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CRIMINAL LAW COMMENTS AND ABSTRACTS

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LESS THAN UNANIMOUS JURY VERDICTS IN CRIMINAL TRIALS

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During the year 1965, forty percent of the defendants who pled not guilty to criminal charges¹ in England were acquitted.² "Quite a lot of them", according to the Home Secretary of England, were known to be guilty "by everyone connected with the case"; and among those who "got off", some were the "centres of networks of criminal activities".³

In offering an explanation for England's high percentage of acquittals, the Home Secretary, Mr. Roy Jenkins, expressed the view that it was through "the power to intimidate or corrupt⁴ jurors".⁵ He proposed, as a remedy, that less than unanimous jury verdicts be made permissible. A bill to that effect was introduced in Parliament on November 29, 1966. In article ten, it provides that in a case where there are not less than eleven jurors,⁶ ten may render a valid verdict; and, if the jury consists of ten persons, nine may agree on the verdict. The bill also provides that:

A court shall not accept a majority verdict

¹ 40% of all persons who were arraigned on criminal charges pled not guilty, thus, 16% of all those arraigned were acquitted.

² Devlin, *Should The Jury System Be Reformed?*, THE LISTENER (London), October 13, 1966, p. 523, col. 1.

³ Address by Mr. Roy Jenkins to the House of Commons, August 8, 1966.

⁴ Bribery of English jurors is said to be practiced frequently. In one recent case, one juror had to be replaced because the defendants' associates were seen approaching the jurors. Soon thereafter a replacement juror was discharged because the police received information that he had been offered a bribe and was considering it. On the same day another juror reported that he was offered 600 pounds to bring in a verdict favorable to the accused. Two weeks later another juror was offered a bribe of 100 pounds. Of the five defendants accused of conspiring to rob a bank, only one, the bank messenger, was convicted. THE TIMES (London), December 13, 1966.

⁵ Address by Mr. Roy Jenkins, *supra* note 3.

⁶ The jury in English criminal trials consists of twelve jurors, but if a member of the jury discontinues (due to illness, for example), the trial may, with the defendant's consent, continue with a lesser number of jurors. Address by Mr. Buck to the House of Commons, August 8, 1966.

unless it appears to the court that the jury have had not less than two hours for deliberation or such longer period as the court thinks reasonable having regard to the nature and complexity of the case.⁷

An analysis of this proposal may be more meaningful if we pause for a brief discussion of the English history of trial by jury.

Although the origin of the trial jury is not clear, it did develop, in part, from the practice of inquisition which the Normans imposed upon the English population during the Norman Conquest.⁸ The King appointed certain persons to officially witness all transactions of a commercial nature. These persons would then be called upon to swear to the facts if a dispute related to the transaction arose at a later date.⁹ A modified version of this practice was first introduced into criminal proceedings late in the twelfth century.¹⁰ The Crown appointed a number of men from the neighborhood to state under oath whether there were any persons in the locality whom they suspected had committed a crime. Those so accused would then be tried.¹¹

The traditional forms of trial in criminal cases were trial by compurgation,¹² ordeal¹³ or battle.¹⁴

⁷ Letter from Peter English, Lecturer in Criminal Law at the University of Exeter, to the *Journal of Criminal Law, Criminology and Police Science*, December 6, 1966.

⁸ DEVLIN, TRIAL BY JURY 5 (8th ser. 1956); MOSCHZIKER, TRIAL BY JURY §27(a) (2d ed. 1930); Inbau, *The Concept of "Fair Hearing" in Anglo-American Law*, 31 TUL. L. REV. 67-68 (1956).

⁹ MOSCHZIKER, *supra* note 8 at §40-41.

¹⁰ The first recorded instance of the use of this device was in a case in which the criminal was such a powerful individual that no person would come forward and accuse him. Wells, *The Origin of the Petty Jury*, 27 L.Q.R. 347 (1911).

¹¹ FORSYTHE, HISTORY OF TRIAL BY JURY 102-03 (1875).

¹² In this form of trial, the jury consisted of twelve character witnesses who testified to the credibility of the oath of one or the other party to the litigation. MOSCHZIKER, *supra* note 8 at §43-44. If the jurors did not agree, more jurors were added until twelve voted for one litigant. The first party to receive twelve votes won

However, one could not claim a right to trial by battle unless he was accused by an individual rather than a compurgatory jury.¹⁵ In 1166, the Assize of Clarendon allowed presentment¹⁶ by compurgation, but restricted criminal trials to trial by ordeal.¹⁷ Then, in 1215, Pope Innocence III prohibited trial by ordeal in Roman Catholic nations,¹⁸ thus leaving one accused by presentment without a mode of trial to vindicate himself.

