THE UNANIMOUS VERDICT: POLITICS AND THE JURY TRIAL

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I. INTRODUCTION

"Trial by jury may be considered in two separate points of view: as a judicial, and as a political institution."[1] Alexis de Tocqueville made this statement in an attempt to demonstrate the important political advantages of the jury in a democratic polity. According to de Tocqueville, the jury could best be understood and appreciated if regarded "above all [as] a political institution."[2] This Commentary focuses on the jury as a judicial institution, but relies on several key political considerations to elucidate the jury's unique character and function.

Specifically, this inquiry concerns the rule of unanimity, a traditional attribute of jury trials. In 1972 the United States Supreme Court held that the sixth amendment guarantee of a jury trial, applicable to the states through the fourteenth amendment, does not require a unanimous jury verdict. In *Johnson v. Louisiana*,[3] the Court upheld a statute providing that only nine members of a jury of twelve must concur in a verdict in trials for noncapital crimes punishable by hard labor; in *Apodaca v. Oregon*,[4] the Court endorsed a similar provision requiring the consent of at least ten jurors to a verdict of guilty. In each case the Court's own verdict was far from unanimous, the four Nixon appointees and Justice White constituting a 5-4 majority.

The Justices' opinions relied upon history, logic, and empirical evidence—references to politics did not appear. Crucial political questions are implicit in the opinions, however, although never explicitly addressed. The constitutional debate over the rule of unanimity in criminal jury trials raises issues of the first importance to democratic

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1. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (P. Bradley ed. 1946).
2. *Id.* at 282.
3. 406 U.S. 356 (1972).
4. 406 U.S. 404 (1972).

theory—issues intrinsically interesting apart from their application to the dispute about jury procedure.

This Commentary proposes that the rule of unanimity is not an essential element of justice in a criminal trial if political and judicial settings are carefully distinguished. The strongest constitutional defense of the unanimity requirement, that it encourages the depth of deliberation necessary for a just determination of guilt or innocence, assumes that the jury's representative character resembles the representative character of a democratic legislature. If the jury's function is distinguished from the function of democratic political institutions, however, it appears that due process does not mandate the rule of unanimity. Nevertheless, although the Constitution should not be interpreted to require unanimous verdicts in state criminal trials, considerations of political legitimacy argue persuasively for retention by the states of the unanimity rule.

II. HISTORICAL BACKGROUND

The Court's sanction of nonunanimous verdicts, although an abrupt break with centuries of common law experience, did not introduce a procedure alien to the history of criminal jury trials. Although there is some disagreement about the precise origins of the jury, it is clear that these origins were not associated with the rule of unanimity. In the ancient Scandinavian tribunals, for example, to which the earliest juries have been traced, the opinion of the majority prevailed.[5] Only in 1367 did the English law institute the requirement that jury verdicts be unanimous.[6]

By the end of the eighteenth century, the rule of unanimity had become well established. Like much of the common law, however, the Americans incorporated the unanimous jury into their criminal justice system without adopting a constitutional provision requiring its use. Indeed, the Constitution's only mention of the dimensions of a jury verdict is the requirement of a two-thirds majority of the Senate, acting as a jury, to convict[7]

5. W. FORSYTH, HISTORY OF TRIAL BY JURY 203 (1875).

6. *See* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 318 (3d ed. 1922).

7. U.S. CONST. art. I, § 3. The Constitution does not explicitly refer to the Senate as a jury, and it is debatable whether the Senate acts as a jury in impeachment trials. Raoul Berger, the leading constitutional scholar on impeachment, considers it an open question. *See* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 83 (1973). For the purposes of this Commentary, it will be useful to view the Senate as functioning as a jury, *i.e.*, determining guilt or innocence.

a person impeached by the House of Representatives.[8] Impeachment, which is essentially a political process, obviously differs from a verdict in a criminal trial; that the former requires substantially less than unanimity arguably justifies a unanimity requirement in the legal process. That is, while it may be foolish to expect unanimity about matters involving partisan sensibilities and conflicting political interests, unanimity may be the only just and accurate way to determine guilt or innocence based on factual evidence. However, one could argue that impeachment of a public official entails more serious social consequences than the trial of a defendant charged with burglary, and that adopting in criminal trials the qualified majority rule applied in impeachment trials is therefore reasonable.

The qualified majority rule is one of several examples of the Founding Fathers' distrust of majoritarianism. By placing restraints upon the simple majority, the Founders revealed their belief that justice is not based upon formal political equality. The resulting minority power to thwart the designs of the majority forces the polity to accept occasionally the disproportionate influence of an individual member of the minority vis-à-vis an individual member of the majority. The question raised by the unanimous verdict requirement can thus be stated as follows: Do the demands of justice in a criminal trial require a procedure that emphatically denies a key principle of democratic theory —the principle of majority rule? In other words, does justice require that a single individual be permitted to veto the will of the rest of the group?

