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Allan Arbman

James McConnell

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TRIAL BY JURY: THE NEW IRRELEVANT RIGHT?

by

Allan Ashman* and James McConnell**

THE RIGHT to trial by jury, guaranteed by the United States Constitution,¹ is one of liberty's oldest and most dependable safeguards, but three recent decisions of the United States Supreme Court, *Williams v. Florida*,² *Johnson v. Louisiana*,³ and *Apodaca v. Oregon*,⁴ have opened the way for what appear to be major changes in the nature of this right. *Williams* held that juries composed of fewer than twelve jurors are permissible in the trial of criminal cases in state courts, and in *Johnson* and *Apodaca* the Court decided that the Constitution does not demand that verdicts in state criminal cases be reached by unanimous consent of all jurors. These decisions, and the changes and proposals following in their wake, have rekindled controversy about the nature of jury trials, the rights of criminal defendants, and the viability of trial by jury in modern society. Much of the debate surrounding the controversy is based on the notion of trial by jury as it existed, or was thought to exist, prior to the Supreme Court decisions.⁵ In order to engage in a useful evaluation of the decisions and to gauge their potential impact, it is first necessary to examine the historical development of trial by jury in this country and the judicial antecedents of *Williams*, *Johnson*, and *Apodaca*.

I. SOURCES OF THE RIGHT TO TRIAL BY JURY

Trial by jury, according to Holdsworth, originated out of the custom of calling together a group of neighbors, presumably familiar with the facts of the case, to decide disputed questions.⁶ Gradually jurors came to rely less on

* A.B., Brown University; LL.B., Columbia University. Director of Research of the American Judicature Society, Chicago, Illinois.

** B.S., Iowa State University; J.D., Northwestern University. Attorney at Law, Chicago, Illinois; formerly Assistant Director of Research of the American Judicature Society, Chicago, Illinois. The authors gratefully acknowledge the invaluable assistance of Mr. Jeffrey S. Lubbers and Mr. James Ball, students at the University of Chicago Law School, in the preparation of this Article.

¹ "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ." U.S. CONST. art. III, § 2. "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 . . ." *Id.* amend. VI. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." *Id.* amend. VII.

² 399 U.S. 78 (1970).

³ 406 U.S. 356 (1972).

⁴ 406 U.S. 404 (1972).

⁵ For some critical articles discussing the probable impact of the *Williams*, *Johnson*, and *Apodaca* cases on trial by jury, see, e.g., Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971); Comment, *A Constitutional Renvoi: Unanimous Verdicts in State Criminal Trials*, 41 FORDHAM L. REV. 115 (1972); Comment, *The Unanimous Jury Verdict: Its Valediction in Some Criminal Cases*, 4 TEXAS TECH L. REV. 185 (1972); Note, *Juries—Unanimous Jury Verdicts No Longer Required for State Felony Convictions*, 4 SETON HALL L. REV. 346 (1972); Note, *Criminal Procedure—Majority Verdicts in Criminal Trials*, 40 TENN. L. REV. 91 (1972). Most of these articles criticize the Supreme Court's weak analysis of the deliberative process within the jury room and the Court's failure to weigh adequately the combined impact of reduction in jury membership and vote percentage required to convict upon the right of defendants to be proven guilty beyond a reasonable doubt.

⁶ 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 317 (3d ed. 1922).

their own knowledge and more on testimony presented by other witnesses, until testimony at the trial became the primary basis for the decision of the jury. The right to trial by jury was guaranteed by the Magna Carta.⁷ Originally, a verdict of a majority of the jurors was sufficient for a decision, but by 1367 a unanimous verdict was required.⁸

English colonists settling in America carried with them the right to trial by jury, and the abuse of this right was one of the many excesses that led to the Declaration of Independence. Fear that such abuses might be repeated by a strong central government ultimately led to incorporation of the right to trial by jury into the Constitution and the Bill of Rights.⁹

Although the jury trial guarantees of the Constitution and Bill of Rights apply directly only to the federal government, every state constitution provides for jury trial in some form.¹⁰ The nature of trial by jury in the United States, therefore, is defined not only by the interpretations of the sixth and seventh amendments but also by the constitutions and laws of the fifty states. However, the right of trial by a jury of twelve persons who are required to render a unanimous verdict, settled since the fourteenth century,¹¹ has not remained constant from colonial times to the present. A brief chronology of the states' modifications of the traditional jury throughout the nineteenth and twentieth centuries may prove useful to those interested in the evolution of the jury trial.

II. DEVELOPMENT OF TRIAL BY JURY IN THE STATES

Early Developments. The change from uniform requirement of juries of twelve began as early as 1844 with the adoption of a new constitution in the state of New Jersey. The original New Jersey constitution provided in general terms that "the inestimable right of trial by jury shall remain confirmed,"¹² but the new constitution permitted the legislature to provide for juries of six in cases involving less than \$50.¹³ Two years later Iowa was admitted to the Union

⁷ *Id.* at 386.

⁸ *Id.* at 318.

⁹ U.S. CONST. art. III, § 2; *id.* amends. VI, VII.

¹⁰ ALA. CONST. art. 1, §§ 6, 11; ALAS. CONST. art. 1, §§ 11, 16; ARIZ. CONST. art. 2, § 23; ARK. CONST. art. 2, § 7; CAL. CONST. art. 1, § 7; COLO. CONST. art. II, § 23; CONN. CONST. art. First, §§ 8, 19; DEL. CONST. art. 1, §§ 4, 7; FLA. CONST. art. 1, §§ 16, 22; GA. CONST. art. I, § 2-105; HAWAII CONST. art. I, §§ 10, 11; IDAHO CONST. art. 1, § 7; ILL. CONST. art. 1, § 13; IND. CONST. art. 1, §§ 13, 20; IOWA CONST. art. 1, §§ 9, 10; KAN. CONST. Bill of Rights §§ 5, 10; KY. CONST. §§ 7, 11; LA. CONST. art. 1, § 9, art. 7, § 41; ME. CONST. art. I, §§ 6, 20; MD. CONST. Declaration of Rights arts. 5, 21; MASS. CONST. pt. I, art. XV; MICH. CONST. art. 1, §§ 14, 20, art. 4, § 44; MINN. CONST. art. 1, §§ 4, 6; MISS. CONST. art. 3, §§ 26, 31; MO. CONST. art. 1, §§ 18(a), 22(a); MONT. CONST. art. III, §§ 16, 23; NEB. CONST. art. 1, §§ 6, 11; NEV. CONST. art. 1, § 3; N.H. CONST. pt. 1, arts. 16, 20; N.J. CONST. art. 1, §§ 9, 10; N.M. CONST. art. II, §§ 12, 14; N.Y. CONST. art. 1, § 2; N.C. CONST. art. 1, §§ 24, 25; N.D. CONST. art. 1, § 7; OHIO CONST. art. I, §§ 5, 10; OKLA. CONST. art. 2, §§ 19, 20; ORE. CONST. art. I, §§ 11, 17; PA. CONST. art. 1, §§ 6, 9; R.I. CONST. art. 1, §§ 10, 15; S.C. CONST. art. 1, §§ 18, 25; S.D. CONST. art. VI, §§ 6, 7; TENN. CONST. art. 1, §§ 6, 9; TEX. CONST. art. 1, §§ 10, 15; UTAH CONST. art. I, §§ 10, 12; VT. CONST. ch. 1, arts. 10, 12; VA. CONST. art. I, §§ 8, 11; WASH. CONST. art. 1, §§ 21, 22; W. VA. CONST. art. 3, §§ 13, 14; WIS. CONST. art. 1, §§ 5, 7; WYO. CONST. art. 1, §§ 9, 10.

