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# Constitutional Law -- Jury Unanimity No Longer Required in State Criminal Trials

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## CONCLUSION

*Lloyd Corporation v. Tanner* is an unfortunate decision. The *Lloyd* test of "related to" and "adequate alternative forum" conceals more problems than it resolves. The *Lloyd* rationale cripples *Logan Valley* without attempting to refute its logic. And the *Lloyd* result, although perhaps acceptable on the particular facts of the case,<sup>56</sup> represents a rather inflexible approach to the delicate process of accommodating conflicting rights. Taken together, *Logan Valley* and *Lloyd* pose such a sharp contrast that one is tempted to sympathize with Justice Marshall: "I am aware," he said, "that the composition of this Court has radically changed. . . ."<sup>57</sup>

FRANK M. PARKER, JR.

### Constitutional Law—Jury Unanimity No Longer Required in State Criminal Trials

For more than six centuries the common law tradition has required a unanimous vote of a twelve-man jury to convict an accused in a criminal proceeding.<sup>1</sup> The Burger Court, in a pair of sharply divided opinions, has radically altered that traditional formula. Two years ago, in *Williams v. Florida*,<sup>2</sup> the Court held that the twelve-man jury panel is not an indispensable element of the sixth amendment jury trial guarantee. A panel of six was found adequate in that case, and the Court left open the possibility of an even smaller jury in some cases. More recently, in *Apodaca v. Oregon*<sup>3</sup> and a companion case from Louisiana,

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<sup>56</sup>If, as Justice Powell maintained, respondents could have moved to the sidewalks surrounding Lloyd Center and reached virtually the same audience as was inside the mall, *Lloyd's* reversal of the lower court's decision did not compromise first amendment interests. An inquiry into whether or not an *equally effective* forum existed would have been relevant to the balancing of rights involved. However, the "related to" criterion is immaterial to the balancing process. Furthermore, its use allows the property owner an unjustified measure of control over the content of the asserted "speech."

<sup>57</sup>92 S. Ct. at 2237 (Marshall, J., dissenting).

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<sup>1</sup>W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 318 (7th ed. 1956); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 88-90 (1898).

<sup>2</sup>399 U.S. 78 (1970).

<sup>3</sup>92 S. Ct. 1628 (1972). The companion case, *Johnson v. Louisiana*, 92 S. Ct. 1620 (1972), was originally tried several months before the Court's decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968), which held the sixth amendment jury trial right applicable to the states under the due

the Supreme Court decided that the unanimity requirement was not an essential element of trial by jury in state criminal proceedings. The majority, composed of the four Nixon appointees and Justice White (who announced the decision), upheld convictions by jury votes of ten to two and nine to three.

The right to trial by jury in criminal cases in the federal courts is provided by article III, section three and the sixth amendment to the Constitution. The Court has said that this includes the right to

a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted . . . . Those elements were— (1) that the jury should consist of twelve men, neither more nor less; (2) that the jury be in the presence or under the superintendence of a judge . . . and (3) that the verdict should be unanimous.<sup>4</sup>

The sixth amendment jury trial guarantee was held applicable to the states under the due process clause of the fourteenth amendment four years ago in *Duncan v. Louisiana*.<sup>5</sup> Justice White, writing for the Court, held that a defendant had the right to a jury trial in state court in any case in which he would be entitled to a jury trial in federal court. At that time the Court was unwilling to express itself as to the future impact of the *Duncan* decision on the details of state jury trials, or as to the applicability to state proceedings of older decisions construing the sixth amendment:

It seems very unlikely that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration . . . . In addition, most of the States have provisions for jury trials equal in breadth to the Sixth Amendment . . . .<sup>6</sup>

The Court could have been suggesting that it would not be too burdensome for the few non-conforming states to put their procedures

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process clause. Because the Court held in *DeStefano v. Woods*, 392 U.S. 631 (1968), that *Duncan* was not to be applied retroactively, the *Johnson* case was not a suitable vehicle for a full expression of the constitutional status of the unanimity requirement under the sixth amendment. Robert Apodaca was tried and convicted of assault with a deadly weapon in an Oregon court after *Duncan* was decided. The *Apodaca* case, therefore, squarely presented the question whether the right to trial by jury in a state court also includes the right to a unanimous verdict.

<sup>4</sup>Patton v. United States, 281 U.S. 276, 288 (1930).

<sup>5</sup>391 U.S. 145 (1968).