III. Calhoun and the Concurrent Majority

Even the well-documented suspicions of majority rule entertained by the Founding Fathers did not lead them to "constitutionalize" any political arrangement based on the rule of unanimity. In fact, John C. Calhoun, whose rejection of the Founders' natural rights principles led him to an even greater distrust of majorities, was the first American political theorist to develop a systematic defense of the rule of unanimity. This defense ultimately proved to be an unsatisfactory attempt to establish the feasibility of unanimity as an operative political principle. Nonetheless, Calhoun did succeed in demonstrating the practicability of unanimity in jury decisionmaking. The jury's consensus about its

8. U.S. Const. art. I, § 2.

fundamental goal, coupled with the jurors' essential disinterest in the result, renders jury unanimity a realistic alternative. In the legislative-political context, however, the decisionmakers are spokesmen for particular interests and can rarely achieve the consensus necessary for unanimity.

Calhoun wanted to replace rule by the numerical majority (majority rule) with rule by the concurrent majority. His principle of "government by the concurrent majority" contemplated

> giving to each interest . . . the means of protecting itself, by its negative, against all measures calculated to advance the peculiar interests of others at its expense. Its effect, then, is to cause the different interests . . . to desist from attempting to adopt any measure calculated to promote the prosperity of one, or more, by sacrificing that of others; and thus to force them to unite in such measures only as would promote the prosperity of all . . . .[9]

Calhoun believed that rule by the numerical majority rested upon the principle of force, whereas rule by the concurrent majority, which he identified with constitutional government, was grounded in compromise.[10] The great advantage of the concurrent majority, according to Calhoun, was its assurance that no important decision would be made unless it reflected the sense of the entire community. Because the numerical majority permitted one part of the community to rule another part, it constituted, in Calhoun's view, an absolute government of the democratic regime.[11] Government by the concurrent majority, on the other hand, "excludes the possibility of oppression"[12] by providing each interest with a veto power over the actions of the rest of the community.

Calhoun anticipated the obvious objections to his theory. The objection that most concerned him was that "it would be impracticable to obtain the concurrence of conflicting interests where they were numerous and diversified."[13] The difficulty of achieving unanimity becomes an especially serious problem in emergency situations requiring prompt, concerted action. Calhoun conceded the difficulty of securing action when no necessity dictated immediate action, but insisted that emergency situations would engender compromise which in turn would lead to

9. J. CALHOUN, A DISQUISITION ON GOVERNMENT 38 (R. Cralle ed. 1943).
10. *Id.* at 37.
11. *Id.* at 36.
12. *Id.* at 38.
13. *Id.* at 64.

unanimity. He relied on the example of trial by jury to support this argument.

Calhoun argued that while the unanimous jury verdict requirement seems impracticable at first blush, closer examination reveals that the rule not only succeeds but has proven to be "the safest, the wisest, and the best [mode of trial] that human ingenuity has ever devised."[14] He maintained that the jury's duty to reach a verdict created a "disposition to harmonize" that propelled the jurors to unanimity. The unanimous verdict requirement, Calhoun argued, tended to produce accurate and just determinations:

> If the necessity of unanimity were dispensed with and the finding of a jury made to depend on a bare majority, jury trial, instead of being one of the greatest improvements in the judicial department of government, would be one of the greatest evils that could be inflicted on the community. It would be, in such case, the conduit through which all the factious feelings of the day would enter and contaminate justice at its source.[15]

Calhoun argued that the same factors which caused jurors to reach unanimity applied with even greater force to the various political interests in the community. Whereas a jury's failure to reach a verdict is unfortunate and inconvenient, the failure of the community interests to agree to a course of action entails "fatal consequences" for the body politic.[16] As jurors are motivated by a "love of truth and justice," interest groups in a government of the concurrent majority likewise possess a "love of country" so strong that the impulse to compromise is almost irresistible.[17]

Calhoun's theory fails to recognize that the community's attachment to particular interests is much stronger than the jury's identification with a particular trial. The juror has no personal stake (except perhaps a psychological one) in the outcome of a trial. Moreover, when he compromises to facilitate unanimity, his change of position will probably remain private. The representative of a community interest, however, cannot hide (though he may try to disguise) his compromises. More importantly, the community representative must account to his constituency and justify his failure to satisfy their demands. Unanimity

14. *Id.* at 66.
15. *Id.* at 66-67.
16. *Id.* at 67.
17. *Id.*

on matters of minor importance might be feasible, but an abstract devotion to "country" is unlikely to overcome self-interest on high saliency issues that deeply divide the community.[18]

The crucial difference between the jury and the community, therefore, is that the former entails initial agreement about the group's objective, whereas disagreement over goals is almost always present in political situations. This suggests an important distinction between the representative functions performed by the two groups. Although the representative character of the jury has always been deemed essential,[19] jurors are not expected to carry out the desires of the community when voting in a particular case; indeed, jurors are sometimes sequestered to prevent communication between the representative and the represented. Thus, the elected official's Burkean dilemma is no dilemma at all for the juror; to the extent that the juror balances his view of the case against his perception of the community's view, justice is subverted.

