differ about the force of the evidence.[72]

The greater ease in obtaining a non-unanimous verdict, moreover, helps reduce any inconsistency between court decisions and jury verdicts; under a unanimity requirement juries usually demonstrate a greater stringency in their interpretation of proof beyond a reasonable doubt than do judges.[73] The further requirement of a unanimous verdict might represent a value judgment that ten guilty should go free rather than have one innocent person convicted.[74] Perhaps the retreat from the unanimous verdict is either a rejection or perversion of this policy. When some jurors can hold out against the majority, their belief is usually strong and indicates reasonable doubt.[75] The rendering of a guilty verdict in this situation might impair public confidence in our trial system.[76]

B. Cross-Section

The Court also had to decide whether a non-unanimous verdict violates the requirement that the jury represent a cross-section of the community.[77] A cross-section does not mean that every group in the

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69. *See* Johnson v. Louisiana, 406 U.S. 356, 362 (1972).

70. *Id.*

71. *Id.* at 362-63.

72. TEX. CONST. art. V, § 13, comment.

73. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 189 (1966) [hereinafter cited as AMERICAN JURY].

74. *Id.* at 189-90; Johnson v. Louisiana, 406 U.S. 356, 393 (1972) (dissenting opinion). *But cf. supra* note 13, at 215 (the unanimous verdict was in force long before the reasonable doubt rule).

75. Comment, *Should Jury Verdicts Be Unanimous in Criminal Cases?*, 47 ORE. L. REV. 417, 423 (1968).

76. P. DEVLIN, TRIAL BY JURY 56 (1956). *But see* Johnson v. Louisiana, 406 U.S. 356, 374 (1972) (concurring opinion states "[t]here is no reason to believe . . . that a unanimous decision . . . is entitled to greater respect in the community").

77. *Cf.* Whitus v. Georgia, 385 U.S. 545 (1967); Strauder v. West Virginia, 100 U.S. 303 (1880).

community is represented on each jury; rather, there cannot be a systematic exclusion of identifiable segments of the community.[78]

Petitioners in the *Apodaca* case had urged that a non-unanimous verdict would deprive jurors that represent a minority group in the community of an effective voice in the verdict.[79] They therefore felt that less than a unanimous jury verdict would not necessarily represent the views of a cross-section of the community.[80] Although the cross-section requirement actually only applies to groups, it seems that it would also be important to hear the dissenting views of any juror. Without a unanimity requirement a "minority view, though intelligent and reasonable, may never be heard. There is always the possibility that such an intelligent minority may be able to persuade the majority."[81]

Even if a minority is heard, a non-unanimous rule might not require juries to deliberate as fully as under a unanimity requirement;[82] as soon as the requisite majority is attained, further consideration is not required.[83] "[H]uman experience teaches that [even] polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity."[84] Since most juries have prejudices they should be restrained "by the cooler sense and judgment of the three or four most conservative or intelligent of their number."[85] In addition, forcing jurors to defend their conclusions often flushes out disregarded or forgotten nuances.[86]

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78. *E.g.*, Swain v. Alabama, 380 U.S. 202, 208-09 (1965); Akins v. Texas, 325 U.S. 398, 403-04 (1945); Ruthenberg v. United States, 245 U.S. 480 (1918); United States v. Guzman, 337 F. Supp. 140, 143 (S.D.N.Y. 1972).

79. Apodaca v. Oregon, 406 U.S. 404, 412-13 (1972). *See also* Johnson v. Louisiana, 406 U.S. 356, 396 (1972) (dissenting opinion). Under a non-unanimous verdict minorities can often be disregarded since the probability of three of its members being on a twelve-man jury is 11 percent. *See* Zeisel, *The Waning of the American Jury*, 58 A.B.A.J. 367, 369 (1972) [hereinafter cited as Zeisel]. *See also* Comment, *The Case For The Retention Of The Unanimous Jury*, 15 DE PAUL L. REV. 403, 406 (1966) [hereinafter cited as DE PAUL].

80. Apodaca v. Oregon, 406 U.S. 404, 413 (1972).

81. Comment, *supra* note 65, at 445 (footnote numbers omitted); *accord*, DE PAUL, *supra* note 79, at 406 (minority protected because it cannot be ignored in a unanimous verdict).

