Constitutional Law - Unanimous Jury Verdict - Sixth Amendment Right to Jury Trial Does Not Mandate Unanimous Verdict - Fourteenth Amendment Reasonable Doubt Standard and Due Process Requirements Satisfied Notwithstanding Lack of Unanimity

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The instant decision will have little effect on bringing about more effective law enforcement through grand jury investigations, and it is unfortunate that news reporters will continue to be subject to contempt convictions. The qualified privilege, it is submitted, will best serve society’s interest in effective law enforcement, while at the same time protecting the public’s need-to-know, which is so critical in times of widespread conflict and dissent.

Douglas Paul Coopersmith

CONSTITUTIONAL LAW — UNANIMOUS JURY VERDICT — SIXTH AMENDMENT RIGHT TO JURY TRIAL DOES NOT MANDATE UNANIMOUS VERDICT — FOURTEENTH AMENDMENT REASONABLE DOUBT STANDARD AND DUE PROCESS REQUIREMENTS SATISFIED NOTWITHSTANDING LACK OF UNANIMITY.

Apodaca v. Oregon (U.S. 1972)

Johnson v. Louisiana (U.S. 1972)

Robert Apodaca, Henry Morgan Cooper, Jr., and James Arnold Madden were convicted of felony charges in Oregon courts by verdicts of eleven to one, ten to two, and eleven to one, respectively. All three appealed their convictions to the Oregon Court of Appeals on the grounds that a conviction by less than a unanimous jury violated the sixth amendment’s guarantee of a right to a “jury trial” which, by implication, necessitates jury unanimity. The court of appeals, sitting en banc, affirmed the

96. See note 50 and accompanying text supra.

97. The objects of the grand jury proceedings in recent cases involving newsmen’s privilege have involved topics of national controversy — those topics about which the first amendment seeks most vehemently to protect the flow of news. See, e.g., Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970) (Black Panthers); Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1970) (marijuana use); State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971) (bombing of building on college campus during protest against Vietnam war).

1. Apodaca was charged with assault with a deadly weapon, Cooper with burglary in a dwelling, and Madden with grand larceny. Apodaca v. Oregon, 406 U.S. 404, 405-06 (1972).

2. Id. at 406. Less than unanimous verdicts in Oregon are provided by its constitution, Ore. Const. art. I, § 11, which provides in part:

In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed . . . provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise . . .

RECENT DEVELOPMENTS

trial courts' decisions⁴ and review was denied by the Supreme Court of Oregon.⁵ However, the United States Supreme Court granted certiorari to consider the petitioners' claim.⁶

Frank Johnson had been convicted of robbery⁷ by a nine-to-three verdict in Louisiana.⁸ Johnson challenged his conviction based upon the non-unanimous verdict as violative of the due process and equal protection rights granted under the fourteenth amendment.⁹ However, his conviction was affirmed by the Louisiana Supreme Court.¹⁰ On appeal to the United States Supreme Court, probable jurisdiction was noted.¹¹

In Apodaca the Supreme Court affirmed, holding that convictions in state criminal proceedings by less than unanimous verdicts do not violate the sixth amendment's guarantee, in all noncapital criminal prosecutions, to a speedy and public trial by an impartial jury on the ground that this right involves no requirement of jury unanimity. The Court further held that jury unanimity is not mandated by the fourteenth amendment's requirement that racial minorities not be excluded from the jury selection process¹² in that it is not warranted to presume that a minority view will not be rationally considered by other jury members where unanimity is unnecessary. Moreover, the petitioners' argument that the sixth amendment requires unanimous juries in order to effectuate the reasonable doubt standard of the fourteenth amendment¹³ was held to be without merit by the Court. Apodaca v. Oregon, 406 U.S. 404 (1972).

In the Johnson case, the Court again affirmed, holding that the provisions of the Louisiana constitution, providing for less than unanimous jury verdicts,¹⁴ do not violate the due process clause of the fourteenth amendment for failure to satisfy the reasonable doubt standard. The Court also held that the Louisiana legal scheme — (1) where verdicts must be unanimous in less serious crimes when the jury is comprised of five members, (2) where a verdict of at least nine to three is necessary to convict in crimes of a more serious nature, and (3) where a unanimous verdict of twelve is necessary to convict in capital cases — does not violate the fourteenth amendment's equal protection guarantee. Johnson v. Louisiana, 406 U.S. 356 (1972).

4. Id.
8. Id. Less than unanimous verdicts are provided for in the Louisiana constitution, La. Const. art. VII, § 41, which provides in part:
... Cases, in which punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.
10. Id.
14. See note 8 supra.
At the time of the adoption of the Constitution, unanimous jury verdicts were viewed as so essential that the common law notion had been considered to have been implicitly included in the Bill of Rights, namely in the sixth amendment. Consequently, for almost two hundred years the questions of unanimity seemed well settled in both state and federal jurisdictions.

Recently, the necessity for unanimous verdicts in criminal proceedings has been questioned in both the United States and England. As a result of the attack on this traditional rule, England adopted The Criminal Justice Act of 1967 which specifically abrogated the requirement for unanimity. In the United States, two states have constitutionally provided for less than unanimous jury verdicts.

Against this background, the Supreme Court examined the constitutionality of nonunanimous verdicts in two separate five-to-four decisions.

15. Jury unanimity has been a feature of American jurisprudence since the beginning of the eighteenth century. See Apodaca v. Oregon, 406 U.S. 404, 407-08 n.2 (1972). Its origins can be traced to medieval England where the requirement of jury unanimity was established as a common law precept as early as 1368. See Thayer, The Jury and its Development, 5 Harv. L. Rev. 295, 297 (1892). With the colonization of America, the English settlers brought with them the concept of the common law as it was known in the mother country. See Reinsch, The English Common Law in Early American Colonies, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 414-15 (J. Wigmore ed. 1907). Thus, by the end of the eighteenth century, most of the colonial states had adopted the jury institution as prescribed in English law. Id. at 412.