<sup>6</sup>*Id.* at 158.

in line with the federal standard. Or it may have been suggesting that the sixth amendment would be re-interpreted not to require all the common law features.

The latter possibility was realized in *Williams v. Florida*<sup>7</sup> when the Court stripped away as unnecessary one of the standard features of the common law jury—the twelve-man panel. Mr. Justice White, again speaking for the majority, articulated a new test to aid in determining which features of the common law jury are preserved in the sixth amendment: “The relevant inquiry, as we see it, must be the function which the particular feature performs and its relation to the purposes of a jury trial.”<sup>8</sup> Again the Court left open the question of whether the Constitution required unanimity in state criminal jury verdicts.

In the *Apodaca* decision the Court finally has faced the issue squarely and held that jury unanimity is not constitutionally required for non-capital proceedings in state courts. Although the four Nixon appointees concurred in the judgment of Justice White’s plurality opinion,<sup>9</sup> the newcomers did not vote as a cohesive bloc. Justice Powell took his position between two groups to create shifting majorities.<sup>10</sup> He agreed with Justices White, Burger, Blackmun, and Rehnquist that unanimity is not constitutionally required in state proceedings,<sup>11</sup> so that the petitioners’ convictions were affirmed; but he sided with the dissenting Justices Douglas, Brennan, Stewart, and Marshall in his belief that the sixth amendment requires a unanimous verdict in federal criminal trials.<sup>12</sup> Powell in effect created a bridge between the two groups by rejecting the doctrine of selective incorporation.<sup>13</sup> This doctrine has resulted in the *ad hoc* absorption of the individual guarantees of the Bill of Rights into the fourteenth amendment, making them applicable to the states to the same extent they apply to the federal government.<sup>14</sup>

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<sup>7</sup>399 U.S. 78 (1970).

<sup>8</sup>*Id.* at 99.

<sup>9</sup>This concurrence led the news media to describe the decision as another victory for the President’s “peace forces.” N.Y. Times, May 23, 1972, § 1, at 1, col. 1; TIME, June 5, 1972, at 65.

<sup>10</sup>92 S. Ct. at 1635 (concurring & dissenting opinion).

<sup>11</sup>*Id.* at 1641.

<sup>12</sup>*Id.* at 1638.

<sup>13</sup>*Id.* at 1637, 1640.

<sup>14</sup>See generally *Benton v. Maryland*, 395 U.S. 784, 795 (1969); *Griffin v. California*, 380 U.S. 609, 615 (1965); *Malloy v. Hogan*, 378 U.S. 1, 11 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Henkin, “*Selective Incorporation in the Fourteenth Amendment*,” 73 YALE L.J. 74 (1963).

Had Justice White been able to win one additional Justice to his position, unanimous jury verdicts would not be required in federal criminal trials either. His plurality decision in *Apodaca* concluded that unanimity—like the twelve-man jury requirement—“was not of constitutional stature.”<sup>15</sup> It is not, therefore, a necessary aspect of the sixth amendment jury.<sup>16</sup> Justice Powell refused to go that far. His reading of the Court’s chain of sixth amendment decisions convinced him that in enacting the amendment the framers desired to preserve the common law jury, including the unanimity requirement.<sup>17</sup> Therefore, “the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial.”<sup>18</sup> That requirement is not “so fundamental to the essentials of jury trial,” however, as to be binding on the states under the fourteenth amendment due process clause.<sup>19</sup>

In holding that conviction by a less-than-unanimous jury does not violate the sixth amendment jury trial guarantee, Justice White found the historical evidence inconclusive as to the intent of the framers and thus turned to other considerations.<sup>20</sup> As in his *Williams* opinion, Justice White focused upon “the function served by the jury in contemporary society”:

As we said in *Duncan*, the purpose of trial by jury is to prevent oppression by the Government by providing a “safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” “Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . .”<sup>21</sup>

Unanimity, concluded Justice White, “does not materially contribute to the exercise of this commonsense judgment.”<sup>22</sup>

Justice White’s one-page analysis of the function of the jury and the unanimity requirement in the modern American legal system seems very cursory in light of the widespread acceptance of that requirement. Certainly, the jury has played an important role as a buffer between the state and individual citizens, particularly in England and the English

<sup>15</sup>92 S. Ct. at 1630.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.* at 1638.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 1639.

<sup>20</sup>*Id.* at 1632.