82. Johnson v. Louisiana, 406 U.S. 356, 388 (1972) (dissenting opinion); DE PAUL, *supra* note 79, at 404, 406; *supra* note 75, at 424.

83. Johnson v. Louisiana, 406 U.S. 356, 388 (1972) (dissenting opinion); *supra* note 19, § 410 (enforced delay in reaching verdicts tends to make for thorough discussion and mature deliberation). It rarely happens that two-thirds or three-fourths are not united on the first ballot. A unanimous verdict assures that there will not be a hasty decision and that there will be an opportunity to convert the majority to the truth. *Id.* § 411; *cf.* DE PAUL, *supra* note 79, at 404, 406; *supra* note 75, at 424.

84. Johnson v. Louisiana, 406 U.S. 356, 389 (1972) (dissenting opinion).

85. *Supra* note 19, § 411.

86. Johnson v. Louisiana, 406 U.S. 356, 389 (1972) (dissenting opinion).

A unanimity requirement means that the jury can more fully represent a cross-section by giving greater weight to a minority. This is because approximately 65 percent of the jury trials result in a majority but not unanimous vote on the first ballot,[87] and approximately 10 percent of the time the jury's initial position is reversed after discussion.[88] Of the juries which have a majority on the first ballot voting to acquit, 9 percent eventually reverse their position and either render a guilty verdict or become hung.[89] When the majority casts guilty votes on the first ballot, 14 percent of the time the jury nevertheless becomes hung or decides that the accused is not guilty.[90] These statistics indicate that the deliberation often inherent in the unanimity requirement has a significant effect—especially on those juries that would originally convict an accused. This effect should be principally attributed to the efforts of the minority voting jurors—efforts made possible by the unanimous verdict. It thus seems lamentable that an innocent accused might be convicted by a hasty non-unanimous verdict when deliberation might have resulted in acquittal.

The Court rejected the cross-section argument, however, because it believed that a non-unanimous system does not systematically exclude any identifiable segment of the community.[91] This holding is probably sound since a minority should be able to represent its views; those outvoted can still be heard.[92] Furthermore, each juror should fulfill his responsibility by considering the argument of minority jurors.[93] And ostensibly, the decision simply manifests an intolerance toward any misguided minority that "block[s] convictions."[94]

C. *Function of the Jury*

The Court, in addition to considering the history of the jury, the doctrine of reasonable doubt, and the requirement of a cross-section, seemed to predicate its decision on the function served by the jury.[95]

> [T]he purpose of trial by jury is to prevent oppression by the Government by providing a "safeguard against the corrupt or over-zealous

87. AMERICAN JURY, *supra* note 73, at 487.
88. Johnson v. Louisiana, 406 U.S. 356, 389 (1972) (dissenting opinion).
89. AMERICAN JURY, *supra* note 73, at 488.
90. *Id.*
91. *See* Apodaca v. Oregon, 406 U.S. 404, 413 (1972).
92. *See* Johnson v. Louisiana, 406 U.S. 356, 379 (1972).
93. *Id.*
94. Apodaca v. Oregon, 406 U.S. 404, 413 (1972).
95. *Id.* at 410.

> prosecutor and against the compliant, biased, or eccentric judge." [Cite omitted.] "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen."[96]

The Court felt that a requirement of unanimity does not materially contribute to the exercise of common sense judgment; even without unanimity the defendant is protected by the judgment of his peers.[97]

Even so, it would seem that the unanimous verdict would generally provide the accused a greater safeguard from oppression by the state and from conviction by a biased or eccentric jury.[98]

POLICY CONSIDERATIONS

The decision of the Court might also have been influenced by the belief that the unanimous verdict survived only because of a reluctance to change the status quo[99] and because many defense lawyers, for personal success motives, were opposed to a change.[100] But the desirability of less than unanimous verdicts is also indicated by studies which have recommended the majority verdict.[101] These studies have found that the unanimity requirement often breeds a compromise that is not founded on any rational basis.[102] Moreover, defendants are protected from irrational non-unanimous verdicts by such safeguards as: (1) peremptory challenges; (2) challenges for cause; (3) jury instructions; (4) the juror's oath; (5) the power of the trial judge to direct an acquittal or to set aside the verdict; and (6) the judge's power to change the venue or restrict press coverage in the face of local prejudice.[103]