16. The Court has never directly decided the question of whether the sixth amendment demands a unanimous jury in state prosecutions. However, unanimous verdicts in federal jurisdictions have always been presumed to have been mandated by the sixth amendment because of the prevailing view that common law notions regarding juries were implicit in that amendment. This view included the precept that juries must render a unanimous verdict. Thus, in Andres v. United States, 333 U.S. 740, 748 (1948), the Court stated that "unanimity in jury verdicts is required where the sixth and seventh amendments apply." In Patton v. United States, 281 U.S. 276 (1930), the Court noted:

These common law elements [unanimous jury trials] are embedded in the constitutional provisions [of the sixth amendment] and are beyond the authority of the legislative department to destroy or abridge.

Id. at 290; accord, Thompson v. Utah, 170 U.S. 343, 349 (1898) ("jury" to be interpreted with reference to meaning in the common law at the time of the adoption of the Constitution). But see Williams v. Florida, 399 U.S. 78, 97-99 (1970).

17. Mr. Justice Douglas pointed out in his dissent in Johnson:

The unanimous jury has been so embedded in our legal history that no one would question its constitutional position and thus there was never any need to codify it.

406 U.S. at 382 n.1.

18. The American Bar Association has approved a draft calling for less than unanimous verdicts. See ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO TRIAL BY JURY § 1.1 (Draft 1968).


21. Since 1934, Oregon constitutionally has provided for less than unanimous verdicts in non-capital cases. Ore. Const. art. I, § 11. See note 2 supra. Since 1898, Louisiana's constitution also permits less than unanimous verdicts, but only when the punishment upon conviction is necessarily at hard labor. La. Const. art. VII, § 41. See note 8 supra.

22. Mr. Justice White wrote the majority opinions in both Johnson and Apodaca and was joined in both by the Chief Justice and Justice Rehnquist. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). Justice Blackmun filed a concurring opinion for both cases. Id. at 365. Justice Powell filed
Since many of the issues presented in the two cases are similar, they have been combined for purposes of analysis. Basically, four main arguments were presented: (1) the sixth amendment requires unanimous juries, and this mandate is applicable to the states through the fourteenth amendment; (2) in order to give substance to the fourteenth amendment reason doubt standard, jury trials must be unanimous; (3) the requirement of unanimity ensures not only that the views of minority jurors will be thoroughly considered, but also that there will be no conviction resulting from a majority influenced by racism, bigotry, or an emotionally inflamed trial; and (4) in jurisdictions that provide for classification of crimes according to severity, the elimination of the unanimity requirement seriously disadvantages an accused — as compared to those who have been accused of lesser crimes — and as such, is violative of equal protection guaranteed in the fourteenth amendment.

Two approaches were taken by the Court in considering the first contention of the petitioners — the sixth amendment’s guarantee of a right to a jury trial mandates, via the fourteenth amendment, an unanimous verdict in state criminal cases, as is still required in federal jurisdictions. It first undertook a brief historical study of the sixth amendment in order to ascertain the intention of the framers at the time of the amendment’s adoption and in order to evaluate the traditional argument that the term “jury trial,” as used in the Constitution, embodies the common law concept of jury as a group comprised of one’s peers, twelve in number, and rendering a unanimous verdict. The Court pointed out that, in Williams v. Florida, it had already exhaustively researched this theory and was unable to substantiate it. On the contrary, it had found that a draft of the amendment, specifically requiring unanimous verdicts, had been defeated in the Senate. However, in view of the dearth of primary source material concerning the debate at the time of the sixth amendment’s adoption by the Senate, and the conflicting inferences that can be drawn from the material available, the Apodaca Court felt obligated to establish more than an historical basis for rejecting the petitioners’ sixth amendment claim.

an opinion concurring in the result in Apodaca and concurring in the judgment and reasoning in Johnson. Id. at 366. Justice Douglas filed a dissenting opinion for both cases in which Justices Brennan and Marshall concurred. Id. at 380. Justice Brennan filed a dissenting opinion for both cases in which Mr. Justice Marshall joined. Id. at 395. Justice Stewart filed dissenting opinions in both cases and was joined by Justices Brennan and Marshall. Apodaca v. Oregon, 406 U.S. 404, 414 (1972); Johnson v. Louisiana, 406 U.S. 356, 397 (1972). Justice Marshall filed a dissenting opinion for both cases in which Justice Brennan joined. Id. at 399.

28. See notes 15 & 16 supra.
30. Id. at 97–99.
31. Id. at 94–95.
32. Id. at 99.
33. 406 U.S. at 410.
The test in determining whether a right, guaranteed by the Bill of Rights, is applicable to the states, has, in recent times, been expressed in terms of fundamental fairness and justice.34 The rationale the Court has developed is that a right provided in the sixth amendment is applicable to the states under the fourteenth amendment's due process requirement only if that right was necessary to assure fundamental justice.35 In the instant cases, the Court employed this measure in rejecting the petitioners' sixth amendment claim.36 In order to determine whether less than unanimous juries would constitute a fundamental injustice, the Court analyzed the function of the jury in American jurisprudence and whether this function would be substantially vitiated by permitting majority verdicts.37

The purpose of the jury was defined in Duncan v. Louisiana38 as “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”39 In Singer v. United States,40 the Court explained that “[t]he [jury trial] clause was clearly intended to protect the accused from oppression by the Government.”41 Recently, in Williams v. Florida,42 the Court characterized the “essential feature” of a jury to be “the interposition between the accused and his accuser of the commonsense judgment of a group of laymen.”43 With these characterizations as a springboard, the Court deemed that a jury would not be seriously hampered in its efforts to reach a common-sense judgment merely by an abrogation of unanimity.44 Furthermore, the Court reasoned that the “interposition” of the jury — between the accused and accuser — would not be seriously altered by such a shift in policy. The underlying reasoning of the Court is syllogistic. The Court posited the proposition that the imposition of the common-sense judgment of the jury is necessary in order to ensure fundamental fairness.45 However, jury unanimity is not necessary to ensure a common-sense judgment.46 Therefore, jury unanimity is not necessary to fundamental fairness. The Court admitted that less than unanimous jury verdicts would result in convictions and