<sup>21</sup>*Id.* at 1632-33 (citations omitted).

<sup>22</sup>*Id.*

colonies during the eighteenth and nineteenth centuries.<sup>23</sup> While that role is still occasionally applauded today, some observers have suggested that the need for this original virtue of the jury trial has largely disappeared.<sup>24</sup> The Court did not even consider an equally important function of the jury as protector of unpopular minorities from the bias of the majority.

When members of minority groups—be they racial, religious, or political—face trial in periods of violent social conflict, the unanimity requirement is an indispensable check against mob rule. The dissenting vote of only one or two men can prevent a hasty and unwarranted conviction. In such a situation, the unpersuaded jurors on a panel may have been less susceptible to passion and prejudice than the majority; the true facts may be evident to those few men with cooler heads, while emotion blinds their fellow jurors. It was to this point that Justice Story referred when he added the following comment to his discussion of the jury trial in his famous *Commentaries on the Constitution*:

The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former

. . . .<sup>25</sup>

Because it requires the concurrence of the unbiased and impartial, the rule requiring unanimous jury verdicts increases the likelihood that the guilt or innocence of an accused will be fairly established. As Judge Brown recently said in condemnation of the *Allen* charge:<sup>26</sup> "I think a

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<sup>23</sup>For centuries after the institution of the jury originated toward the end of the thirteenth century, the right of trial itself was at the King's grace. W. FORSYTH, HISTORY OF TRIAL BY JURY 200 (1852). The jury was essentially a body of witnesses, selected from the local citizenry because they had personal knowledge of the case, until the time of Henry VI (1422-61). *Id.* at 159. Thus the jury was originated to serve the Crown. The accused was not allowed to introduce witnesses in his own behalf until 1606. The assistance of counsel was allowed defendants accused of treason only after the Glorious Revolution (1688), and it was not until 1836 that the same privilege was extended to those accused of other felonies. F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 9-10 (1951). The jury and other sixth amendment rights, therefore, began to serve and protect the criminal defendant fairly late in the development of the common law system.

<sup>24</sup>*E.g.*, *Duncan v. Louisiana*, 391 U.S. at 188 (Harlan, J., dissenting).

<sup>25</sup>J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1780 (5th ed. (1891)).

<sup>26</sup>The *Allen* charge is the traditional formula used by many trial judges in an attempt to urge an apparently deadlocked jury toward unanimity. It was approved by the Supreme Court in *Allen v. United States*, 164 U.S. 492 (1896).

mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise."<sup>27</sup> Now that less than unanimous jury verdicts have been approved for state courts, this protection is virtually eliminated. If a majority of nine or ten jurors can be formed, the majority need not even consider the arguments of any dissenters. Debate and deliberation time will almost certainly be reduced.

As Justice Douglas observed in dissent to *Apodaca*, the result is a diminution in the reliability of jury verdicts.<sup>28</sup> At the close of *Apodaca*'s trial, for example, the jury deliberated only forty-one minutes before bringing in a ten-to-two guilty verdict. It seems unlikely that forty-one minutes was enough time to "piece together the puzzle of historical truth"<sup>29</sup> that was the evidence given these jurors during the trial. One scholar has explained in the following terms his belief that the unanimity requirement is essential to the proper performance of the jury's function:

As writers for years have pointed out, the necessity for unanimity lies in the fact that it is a blending of the ideal and the real, a compromise of the abstract and the mundanely true. Unanimity requires full and frank discussion in the jury room. It requires a defense of each juror's individual viewpoint and a challenging inquiry to those of opposing view . . . . Weakness or insecurity of the position of a majority of the jurors is, in some cases, overcome by the logic and justice of a stronger position which might have been grasped only by a minority.<sup>30</sup>

Kalven and Zeisel, foremost scholars of the American jury, report that examples of a well-reasoned dissident viewpoint being accepted by the early majority are not uncommon: "In roughly one case in ten, the minority eventually succeeds in reversing an initial majority, and these may be cases of special importance."<sup>31</sup> But if non-unanimous verdicts are allowed and deliberation time is thereby shortened, the initial vote will almost always become the final verdict.

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<sup>27</sup>*Huffman v. United States*, 297 F.2d 754, 759 (5th Cir.) (dissenting opinion), *cert. denied*, 370 U.S. 955 (1962).

<sup>28</sup>92 S. Ct. at 1647.

<sup>29</sup>*Id.*

<sup>30</sup>Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120, 139 (1962).