¹¹ 1 W. HOLDSWORTH, *supra* note 6, at 318; Comment, *A Constitutional Renvoi: Unanimous Verdicts in State Criminal Trials*, 41 FORDHAM L. REV. 115, 117 (1972).

¹² N.J. CONST. art. XXII (1776).

¹³ N.J. CONST. art. 1, § 7 (1844).

with a constitution authorizing use of juries of less than twelve in its inferior courts.¹⁴ In 1850 Michigan adopted a new constitution which authorized juries of less than twelve,¹⁵ specifically including juries in criminal cases in courts not of record.¹⁶ The original Michigan constitution had provided only that "[t]he right of trial by jury shall remain inviolate."¹⁷

There was no further movement toward reducing the number of jurors required in state courts between 1850 and 1870, but the nature of trial by jury continued to change with the first specific abrogation of the requirement that verdicts be unanimous. In 1864 Nevada was admitted to the Union with a constitution which provided for verdicts by three-fourths of the jurors in civil cases.¹⁸

In the 1870's five more states changed their constitutions to provide for smaller juries in some or all cases, and one more state adopted the idea of less than unanimous verdicts. In 1872 West Virginia provided for juries of less than twelve in trials de novo of cases heard by justices of the peace.¹⁹ In 1875 Florida amended its constitution to permit the legislature to fix the number of jurors "for the trial of causes in any court."²⁰ This provision was later amended further to fix six as the minimum number of jurors.²¹ The third Missouri constitution, adopted in 1875, also provided that the legislature might fix a number less than twelve as the number of jurors in courts not of record.²² Colorado was admitted in 1876 with a constitution permitting juries of less than twelve in civil cases in all courts, and in criminal cases in courts not of record.²³ In 1879 Louisiana adopted its sixth constitution. This new charter authorized the legislature to establish juries of less than twelve for all criminal cases not necessarily punishable by death or imprisonment at hard labor.²⁴ In the same year, California adopted a new state constitution which permitted verdicts by three-fourths of the jurors in all civil cases.²⁵

Western States Spur Changes. In the years between 1879 and 1889 there were no significant changes in the jury trial provisions of state constitutions. Except for the states which had already authorized the use of smaller juries in some cases, and California and Nevada, which had introduced less than unanimous verdicts, the states continued to provide that citizens had the right to trial by jury in civil and criminal cases without specifying in detail the mechanics of the trial by jury.²⁶

Beginning in 1889, the admission of the western states to the union greatly expanded the ranks of states providing for jury trials by juries of less than

¹⁴ IOWA CONST. art. 1, § 9.

¹⁵ MICH. CONST. art. 4, § 46; art. 6, § 28 (1850).

¹⁶ *Id.* art. 6, § 28.

¹⁷ MICH. CONST. art. 1, § 9 (1835).

¹⁸ NEV. CONST. art. 1, § 3.

¹⁹ W. VA. CONST. art. 3, § 13 (1872).

²⁰ FLA. CONST. art. 6, § 12 (1875).

²¹ *Id.* art. 5, § 38 (1885).

²² MO. CONST. art. 2, § 28 (1875).

²³ COLO. CONST. art. II, § 23.

²⁴ LA. CONST. art. 7 (1879).

²⁵ CAL. CONST. art. 1, § 7 (1879).

²⁶ *See, e.g.,* ILL. CONST. art. 2, § 5 (1870).

twelve, and for verdicts by less than all the jurors. In 1889 four states were admitted to the Union, all four providing in their constitutions for juries of less than twelve in some cases, and three of the four providing for less than unanimous verdicts in civil cases. Montana required juries of six in civil cases and misdemeanors in justice courts, and verdicts by two-thirds of the jurors in civil and misdemeanor cases in all courts.²⁷ South Dakota permitted juries of less than twelve in courts not of record, and verdicts by three-fourths of the jurors in civil cases in any court.²⁸ Washington also provided for juries of less than twelve in courts not of record, and for verdicts by nine or more jurors in civil cases in courts of record.²⁹ North Dakota made no provisions for less than unanimous verdicts, but permitted juries of less than twelve in civil cases in courts not of record.³⁰

Two more states, Idaho and Wyoming, were admitted in 1890. Idaho's constitution directly authorized verdicts by three-fourths of the jurors in civil cases, and allowed legislative provision for verdicts by five-sixths of the jurors in misdemeanor cases.³¹ Wyoming permitted the use of juries of less than twelve in civil cases in all courts and in criminal cases in courts not of record.³² The same year, the Minnesota constitution was amended to permit verdicts in civil cases to be rendered by five-sixths of the jurors after at least six hours of deliberation.³³

In 1895 Utah was admitted to the Union with a constitution which, at that time, contained the most specific provisions regarding jury size and unanimity of verdict:

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict.³⁴

Other States Follow Suit. Although the admission of these new western states represented the most concentrated activity in the modification of the concept of trial by jury, the example of the new states prompted other states to approve constitutional amendments which modified that right in their courts as well. Just three years after Utah's detailed provisions regarding jury size and verdicts became effective, Louisiana adopted a new state constitution which also contained detailed modifications of jury trial requirements. The new Louisiana constitution required bench trials in cases where punishment could not be hard labor, juries of five in cases where punishment might be at hard labor, and juries of twelve in cases where punishment must be at hard labor and in capital cases. Unanimous verdicts were required of five-member juries and juries in capital cases, but in all other cases tried before twelve-member juries concur-

²⁷ MONT. CONST. art. III, § 23.

²⁸ S.D. CONST. art. VI, § 6.

²⁹ WASH. CONST. art. 1, § 21.

³⁰ N.D. CONST. art. I, § 7.

³¹ IDAHO CONST. art. 1, § 7 (1890).

³² WYO. CONST. art. 1, § 9.

³³ MINN. CONST. art. 1, § 4.

³⁴ UTAH CONST. art. 1, § 10.

rence of nine jurors was sufficient.³⁵ In 1900 the Missouri constitution, which already provided for juries of less than twelve in all cases in courts not of record, was amended to permit verdicts by two-thirds of the jurors in all civil cases and by three-fourths of the jurors in civil cases in courts of record.³⁶

New Mexico, admitted in 1912, permitted juries of six in inferior courts, and less than unanimous verdicts in civil cases.³⁷ Also in 1912, Ohio amended its constitution to authorize verdicts in civil cases by not less than three-fourths of the jurors.³⁸ In the same year Arizona was admitted with a constitution permitting juries of less than twelve in courts not of record, and verdicts by nine or more jurors in civil cases in courts of record.³⁹

After 1912 changes in jury trial provisions were sporadic, although amendments continued to be made from time to time to within a few years of the *Williams*, *Johnson*, and *Apodaca* decisions. In 1922 Wisconsin amended its constitution to permit verdicts in civil cases by five-sixths or more of the jurors.⁴⁰ In 1928 Arkansas added a provision for verdicts by nine or more jurors in all civil cases.⁴¹ In 1934 Idaho amended its provision for less than unanimous verdicts to require that jury size be reduced to six in misdemeanor cases and in civil cases involving amounts less than \$500.⁴² In 1947 New Jersey added to its earlier provision for six-member juries⁴³ a provision for verdicts in civil cases by five-sixths of the jurors.⁴⁴

Alaska and Hawaii were both admitted as states in 1959, and both of their constitutions provided for modified rights to trial by jury. Alaska permitted juries of six or more in civil and criminal cases in courts not of record, and for verdicts in civil cases by not less than three-fourths of the jurors.⁴⁵ Hawaii permitted verdicts by not less than three-fourths of the jurors in civil cases⁴⁶ involving a controversy over \$100.

