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A Constitutional Renvoi: Unanimous Verdicts in State Criminal Trials

COMMENT

A CONSTITUTIONAL RENVOI: UNANIMOUS VERDICTS IN STATE CRIMINAL TRIALS

I. INTRODUCTION

In two recent decisions, *Johnson v. Louisiana*[1] and *Apodaca v. Oregon*,[2] the Supreme Court decided that the Constitution does not demand that verdicts in state criminal cases be reached by the unanimous consent of all jurors. Both decisions, although resolving an issue of first impression in the Court, may very well presage the abrogation of the unanimity rule in federal criminal cases, despite clear precedent and many years of unquestioned acceptance in support of that rule. Coupled with an earlier holding permitting states to allow less than twelve-man juries in criminal cases,[3] the decisions may constitute an initial step in the restructuring of the jury system in America. They may affect to a vital degree the extent to which that institution can exercise its function as a protective buffer against irrationality and mistake in the trial of suspected criminals. Finally, the cases raise serious questions about the process of constitutional adjudication and perhaps about the propriety of past decisions construing the meaning of the due process clause of the fourteenth amendment. This Comment will examine the decisions, the problems and the implications resulting therefrom.

II. HISTORY OF THE UNANIMITY RULE

The origin of the practice of trial by jury has never been entirely clear, and scholarly opinion on the question has long been divided.[4] The most recent and predominant view holds that the institution had its beginnings in a royal administrative device of the Carolingian kings which was transported to England by the Normans.[5] With the passage of time, the use of the jury was expanded

1. 406 U.S. 356 (1972).
2. 406 U.S. 404 (1972).
3. Williams v. Florida, 399 U.S. 78 (1970).
4. Moschzisker, The Historic Origin of Trial by Jury, 70 U. Pa. L. Rev. 1 (1921).
5. The device was known as the inquisitio. The king would call before him members of the community and obtain from them information required by the royal government. The information might be used in a pending legal matter, such as a dispute over taxes, or to provide the basis for the detection of crime. This institution flourished in the Norman territories on the continent and was brought by the Normans to England, thereafter dying out in France. At that time, the English jury was a group of neighbors brought before a public officer to give a true answer, under oath, to some question. The famous Domesday Book was compiled by the use of this inquisition. 1 W. Holdsworth, A History of English Law 312-13 (3d ed. 1922); 1 F. Pollock & F. Maitland, The History of English Law 140-149 (2d ed. 1923); T. Plucknett, A Concise History of the Common Law 109-12 (5th ed. 1956); Thayer, The Jury and Its Development, 5 Harv. L. Rev. 249, 249-59 (1892). The other major explanation for the origin of the jury trial is that it derived from Celtic sources with a basis in Roman law, and was later adopted by the Anglo-Saxons and the Normans. Newman,

in England, and its nature changed from what was originally a group of witnesses, to that of a group of objective evaluators of evidence.[6] As the jury developed and attained a settled place in the English legal system, certain features—chiefly the twelve-man size and the unanimous verdict—evolved into basic requirements of the jury trial.

The reason that twelve jurors eventually became a necessity in a jury trial is unclear. The number twelve may have been chosen in imitation of biblical precedents or the Roman code of customary law, or perhaps because of some relation to the Zodiac.[7] The original justification for the requirement that all jury verdicts be unanimous is likewise shrouded in the obscurities of English history. One reason may have been that since a person could not be convicted under early English law except by affirmation of guilt by twelve witnesses,[8] the jury,

Should Trial by Jury Be Modernized?, 29 N.D.L. Rev. 365, 366 (1953); Comment, Right to Trial by Jury: Is It Necessary?, 15 DePaul L. Rev. 398 (1966).

6. Henry II set as one of his objectives the curbing of the power of the barons. He desired to replace the manorial courts and their varying rules of law with a uniform system of royal courts which would provide law for the nation. In order to get parties into his courts, he extended the use of the jury as a means of resolving disputes. The jury was thus transformed from an administrative device to a basic feature of royal justice. 1 W. Churchill, A History of the English-Speaking Peoples 215-18 (1962); 1 W. Holdsworth, supra note 5, at 312-14. Difficulties with the other modes of trial aided this process. In the thirteenth century, the church refused to perform the religious services necessary to the validity of the ordeal, thus effectively abolishing that method of trial. The other alternatives—the battle and the compurgation—likewise declined because of serious defects, and the more rational jury trial became the chief method of trial. F. Heller, The Sixth Amendment to the Constitution of the United States 4-5 (1951); Thayer, supra note 5, at 259. An unsophisticated persuasion was also used to get a criminal defendant to place himself before a jury, which was originally merely voluntary; anyone who failed to consent to jury trial would be sent to prison, where torture was a matter of course. The ordinary means of persuasion in prison was to place the defendant between two boards and pile weights on top of him until he agreed to trial by jury. F. Heller, supra at 6-7; Fullhardt, Evolution of the Petit Jury, 9 Thought 46, 56 (1934).

Originally, the jurors were required to have first-hand knowledge of the facts, and served basically as witnesses. Gradually, the jury became a judicial body which would lack such knowledge but would instead pass judgment on the basis of evidence presented to it. F. Heller, supra at 8; 1 W. Holdsworth, supra note 5, at 317-19; L. Orfield, Criminal Procedure from Arrest to Appeal 346 (1947); 1 F. Pollock & F. Maitland, supra note 5, at 140.

Though confidence in the jury increased with its use, harsh uncertainty still influenced the early law. Thus, the civil jury was, for centuries, checked by means of the attaint, a larger jury which passed upon the same questions as did the original jury. If a different result was reached, the original jury could be convicted of perjury and punished, often severely, such as by a forfeiture of property or imprisonment. Thayer, supra note 5, at 366, 374. In criminal cases, there was apparently no attaint, but jurors could still be punished if they returned an erroneous verdict. F. Heller, supra at 11; L. Orfield, supra at 348; T. Plucknett, supra note 5, at 133; Thayer, The Jury and Its Development, supra at 377-83. It was not until the seventeenth century that this method of insuring "accuracy" in jury verdicts was abandoned. Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670).

7. Comment, Right to Trial by Jury: Is It Necessary?, 15 DePaul L. Rev. 398, 402 (1966).

8. L. Orfield, supra note 6, at 348.

originally a body of twelve "witnesses," would have to unite in agreement to reach a verdict. If the twelve could not agree, more jurors might then be added until twelve were in accord.[9] Judicial hesitancy and doubts about the majority theory may also have contributed to the unanimity requirement.[10] In any case, unanimity, although originally not the rule,[11] became settled as a basic requirement of common law jury trial by the fourteenth century.[12]

The practice of trial by jury flourished in England and in the colonies not only because it was a vast improvement over earlier modes of trial, but also because it served as a protection against the power of a strong government. It was probably the latter factor more than anything else which accounted for the strong concern[13] in the American colonies about the preservation of this right.[14] After the Revolution, provoked in part by the infringement of this right by the English,[15] the American leadership included a provision in the body of the Constitution securing trial by jury in all criminal cases.[16] The sixth amendment, added a few years later, guaranteed that in all future criminal prosecutions the accused would "enjoy the right to a speedy and public trial, by an impartial jury . . . ." Thus, the protective device of trial by jury was preserved in the basic instrument of American government.[17]

The sixth amendment does not specify what is required by the term "trial by jury." The amendment, as originally proposed by James Madison, provided, *inter alia*, for a unanimous verdict. After minor changes had been made by a committee, the proposal was approved by the House of Representatives. In the

9. Comment, The Case for the Retention of the Unanimous Civil Jury, 15 DePaul L. Rev. 403, 405 (1966).

10. 2 F. Pollock & F. Maitland, supra note 5, at 626-27.

11. An early rule permitted a verdict by eleven of twelve jurors because a single witness, which an individual juror was initially considered to be, was held to be nothing. Sometimes a majority was sufficient. Thayer, The Jury and Its Development, 5 Harv. L. Rev. 295, 296 (1892).

12. 3 W. Blackstone, Commentaries 375 (4th ed. 1899); 1 W. Holdsworth, supra note 5, at 318; 2 F. Pollock & F. Maitland, supra note 5, at 625-26; Thayer, supra note 11, at 297.

13. See Sources of Our Liberties (R. Perry ed. 1959). It was often thought, erroneously, that this right derived from the Magna Carta, and was thus a basic right of Englishmen. See Thompson v. Utah, 170 U.S. 343, 349 (1898); 3 W. Blackstone, supra note 12, at 350; Shea, A Defense of the Jury System, 4 Notre Dame Law. 543, 544 (1929); Weinstein, Trial by Jury and Unanimous Verdicts, 69 U.S.L. Rev. 513, 517 (1935); 10 St. John's L. Rev. 373, 374 (1936).

14. See note 17 infra.

15. The Declaration of Independence aired the complaint that the King was "depriving us, in many cases, of the benefits of trial by jury . . . ."

