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INTRODUCTION

Jimmy Carter was arrested and tried for armed robbery. Pursuant to state law he was tried by a jury comprised of six members. The trial lasted three days. The attorneys on both sides made their closing statements, and the judge gave his charge to the jury. The jury then assembled in the jury room, elected a foreman, informed the court that they had reached a verdict, and reassembled in court with that verdict. The total time elapsed from the judge's charge to the reading of the verdict was under 30 minutes. The bailiff read the verdict: "We find the defendant guilty as charged by a jury vote of four to two." Jimmy was sentenced to eight years in prison. Incredible? Inconceivable in this age of social consciousness and awareness?

Blackstone once said that the establishment and use of trial by jury is so highly esteemed and valued by the people that nothing could ever abolish it.[1] The United States Supreme Court, however, in *Williams v. Florida*[2] and *Apodaca v. Oregon*[3] has deviated significantly from the common law definition of trial by jury ascribed to in *Patton v. United States*.[4] The Court in *Patton* declared:

> The phrase "trial by jury" as used in the Federal Constitution (Article III, Section 2 and the sixth amendment) means 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. Those elements were (1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.[5]

However, since the *Patton* decision, court dockets have become increasingly congested.[6] Resultant delays and appeals have produced

1. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 350 (1897).
2. 399 U.S. 78 (1970).
3. 406 U.S. 404 (1972).
4. 281 U.S. 276 (1930).
5. *Id.* at 288.
6. The criminal case backlog has more than doubled in the last decade. Report of the Administrative Office of the Federal Courts, discussed in Graham, *Some Problems In The Safeguards For Defendants*, N.Y. Times, Feb. 9, 1969, § 4, at 8, col. 1.

amplified expense and have consumed additional time. Thus, it was only natural that writers would clamor for reforms in the jury system which would insure speedier trials and allay the expense. The two reforms advocated most incessantly were the reduction of jury size[7] and the elimination of the unanimous verdict requirement.[8]

In *Williams v. Florida*[9] the United States Supreme Court had occasion to evaluate the first of these two reforms—the reduction of jury size. Williams, who was convicted of robbery by a jury of six as provided by Florida law,[10] contended that his sixth amendment right to trial by jury had been violated by the Florida provision. Justice White, writing for the plurality, held that a 12 man panel was not a necessary ingredient of trial by jury, and that therefore a six member jury did not violate the sixth amendment. Asserting that the purpose of a jury trial is to preclude oppression by the government, the Court determined that such a purpose is adequately served whether the number of jurors is six or 12.

In May 1972, in *Apodaca v. Oregon*[11] and *Johnson v. Louisiana*,[12] the Supreme Court had occasion to peruse another of the common law jury requirements—the unanimous verdict. The facts in both cases are similar. In *Johnson* the defendant was convicted of armed robbery by a vote of nine of the 12 jurors. In *Apodaca* two of the defendants were convicted of burglary, grand larceny and assault with a deadly weapon by jury votes of 11 to one. The third defendant was convicted by a ten to two jury vote, the minimum for sustaining a conviction in Oregon.[13]

7. Moss, *The Twelve Member Jury In Massachusetts—Can It Be Reduced?*, 56 MASS. L.Q. 65 (1971); Wiehl, *The Six Man Jury*, 4 GONZ. L. REV. 35 (1968); Phillips, *A Jury Of Six In All Cases*, 30 CONN. B.J. 354 (1956).

8. Haralson, *Unanimous Jury Verdicts*, 21 MISS. L.J. 191 (1950); Haralson, *Why Veto Jury Verdicts?*, 31 J. AM. JUD. SOC'Y. 69 (1947); Winters, *Majority Verdicts in the United States*, 26 J. AM. JUD. SOC'Y. 87 (1942); Roberts, *Trial Procedure—Past, Present, and Future*, 15 A.B.A.J. 667 (1929); Wilkins, *The Jury: Reformation, Not Abolition*, 13 J. AM. JUD. SOC'Y. 154 (1929); Wilbur, *Shall We Continue to Require a Unanimous Verdict?*, 34 PA. BAR ASS'N REP. 333 (1928); Millar, *The Modernization of Criminal Procedure*, 11 J. CRIM. L. 345 (1920); Sloss, *Reform of Criminal Procedure*, 1 J. CRIM. L. 877 (1911); May, *Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642 (1876).

