Case Western Reserve Law Review

Volume 24 | Issue 1 Article 10

1972

Constitutional Law - Trial by Jury - Unanimity in Criminal Trials [*Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972)]

Jane Kober

Recent Case

CONSTITUTIONAL LAW — TRIAL BY JURY — UNANIMITY IN CRIMINAL TRIALS

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

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

In *Duncan v. Louisiana*[1] the Supreme Court stated:

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all [state] criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee.[2]

Although the Court did not expressly so state, this incorporation of the sixth amendment jury trial right into the fourteenth amendment apparently included all federal jury requirements except those existing solely by virtue of the Court's supervisory power.[3] Two years later, however, the Court held in *Williams v. Florida*[4] that a jury of six in a state criminal trial did not violate the sixth amendment as applied to the states through the fourteenth. Finding that the traditional size of the common law jury was a historical accident and that there was no clear indication that the framers had intended to equate the constitutional and common law characteristics of the jury, the Court used a functional approach and determined that six-member juries could carry out jury functions as well as 12-member juries, "particularly if the requirement of unanimity is retained."[5] The Court expressed no view, however, on "whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial," though it suggested that unanim-

[1] 391 U.S. 145 (1968).

[2] *Id.* at 149.

[3] In response to the objection that its decision would require uniformity among state and federal courts, the Court merely pointed out that few differences existed, *id.* at 158 n.30; the inference is that those differences, including the requisite number of jurors and unanimity, could be reconciled and that sixth amendment requirements would be applied uniformly in state and federal courts. *See id.* at 172 (Harlan, J., dissenting); Bloom v. Illinois, 391 U.S. 194, 213 (1968) (Fortas, J., concurring).

[4] 399 U.S. 78 (1970).

[5] *Id.* at 100.

ity "may well serve an important role in the jury function, for example, as a device for ensuring that the Government bear the heavier burden of proof."[6]

The Court's intimations concerning the importance of unanimity were dispelled in two recent decisions. *Johnson v. Louisiana*[7] presented the question whether the fourteenth amendment demands unanimity of jury verdicts in cases decided prior to *Duncan*;[8] and *Apodaca v. Oregon*,[9] whether unanimity is required in cases arising after the incorporation of the sixth amendment right.

The appellant Johnson was convicted of robbery by a 9-to-3 jury vote.[10] Conviction by that vote was possible under a Louisiana statute requiring a unanimous verdict by 12 jurors in capital cases, a majority vote of at least 9 to 3 where punishment is necessarily at hard labor, and a unanimous verdict of a five-man jury where punishment may be at hard labor.[11] The Supreme Court based its decision to affirm primarily on two grounds.[12] First, the standard of proof beyond a reasonable doubt, held in *In re Winship*[13] to be a due process right, does not require jury unanimity;[14] and, second, Louisiana's scheme of varying the jury size and the necessity of unanimity with the seriousness of the alleged crime does not violate the equal protection clause.

The appellants in *Apodaca* were convicted by jury votes of 11 to 1 and 10 to 2, the minimum required in Oregon.[15] The Court held that the majority verdicts had not denied appellants their right to

---

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

[7] 406 U.S. 356 (1972).

[8] DeStefano v. Woods, 392 U.S. 631 (1968), held that *Duncan* applied only prospectively.

[9] 406 U.S. 404 (1972).

[10] The Louisiana Supreme Court affirmed, State v. Johnson, 255 La. 314, 230 So. 2d 825, *prob. juris. noted*, 400 U.S. 900 (1970).

[11] LA. CRIM. PRO. CODE ANN. art. 782 (West 1967).

[12] A fourth amendment search issue addressed briefly by the Court is not discussed here.

[13] 397 U.S. 358 (1970).

[14] In *Williams* when the Court suggested that unanimity may be a device for insuring that the government bear its burden of proof, it cited Hibdon v. United States, 205 F.2d 834 (6th Cir. 1953), which held that a defendant could not agree to a non-unanimous verdict because the standard of proof beyond a reasonable doubt requires unanimity. The Court in *Johnson* did not refer to *Hibdon*.

[15] The convictions were affirmed by the Oregon Court of Appeals, State v. Plumes, 1 Or. App. 483, 462 P.2d 691 (1969). The Supreme Court of Oregon denied review, and certiorari was granted. Apodaca v. Oregon, 400 U.S. 901 (1970). Article I, section 11 of the Oregon Constitution provides for a verdict by 10 members of a 12-member jury except for first degree murder cases, where a guilty verdict must be unanimous.

a jury selected from a cross-section of the community. The major issue in *Apodaca*, however, was the question recognized but not answered by *Duncan* and *Williams*: whether the sixth amendment requires unanimity.[16] *Apodaca* merely decided, though, that it is constitutional for states to allow jury verdicts reached by a 10-to-2 vote.[17] No sixth amendment principle emerges from the case. Mr. Justice White, writing for a plurality,[18] concluded that the sixth amendment right does not require unanimous verdicts. Four dissenting Justices maintained that it does.[19] These eight Justices assumed that, since the sixth amendment right was fully incorporated into the fourteenth amendment by *Duncan*, a sixth amendment decision applies in the same way to state and federal trials. But Mr. Justice Powell, concurring in the result, was of the opinion that history and precedent demand unanimity only of federal court juries and that the sixth amendment right had not been incorporated with all federal accoutrements into the fourteenth amendment. He concluded, therefore, that state provisions for majority verdicts are consistent with due process. Thus, though five members of the Court believe that the sixth amendment right to jury trial requires unanimity and eight members assume that the right applies by the same standard to federal and state trials,[20] the minorities of four and one on these issues affirmed the state felony convictions. In effect, *Apodaca* may be said to have a result rather than a holding.[21]