<sup>31</sup>H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 490 (1966).

Justice White rejected the petitioners' claim that a less-than-unanimous verdict undercuts the standard of reasonable doubt, which was recently incorporated into the fourteenth amendment due process guarantee.<sup>32</sup> The fact that two or three jurors vote to acquit does not impeach the verdict reached by the majority who voted to convict.<sup>33</sup> The Court concluded that the "disagreement of three jurors does not alone establish reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenters' views, remains convinced of guilt."<sup>34</sup>

The Court seems to have overlooked the essence of the interrelation that has developed between reasonable doubt and unanimity: the decision to grant the defendant in a criminal trial the benefit of the minority view of reasonable doubt assures the highest possible degree of certainty. This is not solely a concession to the accused; it is also a conscious sacrifice of efficiency to secure widespread public support for the judicial process. Western society has judged that it is worse for an innocent man to be found guilty than for a guilty man to go free. This social judgment may be, as Kalven and Zeisel suggest, "an almost heroic commitment to decency,"<sup>35</sup> but it is a commitment that flows from an understanding of the terrible consequences of an erroneous conviction. The Supreme Court, in holding that due process requires the reasonable-doubt standard in *In re Winship*, clearly recognized the public demand for near certainty:

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.<sup>36</sup>

Unanimity is so ingrained in the common-law procedure that its elimination would seem to take from the verdict a virtue needed by the criminal law. The criminal verdict is based on the absence of reasonable doubt. A dissenting minority of two, three, or more in itself suggests to the popular mind the existence of a reasonable doubt and impairs public confidence in the criminal justice system.

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<sup>32</sup>*In re Winship*, 397 U.S. 358, 363-64 (1970).

<sup>33</sup>92 S. Ct. at 1623-24, 1633.

<sup>34</sup>*Id.* at 1625.

<sup>35</sup>H. KALVEN & H. ZEISEL, *supra* note 31, at 189.

<sup>36</sup>397 U.S. at 364.

One of the factors that persuaded the Court to drop the twelve-man jury panel in *Williams v. Florida* was the lack of evidence suggesting that the traditional panel was “necessarily more advantageous to the defendant” than a six-man jury.<sup>37</sup> This phrase implies that the Court will consider whether a given modification of the common law jury will tip the scales against the accused as it weighs the constitutionality of the change. Evidence compiled during Kalven and Zeisel’s Chicago Jury Project<sup>38</sup> clearly indicates that the elimination of the unanimity requirement is not a neutral step but a significant detriment to the criminal defendant.

The Chicago study of 3,576 jury trial cases revealed that the jury brought in roughly two convictions for every acquittal, so that a defendant normally has a thirty percent chance of acquittal. Almost six percent of all juries, or some three thousand trials per year nationwide, end in a mistrial following jury deadlock.<sup>39</sup> The study revealed that roughly half of the hung jury cases produce the same practical consequences for a defendant as an acquittal, either because the prosecution drops his case or because he is acquitted in a subsequent retrial.<sup>40</sup> A table indicating the last votes of hung juries under the then-prevailing unanimity standard reveals that had a non-unanimous verdict of nine-three been permitted, almost 500 additional defendants, an increase of thirty-three percent, might have been convicted every year.<sup>41</sup> Furthermore, the evi-

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<sup>37</sup>399 U.S. at 101-02.

<sup>38</sup>This pioneering empirical study provided the basic material for Kalven and Zeisel’s book, *supra* note 31.

<sup>39</sup>H. KALVEN & H. ZEISEL, *supra* note 31, at 56.

<sup>40</sup>*Id.* at 57 n.4. Kalven and Zeisel caution that this statistic is based on the estimate of an “experienced prosecutor” rather than a survey of the outcome of actual cases. *Id.*

<sup>41</sup>*Id.* at 460 n.3:

Last Vote of Deadlocked Juries

Vote for Conviction	Per Cent
11:1 .....	24
10:2 .....	10
9:3 .....	10
8:4 .....	6
7:5 .....	13
6:6 .....	13
5:7 .....	8
4:8 .....	4
3:9 .....	4
2:10 .....	8
1:11 .....	-

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100%

dence does not support the claim made by some supporters of the majority verdict that the accused is just as likely to be acquitted by a majority verdict as he is to be convicted. As noted above, the normal conviction-acquittal ratio for all jury trials is two to one, whereas had nine-three verdicts been accepted, the conviction ratio, in the cases of hung juries studied, would have been almost four to one. Thus, in instances of divided juries defendants would have a twenty percent chance of acquittal, compared to a thirty percent chance in trials generally. This increased conviction rate is particularly disturbing because defendants should have a *more* favorable chance for acquittal in trials resulting in a non-unanimous verdict. Presumably these are the closest, most difficult cases, when neither the prosecution nor the jury majority can convince the dissenting jury members to vote for conviction.