9. 399 U.S. 78 (1970).

10. FLA. R. CRIM. P. 1.270 (1968): "Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases."

11. 406 U.S. 404 (1972).

12. 406 U.S. 356 (1972).

13. *Apodaca v. Oregon* was actually a consolidation of three Oregon cases. The three petitioners, Robert Apodaca, Henry Morgan Cooper, Jr. and James Arnold Madden, were tried separately and convicted in circuit courts in the State of Oregon. The Court of Appeals of the State of Oregon consolidated the cases and upheld the trial courts' decisions. Review was denied by the Supreme Court of Oregon on March 10, 1970.

The Supreme Court affirmed the convictions, although there was no majority opinion in *Apodaca* (Justice Powell, while concurring in the affirmance, disagreed with the plurality's reasoning).

In his plurality opinion Justice White rejected the argument that the sixth amendment right to a jury trial, made applicable to the states by the fourteenth amendment,[14] requires a unanimous verdict in order to give substance to the reasonable doubt standard. Justice White further asserted that unanimity and the reasonable doubt standard are completely independent of each other since "the reasonable doubt standard developed separately from both the jury trial and the unanimous verdict."[15]

Justice Powell, in his concurring opinion, argued that "history and precedent"[16] indicate that the sixth amendment requires a unanimous jury verdict in a federal criminal trial, but that the fourteenth amendment does not require the states to apply the federal jury trial right "with all its gloss."[17] This position would seem to require unanimous jury verdicts in federal criminal cases, while permitting less than unanimous verdicts at the state level.[18]

Justice Douglas, in dissent, termed the decision "a radical departure from American traditions."[19] The requirement of unanimity had been established by the year 1367.[20] While it is highly commendable for legal writers and judges to reevaluate the antiquated rules of common law to determine whether they are still suitable for our modern legal system, the unanimous jury verdict requirement for criminal cases, which has stood the test for centuries and which is still honored by almost all jurisdictions, should not be abandoned without sound reasons.

This note will attempt to fashion a case for retaining unanimous jury verdicts in state criminal trials. First, it will analyze the arguments made for eliminating the unanimous jury verdict, demonstrating that such arguments have little or no merit. Second, it will show by historical analysis that the unanimous verdict requirement and the reasonable

14. Duncan v. Louisiana, 391 U.S. 145 (1968).
15. 406 U.S. at 411.
16. *Id.* at 371 (concurring opinion).
17. *Id.* at 369 (concurring opinion).
18. *See* pp. 262-64 *infra.*
19. 406 U.S. at 381 (dissenting opinion).
20. The first case recorded where unanimity was required is Anonymous Case, 41 Lib. Assisarum 11 (1367), reprinted in English in R. POUND & T. PLUNKETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 155-56 (1927).

doubt standard are not two independent concepts as envisioned by the Supreme Court in *Apodaca*, but that they have emerged as an interrelated evidentiary scheme which merits retention in our judicial system. Finally, this note will take issue with Justice Powell's concurring opinion, which would seemingly establish a different standard for jury verdicts in state criminal cases than in federal criminal cases.

THE ARGUMENTS AGAINST UNANIMITY REFUTED

In the past, writers and reformers have called the unanimous jury verdict requirement a "stumbling block to justice,"[21] and have advocated that juries be permitted to return majority verdicts.[22] This note will commence by examining the five principal arguments advanced for dispensing with unanimous jury verdicts.

Conservation of Time and Money

The first argument traditionally voiced by proponents of majority verdicts is that they precipitate fewer hung juries, thus reducing the number of retrials required and thereby conserving time and expense.

Studies performed by the University of Chicago have revealed that a hung jury occurs in slightly over five percent of criminal jury trials when a unanimous verdict is required.[23] When a majority verdict can be returned, the number of hung juries is reduced to 3.1 percent.[24] Therefore, by permitting majority verdicts, hung juries can be eradicated and savings realized in slightly over two percent of all criminal jury trials. The truth is, however, that unless the case involves a capital offense or has received some calibration of notoriety, most prosecutors will not retry a case where there has been a hung jury.[25] So while the potential exists for savings in slightly over two out of every 100 criminal trials, in reality the actual savings are only a fraction of that amount.