The petitioner in *Johnson* argued that the standard of proof beyond a reasonable doubt can only be met by unanimity. He maintained that nine members of the jury could not conscientiously vote for conviction in the face of disagreement by fellow jurors and that the failure to convince three jurors is a failure of the state to meet its burden of proof. The Court decided, however, that nine jurors can conscientiously vote for conviction while their fellow jurors do not and that the three dissenting votes do not impeach the nine.[22]

---

[16] The petitioners in *Apodaca* also argued that the standard of proof of guilt beyond a reasonable doubt demands unanimous verdicts. The Court noted, however, that this standard is derived from the fourteenth amendment, not the sixth, and, therefore, this argument was foreclosed by the Court's decision in *Johnson*.

[17] A majority of nine jurors of 12, the situation present in *Johnson*, can presumably be read into *Apodaca* as a large enough majority for cases after *Duncan*. Since the sixth amendment as applied to the states through the fourteenth does not require unanimity, any majority large enough to afford due process should suffice. *Johnson* decided that a 9-to-3, or "substantial majority," vote is not a denial of due process.

[18] The Chief Justice and Justices Blackmun and Rehnquist joined in the opinion.

[19] Justices Brennan, Douglas, Marshall, and Stewart wrote dissenting opinions.

Winship did not specify whether the standard of proof beyond a reasonable doubt required the state to persuade each juror or to persuade the jury as an entity.[23] It did indicate however, that the standard is the "prime instrument for reducing the risk of conviction resting on factual error,"[24] and that it ensures the community's respect and confidence that decisions to convict are made with "utmost certainty."[25] Unanimous verdicts would seem to enhance and majority verdicts to denigrate both the certainty and the moral force that the standard is meant to provide.

It is easier to accept the Court's statement that nine jurors who vote for conviction may do so in good faith than it is to assume that

[20] *Summary of the Court's Vote in Apodaca*

Justice	Unanimity Required by 6th Amend.	Same Unanimity Standard for Fed. & State	Result
Burger	No	Yes	Sixth amendment allows majority verdicts in state and federal trials.
White	No	Yes	
Blackmun	No	Yes	
Rehnquist	No	Yes	
Brennan	Yes	Yes	Sixth amendment prohibits majority verdicts in state and federal trials.
Douglas	Yes	Yes	
Marshall	Yes	Yes	
Stewart	Yes	Yes	
Powell	Yes	No	Sixth amendment prohibits majority verdicts in federal trials. Fourteenth amendment allows majority verdicts in state trials.

[21] The result here is comparable to that of National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1948), an even more extreme case, where positions rejected by a majority of the Court controlled the outcome of the case. The issue there was whether Congress could provide for article III jurisdiction over District of Columbia citizens in diversity actions under 28 U.S.C. § 1331. Article III provides for federal jurisdiction in cases between citizens of different states but does not mention District of Columbia citizens. Three members of the Court concluded that jurisdiction was allowable under Congress' article I power to provide courts for the District of Columbia; the other six rejected that reason. Two members said that District of Columbia citizens are citizens for article III purposes; the other seven rejected that approach. As a result of the case federal district courts in the states have diversity jurisdiction over District of Columbia citizens, but no constitutional principle underlies that result.

[22] *But see* note 14 *supra.*

[23] While *Winship* noted that the standard "impresses on the trier of fact the necessity of reaching a *subjective* state of certitude of the facts in issue," 397 U.S. at 364 (emphasis added), in context, this statement did not preclude the possibility that the standard required unanimity. Further, it was clear that the Court considered this question still open when it suggested later in *Williams* that the standard of proof beyond a reasonable doubt might require unanimous verdicts. 399 U.S. at 100 n.46.

[24] 397 U.S. at 363.

[25] *Id.* at 364.

a verdict by those nine will be reliable.[26] Majority jurors may overlook or underrate vital evidence that minority jurors find persuasive.[27] The Court's assumption that the jury will engage in discussion until all minority views have been thoroughly examined is questionable. Apodaca's jury deliberated only 41 minutes. Further, too-quick decisions appear to be typical in Oregon. In states where unanimity is required, roughly 2 percent of juries are deadlocked by 10-to-2 or 11-to-1 votes;[28] in Oregon, where a majority of 10 can convict or acquit, one would therefore expect majority verdicts in 2 percent of the cases. Yet that figure is 25 percent, an indication that jurors stop deliberating when they have reached the minimum degree of agreement required.[29]

If the majority verdict juries did deliberate with the earnestness of juries required to reach unanimity, a 9-to-3 verdict still would undercut the reliability of the verdict. "Beyond a reasonable doubt" is not a quantitative phrase. Some jurors will be lax in interpreting it; others will be demanding. A 9-to-3 verdict truncates the range of standards so that the defendant may be convicted by a consensus of the jurors with the lowest standards on the jury. The composite standard that then prevails may well be lower than that which a judge would apply or a prosecutor would expect to meet.[30]

---

[26] If each juror on a 12-man jury were likely to reach a correct decision three out of four times, the statistical probability of a correct decision is 167,776,220:1 where the verdict is unanimous and 256:1 where an 8-to-4 verdict is sufficient. W. FORSYTH, HISTORY OF TRIAL BY JURY 210-11 n.1 (2d ed. 1971).