35. Duncan v. Louisiana, 391 U.S. 145, 149-50 & n.14 (1968). For an excellent discussion of the three major theories as to the applicability of the Bill of Rights to the states through the fourteenth amendment, see id. at 174-83 (Harlan, J., dissenting).
39. Id. at 156.
41. Id. at 31.
42. 399 U.S. 78 (1970).
43. Id. at 100.
45. Id.
46. Id. at 410-11. This assumption is open to criticism. See notes 111 & 115 and accompanying text infra.
acquittals which theretofore would have resulted in hung juries.\textsuperscript{47} However, the effect this might have on the proper function of the jury was dismissed by a reference to an empirical study conducted by Kalven and Zeisel in which it was demonstrated that “the probability that an acquittal minority will hang the jury is about as great as that a guilty minority will hang it” in jurisdictions that require unanimity.\textsuperscript{48} Thus, it may be argued that the natural conclusion that the elimination of unanimity would have no effect on the overall ratio of the number of convictions to the number of acquittals.

In his dissenting opinion, Justice Douglas vigorously attacked the foundation of the Court's reasoning by utilizing data, taken from the same study, that tended to show that an accused would indeed be disadvantaged by less than unanimous verdicts, and further that the position of the jury is not interposed between the accused and the accuser, but rather stacked on the side of the prosecution.\textsuperscript{49} The Kalven and Zeisel study revealed that juries become hopelessly deadlocked by two or less minority votes in approximately 2 per cent of all cases, which amounts to approximately 1,260 cases each year.\textsuperscript{50} Accordingly, under a nonunanimity rule, 1,260 cases would be disposed of which might have otherwise been retried. Notably, the prosecution would obtain convictions 80 per cent of the time, while the defendant would prevail in only 20 per cent.\textsuperscript{51}

\begin{table}[h!]
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\begin{tabular}{|c|c|}
\hline
Votes for Conviction & Per cent of Total \\
\hline
11:1 & 24 \\
10:2 & 10 \\
9:3 & 10 \\
8:4 & 6 \\
7:5 & 15 \\
6:6 & 13 \\
5:7 & 8 \\
4:8 & 4 \\
3:9 & 4 \\
2:10 & 8 \\
1:11 & 100 \\
\hline
\end{tabular}
\caption{Deadlocked Cases*}
\end{table}

\textsuperscript{51} Id. By examining the table (see note 50 supra), it can be surmised that only 42 per cent of all trials that are deadlocked would be affected by a 10-to-2 non-unanimity rule. Since in 34 per cent of the affected deadlocked cases the majority favors conviction, it can be said that the prosecution will win 80 per cent of these

\textsuperscript{48} Id. at 411 n.5.
\textsuperscript{50} Of the approximately 55,670 jury trials each year in the state and federal courts, it is estimated that the jury becomes deadlocked in 3000 or 5.6 per cent of all cases. \textit{See H. Kalven & H. Zeisel, The American Jury} 502-08 (2d ed. 1971). By examining the schedule below, it can be seen that 42 per cent of all hung juries are a result of 11:1, 10:2, 2:10, or 1:11 votes. Therefore, it can be said that 42 per cent of the approximately 5 per cent of all cases that ended in a deadlock were caused by the votes of two or less jurors. Thus, 2 per cent of all cases tried became deadlocked because of the minority views of two or less. In this way, one can conservatively estimate that, as a result of \textit{Apodaca} and \textit{Johnson}, 1260 cases are immediately decided which otherwise might have been retried.

\begin{table}[h!]
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\begin{tabular}{|c|c|}
\hline
Votes for Conviction & Per cent of Total \\
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11:1 & 24 \\
10:2 & 10 \\
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3:9 & 4 \\
2:10 & 8 \\
1:11 & 100 \\
\hline
\end{tabular}
\caption{Deadlocked Cases*}
\end{table}

\textsuperscript{51} Id. at 460 (Table 125).
It could be argued that, on retrial, there is a high probability that the jury would have found 80 per cent of the defendants guilty. However, as Kalven and Zeisel acknowledge in their study, hung juries are the result of “real difficulties” in the case,\(^{52}\) and, as Justice Marshall noted, a second trial may differ substantially from the first:

On retrial, the prosecutor may be given the opportunity to make a stronger case if he can: new evidence may be available, old evidence may have disappeared, and even the same evidence may appear in a different light if, for example, the demeanor of witnesses is different.\(^{53}\)

Therefore, it is also arguable that the majority’s position lacks merit in that it is entirely too speculative in light of empirical evidence and judicial experience. The divergence in the views of the majority and of Justice Douglas, based upon the same empirical study and concerning the same issue — whether a less than unanimous verdict substantially prejudices the defendant and, therefore, disrupts the proper relationship of the jury — leads to one of two conclusions: either the evidence presented by the Kalven and Zeisel study contradicts itself, or an incorrect inference was drawn by either the majority or by Mr. Justice Douglas. Upon a thorough re-examination of the study in question, it appears that the inference drawn by the majority is on tenuous ground. The statement by Kalven and Zeisel that “the probability that an acquittal minority will hang the jury is about as great as that a guilty minority will hang it” refers merely to the likelihood of whether an acquittal minority will acquiesce with a conviction majority more readily than a conviction minority will bow to an acquittal majority.\(^{54}\) It does not refer to the fact, as the Court inferred, that acquittal minorities hang juries as often as conviction minorities. The fallacy of such an inference is obvious if it is recognized that juries hung by a minority of three or less favor conviction in 80 per cent of the cases and acquittal in only 20 per cent.\(^{55}\) Thus, the overall ratio of convictions to acquittals is altered in the favor of the prosecution. The traditional relationship of the jury has been shifted such that an accused is at a distinct disadvantage.