In Oregon, which has allowed ten to two verdicts since 1934, the number of 11 to one or ten to two verdicts has risen to 25 percent of all cases since the unanimity requirement has been abandoned.[26] The most

21. Haralson, *Why Veto Jury Verdicts?*, 31 J. AM. JUD. SOC'Y 69 (1947).

22. *See* authorities collected at note 8 *supra*.

23. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 461 (Phoenix ed. 1971). Professors Kalven and Zeisel, recognized as two of the foremost experts on the American jury, wrote this book as a result of the study of the American jury system undertaken at the University of Chicago Law School pursuant to a grant from the Ford Foundation.

24. *Id.*

25. This is assuming that the prosecutor does not discover additional information which convinces him that he will get a conviction on retrial.

26. Kalven & Zeisel, *The American Jury: Notes For an English Controversy*, 48 CHI. BAR REC. 195, 201 (1967).

apparent reason for this statistic is that the jury simply stops deliberating once the required majority is reached. Majority verdicts, therefore, may prevent the minority from persuading the majority about guilt or innocence. The Chicago jury study indicates that in roughly one case in ten the minority does eventually succeed in reversing an initial majority, and this is often in a case of special importance.[27] Since jurors are not permitted to take notes while listening to the evidence and could not possibly be expected to remember all the testimony which has been offered (especially in the more time consuming capital offense cases), it is imperative that the jurors discuss, examine, deliberate and piece together the truth. This discussion and deliberation is curtailed as soon as the required majority verdict is reached. For example, if ten out of 12 jurors are needed for a valid conviction, a ten to two vote for guilty on the first ballot may completely preclude discussion. And, even if discussion does take place, it may prove to be merely cursory, since the majority is under no pressure either to listen attentively to the minority viewpoint or to try to persuade the minority of the guilt of the defendant. It is possible that this occurred in *Apodaca* where the jury needed only 41 minutes to reach a verdict.[28] As Justice Douglas pointed out:

> It is said that there is no evidence that majority jurors will refuse to listen to dissenters whose votes are unneeded for conviction. Yet human experience teaches that polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity.[29]

Furthermore, since 1880 in *Strauder v. West Virginia*,[30] the Supreme Court has consistently held that there may be no systematic exclusion of any minority in the selection of petit juries. The purpose of these decisions is to involve all of the citizenry in the administration of criminal justice. To allow majority verdicts would be to extinguish one way of making such participation meaningful. In jurisdictions where majority verdicts are condoned, a majority of the jury can simply ignore the views of those who are of a different class or race. To allow an indigent to be convicted by a vote split along class

27. H. KALVEN & H. ZEISEL, *supra* note 23, at 490.

28. The juries in the Oregon circuit courts deliberated only 51 minutes and less than 30 minutes respectively before returning guilty verdicts against the other two defendants involved in *Apodaca*.

29. 406 U.S. at 389 (dissenting opinion).

30. 100 U.S. 303 (1880). Other cases include: Carter v. Jury Commission, 396 U.S. 320 (1970); Whitus v. Georgia, 385 U.S. 545 (1967); Hernandez v. Texas, 347 U.S. 475 (1954).

lines, or a black man to be convicted by a vote split along racial lines would undermine community confidence in the administration of our judicial system.

It is possible that majority verdicts could save time and effort in the currently congested criminal law courts. However, the problem does not lend itself to a neat choice between quality versus quantity. It is not necessary to sacrifice the quality of our judicial system in order to accelerate its production. Relief from congested and costly conditions could be had as readily if the unanimity requirement were preserved. In fact, such conditions could be alleviated if the unanimity requirement were extended to its logical end, *i.e.*, a hung jury should result in an acquittal rather than a retrial, since the prosecution has not succeeded in meeting the legal standard of proof of guilt. Furthermore, to the extent that a majority verdict provision leads to the conviction of defendants (some possibly innocent) who would not have been convicted under a unanimous verdict requirement, the provision could conceivably result in increased expense to the state. The expenditure for incarceration, parole or other disposition of these defendants may transcend the amount saved by the diminution in the number of hung juries.

