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JURY TRIAL—UNANIMOUS VERDICTS

Johnson v. Louisiana, 406 U.S. 356 (1972)
Apodaca v. Oregon, 406 U.S. 404 (1972)

In *Johnson v. Louisiana*[1] and *Apodaca v. Oregon*[2] the Supreme Court upheld provisions of the Louisiana and Oregon Constitutions permitting jury verdicts by 9–3 and 10–2 votes. The Court held that unanimous verdicts were not necessitated either by the requirement of proof of guilt beyond a reasonable doubt or as part of the sixth amendment right to trial by jury.

Despite consideration of a number of cases related to jury issues,[3] the Court had never previously decided whether the states were required to provide unanimous jury verdicts. The issue arose incidentally in 1968 in *Duncan v. Louisiana*,[4] where the Court held that the sixth and fourteenth amendments required Louisiana to provide trial by jury in a case punishable by two years or more imprisonment. Justice White, writing for the court, stated that the decision would require no widespread change in state criminal processes, because only two states, Louisiana and Oregon, permitted less than unanimous verdicts in cases punishable by more than one year imprisonment.[5] In 1970 the Court held, in *Williams v. Florida*,[6] that the sixth amendment permitted a state to employ juries of six rather than twelve persons. However a footnote suggested that unanimity might be important to ensure that the prosecution bore a heavier burden of proof.[7] Justice Harlan, dissenting in *Williams*, stated that less than unanimous verdicts were unthinkable.[8] These comments seemed to indicate that the Court was likely to require that the states provide unanimous verdicts. However, by the time the issue arose for decision in 1972,[9] Justices Harlan and Black had been replaced by Justices Powell and Rehnquist, and both new justices sided with the 5–4 majority which reversed the previous trend.

The Louisiana Constitution provides that in cases where punishment may be at hard labor, a unanimous verdict by a jury of 5 is required, but where punishment is necessarily at hard labor, concurrence by 9 out of 12 jurors is required.[10]

[1] 406 U.S. 356 (1972).

[2] 406 U.S. 404 (1972).

[3] Relevant cases can be divided into three groups. One group dealt with nonunanimous verdicts in the federal system. American Publishing Co. v. Fisher, 166 U.S. 464 (1897), held that Congress could not permit the then territory of Utah to decide civil cases by a 9 of 12 verdict, since the seventh amendment required jury trial and unanimity was an essential element of jury trial as it existed at common law. It expressly avoided the question of the power of a state to dispense with unanimity. In 1948 Andres v. United States, 333 U.S. 740 (1948), applied *American Publishing* in a criminal trial in territorial Hawaii. Thompson v. Utah, 170 U.S. 343 (1898), decided a year after *American Publishing*, stated that the federal Constitution required unanimous verdicts by a jury of 12. Patton v. United States, 281 U.S. 276 (1930), held that the sixth amendment required unanimous verdicts in federal criminal cases, but that unanimity could be waived. A Sixth Circuit decision, Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953), overturned an irregular waiver of a unanimous verdict by a federal defendant, stating that unanimity was required by the reasonable doubt standard. But the First Circuit, in Fournier v. Gonzales, 269 F.2d 26 (1st Cir. 1959), *cert. denied*, 359 U.S. 93 (1959), rejected *Hibdon*, assuming that the Territory of Puerto Rico had the powers of a state.

A second group of cases contained dictum indicating that the states were not required to provide unanimous verdicts. Maxwell v. Dow, 176 U.S. 581, 605 (1900), held that a jury of 12, required in federal cases, was not required in state prosecutions, and stated that neither unanimous jury verdicts nor jury trial itself was required. Duncan v. Louisiana, 391 U.S. 145 (1968), rejected the *Maxwell* language on the right to trial by jury. However, Williams v. Florida, 399 U.S. 78 (1970), held that the Constitution did not require the states to provide a 12 man jury.

