

# LETTING THE SUPERMAJORITY RULE: NONUNANIMOUS JURY VERDICTS IN CRIMINAL TRIALS

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## I. INTRODUCTION

This jury and you and this trial with that verdict have let loose a monster in our country that will pursue us for eons to come. Our justice system in the country is the laughingstock of other countries, and now they can claim their right to laugh, where our President is shot in plain view of the public and Jim Brady's life is ruined. How much more proof is there that our justice system is sick when this crime proves that the victims lose, not the criminals.<sup>1</sup>

Many recent criminal jury verdicts have evoked the public's frustration with the justice system in the United States. New York State Supreme Court Justice Harold J. Rothwax speaks for many others when he says that criminal trials "too often produce results that are inaccurate or unjust."<sup>2</sup> Many Americans have thus called for radical reforms.<sup>3</sup>

Although the rate of violent crimes committed in the United States has declined recently,<sup>4</sup> Americans are still concerned about the level of crime in their communities.<sup>5</sup> In many neighborhoods, it

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1. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 182 (1986) (quoting a letter sent from a couple in Alabama to Judge Barrington Parker, who presided over the John Hinckley, Jr., trial).

2. HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 23 (1996).

3. See, e.g., HANS & VIDMAR, *supra* note 1, at 182.

4. See Fox Butterfield, *Serious Crime Decreased for Fifth Year in a Row*, N.Y. TIMES, Jan. 5, 1997, at 10.

5. See Yolanda Balido, *S. Dade Gets 10 New Police Officers; Activists Want More*, MIAMI HERALD, Sept. 15, 1996, at SS3; Elaine De Valle, *Gables Anti-Crime Panel Gets Down to Work*, MIAMI HERALD, July 28, 1996, at CT3.

is a gamble to walk to the local store at night. Regardless of whether the criminal justice system needs small modifications, or even a complete overhaul, one thing seems clear in the wake of the crime problem: better ways must be found to keep streets safe. Certainly, no one factor is solely responsible for the crime problem. Nevertheless, when obviously guilty murderers, rapists, abusive husbands, and armed robbers leave the courthouse unpunished, law-abiding citizens no longer feel as safe. Nor should they. Recidivism rates are high in the United States.<sup>6</sup> Ultimately, citizens must rely upon the courts to prevent criminals from striking again.

The jury is considered “the jewel and the centerpiece” of the American justice system.<sup>7</sup> Those who hail this system as the best in the world are generally referring to the jury.<sup>8</sup> The jury represents the people “standing between a possibly oppressive government and the lonely, accused individual.”<sup>9</sup> Too frequently, however, juries acquit blatantly guilty defendants, convict obviously guilty defendants of much lesser offenses, fail to deliberate sufficiently, or fail to reach a verdict in cases with overwhelming evidence.<sup>10</sup> Injustices in the jury system have prompted many scholars to advocate its overhaul.<sup>11</sup>

A hung jury is one that is “so irreconcilably divided in opinion that [it] cannot agree upon any verdict by the required unanimity.”<sup>12</sup> Hung juries have been criticized for wasting significant amounts of time and money.<sup>13</sup> They are burdensome to defendants, witnesses, victims, and already crowded courts.<sup>14</sup> A second trial drains state treasuries and places tremendous emotional and financial strains on defendants.<sup>15</sup> Hung juries either allow the prosecution to benefit from an earlier “dress rehearsal” or prevent the prosecution from re-trying the case because of time or money considerations or problems with witnesses.<sup>16</sup> Further, hung juries give the public the impression

6. See Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 896 (1995) (stating that the recidivism rate for “robbery among previously convicted robbers was 19.6%, for assault was 21.9%, for burglary was 31.9%, for larceny was 33.5%, and for drug offenses was 24.8%”).

7. ROTHWAX, *supra* note 2, at 199.

8. See *id.*

9. *Id.*

10. See *id.* at 200 (referring to the Rodney King trial, the Reginald Denny trial, the O.J. Simpson trial, and the first Menendez brothers trial, respectively).

11. See, e.g., Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1176 (1995).

12. BLACK’S LAW DICTIONARY 741 (6th ed. 1990).

13. See, e.g., *State v. Sawyer*, 630 A.2d 1064, 1076-77 (Conn. 1993) (Katz, J., dissenting).

14. See *State v. Labanowski*, 816 P.2d 26, 34 (Wash. 1991).

15. See *id.*

16. *Id.*

that the justice system is not working.<sup>17</sup> Statistics show that hung juries cause a mistrial in five to twelve percent of the more than 200,000 felony criminal jury trials that occur in the United States each year.<sup>18</sup> Reducing the frequency of hung juries without sacrificing justice should be a priority to increase the efficiency of the criminal justice system.

This Comment analyzes whether permitting supermajority verdicts is one means to achieve this goal. Part II of this Comment reviews the evolution of our current jury system, including the origins of the unanimity requirement. Part III examines how the United States Supreme Court abandoned the unanimity requirement by finding that it is not constitutionally required. Part IV compares the behavioral traits of unanimity-rule juries with majority-rule juries. Part IV also proposes a system for allowing supermajority verdicts. Finally, Part V concludes that permitting nonunanimous verdicts will enhance efficiency and promote justice.

## II. THE ROOTS OF TODAY'S AMERICAN JURY SYSTEM

[A]fter two hundred years, the debate over the jury system, with distinguished participants on both sides, is still going on apace.<sup>19</sup>

### A. The Origins of the Right to a Jury Trial

The right to a jury trial is deeply embedded in the American democratic ethos.<sup>20</sup> Jury trials existed in England for several centuries before the United States Constitution was written.<sup>21</sup> The jury trial system came to this country with English colonists, who strongly supported the concept.<sup>22</sup> The colonists frowned upon government interference with the jury trial.<sup>23</sup> In one of the resolutions it adopted on October 19, 1765, the Stamp Act Congress declared that a jury trial "is the inherent and invaluable right of every British

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17. See Sawyer, 630 A.2d at 1077 (Katz, J., dissenting).