Obstinate Jurors

There are many traditional portrayals depicting 11 frustrated jurors trying vainly to convince a twelfth that the defendant is guilty of the crime charged. Many laymen have this very impression of a hung jury—one stubborn lout who refuses to take the responsibility seriously and relishes the attention he receives by vying with the other 11.[31] The Chicago jury study, however, concludes differently:

> The miracle of the jury is that it is somehow able to reach agreement despite the divergent views with which it enters deliberation. This is the result of many pressures including a great reluctance to fail to do their job and have the jury hang. In part it is the result of a decent respect for the opinions of others on matters where certainty is hard to come by. In part it is the result of a subtle shift in their own perceptions of the facts as the deliberation continues. We find with high frequency that a genuine consensus has been reached at the end with the jurors now preferring the jury verdict to their original positions.[32]

31. *See* authorities collected at note 8 *supra*.
32. Kalven, *The Jury*, 7 U. CHI. LAW SCHOOL RECORD 6, 61 (1958).

Other studies indicate that a hung jury may not be a reflection on the members of the jury but may develop in response to actual difficulties in the case,[33] or perhaps because of the lack of clarity with which the issues of fact and law are submitted to them in the charge by the presiding judge.[34]

In their book, *The American Jury*, Professors Kalven and Zeisel reveal that whenever there are three or fewer dissenters on the first jury ballot the jury will attain unanimity virtually every time:[35]

> Juries which begin with an overwhelming majority in either direction are not likely to hang. It requires a massive minority of four or five jurors at the first vote to develop the likelihood of a hung jury. . . . For one or more jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations.[36]

Thus, it seems that in those cases where one or two jurors hold out in disagreement against the rest, they had a sizeable minority on the first jury ballot and the majority simply was not able to convince all of them that the defendant was guilty beyond a reasonable doubt. In these situations, a provision permitting majority verdicts is not merely a device for pre-empting the veto of a single obstinate juror, but is a means whereby the jury is permitted to return a verdict where there was actual disagreement as to whether the defendant's guilt was proven beyond a reasonable doubt.

Unanimity is an Unreasonable Expectation

The requirement of a unanimous verdict has often been criticized as unreasonable, especially when contrasted with all other executive, legislative and judicial bodies which reach their determinations by majority vote. The two voting systems most often heralded are those of the legislatures and the appellate courts.[37] The reply to this argument is that there is no valid comparison between a jury and any of these other bodies. First, the jury is the only one of these bodies which is bound by the requirement of proof beyond a reasonable doubt.[38] Second, the questions considered by these other bodies are totally removed from the

33. Kalven & Zeisel, *supra* note 26, at 201.
34. 22 CORNELL L.Q. 415 (1937).
35. H. KALVEN & H. ZEISEL, *supra* note 23, at 462.
36. *Id.* at 462-63.
37. *See* authorities collected at note 8 *supra*.
38. *In re* Winship, 397 U.S. 358 (1970).

type of questions facing the jury. The jury must make purely factual determinations—did X rob the bank? Was Y criminally negligent? Did Z act with malice?— and then apply the relevant law to that determination. Legislative decisions, on the other hand, are usually in the form of policy considerations—how much money shall we spend on national defense? Shall we pass a new anti-pollution law? Appellate court decisions, meanwhile, are invariably questions of law—was the evidence properly excluded? Was the defendant afforded his right of confrontation? Consequently, the task of the jury is unique and cannot be compared with other executive, legislative or judicial bodies.

Unanimity is Outmoded by Modern Conditions

A fourth argument which has been propounded against the unanimity principle is that it is outmoded by modern conditions. It has been alleged that the requirement of unanimity was established to counteract barbaric and unjust practices of ancient criminal procedure (*i.e.*, refusal to hear a defendant's testimony and infliction of punishment cruelly out of proportion to petty offenses). Some writers have therefore advocated the relaxation of the requirement since such reasons no longer exist to sustain it.[39] However, it is contended that such a proposition is unture. Our prisons and penitentiaries are still so plagued by cruel and inhuman conditions that we should fear lowering our standards at the cost of convicting innocent men. In May 1971 a federal circuit court in *Holt v. Sarver*[40] found that the Arkansas penal system constituted cruel and unusual punishment in violation of the eighth amendment. Regarding conditions in the average penal institution, Professor Richard Singer of the University of Cincinnati has written:

> The average prisoner is compelled to live in an antiquated building, probably over 50, and perhaps over 100 years old. If he is fortunate he has only one cellmate, in a cell that could barely be called liveable, and certainly not comfortable, otherwise, he will room with five or more inmates in a large overcrowded general area. His recreation, if any is allowed at all, is minimal. The food is adequate but not enticing, served either on metal trays in a dining room or in his cell. He will be denied contact with women, since heterosexual contact is, of course, strictly forbidden. Yet the chances are quite high that he will be forced into homosexual contacts with his fellow inmates.