It was left to the judges to find a new method of trial for presented defendants. The judges responded by bringing in the presentment jurors to be the triers of fact. The compurgators were taken to know the facts, and if they did not, they were replaced by persons who did.¹⁹ By the reign of Edward the Third the trial jury and the grand jury were separated, but the verdict continued to be based upon the private knowledge of jurors who were witnesses as well as fact-finders.²⁰ As time went on, the trial jury began to lose its characteristic of being a testifier to the facts, and various rules of evidence were evolved to constrain the jurors to find their verdict solely on the evidence produced in court.²¹ With this innovation²² the trial jury arrived at the stage of evolution at which we see it today.

The English proposal, if effectuated, will change a longstanding element of the Anglo-American

trial jury system.²³ English common law at present requires that there be twelve²⁴ men on a criminal jury, and that all twelve agree upon the guilt of the defendant.²⁵

Various reasons have been put forth to explain why the unanimous verdict requirement arose. One theory is that there were few legal and procedural rules²⁶ to insure the defendant a fair trial before an impartial panel of jurors, thus the practice of requiring unanimity of the jurors to convict the defendant was initiated to compensate for these shortcomings.²⁷ Another theory suggests that the Crown often exerted great pressure to convict the accused. To shift the pressure from themselves, the judges²⁸ originated the unanimity rule.²⁹ A third theory recognizes the extremely cruel and harsh penalties that the early law imposed upon one convicted of a felony, and attributes the origin of the rule to the desire of the judges to "give the defendant a break".³⁰

Probably none of these explanations³¹ is the correct one. In trial by compurgation twelve jurors

²³ The unanimous jury verdict became mandatory in England in 1367. 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 318 (7th ed. 1956).

²⁴ The number of jurors, twelve was adopted from earlier forms of trial utilized by both the Saxons and the Normans. DEVLIN, *supra* note 8 at 8; FORSYTHE, *supra* note 11 at 199. Although some legal historians felt the number was set at twelve because this was the number frequently used in the Old and New Testaments, this theory is presently in disrepute. See Haralson, *Unanimous Jury Verdicts*, 21 MISS. L. J. 191 (1950).

²⁵ Under the old common law, a jury verdict of less than twelve jurors was considered a nullity, and the defendant was discharged. FORSYTHE, *supra* note 11 at 200.

²⁶ For example, the accused could be tortured to force him to consent to a jury trial. He had no right to counsel, to call witnesses to testify on his behalf, or to challenge jurors. The jurors were allowed to obtain extra-judicial evidence at their discretion. The rules of evidence were nil. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 344-51 (1947); Wells, *Early Opposition to the Petty Jury in Criminal Cases*, 30 L.Q.R. 102-09 (1914).

²⁷ ORFIELD, *supra* note 26 at 347-51; Haralson, *supra* note 24 at 191.

²⁸ At early common law the judges were allowed great freedom in determining what the procedural and substantive rights of the accused were. See 1 STEPHEN, A HISTORY OF CRIMINAL LAW IN ENGLAND 451-54 (1883).

²⁹ 1 HOLDSWORTH, *supra* note 23 at 325; Haralson, *supra* note 24 at 191. Some of the pressures applied to these early juries were harsh, indeed. When the jury retired to deliberate they were allowed neither food, water, light, nor heat until they rendered a verdict. If they failed to reach a verdict by the end of the assize, they were carted along with the judge as he went to the future assizes. If the Crown felt that a juror hadn't rendered a proper verdict, he was attainted. DEVLIN, *supra* note 8 at 50-51.

³⁰ Haralson, *supra* note 24 at 191.

³¹ See Haralson, *supra* note 24 at 191; Wells, *supra* note 26 at 97.

the suit. This practice was referred to as affording the jury. MOSCHIZKER, *supra* at §86.

¹⁵ The parties to a trial by ordeal relied upon Divine Intervention manifested by an omen or miracle to indicate their guilt or innocence. For example, carrying a heated iron without subsequent infection, or swallowing cheese without choking, were signs that the defendant was innocent. Inbau, *supra* note 8 at 67.

¹⁶ The accused had the right to meet the accuser in physical combat to prove he was innocent. The theory was that God would give victory to the combatant who told the truth. Inbau, *supra* note 8 at 68.

¹⁷ FORSYTHE, *supra* note 11 at 102-03.