Additionally, the majority may be criticized, even assuming that its inferences from the empirical evidence were correct, since it has administered the fundamental fairness test to statistics without regard to whether cases, \(34\% + 42\% = 80\%\). Similarly, the accused will be favored in only 20 per cent of these cases. \(8\% + 42\% = 50\%\).

52. Kalven & Zeisel, supra note 19, at 201. Empirical evidence tends to show that juries follow the evidence and understand the cases. It, therefore, can be deduced that, in those cases in which juries hang, the evidence was not sufficiently clear to make a judgment. H. Kalven & H. Zeisel, supra note 50, at 160–61.


54. H. Kalven & H. Zeisel, supra note 50, at 461.

55. See notes 50 & 51 supra. Where 9-to-3 decisions are permissible, 56 per cent of all deadlocked cases are affected. Since 44 per cent of the affected class favor conviction, the prosecution wins 79% of these cases. \(44\% + 56\% = 79\%\). Similarly, acquittal is favored in only 21 per cent. \(12\% + 56\% = 21\%\).
fundamental fairness is thereby provided for defendants as individuals. The Court seems to have reasoned that if in the long run nonunanimous acquittals equal nonunanimous convictions, fundamental fairness is preserved because of the equality of the statistics.

Having rejected the sixth amendment claim, the Court then considered the critical question raised in both cases as to whether nonunanimity would undermine the reasonable doubt standard. The petitioners relied upon the due process clause of the fourteenth amendment in presenting their argument. Essentially, their position was that in order to give substance to the reasonable doubt standard mandated by the fourteenth amendment, jury verdicts must be unanimous.\footnote{57}

Two lines of approach were taken by the Court in rejecting this argument. Since the issue of jury unanimity as a requisite of due process, binding on the states, had never directly been ruled on by the Court, it relied in its first line of approach on a number of cases, in which dicta strongly supports the position that jury unanimity is not an indispensable element of due process. For example, in Jordan v. Massachusetts,\footnote{58} the Court stated that “[i]n criminal cases due process of law is not denied by a state law which dispenses with ... the necessity of a jury of twelve, or unanimity in the verdict.” A similar conclusion was reached in Maxwell v. Dow.\footnote{60} At the time of these cases, the reasonable doubt standard was well settled and considered implicit in the Constitution as a fundamental principle which protected life and liberty.\footnote{61} The Johnson Court, therefore, reasoned that the traditional view was that lack of unanimity did not alter the reasonable doubt standard to the extent that due process would be denied; the proof being that if this were not the case, the dicta in Maxwell

\footnote{56. See In re Winship, 397 U.S. 358, 363-64 (1970).}

\footnote{57. In Apodaca, this point was argued in a slightly different context. The petitioners, relying on Duncan v. Louisiana, 391 U.S. 145 (1968), which held the sixth amendment’s jury trial clause applicable to the state by virtue of the due process clause of the fourteenth amendment, argued that the sixth amendment required unanimous verdicts in state criminal prosecutions in order to give substance to the reasonable doubt standard otherwise mandated by the due process clause. The Apodaca Court noted, however, that this was essentially the same argument that was raised in the Johnson opinion and similarly rejected the petitioners’ claim, 406 U.S. at 412. Since the right to “jury trial” granted in Duncan was applicable prospectively and not retroactively (see DeStefano v. Woods, 392 U.S. 631 (1968)), Johnson was barred from making any claim regarding his sixth amendment rights because he had been convicted on May 14, 1968, and Duncan had been decided on May 20, 1968. Apodaca v. Oregon, 406 U.S. 404, 411 (1972).}

\footnote{58. 225 U.S. 167 (1912).}

\footnote{59. Id. at 176.}

\footnote{60. 176 U.S. 581 (1900). The Maxwell Court posited: [W]hen providing in their constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal Government that [the states] should have the right to decide for themselves what shall be the form and character of the procedures in such trials ... whether there shall be a jury of twelve or a lesser number and whether the verdict must be unanimous or not. Id. at 605.}

\footnote{61. See Brinegar v. United States, 338 U.S. 160, 174 (1949); Davis v. United States, 160 U.S. 469, 488 (1895); Coffin v. United States, 156 U.S. 432, 453-60 (1895).}
and *Jordan* would have been untenable in the light of the already established reasonable doubt standard. 62

In both *Maxwell* and *Jordan*, the issue resolved was whether a sixth amendment right, which was guaranteed in federal criminal proceedings, should be made mandatory upon the states by virtue of the due process clause of the fourteenth amendment. 63 In both cases, the Court rejected the petitioners' arguments on the basis that the due process clause did not limit the states, but mandated only that each state adhere to the uniform procedures established by that state. 64 In this manner, the *Maxwell* and *Jordan* Courts presented their views on the necessity of unanimity in state criminal trials. This narrow interpretation of the due process requirement, however, has long since been rejected. 65

The test of applicability to the states of any provision in the Bill of Rights via the fourteenth amendment's due process clause is now rooted in whether the right is necessary in order to afford fundamental fairness and whether the state procedure in question affords "fundamental fairness and justice" to the citizens of that state. 66 It is at least questionable, therefore, given the present formulation of the due process mandate, whether the Justices who decided *Maxwell* and *Jordan* would have presented the same view with regard to the necessity of jury unanimity.