16. U.S. Const. art. III, § 2.

17. The political climate of England in the seventeenth century and the American colonies in the eighteenth "was probably the most significant factor in the crystalization of the institution and its virtual enshrinement in our Federal Constitution." Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1, 2 (1966). In England for many years, that climate permitted "the widespread use of prosecutions for treason in attempts to enforce political and religious conformity." Id. at 3. Englishmen and Americans conceived of the right to trial by jury as a major protection against such pressure.

Senate, the proposal encountered opposition, chiefly directed at the requirement for trial in the vicinage. Lack of adequate records of the proceedings in the Senate precludes any firm conclusion as to the Senators' understanding of, or opinions with respect to, the items contained in the proposal. A subsequent conference committee achieved little progress and the matter was returned to the House. There a compromise resulting in the present sixth amendment was reached.[18] It is certain that the original Madison proposal specifically provided for unanimous verdicts in jury trials, and that the amendment as it finally emerged omitted the provision for unanimity. Nonetheless, the historical record does not preclude the conclusion that Congress, by the use of the term "trial by jury" in the amendment, meant trial as at common law, including the unanimous verdict requirement.[19] No less an authority than Mr. Justice Story concluded that such was the intention of the authors of the sixth amendment.[20]

Over the years, the Supreme Court has had occasion to touch upon the question of what was meant by the term "trial by jury." In 1888, the Court stated that the provision for jury trials in article III meant jury trials "according to the settled rules of the common law," and that the sixth amendment was a compendium of those rules.[21] In construing the seventh amendment guarantee of trial by jury in civil cases, the Court held that unanimity was a requisite, and that a statute permitting a nonunanimous verdict deprived the plaintiffs of their right to trial by jury.[22] In *Thompson v. Utah*,[23] the defendant was convicted by an eight-man jury of a larceny, allegedly committed while Utah was still a territory. Noting that the terms "trial by jury" and "jury" were inserted in the Constitution "with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument,"[24] the Court held that Thompson could not be deprived of his liberty by Utah "ex-

18. Williams v. Florida, 399 U.S. 78, 94-97, 123 n.9 (1970); F. Heller, supra note 6, at 29-34.

19. Williams v. Florida, 399 U.S. 78, 123 n.9 (1970) (Harlan, J., dissenting). The majority in Williams admitted that such an interpretation was reasonable. Id. at 97.

20. 2 J. Story, Commentaries on the Constitution of the United States § 1779, at 559 n.2 (5th ed. 1891).

21. Callan v. Wilson, 127 U.S. 540, 549-50 (1888). The rules of the sixth amendment were added because of "the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property." Id.

22. Springville v. Thomas, 166 U.S. 707 (1897); American Publishing Co. v. Fisher, 166 U.S. 464 (1897). "[U]nanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right." Id. at 468. See also Capitol Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899). The Court in American Publishing specifically stated that the power of a state to change the unanimity rule was not before the Court. American Publishing Co. v. Fisher, supra at 468.

23. 170 U.S. 343 (1898).

24. Id. at 350.

cept by the joint action of the court and the unanimous verdict of a jury of twelve persons."[25] In *Maxwell v. Dow*,[26] a case in which the defendant was convicted of robbery by a state jury composed of only eight jurors, the Court stated that the Constitution requires "that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury trial is held."[27] In *Patton v. United States*,[28] in which the defendant waived a twelve-man jury in federal court and was convicted of conspiracy by eleven jurors, the Court held that the jury guaranteed by the sixth amendment means, *inter alia*, a jury of twelve whose verdict must be unanimous. Any destruction or limitation of one of these elements of the right of trial by jury "has the effect of abridging the right in contravention of the Constitution."[29]

As recently as 1948, the Court reaffirmed the rule that unanimity in jury verdicts is required where the sixth amendment applies.[30] Thus, regardless of the ambiguity surrounding the intentions of the authors of the sixth amendment, the decisions of the Court have resulted in an apparently settled rule that trial by jury signified a trial according to the standards of the common law, and that unanimous verdicts, therefore, are required in all cases governed by the sixth amendment.[31]

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25. Id. at 351. "[T]he wise men who framed the Constitution . . . were of opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors. It was not for the State . . . to dispense with that guarantee simply because its people had reached the conclusion that the truth could be as well ascertained, and the liberty of an accused be as well guarded, by eight as by twelve jurors in a criminal case." Id. at 353.

26. 176 U.S. 581 (1900).

27. Id. at 586. The Court in Maxwell held that the defendant's robbery conviction by an eight-man jury did not deprive him of liberty without due process of law, and was not an abridgment of his privileges and immunities as a citizen of the United States. The position that unanimity was required in federal criminal jury trials was reiterated by the Court shortly after the decision in Maxwell. Hawaii v. Mankichi, 190 U.S. 197, 211 (1903). Chief Justice Fuller, dissenting from the Court's opinion, stated that among the "fundamental rights of every person living under the sovereignty of the United States" is the "right to be acquitted unless found guilty by the unanimous verdict of a petit jury of twelve." Id. at 226; accord, Dorr v. United States, 195 U.S. 138, 154-55 (1904) (Harlan, J., dissenting). See also Swain v. Alabama, 380 U.S. 202, 211 (1965).

28. 281 U.S. 276, 288 (1930).

29. Id. at 290.

30. Andres v. United States, 333 U.S. 740 (1948). In Andres, the defendant had been found guilty of murder by unanimous verdict. On the issue of whether the jury had also to agree unanimously if mercy was to be granted under a federal statute, the Court held unanimous agreement to be required. "In criminal cases this requirement of unanimity extends to all issues . . . which are left to the jury." Id. at 748. In United States v. Puff, the United States Court of Appeals for the Second Circuit held that, where a federal jury is empowered to impose or withhold the death penalty, the decision of the jurors must be unanimous. 211 F.2d 171 (2d Cir. 1954).

31. C. Burdick, The Law of the American Constitution § 138, at 386 (1922); 1 T. Cooley, Constitutional Limitations 676-77 (8th ed. 1927); 2 W. Willoughby, The Constitutional Law of the United States § 687, at 1141 (2d ed. 1929). See also Minneapolis &

III. The Fourteenth Amendment and Trial by Jury

A. *The Process of Selective Incorporation*

Although the Supreme Court determined the meaning of the right of trial by jury secured by the sixth amendment, the Court did not apply that amendment to the states. Thus, as interpreted, the sixth amendment only guaranteed that trial by jury would not be denied by the federal government, and the rule that unanimous verdicts were constitutionally required had application only to federal juries. The Court decided very early in its history that the various provisions of the Bill of Rights, including the right to trial by jury, do not apply to the states.[32] This view has long since been conclusively settled.[33] With the adoption of the fourteenth amendment, the question arose as to the effect of that amendment on the guarantees of the Bill of Rights. The Court originally decided that the guarantees were not privileges and immunities protected by the new amendment[34] and that the denial of them was not a denial of due process of law thereunder.[35] Indeed, in *Maxwell v. Dow*,[36] the Court explicitly stated that due process did not prevent states from abolishing the twelve-man jury and the unanimous verdict. Gradually, however, the Court began retreating from this limited interpretation of the fourteenth amendment.[37] In 1897, the Court held

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St. L.R.R. v. Bombolis, 241 U.S. 211, 216 (1916); Coates v. Lawrence, 46 F. Supp. 414, 423 (S.D. Ga.), aff'd, 131 F.2d 110 (5th Cir. 1942), cert. denied, 318 U.S. 759 (1943).

32. Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833).

33. Jack v. Kansas, 199 U.S. 372 (1905); Ohio ex rel. Lloyd v. Dollison, 194 U.S. 445 (1904); Pearson v. Yewdall, 95 U.S. 294 (1877); Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475 (1866); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); Permoli v. First Municipality, 44 U.S. (3 How.) 588, 609 (1845); Lessee of Livingston v. Moore, 32 U.S. (7 Pet.) 468 (1833). The Court specifically declared on several occasions that the sixth amendment does not apply to the states. E.g., Gaines v. Washington, 277 U.S. 81, 85 (1928); Eilenbecker v. Plymouth County, 134 U.S. 31, 34 (1890); Twitchell v. Commonwealth, 74 U.S. (7 Wall.) 321, 325, 327 (1868).

34. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). This decision has often been followed by the Court. E.g., Patterson v. Colorado, 205 U.S. 454 (1907); Maxwell v. Dow, 176 U.S. 581 (1900); O'Neil v. Vermont, 144 U.S. 323 (1892); Spies v. Illinois, 123 U.S. 131 (1887).

35. In 1884, the Court decided that due process means the same thing in the fourteenth amendment that it means in the fifth; that the fifth amendment is not superfluous and does not include within it the specific guarantees of the rest of the Bill of Rights; and that, therefore, the Bill of Rights does not apply to the states by virtue of the due process clause. Hurtado v. California, 110 U.S. 516, 535, 543 (1884).