A further strength of *Apodaca* is that those states that do not require unanimity will have less "potential for hung juries occasioned either by bribery or juror irrationality."[104] Unanimity allows one recalcitrant juror to delay and distort the judicial process.[105] A juror opposed to the applicable law can thus nullify the judgment of the rest of the

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96. *Id.*
97. *Id.*
98. *See* Williams v. Florida, 399 U.S. 78, 126 (1970); *supra* note 75, at 424.
99. Comment, *Civil Procedure—Less Than Unanimous Jury Verdicts*, 27 N.C.L. REV. 539, 541 (1949).
100. *Id.*
101. Johnson v. Louisiana, 406 U.S. 356, 376-77 (1972) (concurring opinion).
102. *Id.* at 377.
103. *Id.* at 379-80.
104. *Id.* at 377.
105. *Supra* note 13, at 216-17; *supra* note 99, at 541.

panel[106] when enforcement of the law would better serve the public by rousing it to reject the statute.[107] In addition, twelve jurors from varied backgrounds rarely agree about complicated fact situations.[108] This means that strong jurors might coerce weaker jurors into reaching an agreement to end the deliberation.[109] Knowing that one juror can deadlock a jury, the state often compromises those cases that are uncertain; criminals, as a result, frequently receive minor penalties and are thus indirectly encouraged to violate the law.[110] The hung jury is burdensome on litigants that are forced to retry a case[111] as well as an economic hardship on the state.[112] Under *Apodaca*, many of these problems will be eliminated since there are 45 percent fewer hung juries in majority verdict states than in states requiring unanimous jury verdicts.[113]

On the other hand, those favoring the unanimous verdict also can present cogent arguments concerning the hung jury. While the hung jury marks a failure to resolve the case, it is at the same time an assurance of the integrity of the trial system because the dissent of a minority is protected.[114] Moreover, these deadlocks occur only about 5.6 percent of the time under the unanimity requirement[115] and would still occur about half as frequently under a majority verdict.[116] This small percentage of hung juries is a "tolerable burden."[117] Furthermore, obstinate, corrupt, or eccentric jurors usually do not cause a hung jury[118]—deadlocked juries usually have four or five dissenting jurors on the first ballot.[119] And any prejudicial jurors can often be eliminated by competent voir dire examination.[120] Perhaps those jurors that deadlock a jury are actually treasured jurors, for retrial often proves that dissenting jurors were correct.[121]

In a deadlocked jury that only contains two or three dissenters, the

106. *Supra* note 14, at 196.
107. *Supra* note 13, at 217.
108. *Supra* note 99, at 542.
109. *Id.*
110. *Supra* note 14, at 196.
111. *Supra* note 19, at 299.
112. *Supra* note 75, at 422.
113. AMERICAN JURY, *supra* note 73, at 461.
114. *Id.* at 453.
115. Johnson v. Louisiana, 406 U.S. 356, 391 (1972) (dissenting opinion).
116. Zeisel, *supra* note 79, at 369.
117. *Id.*; ABA PROJECT, *supra* note 2, at 26.
118. *Supra* note 75, at 420-21.
119. AMERICAN JURY, *supra* note 73, at 462.
120. *Supra* note 99, at 542.
121. *Id.*

majority jurors favor the prosecution about 44 percent of the time and the accused 12 percent of the time.[122] Thus, when the majority is for acquittal the jury usually resolves its differences and ends its deadlock.[123] By eliminating the unanimity requirement, a state has fewer hung juries and would obtain three or four times as many guilty verdicts as acquittals.[124] Under less than a unanimous verdict system, the state should save money since fewer cases would be submitted for jury trials on the chance that an eccentric juror would oppose a guilty verdict.[125] But conceivably, the savings in time and money will be as insignificant as the savings obtained by allowing six-man juries.[126]

Several further arguments support the unanimous verdict. One of these arguments is that the unanimous verdict should have been preserved since it has been viable;[127] it safeguards against the occasional imperfections of some juries.[128] The rules of stare decisis and the common law form of the jury verdict should not be disregarded "when the rule of yesterday remains viable, creates no injustice, and can reasonably be said to be no less sound than the rules sponsored by those who seek change, let alone incapable of being demonstrated wrong."[129] "[T]he excellence of an institution like the jury is due as much to the fact that it is embedded deeply in the experience and confidence of the people as it is to its intrinsic merits."[130] Here, the Constitution was implicitly amended—and this should only be done by a formal constitutional amendment.[131] This change should cause greater labor and delay because more motions for retrial due to jurors' misconduct will be filed, resulting in more new trials and appeals from the denial of motions for retrial.[132] Moreover, a change is not really necessary since only 10 percent of the defendants prosecuted for a felony are acquitted—the country would hardly be safer if a few percent more are convicted.[133]

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122. AMERICAN JURY, *supra* note 73, at 460.

