JURIES—UNANIMOUS JURY VERDICTS NO LONGER REQUIRED FOR STATE FELONY CONVICTIONS—*Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972).

Frank Johnson was convicted of armed robbery in Louisiana by a jury verdict of nine-to-three as provided for under Louisiana's Constitution.[1] He appealed to the Supreme Court of Louisiana,[2] claiming that the less than unanimous verdict had violated his due process and equal protection rights guaranteed by the fourteenth amendment.[3] This argument was rejected[4] and the United States Supreme Court noted probable jurisdiction.[5] His appeal in *Johnson v. Louisiana*[6] was founded on the contention that the dissenting jurors who voted for acquittal showed that the state had not met its burden of proof beyond a reasonable doubt,[7] and that he was denied equal protection by being convicted without the unanimity which is requisite to convict individuals of less serious and capital crimes.[8]

In Oregon, where less than unanimous verdicts are also permitted by the state constitution,[9] a jury found Robert Apodaca guilty of assault

---

1 LA. CONST. art. 7, § 41 provides in part:

> All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

2 State v. Johnson, 255 La. 314, 230 So. 2d 825 (1970).

3 *Id.* at 316, 230 So. 2d at 825.

4 *Id.* at 336, 230 So. 2d at 833. The court stated:

> "These arguments do not impress us. We are entirely satisfied that the Constitution and laws of our state provide a system for this prosecution in which fundamental fairness and even-handed justice can be and was dispensed."

Id. (quoting from State v. Schoonover, 252 La. 311, 323, 211 So. 2d 273, 277 (1968), *cert. denied*, 394 U.S. 931 (1969)).

5 400 U.S. 900 (1970).

6 406 U.S. 356 (1972).

7 *Id.* at 359.

8 *Id.* at 363. Louisiana requires unanimous verdicts in five-man jury trials where the punishment *may be* at hard labor, and in twelve-man capital cases. Individuals charged with a crime where the punishment *is necessarily* at hard labor may receive less than unanimous twelve-man verdicts. Each "level" receives a distinct variation in procedure, forming a "tri-level system." *Id.* at 368 (Powell, J., concurring).

9 ORE. CONST. art. I, § 11 provides in relevant part:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed . . . provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise . . . .

with a deadly weapon by an eleven-to-one verdict. On review,[10] the Oregon Court of Appeals summarily dismissed his claim that he was entitled to have the jury instructed to find him guilty only by unanimous concurrence as required by the Constitution of the United States.[11] The Supreme Court granted certiorari[12] and, in *Apodaca v. Oregon*,[13] heard his contention that the conviction violated his sixth amendment right to a trial by jury as guaranteed by the fourteenth amendment.[14] He further argued that due process compelled an interpretation of "jury trial" to include unanimity as a substantive component of reasonable doubt,[15] and that denial of a unanimous verdict prevented him from enjoying a true cross section of community opinion, as required by the equal protection clause of the fourteenth amendment.[16]

The Supreme Court affirmed both convictions, upholding the state constitutional provisions of Louisiana and Oregon which provide for criminal felony convictions by less than unanimous jury verdicts.[17] Thus unanimity has been denied "constitutional stature"[18] as a fundamental right to be applied equally in the state and federal courts, although a majority still favor unanimous verdicts in federal court proceedings.[19] The Court has also promulgated a substantial majority

---

10 State v. Apodaca, 1 Ore. App. 484, 462 P.2d 691 (1969).

11 *Id.* at 485, 462 P.2d at 692. *See* State v. Gann, 254 Ore. 549, 463 P.2d 570 (1969) (10-2 verdict provision in Oregon's Constitution does not infringe upon fourteenth amendment rights); State v. Osbourne, 153 Ore. 484, 57 P.2d 1083 (1936) (10-2 second degree murder conviction affirmed as court found no denial of equal protection or due process). *See also* Note, *Unanimity in Criminal Jury Verdicts: Antiquity or Necessity*, 26 U. MIAMI L. REV. 277 (1971).

12 400 U.S. 901 (1970).

13 406 U.S. 404 (1972).

14 *Id.* at 406 (White, J., joined by Burger, C.J., Blackmun & Rehnquist, JJ., concurring).

15 *Id.* at 411.

16 *Id.* at 412-13.