39. *See* authorities collected at note 8 *supra*.
40. 442 F.2d 304 (8th Cir. 1971).

> Throughout his day, if he is in a typical institution, his life is one of sheer monotony, broken only by staccato orders of discipline or minimal activity. He may be fortunate enough to work all day on a farm, or undergo vocational training or education, but the chances are slim indeed. He will be unable to interest any of the prison's officials in him, unless he is hostile in some way, simply because there are not enough professional people to go around; if he is hostile, the only response will be discipline—probably solitary confinement.[41]

The requirement of unanimity is as necessary today as it was in ancient times. Rehabilitation in our jails and prisons has been a failure.[42] Prisoners released from penal institutions today are hardened and spiteful toward society and more apt to commit wrongdoings than before they were committed.[43] To commit a man to such hell by any lower standard than a unanimous jury verdict would be a barbaric practice of *modern* criminal procedure.

Corrupt Jurors

A final reason given for employing the majority verdict is that it prevents one or two corrupt jurors who have been bribed or who are merely sympathetic to the criminal element from holding out and hanging a jury which would otherwise have reached a decision.[44] Although this reason is often tendered to discredit unanimous verdicts, no one has yet offered any data to support such a contention. The Chicago jury study, on the other hand, has presented some evidence to refute this proposition. In approximately 200 cases of hung juries studied and reported, the trial judge did not even suggest that anything was suspicious about the result.[45] Furthermore, as was indicated above,[46] most hung juries have a minority of four or five, at least at the first ballot. This implies either that there is no corruption of jurors, or that if there is, it is on such a wide scale that a statutory provision allowing nine or ten jurors to return a verdict would not solve the problem.

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41. Singer, *Prison Conditions: An Unconstitutional Roadblock to Rehabilitation*, 20 CATHOLIC U.L. REV. 365, 372 (1971).

42. Rubin, *Needed—New Legislation In Correction*, 17 CRIME AND DELIN. 392 (1971); Clendenen, *What Is the Matter With Corrections?*, 35 FED. PROB. 8 (1971); Lincoln, *Recommendation for True "Prison Reform"*, 22 JUR. CT. J. 50 (1971); Dodd, *Corrections Do Not Correct*, 5 TRIAL 12 (NOV. 1969).

43. *Foreward—Penitentiaries Produce No Penitents, Symposium—Prisoners' Rights*, 63 J. CRIM. L. 154 (1972).

44. *See* authorities collected at note 8 *supra*.

45. Kalven & Zeisel, *supra* note 26, at 200.

46. *See* text accompanying note 38 *supra*.

Even if a problem of this nature can be shown to exist, merely dispensing with the unanimous verdict requirement and supplanting it with a majority verdict standard will not necessarily resolve the problem. If such a problem actually becomes a threat to our judicial system, a better solution would be to screen prospective jurors more exhaustively rather than to deprive a defendant of his claim to a unanimous verdict.

The arguments set out above do not provide convincing reasons for substituting majority verdicts for the requirement of unanimity. Since the beginning of this country the judicial system has functioned satisfactorily and effectively with the use of unanimous jury verdicts. No persuasive evidence has been presented to show that majority verdicts save substantial amounts of time or money, or that obstinate or corrupt jurors are sabotaging the existing system.

THE INTERRELATIONSHIP BETWEEN UNANIMITY AND REASONABLE DOUBT

The main foundation on which the *Apodaca* decision rests is Justice White's contention that unanimity and the reasonable doubt standard are two independent concepts which began at different times and for different reasons. A close analysis, however, will reveal that, although the two concepts did indeed originate at different times and for different reasons, they have evolved historically into one total evidentiary standard that merits retention in our judicial system.