18. See *id.* Justice Katz's dissent referred to two studies. The Chicago Jury Project found hung juries in 5.5% of cases studied by Kalven and Ziesel. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 57 (1966). A California jury study determined hung juries resulted in 12.2% of the cases. See Leo J. Flynn, *Does Justice Fail When the Jury Is Deadlocked?*, 61 *JUDICATURE* 129, 130 (1977).

19. KALVEN & ZEISEL, *supra* note 18, at 7.

20. See HANS & VIDMAR, *supra* note 1, at 31.

21. See *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 349 (Cooley ed. 1899)). While some scholars had traced the origin of the jury trial to the Magna Carta, modern historians now reject this view. See *id.* at 151 n.16 (citing 1 SIR FREDERICK POLLOCK & FREDERIC MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 173 n.3 (2d ed. 1909)).

22. See *id.* at 152.

23. See *id.*

subject in these colonies.”<sup>24</sup> These resolutions were deemed to contain “the most essential rights and liberties of the colonists.”<sup>25</sup>

Adopted in 1791, the Sixth Amendment to the U.S. Constitution guaranteed to all criminal defendants “the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed.”<sup>26</sup> This provision of the Sixth Amendment was essentially superfluous, however.<sup>27</sup> Article III, Section 2, Clause 3 of the Constitution already mandated that all criminal trials, except those for impeachment, were to be heard by a jury.<sup>28</sup> The right to trial by jury in criminal cases was among the few guarantees of individual rights enumerated in the Constitution.<sup>29</sup> Further, it is the lone guarantee listed in both the Constitution and the Bill of Rights.<sup>30</sup>

Even before the Declaration of Independence, the First Continental Congress’s Declaration of Rights of 1774 had provided for the right to trial by jury.<sup>31</sup> Twelve states had enacted written constitutions before the Constitutional Convention.<sup>32</sup> The criminal defendant’s right to trial by jury was the only right that was guaranteed unanimously among these states.<sup>33</sup> The constitution of every state that has since entered the Union also has recognized the right to trial by jury.<sup>34</sup> Other countries opt to use the jury system with much less frequency than the United States.<sup>35</sup> It is estimated that eighty

24. Resolutions of the Stamp Act Congress 1765 ¶ 7, reprinted in *SOURCES OF OUR LIBERTIES* 270 (Richard L. Perry & John C. Cooper eds., 1952). The Stamp Act Congress comprised nine colonies meeting in New York in October 1765. See Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 *NW. U. L. REV.* 144, 153 (1996). The Stamp Act, 5 *Geo. 3*, ch. 12 (Eng.), gave the vice-admiralty courts, which operated without juries, jurisdiction over actions brought to enforce stamp tax penalties and forfeitures. See *id.* § 48.

25. *SOURCES OF OUR LIBERTIES*, supra note 24, at 270.

26. U.S. CONST. amend. VI.

27. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 *U. CHI. L. REV.* 867, 869 (1994).

28. See U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .”).

29. Other guarantees of individual rights in the Constitution are the Habeas Corpus Clause, *id.* art. I, § 9, cl. 2, the Ex Post Facto and Bill of Attainder Clause, *id.* art. I, § 9, cl. 3, the Obligation of Contracts Clause, *id.* art. I, § 10, cl. 1, the Treason Clause, *id.* art. III, § 3, cl. 1, the Corruption of Blood Clause, *id.* art. III, § 3, cl. 2, the Full Faith and Credit Clause, *id.* art. IV, § 1, and the Privileges and Immunities Clause, *id.* art. IV, § 2, cl. 1.

30. Altschuler and Deiss note that “[l]ess explicitly, the First Amendment may have reiterated Article VI’s prohibition of religious tests for office-holding.” Altschuler & Deiss, supra note 27, at 870 n.13 (citing *Torcaso v. Watkins*, 367 *US* 488, 491-93 (1961)).

31. See *id.* at 870 (citing 1 *JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789*, at 69 (Oct. 14, 1774) (U.S. G.P.O., 1904)).

32. See *id.*

33. See *id.* (citing Leonard W. Levy, *Bill of Rights*, in *ESSAYS ON THE MAKING OF THE CONSTITUTION* 258, 269 (Leonard W. Levy ed., Oxford Univ. Press 2d ed. 1987)).

34. See *Duncan v. Louisiana*, 391 *U.S.* 145, 153 (1968).

35. See *HANS & VIDMAR*, supra note 1, at 31 (“England, Scotland, Wales, and Canada do not have as liberal a standard [as the United States] concerning trial by jury.”).

percent of all jury trials worldwide occur in this country.<sup>36</sup> Thus, it is especially critical that legislators and citizens frequently evaluate the jury system to ensure its continued fairness and efficiency. The requirement that all jurors must assent to render a verdict is but one example of a feature in the American system that has not been scrutinized sufficiently.<sup>37</sup>

### B. The Origins of the Unanimity Requirement

During the latter half of the fourteenth century, it became settled in England that a jury's verdict had to be unanimous.<sup>38</sup> Although the reasons for the development of the unanimity rule are unclear, at least four possible explanations have been suggested.<sup>39</sup>

One theory traces the unanimity requirement back to trial by compurgation, an early form of the jury trial.<sup>40</sup> In a trial by compurgation, a judge continued to add jurors to the original panel of twelve until twelve people agreed to vote for one of the parties in the case.<sup>41</sup> When this method of adding jurors was abandoned, the rule that twelve jurors must agree upon a verdict remained.<sup>42</sup>