These statistics and others, *see* notes 28, 30, 54, 69 *infra*, are given in this discussion only as an aid to assessing the reasoning and possible effects of these cases. It is recognized that the selection of jury panels and *voir dire* involved therein are not random, that communities differ, and that possibly unrealistic assumptions have been made in order to make the presentation of the statistical problems manageable.

[27] Dissenting opinions by Mr. Justice Douglas and Mr. Justice Stewart focused on the danger that once a requisite majority is reached juries may not deliberate further.

[28] Kalven & Zeisel, *The American Jury: Notes for an English Controversy*, 48 CHI. B. REC. 195, 200 (1967).

[29] *Id.* at 201.

[30] In a study of the American jury undertaken at the University of Chicago Law School, Kalven and Zeisel found that when a jury verdict differs from the verdict the trial judge would have reached and the reason is differing interpretations of the reasonable doubt standard, the judge almost always applies the lower standard. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 183-85 (1966). The authors suggest that the higher standard of the jury is probably attributable to the unanimity requirement; that is, the jury members with high standards raise the collective view of the jury to demand more of the prosecution than most of the jurors as individuals would otherwise do. *Id.* at 189 n.5. The theory that a higher jury standard can be attributed to a unanimity requirement is corroborated by another study which indicates that the interpretation given the standard by most laymen is less stringent than that given it by judges. Simon & Mahan, *Quantifying Burdens of Proof*, 5 LAW & SOC'Y REV. 319, 324-25 (1971).

In sum, a majority of jurors may convict without meaningful group deliberation, or, even after full deliberation, they may convict by the vote of those with the most lenient standards of proof. Either situation must yield a verdict that is less reliable than a unanimous one, a result that undercuts the protection the reasonable doubt standard is meant to give.

The function of the reasonable doubt standard to inspire community trust in criminal verdicts is likewise diminished by majority verdicts. Although the Court emphasized that a "substantial majority"[31] was involved in the *Johnson* decision, the knowledge that one can be convicted while a substantial minority, 25 percent, remains unconvinced can only lessen community trust in the system.[32] The potential for community distrust is especially great since, as pointed out by Mr. Justice Stewart, it is possible that a member of a minority group may be convicted by a jury split along identifiable group lines.[33]

In addition to the due process claim, Johnson argued that Louisiana's provision for a 9-to-3 verdict in his case violated the equal protection clause, since capital cases required unanimity of 12 jurors, and cases less serious than his, unanimity of five. The Court found no violation, however, because (1) the statute has the rational purpose of saving time and money in the administration of criminal justice, (2) extending more protection with increasing seriousness of the crime and severity of penalty is a rational scheme for achieving that purpose, and (3) whether it is easier to convince five jurors who must decide unanimously than to convince nine of 12 is a question for legislative judgment.

Traditionally the Court has utilized two tests for deciding equal protection challenges. Legislation that creates suspect classifications — classifications based on race, alienage, or lineage —[34] or that touches on fundamental rights[35] is strictly scrutinized.[36] In those

---

[31] The Court stressed the size of the majority needed to convict by the terms "substantial majority," "such a heavy majority," and "so large a majority." 406 U.S. at 361, 362.

[32] The individual in the community, however, may be more likely to applaud the easier route to the conviction of others than to fear for his own chances in court. Mr. Justice Douglas attributed the decisions in *Johnson* and *Apodaca* to a "law and order" judicial mood. *Id.* at 393 (dissenting opinion).

[33] *Id.* at 398 (dissenting opinion).

[34] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (race); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (alienage); Korematsu v. United States, 323 U.S. 214 (1944) (lineage).

[35] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel inter-

cases the Court places the burden on the state to show a compelling state interest in the legislation, to prove the facts underlying the compelling interest, and to show that there are no less onerous alternatives to the statute.[37] Where legislation affects only economic and social interests and creates classifications that are not suspect, however, the Court merely applies a rational basis test. Under this test the equal protection clause

> is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[38]

The Court applied the rational basis test in *Johnson*. Arguably, the compelling interest test should have been used. Although prior cases have not developed clear standards for determining which rights are fundamental for equal protection purposes,[39] commentators have suggested two categories of rights that probably would merit the application of the strict test: rights considered fundamental and therefore protected by the due process clause[40] and rights having "independent constitutional protection."[41] The sixth amendment right to jury trial meets both criteria. Further, since the Court has applied the stricter test in relation to criminal procedure rights that are not fundamental to due process,[42] the right to jury trial, held to be fundamental to due process in *Duncan*, should clearly be

state); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Griffin v. Illinois, 351 U.S. 12 (1956) (rights in criminal procedure).

[36] *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-1132 (1969).

[37] *Id.*

[38] McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). *Accord*, Dandridge v. Williams, 397 U.S. 471, 485-86 (1970).