36. 176 U.S. 581, 602, 605 (1900).

37. Initially, the Court utilized a notion of substantive due process as a restriction on state economic or social welfare programs. See, e.g., Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936); Williams v. Standard Oil Co., 278 U.S. 235 (1929); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Adams v. Tanner, 244 U.S. 590 (1917); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897). Something of the spirit behind this tendency is indicated by the opinion of the court of appeals in Adkins. "The tendency of the times to socialize property rights under the subterfuge of police regulation is dangerous, and if continued will prove destructive of our free institu-

that due process required the states to provide just compensation for confiscated property, much as did the fifth amendment with respect to the federal government.[38] Since that time in a long series of cases, the Court has held most of the guarantees of the Bill of Rights applicable to the states under the due process clause.[39]

The method of adjudication which produced this evolutionary expansion in the understanding of the constitutional imperatives of due process was, in the first instance, a "gradual process of judicial inclusion and exclusion . . . ."[40] Rights embodied in the first ten amendments were applied to the states, not because they were constitutionally mandated, but "because they are of such a nature that they are included in the conception of due process of law."[41] If such rights were to be applied to the states, they had to be found to be "of the very essence of a scheme of ordered liberty."[42] More recently, however, the Court has

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tions. It should be remembered that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty, and property, the chief of these is property . . . ." Children's Hosp. v. Adkins, 284 F. 613, 622 (D.C. Cir. 1922), aff'd, 261 U.S. 525 (1923). In time, of course, the Supreme Court abandoned its strict substantive due process stand. See, e.g., Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).

38. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

39. Among the guarantees which have been held applicable are the following: freedom of speech [Fiske v. Kansas, 274 U.S. 380 (1927); Gitlow v. New York, 268 U.S. 652 (1925)]; freedom of the press [Near v. Minnesota, 283 U.S. 697 (1931)]; freedom of religion [West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940)]; establishment of religion protection [Everson v. Board of Educ., 330 U.S. 1, 15 (1947)]; freedom of assembly [De Jonge v. Oregon, 299 U.S. 353 (1937)]; protection against self-incrimination [Malloy v. Hogan, 378 U.S. 1 (1964), overruling Twining v. New Jersey, 211 U.S. 78 (1908)]; right to a speedy trial [Klopfer v. North Carolina, 386 U.S. 213 (1967)]; right to a public trial [In re Oliver, 333 U.S. 257 (1948)]; right to compulsory process for obtaining witnesses [Washington v. Texas, 388 U.S. 14 (1967)]; right of confrontation [Pointer v. Texas, 380 U.S. 400 (1965)]; prohibition against cruel and unusual punishment [Robinson v. California, 370 U.S. 660 (1962)]; right to counsel [Gideon v. Wainwright, 372 U.S. 335 (1963)]; protection against unreasonable searches and seizures [Mapp v. Ohio, 367 U.S. 643 (1961)]; the provision against double jeopardy [Benton v. Maryland, 395 U.S. 784 (1969)].

40. Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

41. Twining v. New Jersey, 211 U.S. 78, 99 (1908).

42. Palko v. Connecticut, 302 U.S. 319, 325 (1937). The late Mr. Justice Black argued that Congress, in enacting the fourteenth amendment, intended to incorporate in the notion of due process the guarantees of the Bill of Rights. Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting). The question remains the source of considerable controversy. See Avins, Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited, 6 Harv. J. Legis. 1 (1968); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Frankfurter, Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746 (1965).

applied provisions of the Bill of Rights to the states on the basis of a theory of "selective incorporation."[43] This theory, which apparently finds its source in a statement of Justice Cardozo in *Palko v. Connecticut*[44] that the fourteenth amendment applied some of the Bill of Rights guarantees to the states by "a process of absorption,"[45] holds that the guarantees of the Bill of Rights apply to the states only after each has been found to be fundamental. Once such a determination has been made, each guarantee must be applied equally to the states and the federal government.[46] When a "specific" of the Bill of Rights is found to be fundamental and essential to a scheme of ordered liberty, it must be applied to the states and the federal government in the same measure, because "only impermissible subjective judgments can explain stopping short of the incorporation of the full sweep of the specific being absorbed."[47] Even in light of considerations of federalism, due process adjudication does not grant "a license to the judiciary to administer a watered-down, subjective version of the individual guarantees of the Bill of Rights . . . ."[48]

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43. See, e.g., Benton v. Maryland, 395 U.S. 784 (1969); Washington v. Texas, 388 U.S. 14 (1967); Klopfer v. North Carolina, 386 U.S. 213 (1967); Pointer v. Texas, 380 U.S. 400 (1965); Malloy v. Hogan, 378 U.S. 1 (1964). As the cases indicate, selective incorporation is a modification of Justice Black's total incorporation theory (see note 42 supra). See Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 Yale L.J. 74, 76 (1963).

44. 302 U.S. 319 (1937).

45. Id. at 326. For references to this language as the basis for the theory, see Cohen v. Hurley, 366 U.S. 117, 157 (1961) (Brennan, J., dissenting); Ohio ex rel. Eaton v. Price, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting).

46. See Benton v. Maryland, 395 U.S. 784, 795 (1969); Griffin v. California, 380 U.S. 609, 615 (1965); Pointer v. Texas, 380 U.S. 400, 410 (1965) (Goldberg, J., concurring); Aguilar v. Texas, 378 U.S. 108, 110 (1964); Malloy v. Hogan, 378 U.S. 1, 7, 10-11 (1964); Ker v. California, 374 U.S. 23, 33 (1963); Mapp v. Ohio, 367 U.S. 643, 656 (1961).

47. Cohen v. Hurley, 366 U.S. 117, 158 (1961) (Brennan, J., dissenting).

48. Ohio ex rel. Eaton v. Price, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting); Brennan, The Bill of Rights and the States, 36 N.Y.U.L. Rev. 761, 777 (1961). The theory of selective incorporation has suffered severe criticism. The late Justice Harlan opposed both Justice Brennan's and Justice Black's incorporation theories on the grounds that they were unsupported historically and would not prevent, as their proponents argued, wide judicial interpretation of the very general guarantees of the Bill of Rights. See his separate opinions in Benton v. Maryland, 395 U.S. 784, 801 (1969); Klopfer v. North Carolina, 386 U.S. 213, 226 (1967); Griffin v. California, 380 U.S. 609, 615 (1965); Pointer v. Texas, 380 U.S. 400, 408 (1965); Malloy v. Hogan, 378 U.S. 1, 14 (1964); Ker v. California, 374 U.S. 23, 44 (1963); Mapp v. Ohio, 367 U.S. 643, 672 (1961). He instead advocated a flexible approach to due process adjudication based on the notion of fundamental fairness, which, in his view, comported with the original intention of the authors of the fourteenth amendment. Id. Although strongly opposed to the Black theory, Justice Harlan reserved his harshest criticism for the selective incorporation theory. Only recently, he stated: "Although I . . . fundamentally disagree with the total incorporation view of the Fourteenth Amendment, it seems to me that such a position does at least have the virtue, lacking in the Court's selective incorporation approach, of internal consistency: we look to the Bill of Rights, word for word, clause for clause, precedent for precedent because, it

B. *Incorporation of the Right of Trial by Jury*

In 1968, the Court utilized the selective incorporation theory in determining the place of the right to trial by jury in the American constitutional system. In *Duncan v. Louisiana*,[49] the Court, resisting earlier precedents to the contrary,[50] held that trial by jury was fundamental to the American scheme of justice and therefore applicable to the states through the fourteenth amendment. The Court did not, however, pursue the second step in the incorporation theory by applying the right to the states according to the same standards and with the same features which applied to the federal government. Louisiana had argued that if the Court were to incorporate the jury trial provision in due process, the states would then be required to guarantee the elements of the right which the Court

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is said, the men who wrote the Amendment wanted it that way." Duncan v. Louisiana, 391 U.S. 145, 176 (1968) (dissenting opinion). On several occasions, Justice Harlan indicated that the selective incorporation process posed dangers that federal rights long established would be diluted: since the theory required that once a right was held applicable to the states, it had to be applied by the same standards as had previously been held applicable to the federal government, the Court, in an effort to avoid imposing on the states standards which they could not meet, would be likely to "water down" previously clear federal standards. Williams v. Florida, 399 U.S. 78, 129-30 (1970); Chimel v. California, 395 U.S. 752, 769-70 (1969); Malloy v. Hogan, supra at 28; Ker v. California, supra at 45-46. If the Court were to retain the incorporation theory, the only alternative to a watering-down of federal rights would be for the amendments "to mean one thing for the States and something else for the Federal Government." Id. at 46.