A second theory is that the unanimity requirement arose to compensate the defendant for the lack of sufficient legal and procedural rules that insured a fair trial.<sup>43</sup> Penalties for convicted defendants were severe at common law.<sup>44</sup> The unanimity requirement might thus have provided some protection for the accused.<sup>45</sup>

A third theory suggests that jury unanimity developed because, unlike juries today, early juries possessed personal knowledge of the facts of a case.<sup>46</sup> In medieval times, it was presumed that only one view of the facts was correct.<sup>47</sup> If the jurors failed to agree unanimously upon a version of the facts, either the minority or majority of

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36. See *id.*

37. See e.g., ROTHWAX, *supra* note 2, at 213.

38. See *Apodaca v. Oregon*, 406 U.S. 404, 407 n.2 (1972) (citing 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 318 (1956)).

39. See *id.*

40. See HANS & VIDMAR, *supra* note 1, at 171; see also *Apodaca*, 406 U.S. at 407 n.2 (citing William Haralson, *Unanimous Jury Verdicts in Criminal Cases*, 21 *MISS. L.J.* 185, 191 (1950)).

41. See HANS & VIDMAR, *supra* note 1, at 171-72.

42. See *id.* at 172.

43. See *id.*; see also *Apodaca*, 406 U.S. at 409 n.2 (citing Ryan, *Less than Unanimous Jury Verdicts in Criminal Trials*, 58 *J. CRIM. L.C. & P.S.* 211, 213 (1967)).

44. See HANS & VIDMAR, *supra* note 1, at 171-72.

45. See *id.*

46. See *Apodaca*, 406 U.S. at 409 n.2 (citing THEODORE F. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 131 (5th ed. 1956)); see also HANS & VIDMAR, *supra* note 1, at 172.

47. See HANS & VIDMAR, *supra* note 1, at 172.

jurors would be punished for perjury.<sup>48</sup> Thus, there was considerable incentive for unanimity.<sup>49</sup>

A fourth explanation for the development of jury unanimity stems from the medieval concept of consent.<sup>50</sup> The word "consent" implied the idea of concordance or unanimity.<sup>51</sup> In England, the practice of requiring unanimity continued to gain acceptance during the fourteenth century.<sup>52</sup> Evidence exists that Parliament deemed a majority vote inadequate to bind the community or individuals to a legal decision.<sup>53</sup> As the unanimity requirement became extremely difficult to satisfy in the fifteenth century, Parliament changed to a majoritarian decisionmaking process.<sup>54</sup> The requirement of jury unanimity in criminal cases, however, remained intact in England until recently.<sup>55</sup>

The United States was not as quick to follow England's lead in adopting the unanimity requirement.<sup>56</sup> Although England retained what was primarily a unanimity requirement until 1967,<sup>57</sup> the idea of requiring jury unanimity took some time to secure a place in the American legal system.<sup>58</sup> During the seventeenth century, four states explicitly permitted majority verdicts in their constitutions.<sup>59</sup> However, because various legal scholars supported the unanimity rule, and as Americans became more familiar with the details of the English common law and adopted these details in their own colonial legal systems, unanimity became the accepted rule in the United States during the eighteenth century.<sup>60</sup> In 1972, nearly two centuries after its unquestioned acceptance, the rule's applicability to the states became the subject of two landmark cases decided by the U.S. Supreme Court on the same day.<sup>61</sup>

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48. See *id.*

49. See *id.*

50. See *Apodaca*, 406 U.S. at 407 n.2 (citing *MAUDE V. CLARKE*, *MEDIEVAL REPRESENTATION AND CONSENT* 251 (1964)).

51. See *id.*

52. See *id.* (citing Theodore F. Plucknett, *The Lancastrian Constitution*, in *TUDOR STUDIES* 161, 169-70 (R. Seton-Watson ed. 1924)).

53. See *id.*

54. See *id.* at 407-08 n.2 (citing 1 *KENNETH W. PICKTHORN*, *EARLY TUDOR GOVERNMENT: HENRY VII*, at 93 (1967)).

55. See *HANS & VIDMAR*, *supra* note 1, at 172.

56. See *Apodaca*, 406 U.S. at 407-08 (citing John M. Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, in *COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT* 415 (Stanley N. Katz ed., 1971)).

57. See *HANS & VIDMAR*, *supra* note 1, at 172.

58. See *Apodaca*, 406 U.S. at 407-08.

59. See *Williams v. Florida*, 399 U.S. 78, 98 n.45 (1970) (listing Connecticut, Pennsylvania, North Carolina, and South Carolina as the states that authorized majority verdicts).

60. See *Apodaca*, 406 U.S. at 408 n.3 (citing Murrin, *supra* note 56, at 415).

61. See *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

### III. THE MOVE TOWARD A SUPERMAJORITY RULE

As it did in embracing the unanimity requirement, England acted before the United States in abolishing the centuries-old rule.<sup>62</sup> In 1967, after discovering that jurors had been bribed and intimidated to acquit criminal defendants, England passed a law that permitted a jury in a criminal trial to conclude deliberations and return a verdict when a majority of eleven to one or ten to two was established.<sup>63</sup> To prevent a jury from reaching a verdict without deliberating sufficiently, the law mandated that a jury deliberate for at least two hours or whatever the judge thought was a reasonable time.<sup>64</sup> England's Secretary of State for the Home Office, Roy Jenkins, defended the reform:

[Majority verdicts] are not likely to result in different verdicts in many cases, but those few cases may well be crucial from the point of view of law enforcement and the breaking-up of big criminal conspiracies. . . . The disagreements undoubtedly occur in certain cases, not because one or two jurors are borderline—quite the reverse—but because one or two jurors have been persuaded, by bribery or intimidation, to hold out against the evidence. . . . [To] allow criminal interference with juries, which is very difficult to prove except where it fails, to enable big criminals to frustrate the process of justice, is to fight crime with our hands tied behind our backs.<sup>65</sup>

Five years later, in *Johnson v. Louisiana*<sup>66</sup> and *Apodaca v. Oregon*,<sup>67</sup> the U.S. Supreme Court followed England's lead by finding that unanimity is not constitutionally required.