123. AMERICAN JURY, *supra* note 73, at 460; Comment, *supra* note 65, at 446.

124. Johnson v. Louisiana, 406 U.S. 356, 391 (1972) (dissenting opinion); ABA PROJECT, *supra* note 2, at 27.

125. *Supra* note 14, at 196.

126. *See* Zeisel, *supra* note 79, at 370.

127. *Cf.* Apodaca v. Oregon, 406 U.S. 404, 414-15 (1972) (dissenting opinion); Johnson v. Louisiana, 406 U.S. 356, 393 (1972) (dissenting opinion).

128. Johnson v. Louisiana, 406 U.S. 356, 399 (1972) (dissenting opinion).

129. Williams v. Florida, 399 U.S. 78, 128-29 (1970) (concurring opinion); *see* DE PAUL, *supra* note 79, at 404.

130. S. ORTH & R. CUSHMAN, AMERICAN NATIONAL GOVERNMENT 133 (1932).

131. *See* Johnson v. Louisiana, 406 U.S. 356, 393 (1972) (dissenting opinion).

132. *Supra* note 99, at 542-43.

133. Zeisel, *supra* note 79, at 370.

And in states using special issues the change could breed problems concerning whether the majority of the jurors should agree on all issues of the case.[134]

The Court's decision, moreover, is somewhat anomalous since the guarantees brought within the fourteenth amendment traditionally have equally bound the states and the federal government.[135] Conversely, this decision requires only the federal government to provide a unanimous verdict—even though the right to a criminal jury verdict has been incorporated in the fourteenth amendment.[136] Unfortunately, the holding allows states to experiment with the fundamental right of an accused to a jury trial.[137] The Court should not have the power to infringe on this fundamental right—all fundamental rights should be completely granted to all citizens.[138] This is especially true since an accused needs every protection possible when faced with the awesome power of government: "Facts are always elusive and often two-faced."[139] Similarly, the unanimous verdict is necessary to offset the advantages that the state has been given by the rules of procedure.[140] Citizens should thus feel that the judicial system strives to assure that no innocent persons are convicted unless the jury is certain that they are guilty.[141]

POSSIBLE REFORMS

The *Apodaca* Court probably considered some of the policies mentioned above in approving a less than unanimous verdict. Its decision to allow a non-unanimous verdict could be accompanied by the consideration of several reforms in our jury system. First, states should not employ the *Allen* charge in conjunction with less than a unanimous verdict.[142] The *Allen* charge is "a supplemental instruction which emphasize[s] the duty of the minority jurors to reconsider their position in light of the majority's viewpoint."[143] If the charge were used, it might result in coercing a verdict when the evidence does not warrant it, and

134. *Supra* note 99, at 543.
135. Johnson v. Louisiana, 406 U.S. 356, 383 (1972) (dissenting opinion).
136. *See id.*; but FED. R. CRIM. P. 31(a) requires a unanimous federal criminal verdict.
137. Johnson v. Louisiana, 406 U.S. 356, 388 (1972) (dissenting opinion).
138. *Cf. id.* at 388, 394.
139. *Id.* at 392.
140. *Supra* note 99, at 542. The plaintiff opens and closes the jury arguments.
141. Johnson v. Louisiana, 406 U.S. 356, 381 (1972) (dissenting opinion).
142. ABA PROJECT, *supra* note 2, at 28.
143. Comment, *Instructing Deadlocked Juries: The Present Status of the Allen Charge*, 3 TEX. TECH L. REV. 313, 314 (1972).

it could infringe on the right of the accused to be convicted only by proof beyond a reasonable doubt. It could be claimed that a convicting juror had reasonable doubt when he cast a guilty ballot only after hearing the *Allen* charge.

Second, the states also might require a time minimum for deliberations so that the minority has a chance to be heard.[144] In some cases, this would merely cause delay because each juror's views might remain unaltered or the "majority will settle down from the beginning to play out time . . . ."[145] But, this time would provide the opportunity to achieve, at least in some cases, a unanimous verdict.