In modern times a trial is understood to be a process of reasoning by which the true facts in issue are elicited. It should be noted that there were no such trials as this in ancient law.[47] The most ancient of the trial procedures were battle and ordeal. In reaction to these bloody, chaotic and ruthless methods of trial the more civilized trial by compurgation or law wager arose. After the parties to the cause had pleaded, the judge granted to one of them the right to wage his law. This party was required to collect a number of jurors who would swear not to any facts or transactions they had witnessed, but simply that they believed the waging party was telling the truth.[48] The number of juror-witnesses required was set by the judge and varied according to the nature of the case. Regardless of what number was set, the witnesses obviously had to be

47. 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 299 (7th ed. 1956) [hereinafter cited as HOLDSWORTH].

48. *Id.* at 305; W. FORSYTH, HISTORY OF TRIAL BY JURY 69-70, 84-86 (2d ed. 1971) [hereinafter cited as FORSYTH].

unanimous in their testimony for one party; the necessary requisite of evidence to prove a case was thus measured by the number of juror-witnesses who would unanimously swear they believed the waging party.[49] Summing up these ancient methods of trial, the historian Holdsworth wrote:

> Such were the older methods of proof. The court was simply interested in determining which of the two parties must go through the forms of the selected proof, and in seeing that the forms were observed. The decision followed, as of course. They seem to us barbarous and unreasonable. But, for the age in which they flourished, it is difficult to see that any other methods would have been possible. . . . Battle, ordeal and compurgation were suited to the age in which they flourished. Growing civilization demanded a clearer and more certain test.[50]

Thus arose the trial by jury. Early trial by jury was very similar to trial by compurgation. Since trial by jury was substituted for the more ancient forms of trial, it was adapted with little change.[51] Jurors were still mere witnesses, produced by a party to swear their belief in his account of the facts. There was no opportunity to test the witnesses by cross-examination, for the controlling element was the oath itself rather than the probative quality of what was said, or its persuasive effect on the judge.[52]

Later development saw the jury become "a body of neighbors called in, either by express law, or by the consent of the parties, to decide disputed questions of fact."[53] This development was based on the assumption that the neighbors were acquainted with the facts, or could easily acquire the necessary knowledge. Consequently, the requirement of unanimity was carried over from trial by compurgation. Since the jury knew the facts or had access to them, it was assumed that there could be only one correct view of the facts.[54] For this reason it has been said that primitive juries were merely witnesses to the facts rather than

49. HOLDSWORTH 305-19; FORSYTH 61-70.
50. HOLDSWORTH 311-12.
51. *Id.* at 317; FORSYTH 69-70.
52. HOLDSWORTH 302; FORSYTH 105-06.
53. HOLDSWORTH 317.
54. *Id.*; FORSYTH 135-38; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 131 (5th ed. 1956); P. DEVLIN, TRIAL BY JURY 48-49 (1966); Thayer, *The Jury and its Development*, 5 HARV. L. REV. 249, 297 (1892).

judges of the facts.[55] Although they were in one sense only mere witnesses, they were actually more than witnesses. They were a *method of proof* which the parties were either obliged or had agreed to accept.[56] Today with our sophisticated hearsay and exclusionary rules this *method of proof* seems crude. But it is not important that their evidence seems crude to us today—what is important is that this ancient system demanded a necessary requisite of proof to establish a case, which requisite was determined by the number of jurors who would unanimously swear that one party was telling the truth. This system also had potential for development, as Holdsworth pointed out:

> [I]t is clear that an institution of this kind had in it possibilities of development; and in the thirteenth century, English lawyers like Bracton, who had learned from the civil and canon law something of a more rational system of procedure, were just the men to encourage these developments. We shall see that it was just this work of rationalizing native customs by ideas drawn from the civil and canon law that they were doing in many branches of English law. And so in the thirteenth century we find several cases in which witnesses were examined by the judges, and in which a decision was arrived at by considering the credibility of the tales which they told.[57]

Thus, in the thirteenth and fourteenth centuries there began a long and gradual change from a procedure where the proof was determined by the number of witnesses and oaths (with little concern for the character of the evidence), to one where the necessary requisite of proof in terms of its probative value was measured by its persuasive impact upon a set number of triers. Further legal development had only to define the extent to which the set number of triers had to be persuaded. The earliest expressions used to express this quality or extent of persuasion were "a clear impression", "upon clear grounds", and "satisfied." Later still such expressions as "rational doubt", "rational and well-grounded doubt", and "beyond the probability of doubt" came into use.[58] As late as 1798 the present formula of "proof beyond a reasonable doubt" became crystallized,[59] and finally the earlier, unfinished unanimity re-