¹⁸ A group in each district was appointed, whose duty it was to find if there was anyone in the community who was believed to be a criminal, and to report their findings to the judge. This group was, in effect, a grand jury. Inbau, *supra* note 8 at 69.

¹⁹ FORSYTHE, *supra* note 11 at 102-03.

²⁰ DEVLIN, *supra* note 8 at 9.

²¹ FORSYTHE, *supra* note 11 at 161-62, 170.

²² FORSYTHE, *supra* note 11 at 170-71.

²³ McCART, TRIAL BY JURY 7 (1964).

²⁴ English jurors were allowed to find a verdict on their personal knowledge until the practice of attainment was outlawed in Plea in Bushell's Case, 1 Vaugh Rep. 135 (1670). Attainment was a procedure by which the Crown could punish jurors who refused to convict a guilty man. However, if the jurors were assumed to find the verdict by their own personal knowledge, then the Crown could not so easily coerce the jury to convict when they entertained a reasonable doubt as to the guilt of the accused. McCART, *supra* note 21 at 7; FORSYTHE, *supra* note 11 at 136.

were impaneled, but additional jurors were allowed to join them until one party had twelve compurgators "voting" for his position.³² As the function of the jury changed to judging credibility, the practice of adding to the original twelve was dropped, but the requirement that the Crown must obtain twelve "votes" to convict the accused was retained.³³ Thus unanimity, as it is known in present-day criminal trials evolved from a system which did not require unanimity, but only required that the proper amount of evidence to support a verdict be that twelve of the jurors on the panel agree upon the verdict.

Although England, at present, requires a unanimous jury verdict in criminal trials, Scotland has no such requirement. Scottish juries are composed of fifteen members, eight of whom may find a verdict.³⁴

At first blush, one might view the Scottish "mere majority" jury verdict to be unfair to the defendant.³⁵ However, Scotland allows the jury to return a verdict of "not proven". This verdict signifies that there is great suspicion the accused is guilty and only a faint doubt or a legal technicality keeps the jury from convicting him.³⁶ This intermediate verdict stops compromise verdicts because it allows the jury to truthfully attach the stigma of guilt without depriving the accused of his freedom. The jury is thus freed from the guilty-not guilty dilemma.

The proposal to eliminate the unanimous jury verdict requirement causes no great constitutional problems in England. The English Constitution, unlike the United States Constitution, was not written at one time and approved by the populace. It is a product of the common law, one precedent building upon another.³⁷ This allows a flexible system, which easily adopts to changing circumstances. Thus, the fundamental rights in the Eng-

³² DELVIN, *supra* note 8 at 48-49; FORSYTHE, *supra* note 11 at 199.

³³ The only explanation one can offer for the discontinuance of affording the jury is a historical one. The compurgatory jurors were actually witnesses to the facts. To add jurors, then, added witnesses and contributed to the pool of fact upon which the jurors could deliberate. As the jury lost its testimonial capacity, enforcement did not serve any purpose, and the practice was dropped.

³⁴ McDONALD, *CRIMINAL LAW OF SCOTLAND* 559 (4th ed. Mitchell 1929).

³⁵ In civil trials, the Scots use a jury of twelve, and they must unanimously arrive at a verdict. FORSYTHE, *supra* note 11 at 261.

³⁶ FORSYTHE, *supra* note 11 at 282-88.

³⁷ SMITH, *THE CONSTITUTION, ITS STORY AND ITS BATTLES* 68 (1926); RIDGES, *CONSTITUTIONAL LAW IN ENGLAND* 1 (3d ed. Williams 1922).

lish Constitutional system are those which the people, at that moment, feel are fundamental.³⁸ On the other hand, the United States Constitution lists certain fundamental rights in perpetuity, which may be interpreted and construed by the courts to coincide with the times only to a limited extent.

Whether a majority verdict rule could be adopted in the United States depends, in the first instance, upon whether the unanimous verdict in criminal trials is required by the Constitution.

Article Three of the Constitution states that all criminal trials (except impeachment cases) shall be by jury.³⁹ The Sixth Amendment also assures the accused a trial by jury.⁴⁰ The trial by jury that is guaranteed by these two sections is said to be that form of jury trial that existed at common law at the time the Constitution was adopted.⁴¹ However, one may waive some of the concomitants of a common law trial by jury.⁴² Thus the common law number (twelve) may be waived and a lesser number may sit and decide the fate of the accused without violating due process.⁴³ Also, the entire jury may be waived by the accused, and the judge may render a verdict.⁴⁴ Similarly, civil litigants are allowed to waive their constitutional right to a trial by jury.⁴⁵ In addition, although the civil litigant is given the right to a unanimous verdict under the Federal Rules of Civil Procedure, he may waive this right.⁴⁶ If unanimity, an element of the common law trial by jury, is waivable in civil actions, should it not be waivable also in criminal trials?⁴⁷

³⁸ See WILLIAMS, *THE PROOF OF GUILT* 1-14 (3d ed. 1963).