The third group of cases involves the exclusion of minority groups from jury service. In 1879, Strauder v. West Virginia, 100 U.S. 303 (1879), established that the equal protection clause prohibits exclusion of minority members. However, the absence of such members from the jury does not in itself violate equal protection. Swain v. Alabama, 380 U.S. 202, 205 (1965). Since states are free to make valid discriminations in selecting jurors, there has been much litigation over the years on whether particular systems of jury selection are valid, with the challenger bearing the burden of proof. *See, e.g.*, Carter v. Jury Commission, 396 U.S. 320 (1970); Whitus v. Georgia, 385 U.S. 545 (1967); Hernandez v. Texas, 347 U.S. 475 (1954); Cassel v. Texas, 339 U.S. 282 (1950).

[4] 391 U.S. 145 (1968).

[5] *Id.* at 158 n.30. Several states permit less than unanimous verdicts in misdemeanor cases: IDAHO CONST. art. 1, §7 (5/6); MONT. CONST. art III, §23 (2/3); OKLA. CONST. art. II, §19 (3/4); TEX. CONST. art V, §13 (9 of 12).

[6] 399 U.S. 78 (1970).

[7] *Id.* at 100 n.46.

[8] *Id.* at 122 (Harlan, J., dissenting).

[9] A 1968 attempt to raise the issue failed when the Court refused to apply *Duncan* retroactively. DeStefano v. Woods, 392 U.S. 631 (1968).

[10] LA. CONST. art. 7 §41. *See also* LA. CRIM. PRO. CODE ANN. art. 782 (West 1966). A provision requiring a unanimous verdict of 12 jurors in capital cases has been rendered obsolete, for the moment at least, by Furman v. Georgia, 408 U.S. 238 (1972), which held

Frank Johnson was convicted of armed robbery by a 9–3 verdict in a trial held prior to the decision of *Duncan v. Louisiana*. Since the Court had previously held that it would not apply *Duncan* retroactively,[11] Johnson could not argue that unanimous verdicts were a part of the sixth amendment's requirement of trial by jury which *Duncan* had applied to the states. Instead he claimed it was mandated by the requirement of proof of guilt beyond a reasonable doubt, which is applied to the states by the due process clause.[12] He argued that majority jurors should necessarily have some reasonable doubt if their fellow jurors were not convinced, and that dissent is itself proof that reasonable doubt exists. The Court rejected this argument and held, in an opinion by Justice White, that unanimous verdicts are not required by due process.[13] It felt that a majority would try to persuade the minority until the minority "continues to insist upon acquittal without having persuasive reasons in support of its position."[14] The Court felt experience indicated that jurors would not ignore the reasonable doubts of their colleagues. It found that disagreement within a jury does not prove the existence of reasonable doubt because convictions are upheld where reasonable doubt would have been justified or where trial or appellate judges would have disagreed with the jury, and because in the federal system a hung jury does not result in acquittal but subjects the defendant to possible retrial.[15]

Johnson also argued that the Louisiana provisions providing for unanimous verdicts in some but not all cases was an invidious discrimination in violation of the equal protection clause.[16] The Court disagreed, finding that the standard of proof did not change, but only the number of jurors to be convinced. Moreover, it found the state had a rational purpose—to "facilitate, expedite and reduce expense in the administration of justice"[17]—while at the same time it provided more jurors in more serious cases.

Justice Stewart dissented in *Johnson* on the ground that a unanimous verdict was required by due process in order to ensure public confidence in the fairness of the criminal justice system and to minimize the danger of jury misconduct and bigotry. He felt that the decision undermined a line of cases prohibiting discrimination in the jury selection process.[18]