[39] *Developments*, *supra* note 36, at 1123-24. In Parker v. Mandel, 344 F. Supp. 1068, 1076 (D. Md. 1972), Judge Harvey observed:

> Few if any guidelines have been suggested by the Supreme Court for determining whether a claimed violation of the equal protection clause should be considered under the strict scrutiny test or under the reasonable basis test. A high degree of subjectivity would appear to be involved in determining whether a subject is to be termed a fundamental interest or whether the classification is to be called suspect.

[40] *Developments*, *supra* note 36 at 1130.

[41] Comment, *Educational Financing, Equal Protection of the Laws, and the Supreme Court*, 70 MICH. L. REV. 1324, 1341 (1972).

[42] Douglas v. California, 372 U.S. 353 (1963) and Griffin v. Illinois, 351 U.S. 12 (1956) held respectively that where a state allows an appeal as of right, it must provide counsel and a free transcript to indigents. The Court in both cases applied the strict standard of review, although there is no constitutional right to an appeal.

fundamental for equal protection. The holding in *DeStefano v. Woods*[43] that *Duncan* was prospective, however, may have foreclosed treatment of the jury trial right as fundamental in an equal protection context, since the appellant Johnson was convicted before *Duncan* was decided. In *Johnson* the Court was considering a right neither recognized as fundamental nor protected by the Constitution against state infringement. But one of the reasons for *Duncan's* prospectivity was to avoid the upheaval large numbers of retrials would cause in state criminal justice systems. This rationale, which does not deny that the right is fundamental, should not be permitted to negate the fundamentality of the jury trial right in another context.[44]

The Court did not give any reasons for applying the rational basis test in *Johnson*.[45] An explanation other than the prospectivity of *Duncan* may be that the Court assumed that it was dealing not with the fundamental right to a jury trial but with a subsidiary procedure, part of the administration of that right. Such a distinction was made in *Schilb v. Kuebel*[46] where the Court applied the rational basis test to a bail procedure whereby some defendants obtained full refunds after trial and others forfeited 1 percent of their bail. The use of the rational basis test was justified on the ground that the case concerned only the 1 percent cost retention feature of the statute and not the fundamental right to bail that is not excessive.[47] In *Johnson* the Court's premise may have been

---

[43] 392 U.S. 631 (1968).

[44] In *DeStefano* the Court pointed out the problem that retroactivity of the jury trial right would cause: "For example, in Louisiana all those convicted of noncapital serious crimes could make a Sixth Amendment argument. And, depending on the Court's decisions about unanimous and 12-man juries, all convictions for serious crimes in certain other States would be in jeopardy." *Id.* at 634. To strike down the statute in *Johnson* on equal protection grounds would give the result that the Court deliberately averted in *DeStefano*, unless *Johnson* were also prospective. A prospective decision on the equal protection issue would give the unusual holding that a statute is valid to a certain date, then invalid. This result is not inconceivable, however. In Fuller v. Alaska, 393 U.S. 80 (1968) the Court denied retroactive application of Lee v. Florida, 392 U.S. 378 (1968), which had held that the Federal Communications Act made the admission of evidence obtained by intercepting a telephone conversation unlawful in state criminal cases. The effect of *Fuller* is that the statute involved has one meaning until the date of *Lee* and another meaning thereafter.

[45] None of the dissenting opinions took issue with the Court's treatment of Johnson's equal protection claim.

[46] 405 U.S. 948 (1971).

[47] *See* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969), where the Court considered a statute denying absentee ballots to qualified electors in jail and applied the rational basis test because it was "not the right to vote that [was] at stake . . . but a claimed right to receive absentee ballots." *Id.* at 807.

that all defendants were provided a jury trial in Louisiana and that the scheme of jury requirements is an administrative matter. This distinction can be valid only if each of the several "juries" within the Louisiana scheme is a constitutionally adequate jury. If so, then Louisiana provides for a jury trial in all serious cases; the particular type of jury is merely an administrative variable.

Louisiana has three types of juries: (1) a jury of 12 that must decide unanimously, (2) a jury of 12 that may decide by a minimum of nine votes to three, and (3) a five-member panel whose verdict must be unanimous. The first type is clearly constitutional. The second type was held to be acceptable in *Johnson* and *Apodaca*. But the constitutional validity of a five-member jury was left open by *Williams*. If the Court in *Johnson* thought that it was dealing with jury trial administration because the jury trial right had been satisfied, in effect it countenanced the five-member jury as sufficient to satisfy due process in state trials. Furthermore, since elsewhere in his opinion Mr. Justice White acknowledged that a conviction by nine jurors may be less reliable than one by 12,[48] if the Court is distinguishing between the jury trial right and its administration, it must be defining "jury" so that reliability is not elemental. Otherwise the statute would nullify the fundamental right to the extent that it gives some defendants a less effective version of the right than others.

Even applying the rational basis test the Court might have reviewed the Louisiana statute more critically, as it has done in recent cases without reaching the compelling interest test.[49] For example,

[48] Johnson v. Louisiana, 406 U.S. at 362.

[49] If the compelling interest test had been used in *Johnson*, the legislation should have failed because of the availability of less onerous alternatives, that is, alternatives that would not cut so deeply into the fundamental jury trial right. Perhaps expediting the administration of justice could be a compelling state interest. Still, time and cost savings could presumably be effected by administrative changes that would not alter the jury makeup, for example, changing the docket system, reducing salaries, and shortening prison terms to free funds.