#### A. *Johnson v. Louisiana*

Frank Johnson was arrested in Louisiana on January 20, 1968.<sup>68</sup> An armed robbery victim had identified Johnson as the perpetrator of the crime from photographs.<sup>69</sup> Johnson was subsequently identified at a lineup by a victim of yet another robbery.<sup>70</sup> Although Johnson pleaded not guilty to the second robbery charge, he was tried by

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62. See HANS & VIDMAR, *supra* note 1, at 172.

63. See Criminal Justice Act, 1967, ch. 80 (Eng.); see also HANS & VIDMAR, *supra* note 1, at 172.

64. See sources cited *supra* note 63.

65. HANS & VIDMAR, *supra* note 1, at 172 (quoting Roy Jenkins).

66. 406 U.S. 356 (1972).

67. 406 U.S. 404 (1972).

68. See *Johnson*, 406 U.S. at 358.

69. See *id.*

70. See *id.*

twelve jurors, and was convicted by a nine-to-three verdict.<sup>71</sup> The Louisiana Constitution provided:

Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.<sup>72</sup>

Similarly, the Louisiana Code of Criminal Procedure authorized nine-to-three verdicts in cases in which the punishment was necessarily at hard labor.<sup>73</sup> Johnson raised due process and equal protection challenges to the Louisiana constitutional and statutory provisions, which the Louisiana Supreme Court rejected.<sup>74</sup> The U.S. Supreme Court agreed to hear Johnson's claims.<sup>75</sup> According to the Court, the principal question in Johnson's case was whether the Louisiana constitutional and statutory provisions, which allowed majority verdicts in certain cases, violated either the Due Process or Equal Protection Clauses of the Fourteenth Amendment.<sup>76</sup>

With respect to his due process claim, Johnson argued that to satisfy the beyond-a-reasonable-doubt standard mandated to the states by the Due Process Clause, a unanimous jury verdict was required in all criminal cases.<sup>77</sup> In considering Johnson's claim, the Court elected to break down the due process argument into two issues: (1) whether nine individuals can "vote conscientiously in favor of guilt beyond a reasonable doubt when three of their colleagues are arguing for acquittal"; and (2) whether guilt can be said "to have been proved beyond a reasonable doubt when one or more [jurors] at the conclusion of deliberation still possess such a doubt."<sup>78</sup>

In answering the first issue in the affirmative, the majority, in an opinion written by Justice White, found no reason to believe that the nine jurors who voted to convict Johnson failed to follow the trial judge's instructions regarding the need for proof beyond a reasonable doubt or that any juror's vote failed to reflect a sincere belief that guilt beyond a reasonable doubt had been proved.<sup>79</sup> Specifically, the Court reasoned:

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71. See *id.*

72. *Id.* at 357-58 n.1 (quoting LA. CONST. art. VII, § 41).

73. See *id.* at 358 n.1 (citing LA. CODE CRIM. PROC. art. 782).

74. See *id.* at 358.

75. See *id.*

76. See *id.* at 357-58.

77. See *id.* at 359.

78. *Id.* at 360.

79. See *id.* at 360-61.

[T]he mere fact that three jurors voted to acquit does not in itself demonstrate that, had the nine jurors of the majority attended further to reason and the evidence, all or one of them would have developed a reasonable doubt about guilt. We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A majority 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 . . . continues to insist upon acquittal without having persuasive reasons in support of its position.<sup>80</sup>

In considering the second part of Johnson's due process claim, the Court acknowledged that if the State had convinced all twelve jurors, rather than nine, the prosecution's proof could have been regarded as "more certain."<sup>81</sup> In rejecting Johnson's argument, however, the Court concluded that the disagreement of three jurors did not "indicate infidelity to the reasonable-doubt standard."<sup>82</sup> In support of its position, the Court noted that jury verdicts finding guilt beyond a reasonable doubt were frequently upheld, even where the jury would have been justified in possessing a reasonable doubt based upon the evidence.<sup>83</sup> To illustrate that lack of jury unanimity should not be equated with reasonable doubt, the Court emphasized that when a federal jury—which operates under the unanimity requirement and which must acquit a defendant if it possesses a reasonable doubt about his or her guilt—failed to agree unanimously upon a verdict, the defendant was not acquitted.<sup>84</sup> Rather, he or she was subjected to a new trial.<sup>85</sup>

With respect to his equal protection claim, Johnson argued that the constitutional and statutory provisions disadvantaged him when compared with defendants who committed other classifications of

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80. *Id.* at 361.

81. *Id.* at 362.

82. *Id.*

83. *See id.*

Jury verdicts finding guilty beyond a reasonable doubt are regularly sustained even though the evidence was such that the jury would have been justified in having a reasonable doubt, even though the trial judge might not have reached the same conclusion as the jury, and even though appellate judges are closely divided on the issue whether there was sufficient evidence to support a conviction.

*Id.* (citations omitted).

84. *See id.* at 363 (citing *Holt v. United States*, 218 U.S. 245, 253 (1910)).