Despite his failure to demonstrate the practicability of the concurrent majority, Calhoun nevertheless presented a logical argument, confirmed by experience, that jury unanimity is not an unrealistic goal. What remains to be determined is whether unanimity is also, as Calhoun maintained, an essential ingredient of justice.

IV. The Johnson and Apodaca Opinions

A majority of the Supreme Court disagreed with Calhoun's belief that justice requires unanimity. Justice White noted at the outset of the *Johnson v. Louisiana*[20] opinion that the Court had never "held jury unanimity to be a requisite of due process of law."[21] To justify its refusal to require jury unanimity, the Court attempted in *Johnson* and *Apodaca v. Oregon*[22] to establish two fundamental, related principles: First, that a nonunanimous verdict does not, of itself, constitute rea-

18. Calhoun himself argued that the defense of self-interest is the fundamental rule of politics, since it is "in the constitution of our nature" to "feel more intensely what affects us directly than what affects us indirectly through others . . . ." *Id.* at 4.

19. *See* T.F.T. Plucknett, A Concise History of the Common Law 127-29 (5th ed. 1956), which discusses the origins of the jury and the expectations regarding its representative character. *See also* Fay v. New York, 332 U.S. 261, 300 (1947) (Murphy, J., dissenting); and Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946), which refer to the jury as a representative institution.

20. 406 U.S. 356 (1972).

21. *Id.* at 359.

22. 406 U.S. 404 (1972).

sonable doubt; and second, that a nonunanimous verdict does not negate the requirement that jury panels reflect a cross section of the community.

If, after extensive and open discussion of the facts and issues of a case, a majority of nine jurors cannot persuade a minority of three that the defendant is guilty, the existence of that amount of doubt will not violate the due process rights of the defendant under the system endorsed in *Johnson*. If permitting nonunanimous jury verdicts discourages extensive and open discussion, however, it raises a serious question about whether the nine who favor conviction have deliberated sufficiently to remove all reasonable doubt from their minds. As Justice Douglas' dissent suggested, "[t]he diminution of verdict reliability flows from the fact that nonunanimous juries need not debate and deliberate as fully as must unanimous juries."[23] What worried Douglas was that a jury, nine of whom agree to a verdict at the outset of deliberations, might not expend much energy convincing the holdouts or considering the dissenters' arguments.

A majority of the Court felt that this thesis reflected an overly cynical view of juror responsibility. Justice White wrote, "We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render verdict."[24] Justice Powell added: "In part, at least, the majority-verdict rule must rely on the same principle that underlies our historic dedication to jury trial: both systems are premised on the conviction that each juror will faithfully perform his assigned duty."[25] With this faith in the good sense and maturity of their fellow citizens, the Court contended that a jury majority would outvote a minority only after "reasoned discussion" had ceased to change anyone's mind. If after such discussion the minority fails to persuade the majority of its error, the verdict of a large majority of the jurors might reasonably be considered accurate beyond a reasonable doubt.[26] That three jurors disagree does not, of itself, establish reasonable doubt; it merely establishes that, for whatever reason, three jurors will occasionally be wrong.[27]

23. Johnson v. Louisiana, 406 U.S. at 388 (Douglas, J., dissenting).

24. *Id.* at 361.

25. *Id.* at 379 (Powell, J., concurring).

26. *Id.* at 361.

27. This reasoning becomes more problematic if applied to the minority's judgment in a situation in which the verdict of a simple majority could prevail. Justice Blackmun wrote, "I do not hesitate to say . . . that a system employing a 7-5 standard,

The second and related principle, which the majority addressed in *Apodaca,* concerns the jury's representative function. The dissenting Justices' argument was essentially the same as Calhoun's argument for concurrent majority rule. With respect to the constitutional requirement that juries be drawn from an accurate cross section of the community, Justice Brennan stated:

> When verdicts must be unanimous, no member of the jury may be ignored by the others. When less than unanimity is sufficient, consideration of minority views may become nothing more than a matter of majority grace. In my opinion, the right of all groups in this Nation to participate in the criminal process means the right to have their voices heard. A unanimous verdict vindicates that right. Majority verdicts could destroy it.[28]

Justice Stewart's dissent in *Johnson* was blunter:

> Under today's judgment, nine jurors can simply ignore the views of their fellow panel members of a different race or class. . . . [c]ommunity confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines.[29]

The majority, too, recognized the time-honored principle that the jury represents the community from which it is selected. Justice Powell argued, however, that the selection process, which permits peremptory challenges for cause, offers sufficient protection against "representative but wilfully irresponsible" juries.[30] According to Justice Powell, this

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rather than a 9-3 or 75% minimum, would afford me great difficulty." *Id.* at 366 (Blackmun, J., concurring). Justice Douglas also was troubled by this point: "Today the Court approves a nine-to-three verdict. Would the Court relax the standard of reasonable doubt still further by resorting to eight-to-four verdicts, or even a majority rule?" *Id.* at 393 (Douglas, J., dissenting). One response to this argument is that the Court could simply draw the line at nine-to-three, reasoning that jury verdicts, like other constitutional decisions, are important enough to require an extraordinary majority.