Alternatively, the Court might have applied a balancing test to determine whether the benefit of the statute offsets the infringement of defendants' jury trial rights. An important personal interest may trigger a balancing test. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); *Developments*, *supra* note 36, at 1122. A balancing approach would also work against the statute, because majority verdicts probably save little time and money. The *voir dire* for 12 jurors should take the same amount of time whether or not the jury can convict by a 9-to-12 vote. While jury deliberation time may be shorter in majority verdict cases, if the jury deliberates until all the views of dissenting jurors have been heard, in most cases there should be no great time saving attributable to the majority verdict provisions. Similarly, cost savings may be minimal. Only about 2.8 percent of cases that would otherwise end in deadlock would be decided where a 9-to-3 vote is sufficient to convict or acquit, Kalven & Zeisel, *supra* note 28, at 200, and not all of those cases would be retried. In addition, any cost savings of fewer re-

in *Reed v. Reed*,[50] the Court invalidated a statute preferring men to equally qualified women in the administration of estates. Although conceding that the statute had a rational basis (to reduce the probate workload by eliminating contests), the Court held that the method by which it did so was an arbitrary choice violative of the equal protection clause. Similarly, in considering whether legislation treating single and married persons differently with respect to the distribution of contraceptives violated the equal protection clause, the Court in *Eisenstadt v. Baird*,[51] rejected three rationales offered by the state.[52] Again without reaching the compelling interest test, it refuted the submitted rationales as though it actively sought to undermine them.

The Court in *Johnson* could have followed the critical attitude it adopted in *Reed* and *Eisenstadt*. Arguably, it should have. If the right to jury trial was not at issue in *Johnson*, still, a procedure affecting the defendant's freedom was. Therefore, the Court should have taken an analytical approach more discriminating than the approach it has historically used in economic regulation cases. If the Court had scrutinized the statute more actively, it might have concluded that the cost savings of majority verdicts are small and the time savings insignificant.[53] Further, from the defendant's point of view, an accused who is entitled to a unanimous verdict of five jurors apparently has a better chance of acquittal than did Johnson. Persons accused of crimes less serious than Johnson's need convince only one person in five, or 20 percent, of their innocence to avoid conviction, while Johnson would have had to persuade four of 12, or 33 1/3 percent, to have a hung jury.[54] Thus, the Court

---

trials may be offset by incarceration costs. *See* Comment, *Should Jury Verdicts Be Unanimous in Criminal Cases?*, 47 ORE. L. REV. 417 (1968).

[50] 404 U.S. 71 (1971).

[51] 405 U.S. 438 (1972).

[52] The state argued that the statute was (1) a deterrent to premarital sexual relations, (2) a regulation of harmful articles, or (3) a ban on contraception per se. The Court rejected all three. It said: (1) The deterrent effect of the statute was de minimis because of the availability of contraceptives to all married persons and to unmarried persons for disease prevention; (2) the statute could not be a ban on harmful articles because it did not protect everyone from them; and (3) if the legislation was meant to bar the use of contraceptives, whether or not a state may lawfully do so treating married and unmarried persons differently is arbitrary and violates the equal protection clause.

[53] *See* note 49 *supra*.

[54] In a hypothetical community where 10 percent of the people would not convict a given defendant because of a strict interpretation of the reasonable doubt standard, for example, the probability of obtaining one or more of the persons in that minority on a jury of five is 44 times in 100 juries, while the probability of having four or

could have concluded that the legislative classification into degrees of jury protection was arbitrary, as in *Reed*, or that it had no rational basis, as in *Eisenstadt*, since the scheme could not have been designed to expedite criminal justice.

Thus, *Johnson* left to *Apodaca* questions concerning the scope of the jury trial guarantee. The petitioners in *Apodaca* argued that unanimity is a requisite of the jury right guaranteed by the sixth amendment. But the plurality concluded that majority verdicts neither defy the intent of the framers nor denigrate the function of the jury. In holding that trial by jury is a fundamental right, the Court in *Duncan* cited sources generally indicating that the parameters of the right are defined by the common law.[55] In fact, that opinion, written by Mr. Justice White, limited the application of the right to serious crimes because the common law had done so. In *Williams*, however, Mr. Justice White, writing for the Court, concluded that historical analysis was not determinative of whether the framers intended to equate the constitutional and common law characteristics of the jury.[56] Adopting this approach, the plurality in *Apodaca* then considered whether unanimity is elemental to the function of the jury and decided that it is not. Mr. Justice Powell agreed with this functional analysis and concluded that states could allow majority verdicts.

The five members of the Court focused on the function set forth in *Duncan*[57] and reiterated in *Williams*:[58] that the jury interposes a commonsense judgment between the state and the defendant to guard against the "compliant, biased, or eccentric judge" and the "overzealous prosecutor." In *Williams* the Court said that this function is served so long as the jury (1) is drawn from a cross section of the community, (2) has the duty and opportunity to deliberate as a group, and (3) is free from outside attempts at intimidation.[59] The *Apodaca* plurality and Mr. Justice Powell, concurring, stated without any analysis that the *Williams* requirements can be met by a jury whether or not unanimity is required. It seems clear however that the *Williams* criteria will be affected by majority verdicts. First, while it is true that allowing majority verdicts will not neces-

more in a jury of 12 is 2.5 juries in 100. *See* THE CHEMICAL RUBBER CO., HANDBOOK OF TABLES FOR MATHEMATICS 887 (3d ed. 1967).