Chief Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit argued that, however slim the historical support for the Black total incorporation theory, "it appears undisputed that the selective incorporation theory has none." Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 934 (1965) (footnote omitted). Prof. Henkin is in accord, and notes further that the decision in Palko itself precludes any notion that that case constitutes support for a theory of absorption. Henkin, supra note 43, at 77-78, 80-81. The theory holds that once a right is incorporated, it is incorporated as a whole, with all the facets the Court has given it with respect to the federal government. But why this must be so is not clear to these authorities. If the Court seeks to avoid an "impermissible subjective" judgment by this process of automatic incorporation of a right with all the attributes held applicable to the federal government, it can hardly succeed, since it must make judgments at least as subjective in determining in the first instance which of the rights found in the first ten amendments are applicable to the states. Friendly, supra at 936. The Court is desirous of achieving objectivity by reference to the "specifics" of the Bill of Rights as guides, but the fact is that the specifics are not very specific. Id. at 937. Incorporation begins with an analysis of the imperatives of ordered liberty and, therefore, "does not, and cannot, avoid reference to the uncertain, debatable, changeable touchstone of ordered liberty. And incorporation, by reference to ordered liberty, cannot claim that specific procedural provisions in the Bill of Rights are incorporated 'whole.'" Henkin, supra at 79.

49. 391 U.S. 145 (1968).

50. Irving v. Dowd, 366 U.S. 717, 721 (1961); Fay v. New York, 332 U.S. 261, 288 (1947); Palko v. Connecticut, 302 U.S. 319, 325 (1937); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Jordan v. Massachusetts, 225 U.S. 167, 176 (1912); Maxwell v. Dow, 176 U.S. 581, 595-96 (1900); Walker v. Sauvinet, 92 U.S. 90, 92 (1875).

had previously found were required of the federal government, in particular, the twelve-man jury and unanimity requirements.[51] The Court responded that the holding of *Duncan* would likely require little significant alterations in state criminal procedures. In any case, the earlier decisions of the Court construing the content of the jury trial right were, said the Court, always "subject to reconsideration." Most of the states, the Court noted, already provided the same elements.[52]

Justice Harlan dissented,[53] repeating his customary arguments[54] against the incorporation theory and questioning any possible application of past Court interpretations of the jury trial right to the states.[55] In his view, unanimity was not essential to liberty, and the twelve-man size of the jury was of "no significance except to mystics . . . ."[56] Furthermore, that the Court was willing to reconsider past sixth amendment cases indicated a major danger posed by the incorporation theory—that settled rights may be "watered down in the needless pursuit of uniformity."[57]

Mr. Justice Fortas took rather a unique position in a separate opinion.[58] Unlike Justice Harlan, he believed that the Court's due process theory and its decision applying the jury trial right to the states were constitutionally correct.[59] But like Harlan, he could not accept the notion "that the tail must go with the hide"—that is, that all the "ancillary rules" respecting the rights developed by the Court with reference to federal cases need be applied to the states in equal measure.[60] The Court could, in his view, depart from the rule that the same standards with respect to an incorporated right must apply to the states as to the federal government.[61] This would be particularly justifiable in the instant situa-

51. See notes 21-31 supra and accompanying text.

52. 391 U.S. at 158-59 n.30.

53. Id. at 171. "[E]ach State is compelled to conform its procedures to the requirements of the Federal Constitution. The Due Process Clause of the Fourteenth Amendment requires that those procedures be fundamentally fair in all respects. It does not, in my view, impose or encourage nationwide uniformity for its own sake; it does not command adherence to forms that happen to be old; and it does not impose on the States the rules that may be in force in the federal courts except where such rules are also found to be essential to basic fairness." Id. at 172.

54. See note 48 supra.

55. "The requirement of trial by jury in federal criminal cases has given rise to numerous subsidiary questions respecting the exact scope and content of the right. It surely cannot be that every answer the Court has given, or will give, to such a question is attributable to the Founders; or even that every rule announced carries equal conviction of this Court; still less can it be that every such subprinciple is equally fundamental to ordered liberty." 391 U.S. at 181.

56. Id. at 182.

57. Id. n.21; see note 48 supra.

58. Bloom v. Illinois, 391 U.S. 194, 211 (1968) (concurring opinion also applies to Duncan).

59. Id. at 211-12.

60. Id. at 213.

61. See notes 46-47 supra and accompanying text.

tion since the right to a jury trial differs from other rights incorporated in due process. It "is more than a principle of justice applicable to individual cases. It is a system of administration of the business of the State."[62] This position, it should be noted, would have permitted the retention of unanimity and the twelve-man jury as elements of the sixth amendment right of trial by jury in the federal courts.

IV. The Decline of the Twelve-Man Jury

With the decision in *Duncan*, states could no longer deny their citizens trial by jury in serious cases without violating the Due Process Clause of the fourteenth amendment. But whether due process also required that states provide those elements of trial by jury that the Court had found to be part of the sixth amendment right in federal cases, was entirely uncertain. In *Williams v. Florida*,[63] the Court undertook to answer that question as far as the element of jury size was concerned. In *Williams*, the defendant was convicted of robbery by a six-man jury after his request for a twelve-man jury had been denied. On appeal, the Supreme Court affirmed. The Court,[64] by Mr. Justice White, concluded that the peculiar size of the common law jury was merely an "historical accident, unrelated to the great purposes which gave rise to the jury in the first place."[65] The prior statements of the Court indicating that the sixth amendment required a twelve-man jury[66] were not persuasive, being only dicta[67] based upon "the easy assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution."[68] Justice White determined that the background of the sixth amendment gave no clear indication as to what Congress intended to signify by use of the word "jury," but that it was "more plausible" than not that Congress intended nothing by that term as far as a particular size was concerned.[69] In light of the historical ambiguity, it was necessary, said the Court, to turn to the function which the twelve-man jury performs in the present legal system—protection against governmental oppression. By this standard, the common-law jury size is not an indispensable component of the sixth amendment.[70] There is no significant reason for suppos-

62. 391 U.S. at 214. While the Court must determine the demands of due process, it is not, Justice Fortas argued, "bound slavishly to follow not only the Sixth Amendment but all of its bag and baggage . . . ." Id. at 213.

63. 399 U.S. 78 (1970).

64. Justice White's opinion on the jury size issue was accepted by Justice Brennan, Chief Justice Burger and Justices Black and Douglas. Justices Marshall, Stewart and Harlan disagreed. Justice Blackmun did not take part in the decision.

65. 399 U.S. at 89-90 (footnote omitted).

66. Patton v. United States, 281 U.S. 276, 288 (1930); Rassmussen v. United States, 197 U.S. 516, 519 (1905); Maxwell v. Dow, 176 U.S. 581, 586 (1900); Thompson v. Utah, 170 U.S. 343 (1898).

67. 399 U.S. at 90-92.

68. Id. at 92-93.

69. Id. at 92-99.

70. Id. at 99-100.

ing, the Court concluded, that the goals of the jury[71] are any less effectively furthered by a jury of fewer than twelve than by the common-law jury, "particularly if the requirement of unanimity is retained."[72] The states, therefore, though required to provide trial by jury, could permit juries of fewer than twelve persons in criminal cases without violating due process of law.

Justice Harlan, in a concurring opinion, vigorously dissented on the issue of jury size, characterizing the decision as one which, in seeking to allow states greater room for control of their own criminal systems, accomplished this end "by diluting constitutional protections within the federal system itself."[73] He took exception both to the Court's historical analysis and treatment of precedent,[74] terming the Court's approach as "hoisting the anchor to history."[75] The attempt of the Court to escape the effect of the erroneous selective incorporation doctrine,[76] he said, resulted "in a Sixth Amendment rule that could only be reached by standing the constitutional dialectic on its head."[77]

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71. "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." Id. at 100.

72. Id. (footnote omitted). The Court specifically did not consider the place of unanimity in jury trials. Id. n.46. The Court also rejected the notion that a twelve-man jury was necessary if the defendant was to get a jury that would be fairly and representatively composed. Id. at 101-02.

73. Id. at 118. The decision is a "constitutional renvoi." Id. at 122.

74. Id. at 122-29.

75. Id. at 126.

76. Id. at 129-38.

77. Id. at 119. Justice Black, concurring on the issue of jury size, responded to Justice Harlan's charge that the Court sought to escape the effects of its ruling in Duncan v. Louisiana, 391 U.S. 145 (1968). "Today's decision," he said, "is in no way attributable to any desire to dilute the Sixth Amendment in order more easily to apply it to the States, but follows solely as a necessary consequence of our duty to reexamine prior decisions to reach the correct constitutional meaning in each case." 399 U.S. at 107. Justices Marshall and Stewart also dissented from the decision in Williams. Marshall was of the view that the same standards of what constitutes trial by jury in federal courts should be applied to state courts; that the sixth amendment jury consisted of twelve; and that therefore Florida could not constitutionally try Williams with a jury composed of fewer than twelve. Id. at 116. Justice Stewart, on the other hand, agreed with Justice Harlan that the incorporation theory was erroneous. It required the Court "either to impose intolerable restrictions upon the constitutional sovereignty of the individual States in the administration of their own criminal law, or else intolerably to relax the explicit restrictions that the Framers actually did put upon the Federal Government in the administration of criminal justice." Id. at 143 (emphasis omitted).