17 *Johnson*, 406 U.S. at 365; *Apodaca*, 406 U.S. at 414 (White, J., concurring). Justice White delivered the opinion of the Court in *Johnson*, 406 U.S. at 357, in which the Chief Justice, Justice Blackmun, Justice Powell and Justice Rehnquist joined. Justice White also delivered the *judgment* of the Court in *Apodaca*, 406 U.S. at 405, in an opinion in which only the Chief Justice, Justice Blackmun and Justice Rehnquist joined. Justice Powell wrote a concurring opinion in *Johnson*, 406 U.S. at 366, in which he stated that he agreed with Justice White's opinion in *Johnson*, but agreed only with the result reached in *Apodaca*. Since Powell disagreed with White in *Apodaca* on a point which must be regarded as dictum in that case—unanimity in federal courts—Justice White's opinion in *Apodaca* will be referred to in the text of this note as the opinion of the Court.

18 *Apodaca*, 406 U.S. at 406.

19 The minority of four justices would retain unanimous verdicts in both state and federal courts. Justice Powell in his concurring opinion agreed with the minority in the retention of federal unanimity, but voted with the majority in refusing to mandate such state procedure. This created an artificial majority in favor of upholding unanimous

rule, which should provide procedural guidance for future state criminal trials.[20]

Although both cases represent state felony convictions in the absence of jury unanimity, they may be distinguished on two points. First, Johnson was convicted prior to the Court's ruling in *Duncan v. Louisiana*[21] that defendants in state criminal proceedings were entitled to a trial by jury for all crimes which would fall within the sixth amendment protection if tried in a federal court.[22] Since this decision was found to be prospective in application, he was unable to raise a sixth amendment issue, a handicap not shared by Apodaca by virtue of his post-*Duncan* conviction.[23] Secondly, the Constitution of Louisiana allows a nine-to-three jury verdict, while Oregon sets its standard of concurrence at ten-to-two. In light of the majority's indication that the Constitution requires conviction by a "substantial majority" of the jury, this difference in ratio could have been significant.[24]

At the outset, it should be noted that the history of unanimity has been somewhat erratic. In early England it was once achieved by removing the twelfth juror who would not agree,[25] by fining a dissenting juror,[26] or by imprisoning the minority juror and giving the verdict to the majority.[27] It was believed to be sufficient if eleven were

verdicts as a federal requirement. 406 U.S. at 395 (Brennan, J., joined by Marshall, J., dissenting). *See also* N.Y. Times, May 28, 1972, § 4 (The Week in Review), at 6.

20 This "rule" is rooted in the reliance which the Court puts on the verdict of a substantial majority of the jury as fulfilling the due process requirement. A state which contemplates dropping its unanimity requirement would be guided by the knowledge that the Court found necessary a heavy majority, and would probably be reluctant to approve at this time a bare majority rule. The Court saw no constitutional violations because the verdict was rendered by "so large a majority of the jury" (*Johnson*, 406 U.S. at 361), and referred often to the "substantial" and "heavy" majority of the jury. *Id.* at 362. Justice Blackmun concurred, but "[did] not hesitate to say, either, that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty." *Id.* at 366.

21 391 U.S. 145 (1968).

22 *Id.* at 149.

23 Johnson conceded this point because of the Court's decision in DeStefano v. Woods, 392 U.S. 631, 635 (1968), where it was held that the right to a trial by jury in state courts for serious crimes was not retroactive. 406 U.S. at 358.

24 See discussion note 20 *supra*.

25 Thayer, *The Jury and its Development*, 5 HARV. L. REV. 295, 297 (1892). A sophisticated variation of this ancient method is the removal of the whole jury when agreement cannot be reached and the initiation of a new trial with an eye towards unanimity. *See* United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824) (precedent of allowing retrial established where first trial ends with defendant neither convicted nor acquitted).

26 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 626 (2d ed. 1898).

27 Thayer, *supra* note 25, at 297. *Cf.* Mead v. City of Richland Center, 237 Wis. 537, 297 N.W. 419 (1941) (error to instruct jury that if they did not agree quickly they would suffer from cold because heat in building was being turned off). *But cf.* Pope & Jacobs

in agreement, the single dissenter being of no consequence.[28] Not until the middle of the fourteenth century was unanimity deemed to be an established rule.[29] Despite this apparent early acceptance, majority verdicts were permitted in the American colonies of the Carolinas, Connecticut and Pennsylvania,[30] and the Bill of Rights was passed without the specific provision for unanimity which had appeared in an earlier draft,[31] leaving "such specification to the future."[32]

In federal criminal proceedings, the concept of unanimity has been faithfully supported in decisions which call it a "constitutional right,"[33] "required,"[34] and an "inescapable element of due process."[35]

---

v. State, 36 Miss. 121 (1858) (no error where bailiff "joked" to jury that until they decided they would have nothing to eat or drink).

28 In Thayer, *supra* note 25, the author concluded: "[I]t was enough if eleven agreed; the ground of this being the old rule that a single witness is nothing—*testis unus testis nullus*." *Id.* at 296 (footnote omitted).