Surprisingly, this weakness in the majority reasoning was not explored in any dissenting opinion. While Justice Powell in his concurring opinion alluded to this infirmity, he quickly dismissed it, stating:

"It is true, of course, that the *Maxwell* and *Jordan* Courts went further and concluded that the States might dispense with the jury trial altogether. That conclusion, grounded on a more limited view of due process than has been accepted by this Court in recent years, was rejected by the Court in *Duncan*. But I find nothing in the constitutional principle upon which *Duncan* is based, or in other precedents, which requires repudiation of the views expressed in *Maxwell* and *Jordan* with respect to the size of a jury and the unanimity of its verdict. 67"

Thus, Justice Powell reasoned that the analysis behind the dicta of *Maxwell* and *Jordan* is still viable even when viewed in the light of the modern fundamental fairness test of *Duncan*. This approach seems to be on firmer ground than the path pursued by the majority. However, it relies on the validity of the Court's conclusion in rejecting the petitioners' sixth amendment argument; namely, less than unanimous verdicts are not fundamentally unfair. As has been suggested, however, this reasoning itself is also on

62. 406 U.S. at 359.
63. *See* notes 58-61 and accompanying text *supra*.
64. 225 U.S. at 174; 176 U.S. at 599.
66. *See* note 34 and accompanying text *supra*.
tenuous ground. It, therefore, must be concluded that Justice Powell's reasoning in affirming the dicta of Maxwell and Jordon, though logically sound, is crippled because of its reliance on this dubious assumption.

The second approach taken by the Court was an analysis of the foundations upon which the petitioners' reasonable doubt claim rested; that is, the burden of proof to establish guilt beyond a reasonable doubt can not be met by the prosecution when there are minority jurors who still possess doubts. In the landmark case of Commonwealth v. Webster, Chief Justice Shaw defined reasonable doubt:

It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal.

This traditional definition of reasonable doubt presumes that the prosecution must convince each juror as to guilt. However, the majority rejected this presumption by ruling that, if a "substantial majority" of the jury rendered a verdict of guilty, then the prosecution had fulfilled its burden of establishing guilt beyond a reasonable doubt. The Court stated:

That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard.

In order to substantiate this position, it was noted that convictions are regularly sustained on appeal, "even though the evidence was such that the jury would have been justified in having a reasonable doubt . . . even though the trial judge might not have reached the same conclusion as the jury; and even though appellate judges are closely divided on the issue

68. See notes 54–55 and accompanying text supra.
69. See In re Winship, 397 U.S. 358, 363–64 (1970) (holding that the due process clause of the fourteenth amendment required that guilt be proven beyond a reasonable doubt in all criminal cases).
72. Id. at 320.
73. Thus, in In re Winship, 397 U.S. 358 (1970), the Court defined reasonable doubt as "impress[ing] on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." Id. at 364. Also, in Eagan v. United States, the court stated:
A reasonable doubt may be defined to mean such a doubt as will leave the juror's mind, after a candid and impartial investigation of all the evidence, so undecided that he is unable to say that he has an abiding conviction of the defendant's guilt, or such a doubt as in the graver and more important transactions of life, would cause a reasonable and prudent man to hesitate and pause.
287 F. 958, 967 (D.C. Cir. 1923).
75. Id.
whether there was sufficient evidence to support a conviction.”76 It was, therefore, concluded that a margin of disagreement has always been a permissible factor within the reasonable doubt standard.77 Moreover, as evidence that the lack of unanimity is not to be equated with the existence of reasonable doubt, the Court noted that in jurisdictions where unanimity is required, the defendant is not acquitted if the jury fails to reach a unanimous verdict, but rather is merely given a new trial.78 If the doubts of the minority jurors were indicative of reasonable doubt, the Court reasoned, then it would be the duty of the trial judge to direct a verdict of acquittal rather than a retrial.79

The dissenting Justices strongly attacked the majority’s view of the reasonable doubt standard. Calling the treatment “cavalier,” Mr. Justice Marshall noted that the Court’s argument rested on a “complete non sequitur.”80 Reasonable doubt “simply establishes that, as a prerequisite to obtaining a valid conviction, the prosecutor must overcome all of the jury’s reasonable doubts; it does not, of itself, determine what shall happen if he fails to do so.”81 That question, according to Justice Marshall, is answered by the fifth amendment’s ban on double jeopardy.82 Thus, if the prosecution does not carry its burden of proof, as evidenced by minority jurors, there is no verdict at all. “The prisoner has not been convicted or acquitted and may again be put on his defence.”83 It should be noted that the petitioner in Johnson did not argue that he should be acquitted because of the doubts of three jurors, but argued only that because of these individual doubts, the prosecution had not carried its full burden of proof, and, therefore, he should not be convicted but rather receive a new trial.84

It is surprising that the dissent did not take the majority to task on the significance of the precedent relied upon as support for the majority proposition that the reasonable doubt standard may be satisfied even though reasonable men disagree. The weakness in the majority’s reasoning is that, in the authority cited, the difference of opinion with respect to the sufficiency of the proof presented at trial lies outside of the jury.85 The jury is

76. Id. at 362-63.
77. Id. at 364.
78. Id.
79. Id.
80. Id. at 401 (Marshall, J., dissenting).
81. Id.
82. Id.
84. 406 U.S. at 359.
85. The first case cited by the Court, United States v. Quarles, 387 F.2d 551 (4th Cir. 1967), cert. denied, 391 U.S. 922 (1968), presented the issue of whether the evidence present at the trial could support a guilty verdict. That court stated that the proper test to be applied in resolving this issue did not depend upon the possibility that the jury could have had a reasonable doubt, but rather upon the determination that guilt could be established upon the facts to be beyond a reasonable doubt when viewed in the light most favorable to the government. Id. at 554. The second case cited in support of the majority reasoning was Bell v. United States, 185 F.2d 302 (4th Cir. 1950), wherein the issue was the criteria necessary to mandate a directed verdict: When a motion for a directed verdict of acquittal is made in a criminal case, the sole duty of the trial judge is to determine whether there is substantial evidence
the sole body entrusted with the determination of whether guilt was established beyond a reasonable doubt. Once a jury has reached a verdict, there is no remaining doubt. The possibility of reasonable doubts persisting among those outside the jury is irrelevant to the issue of whether the reasonable doubt standard allows for disagreement among reasonable men because, under the criminal justice system, the only reasonable men whose views are at issue are those of the jury.

