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HISTORICAL DEVELOPMENT OF THE INTERRELATIONSHIP OF UNANIMOUS VERDICTS AND REASONABLE DOUBT

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INTRODUCTION

In 1970 the United States Supreme Court held that the fourteenth amendment due process clause requires states to prove guilt beyond a reasonable doubt in criminal prosecutions.[1] Two years later, the Court was called upon to decide, in *Apodaca v. Oregon*[2] and *Johnson v. Louisiana*,[3] whether the reasonable doubt standard might be satisfied where the jury's guilty verdict was less than unanimous. The Court concluded that the reasonable doubt rule does not necessitate unanimity, and that guilty verdicts supported by nine or ten of twelve jurors are constitutionally permissible.[4]

One of the difficulties facing the Court in these decisions was the apparent inconsistency of its position: How is it possible for a person to be proved guilty beyond a reasonable doubt where a verdict of guilt is less than unanimous? Does not the existence of dissenting jurors prove the existence of reasonable doubt?

In concluding that jury unanimity is not indispensible to the reasonable doubt rule, the Court relied partially on a line of its own decisions beginning in 1824 with *United States v. Perez*,[5] which held that in federal cases where jurors had been unable to agree on a verdict and so were "hung," the result was not defendant's acquittal but a new trial. In citing *Perez*, the Court in *Johnson* reasoned:

> That want of jury unanimity is not to be equated with the existence of a reasonable doubt emerges even more clearly from the fact that when a jury in a federal court,

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1. *See In re* Winship, 397 U.S. 358, 362 (1970), and cases cited therein.
2. 406 U.S. 404 (1972).
3. 406 U.S. 356 (1972).
4. Apodaca v. Oregon, 406 U.S. 404, 412 (1972); Johnson v. Louisiana, 406 U.S. 356, 363 (1972).
5. 6 U.S. (9 Wheat.) 194 (1824).

> which operates under the unanimity rule and is instructed to acquit a defendant if it has a reasonable doubt about his guilt . . . cannot agree unanimously upon a verdict, the defendant is not acquitted, but is merely given a new trial. . . . If the doubt of a minority of jurors indicates the existence of a reasonable doubt, it would appear that a defendant should receive a directed verdict of acquittal rather than a retrial. We conclude, therefore, that verdicts rendered by nine out of 12 jurors are not automatically invalidated by the disagreement of the dissenting three. Appellant was not deprived of due process of law.[6]

This article questions the Court's reliance on *Perez* in *Johnson*, demonstrating that in the historical context in which it was decided, *Perez* was a landmark decision. In holding that jury unanimity was not mandated, the *Johnson* Court destroyed what *Perez* established: the integrity and reality, not only of unanimous jury verdicts, but also of the reasonable doubt rule.

THE HISTORICAL BACKGROUND OF UNITED STATES V. PEREZ

The integrity of unanimous jury verdicts was highly questionable before the nineteenth century. For nearly three hundred years, England had employed two rules which may have rendered unanimity illusory in some cases. One rule forbade discharging the jury in any serious criminal case until they gave a verdict. The justification for this requirement was that it guaranteed the accused a definite result in a single trial and avoided repetitious jeopardy.[7] The other rule required that jurors be kept together incommunicado during deliberations, without food, drink, fire or candle. This was done ostensibly to avoid jury tampering and to expedite deliberations.[8] British jurors were coerced to unanimity in this manner until 1866, when it was decided that they might be discharged for inability to agree after a reasonable time, in which event the accused could be tried again.[9] Not until 1870 did England

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6. 406 U.S. 356, 363 (1972) (citations omitted).

7. E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 495 (Thomas ed. 1818).

8. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 523-33 (Browne ed. 1897) [hereinafter cited as BLACKSTONE]. For an excellent historical account of these doctrines, see People v. Olcott, 2 Johns. Cas. 301, 1 Am. Dec. 168 (N.Y. 1801).