29 *Id.* at 297.

30 The Court in *Apodaca* described the historical development in America thusly:

> Although unanimity had not been the invariable practice in 17th-century America . . . explicit [state] constitutional provisions . . . indicate that *unanimity became the accepted rule during the 18th century*, as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems.

406 U.S. at 408 n.3 (emphasis added).

31 *Id.* at 409. James Madison proposed that the sixth amendment provide for trial

> "by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites . . . ."

Id. (quoting from 1 ANNALS OF CONG. 435 (1789) [1789-1791]).

32 *Apodaca*, 406 U.S. at 410. The Court stated in its analysis of the history of unanimity as it was intended to be incorporated into the Constitution that

> [s]urely one fact that is absolutely clear from this history is that . . . the Framers explicitly rejected the proposal [of unanimous verdicts] and instead left such specification to the future.

Id.

33 *See* Thompson v. Utah, 170 U.S. 343 (1898), where the Court reversed a unanimous eight-man state conviction for a felony that was committed while Utah was still a territory but under full constitutional protection, holding that

> it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.

Id. at 351.

34 Andres v. United States, 333 U.S. 740, 748 (1948). The Court held that it was reversible error to allow a murder conviction in federal court on jury instructions which omit the requirement of unanimity in determining the punishment. *Id.* at 748-49.

35 Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953). A felony conviction was reversed because the defendant had waived the requirement of unanimity. The court held that the right to a unanimous jury verdict may not be waived because

> [i]t is the inescapable element of due process that has come down to us from earliest time. No federal case has been cited and none can be found . . . that holds or even remotely suggests that it may be waived.

Id.

But such conclusions were based on a belief that the sixth amendment meaning of "trial by jury" was fixed according to the common law at the time the Constitution was written,[36] rather than on a finding of unanimity as a fundamental right.[37] Limited by such an historical interpretation, the Court has not had to justify the requirement of unanimity as a right per se where the sixth amendment applies,[38] and has resisted extension of this common-law protection to the states through the fourteenth amendment. This reluctance was reflected in *Maxwell v. Dow*,[39] where the Court concluded that the states should determine for themselves the necessity of unanimous verdicts.[40] Further, in the recent cases of *Duncan v. Louisiana*[41] and *Williams v. Florida*,[42] the Court noted that it was not considering the issue of unanimity in state courts.[43]

Johnson and *Apodaca* squarely presented the Supreme Court with the issue of jury unanimity in state felony trials.[44] Perhaps the closest

---

36 In Thompson v. Utah, 170 U.S. 343 (1898), the Court stated its reliance on this approach thusly:

> It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument . . . .

Id. at 350. *See* Patton v. United States, 281 U.S. 276 (1930), where the Court held that trial by jury

> means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted . . . .

Id. at 288.

37 *See* Andres v. United States, 333 U.S. 740 (1948), where the Court justified the requirement of extending unanimity to both guilt and punishment not because it was fundamental in nature but because it was consistent with the history "of the Anglo-American jury system." *Id.* at 749.

38 406 U.S. at 370-71 (Powell, J., concurring).

39 176 U.S. 581 (1900) (state provision allowing for conviction by an eight-man jury held to be no violation of due process).

40 *Id.* at 605. The Court stated:

> [I]t is in entire conformity with the character of the Federal Government that [states] should have the right to decide for themselves what shall be the form and character of the procedure in such trials . . . and whether the verdict must be unanimous or not.

Id. (dictum).

41 391 U.S. 145 (1968).

42 399 U.S. 78 (1970) (Court held six-man jury was not unconstitutional in a state felony trial).

43 391 U.S. at 158 n.30; 399 U.S. at 100 n.46. In *Williams* the Court stated: "We intimate no view whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial." *Id. See also* Bloom v. Illinois, 391 U.S. 194, 213 (1968) (Fortas, J., concurring) (unanimity was not yet required of states and suggestion was made that it may be found non-fundamental).

44 406 U.S. at 369 (Powell, J., concurring).

case on point was that of *Hawaii v. Mankichi*,[45] where the Court let stand a manslaughter conviction returned by a nine-to-three jury verdict in the annexed territory of Hawaii.[46] This case was distinguished from other similar fact situations in which the full requirements of the sixth amendment were instinctively enforced against territories of the United States by a finding that Congress had not intended the full incorporation of Hawaii into the United States. The Islands had only been annexed at the time of the conviction and had not yet achieved territorial status with full constitutional protections.[47] But in a 5-4 decision,[48] the Court went further and stated:

> [W]e place our decision of this case upon the ground that the two rights alleged to be violated in this case *are not fundamental in their nature*, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being.[49]

It was this approach which was endorsed in the *Johnson* and *Apodaca* decisions: the approval of a reasoned method of procedure which does not deny a fundamental right.