Apodaca v. Oregon[19] arose under the Oregon Constitution which provides that all verdicts other than guilty of first degree murder must have the concurrence of 10 out of 12 jurors.[20] For a verdict of guilty of first degree murder a unanimous verdict is required. Three defendants, including Robert Apodaca, were convicted of assault with a deadly weapon, burglary of a dwelling and grand larceny, two defendants by 11–1 votes and one by a 10–2 vote. They argued that unanimous verdicts were part of the sixth amendment right to jury trial required of the states by due process under *Duncan*. The Court disagreed by a 5–4 vote but without a majority opinion or rationale. Justice White, joined by Chief Justice Burger and Justices Blackmun and Rehnquist, found that the sixth amendment right to jury trial did not require unanimous verdicts. Relying on historical material similar to that considered in *Williams v. Florida*,[21] he concluded that the requirement of unanimity, like the jury of 12, was a historical accident. He cited the deletion of a unanimity provision from the House version of the sixth amendment to show that the framers' intent was not to require unanimity. He reiterated that the purpose of the jury system was to protect against prosecutorial and judicial misconduct and to infuse the common sense of laymen into the criminal process.[22] He found that this did not require unanimous verdicts, but only required that juries be selected from a cross section of the community and be free from intimidation. He found that the reasonable doubt standard developed at a different time than the jury system and was unrelated to the sixth amendment. To counter the assertion that the decision undermined provisions prohibiting discrimination in jury selection, White stated that minority group jurors have no right to veto the conviction of a fellow member since there is no requirement that minority group members be on the jury at all.[23]

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the death penalty unconstitutional. A provision requiring trial without a jury in cases providing imprisonment not at hard labor was overturned in Duncan v. Louisiana, 391 U.S. 145 (1968).

[11] DeStefano v. Woods, 392 U.S. 631 (1968).

[12] U.S. CONST. amend. XIV. *See In re* Winship, 397 U.S. 358 (1970).

[13] 406 U.S. at 363. *See also* Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).

[14] 406 U.S. at 361.

[15] *Id.* at 1624–25.

[16] U.S. CONST. amend. XIV.

[17] 406 U.S. at 364, citing State v. Lewis, 129 La. 800, 804, 56 So. 893, 894 (1911).

[18] *See* cases cited in note 3 *supra*.

[19] 406 U.S. at 404 (1972).

[20] ORE. CONST. art. I, §11.

[21] 399 U.S. 78 (1970).

[22] 406 U.S. at 410 (White, J., concurring).

[23] *Id.* at 413. *See* Swain v. Alabama, 380 U.S. 202 (1965).

He also presumed that minority jurors' views would be rationally considered by the rest of the jury. Justice Blackmun wrote a concurring opinion, adding that he felt that a less substantial majority than 9–3 would pose a closer question, and that he would, were he a legislator, oppose the contested provisions.

Justice Powell concurred in the result but disagreed with the reasoning. He read history and precedent as preserving in the sixth amendment, and thereby imposing on the federal system, the jury trial as it existed at common law, including the requirement of unanimous verdicts.[24] However, he felt that the due process clause of the fourteenth amendment did not impose federal sixth amendment standards on the states. Although he accepted *Duncan's* holding that due process required the states to provide jury trial in serious cases,[25] he felt states should be free to experiment with the jury system.[26] He agreed with Justice White's analysis of the fundamental purposes of the jury system and their satisfaction by the Oregon practice. He also found support for less than unanimous verdicts in England, where unanimity was recently abandoned,[27] and in proposals by the American Law Institute[28] and American Bar Association.[29]

Justice Stewart dissented from the White opinion's holding that unanimous verdicts are not part of the sixth amendment's guarantee of trial by jury.[30] Justice Douglas dissented in both cases, finding a radical departure from tradition and from cases applying the Bill of Rights to the states.[31] He also noted evidence from the Kalven and Zeisel jury studies[32] indicating that nonunanimous verdicts would provide more acquittals than convictions and would lead to hasty verdicts decided without proper deliberation. Justice Brennan echoed Justices Stewart and Douglas. Justice Marshall's dissent disputed three other bases of the White opinion. It argued that guilt is not proved beyond a reasonable doubt if all jurors are not convinced, that the fact that the Constitution permits retrial after a hung jury does not imply that it permits conviction by less than unanimous verdict, and that if a jury is properly selected and composed of rational persons, then the irrationality objected to by Justice White is in fact part of the essence of the jury system.