Neither the majority nor the dissent squarely confronted the ultimate question to be answered in resolving this issue; that is, whether a single reasonable doubt in the mind of one juror frustrates the prosecutor's meeting his burden — whether, in other words, the entire jury, as a single entity, must be convinced in order for the burden to be met. The state has the obligation of proving guilt beyond a reasonable doubt. Assuming, as the Court does, that this obligation is met where there are three or less minority jurors, then it would appear that in jurisdictions that require unanimity, an additional burden is placed on the prosecutor; that is, not only that of proving guilt beyond a reasonable doubt, but that of persuading the entire jury of the defendant's guilt. This additional burden has been called the burden of persuasion. Where unanimity is a requirement, these two burdens are indistinguishable and, in fact, are interchangeable, for if the entire jury has been persuaded of guilt beyond a reasonable doubt, it is obvious that each juror has been convinced of it beyond a reasonable doubt. The distinction between these burdens becomes apparent only when the burden of proof is permitted to be satisfied by a nonunanimous verdict. The question to be decided, therefore, is whether requiring the prosecution to meet the burden of persuasion is mere surplusage or a necessity to protect the defendant from the "corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge." It can be argued in reply to this question that any lightening of the burden upon the prosecution frustrates the proper function of the jury in

which, taken in the light most favorable to the United States, tends to show that the defendant is guilty beyond a reasonable doubt. The possibility that a jury may have a reasonable doubt upon the evidence as to the guilt of the defendant is not the criterion which determines the action of the trial judge. In Takahashi v. United States, 143 F.2d 118 (9th Cir. 1944), the court held: Even though a judge would not have drawn the particular inference, he is not required to set aside a verdict if the jury could find [proof] beyond a reasonable doubt. Id. at 122.

86. See notes 71-73 and accompanying text supra.

87. Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953), determined that an accused may not waive unanimity, noting that the unanimity of a verdict is "inextricably interwoven with the required measure of proof" and that this burden of proof is carried by the prosecution by convincing the entire jury as to guilt. Id. at 838-39. Anything less than unanimity would be fatal to the prosecution because the reasonable doubt standard would not be fulfilled. Id. at 833.


89. C. McCORMICK, LAW OF EVIDENCE § 341, at 798 (2d ed. 1972).

that, clearly, the easier it is for a prosecutor to obtain a conviction, the more likely it becomes that overzealous or biased prosecutors or judges will prevail. Statistically, the prosecution salvages victory in 80 per cent of the cases that would otherwise have been hung in unanimous jurisdictions. It is submitted that such a sizable increment in the number of convictions as compared to the increment in the number of acquittals warrants the conclusion that the requirement of meeting the burden of persuading the entire jury, as a body, is necessary to insure that the jury continues to serve its proper function as required by due process.

Another unfortunate aspect of the Court's ruling was its silence as to what constitutes a "substantial majority." In Johnson, a majority of nine of the twelve jurors, or 75 per cent, was considered substantial. However, the Court gave little indication as to whether, for example, an eight-to-four vote (66 per cent) would be an acceptable majority. However, Mr. Justice Blackmun did indicate that he would draw the line above the 58 per cent level or a seven-to-five vote, stating that such a standard would afford him "great difficulty."

An additional question left unanswered is whether a majority rule of 75 per cent would be constitutionally acceptable in jurisdictions where juries may consist of less than twelve. The Court, in Williams v. Florida, intimated that unanimous verdicts, where juries consist of less than twelve, serves the purpose of insuring that the government bear the heavier burden of proof. However, it categorically refused to rule on the question of unanimity as it pertains to juries of less than twelve. Thus, the question also remains open as to whether a five-to-one vote, a four-to-two vote, or even a four-to-one vote, for example, would constitute an acceptable "substantial majority."

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91. Hibdon v. United States, 204 F.2d 834, 839 (6th Cir. 1953).
92. See notes 50 & 51 and accompanying text supra.
94. Id. at 366 (Blackmun, J., concurring).
95. 399 U.S. 78 (1968) (requirement of a twelve-man jury not mandated by the sixth amendment).
96. Id. at 100.
97. Id.
98. This poses an interesting question in terms of statistical advantage gained by the prosecution. It is statistically easier to convince at least five of six jurors, or an 83 per cent majority, than to convince nine of twelve, given the same case:

<table>
<thead>
<tr>
<th>Verdicts</th>
<th>For Conviction</th>
<th>Probabilities</th>
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<tbody>
<tr>
<td>5:1</td>
<td>83</td>
<td>.11</td>
</tr>
<tr>
<td>9:3</td>
<td>75</td>
<td>.075</td>
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As the above statistics indicate, the minimum standard percentage needed for conviction rises when verdicts are five to one but the difficulty of persuasion falls. An examination of the above probability column indicates that it is nearly twice as easy to convince five of six jurors than nine of twelve. Thus, the increase in the percentage needed in order to convict when juries are comprised of less than twelve does not accomplish its purpose of equalizing the difficulty of persuasion. These probabilities were determined by Mr. Ching-Tuan Chiang, Associate Professor of Mathematics, Villanova University, Villanova, Pa. Probabilities may be derived for various combinations of jurors by use of a binomial theorem table which can be found in most secondary school mathematics texts.
In rejecting the petitioners' second argument, the Court has not redefined the reasonable doubt standard itself, but rather has shifted the benchmark by which the existence or lack thereof of a reasonable doubt has been traditionally established. In so doing, the Court has distinguished the burden of proof necessary for conviction from the burden of persuasion that must be carried by the prosecutor.