The Williams decision may have ended the established federal twelve-man jury in criminal cases as a constitutional requirement. The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 168 (1970). Some commentators agreed with Justice Harlan that the decision represented an indication that the Court was willing to dilute federal rights, thereby preserving the incorporation scheme and relieving from the states the threatened imposition of higher standards for state jury trials. O'Brien, Juries and Incorporation in 1971, 1971 Wash.

V. UNANIMITY AND THE STATES

A. *Johnson v. Louisiana*

In the first of the recent cases, *Johnson v. Louisiana*,[78] the defendant urged reversal of his conviction by a nine-to-three verdict solely on the grounds that it violated the due process and equal protection provisions of the fourteenth amendment, since he had been convicted prior to the Court's decision in *Duncan v. Louisiana*.[79] Johnson's initial claim[80] was that due process demands a unanimous verdict in order to fully effect the constitutional requisite of proof beyond a reasonable doubt, which the state is required to furnish.[81] Justice White, for the Court, noted that past cases had never held unanimity to be required by due process. In fact, there existed dicta that stated precisely the opposite,[82] at the same time that other cases[83] indicated that proof beyond a reasonable doubt was a necessity in criminal cases. Apart from this coexistence, defendant's conviction, in spite of three dissents, raised "no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt."[84]

Defendant contended that nine jurors cannot properly return a verdict of guilty beyond a reasonable doubt when three jurors vote for acquittal. The defendant's argument, said the Court, rested on the assumption that the majority jurors will ignore the sincere doubts of the minority and vote for conviction even if full deliberation has not been had and bases for doubt exist, which if investigated and discussed, would convince some of the majority to alter their position. There are no grounds for believing, stated the Court, that some of the majority will simply ignore their responsibility and hurriedly vote to convict. Quite to the contrary, 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 . . . ."[85] In the opinion of the Court, there was no basis for "refusing to accept their decision as being, at least in their minds, beyond a rea-

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U.L.Q. 1; Comment, Constitutional Law—Defendant's Right to a Jury Trial—Is Six Enough?, 59 Chi. Kent. L. Rev. 996, 999 (1971). Some also criticized the decision because it effectively placed upon the defendant the burden of justifying the twelve-man jury rule, despite the precedents, when a proper approach would have required the state to justify its six-man jury procedure. The Supreme Court, supra, at 167; Comment, supra, at 996.

78. 406 U.S. 356 (1972).

79. 391 U.S. 145 (1968). Duncan was held not to be retroactively applicable. DeStefano v. Woods, 392 U.S. 631 (1968). The sixth amendment right to trial by jury was thus not involved in this case.

80. The defendant did not question the instructions to the jury on reasonable doubt or the sufficiency of the evidence. 406 U.S. at 359.

81. In re Winship, 397 U.S. 358, 363-64 (1970), noted in 39 Fordham L. Rev. 121 (1970).

82. 406 U.S. at 359, citing Jordan v. Massachusetts, 225 U.S. 167, 176 (1912); Maxwell v. Dow, 176 U.S. 581, 602 (1900).

83. Davis v. United States, 160 U.S. 469, 488 (1895); Coffin v. United States, 156 U.S. 432, 453-60 (1895).

84. 406 U.S. at 360.

85. Id. at 361.

sonable doubt."[86] Defendants will have to supply that basis before the Court will overrule legislative judgment dispensing with unanimity.

The defendant also argued that when a juror possesses a reasonable doubt after deliberation, the state has, for all intents and purposes, failed to prove guilt beyond a reasonable doubt. While it might be that a verdict would be more certain if unanimous, the disagreement of three jurors did not mean there was reasonable doubt. The present verdict, the Court noted, gained the acceptance of a "substantial majority" of nine, and the failure to attain unanimity did not signify a failure of proof on the part of Louisiana.[87] The Court referred to several established procedures[88] relating to reasonable doubt and jury verdicts which in its opinion, undercut the defendant's contention, principally the criminal practice in federal courts, which operate under the unanimity requirement and yet permit a retrial rather than an acquittal if the jury is unable to unanimously agree.[89] If, as the defendant argued, the dissent of a minority of jurors indicated that a reasonable doubt existed, then, said Justice White, a defendant should be acquitted for failure of proof, rather than retried. The Court therefore concluded that defendant's due process contentions must be rejected.[90]

Defendant Johnson also argued that the Louisiana statute violated the Equal Protection Clause by requiring unanimity in some cases but not in others. The Court dismissed this contention, stating that the Louisiana scheme of higher jury standards for graver offenses was a rational system, devoid of any discrimination.[91] Johnson's conviction was therefore affirmed.

Justice Stewart, speaking for Justices Marshall and Brennan, dissented on the ground that the fourteenth amendment alone "clearly requires that if a State purports to accord the right of trial by jury in a criminal case, then only a unanimous jury can return a constitutionally valid verdict."[92] Justice Stewart noted that the Court has declared that discrimination in criminal jury selection violates the fourteenth amendment.[93] But the plurality opinion, in his view, effectively abolished the one rule which effectuates this constitutional demand

86. Id.

87. Id. at 362.

88. Id. at 362-63. A jury will be upheld in finding a defendant guilty: even if the state of the evidence was such that the jury could justifiably have entertained a reasonable doubt [see United States v. Quarles, 387 F.2d 551, 554 (4th Cir. 1967)]; even if the trial judge disagreed with the jury's conclusion [see Takahashi v. United States, 143 F.2d 118, 122 (9th Cir. 1944)]; and even if the reviewing judges, on appeal, are closely divided on the sufficiency of the evidence [see United States v. Johnson, 433 F.2d 1160, 1166 (D.C. Cir. 1970)].

89. 406 U.S. at 363; see Downum v. United States, 372 U.S. 734, 735-36 (1963); Green v. United States, 355 U.S. 184, 188 (1957); Keerl v. Montana, 213 U.S. 135, 137-38 (1909); Dreyer v. Illinois, 187 U.S. 71, 83-86 (1902); Selvester v. United States, 170 U.S. 262 (1898); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

90. 406 U.S. at 363.

91. Id. at 363-65.

92. Id. at 397.

93. Id.; Carter v. Jury Comm., 396 U.S. 320 (1970); Patton v. Mississippi, 332 U.S. 463 (1947); Strauder v. West Virginia, 100 U.S. 303 (1880).

by insuring that majority decisions could not be reached without consideration of dissenting views.[94]

B. *Apodaca v. Oregon*

In the second of the cases, *Apodaca v. Oregon*,[95] the defendants contended that their convictions by eleven-to-one and ten-to-two verdicts violated the right of trial by jury secured by the sixth amendment as applied to the states by *Duncan v. Louisiana*.[96] Following its method in *Williams v. Florida*,[97] the Court, by Mr. Justice White, recognized the existence of unanimity as a feature of the common-law jury,[98] but pointed out that the Court could not make the "easy assumption" that this feature was preserved in the sixth amendment. The Court reexamined the history of the Madison proposal, predecessor of the present sixth amendment,[99] and concluded that it offered no clear support for any position on unanimity as a part of the amendment.[100] Mr. Justice White stated that the lack of historical evidence as to the meaning of "jury" in the sixth amendment required that the Court "turn to other than purely historical considerations."[101]

Again following a functional analysis, the Court restated that the purpose of the jury is to protect against governmental oppression.[102] All that is necessary

94. 406 U.S. at 397. Justice Stewart noted that the decision will erode public confidence in the criminal system since now "a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines." Id. at 398. The Court's decision also conflicts with prior holdings of the Court relating to the jury. See, e.g., Groppi v. Wisconsin, 400 U.S. 505 (1971) (Constitution requires that alteration of venue be available); Sheppard v. Maxwell, 384 U.S. 333 (1966) (Constitution requires protection for defendant against improper press coverage and influencing by court officers); Bruton v. United States, 391 U.S. 123 (1968) (though jurors presumably obey court instructions, certain information must not be revealed to the jury at all). The Court's decision largely destroys "the simple and effective method endorsed by centuries of experience and history to combat the injuries to the fair administration of justice that can be inflicted by community passion and prejudice." 406 U.S. at 399. The decision also leaves open the question of the constitutional minimum in jury verdicts: a vote of eight-to-four or seven-to-five may be acceptable under the rationale of this case. Id. at 397.

95. 406 U.S. 404 (1972).

96. 391 U.S. 145 (1968).

97. 399 U.S. 78 (1970). There the Court examined the twelve-man jury requirement of common law, and the intention of the draftsmen of the sixth amendment with relation to the requirement. Concluding that the evidence was too scanty to draw a firm conclusion as to this intention, the Court undertook a functional analysis of the common-law jury size, concluding that it was not essential to a sixth amendment trial by jury. See notes 63-77 supra and accompanying text.