The basic issues presented in the cases are whether unanimous verdicts are inherently part of the trial by jury which is required of the states, and whether nonunanimous verdicts are consistent with proof of guilt beyond a reasonable doubt. Proof of guilt beyond a reasonable doubt is required of the states,[33] but the *Johnson* majority held that this does not require that jury verdicts be unanimous, since the reasonable doubt standard lies in the mind of each individual juror and not in the way the votes are counted. This double aspect of the reasonable doubt standard has long been recognized[34] but, as Justice Marshall notes, it strains the language to say someone has been proved guilty beyond a reasonable doubt when three jurors disagree. The *Johnson* opinion's answer seems to be a suggestion that the minority jurors are being unreasonable because they cannot persuade the majority jurors.[35] It cites language from the "Allen charge" [36] telling minority jurors on a deadlocked jury to consider whether their views are tenable in view of their inability to persuade others who are equally intelligent. However, suggesting that a juror consider whether he is being

[24] 406 U.S. at 370 & n.6, 371 nn.7&8 (Powell, J., concurring). *See* Patton v. United States, 281 U.S. 276, 280 (1930).

[25] 406 U.S. at 372 n.9 (Powell, J., concurring). *Duncan* rejected several cases, particularly Maxwell v. Dow, 176 U.S. 581, 605 (1900), relied on by Justice Powell for his conclusion that the states may deny unanimous verdicts. These cases said in dictum that states may deny jury trial altogether, since due process required only that which was necessary to ordered liberty. Justice Powell accepts *Duncan*, finding that the modern view of due process requires that which is fundamental in the context of the Anglo-American jurisprudential system common to the states. He finds trial by jury, but not unanimous verdicts, fundamental.

[26] 406 U.S. at 376–77 (Powell, J., concurring).

[27] *See* Kalven & Zeisel, *The American Jury: Notes on an English Controversy*, 48 CHI. BAR RECORD 195 (1967).

[28] ALI, CODE OF CRIMINAL PROCEDURE §335 (1931).

[29] ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY §1.1 & commentary pp. 25–28 (Approved Draft 1968).

[30] 406 U.S. at 414 (Stewart, J., dissenting). *See* Andres v. United States, 333 U.S. 740 (1948).

[31] 406 U.S. at 381–84 (Douglas, J., dissenting). *See* Malloy v. Hogan, 378 U.S. 1 (1964).

[32] H. KALVEN & H. ZEISEL, THE AMERICAN JURY 460, (1966) [hereinafter cited as KALVEN & ZEISEL] cited by Douglas, J., dissenting, 406 U.S. at 391 & n.5.

[33] *In re* Winship, 397 U.S. 358 (1970).

[34] *See* Comment, *Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt*, 21 U. CHI. L. REV. 438, 441 (1954).

[35] 406 U.S at 361–62.

[36] Allen v. United States, 164 U.S. 492, 501 (1896). For criticism of the Allen charge, see KALVEN & ZEISEL, *supra* note 32, at 454 n.3.

unreasonable is different from establishing as a matter of law that he is. Furthermore, the fact that jury verdicts are sustained where trial or appellate judges or hypothetical reasonable men might disagree has little bearing on what should happen when the jurors, the established triers of fact, do disagree. In addition, the opinion construes the fact that a federal defendant who receives a hung jury can be retried and convicted by a unanimous verdict to indicate that conviction is possible even though some jurors are never convinced of guilt. However, conviction on retrial after a hung jury bears more resemblance to a verdict reached after several votes than to a less than unanimous verdict, since at least some jury must be unanimously convinced of guilt beyond a reasonable doubt before the defendant can be convicted. The *Johnson* Court's arguments on the reasonable doubt issue are unpersuasive.

Apodaca turned on the question of whether unanimous verdicts were inherent in trial by jury required of the states by the sixth and fourteenth amendments. Determination of what constitutes trial by jury is difficult because the jury is a legal institution which has developed over centuries in England and the United States. Unless one accepts, as Justice Powell does, that the Constitution adopts all aspects of the jury system as it existed in 1787, it is necessary to make a "functional analysis" of the jury in order to determine the fundamental purposes it serves. This analysis must consider the reasons for the original development of the jury, the reasons for its retention in the legal system if the old reasons became invalid, and the reasons for its retention today.