In discussing Apodaca's sixth amendment claim that his right to a trial by jury was denied by a less than unanimous verdict, the Court first noted the lack of a clear expression in the Constitution or in the intent of the Framers which would compel an interpretation of "jury" to include unanimity as an inseparable element.[50] Thus freed from the written instrument, the task became one of fathoming the role of a

---

45 190 U.S. 197 (1903).

46 *Id.* at 198, 218. *See also* Fournier v. Gonzalez, 269 F.2d 26 (1st Cir. 1959), where the court upheld a less than unanimous verdict of first degree murder in Puerto Rico because it had not been incorporated into the United States and thus was free to modify its jury system. *Id.* at 29.

47 190 U.S. at 209-11. *See* Balzac v. Porto Rico, 258 U.S. 298 (1922) (full constitutional right to a jury trial not applied to an Island not fully incorporated into the United States); Dorr v. United States, 195 U.S. 138 (1904) (refusal to extend full constitutional right to a jury trial to Philippine Islands which had not been incorporated into the United States).

48 Two of the five majority Justices concurred, preferring to base their decision solely on the distinction that Hawaii had not yet become a full territory and therefore was not entitled to sixth amendment protection. 190 U.S. at 218-19.

49 *Id.* at 218 (emphasis added). The other right to which the Court referred was that of grand jury indictment, as the defendant had been indicted on information only. *Id.* at 198.

50 *Apodaca*, 406 U.S. at 410. The Court stated that their

> inability to divine "the intent of the Framers" when they eliminated references to the "accustomed requisitions" requires that in determining what is meant by a jury we must turn to other than purely historical considerations.

Id.

jury in today's society to determine if a unanimous verdict is essential to preserve the guarantee of a jury trial.[51] Unanimity was examined not as a separable and distinct right, but as a component of the concept of trial by jury, and the majority chose to evaluate the unwritten ideal of unanimity in terms of the real purpose of a jury determination. The function of a jury decision as a barrier between the state and the defendant was recognized, but the Court also concluded that unanimity did not "contribute to the exercise of . . . [the jury's] commonsense judgment."[52]

The four dissenting Justices urged that acceptance of the *Duncan* sixth amendment guarantee of a trial by jury necessarily included conviction by a unanimous jury verdict.[53] They were of the opinion that the federal standard of unanimity is fully incorporated into the due process clause of the fourteenth amendment.[54] Indeed, the history of the incorporation of the sixth amendment demonstrates a pattern of applying the federal standard to the states on a point by point basis.[55] However, the scope of such absorption depends on the judicial outlook of the majority.[56]

---

51 *Id.*

52 *Id.*

53 *Id.* at 414-15 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting). Justice Stewart's dissent was based on the historical precedent which had found unanimity to be essential to the sixth amendment jury trial. *Id.* Justice Marshall further objected to the "'functional'" technique which the majority used to "strip away, one by one, virtually all the characteristic features of the jury as we know it." *Id.* at 400 (Marshall, J., joined by Brennan, J., dissenting).

54 In his dissent, Justice Brennan noted the confusing result caused by the concurring opinion of Justice Powell, but concluded that

> [i]n any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the Bill of Rights that extends to the States, the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments.

Id. at 395-96 (footnote omitted).

55 *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (right to trial by jury); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process to obtain witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); Parker v. Gladden, 385 U.S. 363 (1966) (right to impartial jury); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront witnesses); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to assistance of counsel); *In re* Oliver, 333 U.S. 257 (1948) (right to a public trial). No single decision incorporated the sixth amendment in toto to be applied to the states. Rather, such absorption was done selectively. *See generally* Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); O'Brien, *Juries and Incorporation in 1971*, 1971 WASH. U.L.Q. 1.

56 *See* Ryan, *Less Than Unanimous Jury Verdicts in Criminal Trials*, 58 J. CRIM. L.C. & P.S. 211 (1967), where the acceptance of non-unanimous verdicts is stated as being dependent on who is sitting on the Court when the question arises: "The 'incorporation

An awkward result was reached in *Apodaca* because there was an implied sixth amendment requirement of unanimity for federal courts while such protection was decidedly withheld from the states. In his concurring opinion, Justice Powell viewed the federal standard as being "in accord both with history and precedent," and found it must be honored as a matter of comity to the past.[57] His decisive vote with the majority rested on a belief that incorporation must not deprive the states of their right to experiment with reasoned methods of procedure which do not result in denials of fundamental liberties.[58] He chose to establish the fundamental nature of each claimed right before demanding state acquiescence[59] to avoid enforcing common-law practices which have questionable contemporary application.[60]

Traditionally, the essential function of a jury has been the interposition between the accused and the accuser of the unanimous judgment of an impartial group of twelve citizens before life, liberty

school' will do battle with the 'fundamental principles of justice' school. Whichever school has the most adherents will carry the day." *Id.* at 216 n.84.