85. *See id.*

crimes.<sup>86</sup> Cases involving less serious crimes were tried by only five jurors, all of whom had to concur to render a verdict, while capital cases were tried by twelve jurors, all of whom had to concur to render a verdict.<sup>87</sup> The Court dismissed this argument as well, in part because a state is constitutionally permitted to treat accused capital offenders differently than those accused of committing lesser crimes.<sup>88</sup> The Court also elected to defer to the Louisiana Legislature's judgment because the Legislature had the discretion to vary the difficulty of obtaining a conviction with the severity of the punishment and the gravity of the crime.<sup>89</sup>

Four justices dissented in four separate opinions.<sup>90</sup> Two justices joined in Justice Stewart's dissent, which cited several cases upholding the right of all citizens to participate on a jury.<sup>91</sup> Justice Stewart argued that the Court's decision undermined this right, claiming that "only a unanimous jury . . . can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear."<sup>92</sup> Further, Justice Stewart argued that community confidence in the administration of criminal justice would be diminished by the Court's authorization of majority verdicts.<sup>93</sup>

## B. *Apodaca v. Oregon*

Decided on the same day as *Johnson*, *Apodaca v. Oregon*,<sup>94</sup> the second landmark case regarding the unanimity requirement, presented the Court with similar constitutional challenges. Three criminal defendants were convicted of crimes by separate Oregon juries, all of which returned nonunanimous verdicts.<sup>95</sup> After their appeals in the Oregon courts were unsuccessful, all three defendants sought review by the U.S. Supreme Court, claiming that conviction

86. See *id.* at 363-64.

87. See *id.* at 364.

88. See *id.* ("Appellant might well have been ultimately acquitted had he committed a capital offense. But . . . this does not constitute a denial of equal protection of the law; the State may treat capital offenders differently without violating the constitutional rights of those charged with lesser crimes.")

89. See *id.* at 365.

90. See *id.* at 380-94 (Douglas, J., dissenting); *id.* at 395-96 (Brennan, J., dissenting); *id.* at 397-99 (Stewart, J., dissenting); *id.* at 399-403 (Marshall, J., dissenting).

91. See *id.* at 397-99 (Stewart, J., dissenting). Justices Brennan and Marshall joined Justice Stewart's dissent. See *id.* at 397.

92. *Id.* at 398.

93. See *id.* ("[C]ommunity confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines.")

94. 406 U.S. 404 (1972).

95. See *id.* at 405-06.

of a crime by a nonunanimous jury verdict violated the Sixth Amendment's right to trial by jury.<sup>96</sup>

The Oregon Constitution permitted nonunanimous jury verdicts in certain criminal cases.<sup>97</sup> Specifically, article I, section 11 provided:

In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; . . . provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise . . .<sup>98</sup>

The Court took the same approach to considering the importance of the unanimity requirement as it did in an earlier case, in which it considered whether a jury size of twelve was constitutionally required.<sup>99</sup> After reviewing the origins of the unanimity requirement, the plurality, in another opinion written by Justice White, focused on the jury's role in contemporary society.<sup>100</sup> The Court noted that the jury's primary function was to protect the accused from the "corrupt or overzealous prosecutor and the compliant, biased, or eccentric judge."<sup>101</sup> Given this purpose, the Court found that the unanimity requirement was not an indispensable feature of the criminal justice system.<sup>102</sup> The Court reasoned that a jury would protect the accused, regardless of the unanimity rule, as long as it was composed of "a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation."<sup>103</sup> Obviously, the Court observed, abandoning the unanimity requirement would produce fewer hung juries, thereby resulting in more convictions or acquittals.<sup>104</sup> The Court concluded, however, that in either instance, the in-

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96. See *id.* at 405.

97. See *id.* at 406.

98. *Id.* at 406 n.1 (quoting OR. CONST. art. I, § 11).

99. See *id.* at 406 (following *Williams v. Florida*, 399 U.S. 78 (1970)). The question before the Court in *Williams* was "whether the constitutional guarantee of a trial by 'jury' necessarily requires trial by exactly 12 persons, rather than some lesser number—in this case six." 399 U.S. at 86. The *Williams* Court held that "the 12-man panel is not a necessary ingredient of 'trial by jury,' and that respondent's refusal to impanel more than the six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth Amendment." *Id.*

100. See *id.* at 407-11.

101. *Id.* at 410.

102. See *id.*

103. *Id.* at 410-11.

104. See *id.* at 411.

terest in having the common-sense judgment of a jury interposed between the defendant and the government was equally well safeguarded.<sup>105</sup>

The second argument put forth by the petitioners was that the Sixth Amendment right to a jury trial required that the unanimity requirement be preserved in criminal trials to give substance to the beyond-a-reasonable-doubt standard, which is mandated by the Fourteenth Amendment's Due Process Clause.<sup>106</sup> The Court responded by noting that the reasonable-doubt standard developed independently from both the right to a trial by jury and the unanimity rule.<sup>107</sup> Further, the beyond-a-reasonable-doubt standard did not fully develop in America until after the Constitution was adopted.<sup>108</sup> The Court concluded that the Sixth Amendment did not require proof beyond a reasonable doubt.<sup>109</sup> Thus, the petitioners' reasonable-doubt argument had to be premised upon due process, which the Court had previously ruled in *Johnson* was not violated by a nonunanimous verdict.<sup>110</sup>

The final argument advanced by the petitioners was that a unanimous verdict was necessary to uphold the Fourteenth Amendment's requirement that juries reflect a cross section of the community.<sup>111</sup> This argument also proved unavailing.<sup>112</sup> The Court reasoned that the Constitution merely forbade "systematic exclusion of identifiable segments of the community from jury panels."<sup>113</sup> Thus, the petitioners' assumption that every group in the community has a right to be represented on every jury was flawed.<sup>114</sup> Permitting nonunanimous verdicts does not prevent effective application of the cross-section requirement.<sup>115</sup>