28. *Id.* at 396 (Brennan, J., dissenting).

29. *Id.* at 397-98 (Stewart, J., dissenting) (footnote omitted). Justice Marshall expanded on this theme in his dissent:

> Each time this Court has approved a change in the familiar characteristics of the jury, we have reaffirmed the principle that its fundamental characteristic is its capacity to render a commonsense, layman's judgment, as a representative body drawn from the community. To fence out a dissenting juror fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests.

Id. at 402 (Marshall, J., dissenting).

30. *Id.* at 379 (Powell, J., concurring). The Constitution does not require that all

system insures that determinations of guilt or innocence are based on evidence rather than prejudice.

More directly responsive to Calhoun's argument was Justice White's opinion in *Apodaca*. He maintained that to perceive the juror as a protector of the interests of his particular group in the community misconstrues the jury's function. "No group . . . has the right to block convictions; it has only the right to participate in the overall legal processes by which criminal guilt and innocence are determined."[31] The concurrent majority theory, in other words, is inappropriate in the criminal process. The dissenting Justices' argument, however, was not that groups of jurors *should* have this right, but that when prejudice influences the judgment of a substantial majority of jurors, the minority should be able to defend itself and the defendant against this prejudice.

One of the dissenters, Justice Douglas, went so far as to accuse his colleagues in the majority of revealing a "law and order" judicial mentality[32] and abandoning the traditional presumption of innocence for the "tradition of the inquisition."[33] Such rhetorical excess does not really clarify the Court's basic division. To extract from the various opinions an explanation for the division requires a careful distinction between two views of how the jury actually operates. The majority assumed the best about the jury—that the jury is aware of its responsibility, follows the judge's instructions, and seeks only the truth. The minority Justices, on the other hand, accepted the judicial realist's separation of "myth and reality in American justice" and were skeptical of the jury's ability to live up to its responsibilities. From the perspective of the majority, it is reasonable for states to permit nonunanimous verdicts without fear of undermining justice, whereas the minority's perspective views the unanimity rule as an auxiliary protection against the defects of human nature. This is not to suggest that the majority was prepared to acknowledge only the nobler instincts of humankind; indeed, Justice Powell noted that "[r]emoval of the unanimity requirement could well minimize the potential for hung juries occasioned either

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groups in the community be represented on the jury; it forbids only *systematic* exclusion of members of identifiable groups or classes. *See* Swain v. Alabama, 380 U.S. 202, 208-09 (1965); Cassell v. Texas, 339 U.S. 282, 286-87 (1950); Akins v. Texas, 325 U.S. 398, 403-04 (1945).

31. Apodaca v. Oregon, 406 U.S. 404, 413 (1972).

32. Johnson v. Louisiana, 406 U.S. at 393 (Douglas, J., dissenting).

33. *Id.* at 394 (Douglas, J., dissenting).

by bribery or juror irrationality."[34] The implication, however, is that bribery and irrationality influence only one, two, or three individuals. To assume otherwise requires use of the unanimity rule, for if nine jurors act irrationally (ruling on racial grounds, for example), then justice can only be achieved through a hung jury.

V. UNANIMITY AND LEGITIMACY

It might be helpful at this point to consider the unanimous verdict issue as a problem of political legitimacy. Legitimacy in a political context refers to "the capacity of a political system to engender and maintain the belief that existing political institutions are the most appropriate or proper ones for the society."[35] With respect to individual institutions, legitimacy requires a demonstration that the way decisions are made is consistent with, or appropriate for, the purpose of the institution as well as the nature of the decisions. In other words, when it appears that the method of making a decision subverts the end commonly associated with the decisionmaking body, a problem (or crisis, depending on the importance of the decision) of legitimacy may be said to exist. For example, if a university with a tradition of academic excellence adopted a policy of admitting students on a lottery basis, it might suffer a fatal loss of legitimacy in the eyes of its financial supporters.

Under what circumstances is unanimity related to legitimacy? Perhaps the most obvious example is a situation in which a crucial decision must be made in the absence of social consensus. The unanimity of the Supreme Court's landmark school segregation decision of 1954, for instance, is frequently cited as an example of judicial statesmanship. A less clear-cut decision in *Brown v. Board of Education*[36] might have exacerbated racial tensions in the relevant communities. Ideally, of course, unanimity would be an appropriate requirement for all the decisions of a nonelected body charged with rendering final interpretations of the fundamental law of the land. As every schoolboy knows, however, the language of the Constitution is ambiguous, making constitutional interpretation an unlikely subject of unanimity among nine strong-willed jurists. To require unanimity in all Supreme Court rulings would undermine the Court's effectiveness as a decisionmaking body

34. *Id.* at 377 (Powell, J., concurring).

35. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69, 86 (1959).

36. 347 U.S. 483 (1954).

and, by diminishing its capacity to perform its assigned task, undermine its legitimacy as well.[37]

As Heinz Eulau has observed, unanimity is also "celebrated as a political achievement" in crisis situations that threaten the survival of the community.[38] This principle, which underlies Calhoun's concurrent majority theory, is most dramatically evident in the unanimity requirement of the United Nations Security Council. In the international community, in which a system of shared values does not exist and collective decisions affect the self-determination of individual nations, the concurrent majority is most defensible. Calhoun, on the other hand, wanted to defend the institution of slavery, which the majority regarded as offensive to the fundamental beliefs of the political community. Denying the majority the power to act under these circumstances is significantly different from permitting a veto power in the "State of Nature" situation in which nation-states find themselves.

The relationship of unanimity to legitimacy is a familiar one in social contract theory, most notably in Locke's political philosophy. Unanimous consent constitutes the underpinning of civil society. "Men being . . . by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent."[39] While only unanimity can confer the title to rule, however, majority rule constitutes the operative principle of ruling. "For when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority."[40] Because a civil society must be governed, and because disagreements inevitably arise within any community, nonunanimous decisionmaking must usually prevail; it is both legitimate and unavoidable. As Eulau wrote, "A democratic legislature is an institution composed of opposing sides, and the more the lines of division follow predictable lines, the more rational would

37. As Lipset has pointed out, a regime's legitimacy may enable it to survive a crisis of effectiveness. An institution perceived to be performing an important function, however, is unlikely to survive a crisis of legitimacy if it becomes consistently incapable of performing.

38. Eulau, *Logics of Rationality in Unanimous Decision-Making*, in NOMOS VII: RATIONAL DECISION 29 (C. Friedrich ed. 1964).

39. J. LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION § 95, at 48 (J. Gough ed. 1946).

40. *Id.* § 96, at 48.

the legislative process seem to be."[41] These principles, of course, rest on the assumption that the divisions are not of a character such as to destroy the fundamental consensus that justifies the existence of popular government.

VI. Unanimity and Jury Legitimacy

Is the rule of unanimity related to the legitimacy of the jury? Because most jury decisions are irrevocable and carry such grave consequences for the defendant, it is reasonable to assume that the community thinks it important for the jury to render correct decisions. Arguably, the accuracy of a jury's decision is more important than the accuracy of the legislature's in any given case, since the legislature can reverse its decision. If the community in fact attaches extraordinary importance to a jury's arriving at the truth, then it is necessary to determine whether a unanimous verdict is more likely to produce an accurate result than a nonunanimous verdict. The unanimous verdict requirement may enhance the jury's legitimacy simply because the public believes that unanimity is more likely to produce truth. Arguably, however, a unanimous verdict requirement produces *less* truthful results. In that case, the legitimacy fostered by the unanimity principle rests upon a popular misconception that the requirement produces truth and justice. This seeming paradox will be explored in detail; first, however, it is necessary to elucidate what is unique about the jury as a governmental institution.

Unlike the democratic legislature, the jury is not a governing body in the textbook sense of an institution formulating general rules for the regulation of society. It is, however, the community's representative in judging guilt or innocence with respect to individual violations of these general rules. Thus, in the entire scheme of government, the jury's critical function warrants calling it an official governmental institution.

The jury is a *unique* governmental institution, however, because of the irrevocable nature of most of its decisions and the criteria it applies in making those decisions. A jury's guilty verdict can, of course, be reversed on appeal. When such reversals occur, however, they are usually based upon matters of law, *i.e.*, errors committed by judges or law enforcement officials rather than juries. For example, when a trial judge rules incorrectly on an evidence question, an appellate court's

41. Eulau, *supra* note 38, at 29.

reversal of the guilty verdict does not indicate that the jury's finding of guilt on the basis of the facts was erroneous. The trial judge, of course, can correct the jury's errors by entering a judgment notwithstanding the verdict if it is clear that the jury failed to follow the relevant law. In this respect judge and jury compose a system of checks and balances. Jurors are amateurs with respect to legal questions, so trial and appellate judges, as experts in the law, may reverse jury decisions that are incorrect by virtue of the jurors' amateur status. The jury's factual determinations, however, are irrevocable, since both judge and jury are presumed to be equally expert (or equally inexpert) finders of fact. The judge may direct a verdict only when he believes that no reasonable person could reach a decision different from his own. By doing so, he implies that the jury could reach a different result only by misapplying the applicable law.