³⁹ U.S. CONST. ART. 3 §2.

⁴⁰ "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ." U.S. CONST. AMEND. VI.

⁴¹ *Thompson v. Utah*, 170 U.S. 343, 349-50 (1898).

⁴² Those which are not essential to due process. See Comment, *Waiver of Unanimity—Some Doubts About Reasonable Doubt*, 21 U. CHI. L. REV. 438-40 (1954). However, there is dicta that unanimity was essential to trial by jury at common law. Thus, although not essential to due process, it is a necessity because it is guaranteed by Article Three and the Sixth Amendment. See *Andres v. United States*, 333 U.S. 740 (1948) (dictum); *Thompson v. Utah*, 170 U.S. 343 (1898) (dictum). But see note 47 *infra*.

⁴³ *Patton v. United States*, 281 U.S. 276 (1930); *Williams v. United States*, 332 F. 2d 36 (7th Cir. 1964).

⁴⁴ *Wright v. United States*, 165 F. 2d 405 (8th Cir. 1948); *Fowler v. Hunter*, 164 F. 2d 668 (10th Cir. 1947), *cert. denied*, 333 U.S. 868 (1948); *Hood v. United States*, 152 F. 2d 431 (8th Cir. 1946).

⁴⁵ *American Publishing Co. v. Fisher*, 166 U.S. 464, 467 (1897); *Kass v. Baskin*, 164 F. 2d 513 (D.C. Cir. 1947).

⁴⁶ FED. R. CIV. P. 48.

⁴⁷ ORFIELD, *supra* note 26 at 438 n. 641; Comment,

Although the Supreme Court has never decided this point, two federal circuit courts have, with contrary results. The Sixth Circuit, in *Hibdon v. United States*,⁴⁸ held that the accused in a criminal trial could not, under any circumstances, waive his right to a unanimous verdict, since this right is an "inescapable element of due process",⁴⁹ and is "inextricably interwoven with the required measure of proof (beyond a reasonable doubt)."⁵⁰ As an alternative ground, the court held that, even if the right were waivable, in this particular instance the defendant had not freely given his consent to the waiver.⁵¹ On the other hand, the First Circuit, in *Fournier v. Gonzales*,⁵² held that the Due Process Clause of the Fifth Amendment⁵³ does not require a unanimous jury verdict in criminal trials.⁵⁴ The court went on to say that, upon waiver, a verdict by less than all the jurors satisfies the requirement that the prosecution prove the defendant guilty beyond a reasonable doubt.⁵⁵

The question that arises when the accused waives the unanimous verdict requirement in a federal criminal proceeding, then, is whether a verdict by less than all members of the jury allows the prosecution to obtain a conviction without proving the

accused guilty beyond a reasonable doubt.⁵⁶ If a majority verdict does allow the defendant to be convicted, although reasonable doubts have not been dispelled, then the due process requirement, that one may be convicted of a crime only if he has been proven guilty beyond a reasonable doubt,⁵⁷ has not been satisfied. Conceptually the problem devolves to the issue of whether the jury finds its verdict as an entity,⁵⁸ or as individuals.⁵⁹ If the latter theory is accepted,⁶⁰ then the burden of proof beyond a reasonable doubt is not changed by the number of jurors who must be convinced. This becomes clear when one notes that the burden would remain the same, to convince the individual juror beyond a reasonable doubt. What would be changed (as the number of jurors on the panel who are to be convinced is reduced) is the burden of persuasion because the prosecution needs to convince a lesser number of persons.⁶¹ However, if one accepts the proposition that the jury arrives at its verdict as an entity,⁶² then the burden of proof would be reduced if the prosecution does not have to prove to all members of the jury that the defendant is guilty beyond a reasonable doubt.

A mere lessening of the burden of persuasion does not seem to be a violation of due process.

supra note 42 at 438. The assumption is that a unanimous verdict is not essential to common law trial by jury, nor is it essential to due process. But see note 42 *supra*.