Justice Douglas has been a consistent advocate of full incorporation, believing that the fourteenth amendment's due process clause fully incorporated the first eight amendments. *See* Malloy v. Hogan, 378 U.S. 1, 14 (1964) (Douglas, J., concurring); Gideon v. Wainwright, 372 U.S. 335, 345-47 (1963) (Douglas, J., concurring); Poe v. Ullman, 367 U.S. 497, 516 (1961) (Douglas, J., dissenting). This approach mirrors that of the late Justice Black as expressed in Adamson v. California, 332 U.S. 46, 68 (1947), *overruled by implication*, Malloy v. Hogan, 378 U.S. 1 (1964), wherein he asserted his opposition to the majority holding that the fifth amendment provision regarding self-incrimination did not apply to the states. In his dissent, Justice Black reasoned thusly:

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.

332 U.S. at 71-72 (footnote omitted) (joined by Douglas, J.).

In *Apodaca* Justice Douglas "would construe the Sixth Amendment, when applicable to the States, precisely as [he] would when applied to the Federal Government." 406 U.S. at 388 (Douglas, J., joined by Brennan & Marshall, JJ., dissenting). Anything less would be, in his opinion, a " 'watered down' " version of fundamental guarantees. *Id.*

He also dissented "from this radical departure from American traditions" which would permit less than unanimous convictions. *Id.* at 381. Yet his position should be compared with that taken in Williams v. Florida, 399 U.S. 78 (1970), which approved the six-man jury, a marked departure from the historical reliance on twelve men. His acceptance of that interpretation was viewed not as a dilution of rights, but "as a necessary consequence of our duty to re-examine prior decisions to reach the correct constitutional meaning in each case." *Id.* at 107 (Black, J., joined by Douglas, J., concurring in part, dissenting in part).

57 406 U.S. at 371.

58 *Id.* at 377.

59 *Id.* at 373, 376.

60 *Id.* at 375-77.

or property may be taken away.[61] The necessity of twelve men as an indispensable element of a jury was found in *Williams v. Florida*[62] to be "a historical accident."[63] Thus conviction by six men was not a denial of the sixth amendment's guarantee of a trial by jury. Noticeably absent from both the majority and concurring opinions of *Johnson* and *Apodaca* is any mention of what specific number of fact-finders constitutes an acceptable barrier.[64] Insofar as the sixth amendment is concerned, the Court placed its emphasis on the mere existence of a jury as satisfying the requirements of the amendment.[65] Consequently, the function of a jury has been distilled to the singular right of a defendant to have an independent judgment imposed between himself and the state.[66]

Johnson claimed that the dissenting jurors were proof of the state's failure to establish guilt beyond a reasonable doubt in violation of his due process rights.[67] He relied on *In re Winship*,[68] where the Court held that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt."[69] The Court looked at the instant situation surrounding *Johnson* and concluded that the nine jurors who were persuaded to vote for a conviction were convinced on an individual basis by the evidence and by discussion with the other members of the jury.[70] Thus the Court viewed the reasonable doubt protection as dependent upon an individual rather than a collective state of mind.[71] This approach underscores the importance of

---

61 *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (jury is a "safeguard" providing accused protection against the aberrant prosecutor or judge); Vanhorne v. Dorrance, 2 U.S. (2 Dall.) 304, 314 (1795) (jury is a "barrier" which "ought never to be removed"). *See generally* Pope, *The Jury*, 39 TEXAS L. REV. 426 (1961); White, *Origin and Development of Trial by Jury*, 29 TENN. L. REV. 8 (1961).

62 399 U.S. 78 (1970).

63 *Id.* at 102. The Court concluded that twelve men are not necessary to effect the purpose of the jury system. *Id.*

64 Only Justice Blackmun in his concurring opinion mentioned the specific number of 7-5 as giving him "difficulty," yet he did not go on to state what margin is acceptable. 406 U.S. at 366. See discussion note 20 *supra*.

65 *Apodaca*, 406 U.S. at 411.

66 *Id.*

67 *Johnson*, 406 U.S. at 359.

68 397 U.S. 358 (1970) (juvenile charged with adult crime may be convicted only on proof beyond a reasonable doubt, not by a mere preponderance of evidence).

69 *Id.* at 364.

70 *Johnson*, 406 U.S. at 361.