9. Windsor v. Queen, 118 Eng. Rep. 165 (1866).

permit jurors to have refreshments, at their own expense, during deliberations.[10]

The perplexity sometimes experienced by nineteenth century American courts in deciding whether to dispense with inherited British traditions is illustrated by their struggle over the "hung jury" situation in criminal cases. The extent to which independent American courts continued to deny jurors refreshments during deliberations is uncertain. Except for information from Pennsylvania,[11] there is no clear evidence to refute the claim that American states immediately rejected this British procedure.[12] Perhaps this is the reason the hung jury problem arose much earlier in America than in England. Jurors were not starved to agreement here.

The factual context of the typical hung jury case was one where the defendant was brought to trial a second time, after the trial court had discharged a jury which had remained unagreed at a prior felony trial. The defendant pleaded double jeopardy as a bar to the second trial and argued for adherence to the British rule forbidding discharge of a jury before a verdict.

The American courts divided on the jeopardy issue. Quite a few ordered defendants released.[13] Because they thought the Brit-

10. 1 F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 305 (1883).

11. That Pennsylvania jurors were not permitted refreshments during deliberations in 1822 was admitted by the court in Commonwealth v. Cook, 21 Pa. 577, 593 (1822).

12. One author has so claimed. *See* PROFFATT, A TREATISE ON TRIAL BY JURY 459 (1880). The question would be an interesting one for further investigation. The extent and longevity of America's adherence to the ancient coercive rules has never been clarified. *See* 1 BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 609 (2d ed. 1872). In 1837, the Tennessee Supreme Court thought that New York and Massachusetts had kept jurors without refreshments during the first two decades of the nineteenth century. *See* Mahala v. State, 18 Tenn. 532, 31 Am. Dec. 591 (1837). Massachusetts has denied it. Commonwealth v. Purchase, 19 Mass. (2 Pick.) 521, 525 (1824). *But see* Commonwealth v. Roby, 29 Mass. (12 Pick.) 521, 525 (1832).

Connecticut always permitted jurors refreshments and even the right to separate during adjournments. Bow v. Parsons, 1 Root 429 (Conn. 1792); State v. Babcock, 1 Conn. 401 (1815).

However, at least one state had a statute requiring an officer's oath to keep the jury without refreshment as late as 1902. Dryer v. Illinois, 187 U.S. 71 (1902). It is suspected that whether and when refreshments were permitted was a matter of trial court discretion in most states.

13. *See, e.g.*, Mahala v. State, 18 Tenn. 532, 31 Am. Dec. 591 (1837). The division of view on this issue continued beyond 1850. *See* State v. Walker, 26 Ind. 346, 348 (1866) and authorities cited therein.

ish rules favored the accused, these courts would not countenance dismissal of a jury for their mere inability to agree. Much more extreme necessity was needed to justify putting the defendant to a second trial. A North Carolina court argued that juror disagreement at the first trial was strong evidence of defendant's innocence, and he might be disadvantaged by his inability to have witnesses available at a second trial.[14] The Pennsylvania court, which denied the jury refreshment, strongly suggested that their lot was not so hard; and that if they had any reasonable doubt of guilt, they ought to acquit.[15]

Other American courts took the position which ultimately prevailed throughout the country. They held that a jury might be discharged in a felony case for inability to agree if the trial court decided they could not be expected to agree after further deliberations. In such circumstances defendant might be held for retrial. Judge Kent of New York initiated this view in an 1801 misdemeanor case.[16] Massachusetts soon followed in a felony case in 1813;[17] and its native son, Justice Story, wrote the United States Supreme Court opinion in *United States v. Perez*,[18] which adopted that solution for the federal courts in 1824. The rationale of this prevailing position was to assure the integrity of unanimous jury verdicts by relieving jurors of the coercive British rules.[19] By the end of the nineteenth century it was well settled that inordinate judicial pressures upon jurors to reach unanimity constituted reversible error.[20]

PEREZ: SECURING THE REASONABLE DOUBT RULE AGAINST POSSIBLE VIOLATION BY JURIES

We will probably never know whether coerced jury verdicts tended to benefit defendants rather than the state. One can only speculate on the behavior of fatigued, cold and hungry jurors who

14. State v. Garrigues, 2 N.C. 241 (Halifax Super. Ct. 1795).

15. Commonwealth v. Cook, 21 Pa. 577, 587, 597 (1822). *See* note 11 *supra.*

16. People v. Olcott, 2 Johns. Cas. 301, 1 Am. Dec. 168 (N.Y. 1801). *See also* People v. Goodwin, 18 Johns. 187 (N.Y. 1820).