In 1963 Michigan amended its constitution to provide for verdicts of ten of twelve jurors in civil cases⁴⁷ in addition to its earlier provision for juries of less than twelve.⁴⁸ And in 1969 the last state action prior to the Supreme Court's decision in *Williams* was taken by Oklahoma, which amended its constitution to require six-member juries in misdemeanor and ordinance violation cases, juvenile cases, eviction cases, and civil cases involving less than \$2,500.⁴⁹ The new provision also directly authorized verdicts by three-fourths of the jurors in all cases except felonies.⁵⁰

³⁵ LA. CONST. art. 116 (1898).

³⁶ MO. CONST. art. II, § 28 (1900).

³⁷ N.M. CONST. art. II, § 12.

³⁸ OHIO CONST. art. I, § 5.

³⁹ ARIZ. CONST. art. 2, § 23.

⁴⁰ WIS. CONST. art. 1, § 5.

⁴¹ ARK. CONST. art. 2, § 7.

⁴² IDAHO CONST. art. 1, § 7.

⁴³ N.J. CONST. art. 1, ¶ 7 (1844).

⁴⁴ *Id.* art. 1, ¶ 9.

⁴⁵ ALAS. CONST. art. I, §§ 11, 16.

⁴⁶ HAWAII CONST. art. I, § 10.

⁴⁷ MICH. CONST. art. 1, § 14.

⁴⁸ *Id.* art. 4, § 44.

⁴⁹ OKLA. CONST. art. 2, § 19.

⁵⁰ *Id.*

The Situation in 1969. The various changes from twelve-member juries and unanimous verdicts described above indicate that the nature of trial by jury was neither fixed nor uniform when the *Williams* case reached the Supreme Court. In 1969 there were twenty states that specifically authorized juries of less than twelve in some cases.⁵¹ Of these, eighteen permitted the smaller juries in some criminal cases.⁵² However, only three states, Florida, Louisiana, and Utah, authorized juries of less than twelve in any type of felony case.⁵³ Less than unanimous verdicts were permitted in some cases in twenty-five states,⁵⁴ but nineteen of these provided for such verdicts in civil cases only.⁵⁵

Therefore, the traditional notion that a jury trial meant a trial before a panel of twelve members which was required to render a unanimous verdict was not always the rule. In every state where a felony case could be tried before a jury of less than twelve members, however, that jury was required to reach unanimity. Moreover, in addition to the few states whose constitutions specifically required twelve-member juries and unanimous verdicts,⁵⁶ states which had not modified that common law conception by specific enactment interpreted the term "trial by jury" to include both requirements.⁵⁷ Thus, just prior to *Williams*, *Johnson*, and *Apodaca*, although thirty-one states permitted some variations in the traditional twelve-member unanimous juries (mostly in civil cases or in misdemeanor trials),⁵⁸ few states had tampered with the traditional right of a

⁵¹ See ALAS. CONST. art. I, §§ 11, 16; ARIZ. CONST. art. 2, § 23; COLO. CONST. art. II, § 23; FLA. CONST. art. 5, § 22; IDAHO CONST. art. 1, § 7; IOWA CONST. art. 1, § 9; LA. CONST. art. 7, § 41; MICH. CONST. art. 1, § 20, art. 4, § 44; MO. CONST. art. 1, § 22(a); MONT. CONST. art. III, § 23; NEB. CONST. art. I, § 6; N.J. CONST. art. 1, § 9; N.M. CONST. art. II, § 12; N.D. CONST. art. 1, § 7; OKLA. CONST. art. 2, § 19; S.D. CONST. art. VI, § 6; UTAH CONST. art. I, § 10; WASH. CONST. art. 1, § 21; W. VA. CONST. art. 3, § 13; WYO. CONST. art. 1, § 9.

⁵² The only exceptions were New Jersey and North Dakota. New Jersey uses juries of six in cases involving less than fifty dollars, N.J. CONST. art. 1, § 9; North Dakota permits juries of less than twelve in courts not of record in civil cases only, N.D. CONST. art. I, § 7.

⁵³ See FLA. CONST. art. 5, § 22; LA. CONST. art. 7, § 41; UTAH CONST. art. I, § 10.

⁵⁴ See ALAS. CONST. art. I, § 16; ARIZ. CONST. art. 2, § 23; ARK. CONST. art. 2, § 7; CAL. CONST. art. 1, § 7; HAWAII CONST. art. I, § 10; IDAHO CONST. art. 1, § 7; LA. CONST. art. 7, § 41; MICH. CONST. art. 1, § 14; MINN. CONST. art. 1, § 4; MISS. CONST. art. 3, § 31; MO. CONST. art. 1, § 22(a); MONT. CONST. art. III, § 23; NEB. CONST. art. 1, § 6; NEV. CONST. art. 1, § 3; N.J. CONST. art. 1, § 9; N.M. CONST. art. II, § 12; N.Y. CONST. art. 1, § 2; OHIO CONST. art. I, § 5; OKLA. CONST. art. II, § 19; ORE. CONST. art. I, § 11; S.D. CONST. art. VI, § 6; TEX. CONST. art. 5, § 13; UTAH CONST. art. I, § 10; WASH. CONST. art. 1, § 21; WIS. CONST. art. 1, § 5.

⁵⁵ Of the six exceptions, Idaho, Montana, Oklahoma, and Texas permitted less than unanimous verdicts in misdemeanor trials only. IDAHO CONST. art. 1, § 7; MONT. CONST. art. III, § 23; OKLA. CONST. art. 2, § 19; TEX. CONST. art. 5, § 13. Louisiana allowed less than unanimous verdicts in all cases tried to twelve-member juries except capital cases, LA. CONST. art. 7, § 41, and Oregon allowed them in all criminal cases except first degree murder, ORE. CONST. art. I, § 11.

⁵⁶ See, e.g., MD. CONST. Declaration of Rights art. 5; N.C. CONST. art. I, §§ 24, 25.