[55] 391 U.S. at 151-55.

[56] 399 U.S. at 99.

[57] 391 U.S. at 156.

[58] 399 U.S. at 100.

[59] *Id.*

sarily change the cross-sectional makeup of the jury, the representation of minorities will potentially be merely cosmetic where minority members can be summarily outvoted.[60] Second, jurors may not be impressed by their duty to deliberate as a group, and minority jurors may be denied the opportunity to deliberate. Ironically, both the Court in *Johnson* and Mr. Justice Powell concurring in the *Apodaca* result cited the "Allen charge" as impressing on jurors their duty to deliberate,[61] but this reference is inapposite since that charge would not be given where a majority can reach a verdict. Further, the term "duty" is hollow where there is no corresponding liability or safeguard to ensure that the duty is carried out.[62] And, in fact, as discussed earlier, evidence indicates that majority jurors do not deliberate as much where a split vote suffices for decision as where unanimity is required.[63]

While less than unanimous verdicts hinder the first two prerequisites set forth in *Williams*, they probably aid the third, freedom from outside attempts at intimidation. A majority vote may negate bribery or the partiality of one or two jurors. But studies indicate that the intimidation of jurors rarely causes hung juries.[64] Further,

---

[60] *See* notes 75-80 *infra* & accompanying text.

[61] 406 U.S. at 362, 380, respectively. In Allen v. United States, 164 U.S. 492 (1896), the Court approved an instruction urging a jury to reach unanimity. The substance of the instruction, given only after the jury had reported a failure to agree, was that it was the jury's duty to decide the case and the jurors should listen, "with a disposition to be convinced," to one another's arguments. The instruction stressed that minority jurors should question the validity of their positions when the majority of jurors is convinced otherwise. Judges have since often added that the majority should also reexamine its beliefs. *See, e.g.*, Garrett v. State, 171 Ark. 297, 284 S.W. 734 (1926); Hyde v. State, 196 Ga. 475, 26 S.E.2d 744 (1943). Still, the charge has been criticized as being coercive because the words "majority" and "minority" suggest that the majority is correct and because the charge is given when the jury has already admitted a failure to agree. *See* United States v. Fioravanti, 412 F.2d 407 (3d Cir. 1969), where the court ruled prospectively that use of the *Allen* charge would be reversible error; ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 146-58 (Approved Draft, 1968); Note, *On Instructing Deadlocked Juries*, 78 YALE L.J. 100 (1968).

[62] Perhaps a "reverse Allen" charge should be requested by defendants. It would instruct the jury that (1) the verdict should be the verdict of each member of the jury, if possible; (2) though unanimity is not required, the jurors should reach unanimity if they possibly can; (3) where a substantial majority of jurors is for conviction, members of that majority should ask themselves whether those in the minority are correct in finding a reasonable doubt in the state's evidence or lack of it.

[63] *See* notes 27-29 *supra* & accompanying text.

[64] Kalven & Zeisel, *supra* note 28, report that not one of the trial judges in 200 hung jury cases, when asked to comment on the reason for the deadlock, suggested that there was anything suspicious about that result. Further, the jury study found that juries end in deadlock where the first ballot vote shows a minority view supported by four or five jurors. If the divergence of view on the first ballot vote is taken as a measure of the difficulty of the case, hung juries result from difficult cases. *Id.* at 200-01.

should the question arise in the future whether three of five or four of six is sufficient for conviction, it should be noted that a majority verdict could have the reverse effect on the possibility of intimidation. Where three or four persons constitute a majority, it could be feasible to intimidate enough persons to bring about a conviction or an acquittal, not merely a hung jury, as influence on a few jury members of 12 would do.

The plurality and Mr. Justice Powell could have been more incisive in relating the jury's function — to stand between the defendant and the state — with unanimity. Tempering the law, promoting fairness in trials before the bench, and reaching a correct verdict are elements of that function that are enhanced by the requirement of unanimity. Tempering the law is an aspect of the jury function the Court recognized in *Duncan*, where it said, "[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."[65] Mr. Justice Douglas in his dissent to *Apodaca* and *Johnson* stressed the role played by unanimity in forcing compromise verdicts where some jurors have reservations about the guilt of the defendant.[66] Yet the *Apodaca* plurality did not mention jury compromise, and Mr. Justice Powell referred to the situation as "agreement by none and compromise by all, despite the frequent absence of a rational basis for such compromise."[67]

Duncan also said that the right to a jury trial promotes fairness in trials before the bench.[68] If this function is unfortunately necessary, it is diminished by six-man juries and majority verdict juries. Smaller juries are statistically likely to reach different decisions from those made unanimously by juries of 12.[69] Further, majority ver-

---

[65] 391 U.S. at 157.

[66] 406 U.S. at 390.

[67] *Id.* at 377.

[68] To counter the argument that *Duncan* would make suspect the results of trials without juries the Court said, "Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely." 391 U.S. at 158.