98. See notes 4-12 supra and accompanying text.

99. See notes 18-20 supra and accompanying text.

100. 406 U.S. at 409-10. The Court did state, as it had in Williams, that the background of the sixth amendment suggested that it was "more plausible" that the deletion of the specific references to unanimity in the Madison proposal was intended to mean that unanimity was not required. Id. at 410.

101. Id. at 410.

102. See note 71 supra.

to achieve this purpose is that the jury consist of a "group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate . . . ."[103] Though unanimity will produce more hung juries, it is no more essential to the purpose of the jury than nonunanimous verdicts.

The Court then turned to defendants' argument that unanimity is necessary to achieve *other* purposes essential to the jury system. The chief argument was that unanimity is essential in effectuating the standard of reasonable doubt required by the Due Process Clause. This standard, the Court noted, developed apart from and later than trial by jury and unanimity.[104] Although the reasonable doubt rule is constitutionally required,[105] defendants' argument that the sixth amendment demands unanimity in order to give substance to the standard of proof beyond a reasonable doubt must fail because that amendment does not require such proof. Rather, it is due process of law which compels adherence to such a standard,[106] and an argument for unanimity based upon the need to effectuate this due process requisite was rejected in *Johnson v. Louisiana*.[107]

Defendants' final contention was that unanimity is necessary to give effect to the requirement that juries be representative of the community,[108] since lack of unanimity permits the majority to ignore minority members of the community. The Court rejected this argument, stating that all that the Constitution forbids is systematic exclusion; there is no rule, as defendants assumed, that requires that each voice in the community be represented on every jury. Defendants also erred in assuming that minority viewpoints will be inadequately represented by minority groups if they may be outvoted. Minority jurors can and will function as such by their presence.[109] The Court could find "no proof . . . that a majority will disregard its instructions and cast its votes for guilt or innocence based on prejudice rather than the evidence."[110] The convictions were therefore affirmed.

Mr. Justice Powell filed a lengthy concurring opinion in *Johnson* and in *Apodaca*. He was unable to accept a "major premise" of the rationale that the jury trial applied by the fourteenth amendment to the states must be "identical in every detail" to the jury trial required by the sixth amendment in federal court.[111] He also disagreed with the plurality's conclusion that the content of

103. 406 U.S. at 410-11.

104. 406 U.S. at 411.

105. In re Winship, 397 U.S. 358, 363-64 (1970).

106. 406 U.S. at 412.

107. 406 U.S. 356 (1972).

108. See note 93 supra and accompanying text.

109. 406 U.S. at 413.

110. Id. at 413-14. Justice Blackmun, in a single opinion, concurred in both cases, although he expressed personal disfavor for the state policies involved. He did note, however, that a state system permitting a seven-to-five verdict rather than the 75% minimum involved in Johnson would cause him "great difficulty." Id. at 366. Justice Stewart again dissented, preferring to follow "settled Sixth Amendment precedents." Id. at 415.

111. Id. at 369 (concurring opinion applies to both cases). Justice Powell agreed with Justice Fortas' opinion in Duncan v. Louisiana, 391 U.S. 145, 213 (1968). See notes 58-62 supra and accompanying text.

the sixth amendment jury trial right did not include unanimity. Unanimity, in his view, is required in federal trials, not because it is essential to the function or purpose of the jury, "but because that result is mandated by history."[112] The incorporation process which the Court followed in reaching its decision "derogates principles of federalism" by preventing the states from experimenting with variations in their criminal systems,[113] and the Court's adherence to this process, coupled with an unwillingness to impose "unnecessarily rigid" requirements on the states, results in "the dilution of federal rights that were, until these decisions, never seriously questioned."[114] Giving due weight to the significance of unanimity as a feature of federal trials, and entertaining a putatively more appropriate view of due process than the incorporationists, Justice Powell nonetheless agreed with the plurality, on the same grounds—that a nonunanimous verdict in a state court is not violative of due process.[115]

Mr. Justice Douglas dissented in both cases. The "anomalous" result of the Court's decisions, he declared, is that unanimity is required in federal courts but may be dispensed with in state courts, even though jury trial in both systems derives from the sixth amendment.[116] Similarly, he stated, a "man's property may only be taken away by a unanimous jury vote, yet he can be stripped of his liberty by a lesser standard."[117] Justice Douglas examined the decisions of the Court which required an incorporated right to be applied in the same manner in state and federal courts,[118] and concluded that the same rule should be followed in the present case. Any position which seeks to permit experimentation with the "basic rights of people" should not be constitutionally permissible.[119] The Court's decision, in his opinion, allows the majority to ignore the views

112. 406 U.S. at 370 (footnote omitted). On this point, Justice Powell concurred in the views expressed by Justice Harlan in Williams v. Florida, 399 U.S. 78, 117 (1970). See notes 73-77 supra and accompanying text.

113. 406 U.S. at 375. Powell relied upon Justice Brandeis' statement that the states ought to be permitted space to become "laboratories" for the improvement of our social system (New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 309-11 (1932) (Brandeis, J., dissenting)). 406 U.S. at 376 n.16.

114. 406 U.S. 375. Justice Powell agreed with Justice Harlan that the position is "constitutional schizophrenia." Williams v. Florida, 399 U.S. 78, 136 (1970) (Harlan, J., dissenting). Powell noted that his position does not require that he take issue with past decisions arrived at by the incorporation process. 406 U.S. at 375-76 n.15.

115. 406 U.S. at 380.

116. Id. at 383 (dissenting opinion applies to both cases).

117. Id. The "anomaly" appears to be in error. As Douglas noted, the Court has held unanimity to be a requirement of civil jury trial. Springville v. Thomas, 166 U.S. 707, 708 (1897); American Publishing Co. v. Fisher, 166 U.S. 464, 467-68 (1897). The Court has not, however, incorporated this right in due process. Thus, there is no precedent which requires unanimity in state civil trials by jury, and the present decisions indicate there never will be. A man can lose both his property and his liberty by a nonunanimous verdict in state courts, but, in each instance, only by a unanimous verdict in federal courts.

118. See notes 43-48 supra and accompanying text.

119. 406 U.S. at 387. Such a view also permits the nine members of the Court to become a "super-legislative body." Id. at 388.

of a minority and to cut short the process of deliberation. It removes, to a large degree, the possibility that minority jurors may influence the majority to reach a compromise verdict. Also, it permits the states to obtain convictions in cases which previously would have led to deadlocks, and makes it less likely that convictions will be beyond a reasonable doubt.[120] Finally, Justice Douglas asked whether, now that twelve-man juries are no longer required,[121] the Court might not approve a three-to-two or two-to-one verdict.

Justice Marshall, dissenting, suggested that the decision by the Court "cuts the heart out" of the right to trial by jury and the requirement of proof beyond a reasonable doubt.[122] The Court's rationale that if the misgivings of dissenters constituted reasonable doubt then acquittal rather than retrial would follow was, in his view, a "complete non sequitur." The question of what occurs if a prosecutor fails to prove guilt beyond a reasonable doubt is not answered by reference to that standard, but by the standards relating to the protection against double jeopardy.[123] Justice Marshall said that the problem of restricting the influence of minorities extends beyond minority groups as such. The ignored dissenter, he stated, "may be a spokesman, not for any minority viewpoint, but simply for himself—and that, in my view, is enough."[124]

C. *The Safeguard of Unanimity*

The plurality in *Apodaca v. Oregon*[125] clearly departs from the historical understanding of the right to trial by jury. The history of the sixth amendment,[126] at the least, permits the reasonable conclusion that Congress intended to embrace within the terms of that amendment the venerable common-law feature of unanimity. Such was the opinion of the Court, stated in numerous cases over many years.[127] As Justice Powell pointed out,[128] the unanimity rule was simply never questioned. Giving the facts the most limited construction possible, the Court, in ruling as it did, arguably violated the intent of the authors of the sixth amendment, and unquestionably contradicted the opinions of past Courts as to what that amendment required. In defending the identical process of construction in *Williams v. Florida*,[129] Justice Black said that the Court there was merely pursuing its duty "to re-examine prior decisions to reach the correct constitutional meaning in each case."[130] But, as in that case, such protestations fail to blunt the charge that the Court was compelled to dilute previously un-

120. Id. at 391.

121. Williams v. Florida, 399 U.S. 78 (1970).

122. 406 U.S. at 399-400 (dissenting opinion applies to both cases).

123. Id. at 401.

124. Id. at 403. Justice Brennan also dissented in a separate opinion applicable to both cases, urging adherence to the incorporationist scheme. Id. at 395.

125. 406 U.S. 404 (1972).

126. See notes 18-20 supra and accompanying text.

127. See notes 21-31 supra and accompanying text.

128. 406 U.S. at 375.