55. HOLDSWORTH 317.
56. *Id.*
57. *Id.* at 303.
58. 9 J. WIGMORE, EVIDENCE § 2497 (3d ed. 1940).
59. Its first appearance, so far as we have been able to determine, was in the high-treason cases tried in Dublin in 1798, as reported by *McNally, Rules of Evidence on Pleas of the Crown*, Dublin, 1802, who was himself counsel for the defense. "It may also", he

quirement was made whole by infusion of the reasonable doubt standard. After centuries of development and growth, the fusion of the unanimous verdict-reasonable doubt standard was completed.

This total evidentiary standard, along with the presumption of innocence, was considered such an integral part of our judicial system[60] that it was rarely challenged. On those rare occasions when the unanimity principle was contested, the federal courts emphatically pronounced that the reasonable doubt standard and the unanimity principle were "inextricably interwoven."[61]

In the 1953 case of *Hibdon v. United States*,[62] the defendant took his appeal from a felony conviction to the Sixth Circuit Court of Appeals. At the trial stage, both the prosecutor and the defendant had agreed to be bound by a majority verdict after the jury declared they could not reach a unanimous decison. A poll of the jury resulted in a nine to three verdict in favor of conviction on the first count and a ten to two verdict in favor of conviction on the second count. In reversing these convictions the court stated:

> The humanitarian concept that is at the base of criminal prosecutions in Anglo-Saxon countries . . . is the presumption of innocence which can only be overthrown by proof beyond a reasonable doubt. The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms.[63]

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said, "at this day, be considered a rule of law, that, if the jury entertain a reasonable doubt upon the truth of the testimony of witnesses given upon the issue they are sworn well and truly to try, they are bound to acquit."

May, *supra* note 8, at 656-57.

60. It is a safe and most valuable principle of criminal law that before a person should be convicted of an offense, and deprived of the most sacred rights a man can enjoy, life and liberty, there should be proof of his guilt beyond all reasonable doubt; and if, when the facts and evidence are placed before twelve men who, we must presume, are conscientious, a single one of them has a doubt of the person's guilt, this ought to be sufficient to prevent a conviction.

J. PROFFATT, A TREATISE ON TRIAL BY JURY 117 (1876).

61. Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953).

62. 204 F.2d 834 (6th Cir. 1953).

63. *Id.* at 838; *accord*, Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950).

As late as 1969 the Third Circuit in *United States v. Fioravanti*[64] averred:

> An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned.[65]

It is not at all surprising that such an advanced total standard took centuries to develop, and surely its worth in today's society cannot be any less, merely because the two standards arose separately and for different reasons. The very heart of the interrelationship between unanimity and reasonable doubt as a total standard has been to provide the defendant the benefit of minority doubt as expressed in the minority veto of a guilty verdict—a right which Americans have long cherished, and which many consider to provide the unique fairness of our criminal procedure.

The End Of The Incorporation Theory?

Beginning with the 1961 case of *Mapp v. Ohio*,[66] the United States Supreme Court embarked on what has been labelled the "selective incorporation" theory. Utilizing this theory, the Court has incorporated most of the essential provisions of the Bill of Rights to the states through the due process clause of the fourteenth amendment. This incorporation process was instituted in reaction to the natural law theory of due process espoused by some of the Court's members. The natural law theory, in essence, championed only those rights which a majority of the Justices thought "fundamental." Under such a theory, due process cases were resolved in a case by case analysis on the basis of whether the alleged conduct in issue was compatible or accordant with "fundamental fairness"[67] or "immutable principles of liberty and justice."[68] This test understandably led to many problems, for the bounds of due process were determined solely according to the sensitivities of each of the Justices.