These reflections lead to a reconsideration of the debate about the reasonable doubt standard. An inverse relationship exists between the irrevocability of decisions (particularly in matters as important as criminal liability) and the amount of error that the system can tolerate. The legitimacy of majoritarian legislative decisionmaking resides partially in the knowledge that if the majority is proved wrong it may lose its majority status and its power to dictate public policy. It is interesting to note, therefore, that in early jury systems, when unanimity was not required, minority jurors were subject to punishment by the state for deliberately disregarding the applicable law.[42] In present day America, punishment of dissenting jurors is unthinkable, yet the underlying rationale—that there is only one correct decision in matters of guilt or innocence—is not seriously questioned.[43] The function of the jury, as Blackstone said, is to examine "the truth of every accusation,"[44] and truth, as the philosophers tell us, is the highest and most difficult standard upon which to base one's actions.

At this point it is essential to consider the relationship between the rule of unanimity and the jury's obligation to pursue the truth. It has been observed that "[t]he requirement of extraordinary majorities for

42. *See* W. FORSYTH, *supra* note 5, at 199; 1 W. HOLDSWORTH, *supra* note 6, at 337-47.

43. A similar argument might be applied to crisis unanimity. When the stakes are so high as to call into question the very survival of the community, it makes political sense to speak of the possibility of only one correct decision.

44. 4 W. BLACKSTONE, COMMENTARIES *349.

extraordinary purposes is a device for compelling fuller consideration . . . ."[45] The Senate filibuster is frequently defended on these grounds, although the goal of a filibuster is usually delay and obstruction rather than fuller consideration of the issues. Stated another way, "it makes sense for an individual to express his policy preference only so long as he has still a chance to affect the outcome of the decisionmaking."[46] Logically, under the rule of unanimity, it *always* makes sense for an individual to express his opposition to a proposed policy.[47] Another theorist has observed:

> There is much to be said against the unanimity-principle as a criterion of right in an organized society, but there is this to be said in its favor: that where action can be taken under it at all there is some sort of presumption that the action taken is the wisest and most reasonable of which the deliberators are, as a group, capable. Every disputant among them must have been heard and convinced before action becomes possible; every suggestion that the action about to be taken is unwise or unjust must have been refuted to the satisfaction of him who has put it forward. By providing a maximum of guarantees against new decisions of all kinds, it provides a maximum of guarantees against new decisions which are unwise or unjust . . . . The unanimity principle . . . forces the deliberators to observe the basic rules of the reasoning process: consideration of all evidence available, attribution of equal weight to all points of view, etc. . . . .[48]

While these arguments tend to support the reasoning of the minority Justices in *Johnson* and *Apodaca*, the statements were made in a political context, and their application to the jury system must be carefully scrutinized. In a majority or qualified majority situation, when representatives of identifiable political interests fail to observe the "basic rules of the reasoning process" in their deliberations, their failure is easy to understand from a political standpoint. Their behavior is designed to further their interests, not necessarily to find the truth. Since the jury *is* principally interested in pursuing the truth, however, its failure to observe the basic rules is, if not incomprehensible, clearly inconsistent with the jury's purpose and its presumed interest.

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45. Pennock, *Responsiveness, Responsibility, and Majority Rule*, 46 AM. POL. SCI. REV. 790, 807 (1952).

46. E. BERG, DEMOCRACY AND THE MAJORITY PRINCIPLE 148 (1965).

47. *Id.*

48. W. Kendall, *John Locke and the Doctrine of Majority-Rule*, in 26 ILLINOIS STUDIES IN THE SOCIAL SCIENCES No. 2, at 109 (1941).

Admittedly, however, compliance with the rules of deliberation engendered by the unanimity requirement does not necessarily lead to the truth. Calhoun himself pointed out that the unanimity requirement facilitates compromise, which he believed to be the most fundamental political virtue. "Compromise, [however], is a matter neither of theoretical truth nor of inherently right action. It means . . . that the preferences of other people are taken into account, not because of their substantive quality, but simply because they are the preferences of others."[49] Justice Powell made a similar observation: "[T]he rule that juries must speak with a single voice often leads, not to full agreement among the 12 but to agreement by none and compromise by all, despite the absence of a rational basis for such compromise."[50] Guilt or innocence, moreover, is a question that admits of no compromise, although there is room for compromise about the degree of guilt (*i.e.*, what crime has been committed) and the nature of the punishment. More problematic, however, are situations in which individual jurors under the intense pressure to reach unanimity compromise their own judgments to avoid deadlock.[51]