Third, the trial judge could be given the discretion to refuse to accept a majority verdict.[146] This requirement could help assure that a verdict is not accepted unless it seems that the possibility of reaching a consensus is exhausted, but it also might result in non-uniform, capricious decisions by judges. At best, there is little chance that "the judge could satisfy himself that the possibilities of unanimity had really been exhausted and [that there is] no principle upon which the discretion could be exercised."[147]

CONCLUSION

No matter what future reforms the decision might portend, the holding allowing a 9-3 verdict is undoubtedly a significant constitutional interpretation of unanimity and the jury verdict. This decision might have greater repercussions than now thought; possibly this was a question that should have been decided by Congress.[148] Under the Court's holding, marginal cases in which one to three jurors disagree will tend to result in more convictions which could help create a safer society, fewer hung juries, quicker jury deliberations, and less protection for an accused. A unanimous verdict would, on the other hand, certainly be more decisive and indicate to all concerned that the conviction was beyond reasonable doubt. Unanimity has the benefit of creating a unanimous consensus, by the deliberation process, in trials which reach a jury verdict.[149] And in those cases in which the minority swayed the others, "the arguments used by the minority will more often reflect the true

144. DEVLIN, *supra* note 76, at 55.
145. *Id.*
146. *Id.*
147. *Id.*
148. Zeisel, *supra* note 79, at 370.
149. AMERICAN JURY, *supra* note 73, at 488-89.

reasons for the decision."[150]

In addition, it is perhaps unfortunate that the decision could later be extended; 2-1 verdicts are foreseeable if the *Apodaca* and *Williams* decisions are carried to their logical extremes. When the non-unanimous verdict is coupled with less than a twelve-man jury, the voice of large segments of the community can effectively be muted in jury verdicts. Justice Blackmun warned that he, at least, would look askance at less than a 75 percent 9-3 decision.[151] But the Court has taken the first step which could serve as a precedent for a conviction-minded Court.

The decision may have been influenced by the intensification of attacks on the jury system because of the deadlock of the jury in several recent and notorious criminal cases.[152] Inevitably, some will disagree with the decision. But this disagreement should be based mainly on a difference in value judgments concerning the importance of the unanimous verdict, the degree of protection that should be afforded an accused, and the importance of maintaining a prevailing system. Even though the policies favoring unanimity may seem to have greater import, the decision was sound because the Justices' arguments were tenable and did not avoid the major issues of due process, the historical role of the jury, and the representation of a cross-section of the community on juries. Those that criticize the holding might not fully appreciate that the Court is not necessarily approving a non-unanimous verdict as the best possible solution—it is merely leaving this determination to the legislatures of the respective states.[153]

These legislatures should not permit less than an 8-4 or 4-2 verdict. Such a vote should fulfill the aims of those favoring a non-unanimous verdict without totally perverting the traditional concept of conviction only upon proof beyond a reasonable doubt. In addition, this proportion would allow a verdict by two-thirds of the jurors on both six- and twelve-man juries; this is still a decisive verdict and is comparable to the three-fourths vote now permitted.

Other states that do not agree with the position taken by the *Apodaca* Court can, by their statutes and constitution, retain the requirement of a unanimous verdict. As a result, the citizens of some

150. *Id.* at 490.

151. Johnson v. Louisiana, 406 U.S. 356, 366 (1972).

152. N.Y. Times, June 24, 1972, at 31, cols. 3-6. The acquittals of Angela Davis and the Soledad brothers, and "the hung juries in the Berrigan & Company, Bobby Seale, Huey Newton and Harlem Four Cases, have focused public attention on the jury system."

153. Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (concurring opinion).

states will not be afforded the protection given those in a unanimous verdict state. Nevertheless, the Court's resolution of the unanimity controversy[154] does allow those states that endorse the decision, license to experiment in their attempt to discover the optimum form of the jury verdict.

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154. Some earlier Supreme Court decisions said that unanimity was not required. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 213 (1968) (concurring opinion); Jordan v. Massachusetts, 225 U.S. 167, 176 (1912). Other decisions stated that unanimity was an essential part of the sixth amendment. Andres v. United States, 333 U.S. 740, 748 (1948); Patton v. United States, 281 U.S. 276, 288 (1930).