⁴⁸ 204 F. 2d 834 (6th Cir. 1953). The jury retired and twenty-seven minutes thereafter informed the court that it was hopelessly deadlocked. The judge, in the presence of the jury, asked the defendant if he would agree to allow the jury to bring a valid majority verdict. He agreed, and subsequently, verdicts were returned against him on two counts, 9-3 and 10-2.

⁴⁹ *Id.* at 838.

⁵⁰ *Ibid.*

⁵¹ *Id.* at 839. The suggestion emanated from the judge, and the Circuit Court felt that the accused accepted it because he didn't wish to be "at the mercy of a judge whose suggestion to him to accept a majority verdict was flouted".

⁵² 269 F. 2d 26 (1st Cir. 1959). *cert. denied*, 359 U.S. 93 (1959). Puerto Rican Law [34 L.P.R.A. §612 (1956)] allowed a verdict by nine of the twelve members of the jury to convict in felony cases. The defendant was convicted of first degree murder by a verdict of 10-2.

⁵³ "[N] or be deprived of life, liberty or property without due process of law. . ." U.S. CONST. AMEND. V.

⁵⁴ The Constitutional guarantee of trial by jury, both in Article Three and in the Sixth Amendment, does not apply to Puerto Rico. *Balzac v. Puerto Rico*, 258 U.S. 298 (1921). Hence *Fournier* was decided solely on the Fifth Amendment. Although the *Hibdon* case discussed Article Three, the Sixth Amendment and Fed. R. Crim. P. 31 (a) (which gives every defendant in a criminal trial the right to a unanimous jury verdict), the court based its holding on Fifth Amendment grounds.

⁵⁵ *Fournier v. Gonzales*, *supra* note 52 at 29.

⁵⁶ For an interesting discussion on this question by a state court, see *State v. Robbins*, 176 Ohio St. 362, 199 N.E. 2d 742 (1964). In this case the defendant waived his right to a jury trial and, under a state statute agreed to be tried before a three-judge court. He was convicted by a 2-1 decision. The court upheld the conviction and stated that a majority verdict did not contravene the requirement of proof beyond a reasonable doubt.

⁵⁷ Here it is assumed that proof beyond a reasonable doubt is needed to satisfy due process. This is probably the attitude of the present Supreme Court, although there is copious dicta to support either side of the argument. See Comment, 112 U. Pa. L. Rev. 769-70 and n.n. 2-3.

⁵⁸ This theory arose when trial by compurgation was in full flower. The accused put himself "on the country", and the jury's judgement was thought to be the judgement of the neighborhood. This "oricular" characterization was carried over when trial by jury evolved from trial by compurgation. SPOONER, TRIAL BY JURY 132-33 (1852).

⁵⁹ The concept is fully discussed in Comment, *supra* note 42 at 438.

⁶⁰ This is probably the prevailing view. See generally Annot., 137 A.L.R. 394 (1942).

⁶¹ An instruction demanding that all the jurors must find the defendant guilty beyond a reasonable doubt does not necessarily indicate that the entity theory has been adopted by the judge, since such an instruction would be required if the unanimous verdict rule was in force in that jurisdiction. *Cf. State v. Robbins*, cited at note 56 *supra*.

⁶² See, e.g., *Egan v. United States*, 287 F. 958, 967 (D.C. Cir. 1923).

When the jury consists of less than twelve members,⁶³ or when the accused consents to a bench trial, the burden of persuasion is reduced because the prosecution needs to convince less than twelve persons. These lessenings of the burden of persuasion have been held not to violate due process.⁶³ Hence the Supreme Court has a theory upon which they may rely if they wish to hold that a majority verdict in a criminal trial does not reduce the quantum of proof the Due Process Clause of the Fifth Amendment imposes upon the prosecution.

Historically, it is apparent that unanimity is not "inextricably interwoven with the required measure of proof"⁶⁴ since the two arose for different reasons and at different times. The unanimous verdict requirement was in force long before the reasonable doubt rule. The latter arose as a term of art, used to instruct the jurors on the quantum of proof needed to support a verdict of guilty.⁶⁵ If reasonable doubt is merely a measure of the proof, then it has no bearing upon the process by which a reasonable doubt is overcome.⁶⁶

If one adopts the entity theory, the reasonable doubt of one juror becomes a reasonable doubt of the jury as an entity. If this is true, then, logically, the accused should be acquitted, because the entire jury reasonably doubts the guilt of the accused. But, in practice, this is not the case; unless all the jurors as individuals have a reasonable doubt as to the guilt of the defendant, the jury is said to be hung, and the defendant may be subjected to a trial de novo.⁶⁷

In summary, it seems that the jurors need not all be convinced beyond a reasonable doubt to satisfy the requirements of due process. And it seems that the jury does not find its verdict as an entity. Thus the accused can waive his right to a unanimous jury verdict in a federal court.⁶⁸

A waiver is consensual, however, and the English proposal forces the defendant to accept a majority jury verdict. May an accused be similarly deprived of the right to a unanimous jury verdict in a United States federal court, without his consent?