Having dispensed with this argument, the Court turned to consider the third issue presented by the petitioners; namely, by permitting majority verdicts, the requirement that juries be comprised of a cross section of the community would be effectively undermined since convictions could thereby occur without proper consideration of minority viewpoints within that community. Moreover, the majority of the jury would be under no compulsion even to entertain minority viewpoints where the jury was properly drawn, and a conviction or acquittal could be the result of “racism, bigotry, or an emotionally inflamed trial.” The Court rejected this argument on two grounds: (1) the Court has never held the community “cross section” requirement to mean that identifiable minority groups within the community must be represented on each jury; and (2) there are no grounds for believing that majority jurors would simply refuse to entertain the reasoned argument of minority jurors, would terminate discussion, and summarily render a verdict.

In the first instance, the Court noted that, while in Swain v. Alabama it had held that an identifiable minority group within the community may not be systematically excluded from the jury panel, this does not mean that each jury must have a representative minority faction, nor that a minority group has the right to block convictions. Rather, the ruling in Swain requires only that minority groups be afforded the right to “participate in the overall legal processes by which criminal guilt and innocence are determined.” The Court reasoned that majority verdicts do not affect the inclusion or exclusion of minority groups in the judicial process and, therefore, do not violate the “cross section of the community” requirement.

In refusing to assume that the majority jurors would not consider the reasoned arguments of a minority, Mr. Justice Powell, concurring, argued that juries “are premised on the conviction that each juror will faithfully perform his assigned duty.” Traditionally, this duty has been to weigh

102. Id. at 413-14.
106. Id.
the evidence objectively and to entertain any reasoned arguments presented by minority jurors. 108 In this light, the Court noted that a minority which presents reasoned arguments for acquittal:

[W]ould either have [their] arguments answered or would carry enough other jurors with [them] to prevent conviction. A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose — when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position. 109

Moreover, the Court noted that the petitioners did not present any evidence which tended to show that a majority would ignore the reasonable doubts and arguments of minority jurors. 110

The assumption that jurors will consider the arguments of a minority was vigorously questioned by the dissenting Justices. Mr. Justice Brennan noted that emotions may run high during the course of a criminal trial and that jurors, as a result, enter the jury room with strong convictions on the merits of the case. Jurors have only “their own common sense to restrain them from returning a verdict before they have fairly considered the positions of jurors who would reach a different conclusion” if, at that time, there was a sufficient majority to render a verdict. 111 Under a unanimity rule, on the other hand, the jury would be forced to consider minority arguments, and, therefore, it would not be left to chance whether or not the jury performed its required duty. 112

Mr. Justice Powell dismisses the possibility that jurors may be prejudiced by the emotions of the trial such that they could not perform their duty to entertain the reasoned arguments of a minority and notes that the judicial system contains safeguards to eliminate emotionalism by providing for changes of venue and limitations on press coverage. 113 However, it may be argued that these safeguards protect the jury only from the outside influence of public emotionalism and are not designed to reduce emotional prejudices that may arise at the trial itself. Of course, as Justice Powell points out, 114 such miscarriages of justice are diminished by the court’s instructions to the jury as to the burdens of proof and the duty of the jury to weigh minority opinions. Contrariwise, however, as Justice Douglas emphasized in dissent, “human experience teaches that polite and academic

110. Id.
111. Id. at 396 (Brennan, J., dissenting).
112. Id. at 389 (Douglas, J., dissenting). In this connection, some jurisdictions that allow less than unanimous jury verdicts in civil cases, have recognized this problem and provided for it by requiring a minimum time that the jury must deliberate. See Minn. Stat. Ann. § 546.17 (Supp. 1972) (six hours); Neb. Rev. Stat. § 25-1125 (1964) (six hours).
114. Id.
conversation is no substitute for the earnest and robust argument necessary to reach unanimity."

Although there is little empirical evidence as to the effect majority verdicts have on jury deliberations, the more convincing arguments seem to lie with the dissenting Justices. Notwithstanding the premise that the jury will fulfill its duty to consider minority views, unanimity at the very least acts as a substantial safeguard against the possibility of jury misconduct and assures the accused a more deliberate examination of his case such that the jury is better able to render a "commonsense judgment."

With the rejection of this argument, the Court affirmed the convictions in the Apodaca case. However, the Court had yet to deal with a fourth issue presented by petitioner Johnson. Under Louisiana law, crimes that may be punished at hard labor are to be tried by a jury of five, all of whom must agree, while crimes that are necessarily punished at hard labor are to be presented to a jury of twelve, nine of whom must concur.

115. Id. at 389 (Douglas, J., dissenting).
116. In Oregon, the number of nonunanimous juries increased 25 per cent once the majority rule was put into effect. Kalven & Zeisel, supra note 19, at 201. In interpreting this unusual increase, at least two explanations may be feasibly suggested: (1) minority jurors in nonunanimous jurisdictions are more adamant than their counterparts where unanimity is required; or (2) deliberation simply stops when the requisite majority is reached. The first conclusion must be rejected on the grounds that empirical evidence tends to show that juries are not likely to hang unless there is a substantial minority for acquittal or conviction on the first ballot. H. Kalven & H. Zeisel, supra note 50, at 462-63. A further reason is the sociological phenomenon that small minorities usually will not hold out against overwhelming majorities, but will immediately tend to question the validity of their own position, even if that position is in fact correct. Id. The argument that nonunanimous verdicts were increased 25 per cent in Oregon because of the desire of minority jurors not to compromise but to go on record as against the verdict does not, it is submitted, account for this increase in its entirety. The pressures of conformity are simply too compelling for a small minority, unless there are very substantial reasons for disagreement. Id. Thus, it may be concluded that majority jurors do not entertain the arguments of a minority if the minimum number necessary for conviction or acquittal has been reached. In the light of these findings, it would seem that the better policy would be a system that ensures earnest deliberation and does not leave this to the caprice of jury members, notwithstanding the instructions of the trial judge.