71 *See* Comment, *Waiver of Jury Unanimity—Some Doubts about Reasonable Doubt*, 21 U. CHI. L. REV. 438 (1954), where a distinction is drawn between reasonable doubt as an individual decision and unanimity (or verdict) as a group decision.

> If any juror has a reasonable doubt, then the "group mind" has a reasonable doubt, and the group should also vote a not guilty verdict. But the law is that

jury deliberation as the means by which an individual juror reaches that state of mind characterized as being "beyond a reasonable doubt."[72] With unanimous verdicts, the state's burden is one of persuading the entire jury beyond a collective reasonable doubt.[73] One dissenting juror would be evidence of the state's failure to convince the jury and a conviction cannot be returned. A more realistic approach is taken by the less than unanimous jury verdict because the burden of proof beyond a reasonable doubt is on an individual basis, leaving to those similarly-convinced jurors the responsibility of finding guilt or innocence.[74]

Johnson further claimed that his conviction under Louisiana's three-tier system violated his equal protection rights.[75] However, the Court found that there was a rational basis for a sliding procedural scale dependent upon the severity of the crime charged, and thus held that selective use of less than unanimous jury verdicts by a state is not violative of equal protection guarantees.[76]

Apodaca's equal protection contention was that unanimity was essential to preserve jury panels which reflect cross sections of the community, equating meaningful participation with unanimity.[77] He argued that unless the state required unanimous verdicts, convictions

---

> the jury is "hung" and a new trial is necessary. This inconsistency seems to indicate that the analogy is faulty . . . . Proof beyond a reasonable doubt should be confined to the subjective standard applied by the individual juror, and unanimity—a group concept—must be justified in some other terms.

Id. at 442 (footnotes omitted). *See also* Ryan, *supra* note 56, at 214.

72 In Coffin v. United States, 156 U.S. 432 (1895), the Court described reasonable doubt as being "of necessity the condition of mind produced by the proof resulting from the evidence in the cause." *Id.* at 460. *See also* Hill v. Wabash Ry. Co., 1 F.2d 626, 631 (8th Cir. 1924) (court approved instruction to jury to individually decide with deference to the majority opinion).

73 In his dissent, Justice Marshall noted the majority's reasoning that lack of unanimity established a group reasonable doubt sufficient to compel a retrial but not enough to result in acquittal, and that therefore three dissenting jurors were not evidence of the state's failure to prove guilt beyond a reasonable doubt. 406 U.S. at 400-01. Justice Marshall found this argument to be "a complete *non sequitur*:"

> The reasonable-doubt rule, properly viewed, simply establishes that, as a prerequisite to obtaining a valid conviction, the prosecutor must overcome all of the jury's reasonable doubts; it does not, of itself, determine what shall happen if he fails to do so. That is a question to be answered with reference to a wholly different constitutional provision, the Fifth Amendment ban on double jeopardy . . . .

Id. at 401.

74 *See* Comment, *supra* note 71, at 442.

75 *Johnson*, 406 U.S. at 363.

76 *Id.* at 364.

77 *Apodaca*, 406 U.S. at 412-13. In his dissent Justice Brennan was troubled by the possibility that "[w]hen less than unanimity is sufficient, consideration of minority views may become nothing more than a matter of majority grace." *Id.* at 396.

would "occur without the acquiescence of minority elements within the community."[78] But the Court refused to extend the right of dissent to every distinct minority group, construing equal protection in this instance as being no more than the right not to have such groups systematically excluded from jury panels.[79] The right of a defendant to have a jury which is representative of the community has never been viewed as one of requiring the "physical" presence of minorities.[80] Rather, it has been held in *Witherspoon v. Illinois*[81] that the jury "can do little more—and must do nothing less—than express the conscience of the community."[82] Since this community cross section can be adequately represented by a six-man jury,[83] a verdict rendered by nine or ten jurors, from which two or three dissent, does not deny a defendant the benefit of adequate community participation. However, there is a possibility for denial of meaningful deliberation if the required concurrence of jurors is reached before any discussion takes place, thus allowing the return of a verdict absent even a cursory examination of the facts.[84]

---

78 *Apodaca*, 406 U.S. at 413.

79 *Id. See* Strauder v. West Virginia, 100 U.S. 303 (1880) (state may not exclude jurors on basis of race); Hansen v. United States, 393 F.2d 763 (8th Cir.), *cert. denied*, 393 U.S. 833 (1968) (jurors cannot be systematically excluded on basis of race, religion, political, economic or social status).

80 *See* Swain v. Alabama, 380 U.S. 202 (1965) (defendant not entitled to presence of fellow minority citizens on jury, but such persons may not be systematically excluded); Virginia v. Rives, 100 U.S. 313 (1880) (Negro defendant has no right to have jury composed of fellow Negroes, such mixture of jury is not essential).