### C. The Aftermath

The *Johnson* and *Apodaca* decisions only authorized nonunanimous verdicts in state criminal trials.<sup>116</sup> The unanimity requirement endures in federal criminal trials.<sup>117</sup> Justice Powell, in his concur-

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105. See *id.*

106. See *id.*

107. See *id.*

108. See *id.*

109. See *id.* at 412.

110. See *id.*; see also *Johnson*, 406 U.S. at 363.

111. See *Apodaca*, 406 U.S. at 412-13.

112. See *id.* at 413.

113. *Id.*

114. See *id.*

115. See *id.*

116. See *Johnson*, 406 U.S. at 358; *Apodaca*, 406 U.S. at 406.

117. See, e.g., *Johnson*, 406 U.S. at 369 (Powell, J., concurring) ("[U]nanimity is one of the indispensable features of federal jury trial."); see also *ROTHWAX*, *supra* note 2, at 213.

ring opinion in *Johnson*, asserted that “unanimity had long been established as one of the attributes of a jury conviction at common law” by the time the Bill of Rights were adopted.<sup>118</sup> Therefore, he argued that history and precedent dictated that the Sixth Amendment required a federal criminal defendant to be convicted by a unanimous verdict.<sup>119</sup>

Despite the Supreme Court’s authorization of nonunanimous verdicts in state criminal cases, most state legislatures have declined to deviate from the unanimity requirement in criminal cases.<sup>120</sup> While thirty-three states allow nonunanimous verdicts in civil cases, only two permit them in criminal cases.<sup>121</sup> Perhaps many states are simply following common-law tradition in preserving the unanimity rule in criminal trials. Perhaps tradition has prompted them to ignore the compelling arguments made in favor of abandoning the rule. For example, in 1994, a commission appointed by the chief judge of the New York Court of Appeals to evaluate the jury system failed to address the subject of unanimity because of its controversial nature.<sup>122</sup> While those who have the power to act have ignored the issue, many scholars continue to debate the merits of the unanimity rule.<sup>123</sup> Much of the debate is focused on the differences in deliberation between a jury required to reach a unanimous verdict and one permitted to reach a majority verdict.

#### IV. THE SUPERMAJORITY SHOULD RULE

##### A. Behavioral Differences Between Unanimous and Nonunanimous Juries Fail to Indicate a Unanimous Jury Is Superior

In their renowned jury study, Reid Hastie, Steven Penrod, and Nancy Pennington found six differences between behavior on unanimity-rule juries and behavior on majority-rule juries.<sup>124</sup> First, majority-rule juries render a verdict more quickly.<sup>125</sup> Second, majority-rule juries tend to adopt a verdict-driven deliberation style, in which jurors vote early and conduct discussions in an adversarial manner, rather than an evidence-driven style, in which jurors first discuss

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Interestingly, the Supreme Court recently has noted that this federal right “is more accurately characterized as a due process right than as one under the Sixth Amendment.” *Schad v. Arizona*, 501 U.S. 624, 634 n.5 (1991).

118. 406 U.S. at 371 (Powell, J., concurring).

119. See *id.*

120. See ROTHWAX, *supra* note 2, at 213.

121. See *id.*

122. See *id.*

123. See, e.g., REID HASTIE ET AL., *INSIDE THE JURY* (1983); Stephen Saltzburg, Understanding the Jury with the Help of Social Science, 83 MICH. L. REV. 1120 (1985) (reviewing HASTIE ET AL., *supra*).

124. See HASTIE ET AL., *supra* note 123, at 173.

125. See *id.*

the evidence as one group and vote later.<sup>126</sup> Third, majority-rule juries generally vote sooner than unanimity-rule juries.<sup>127</sup> Fourth, majority-rule jurors are more likely to remain holdouts at the conclusion of deliberations.<sup>128</sup> Fifth, members of small groups are less likely to speak on a majority-rule jury.<sup>129</sup> Finally, large factions attract members more quickly on a majority-rule jury.<sup>130</sup>

Proponents of the unanimity requirement claim these differences indicate the unanimity rule is superior to the majority scheme.<sup>131</sup> However, when each factor is independently analyzed, the differences do not illustrate that the unanimity rule is better.

With respect to the first difference—that majority-rule juries take less time to render a verdict<sup>132</sup>—the minimal disparity in time is unlikely to affect the verdict's accuracy.<sup>133</sup> The most comprehensive jury study done in the last thirty years suggests that the first-ballot vote is the same as the verdict in approximately nine out of ten cases.<sup>134</sup> Thus, the outcome of the case is frequently decided before any significant deliberation.<sup>135</sup> In their study, Kalven and Zeisel went so far as to conclude that the “deliberation process might well be likened to what the developer does for an exposed film: it brings out the picture, but the outcome is pre-determined.”<sup>136</sup> Even in the small percentage of cases where the initial minority might succeed in reversing the initial majority, there is nothing to suggest that majority-rule juries, which take less time to render a verdict, simply ignore the rational arguments forwarded by jurors in the minority. Rather, it is more likely that unanimity-rule juries take slightly more time to render a verdict to persuade the final one or two holdouts.

The second difference—that majority-rule juries tend to adopt a verdict-driven deliberation style instead of an evidence-driven style<sup>137</sup>—is a matter of negligible concern. The law often encourages juries, through the use of special verdicts, to employ a verdict-driven style.<sup>138</sup> In verdict-driven juries, the adversarial discussions do not impede the jury's ability to decide the facts based upon the evidence.