The danger of this kind of compromise is illustrated by the so-called "*Allen* charge" (sometimes known as the "dynamite charge"), by which the trial judge cajoles a jury to seek unanimity. Kalven and Zeisel observed that "[c]oncern about the *Allen* charge has been mounting on two grounds: That it may give the jury the impression that the judge agrees with the majority position on the jury, and that he is in fact suggesting to the minority that it capitulate without being convinced."[52] The jury's objective—discovering the "truth"—is perhaps more accurately described as "the truth as perceived by twelve individual jurors." While it may be unsatisfying to be forced to consider two versions of the "truth," decisions based upon the honest perceptions of nine jurors

49. E. BERG, *supra* note 46, at 143-44 (1965).

50. Johnson v. Louisiana, 406 U.S. at 377 (Powell, J., concurring).

51. Relevant here is a conclusion that appears in the most extensive empirical analysis of the jury system undertaken to this date. "[T]he deliberation process although rich in human interest and color appears not to be at the heart of jury decision-making. Rather, deliberation is the route by which small group pressures produce consensus out of the initial majority." H. KALVEN & H. ZEISEL, THE AMERICAN JURY 496 (1966).

52. *Id.* at 454. In Allen v. United States, 164 U.S. 492 (1896), the Supreme Court gave constitutional sanction to a trial judge's suggestion that "the minority [on the jury] ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority." *Id.* at 501.

may be more principled than unanimous verdicts that do not connote honest agreement.[53]

In short, it seems impossible to prove that the unanimous verdict requirement is positively associated with the jury's sense of obligation to pursue the truth. The most that can be said is that the rule of unanimity, as applied in the jury system, supports the basic rules of the reasoning process, and that it may be a necessary safeguard when extraneous considerations (*e.g.*, prejudice) significantly influence the jury's deliberations. In some cases, unanimity will promote the objectives of the jury system; in others it will subvert those ends.

This conclusion, however, is not directly responsive to the question whether unanimity is essential to the jury's legitimacy. Legitimacy contemplates more than an institution's capacity to perform the duties society assigns to it; legitimacy also requires a popular *belief* that the institution is performing as expected. That nonunanimous verdicts *may* produce more accurate determinations than unanimous verdicts produce is not, standing alone, an adequate defense of the legitimacy of nonunanimous verdicts. As discussed earlier, the method of decisionmaking must be consistent with the purpose of the institution *and* the nature of the decision. The jury's legitimacy, therefore, depends upon a widespread belief that the process the jury utilizes to determine guilt or innocence is consistent with the irrevocable and grave nature of the decision.

Ultimately, it must be determined whether a nonunanimous jury verdict implies inaccuracy. Is the community satisfied that guilt has been proved beyond a reasonable doubt when one, two, or three jurors opposed the guilty verdict? Unlike the Supreme Court, which explains in detail the reasoning behind its decisions, the jury does not announce its reasoning; consequently, the community cannot evaluate the relative merits of differing perceptions of the truth. When unanimous verdicts are required, the public is similarly unable to discover the compromises that may have been necessary to attain unanimity. Logic suggests, therefore, that public confidence in jury verdicts, and thus in the jury system, will be higher when verdicts are unanimous. If empirical analysis sub-

53. For an interesting examination of this situation in a political context, see Zuckerman, *The Social Context of Democracy in Massachusetts*, 25 WM. & MARY Q. 523 (3d ser. 1968). Zuckerman discusses the colonial New England town meeting, where unanimity frequently reflected "the absence of any socially sanctioned role for dissent." *Id.* at 539. *See also* A. VIDICH & J. BENSMAN, SMALL TOWN IN MAN SOCIETY 112-14, 129-31 (1960) for a discussion of this problem in a contemporary rural political setting.

stantiates this proposition, a strong argument for requiring unanimity is made.

How does the above discussion relate to the constitutional question? The Supreme Court framed the issue in *Johnson* as "whether unanimity is in fact so fundamental to the essentials of jury trial that this particular requirement of the Sixth Amendment is necessarily binding on the States under the Due Process Clause of the Fourteenth Amendment."[54] To answer this question one must distinguish between legitimacy and justice. The unanimity rule may be related to the legitimacy of the jury trial but unrelated to the jury's capacity to render a just verdict. If so, the constitutional question becomes whether due process requirements should reflect legitimacy as well as justice. If the public perceives a direct connection between unanimous verdicts and justice, should the Court incorporate the popular view into its interpretation of due process even if the existence of such a connection may be impossible to prove?

This is a very complicated question, a complete answer to which is beyond the scope of this inquiry. The Supreme Court certainly has an interest in the legitimacy of American institutions, particularly an institution at the heart of the criminal process. For this reason, it is important to examine closely the Court's precise holding. In his concurring opinion in *Johnson*, Justice Powell distinguished himself from the other four majority Justices who were prepared to remove the unanimity requirement from federal as well as state trials. Thus, Justice Powell's conclusion that "unanimity is one of the indispensable features of *federal* jury trial"[55] in effect became the decision of the court. According to Powell, unanimity is indispensable "not because unanimity is necessarily fundamental to the function performed by the jury, but because that result is mandated by history."[56]

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54. Johnson v. Louisiana, 406 U.S. at 357.