117. See notes 107-08 and accompanying text supra.
118. As Justice Stewart notes in his dissenting opinion in Johnson, the Court has recognized the fact that juries do not always perform their duties in accord with the premise upon which the jury system is founded. 406 U.S. at 398; see notes 107-08 and accompanying text supra. This very fact has given rise to a number of decisions with the expressed purpose of ensuring jury regularity. Parker v. Gladden, 385 U.S. 363 (1966) (prejudicial influence on the jury exerted by court officials is grounds for reversal); Sheppard v. Maxwell, 384 U.S. 333 (1966) (prejudicial press coverage that may influence jurors is grounds for reversal); Swain v. Alabama, 380 U.S. 202 (1965) (systematic exclusion of minority groups from jury panel held reversible error); Jackson v. Denno, 378 U.S. 368 (1964) (inadmissible confessions may not be presented for jury to hear); Irvin v. Dowd, 366 U.S. 717 (1961) (providing change of venue); Strauder v. West Virginia, 100 U.S. 303 (1879) (providing change of venue). Thus, the Court's presumption of jury reliability in the instant cases seems to be a departure from the positions previously taken by the Court in regard to duties performed by juries.

120. See notes 42 & 43 and accompanying text supra.
The petitioner was charged with a crime that required punishment at hard labor and was convicted by a nine-to-three vote. He argued that such a classification denies the right of equal protection under the fourteenth amendment, insisting that, by dispensing with unanimity, he was disadvantaged as compared to those who committed lesser crimes.

The purpose of the Louisiana statutory provision was to "facilitate, expedite, and reduce expenses in the administration of criminal justice," which the Court noted was a legitimate state purpose. As the crime becomes more serious, the number of jurors to be convinced increases, thus providing the defendant with an added safeguard, because the necessity of persuading more jurors imposes an increasingly heavier burden upon the prosecution. It was pointed out that this did not change the burden of proof, for in both cases the prosecutor must prove guilt beyond a reasonable doubt. Additionally, it was noted that, "if appellant's position is that it is easier to convince nine of twelve jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature."

The argument by the petitioner Johnson deserved a more thorough examination by the Court. If it is easier to convince nine of twelve jurors of guilt in more serious cases than five of five jurors where less serious offenses are alleged, then the entire rational basis of the Louisiana classification system can be questioned. The stated purpose of the system was judicial economy. However, the legislature recognized the fact that the state should not gain easy convictions where a defendant had a great deal to forfeit. Thus, as the seriousness of the offense increased, the number of jurors that the state must convince increased. Assuming that the amount of the evidence is equal in two different cases, the prosecution has a .031 probability of convincing five of five jurors as to a defendant's guilt. However, given the same amount of evidence under a majority rule, whereby at least nine out of twelve jurors must be convinced of guilt, the prosecution has a .073 probability of gaining a conviction. Thus, in cases allowing nine-to-three decisions, the prosecutor more than doubles his chance of obtaining a conviction than if he had to convince all the members of a five-man jury on the same amount of evidence. Accordingly, as these figures demonstrate, the ultimate result of the scheme directly contradicts its stated purpose and is, therefore, without rational basis. It is the irrationality of the classification system itself that is violative of the petitioner's due process rights, irrespective of whether the reasonable doubt

122. 406 U.S. at 358.
123. Id. at 364.
125. 406 U.S. at 364.
126. Id. at 364-65.
127. Id. at 364.
128. Id. at 365.
129. Id. at 364.
130. These probabilities were derived by Mr. Ching-Taun Chiang, Associate Professor of Mathematics, Villanova University, Villanova, Pa. See note 98 supra.
standard is emasculated for defendants in his category. Thus, the question is not at all a matter of "judgment" by the legislature but rather a question that should have been more thoroughly investigated by the Court.

There were several further considerations tangentially evaluated by the Court in coming to its conclusion. Of significant effect was the fact that a nonunanimity rule had been enacted in England and that a similar rule is favored for adoption in the United States by the American Bar Association's Criminal Justice Project.

Another consideration, which was most certainly entertained though not emphasized by the Court in its opinion, was the administrative cost, both in time and in money, which would be substantially lessened by the reduction in the number of hung juries. In his concurring opinion, Justice Powell intimates that this factor influenced his reasoning, for nonunanimous verdicts would tend to nullify the obstruction of the unreasonable or corrupt juror, thus reducing the number of hung juries and the attendant expenses. However, it is submitted that if, as the empirical evidence tends to demonstrate, each defendant's chances for acquittal are to be significantly altered, then the tangential benefits that may be derived from opting for nonunanimity cannot be deemed sufficient justification for such a rule. It might be better to heed the words of Mr. Justice Black:

[T]rifling economies . . . have not generally been thought sufficient reason for abandoning our great constitutional safeguards. . . . Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those accused of crimes.

In conclusion, notwithstanding previous decisions requiring unanimity in federal criminal cases under the sixth amendment, there seems to be nothing in the Court's reasoning in the instant cases which would prohibit a less than unanimous verdict in the federal courts. It is exceedingly

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131. The question of standing does not appear to be a problem as long as the defendant bases his equal protection claim on the fact that his rights have been abridged by the arbitrary classification statute. In the instant case, the defendant would have had little difficulty in showing that: (1) he suffered a personal injury in fact, economic or otherwise, and (2) he was "arguably within the zone of interest intended to be protected or regulated . . . ." See Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970).
132. See The Criminal Justice Act of 1967 § 13. It should be noted that the English adoption of the majority rule was prompted by reports of holdout jurors who were bribed to hang the jury. The measure only passed Parliament after party discipline was invoked, which prompted one M.P. to comment: "If the house were given a free vote, the proposal would be thrown out neck and crop." See Kalven & Zeisel, supra note 19, at 195.
133. ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO TRIAL BY JURY § 1.1 (Draft 1968).
136. See note 16 and accompanying text supra.
137. It could be argued that, since the unanimity requirement is not expressly incorporated in the sixth amendment, it is not required in federal jurisdictions.