126. See *id.* at 173-74.

127. See *id.* at 173.

128. See *id.*

129. See *id.*

130. See *id.*

131. See *id.* at 227-33.

132. See *id.* at 173.

133. See *KALVEN & ZEISEL*, *supra* note 18, at 488.

134. See *id.*

135. See *id.*

136. *Id.* at 489.

137. See *HASTIE ET AL.*, *supra* note 123, at 173.

138. See David A. Lombardero, *Do Special Verdicts Improve the Structure of Jury Decision-Making?*, 36 *JURIMETRICS J.* 275, 298 (1996).

If anything, adversarial discussions encourage opposing views of the facts to be analyzed and heard by everyone. In his dissent in Johnson, Justice Douglas expressed concern that the “polite and academic conversation” in which he apparently felt majority-rule juries engaged was “no substitute for the earnest and robust argument necessary to reach unanimity.”<sup>139</sup> This concern seems unfounded for two reasons. First, as noted above, majority-rule juries, far from engaging in “polite and academic conversation,” are verdict-driven, voting at the beginning of deliberation and proceeding to enter into a verbal tug-of-war.<sup>140</sup> Second, the supposed “earnest and robust argument” in which unanimity-rule jurors must engage to reach a unanimous verdict is more often “intimidation and peer pressure.”<sup>141</sup> Further, in Judge Rothwax’s own experience, “[i]n every instance . . . where the jury was split ten to two or eleven to one, . . . the holdout was not being rational.”<sup>142</sup> Therefore, a unanimous verdict appears no more reliable than a verdict in which a supermajority (ten to two or eleven to one) is reached.<sup>143</sup>

The third difference—that majority-rule juries vote sooner than unanimity-rule juries<sup>144</sup>—is also an unfounded concern. Jurors are instructed by the judge to refrain from talking to other jurors about the case they are trying until deliberation begins. This allows jurors to formulate their own impressions about the evidence. However, once deliberation begins, jurors are supposed to share, not conceal, their views of the case. There is nothing wrong with taking a vote when deliberation begins to see where the group stands. If a requisite majority is immediately established, but the dissenting jurors feel strongly about their position, the majority jurors will hear them out because they possess a heightened sense of responsibility. Although this notion of responsibility is not free from dispute, in some areas, a majority-rule jury is likely to feel more responsibility.<sup>145</sup> “[A] juror in a verdict-rendering majority under a nonunanimous decision rule is more likely to feel responsibility. Typically fewer jurors render the verdict, and often they render the verdict in the face of persistent opposition from an outvoted minority faction.”<sup>146</sup>

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139. 406 U.S. at 389 (Douglas, J., dissenting).

140. See HASTIE ET AL., *supra* note 123, at 173-74.

141. ROTHWAX, *supra* note 2, at 214. “[Kalven and Zeisel] also concluded that deliberation [in unanimity-rule juries] did not change votes through reasoning, but rather through intimidation and peer pressure.”

142. *Id.*

143. See *id.*

144. See HASTIE ET AL., *supra* note 123, at 173.

145. See Michael Mello, Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury, 30 B.C. L. REV. 283, 331 (1989).

146. HASTIE ET AL., *supra* note 123, at 116-17.

The fourth difference—that majority-rule jurors are more likely to remain holdouts<sup>147</sup>—does not undermine confidence in majority-rule verdicts. Justice Powell once declared that the unanimity requirement leads “not to full agreement among the twelve but to agreement by none and compromise by all.”<sup>148</sup> That majority-rule jurors may be less willing to compromise does not diminish the reliability of the verdict.<sup>149</sup> In the Hastie study, jurors were asked post-deliberation questions about their confidence in the verdicts they had rendered.<sup>150</sup> The confidence level among juries required to reach a ten-to-two verdict was higher than among unanimity-rule juries.<sup>151</sup> Even the holdout jurors on majority-rule juries expressed greater confidence in the verdict than did the jurors on unanimity-rule juries.<sup>152</sup>

The fifth difference—that small groups are less likely to speak in majority-rule juries<sup>153</sup>—does not hold up on closer examination. Individual personality traits would appear to dictate the extent of each juror’s contribution during deliberations and willingness to vehemently defend his or her position more than the fact of service on a unanimity- or majority-rule jury. The author of this Comment recently served on a six-person, unanimity-rule criminal jury. The jurors were disinclined to speak each time they had to wait in the jury room during brief recesses. Even when the jury retired to deliberate, none of the jurors seemed willing to express his or her view of the facts. The author wanted to take a vote because discussion of the case was virtually nonexistent. The vote revealed that three were in favor of guilt and three were in favor of acquittal. One would think that a split vote would generate vigorous debate. Instead, only two other jurors (one from each side) defended their positions. Finally, the author asked the others why they had voted the way they did. Twenty minutes later, the jury reached a unanimous decision. The quality of deliberation would not have suffered had this been a majority-rule jury. Half of the jurors appeared to be reserved and likely would not have spoken up as members of a small group—especially if they were the lone dissenting vote—regardless of whether the jury was operating under a unanimity or majority rule.

Even where dissenting jurors would be willing to assert themselves, a majority-rule scheme would encourage them to speak up

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147. See *id.* at 173.

148. ROTHWAX, *supra* note 2, at 214-15.

149. See Saltzburg, *supra* note 123, at 1134.

150. See HASTIE ET AL., *supra* note 123, at 78-82.

151. See *id.* at 77.

152. See *id.*

153. See *id.* at 173.

more than a unanimity-rule scheme because they would need to persuade fewer jurors to change the verdict. Assume, for example, that on a unanimity-rule jury there were nine votes in favor of guilt and three in favor of acquittal. To obtain an acquittal, the three dissenters would have to persuade all nine remaining jurors to change their votes. The difficulty of achieving this task is obvious, and the three jurors frequently would either succumb to the will (and reason) of the majority or hold out to create a hung jury. However, if the same situation arose on a majority-rule jury, with, for example, a ten-to-two majority, the three jurors in the minority only would need to convince seven of the remaining nine jurors to change the verdict. This is a lesser hurdle, perhaps prompting the three jurors to passionately argue their position.