⁶³ See *Patton v. United States*, 281 U.S. 278 (1930); *United States v. Sorrentino*, 175 F. 2d 721 (3d Cir. 1949).

⁶⁴ *Hibdon v. United States*, 204 F. 2d 834, 836 (6th Cir. 1953).

⁶⁵ Comment, *supra* note 57 at 771.

⁶⁶ *Cf. Brinegar v. United States*, 338 U.S. 160 (1949) *rehearing denied*, 338 U.S. 839 (1949); *People v. DeCillis*, 14 N.Y. 2d 750 (1964).

⁶⁷ Comment, *supra* note 57 at 772 n. 22.

⁶⁸ It is doubtful that intelligent counsel would allow his client to make such a waiver.

If due process does not require a unanimous verdict, then unanimity is not essential to trial by jury at common law,⁶⁹ and to deprive one of his right⁷⁰ to a unanimous verdict would be constitutionally permissible.

Assuming that "due process" as used in the Fourteenth Amendment⁷¹ carries the same meaning as it does in the Fifth Amendment,⁷² the accused in a state criminal proceeding could similarly be relegated to a majority verdict without his consent.⁷³ But, if the two Amendments differ in scope,⁷⁴ then an inquiry must be made as to whether the Fourteenth Amendment requires a unanimous verdict in state criminal proceedings.

The scope of the Due Process Clause of the Fourteenth Amendment is hotly disputed, but it is generally agreed that at least some parts of the Bill of Rights are incorporated in it.⁷⁵ Although some of the present Justices of the Supreme Court are of the opinion that all eight amendments of the Bill should be included,⁷⁶ others are of the opinion that not all the Bill of Rights should be incorporated in the Amendment.⁷⁷ Neither Article Three

⁶⁹ There is much dicta that trial by jury itself is not necessary for due process. See *Morr*, *DUE PROCESS OF LAW* 209-13 and n.n. 4-15. Granting this, surely a unanimous jury verdict can not be essential to due process.

⁷⁰ One must agree that the "trial by jury" which the Constitution guarantees the accused is that which existed at the time the Constitution was adopted. However, one may argue that only those parts of a common law jury trial that were essential to it were intended to be guaranteed. One then further argues that a unanimous verdict was not considered essential by the framers, and that they did not intend to form procedural straight jackets which would bind future courts to the outmoded. The flexibility underlying our Constitutional system forces one to reach this answer.

⁷¹ "(N) or shall any state deprive any person of life, liberty, or property without due process of law. . ." U.S. CONST. AMEND. XIV §2.

⁷² "(N) or be deprived of life, liberty or property without due process of law. . ." U.S. CONST. AMEND. V.

⁷³ Discussed at text with notes 56-66 *supra*.

⁷⁴ "Due process", as used in the Fourteenth Amendment, is presently much wider than the Fifth Amendment in scope. It has been defined as "the fundamental principals of liberty and justice which lie at the base of all our civil and political institutions". Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

⁷⁵ For an interesting discussion on the relative merits of the two schools, see Mr. Justice Goldberg's concurring opinion, *Pointer v. Texas*, 380 U.S. 400, 410-14 (1965).

⁷⁶ Mr. Justice Black is the champion of this school of thought. *Cf. Adamson v. California*, 332 U.S. 49, 68-123 (1946) (dissent). Probably Mr. Justice Douglas agrees with his position. *Cf. Gideon v. Wainwright*, 372 U.S. 335, 345-47 (1963) (concurring opinion).