⁵⁷ See, e.g., *Kirk v. State*, 247 Ala. 43, 22 So. 2d 431 (1945); *Dixon v. State*, 27 Ala. App. 64, 167 So. 340 (1936); *Liska v. Chicago Rys.*, 318 Ill. 570, 149 N.E. 469 (1925); *Sinopoli v. Chicago Rys.*, 316 Ill. 609, 147 N.E. 487 (1925); *Coca Cola Bottling Works v. Harvey*, 209 Ind. 262, 198 N.E. 782 (1935); *State v. Simons*, 61 Kan. 752, 60 P. 1052 (1900); *Boman v. Wheaton*, 2 Kan. App. 581, 44 P. 750 (N. Dept. 1896); *Jackson v. Commonwealth*, 221 Ky. 823, 299 S.W. 983 (Ct. App. 1927); *Gallo v. Commonwealth*, 343 Mass. 397, 179 N.E.2d 231 (1961); *Opinion of the Justices of the Supreme Judicial Court*, 41 N.H. 550 (1860); *Commonwealth v. Fugmann*, 330 Pa. 4, 198 A. 99 (1938); *Wellitz v. Thomas*, 122 Pa. Super. 438, 185 A. 864 (1936); *Advisory Opinion to the Senate*, 278 A.2d 852 (R.I. 1971); *State v. Hall*, 137 S.C. 261, 101 S.E. 662 (1919).

⁵⁸ See notes 51, 54 *supra*.

person accused of a serious crime to demand that a verdict of guilty be given only by a unanimous jury of twelve of his peers.

III. THE DECISIONS

On June 22, 1970, the United States Supreme Court took its first dramatic step toward redefining its concept of "trial by jury." In *Williams v. Florida*⁵⁹ the question arose as to whether the traditional twelve-man criminal jury requirement was so fundamental to trial by jury as to be applied to the states by virtue of *Duncan v. Louisiana*.⁶⁰ The Court had held in *Duncan* that the sixth amendment jury trial guarantee was binding on the states through the fourteenth amendment. The Court determined in *Williams*, however, that the twelve-man requirement was an "historical accident, unnecessary to effect the purposes of the jury system and wholly without significance . . ."⁶¹

In upholding the constitutionality of six-man juries, Justice White, writing for the majority, concluded that the background of the sixth amendment provided no real guidance in determining what Congress intended to signify by use of the word "jury" when it drafted the amendment, but that it was "more plausible" that Congress intended nothing by that term with respect to any particular jury size.⁶² Thus, the Court concluded, there was no significant reason for supposing that the goals of the jury would be any less effectively furthered by a jury of six than by a jury of twelve, "particularly if the requirement of unanimity is retained."⁶³ Since the twelve-member requirement was not an essential element of trial by jury, the states, although required to provide trial by jury, could permit juries of fewer than twelve persons in criminal cases without violating due process of law.

Although the Court in *Williams* pointed out that it was intimating "no view whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial,"⁶⁴ it did rest its decision in part on the assumption that no harm would come from a reduction in the number of jurors as long as unanimous verdicts were retained. But two years later, in *Johnson v. Louisiana*⁶⁵ and *Apodaca v. Oregon*,⁶⁶ the Court held that Louisiana's use of 9-3 verdicts in major crimes was not a denial of due process and that Oregon's use of 10-2 verdicts in criminal cases did not violate the sixth amendment as applied to the states by the Court four years earlier in *Duncan*. Prior to *Johnson* and *Apodaca* the specific question of unanimity in criminal trials had never been raised before the Court, although it had been well established, albeit by dicta, that unanimity was a fundamental feature of a federal jury trial.⁶⁷ Then

⁵⁹ 399 U.S. 78 (1970).

⁶⁰ 391 U.S. 145 (1968).

⁶¹ 399 U.S. at 102.

⁶² *Id.* at 97.

⁶³ *Id.* at 100.

⁶⁴ *Id.* at 100 n.46.

⁶⁵ 406 U.S. 356 (1972).

⁶⁶ 406 U.S. 404 (1972).

⁶⁷ For civil cases, see, e.g., *Springville v. Thomas*, 166 U.S. 707 (1897); *American Publishing Co. v. Fisher*, 166 U.S. 464 (1897). For criminal cases, see, e.g., *Andres v. United States*, 333 U.S. 740, 748 (1948); *Patton v. United States*, 281 U.S. 276, 288 (1930); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Thompson v. Utah*, 170 U.S. 343, 346-48 (1898). These cases are discussed in Comment, *supra* note 11, at 118-19.

suddenly, a closely divided United States Supreme Court sustained the constitutionality of less than unanimous jury verdicts in state criminal trials.

In *Johnson* the Court specifically held that a Louisiana law allowing 9-3 verdicts for certain crimes neither violated due process for failure to satisfy the reasonable doubt standard of proof nor deprived the defendant of equal protection because convictions for other kinds of crime required unanimous verdicts. In *Apodaca* the Court upheld Oregon's constitutional provision allowing 10-2 verdicts for crimes other than first degree murder, concluding that the sixth amendment, as applicable to the states through the fourteenth amendment, did not require a unanimous jury verdict. Four members of the Court—Chief Justice Burger along with Justices White, Blackmun, and Rehnquist—concluded that the sixth amendment did not require a unanimous verdict even in federal criminal trials. Four other members—Justices Douglas, Brennan, Stewart, and Marshall—concluded that unanimous verdicts were required in all criminal trials. Justice Powell curiously concluded that the sixth amendment requires unanimity in federal criminal trials only. Because of the division of the Court, Justice Powell's view prevailed and the Court's holding rests upon the dichotomy seized upon by him, with the result that the Court validated less than unanimous convictions in state trials, while prohibiting them in federal trials.⁶⁸

In *Johnson* the appellant contended that a verdict of guilty by only nine out of twelve jurors clearly showed reasonable doubt as to guilt on the part of the jury as a whole. He contended that since the beyond-a-reasonable-doubt standard of proof is rooted in the basic constitutional principle of due process, any verdict not based on a finding of guilt beyond a reasonable doubt abrogated due process and, thus, violated the Constitution.⁶⁹ Justice White, writing for a majority of the Court,⁷⁰ disagreed. Replying that the Court had never held that jury unanimity was an essential part of due process, he stated, "[i]ndeed, the Court has more than once expressly said that '[i]n criminal cases due process of law is not denied by a state law . . . which dispenses with the necessity of a jury of twelve, or unanimity in the verdict.'"⁷¹

While Justice White agreed that due process of law requires a finding of guilt beyond a reasonable doubt before a defendant can be convicted, he saw no reason to conclude that the reasonable doubt of three jurors constituted reasonable doubt for an entire jury.⁷² He rejected the view that if dissenters

⁶⁸ In *Johnson* Justice White delivered the opinion of the Court in which Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined. Justices Blackmun and Powell filed separate concurring opinions. Dissenting opinions were filed by the following Justices: Justice Douglas, joined by Justices Brennan and Marshall; Justice Brennan, joined by Justice Marshall; Justice Stewart, joined by Justices Brennan and Marshall; Justice Marshall, joined by Justice Brennan.

In *Apodaca* Justice White delivered the judgment of the Court, this time joined in his opinion only by Chief Justice Burger and Justices Blackmun and Rehnquist. The separate opinions filed in *Johnson*, with the exception of Justice Stewart's dissent, were applicable in *Apodaca*. Justice Stewart filed a different dissenting opinion, again joined by Justices Brennan and Marshall.

⁶⁹ 406 U.S. at 359-62.

⁷⁰ See note 68 *supra*.

⁷¹ 406 U.S. at 359, quoting *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912) (dictum); *accord*, *Maxwell v. Dow*, 176 U.S. 581, 602, 605 (1900) (dictum).