In light of the vagaries of the natural law approach, the majority of the Court began incorporating specific provisions of the Bill of Rights

64. 412 F.2d 407 (3d Cir. 1969).
65. *Id.* at 418.
66. 367 U.S. 643 (1961).
67. Ciucci v. Illinois, 356 U.S. 571, 573 (1958); Payne v. Arkansas, 356 U.S. 560, 567 (1958); Moore v. Michigan, 355 U.S. 155, 160 (1957).
68. Bartkus v. Illinois, 359 U.S. 121, 128 (1959); Leland v. Oregon, 345 U.S. 790, 798 (1952); Snyder v. Massachusetts, 291 U.S. 97, 105 (1933).

into the due process clause of the fourteenth amendment. In less than a decade most of the essential provisions of the first eight amendments had been made applicable to the states[69] "according to the same standards that protect those personal rights against federal encroachment."[70]

The defendants in *Apodaca* alleged that their convictions, returned by less than unanimous jury verdicts, violated the sixth amendment right to trial by jury as made applicable to the states by the fourteenth amendment.[71] Chief Justice Burger, along with Justices White, Rehnquist and Blackmun, felt that unanimous jury verdicts were not required by the sixth amendment guarantee of trial by jury *in any case*. A majority of five Justices comprised of Stewart, Brennan, Marshall, Douglas and Powell found the unanimous verdict to be an implicit element of the sixth amendment jury trial guarantee. This would have precluded the defendants' convictions in a federal court, and seemingly, under the incorporation doctrine, should have precluded the convictions at the state level as well.

However, Justice Powell, while agreeing that unanimous jury verdicts are demanded by the sixth amendment in federal criminal trials, voted to uphold the convictions, arguing that the fourteenth amendment does not require the states to apply the federal jury trial right "with all its gloss."[72] The decision thus seems to establish different jury verdict standards for federal and state courts, contrary to the incorporation trend of the Supreme Court for the past decade, and could mark a possible return to the discredited natural law theory of due process.

Past use of the natural law theory of due process has produced highly subjective and discretionary results. For nearly a decade the

69. Mapp v. Ohio, 367 U.S. 643 (1961), began this incorporation process by applying the exclusionary rule to the states, rendering inadmissable at state trials evidence seized in violation of the fourth amendment. For other provisions of the Bill of Rights incorporated by the Court see: Robinson v. California, 370 U.S. 660 (1962) (eighth amendment prohibition against cruel and unusual punishment); Ker v. California, 374 U.S. 23 (1963) (fourth amendment probable cause for search and seizure); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Malloy v. Hogan, 378 U.S. 1 (1964) and Griffin v. California, 380 U.S. 609 (1965) (fifth amendment privilege against self-incrimination); Aguilar v. Texas, 378 U.S. 108 (1964) (fourth amendment standard for obtaining a search warrant); Pointer v. Texas, 380 U.S. 400 (1965) (the sixth amendment confrontation clause); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial guarantee of the sixth amendment); Duncan v. Louisiana, 391 U.S. 145 (1968) (the sixth amendment jury trial right); Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy protection of the fifth amendment).

70. Malloy v. Hogan, 378 U.S. 1, 10 (1964).

71. Duncan v. Louisiana, 391 U.S. 145 (1968).

72. 406 U.S. at 369 (concurring opinion).

Supreme Court has labored to unshackle itself from such an unworkable doctrine. By permitting the states to experiment with less than unanimous jury verdicts in criminal cases, Justice Powell (by means of his controlling vote in *Apodaca*) has repudiated the incorporation theory and has taken a definite step backward in the preservation of individual rights.

CONCLUSION

The arguments made for dispensing with the unanimous jury verdict simply do not offer enough advantages to outweigh the individual's right to have his guilt proven by a unanimous jury. For centuries this country has felt that unanimous jury verdicts were a safeguard afforded defendants to insure that guilt was proven with the greatest certainty possible. The Supreme Court's decision in *Apodaca* allows the states to abridge this right on the premise that unanimous jury verdicts and proof beyond a reasonable doubt are two independent concepts of separate origins and purposes. However, a close historical analysis reveals that, even though the two concepts did originate independently of each other, they have evolved historically into an interrelated evidentiary scheme that merits retention in our judicial system. Moreover, the Court's decision is in direct conflict with the decade old theory of incorporation by which the states and the federal government are held equally accountable under the Bill of Rights. Such a decision may well revive the natural law theory of due process and its resultant problems. For these significant reasons, it is contended that the unanimous verdict in criminal trials should be retained.