In his *Apodaca* opinion Justice White adopted the results of the searching historical and functional analysis given the jury system in *Duncan v. Louisiana*[37] and *Williams v. Florida*.[38] In those cases, determining whether states were required to provide trial by jury in serious cases and whether the jury had to be composed of twelve persons, the Court found that the essential purpose of the jury was "to safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge," [39] and "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." [40] After accepting that view of the jury's purpose, Justice White suggested four historical reasons for the development of the unanimous verdict rule: 1) the absence of other rules ensuring a fair trial; 2) the medieval practice of trial by compurgation where twelve witness-jurors were required to convict; 3) the possibility of perjury charges against a dissenting witness-juror; and 4) the medieval concept of consent which required unanimity to bind a community.[41] Such reasons, relevant in the late fourteenth century, have little significance today and do not explain why the tradition of unanimous verdicts persisted through 1787 to the present.

The dissenting opinions argue with much force that the reasons for the persistence of the unanimous verdict are the same as the reasons for the reasonable doubt standard—to maintain community confidence in the criminal justice system and to avoid the serious harm resulting from wrongful conviction.[42] The Court considers evaluation of community confidence a job for legislators,[43] but it is difficult to avoid the constitutional implications of the prevalence of unanimous verdicts at the time the Constitution was adopted.[44] Moreover, stating that the jury exists only to protect against prosecutorial and judicial misconduct, to infuse commonsense into factfinding and to spread responsibility for the decision of whether to use criminal sanctions, although adequate for the issues presented in *Duncan* and *Williams*, overlooks other policies relevant to unanimous verdicts. The jury is a democratizing force in the law which at times functions properly by ignoring legislative and judicial commands.[45] The unanimous verdict acts as a check on the jury's power and ensures that its decisions reflect the most broadly shared values. The dissenters, particularly Justice Marsha'l, grasp this aspect of the jury which the other Justices ignore.

Justice White's functional analysis leads him

[37] 391 U.S. 145, 151–53 (1968).
[38] 399 U.S. 78, 87 nn.19 &20, 92–100, 98 n.45 (1970).
[39] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).
[40] Williams v. Florida, 399 U.S. 78, 100 (1970).
[41] 406 U.S. at 407 n.2 (White, J., concurring in *Johnson*).
[42] 406 U.S. at 398 (Stewart, J., dissenting); *id.* at 392 (Douglas, J., dissenting).
[43] 406 U.S. at 364–65; *id.* at 366 (Blackmun, J., concurring).
[44] See 406 U.S. at 408 & n.3 (White, J., concurring). Justice Harlan, dissenting in *Williams*, noted the final wording of the sixth amendment as likely represents a streamlining of language as a statement of constitutional indifference to the unanimous verdict. 399 U.S. at 123 n.9 (Harlan, J., dissenting).
[45] *See* P. DEVLIN, TRIAL BY JURY 164 (1956).

to the conclusion that no essential purpose of the jury requires unanimity.[46] Except for a footnote comment that unanimity proved unworkable in fifteenth century Parliament,[47] he offers no reasons against unanimity.[48] Presumably he considers evaluation of such issues to be a legislative function.[49] Justice Powell presents some reasons against unanimity,[50] including the ease of bribing a single juror[51] and the possibility of a hanging juror who through wilfulness and stubborness closes his eyes to the law and the evidence. He also notes that the unanimity rule does not always produce true unanimity but rather often causes compromise verdicts, sometimes contrary to the facts in evidence, which will lessen any deterrent effect of conviction and further erode the confidence of participants and the public in the criminal process. Other reasons alluded to in the opinions include the cost of retrial in money and court time,[52] the fact that important public decisions are made by judges, legislators and voters by less than unanimous votes,[53] and the likelihood that less than unanimous verdicts will increase the number of convictions.[54] Although the Court does not expressly evaluate the merits of these reasons against unanimity, a majority of justices consider them strong enough to permit the states to rely on them despite the prevalence, historically and today, of less than unanimous verdicts.