[69] The probability of conviction as a function of the percentage of all available jurors who would favor conviction differs between juries of six members and juries of 12. Where fewer than half of the available jurors would convict, the probability of conviction is greater for the small jury than the 12-member jury. The converse is also true: where over half of the available jurors would convict, the 12-member jury is statistically more likely to render a guilty verdict than the six-member jury. Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 CASE W. RES. L. REV. 529, 546 (1971).

dicts seem to favor the prosecution more often than the defendant.[70] Thus, juries are likely to be waived more often in cases where a statute allows conviction by a six-member jury or nine of 12 jurors than where unanimity of 12 is required. The impetus toward fairer bench trials may be lessened accordingly.

Finally, accurately weighing the evidence is a function that should have figured in the *Apodaca* decision but perhaps is too obvious for the Court to have mentioned. The risk of a wrong decision where jury deliberation is cut off by an early arrival at the requisite majority has been mentioned.[71] Equally important are the complex, inherently difficult cases where the jury is nearly evenly divided at the outset and after long deliberation can only arrive at a 9-to-3 or 10-to-2 vote. The correct decision in these cases may be so uncertain that only a hung jury is a viable result.[72]

In its functional analysis the Court overlooked a decision-making aid relied on in both *Duncan* and *Winship* — the prevailing practice in the states. In *Duncan* the Court noted that the laws of every state provide for jury trial and concluded that in view of both the early history of trial by jury in England and the United States and current support for the procedure among the states, jury trial in criminal cases is a fundamental right.[73] Similarly, in *Winship* the Court said, "Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a reqiurement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.' "[74] Yet in *Apodaca* the Court did not give weight to the fact that only two states do not give accused felons the right to a unanimous verdict.

The petitioners in *Apodaca* also argued that the right to a jury from which no part of the community has been systematically excluded[75] is a hollow right if the views of minority group members on a jury may be disregarded by the other jurors. The plurality rejected this argument, saying there exists only the right to participate

[70] Mr. Justice Douglas pointed out that in the University of Chicago studies 44 percent of the deadlocked juries had nine, 10, or 11 jurors in favor of conviction, while a majority of nine or more favored acquittal in only 12 percent of the deadlocked cases. 406 U.S. at 391 (dissenting opinion).

[71] *See* notes 26-27 *supra* & accompanying text.

[72] *See* Kalven & Zeisel, *supra* note 28, at 201.

[73] 391 U.S. at 154-56.

[74] 397 U.S. at 361-62 (citing Duncan v. Louisiana, 391 U.S. at 155).

[75] *E.g.*, Whitus v. Georgia, 385 U.S. 545 (1967); Smith v. Texas, 311 U.S. 128 (1940).

generally in the jury process and that no group has the right to "block" convictions.[76] The plurality and Mr. Justice Powell read narrowly the precedents where convictions were reversed because the defendants had proved that minority jurors were deliberately excluded from the grand or petit juries.[77] But the cases holding that such exclusion violates the equal protection clause were decided in a context of unanimity. Their logical inference, then, is that representation on a jury includes the right to determine the outcome of a case. In deeming the right of a juror to extend only as far as discussion, *Apodaca* made a part of the jury merely advisory, not fact-determining.

The *Apodaca* cross section decision, like the *Johnson* reasonable doubt decision, presumes that jurors will always seriously consider the opinions and reasoning of minority group jurors and accept the minority decision if it is reasonable.[78] If this presumption is not in fact how nonunanimous juries operate, the cross section right is seriously diminished in majority verdict cases. Now, because 10-to-2 and 9-to-3 verdicts are constitutionally permissible, only where three (Oregon) or four (Louisiana) minority group members are on the jury will the nonminority group members have to listen to minority views. The probability of such heavy representation of minorities on juries is statistically low[79] and is made even lower by jury panel selection processes and *voir dire*.[80]

The immediate effect of *Johnson* and *Apodaca* may seem small. Only two states allow majority verdicts in serious criminal cases, so most jury trials will not be affected. Similarly, the narrowing of the cross section right by *Apodaca* and the explication of the rea-

[76] When a jury deliberates in accordance with due process, jurors discuss the trial, give credence to one another's views, and reach conclusions based on their convictions. Inherent in this due process functioning is the right to disagree. The plurality, in using the evaluative word "block," characterized such disagreement pejoratively.

[77] Whitus v. Georgia, 385 U.S. 545 (1967); Smith v. Texas, 311 U.S. 128 (1940); Norris v. Alabama, 294 U.S. 587 (1935); Strauder v. West Virginia, 100 U.S. 303 (1880).

[78] The difference in the two discussions is that *Apodaca* is stated in terms of the possibility of jurors voting their prejudices, while *Johnson* is concerned with jurors making hasty decisions not necessarily based on prejudice.

[79] The difficulty of obtaining so large a number of representatives of minority groups on a jury is patent. Where 10 percent of a given population is a minority group, racial or other, a unanimous vote would require 72 percent of all juries to reckon with at least one minority group juror, while if 10 of 12 can convict, only in 11 percent of the cases would the majority have to listen to minority group views. *See* Zeisel, *And Then There were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 772-73 (1971). *See also* note 54 *supra*.

[80] *See* Donaldson v. California, 404 U.S. 968 (1971) (Douglas, J., dissenting to denial of certiorari).

sonable doubt standard in *Johnson* will not affect cases where jury unanimity is required. But the Court's approach in *Johnson* and *Apodaca* portends more.