Finally, the sixth difference—that large groups attract members more rapidly on a majority-rule jury<sup>154</sup>—is not a concern at all. There is nothing wrong with such an attraction given that majority-rule jurors are less likely to compromise.<sup>155</sup> For the large group to attract the small group, which is uncompromising, the large group's argument likely would have to be very compelling.

These six behavioral differences fail to indicate the unanimity rule's superiority over the majority rule. In fact, some of the behavioral characteristics of majority-rule juries, as set out above, are preferable to characteristics of unanimity-rule juries. Moreover, numerous arguments exist in favor of developing a sensible nonunanimous scheme.

### B. Why Abandon Unanimity?

Adopting the majority rule will significantly reduce the frequency of hung juries.<sup>156</sup> Kalven and Zeisel noted that jurisdictions which allow nonunanimous verdicts have forty-five percent fewer hung juries than those that compel unanimity.<sup>157</sup> The benefits of reducing the number of hung juries are obvious. The criminal justice system will function more efficiently, saving many people time, expense, and the inconvenience of another trial, without reducing the verdict's reliability.<sup>158</sup>

Implementing a nonunanimous scheme would also negate the impact of an eccentric or irrational holdout who prevents a jury from reaching unanimity.<sup>159</sup> The jury selection process allows for a jury to be composed of people who are emotional, suggestible, gullible, or

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154. See HASTIE ET AL., *supra* note 123, at 173.

155. See Saltzburg, *supra* note 123, at 1134.

156. See KALVEN & ZEISEL, *supra* note 18, at 461.

157. See *id.*

158. See ROTHWAX, *supra* note 2, at 214.

159. See *id.* at 215.

even intellectually incapable of evaluating complex evidence.<sup>160</sup> The criminal justice system should not allow a hung jury in a robbery case on the basis of one juror who sleeps during a crucial witness's testimony, claiming that he or she doesn't "really have to listen to every word" because he or she "can tell whether someone is telling the truth by looking at the way he moves his eyebrows."<sup>161</sup> Nor should we tolerate a hung jury in a murder case due to one holdout's strong belief that the defendant was innocent because "[s]omeone that good-looking could not commit such a crime."<sup>162</sup>

Many analogies to other systems in the United States also suggest the reasonableness of adopting a nonunanimous scheme.<sup>163</sup> Legislatures generally utilize a "majority rules" system.<sup>164</sup> Voters abide by a "majority rules" premise.<sup>165</sup> Appellate courts and grand juries also employ a "majority rules" scheme, even in criminal cases.<sup>166</sup> Requiring unanimity is an outdated tradition.<sup>167</sup> The rule originally drew strength from various "metaphysical and religious ideas about Truth that are no longer plausible."<sup>168</sup> It is time for our justice system to adopt a nonunanimous scheme that governs all cases.

### C. A Proposal for a Nonunanimous Scheme

Many proponents of preserving the unanimity rule argue that a nonunanimous scheme allows jurors in the majority to ignore the arguments of jurors in the minority once the requisite number of assenting jurors is attained. A successful plan must ensure thorough deliberation before a verdict is rendered. Several factors will encourage this ideal. First, the jurors' own consciences frequently will prompt further discussions even after the necessary majority is established. When a defendant's life or freedom hangs in the balance, jurors will feel an immense responsibility to consider every argument before returning a verdict. Otherwise, twelve laypeople should not be entrusted in the first place to decide an accused citizen's fate. Second, the judge's instructions to the jury should include a reminder to the jury that even when the requisite majority is achieved, arguments and discussions should continue until the jurors "reach a

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160. See *id.* at 200-01.

161. *Id.* at 197 (quoting a juror).

162. *Id.* at 199 (quoting another juror).

163. See Amar, *supra* note 11, at 1189-90.

164. See *id.* at 1189.

165. See *id.*

166. See *id.*

167. See *id.*

168. *Id.*

point at which [they] believe that further deliberations will not affect the verdict."<sup>169</sup>

The number of assenting jurors required to render a verdict should vary according to the gravity of the charge or severity of the punishment. A practical plan would require an eleven-to-one majority for capital cases. This would prevent one irrational juror from allowing a violent criminal to escape justice while still requiring the prosecution to prove its case beyond a reasonable doubt. The lone dissenter will have ample opportunity to express and support his or her position. If the argument is reasonable, it will carry at least one of the remaining eleven votes, thereby preventing a guilty verdict from being rendered. Felony cases should require a ten-to-two majority, similar to the provision unsuccessfully challenged in *Apodaca*.<sup>170</sup> In lesser criminal cases, a nine-to-three majority would suffice to effectively balance the competing interests. The number of assenting jurors needed to render a verdict in civil cases should be lower than in any criminal case because an individual's freedom is not at stake. Most states already permit nonunanimous verdicts in civil cases.<sup>171</sup> Thus, an eight-to-four majority should suffice in civil cases.

## V. CONCLUSION

Tradition notwithstanding, change is inevitable over two hundred years. Many people have lost faith in the criminal justice system. It is necessary to evaluate frequently each feature of the system to determine what improvements can be made. While the unanimity rule is certainly not the exclusive source of the public's frustration, permitting nonunanimous verdicts may instill in the public a renewed sense of trust in the system while promoting the efficient administration of justice.

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169. Saltzburg, *supra* note 123, at 1132.

170. See 406 U.S. at 406.

171. See ROTHWAX, *supra* note 2, at 213.