⁷² 406 U.S. at 360.

on a jury express sincere doubts about a defendant's guilt the jurors who are convinced of that guilt will simply ignore them and will carelessly proceed to convict the accused.⁷³ Rather, he set out to develop what might be termed the "doctrine of the conscientious juror." It is far more likely, according to Justice White, that when a juror presents "reasoned argument in favor of acquittal," his fellow jurors would either answer his arguments satisfactorily, or he would convince enough of them to come around to his position to prevent conviction.⁷⁴ In practice, he continued, the majority members of a jury "will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose—when a minority that is, continues to insist upon acquittal without having persuasive reasons in support of its position."⁷⁵

Justice Douglas disagreed with Justice White about the way jurors actually behave in a jury room. Juries that do not have to reach a unanimous finding for a conviction, he argued, are far less likely to "debate and deliberate as fully as must unanimous juries."⁷⁶ As for the claim that there is no evidence to suggest that a majority will refuse to listen to a minority when its votes are not needed for a conviction, Justice Douglas emphasized that "human experience teaches that polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity."⁷⁷ He concluded that the Court had removed from the jury room the "automatic check against hasty fact-finding by relieving jurors of the duty to hear out fully the dissenters."⁷⁸

Justice Powell did not share Justice Douglas' doubts about jurors' fidelity to the truth as they see it, and observed that "our historic dedication to jury trial" is founded upon "the conviction that each juror will faithfully perform his assigned duty."⁷⁹ Citing certain procedural safeguards designed to protect defendants against a "willfully irresponsible jury,"⁸⁰ Justice Powell was confident that such safeguards sufficiently diminished the "likelihood of miscarriage of justice."⁸¹

In *Apodaca* Justice White in his plurality opinion⁸² cited the Court's refusal in *Williams* to insist that a jury must have twelve members to support his contention that Oregon law maintained the essential safeguards between the state and those it accused of crimes. He believed that, like the number of jurors considering the case, unanimity "was not of constitutional stature."⁸³ Justice Powell concurred, at least with respect to state trials, that a jury verdict joined in by ten members of a jury of twelve was as "likely to serve the high

⁷³ *Id.* at 361.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 388.

⁷⁷ *Id.* at 389.

⁷⁸ *Id.*

⁷⁹ *Id.* at 379.

⁸⁰ Justice Powell cited defense lawyers' right to use peremptory challenges and challenges for cause, and to request that the judge instruct that each juror is obliged by oath to weigh the views of fellow jurors. *Id.* at 379-80.

⁸¹ *Id.* at 379.

⁸² See note 68 *supra*.

⁸³ 406 U.S. at 406.

purpose of jury trial" as a unanimous decision of twelve jurors.⁸⁴

Dissenting, Justice Brennan assailed the majority's argument, claiming that its basic premise was unsound. Once there are enough jurors to reach a verdict of conviction, Justice Brennan insisted, there is nothing except perhaps common sense to restrain them from returning that verdict without paying attention to the minority's views. Like Justice Douglas, Justice Brennan found the majority's opinion based upon an overweening faith in human reason. Justice Brennan thought "it simply ignores reality to imagine that most jurors in these circumstances would or even could fairly weigh the arguments opposing their position."⁸⁵

On this particular point Mr. Justice Stewart, in his separate dissent in *Johnson*, told the Court that it had "never before been so impervious to reality in this area."⁸⁶ He reminded his fellow Justices on the majority side that the Court's longstanding concern about the "serious risks of misbehavior" had prompted a series of decisions over the years aimed at preventing juries from carelessly or willfully abusing defendants' rights.⁸⁷ Justice Stewart believed that the protection afforded by these decisions would be seriously undermined by the majority's position.

With regard to dissenting jurors, Justice Powell vigorously supported the majority view that doubts of minority jurors may be attributable to their own "irrationality" against which some protection was essential.⁸⁸ Justice Marshall disagreed, observing that "if the jury has been selected properly, and every juror is a competent and rational person, then the 'irrationality' that enters into the deliberation process is precisely the essence of the right to a jury trial."⁸⁹ Justice Marshall added that the fundamental characteristic of a jury is "its capacity to render a commonsense, layman's judgment, as a representative body drawn from the community."⁹⁰ "To fence out a dissenting juror," he asserted, "fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests."⁹¹ For Justice Marshall the doubt of a single juror was evidence that the government had failed to carry its burden of proving guilt beyond a reasonable doubt.

The relationship of the sixth amendment to the unanimity requirement was raised in *Apodaca* in the context of the petitioners' contentions that their convictions by less than unanimous verdicts violated their sixth amendment right

⁸⁴ *Id.* at 374.

⁸⁵ *Id.* at 396.

⁸⁶ *Id.* at 398.

⁸⁷ Justice Stewart cited a number of decisions, *id.* at 398-99: that the Constitution requires the availability of changes of venue—*Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879); that the Constitution requires protection from inflammatory press coverage and ex parte influence by court officials—*Parker v. Gladden*, 385 U.S. 363 (1966); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Turner v. Louisiana*, 379 U.S. 466 (1965); that the Constitution requires that certain information must not go to the jury no matter how strong a cautionary charge accompanies it—*Burton v. United States*, 391 U.S. 123 (1968); *Jackson v. Denno*, 378 U.S. 368 (1964); that the Constitution requires that no man is to be convicted by a jury from which members of an identifiable group to which he belongs have been systematically excluded—*Hernandez v. Texas*, 347 U.S. 475 (1954).

⁸⁸ 406 U.S. at 377.

⁸⁹ *Id.* at 402.

⁹⁰ *Id.*

⁹¹ *Id.*

to trial by jury as it was applied to the states through *Duncan*. Justice White accepted the relevance of the sixth amendment, since the three cases consolidated for appeal in *Apodaca* all were tried subsequent to the *Duncan* decision which recognized that the sixth amendment's right to jury trial was binding on the states. But that right, according to Justice White, was all that *Duncan* provided for in state courts. Since the Court was unable "to divine 'the intent of the Framers,'" Justice White asserted that the Court's inquiry should "focus upon the function served by the jury in contemporary society."⁹² He relied upon his own language in *Williams v. Florida*, where he characterized that function as "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . ."⁹³ That barrier, according to Justice White, remained unaffected by unanimity or the lack of it. In addition, he reasserted that the guilt-beyond-a-reasonable-doubt principle did not require a unanimous verdict.

Justice Powell did not agree with Chief Justice Burger and Justices White, Blackmun, and Rehnquist that unanimity was entirely inapplicable to criminal jury trials.⁹⁴ While acknowledging that the Court had recognized "virtually without dissent, that unanimity is one of the indispensable features of *federal* jury trial," Justice Powell did not think that the states were bound by the unanimity rule.⁹⁵ In his view it was not the sixth amendment that imposed jury trials on the states as the other members of the Court seemed to believe, but the fourteenth amendment. "I do not think," Justice Powell stated, "that all of the elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment."⁹⁶

However, Justice Douglas believed that the sixth amendment was wholly applicable to the states by virtue of the fourteenth amendment. Justice Stewart concurred, noting that this was precisely what *Duncan* had "squarely held."⁹⁷ Unless *Duncan* was to be overruled, the only question left, according to Justice Stewart, was whether the sixth amendment right to a jury trial carried with it the requirement of a unanimous verdict. "The answer to that question," Justice Stewart concluded, "is clearly 'yes,' as my Brother Powell has cogently demonstrated in that part of his concurring opinion that reviews almost a century of Sixth Amendment adjudication."⁹⁸

IV. THE AFTERMATH

As expected, the decisions in *Williams*, *Johnson*, and *Apodaca* have prompted renewed interest in smaller juries and less than unanimous verdicts. Although all three cases involved criminal trials in state courts, the federal courts were among the first to initiate changes after the decision in *Williams*. As of January 15, 1973, fifty-seven United States district courts had provided by local rule

⁹² *Id.* at 410.