The Court does, however, insist upon the physical presence of minority groups in the panels from which the jury is drawn. *See* Whitus v. Georgia, 385 U.S. 545 (1967) (Court found prima facie case of Negro exclusion); Norris v. Alabama, 294 U.S. 587 (1935) (prima facie case of exclusion compels inclusion). The same is true for grand juries, which also directly affect a defendant's imperiled freedom. *See* Cassell v. Texas, 339 U.S. 282 (1950) (token Negro on grand jury for past 21 years established prima facie case of exclusion).

The right to proportional representation does not extend to those areas which do not directly affect a defendant, such as jury commissions. *See* Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970) (absence of Negroes on jury commission does not compel their inclusion).

81 391 U.S. 510 (1968). The Court found that a defendant has a right to a jury which reflects community opinion. The exclusion of potential jurors whose aversion to the death penalty mirrored public opinion denied the defendant the benefit of their conscience. The requirement that a jury be neutral demanded that reasoned public sentiment not be systematically excluded. *Id.* at 518-23.

82 *Id.* at 519.

83 Williams v. Florida, 399 U.S. 78 (1970). The Court reasoned:

> [I]n practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible.

Id. at 102.

84 406 U.S. at 396 (Brennan, J., joined by Marshall, J., dissenting). *See also* Tamm,

In thus interpreting the sixth and fourteenth amendments, the Supreme Court placed a heavy emphasis on the individual juror. Justice Stewart's dissent presented other protections which have been thrown around the jury, such as change of venue, protection from exaggerated press coverage, and restrictions on information the jury may receive during a trial, and suggested that unanimity was equally necessary.[85] The majority did not confront these arguments, implying that while such protections are necessary for the whole jury insofar as they protect the collective mind of the jury from improperly oriented evidence,[86] the individual juror will reach a state of certitude on the facts regardless of any limitation or imposition of unanimity.[87] While the Court recognized the importance of the individual juror, it was dissuaded from giving such an individual the right to block a conviction with a dissenting vote when a state legislature has provided for less than unanimous jury verdicts.[88]

The traditional acceptance of unanimity has been carefully criticized in recent years.[89] The American Bar Association has issued

The Five-Man Civil Jury: A Proposed Constitutional Amendment, 51 GEO. L.J. 120 (1962), where the author suggests:

> Unanimity requires full and frank discussion in the jury room. It requires a defense of each juror's individual viewpoint and a challenging inquiry to those of opposing view. Minority conclusions, possibly founded on passions and prejudices, must yield in the forum of the jury room to the demand of a unanimous, objective verdict.

Id. at 139. *But see* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 496 (1966), where the authors concluded that

> the deliberation process although rich in human interest and color appears not to be at the heart of jury decision-making. Rather, deliberation is the route by which small group pressures produce consensus out of the initial majority.

Id.

85 406 U.S. at 398-99.

86 These "whole jury" protections insure that the evidence which the jury receives and upon which it must render a verdict comes solely from the witness stand. *See* Bruton v. United States, 391 U.S. 123 (1968) (reversal due to improper introduction of co-defendant's confession because of "risk" that jury might be swayed, despite court instructions to disregard such evidence); Sheppard v. Maxwell, 384 U.S. 333 (1966) (conviction obtained in a community saturated with inflammatory press coverage overturned); Turner v. Louisiana, 379 U.S. 466 (1965) (murder conviction reversed where jury had constant association with deputies who testified at trial because such contacts could color the credibility jurors might place on the testimony); Irvin v. Dowd, 366 U.S. 717 (1961) (state conviction vacated on ground of prejudicial publicity).

87 *Johnson*, 406 U.S. at 362. *See* Comment, *supra* note 71, at 443.

88 *Apodaca*, 406 U.S. at 413. *See* Haralson, *Unanimous Jury Verdicts in Criminal Cases*, 21 MISS. L.J. 185, 193 (1950).