17. Commonwealth v. Bowden, 9 Mass. 467 (1813).

18. United States v. Perez, 6 U.S. (9 Wheat.) 194 (1824).

19. The clearest statement of this rationale appears in People v. Olcott, 2 Johns. Cas. 301, 1 Am. Dec. 168 (N.Y. 1801).

20. For an interesting case which presents a summary of the methods used by various American trial judges to coerce unanimous verdicts in the nineteenth century, see People v. Sheldon, 156 N.Y. 268, 66 Am. St. R. 564 (1898).

found themselves in fundamental disagreement. They had to decide on a verdict, but which one? Did they generally adhere to majority rule, even in decisions to convict?[21] Or did even a substantial majority for conviction usually acquiesce in verdicts of acquittal, because they knew the case had not been proven beyond a doubt to the satisfaction of all and that conviction was improper in such circumstances?[22] For centuries, English writers had expounded the maxim that it is better that a certain number of guilty go free than that an innocent be punished erroneously.[23] A similar eighteenth century maxim taught that it was safer to err on the side of mercy than of strict justice.[24] Is it improbable that jurors, subjected to physical and mental distress, tended as a rule to extend mercy to others? We can only speculate, but it seems probable that defendants were acquitted far more frequently than they were convicted on less than unanimous verdicts. If in fact many a man was sent to the gallows on what was really a substantial majority verdict, seemingly acquiesced in by a small, doubting minority, one would have to conclude either that the minority regarded their uncertainty as infinitesimal or, to be cynical, that

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21. There is one civil case which suggests that minority jurors may have acquiesced in a majority-view unanimous verdict. Apthorp v. Backus, 1 Kirby 407 (Conn. 1788). There the court refused to permit the verdict to be impeached on such grounds. However, there is apparently no reported similar instance in a criminal case.

For a suggestion that minority jurors may have consented to majority verdicts in criminal cases, together with a ringing criticism of Britain's coercive rules, see Emlyn, *Preface to the Second Edition of the State Trials*, 1 HOWELL'S STATE TRIALS XXXIX (1730).

22. The writer has demonstrated in another article that jurors had deliberated for centuries under a satisfied conscience standard of persuasion, requiring acquittal if there were "any doubt" of guilt, which was more favorable to the accused than the reasonable doubt test. The latter was a prosecutorial innovation of the eighteenth century which imposed a novel requirement that juror doubts had to be rational to warrant acquittal. *See* Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U.L. REV. 507 (1975).

23. J. FORTESCUE, COMMENDATION OF THE LAWS OF ENGLAND 45 (Grigor trans. 1917); BLACKSTONE, *supra* note 8, at 532-33; 2 HALE, THE HISTORY OF THE PLEAS OF THE CROWN 288 (1st Am. ed. 1847).

24. Jurors were familiar with this maxim. For example, in Commonwealth v. Dillon, 4 Pa. 116, 117 (1792), the court charged the jury, "The jury will . . . remember that if they entertain a doubt . . . it is their duty to pronounce an acquittal. . . . [I]n a doubtful case, an error on the side of mercy is safer." *See also* John Adams' summation for the defense in the Boston Massacre Case, also known as Wemms' Case, 10 Am. St. Tr. 415, 472 (1770).

their consciences were much less keenly developed than their stomachs.

However, it would be unrealistic to deny the probability that, in some instances at least, coerced verdicts favored the state. Especially as criminal punishments were ameliorated, there may have been occasions where minority jurors found it impossible to resist group pressures for conviction. If doubting jurors did succumb and acquiesce in conviction, they denied the accused not only the protection of the unanimity standard but also of the reasonable doubt standard of persuasion.

Thus, as long as unanimity could be the product of legally sanctioned coercion, it was possible to maintain that unanimity and reasonable doubt requirements were fictions. *Perez* rendered such a view untenable as to the federal criminal justice system. Properly understood in historical context, *Perez* can only be regarded as having championed, perhaps unwittingly,[25] unanimity-reasonable doubt principles by assuring the reality of their interdependence and integration as a combined standard of proof and persuasion.