⁹³ *Id.*, citing *Williams*, 399 U.S. at 100.

⁹⁴ See note 68 *supra*.

⁹⁵ 406 U.S. at 369.

⁹⁶ *Id.*

⁹⁷ *Id.* at 414.

⁹⁸ *Id.*

for juries of less than twelve in some or all civil cases.⁹⁹ Recently, in *Colgrove v. Battin*,¹⁰⁰ the Supreme Court upheld the constitutionality of these local federal court rules by a narrow, five-to-four decision. The majority expressly reaffirmed the determination made in *Williams* that there was "no discernable difference between the results reached by the two different-sized juries."¹⁰¹ In *Colgrove* they said:

Since then, much has been written about the six-member jury, but nothing that persuades us to depart from the conclusion reached in *Williams*. Thus, while we express no view as to whether any number less than six would suffice, we conclude that a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases.¹⁰²

The failure of the Court to establish a "floor" of six jurors foreshadows its difficulty in getting off the "slippery slope" before it reaches the bottom.¹⁰³ However, it is hardly surprising that the Court did not hold that twelve-member civil juries are constitutionally required after it had rejected the same proposition in *Williams* for criminal juries, where liberty itself is at stake.

The states have not been as quick to rise to the bait as some federal district courts, but there have been some nibbles. In Connecticut, a law limiting the number of jurors to six in all but capital cases was passed and signed by the Governor, to be effective immediately.¹⁰⁴ The North Dakota legislature passed a proposed constitutional amendment which, if approved, will extend the use of juries with less than twelve members to all cases except felonies.¹⁰⁵ The proposed amendment, which will be submitted to the people in 1974, specifically requires unanimity in all cases.¹⁰⁶ The New Jersey legislature recently passed a proposed constitutional amendment which allows civil cases to be tried before six-member juries.¹⁰⁷ However, it rejected a broader measure which would have allowed five-sixths verdicts in civil cases and six-member juries in most criminal cases.¹⁰⁸ In Ohio revised Rules of Criminal Procedure recently became effective, one of which permits juries of eight in "petty offense" cases and of twelve in all other non-capital serious offense cases,¹⁰⁹ while still requiring unanimity.¹¹⁰ In Utah, a similar change in the Code of Criminal Procedure is currently "under consideration."¹¹¹

Within the past year, however, most states that have considered changes

⁹⁹ ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, LIST OF U.S. DISTRICT COURTS THAT HAVE ADOPTED RULES REDUCING THE SIZE OF CIVIL JURIES (1973), cited in Note, *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results*, 6 U. MICH. J.L. REF. 671 (1973).

¹⁰⁰ 93 S. Ct. 2448, 37 L. Ed. 2d 522 (1973).

¹⁰¹ *Id.* at 2453, 37 L. Ed. 2d at 530, citing *Williams v. Florida*, 399 U.S. 78, 101 (1970).

¹⁰² 93 S. Ct. at 2454, 37 L. Ed. 2d at 530-31.

¹⁰³ *Id.* at 2465 n.9, 37 L. Ed. 2d at 543 n.9 (Marshall, J., dissenting).

¹⁰⁴ Pub. L. No. 73-576 (June 13, 1973), [1973] Conn. Acts.

¹⁰⁵ H. Con. Res. 3002, 43d N.D. Legislative Assembly (1973).

¹⁰⁶ *Id.*

¹⁰⁷ S. Con. Res. 2010, 195th N.J. Legislature, 2d Sess. (1973). The proposed amendment will appear on the ballot in the general election in Nov. 1973.

¹⁰⁸ Ass'y Con. Res. 178, 195th N.J. Legislature, 1st Sess. (1972).

¹⁰⁹ OHIO R. CRIM. P. 23.

¹¹⁰ *Id.* rule 31.

¹¹¹ Letter from Assistant Attorney General William Evans to James Ball, Mar. 29, 1973; telephone conversation with Attorney General Evans' office, July 5, 1973.

have rejected them. Eleven state legislatures have rejected, failed to pass, or allowed to die in committee, bills to change the state jury requirements. In New Hampshire, legislation which would have adopted less than unanimous verdicts in civil cases was rejected on March 15, 1973. The Governor's office felt that the change had merit and would be considered at the April 1974 constitutional convention.¹¹³ Colorado rejected a proposal to allow 10-2 verdicts in criminal cases.¹¹³ Michigan's House of Representatives twice rejected a bill which would have permitted verdicts by five-sixths of the jurors in criminal cases.¹¹⁴ A package of bills was introduced in Maryland to effect the constitutional and legislative changes necessary for less than unanimous verdicts in criminal cases,¹¹⁵ but all the bills received unfavorable committee reports. In Massachusetts the legislature accepted a negative committee report on a proposed bill which would have allowed a majority verdict in any civil or criminal proceeding.¹¹⁶ In Arizona a bill to reduce the number of jurors to eight in criminal cases where the possible sentence is less than thirty years was not reported out of committee.¹¹⁷ The bill also would have reduced civil juries to eight members in courts of record and six members in other courts, and reduced the number of jurors required to render a verdict in a civil case to a simple majority of the jury.¹¹⁸ And in New York bills to allow five-sixths verdicts either in all criminal cases¹¹⁹ or in all non-capital cases¹²⁰ did not get out of committee. Other state legislatures which failed to pass bills calling for similar changes include Georgia,¹²¹ California,¹²² Nevada,¹²³ and Delaware.¹²⁴

In other developments, the Florida Supreme Court proposed, but later withdrew, a rule which would have permitted verdicts by five of six jurors, or ten of twelve in capital cases, except that a unanimous verdict would have been required to impose the death penalty.¹²⁵ The voters of New Mexico rejected legislatively proposed amendments which would have required juries of six in all cases, and permitted verdicts by five jurors in criminal cases or four in civil cases.¹²⁶ Finally, in Wisconsin the Citizen Study Committee on Judicial Organization issued a report recommending that unanimous verdicts be re-

¹¹³ Telephone conversation with counsel of Governor's office, July 5, 1973.

¹¹³ Letter from O. Otto Moore to James Ball, Apr. 2, 1973.

¹¹⁴ J. Joint Res. RRR (May 31, 1972).

¹¹⁵ H.B. Nos. 70, 71, 202, Md. Gen. Assembly, 350th (Regular) Sess. (1973).

¹¹⁶ H.B. No. 2517, 178th Mass. Gen. Court, 1st Sess. (1973). Negative report May 31, 1973; accepted by legislature June 4, 1973.

¹¹⁷ H.B. 2199, 31st Ariz. Legislature, 1st Regular Sess. (1973).

¹¹⁸ *Id.*

¹¹⁹ S-1200, 196th N.Y. Legislature, Regular Sess. (1973-74); A-1828, 196th N.Y. Legislature, Regular Sess. (1973-74).

¹²⁰ S-5548, 196th N.Y. Legislature, Regular Sess. (1973-74).