89 *See* Barnett, *The Jury's Agreement—Ideal and Real*, 20 ORE. L. REV. 189 (1941); Haralson, *supra* note 88; Kun, *Validity of the Unanimous Verdict Requirement*, 58 DICK. L. REV. 165 (1954); Weinstein, *Trial by Jury and Unanimous Verdicts*, 69 U.S.L. REV. 513 (1935); Winters, *Majority Verdicts in the United States*, 26 J. AM. JUD. SOC'Y 87 (1942). For earlier criticism, *see* ALI CODE OF CRIMINAL PROCEDURE § 335 (June 1930 Draft)

a tentative draft entitled *Trial By Jury* in which its Advisory Committee noted only one drawback, that of deadlock, which occurs in an insignificant number of trials.[90] Yet they "concluded that the minimum standards should recognize the propriety of less than unanimous verdicts."[91] England has abandoned its protection of unanimity,[92] although it requires that there be a minimum deliberation time by the jury before a verdict may be returned.[93] Finally, by upholding the state constitutional provisions of Louisiana and Oregon allowing for non-unanimous verdicts, the Supreme Court has added its criticism of the concept of unanimity. It has been suggested that the reasons for ending the requirement of unanimous jury verdicts would be to eliminate obstinate or corrupt jurors, hung juries and their consequential economic and emotional burdens, and the "unreasonable" expectation that twelve jurors can arrive at one opinion.[94] Others attribute this trend to a growing "law and order" mood.[95] But these

(approval of 12-0, 10-2, and 8-4 verdicts dependent upon severity of crime charged); Burdick, *Criminal Justice in America*, 11 A.B.A.J. 510 (1925); Lindsey, *Unanimity of Jury Verdicts*, 5 VA. L. REG. 133 (1899) (civil cases); Linn, *Changes in Trial by Jury*, 3 TEMPLE L.Q. 3 (1928); Roberts, *Trial Procedure—Past, Present and Future*, 15 A.B.A.J. 667 (1929); Note, *Unanimity of the Jury*, 39 AM. L. REV. 108 (1905); Summary of Events, *The Juries Bill*, 8 AM. L. REV. 175 (1873).

90 ABA, STANDARDS RELATING TO TRIAL BY JURY 26 (Project on Minimum Standards for Criminal Justice, Tentative Draft, 1968). The Advisory Committee noted two advantages to unanimous verdicts: 1. careful jury deliberation and continued debate until unanimity is achieved, and 2. prima facie evidence of a fair trial. *Id.* (quoting from Holtzoff, *Modern Trends in Trial by Jury*, 16 WASH. & LEE L. REV. 27, 27-28 (1959)).

91 *See* ABA, *supra* note 90, at 28.

92 Criminal Justice Act 1967, c. 80 provides:

> 13. Majority verdicts of juries in criminal proceedings.—(1) Subject to the following provisions of this section, the verdict of a jury in criminal proceedings need not be unanimous if—
>
> (*a*) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and
>
> (*b*) in a case where there are ten jurors, nine of them agree on the verdict; and a verdict authorised by this subsection is hereafter in this section referred to as "a majority verdict".

See also Samuels, *Criminal Justice Act*, 31 MOD. L. REV. 16 (1968).

93 Criminal Justice Act 1967, c. 80 provides also:

> (3) A court shall not accept a majority verdict unless it appears to the court that the jury have had not less than two hours for deliberation or such longer period as the court thinks reasonable having regard to the nature and complexity of the case.

See also Practice Direction, [1967] 3 All E.R. 137 (C.A.) (directions given to judges to insure uniform summing up before jury under the new procedure of non-unanimous verdicts).

94 For discussion regarding the rationale for allowing less than unanimous jury verdicts see TEX. CONST. ANN. art. 5, § 13 (Interpretive Commentary) and Comment, *Should Jury Verdicts Be Unanimous in Criminal Cases?*, 47 ORE. L. REV. 417 (1968).

95 Justice Douglas in his dissent commented that the majority holdings in *Johnson*

are essentially practical considerations which attempt to add a finite dimension to a concept that is perhaps beyond rational measurement.

Advocates and critics of the unanimous jury verdict ideal possess an almost religious conviction regarding its worth. While the Justices in both the majority and dissenting opinions of *Johnson* and *Apodaca* justify their respective beliefs, they fail to explain why the concept of unanimity has endured for over 600 years. Was it "a historical accident" like the twelve-man jury requirement? Or did it serve the function of insuring meaningful deliberation in those instances which demanded a complete discussion of the facts? If the Court is to discard its traditional adherence to unanimity, then it should substitute the guarantee that a jury must deliberate before returning a verdict. A defendant's right to a trial by jury is not wholly served in some capricious numerical majority, but in the deliberated verdict of an impartial jury. However, the Supreme Court may continue to place added emphasis on the individual juror by interpreting the decision-making process which the individual undergoes while hearing proper trial evidence to be sufficient reasoned judgment in lieu of actual group deliberation. Whichever direction the Court pursues, the *Johnson-Apodaca* rationale insures that future inquiry into the fundamental requisites of jury verdicts will be unhindered by outdated historical concepts.

Robert J. Hrebek

---

and *Apodaca* are the result of "a 'law and order' judicial mood." 406 U.S. at 393. *See also* N.Y. Times, *supra* note 19.