55. *Id.* at 369 (Powell, J., concurring) (emphasis original).

56. *Id.* at 370. (Powell, J., concurring). Justice Douglas, in dissent, raised the obvious question, one the Court has often faced in interpreting the due process clause of the fourteenth amendment: "The result of today's decisions is anomalous: though unanimous jury decisions are not required in state trials, they are constitutionally required in federal prosecutions. How can that be possible when both decisions stem from the Sixth Amendment?" *Id.* at 383. Justice Powell, however, did not argue that unanimity was indispensable to the jury's function or an essential element of justice. A procedural safeguard may be indispensable (though not essential to due process) at one jurisdictional level but dispensable (at least for purposes of experimentation) at another level.

This result seems to be a sensible one. The Court recognized that a sudden and general reversal of the centuries-old unanimity rule could undermine the legitimacy of the jury as an institution. By permitting states to experiment with nonunanimous verdicts, however, *Johnson* and *Apodaca* offer an opportunity to measure the extent to which the legitimacy of the jury decision actually rests upon popular expectation of unanimity—experimentation that would be totally unwarranted if unanimity were known to be essential to criminal justice. After *Johnson* and *Apodaca*, state officials will be forced to respond to any crisis of legitimacy caused by the institution of a qualified majority verdict.

VII. CONCLUSION

"The certainty required to prove a man guilty . . . is that which determines every man in the most important transactions of his life."[57] This observation by Beccaria, an influential eighteenth century legal thinker and criminologist, states the decisive consideration in our analysis of the unanimous verdict. The "certainty" that Beccaria refers to is achieved by adopting a reasonable doubt standard to guide the individual juror, and a procedure through which the community becomes convinced of the jury's compliance with that standard. While a unanimous verdict may be necessary to maintain the community's trust in the jury's capacity to do justice, its effect on juror responsibility can be either positive or negative.

The issues of juror responsibility and political legitimacy, significant as they are, do not address the problem of unanimity from the accused's viewpoint. Obviously, the difference between a unanimous and nonunanimous verdict can be crucial to the defendant—the rule of unanimity lessens his chance of being convicted. It is clearly in the accused's interest to retain the unanimous verdict requirement.[58]

The community, however, is interested in providing fair trials (*i.e.*, trials that lead to acquittal of the innocent and conviction of the guilty) in the most efficient manner. Thus, the public may favor a system that reduces the number of hung juries but also assures the accused a fair trial. Reducing the number of hung juries—which constitute

57. C. BECCARIA, ON CRIMES AND PUNISHMENTS 21 (1963).

58. *See*, in this regard, Nagel and Neef, *Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict*, 1975 WASH. U.L.Q. 933. The authors develop a mathematical model to dispute Justice White's contention that the fraction required to convict will have no effect on reliability or accuracy. They point out, however, that the empirical premises of their model have not been tested.

more than five percent of all juries[59]—would alleviate the crowded condition of court dockets and might enhance the legitimacy of the judicial system. One way to reduce the number of hung juries is to abandon the unanimity requirement while retaining the reasonable doubt standard. Kalven and Zeisel estimate that if juries could return 10/2 or 11/1 verdicts, the number of hung juries would drop by 42 percent.[60] This proposal poses an interesting dilemma for the accused. If he fears conviction by a jury majority, he may waive his right to a jury trial in favor of a bench trial. In doing so, however, he confronts mathematical proof that, as a general rule, juries adhere to a stricter view of proof beyond a reasonable doubt than judges do.[61]

Another method of reducing the number of hung juries is to retain the unanimity requirement but to adopt a less exacting standard of probable guilt. The effect of this innovation is difficult to predict; at any rate, it is so foreign to Anglo-Saxon traditions of criminal justice that it is a political impossibility. The Supreme Court's willingness to permit state experimentation with nonunanimous verdicts almost certainly would not extend to allowing experimentation with less stringent standards of proof, because "the certainty required to prove a man guilty" often would be lacking both in the community and in the jury itself.[62]

Both the public and the accused may object to any tampering with the unanimity requirement or the reasonable doubt standard of proof. Nonunanimous verdicts, however, may satisfy the community's interest in (as opposed to the community's opinion about) fair and efficient trials. While it probably makes sense as a policy matter to require unanimity in criminal jury verdicts, it is doubtful that the rule of unanimity is essential to constitutional due process.

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59. H. KALVEN & H. ZEISEL, *supra* note 51, at 453.

60. *Id.* at 461.

61. *Id.* at 189.

62. Experiments conducted to evaluate the Anglo-American adversary system's capacity to produce objective and rational decisions revealed that "the adversary role structure seems most congruent with a public policy requiring overwhelming proof before a verdict can be rendered." Lind, Thibaut, & Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129, 1143 (1973).

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