¹²¹ H.R. 37-135, S.R. 13, S.R. 34, Ga. Gen. Assembly, 1973 Sess. (smaller juries and less than unanimous verdicts).

¹²² Letter from R. Thomas Allen (Governor's office) to James Ball, Apr. 26, 1973 (smaller juries in civil and criminal cases).

¹²³ A.B. 780, 57th Sess. (1973) (10-2 verdicts in all criminal cases except first-degree murder).

¹²⁴ Letter from Robert G. Carey (counsel to Governor) to James Ball, Mar. 26, 1973 (a new constitution containing an extension of six-member juries to non-capital criminal cases).

¹²⁵ Proposed Fla. Supreme Court rule 3.440 (1972).

¹²⁶ STATE OF NEW MEXICO OFFICIAL RETURNS 1972: PRIMARY AND GENERAL RETURNS (B. Fiorina, Secretary of State, Santa Fe, N.M. 1972).

tained, based upon its conclusion that unanimity is a prerequisite for proof beyond a reasonable doubt.¹²⁷

V. JOHNSON AND APODACA: AN APPRAISAL

Some observers fear that in the wake of *Johnson* and *Apodaca* states will begin to abolish the unanimity requirement in the vague and illusory hope that such a move will help them combat crime.¹²⁸ Indeed, as previously indicated, several states have considered removing the unanimity requirement in response to the Court's invitation. However, while a few states have moved pursuant to *Williams* to reduce the number of jurors, no state has responded by accepting less than unanimous verdicts in civil or criminal cases. This does not mean that the states have absolutely rejected majority verdicts. On the contrary, it is very likely that, without constitutional prohibition, more and more states will selectively experiment with majority verdicts. But for the moment at least, in this area the states seem to be exhibiting great caution in departing from such a traditional safeguard, a caution not evidenced by the majority in *Johnson* and *Apodaca*.

It is indeed a solemn occasion when society convicts one of its members of a crime. It is not a task that should ever be treated in a frivolous or cursory fashion. Convicted persons may be incarcerated and lose not only their liberty but their dignity and self-esteem. The stigma of being an ex-convict bars an individual from many of the privileges and opportunities afforded "free" citizens. Thus, government not only bears a heavy obligation to an accused to prove him guilty with the greatest certainty reasonably possible before punishing him, but it has an obligation to every citizen to establish as much public confidence as possible in the reliability of its criminal convictions. Unanimous jury verdicts have been required at common law for approximately 600 years,¹²⁹ and such a rule should not be abandoned by the states without sound and compelling reasons.

Toward this end, it is submitted that, in light of the relative practical weaknesses of the arguments in support of less than unanimity presented by the majority in *Johnson* and *Apodaca* and the sound legal theories presented by the dissenters, the Court needlessly removed from criminal defendants a tested safeguard. The Court apparently was not persuaded by, or simply ignored, existing empirical data that did not support its assertions. What is more, the Court did not feel compelled to generate its own data which would facilitate reasoned projections. Moreover, the Court failed to articulate standards on what specific majority vote would be constitutional. Raising far more questions than they answer, *Johnson* and *Apodaca* serve as unconvincing vehicles upon which to base removal of such a fundamental protection.

Specifically, several practical implications of sanctioning the less than unanimous verdict should be weighed carefully. For example, it has been argued that one unreasonably stubborn or obstinate juror can produce a hung

¹²⁷ Letter from Governor Patrick J. Lucey to James Ball, Apr. 5, 1973.

¹²⁸ See, e.g., Saati, *The Criminal Jury Faces Future Shock*, 57 JUDICATURE 12, 13 (1973).

¹²⁹ 1 W. HOLDSWORTH, *supra* note 6, at 318.

jury. However, juror studies conducted by Professors Kalven and Zeisel indicate that hung juries generally are the result of several dissenting jurors.¹³⁰ Their data on first ballot votes of juries that eventually deadlocked suggests that a jury will not "hang" unless there is initially a substantial minority of four or five jurors.

The majority in *Johnson* and *Apodaca* apparently was troubled by the inherent inefficiency of unanimous verdicts since, no matter how clear the proof of guilt or innocence, there could always be a dissenting juror who refused to follow the majority. Allowing less than unanimous verdicts clearly would reduce the number of hung juries and thus save the expense of retrial. However, the studies of Kalven and Zeisel indicated that the frequency of deadlocked juries in states retaining the unanimity requirement is 5.6%. Since 42% of the hung juries ended with 11-1 or 10-2 votes, and since a little over 5% of all juries hang,¹³¹ permitting 11-1 or 10-2 verdicts would only prevent hung juries in about two of every 100 cases. With the use of Louisiana's 9-3 verdict, the percentage of mistrials would be reduced to approximately 2.5%. Thus, utilizing 9-3 verdicts would prevent hung juries in about three of every 100 cases.¹³² What is the benefit of transforming two or three cases in 100 from hung juries into verdicts? Even assuming that fewer mistrials are desirable from a cost-efficiency standpoint, it would seem that the savings flowing from such a small percentage of cases does not justify eliminating such a crucial safeguard.

How often is the extreme minority dissent attributable to juror corruption rather than to some inherent difficulty in the case itself? Advocates of majority verdicts assert that there is a danger that a corrupt juror could prevent unanimity. But the threat of juror corruption appears more hypothetical than real. Existing data suggests that in a sample of hung jury cases not once did the trial judge even suggest that there was anything suspicious about the jury deadlock.¹³³

While the Court in *Johnson* and *Apodaca* acknowledged that majority verdicts would reduce the number of hung juries, it expected that the ratio between acquittals and convictions would not be affected.¹³⁴ The Court's lack of curiosity about the impact of majority verdicts upon the rate of convictions suggests that the Court felt that such data was beyond its reach and, perhaps, of no real import. However, in the early 1800's the great French mathematician Poisson, a student of the performance of juries, was able to trace accurately the reduction of the number of convictions which resulted when the number of guilty votes needed to convict was raised from seven to eight.¹³⁵ But "the United States Supreme Court, 150 years later thought the much broader jump from unanimity to a 9-3 majority would make no difference."¹³⁶

¹³⁰ H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 462-63 (1966).

¹³¹ *Id.* at 460-61.

¹³² *Id.*

¹³³ See Kalven & Zeisel, *The American Jury: Notes for an English Controversy*, CHICAGO B. RECORD, May-June 1967, at 195, 200.

¹³⁴ See *Apodaca*, 406 U.S. at 411.

¹³⁵ S. POISSON, *RECHERCHES SUR LA PROBABILITÉ DES JUGEMENTS* (1837).

¹³⁶ H. ZEISEL, *SIX-MAN JURIES, MAJORITY VERDICTS—WHAT DIFFERENCE DO THEY MAKE?* 7 (University of Chicago Law School Occasional Paper No. 5, 1973).

Perhaps most disconcerting about *Johnson* and *Apodaca* is Justice White's emphasis in both cases on what Justice Stewart called the "presumptive reasonableness" of juries.¹³⁷ Despite Justice White's confidence in the cerebral, rational, and reasoned way in which jurors go about their business, jurors, being ordinary human beings, are susceptible to occasional irrationality and vindictiveness. But because of their unique and awesome responsibility as jurors, they must not be permitted to allow these human failings to determine their ultimate decisions. Unanimity serves to insure that this will not occur by promoting thorough consideration of each juror's opinion and understanding of the case. Justice White's unrealistic view of the jury process gives inadequate weight to the fact that less than unanimous juries need not debate as fully as unanimous ones. Indeed, once the requisite number of jurors agree upon guilt, discussion may end abruptly.