THE BALANCE OF INTERESTS STRUCK BY PEREZ

The *Perez* decision and others which upheld the integrity of unanimous verdicts struck an admirable harmonious balance between the interests of society and those of individual accused persons. *Perez* established the unanimous verdict-reasonable doubt rule as a truly double-edged standard which provides maximum protection against either erroneous conviction or erroneous acquittal. To convict, *all* jurors must agree there is no reasonable doubt of guilt. That is defendant's side of the standard. But society's edge is that to acquit, *all* jurors must agree there is reasonable doubt. If they cannot unanimously agree either way, the proceedings are a nullity, and defendant may be held for a second trial.

It is difficult to imagine a more perfect reconciliation of the community's interest in incapacitating criminals and its desire that the innocent be secure from conviction than that resulting from an integrated, interdependent unanimous verdict-reasonable doubt standard. Nothing is better suited to promote the whole community's satisfaction with the results of criminal prosecutions. The combined standard provides both maximum assurance of ac-

25. *See* author's conclusion, *infra* text at 229.

curacy and maximum insurance against irrationality in the decisional process.

Unlike the substantial majority verdict, the unanimity requirement is not implicitly grounded upon the dubious assumption that irrationality and error are entirely alien to large majorities of jurors, and peculiarly the propensities of small minorities.[26] It is true that the substantial majority verdict increases, with balanced impartiality, the probability of both erroneous acquittals and convictions. A majority of the jury may be as easily swayed by emotion or their own fallibility to free a guilty person as to convict an innocent one, when no possibility of a new trial is provided. However, it should hardly be comforting to anyone to know that the additional risk of injustice is equally distributed between the defendant and society.

CONCLUSION

The denial of an accused's right to a reasonable doubt standard, through use of the substantial majority verdict rule, would not have been countenanced by the Court which decided *Perez*. On the other hand, *Perez* may have disadvantaged the accused in one respect, by allowing the state to retry him in a hung jury case instead of forcing a unanimous verdict from the jury.

Despite the *Perez* decision, however, it would be unfair to attribute hypocrisy or cruelty to those American courts which continued to coerce unanimity in hung jury cases, since coercive devices were mild for the nineteenth century. More importantly, the courts appear to have presumed, in good faith, that coercion would produce only acquittals in hung jury cases. Judges who shared this presumption had some difficulty in appreciating the impropriety of coercing jurors to a unity which could only benefit the accused. They saw nothing fictitious in compelling jurors who had no personal doubts of the accused's guilt merely to affirm, by acquiescing in a verdict of acquittal, that doubt existed among *some* members of the jury and therefore among the jury as a whole. Significantly, none of these courts considered the alternative of accepting non-unanimous *guilty* verdicts as a viable solution to the hung jury problem. Apparently, so striking an infringement on the accused's rights was unthinkable in that era.

Taken out of historical context, then, the *Perez* decision may easily be misunderstood as entirely pro-prosecution. The brief

26. *See* Johnson v. Louisiana, 406 U.S. 356, 361 (1972).

opinion dealt only with the double jeopardy issue raised in hung jury cases, and held that the defendant could be retried. The Supreme Court's holding tersely favored the state on the retrial issue, without discussing the implications of that holding on the reasonable doubt issue.

If the Court had expressly considered the reasonable doubt rule, its decision could not have been more just than the one pronounced. The Court might conceivably have held that trial courts should instruct hung juries to acquit because of the prosecution's failure to satisfy its burden of persuading each member of the jury beyond a reasonable doubt. Such a course would have been most favorable to the accused, but it would have left the Court open to criticism for being unresponsive to society's interests in the administration of criminal justice. *Perez* balanced state and individual interests, in effect, by establishing the interdependence of the unanimity and reasonable doubt standards for either conviction *or* acquittal. Thus, the *Perez* decision affords no sound basis for the Supreme Court's recent denial of their interrelationship in the *Apodaca* and *Johnson* substantial majority verdict decisions.