129. 399 U.S. 78 (1970).

130. Id. at 107.

questioned federal rights in order to avoid imposing upon the states, by means of the incorporation process, burdens they would find difficult to bear.[131] The Court had held that the states were bound to provide trial by jury in criminal cases, since the Due Process Clause incorporated the jury trial provision of the sixth amendment.[132] The Court had also held that the jury trial provision contemplated unanimity in jury verdicts.[133] The Court could thus only apply unanimity to the states, by either following the suggestion of Justice Fortas in *Duncan*[134] that the right meant one thing for the states and another for the federal government, or by reversing the prior holdings construing the content of the right. The dilemma facing the members of the plurality was either to do violence to history and tradition in order to avoid burdening the states, or to adhere to the demands of the past while constraining state criminal procedures. The members of the plurality have, in the past, taken issue with the decisions of the Court because either one of these principles was, in their view, being violated.[135] The decision reversing the prior holdings as to the meaning of the right runs counter to history and lacks real justification. Since the history of the amendment is somewhat ambiguous, the Court might have been free to re-examine the rule. But the precedents of seventy years have removed that ambiguity, and the Court offered no historical justification for reversing that settled understanding. A proper philosophy of judicial review[136] would, it is contended, adhere to the

131. The charge was made by Justice Harlan (see note 48 supra) and repeated by Justice Powell. 406 U.S. at 375.

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

133. See notes 21-31 supra and accompanying text.

134. See notes 58-62 supra and accompanying text.

135. For example, see the dissents of the members of the plurality in Furman v. Georgia, 408 U.S. 238 (1972) (Chief Justice Burger, and Justices Blackmun and Rhenquist, dissenting); Miranda v. Arizona, 384 U.S. 436, 526 (1966) (White, J., dissenting); Escobedo v. Illinois, 378 U.S. 478, 495 (1964) (White, J., dissenting). One eminent student of the Court summarized the conflicting principles confronting the Court by describing the two basic constitutional viewpoints. "[T]here is . . . a group that believes change can come only through constitutional amendment (or revolution?). Their demand is for rigidity, for adherence to what is typically but inaccurately referred to as the 'intent of the Framers' . . . . On the other side are those who would recognize no institutional obligations to continuity. . . . Their call is for flexibility, for the adaptation of the 'central meanings' . . . to the times in which they are being applied . . . ." Kurland, 1970 Term: Notes on the Emergence of the Burger Court, 1971 Sup. Ct. Rev. 265, 266. These distinct positions are, in the recent cases, not the tenets of certain general constitutional philosophies so much as they are warring alternatives of principle between which the Court must choose.

136. The nature and scope of judicial review have been the subject of continuing controversy since the decision in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Compare L. Hand, The Bill of Rights (1958), with Black, The Bill of Rights, 35 N.Y.U.L. Rev. 865 (1960); Choper, On the Warren Court and Judicial Review, 17 Cath. U.L. Rev. 20 (1967); Pye, The Warren Court and Criminal Procedure, 67 Mich. L. Rev. 249, 256 (1968). Justice Cardozo said that in many areas of the law, "history will tend to give direction to development." B. Cardozo, The Nature of the Judicial Process 65 (1921). Even so, "there are times when we must bend symmetry, ignore history and sacrifice

position of Justice Holmes that "imitation of the past, until we have a clear reason for change, no more needs justification than appetite."[137] As most states embody the unanimity rule in their criminal systems, the Court, as it hinted previously,[138] would have caused little practical disruption to state procedures by holding unanimity to be a requisite of due process. Thus, the Court would more clearly have adhered to the "highest judicial duty,"—"to recognize the limits on judicial power"[139]—if it had followed precedent instead of upsetting a settled rule in order to avoid what could only be a minor disruption of state systems.

Justice Powell would have had the Court depart from the symmetry of the incorporation scheme, although he would not have affected prior cases which established that scheme. The chief grounds for not demanding unanimity in state courts though requiring it in federal courts were, in his view, that lack of unanimity nonetheless insured the purpose of the jury and that federalism demanded that states be allowed to function as laboratories of the criminal process. The majority made no effort to refute Justice Powell's argument, thereby implicitly adhering to the incorporation doctrine.[140] Justice Douglas replied that the settled theory of the Court forbids applying watered-down versions of federal rights to the states, and therefore Justice Powell's argument could not be accepted. Justice Douglas did not attempt to contradict the notion that federalism is essential and that federalism permitted the states to engage in social experimentation. Since these arguments had arisen in prior cases and had been rejected there, he apparently felt no need to say more than that experimentation with basic rights is impermissible. It is simple theory that "state legislatures have constitutional authority to experiment with new techniques . . . so long as specific constitutional prohibitions are not violated . . . ."[141] It is

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custom in the pursuit of other and larger ends." Id.; accord, Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 443 (1934). Basic rights ought not to be rigidly static since it is fundamental to a free society that it "advance in its standards of what is deemed reasonable and right." Wolf v. Colorado, 338 U.S. 25, 27 (1949). A noted scholar concluded after an examination of the process of judicial review: "[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?" Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 15 (1959).

137. Holmes, Holdsworth's English Law, in Collected Legal Papers 285, 290 (1920).

138. Duncan v. Louisiana, 391 U.S. 145, 158-59 n.30 (1968).

139. Furman v. Georgia, 408 U.S. 238, 405 (1972) (Burger, Ch. J., dissenting).

140. The plurality applied the jury trial right to the states according to the standards of the sixth amendment, as the incorporation theory requires. It merely revised the standards of what constitutes that right.

141. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

not, however, sufficient merely to say, as Justice Douglas did, that states cannot "experiment with rights guaranteed by the Bill of Rights."[142] The very question before the Court was "how far [do] these safeguards extend."[143] Although, as Justice Douglas stated, the incorporation theory has been settled by past cases for almost all the other rights protected by the first ten amendments, it may be possible to distinguish the right to trial by jury from those other rights and to follow a different approach. As Justice Fortas contended,[144] trial by jury is more than an individual right. It is a feature of state government, a part of the structure which administers the business of the states. Because of this difference in nature, it may be argued that different treatment is necessary. Such a result would require that trial by jury "mean one thing for the States and something else for the Federal Government."[145] Unanimity is of such importance to jury trial that it can be called fundamental, and therefore applicable to the states. If that is so, then it is difficult to see why a distinction between the right to jury trial and other rights would justify the failure to apply unanimity to the states. Nonetheless, Justice Douglas would have presented a more convincing line of reasoning had he noted and refuted in detail the argument that a distinction in the nature of the right justified a departure from the incorporation theory.

Setting aside the problem of a possible departure from the symmetry of the incorporation approach, the major question facing the Court was whether unanimity occupies so important a place in the process of trial by jury that it should be required of the states. Five members of the Court were of the view that it does not. As the dissenters point out, the jury must be fairly drawn from the community.[146] The decision of the Court which allowed the states to reduce the size of juries[147] had the effect of reducing the likelihood that minority viewpoints would be represented on future juries. Now, since unanimity is no longer required, states may permit six-man juries with only the agreement of four jurors needed for conviction. Such a jury will rarely allow for effective representation of minority views.[148] Even in a full twelve-man jury, the ability of a minority

142. 406 U.S. at 388.

143. Friendly, supra note 48, at 955.

144. See notes 58-62 supra and accompanying text.

145. Ker v. California, 374 U.S. 23, 46 (1963) (Harlan, J., dissenting).

146. In a recent case, the Court found that the defendant had standing to attack the exclusion from grand and petit juries of blacks in violation of federal constitutional and statutory requirements, regardless of any showing of actual prejudice to him, even though he was not a member of the excluded group. Peters v. Kiff, 407 U.S. 493 (1972). This is so since, whenever "any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." Id. at 503. Exclusion "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." Id. at 503-04 (footnote omitted). See also United States ex rel. Toth v. Quarles, 350 U.S. 11, 18 (1955).

147. Williams v. Florida, 399 U.S. 78 (1970).

148. See Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710, 723 (1971). The abolition of the unanimity requirement is

to influence decision is lessened. The Court was of the opinion that 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 . . . ."[149] This conclusion is no more justified than one which holds that jurors will from time to time act irrationally or with prejudice. The former view results in the relaxation of a wise safeguard for the effective representation of viewpoints,[150] and an assurance that such viewpoints will be considered by the majority.[151] Such a safety device is important in all cases, but especially so in controversial or outrageous cases, wherein the jury is most likely to function improperly.[152]

Those who have opposed unanimity have used as one of their major arguments that such a rule permits one merely obstinate juror to frustrate justice,[153] and the Court obliquely referred to this fear in support of its conclusion.[154] But "obstinacy," which might occur even in juries permitted to reach majority verdicts, may result from sincere convictions by the minority.[155] Professors Kalven and Zeisel, after an examination of cases in which dissent by one or two jurors resulted in a deadlock, concluded that mere obstinacy or irrationality was not the basis for such dissent. In their view, "hung juries, whatever the final vote, are largely the product of difficulties in the case."[156] Furthermore, a change from the unanimity requirement may result in a higher conviction rate than would

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merely another way of reducing the size of the jury, but it is "reduction with a vengeance . . . ." Id. at 722.