However, Justice White's naive assumption that juries will deliberate fully, even if there is no compulsion to do so, is relatively inconsequential when placed next to his conception of the constitutional mandate of proof beyond a reasonable doubt. Where a prosecutor is able to convince only nine out of twelve jurors of guilt, it would seem contradictory to state that he has proved his case beyond a reasonable doubt, since presumptively reasonable jurors still entertain some doubts.

Justice White did not find such a contradiction because he believed that the state has to carry its burden of proof only so far as to eliminate reasonable doubt from the mind of each juror who votes to convict, and not to eliminate reasonable doubt from among the members of the jury as a whole. But his position seems to disregard two important and historical policies underlying the reasonable doubt standard of proof enunciated by the Court in *In re Winship*:¹³⁸ *first*, our society adheres to the fundamental belief that, given the immense importance of the defendant's interests at stake (for example, loss of liberty and the social stigma of conviction), it is far worse to convict an innocent man than to fail to convict a guilty one; and *second*, our society places great value in its own confidence in the justness of the criminal process and in the moral force of the criminal law, a force which would be diluted if persons were left in doubt as to whether innocent men were being convicted.

If the government can obtain a conviction when only nine or ten out of twelve jurors have been persuaded, the possibility of convicting an innocent man increases. What is more, substantial doubt persists, if only in the minds of dissenting jurors, that possibly an innocent man might have been convicted. Neither possibility promotes confidence in our criminal justice system.¹³⁹ Clearly, there is an interrelationship between the "beyond a reasonable doubt" burden-of-proof requirement and the number of jurors required to return a verdict, despite Justice White's intimations to the contrary. Even granting Justice White the benefit of the doubt that reasonable minds might differ as to whether it takes one, two or three dissenting jurors before there is "reasonable doubt" as to guilt, there can be no dispute that reducing the number of

¹³⁷ *Johnson*, 406 U.S. at 398.

¹³⁸ 397 U.S. 358 (1970).

¹³⁹ See also Saari, *supra* note 128, at 14.

jurors required to return a verdict lessens the burden of proof on the prosecutor.¹⁴⁰

Unanswered by the Court in *Johnson* and *Apodaca* is the question of what will be the constitutionally appropriate minimum number of jurors needed to convict in criminal cases. Implicit in *Johnson* is the assumption that at least a majority of the jurors must vote to convict in order for a conviction to be valid. However, is only a majority required, or is a "heavy majority of the jury" required?¹⁴¹ And if a "heavy majority" is required, how is that term to be construed? Justice Blackmun felt constrained to point out that he supported the Court's view as long as it allowed a majority verdict of 9-3 or 75 percent minimum, but would "hesitate" to allow a 7-5 majority.¹⁴² He made no mention of how he would be disposed to view the 8-4 possibility. Given Justice Blackmun's 75 percent minimum, and Justice Powell's warning that he would not necessarily accept any other conviction ratio, the Louisiana 9-3 conviction ratio may, for all practical purposes, be the minimum the Court will allow, despite the fact that the Court's reasoning would support 8-4 or 7-5 verdicts. It remains to be seen, however, on what basis the Court will draw such a line if and when it is faced with the necessity to do so.

Also unexplained is how *Johnson* and *Apodaca* relate to *Williams v. Florida*.¹⁴³ In permitting majority verdicts the Court in *Johnson* and *Apodaca* did not qualify *Williams*. Evidently, state court juries may not only number less than twelve but can convict by less than unanimous verdicts, raising additional questions as to what, if any, minimum constitutional standards apply to the states in this area. For example, would the Court permit 5-3, 4-2, 3-2, or even 2-1 decisions? If not, upon what rationale will the Court draw the line?

Still another unresolved problem is that while unanimity in criminal trials now is no longer required in state courts, unanimity is still the rule in federal courts. A defendant would stand a better chance of avoiding conviction in a federal court than in a state court wherein the majority verdict rule applies. In effect, *Johnson* and *Apodaca* have created two distinct "rights" to jury trial—one right for individuals tried in state courts and another right for those who are tried in federal court—and this despite the fact that the right to jury trial at both the state and federal levels originated in the sixth amendment.

VI. CONCLUSION

The requirement of unanimity in criminal trials promotes justice in several ways. It encourages deliberation by imposing a delay, and provides added protection to the accused from governmental oppression. Unanimity also gives the rational dissenter an opportunity to be heard while making a conviction more palatable for the community and the accused. It also affirms the maxim

¹⁴⁰ See, e.g., Comment, *Should Jury Verdicts be Unanimous in Criminal Cases?*, 47 ORE. L. REV. 417, 424 (1968). This article, written before the Supreme Court passed upon Oregon's majority verdicts in *Apodaca*, was highly critical of the less than unanimous verdicts.

¹⁴¹ *Johnson*, 406 U.S. at 362.

¹⁴² *Id.* at 366.

¹⁴³ 399 U.S. 78 (1970).

that it is far better to let a guilty man go free than to convict an innocent man. When all the factors are considered together—including the representation of dissenting viewpoints, full deliberation of all the jurors on the evidence, maintenance of public confidence in jury decisions, and conviction of accused persons only on the clearest and most certain grounds—the *Johnson* and *Apodaca* decisions appear to be gigantic steps backward. They discard rather casually what Justice Stewart described as “the simple and effective method endorsed by centuries of experience and history to combat the injuries to the fair administration of justice that can be inflicted by community passion and prejudice.”¹⁴⁴

While the unanimity rule leaves the jury vulnerable to the bribing or irrationality of a single juror, it also serves as a useful symbol of the patience of our criminal justice system and of the tradition of requiring proof beyond a reasonable doubt in order to convict. It is by no means certain that the Court intended these decisions to undercut the role and function of the jury. In fact, the Court's decision in *Duncan v. Louisiana* would seem to indicate otherwise. But “[e]ver smaller juries, because they are less homogeneous, will make verdicts more erratic, and it is just possible that the ever smaller majorities will make jury verdicts more conforming to what the judges would do.”¹⁴⁵ Under the impact of *Williams*, *Johnson*, and *Apodaca*, the jury could wilt away, simply because there would no longer be any point in having one.¹⁴⁶ To be sure, jury reform is needed. But should reform come at the expense of the jury system itself? Despite the many procedural safeguards afforded criminal defendants, the wisdom of removing the ancient and effective unanimity safeguard is questionable. Removing this source of protection for everyone in the name of social well-being seems a peculiarly short-sighted and self-defeating course of action. Now that the Court has set the traditional twelve-man unanimous jury adrift to fend for itself, its survival rests with the individual states. First in *Williams*, and now in *Johnson* and *Apodaca*, the Court has told us what “trial by jury” does not mean. However, we still have not been told what “trial by jury” *does* mean. States should continue to be skeptical and to resist the temptation which these cases offer until the Court tells us.

¹⁴⁴ *Johnson*, 406 U.S. at 399.

¹⁴⁵ H. ZBISSEL, *supra* note 136, at 9.

¹⁴⁶ *Id.*