⁷⁷ Mr. Justice Harlan is the leading light of this school. *Cf. Ker v. California*, 374 U.S. 23, 44-46 (1963) (concurring opinion); *Pointer v. Texas*, 380 U.S. 400, 410-414 (1965) (Goldberg, J., concurring).

nor the Sixth Amendment guarantee of trial by jury has been incorporated, as yet, into the Fourteenth Amendment.⁷⁸ What has been incorporated into the Amendment are those rights fundamental and essential to a "fair trial".⁷⁹ The states, it has been said, may partially or completely do away with trial by jury without violating the Fourteenth Amendment.⁸⁰ Taking this obiter at face value, those states whose constitutions authorize majority verdicts in criminal trials have initiated the practice by legislation, while other states have amended their constitutions to allow majority verdict.⁸¹

Are majority verdicts valid under the United States Constitution when, in either a state or a Federal criminal proceeding, the accused does not consent to such a less than unanimous jury verdict? When considered in the abstract, in the light of legal history, precedent, and Constitutional guarantees, the answer seems to be that such verdicts should be valid. But when one notes the recent broadening of the rights of the accused, both inside and outside the courtroom,⁸² the chances are slim that history and prior decision will be the basis upon which the Court will actually base its decision.⁸³ In the final analysis, the outcome of the case will depend upon the personal philosophy of the justices sitting at the time.⁸⁴ However, doctrinally, the court is not forced to the decision that majority jury verdicts in criminal trials are required by the Constitution.

⁷⁸ See *Fay v. New York*, 332 U.S. 261 (1947) (dictum); *Jordan v. Commonwealth*, 225 U.S. 167 (1912) (dictum); *Maxwell v. Dow*, 176 U.S. 581 (1900) (dictum).

⁷⁹ *E.g.*, *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Gideon v. Wainwright* 372 U.S. 335, 342-43 (1963) (right to counsel).

⁸⁰ See cases cited note 78 *supra*.

⁸¹ Idaho, Louisiana, Montana, Oklahoma, Oregon and Texas all allow less than unanimous jury verdicts in certain criminal cases. Connecticut, Ohio and New York allow the accused to waive a jury trial in favor of a three-judge panel; a verdict by two of the judges is sufficient to convict.

⁸² See, *e.g.*, *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁸³ Compare *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), and *Malloy v. Hogan*, 378 U.S. 1 (1964), with *Knapp v. Schweitzer*, 357 U.S. 371 (1958) and *Adamson v. California*, 332 U.S. 46 (1947) and *Feldman v. United States*, 322 U.S. 487 (1944) and *United States v. Murdock*, 284 U.S. 141 (1931) and *Twining v. New Jersey*, 211 U.S. 78 (1908).

⁸⁴ The "incorporation school" will do battle with the "fundamental principles of justice" school. Whichever school has the most adherents will carry the day. The fundamental principles school has Justices Harlan, Clark, Stewart and White in its camp. *Cf.* *Pointer v. Texas*, 380 U.S. 400, 409-10 (1965) (Stewart, J., concurring); *Escobedo v. Illinois*, 378 U.S. 478, 495-496

If a less than unanimous jury verdict rule can be adopted by our federal and state courts, the next inquiry is, should it be adopted?

Those who favor the retention of the unanimous verdict rule claim that it is essential to justice: it promotes deliberation by imposing a delay;⁸⁵ it allows a platform for the intelligent dissenter;⁸⁶ it makes a trial more palatable to the community and to the losing party;⁸⁷ it protects the accused from unjust and undesirable laws;⁸⁸ and, finally, it protects the accused by lessening the influence a biased juror may have upon the rest of the panel.⁸⁹

Those who advocate that a majority verdict should be sufficient to convict base their position upon the following arguments: the verdict of the trial jury is the product of compromise anyway the jury only superficially adheres to the unanimity requirement;⁹⁰ one stubborn or corrupt juror can

(1964) (White, J., with whom Clark, J., and Stewart, J., join, dissenting); *Malloy v. Hogan*, 378 U.S. 1, 14-33. (1964) (Harlan, J., with whom Clark, J., joins, dissenting).

Mr. Justice Black and Mr. Justice Douglas seem to be strict incorporationists. See note 76 *supra*.

Chief Justice Warren and Mr. Justice Brennan belong to neither school. They feel that "due process" does not include all the first eight amendments, but that it does include rights not enumerated in the Bill of Rights. *Cf.* *Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1965) (Goldberg, J., with whom Warren, C. J., and Brennan, J., join, concurring); *Malloy v. Hogan*, 378 U.S. 1-14 (1964) (opinion of Brennan, J., in which Warren, C. J., joins); *Gideon v. Wainwright*, 372 U.S. 335, 345-47 (1963) (Warren, C. J., concurring).

Mr. Justice Fortas has not yet conclusively demonstrated with whom he sides in the battle. However, he has indicated that he follows the theory adhered to by the Chief Justice and Justice Brennan. *Cf.* *Brown v. Louisiana* 383 U.S. 131-143 (opinion of Fortas, J.) and 151-68 (Black, J., dissenting).