First, in addressing the reasonable doubt and cross section issues the Court assumed that juries will deliberate conscientiously. Because allegations of jury misbehavior are difficult to sustain, the Court in the past has guarded against possible unfairness that might not be demonstrable.[81] Yet *Johnson* and *Apodaca* are consistent with other cases, fewer in number, which are based on trust in juries and an unwillingness of the Court to create rules to ensure that enumerated rights are not undercut by jury trial procedures.[82] *Johnson* and *Apodaca* may presage more jury-trusting decisions in the future.

Second, the reasonable doubt, cross section, and equal protection issues all illustrate extreme judicial deference toward legislative judgment concerning state problems in the administration of criminal justice. The majority of the Court did not consider even the elementary statistics available to it that speak for the opposite results in these cases,[83] nor did it assess the cost of unanimity in determining whether the Louisiana scheme of juries has a rational basis.

Third, the Court's craftsmanship in these cases indicates that the outcome of future cases will be difficult to predict. The *Apodaca* plurality gave no weight to cases assuming, if not holding, that juries must make decisions unanimously.[84] As in *Williams*, it ignored the historical view of jury trial it had relied on through *Duncan*. In fact, the opinions are replete with inconsistencies with earlier positions of individual Justices, and the split result in *Apodaca* arises from Mr. Justice Powell's reliance on minority opinions in *Duncan*.[85]

---

[81] Mr. Justice Stewart listed numerous decisions recognizing that juries are imperfect. 406 U.S. at 398-99 (dissenting opinion). Examples include Groppi v. Wisconsin, 400 U.S. 505 (1971) (request for change of venue must always be available to defendant); Bruton v. United States, 391 U.S. 123 (1968) (co-defendant's confession implicating defendant may not be introduced at joint trial where co-defendant does not testify); and Jackson v. Denno, 378 U.S. 368 (1964) (jury may not learn of confession to decide whether it was coerced unless judge first finds that it was not).

[82] For example, confessions obtained without the safeguards imposed by Miranda v. Arizona, 384 U.S. 436 (1966), may be introduced to impeach a defendant, Harris v. New York, 401 U.S. 222 (1971); jurors may learn of prior convictions to determine sentence under a habitual offender act, Spencer v. Texas, 385 U.S. 554 (1967), or to decide whether entrapment occurred, Sherman v. United States, 356 U.S. 369 (1958).

[83] *See* notes 26, 28, 30, 53, 69 *supra* & accompanying text.

[84] *E.g.*, Andres v. United States, 333 U.S. 740 (1948); Patton v. United States, 281 U.S. 276 (1930).

[85] Mr. Justice Powell accepted the *Duncan* view of history but only part of the

Fourth, applying a right previously incorporated into the fourteenth amendment differently in state and federal courts is a result that might reoccur. Mr. Justice Douglas said in dissent that *Apodaca* portends a "watering down" of all incorporated rights as applied in the states.[86] That possibility exists. Yet only Mr. Justice Powell adopted the dual standard approach, and he indicated that he does not take issue with all prior incorporation decisions.[87] In *Apodaca* the Court dealt with a historical basis undercut by *Williams*, a holding in *Duncan* that was equivocal on complete incorporation, and an absence of cases squarely holding that unanimity is a sixth amendment requirement. Perhaps only similar configurations of history and precedent could yield double standards with respect to other incorporated rights.

Finally, *Johnson* and *Apodaca* represent a large step toward redefining the jury. Mr. Justice Marshall's comment that "so long as the tribunal bears the label 'jury,' it will meet the sixth amendment requirements as they are presently viewed by this Court"[88] does not seem overly exaggerated. In one sense these cases cannot be read as a go-ahead to the states to experiment. Only Mr. Justice Powell endorsed dual standards for state and federal juries. But the four Justices of the plurality in *Apodaca* showed a willingness to review the requisites of the sixth amendment right in terms of a function that is not examined in depth.[89] Accordingly, other cases introducing new jury characteristics and seeking to determine the reach of *Johnson* and *Apodaca* are likely to be addressed by a sympathetic Court.[90]

JANE KOBER

holding of *Duncan*. He also accepted *Duncan's* minority opinions that different standards for jury trial should apply in state and federal courts. Ironically, Mr. Justice Powell cited Mr. Justice Stewart for that position, while in *Apodaca*, Mr. Justice Stewart followed the *Duncan* holding and maintained that there is one standard for both. At the same time Mr. Justice Stewart rejected the *Apodaca* plurality view of constitutional history that he had accepted in *Williams*. Mr. Justice White changed his position in writing the opinions in *Duncan*, *Williams*, and *Apodaca*. Justices Brennan and Douglas abandoned the view of history they took in *Williams*. Yet Mr. Justice Douglas maintained his own dissenting position from *DeStefano* and treated *Johnson* and *Apodaca* in one opinion as though both cases were governed by the sixth and the fourteenth amendments.

[86] 406 U.S. at 381-88 (dissenting opinion).

[87] *Id.* at 375 n.15.

[88] 406 U.S. at 400 (dissenting opinion).

[89] In *Williams* Mr. Justice Douglas joined Mr. Justice Black, concurring in part, who stated that the Court has a duty to reexamine its earlier decisions.

[90] *But see* Mr. Justice Blackmun, concurring: "I do not hesitate to say . . . that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty." 406 U.S. at 366.