The writer does not mean to imply that these figures provide a completely accurate forecast of the actual effect of allowing less than unanimous verdicts in every state. These statistics do indicate, however, that a shift to non-unanimous verdicts would under no circumstances aid an accused more than it imperiled him. The converse is equally clear; the unanimity requirement "is necessarily more advantageous to the defendant" than a mere majority verdict and thus meets the *Williams* test.<sup>42</sup>

When a man's liberty is in the balance, the reliability of the decision-making process is very important. Therefore it is significant that probability theory also underscores the value of the unanimous jury verdict. Speaking in support of the unanimity requirement over fifty years ago, James Clark asserted: "It is unquestionably true that the greater the number of persons entertaining a conclusion the greater the

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Number of Juries in Sample—48.

The estimates in the text (and they must be understood as being no more than estimates) were derived from an analysis of the 3000 cases which end in a divided jury annually. *See* text accompanying note 39 *supra*. Under the unanimity standard, 1500 of these defendants may be convicted at a subsequent retrial. *See* text accompanying note 40 *supra*. If a 9-3 verdict is allowed, 1320 defendants (44% times 3000) may be convicted at their first trials. *See* table *supra*. Approximately 360 defendants (12% times 3000) may be acquitted. *See* table *supra*. The remaining 1320 cases would still end in a mistrial because the jury was not able to meet the new 9-3 minimum standard of agreement. An additional 660 of these remaining defendants might be convicted at a subsequent retrial. *See* text accompanying note 40 *supra*. Therefore, from the 3000 cases a total of 1980 defendants may be convicted under a 9-3 standard, an increase of 480 from the results under the unanimity standard.

<sup>42</sup>399 U.S. at 101-02.

probability of that conclusion being sound and true."<sup>43</sup> Professor Forsyth has confirmed this axiom mathematically. The probability of a unanimous verdict being right in a hypothetical case is 167776220:1, that of a majority of eight to four being right, about 256:1, and that of a majority of seven to five, about 17:1.<sup>44</sup> That these figures are not without meaning is evident from the Louisiana and Oregon constitutional provisions requiring a unanimous jury verdict only to convict a defendant of a capital crime.<sup>45</sup> Apparently the people of those two states want to be as certain as possible of guilt before convicting a defendant of first degree murder, but do not feel it is necessary to be quite so certain before convicting him of lesser crimes.

Although the unanimity rule has been a feature of Anglo-American law for six hundred years, the United States is not the only country to question its continued application under modern conditions. At present many foreign legal systems, among them former British territories, allow majority verdicts.<sup>46</sup> Scottish juries are composed of fifteen members and for centuries have been able to bring in a simple majority verdict of eight to seven.<sup>47</sup> Most striking of all, however, is the abandonment of the unanimity requirement in England. The Criminal Justice Act of 1967<sup>48</sup> provides that the verdict of a jury in criminal cases need not be unanimous if in a case where there are twelve or eleven jurors, ten agree on the verdict, or in a case where there are only ten jurors, nine agree. The court may not accept a majority verdict of guilty unless the jury has deliberated for at least two hours.

As far-reaching as the unanimity decision is, the Court has left open a number of important questions. Probably foremost among these unresolved issues is the acceptable minimum jury vote. The Court approved a nine-three verdict, and Justice White emphasized the fact that a "heavy majority" had voted for conviction.<sup>49</sup> Concurring, Justice Blackmun implied that he would draw the line at eight-four; anything below that would be unacceptable.<sup>50</sup> But in dissent, Justice Stewart suggested that nothing in the majority's reasoning would prevent states

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<sup>43</sup>Clark, *Should Verdicts Be Unanimous in Criminal Cases?*, 46 A.B.A. REP. 591, 593 (1921).

<sup>44</sup>W. FORSYTH, *supra* note 23, at 210-11 n.1.

<sup>45</sup>LA. CONST. art. 7, § 41; ORE. CONST. art. I, § 11.