Appellants also argued that less than unanimous verdicts would deprive minority group jurors of the ability to cause a hung jury and prevent conviction, and would thereby render meaningless decisions which prohibit discrimination in jury selection.[55] Justice White in *Apodaca*, after noting that minority group members do not have the right to have fellow members on their particular juries,[56] stated that if such members are on the jury they have the right to try to persuade the rest of the jurors of their position. He presumes that the majority will act rationally and in good faith toward the minority group members. This appears to be an overly optimistic view of the history of minority group relations in the United States.[57] Nevertheless a majority of the Justices feel that protection of minority groups is not an essential function of the jury and does not justify a unanimous verdict requirement.

Johnson and *Apodaca* leave several questions open. Five Justices are of the opinion that unanimous verdicts are required in federal criminal trials, even though five Justices found them not required in state trials. Only Justice Powell finds this theoretically consistent, and it is not clear that unanimity would be required in federal trials, were the issue to arise in the future.[58] A question is also raised as to how small a majority is permissible. The functional analysis in Justice White's *Apodaca* opinion does not appear to require more than a simple majority, although Justice Blackmun expresses misgivings.[59] However, the *Johnson* majority found the reasonable doubt standard satisfied because a "substantial" and "heavy" majority

[46] Justice Powell would agree that no essential purpose of the jury requires the states to provide unanimity, although he sees the federal system as being bound by history.

[47] 406 U.S. at 407 n.2 (White, J., concurring).

[48] *See generally* Comment, *Should Jury Verdicts Be Unanimous in Criminal Cases?*, 47 ORE. L. REV. 417 (1968).

[49] The Louisiana procedure, said to be designed "to facilitate, expedite and reduce expense in the administration of criminal justice," 406 U.S. at 364 appears to be rooted in that state's civil law tradition. *See*, Comment, *Jury Trial in Louisiana—Implications of Duncan*, 29 LA. L. REV. 118, 120 (1968). The Oregon practice was adopted by constitutional amendment in 1934 during a period of nationwide controversy concerning the jury system. *See* Comment, *supra* note 48, at 418.

[50] 406 U.S. at 377 (Powell, J., concurring).

[51] This has been cited as the reason for the abandonment of the unanimity rule in England. Kalven & Zeisel, *supra* note 27.

[52] 406 U.S. at 364.

[53] *Id.* at 362–63. *Id.* at 407 n.2 (White, J., concurring in *Apodoca*).

[54] This issue was severely disputed. Justice Douglas cited the Kalven & Zeisel jury studies, indicating that twice as many nonunanimous verdicts will result in convictions as acquittals. KALVEN & ZEISEL at 460, Table 125, quoted by Douglas, J., dissenting at 406 U.S. 391 n.5. This is the same ratio as that of convictions to acquittals generally. KALVEN & ZEISEL at 461. Thus when Kalven and Zeisel say "the probability that an acquittal minority will hang the jury is about as great as that a guilty minority will hang it," *id.*, they mean that acquittal minority jurors are no more stubborn than conviction minority jurors, not that an equal number of hung juries (and therefore nonunanimous verdicts) will be for acquittal as for conviction. But the latter meaning is what Justice White appears to have in mind when he uses the quotation in his *Apodaca* opinion. 406 U.S. at 411 n.5.

[55] *See* cases cited in note 3 *supra*.

[56] Swain v. Alabama, 380 U.S. 202, 205 (1965).

[57] For abuses against minority groups perpetrated through the criminal justice system, *see* Furman v. Georgia, 408 U.S. 238, 250 n.15, 251 (1972) (Douglas, J., concurring); *id.* at 364 (Marshall, J., concurring) indicating that blacks have received a disproportionate share of death sentences in rape cases.

[58] Federal unanimous verdicts are required under FED. R. CRIM. P. 31(a). In the 38 years that Oregon and Louisiana have had nonunanimous verdict provisions, other states and the federal system have not been persuaded to follow, although these cases may persuade them to do so.

[59] 406 U.S. at 366 (Blackmun, J., concurring).