149. Johnson v. Louisiana, 406 U.S. 356, 361 (1972).

150. Note, Trial by Jury in Criminal Cases, 69 Colum. L. Rev. 419, 425-26 (1969).

151. The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 169-70 (1970). See also Kaufman, Harbingers of Jury Reform, 58 A.B.A.J. 695, 699 (1972).

152. Justice Brennan, in dissent, felt that the plurality opinion, in reaching its conclusion that juries would not act improperly, "simply ignores reality," at least with respect to heated cases. 406 U.S. at 396.

153. Weinstein, Trial by Jury and Unanimous Verdicts, 69 U.S.L. Rev. 513, 523 (1935). This fear was largely the basis for the repeal of unanimity by the English. Kalven & Zeisel, The American Jury: Notes for an English Controversy, 48 Chi. Bar Record 195 (1967). It should be noted that England lacks an effective voir dire to screen out prior to commencement of trial persons who would likely be obstinate or corrupt. Samuels, Criminal Justice Act, 31 Mod. L. Rev. 16, 25 (1968). "The very nature of the unanimity rule is that it leaves the jury vulnerable to the bribing of a single juror. The jury has had this weakness, if it be one, for some centuries now and it seems a little late in the day suddenly to notice it." Kalven & Zeisel, supra, at 199.

154. Johnson v. Louisiana, 406 U.S. 356, 361-62 (1972).

155. Barnett, The Jury's Agreement—Ideal and Real, 20 Ore. L. Rev. 189, 193 (1941). Obstinacy may be less of a danger in practice than a ready willingness to give in.

156. Kalven & Zeisel, supra note 153, at 201. Juries are hung in 5.6% of the cases, and, of those, 42% are due to the dissent of one or two jurors. That is, in two out of one hundred cases will a jury hang because of this kind of dissent. Abolishing unanimity then would transform only these two hung cases into verdict cases. A majority verdict system would still produce deadlocks in 3.1% of the cases. Id. at 200.

In cases where deadlock occurs because of the votes of one or two jurors, the study indicated that such jurors originally had strong support from other jurors for their position. The holdout juror needed such support to withstand the pressure of the majority. Id. at 201.

be anticipated. Such a change, in fact, occurred in Oregon.[157] The reason for such an increase is apparently that, as the dissenters feared, "the jury simply stops deliberating when it reaches the requisite majority."[158] Abolishing unanimity will also have the effect of reducing public confidence in the jury and in the accuracy of its verdict.[159]

The dissenters rightly questioned the decisions because of their effects on the values which the standard of proof beyond a reasonable doubt is designed to secure. Reasonable doubt refers to that state of the case against the accused which, "after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."[160] It is merely a standard as to the quantum of evidence necessary for conviction, "the measure of persuasion" to which the prosecutor must bring the jurors on each element of the crime.[161] Since "the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors."[162] The basis for this refusal is a "determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[163]

It has been argued that the jurors together constitute one "mind" which must have no reasonable doubt; and that if a single juror disagrees, the prosecutor has failed to carry his burden, thus requiring that the defendant be released,[164] or that the matter then be dealt with according to double jeopardy standards.[165] But such a view is not the sole ground upon which unanimity can be supported.

Unanimity arose, as the Court noted, prior to and apart from the standard of proof beyond a reasonable doubt,[166] but that does not mean that the two have not since become interrelated. Even if, as the plurality holds, reasonable doubt

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"[T]here is nothing in the hung jury phenomenon, even when a small minority finally deadlocks the jury, which compels . . . the view that hung juries are caused by a lone corrupt juror holding out against the objective weight of the evidence." Id.

157. Changing the unanimity rule should cause verdicts to occur in the two percent of the cases in which one or two jurors presently cause deadlocks. In Oregon, however, the number of nonunanimous verdicts rose sharply, by about twenty-five percent. Id. at 201.

158. Id.

159. Justice Story long ago expressed such a view. Hogan, Joseph Story on Juries, 37 Ore. L. Rev. 234, 254 (1958); see Kalven & Zeisel, supra note 153, at 201.

160. Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850).

161. C. McCormick, Evidence § 321, at 682 (1954).

162. Leland v. Oregon, 343 U.S. 790, 802 (1952) (Frankfurter, J., dissenting).

163. In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

164. See Comment, Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt, 21 U. Chi. L. Rev. 438, 442 (1954).

165. 406 U.S. at 401 (Marshall, J., dissenting).

166. Morano, Retreat from Unanimity and Reasonable Doubt in Criminal Cases, 1969 U. Tol. L. Rev. 337, 339-41; Comment, Criminal Procedure—Unanimous Criminal Verdicts and Proof Beyond a Reasonable Doubt, 112 U. Pa. L. Rev. 769, 771-72 (1964).

is satisfied when the requisite number of jurors have been convinced by the proper measure of evidence, reasonable doubt is at the same time weakened as a legal device to protect against irrational or prejudicial convictions of innocent persons. The Court may be correct in saying that the measure of persuasion remains the same for each juror in a nonunanimous verdict, but such a statement alone conceals the effect of what has been done. The requisite number of jurors who must each be convinced to this level of persuasion is lowered. Reasonable doubt may be preserved, but common sense indicates that a substantial change in the jury has occurred. Convictions are more difficult and errors less likely if each member of the jury must be convinced beyond a reasonable doubt, than if some lesser portion of the jury must be so convinced. If only one out of six jurors need be convinced beyond a reasonable doubt, the standard is preserved, but the alteration in the protection which the standard seeks to maintain is unquestionably significant. The Court, it is argued, ought to have recognized that unanimity and reasonable doubt are interrelated. Together, they serve to require the highest degree of certainty possible, which is only fair in order to avoid the conviction of the innocent or the liberation of the guilty.[167] To hold as the Court has, frustrates the purpose of the reasonable doubt rule by lessening to an extraordinary degree the burden of persuasion on the prosecutor and increasing the possibility of error in jury verdicts.

VI. Conclusion

When all of the factors are considered together—representation of dissenting views, full deliberation of all jurors on the evidence, maintenance of public confidence in jury decisions, and conviction of accused persons only on the clearest and most certain of grounds—the decisions of the Court appear to be in error in permitting states to allow nonunanimous verdicts. The breadth of the decision in *Apodaca* is such that, by its reasoning, unanimity may soon be discarded in federal courts as well.[168] In any case, exactly what minimum percentage of jurors is required to satisfy the demands of due process in state trials remains unclear. The Court referred to a substantial majority[169] as being necessary; but what the limit is, particularly in a jury composed of fewer than twelve, must await the resolution of future cases.[170] However, it is difficult to see how other than an arbitrary line can be drawn to settle the matter.

Over the strong objections of Justice Powell, the Court in *Apodaca* reaffirmed without discussion the theory of selective incorporation. Justice Douglas and the other dissenters took issue with Justice Powell's position. They did not, however, argue the merits of the application of the theory in this case, assuming instead that that matter had been effectively settled by past cases. Justice Powell's position deserved a clearer and more deeply reasoned response than it elicited.

167. Morano, supra note 166, at 342; see note 25 supra.

168. Justices Douglas, Brennan, Stewart, Marshall, and Powell, a majority, opposed such a position. The threat extends to both federal civil and criminal juries.

169. Johnson v. Louisiana, 406 U.S. 356, 362 (1972).

170. Justices Stewart and Douglas both questioned the wisdom of the decisions in light of these resultant problems. See note 94 and text accompanying note 121 supra.

Finally, in a time of widespread concern with the epidemic of crime in America, states will be encouraged by these decisions to abolish unanimity in the vague and illusory hope that they might somehow strike at the problem.[171] But to obtain a higher rate of conviction by dispensing with an ancient and effective safeguard against irrationality, prejudice, misunderstanding or mistake in jury verdicts would hardly appear to be a proper or effective way in which to deal with the problem of crime. Jurors certainly are as susceptible to occasional irrationality and vindictiveness as other men, but because of their unique power and awesome duty, they must not be permitted to allow these failings to determine their decisions. Unanimity serves to insure that such will not occur. To remove this source of protection for all the members of society, each of whom might one day be accused of crime, and to do so in the name of social well-being, seems a peculiarly unwise and self-defeating course upon which to embark. It may be hoped that states will resist the temptation which these cases offer, and that a future Court will refuse to follow a similar approach and thereby preserve for defendants in the federal courts the important safeguard of unanimity.

171. See N.Y. Times, June 30, 1972, at 14, col. 8. England, which originated the unanimity rule centuries ago, recently abolished it. Criminal Justice Act 1967, § 13. See note 153 supra.