<sup>46</sup>Samuels, *Criminal Justice Act*, 31 MODERN L. REV. 16, 25 (1968).

<sup>47</sup>J. McDONALD, *CRIMINAL LAW OF SCOTLAND* 559 (4th ed. 1929).

<sup>48</sup>Criminal Justice Act 1967, c. 80, § 13.

<sup>49</sup>92 S. Ct. at 1625.

<sup>50</sup>*Id.* at 1635.

allowing simple majority (seven-five) verdicts.<sup>51</sup> There is no clue in the majority decision as to whether juries of less than twelve (allowed under *Williams*) must be unanimous. Nor is it clear whether unanimity will be required in capital cases; all of the defendants whose convictions were affirmed in *Apodaca* and the companion cases faced non-capital sentences. Finally, how will the Court justify invalidating convictions brought in by votes of "three to two, or even two to one," as Justice Douglas put it?<sup>52</sup>

The full impact of the decisions will not be evident until the states respond to the new opportunities opened to them. It should be emphasized that the old rule of unanimity still stands in the federal courts. Although they handle only a tiny fraction of all criminal trials, the federal courts are the fora for some of the nation's most dramatic and difficult cases—particularly the federal conspiracy charges,<sup>53</sup> so popular of late with the Justice Department. Most criminal trials take place in the state courts,<sup>54</sup> and it is there that changes will be felt. Most observers believe that many states will alter their criminal procedures to take advantage of the less than unanimous jury verdict.<sup>55</sup> As indicated above, a slightly higher conviction rate may be expected.<sup>56</sup> Concomitantly, state prosecutors may enjoy whatever benefits accrue from a few more guilty pleas and a greater willingness to plea-bargain on the part of criminal defendants. Despite the anguished cries of the dissenters that the majority has "cut the heart out of" the jury trial,<sup>57</sup> the decision can affect at most only five or six percent of all criminal trials. Over ninety-four percent result in clearcut conviction or acquittal—without jury disagreement—under the old unanimity rule.<sup>58</sup> Furthermore, only a tiny fraction of all criminal defendants ask for trial—no more than fifteen

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<sup>51</sup>*Id.* at 1627.

<sup>52</sup>92 S. Ct. at 1649.

<sup>53</sup>18 U.S.C. § 371 (1970).

<sup>54</sup>See Friendly, *supra* note 14, at 936 n.40, pointing out that in 1963 the Supreme Court and County Courts of New York handled the cases of 19,888 criminal defendants, and the state's lowest courts handled an additional 452,271 felonies and misdemeanors. During approximately the same period, the federal district courts in New York disposed of 1,816 criminal cases.

<sup>55</sup>See sources cited note 9 *supra*.

<sup>56</sup>See text accompanying notes 38-42 *supra*.

<sup>57</sup>92 S. Ct. at 1651 (Marshall, J., dissenting).

<sup>58</sup>H. KALVEN & H. ZEISEL, *supra* note 31, at 453. Of this 6% of deadlocked juries, just over half contain one, two, or three dissenting jurors. If the Court does draw the line at 9-3 verdicts (see text accompanying notes 49-51 *supra*), the unanimity decisions will affect some 3% of all criminal trials annually.

percent.<sup>59</sup> Unlike the rulings on the right to counsel,<sup>60</sup> search and seizure,<sup>61</sup> or coerced confession,<sup>62</sup> for example, which affected most criminal defendants, the *Apodaca* decision will directly touch only one of every one or two hundred defendants. Its psychic impact on the American system of justice may be more difficult to measure.

THOMAS A. LEMLY

### Environmental Law-Substantive Judicial Review Under The National Environmental Policy Act of 1969

The National Environmental Policy Act of 1969 (NEPA)<sup>1</sup> sets forth a declaration of national environmental policy (section 101)<sup>2</sup> and establishes procedural requirements for governmental agencies whenever a major Federal activity which will have a major impact on the environment is undertaken (section 102).<sup>3</sup> These procedural requirements include the compilation of information and submission of an environmental impact statement to the Council on Environmental Quality before any work on a major federal project is begun. Section 102

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<sup>59</sup>*Id.* at 17-18.

<sup>60</sup>*Argersinger v. Hamlin*, 92 S. Ct. 2006 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>61</sup>*Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>62</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

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<sup>1</sup>42 U.S.C. §§ 4321-47 (1970).

<sup>2</sup>42 U.S.C. § 4331 (1970):

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;