Viewing the recent explosion of rights granted a defendant to insure him a "fair trial", one may suspect that any tampering with the jury system will be frowned upon by a majority of the present Court. See notes 82-83 *supra*. However, with all these "new" safeguards, the Supreme Court may be persuaded that a majority verdict would not deprive the defendant of a "fair" trial.

⁸⁵ *Carlee v. State*, 162 Miss. 263, 139 S. 618 (1932); *HART, LONG LIVE THE AMERICAN JURY* 66 (1964); *MOSCHZISKER, TRIAL BY JURY* §410-11 (2d rev. ed. 1930).

⁸⁶ *STOREY, THE REFORM OF LEGAL PROCEDURE* 191 (1931).

⁸⁷ *SPOONER, TRIAL BY JURY* 132-33 (1852).

⁸⁸ *Id.* at 211-21; Address by Seasongood to the Cincinnati Conference on Trial by Jury, Feb. 27, 1937 in 11 U. CINC. L. REV. 139 (1937).

⁸⁹ Linn, *Changes in Trial by Jury*, 3 TEMP. L.Q. 12-13 (1928-29).

⁹⁰ "It is very difficult, if not impossible, to realize the theory in practice. . . . A kind of formal 'give-and-take' is thus encouraged, which approaches the 'mere acquiescence' that has been condemned (by the courts); and this shades off into. . . more or less formal com-

cause a mistrial;⁹¹ one juror can veto (in effect) legislation passed by the majority of the people;⁹² the present rule allows the jury to temper unjust laws⁹³ when strict enforcement would better serve the public by rousing it to reject the statute;⁹⁴ and finally, many of the most crucial decisions in our present day system of government are arrived at by less than unanimous agreement of the determining group.⁹⁵

promises. . .⁹² Barrett, *The Jury's Agreement—Ideal and Real*, 20 ORE. L. REV. 190, 195 (1941). See OSBORN, *THE MIND OF THE JUROR* 166 (1937).

⁹¹ ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 438 (1947). But some authorities feel that the intransigent juror is a rarity, and does not occur often enough to force a change in the present unanimity rule. *E.g.*, DEVLIN, *TRIAL BY JURY* 56-57 (8th ser. 1956).

⁹² Broeder, *The Functions of the Jury—Facts or Fiction?* 21 U. CHI. L. REV. 388-89 (1954).

⁹³ However, one school of opinion extols this as the finest feature of the unanimity rule. See authorities cited in note 88 *supra*. "Patriots and martyrs were never hung, burnt, or beheaded by the Jury of England, but by the arbitrary provision of the law by the judges." AUSTIN, *OBSERVATIONS ON THE PERNICIOUS PRACTISE OF THE LAW* 59-60 (1819).

⁹⁴ If these laws are left on the books, they will be only occasionally enforced to "get" someone the public feels should be punished. However, the public is, itself, always threatened when a law is used discriminately, because it may be utilized to penalize members of the public who are not criminals, but merely members of an unpopular group. See PARMITTER, *THE VALUE OF TRIAL BY JURY* 1-2, 13 (1938).

⁹⁵ For example, impeachment of the president of the United States or whether to become a combatant in a

war. None of the arguments on either side demonstrate that unanimity is or is not essential to trial by jury.⁹⁶ But, on balance, the arguments on behalf of majority jury verdicts carry more weight. The Home Secretary of England wishes to enact a majority verdict rule because jurors are being intimidated or corrupted, especially by those in organized crime.⁹⁷ Since the United States has organized crime,⁹⁸ one may assume jury tempering goes on in the United States as well.⁹⁹

Today, in contrast to earlier days, numerous safeguards exist for the protection of the innocent person on trial.¹⁰⁰ It has become increasingly difficult to convict, and crime is rampant. Has not the time come to remove the anachronistic and unrealistic requirement of unanimity?

war. In fact, the decisions of the Supreme Court of the United States, which, to a large effect, determine the basic rights an individual may have in our society, decides by a mere majority.

⁹⁶ Since the jury deliberates in secret, and renders no opinion, many of the arguments buttressing either side are speculative, at best.

⁹⁷ Address by Mr. Roy Jenkins to the House of Commons, August 8, 1966.

⁹⁸ England had no large organized crime problem until it legalized gambling in 1961. There are indications that, at the time, the American "Syndicate" extended itself to England and today forms a large percentage of England's organized criminals. *Cf.* Chicago Tribune, Feb. 25, 1967, p. 14, col. 2.

⁹⁹ This is not to say that jury tampering its exclusively a tool of the organized criminal.

¹⁰⁰ See notes 82-83, 91 *supra*.