UNANIMITY: HISTORY, EMPIRICS, & MCDONALD

Zachary C. Smallwood
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## I. Introduction

I’m no idealist to believe firmly in the integrity of our courts and in the jury system – that is no ideal to me, it is a living, working reality. Gentlemen, a court is no better than each man of you sitting before me on this jury. A court is only as sound as its jury, and a jury is only as sound as the men who make it up.\(^1\)

Deliberation. Juries, made up of numerous individuals, not less than six, not more than twelve, will deliberate over the fate of thousands of accused persons each year. The number of jury trials conducted in the United States each year is incomparable to any other country in the world. In fact, eighty percent of all jury trials in the world occur in American jurisdictions.\(^2\)

Considering this substantial figure, it is critical that legislators and citizens regularly reexamine the accuracy, the fairness, and the efficiency of the jury system.

The jury trial, an essential feature of the United States’ Constitution, is not bound by consistent rules throughout American jurisdictions. Notably, the United States Supreme Court


## Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>II.</td>
<td>Background: Apodaca &amp; McDonald</td>
<td>2</td>
</tr>
<tr>
<td>a.</td>
<td><em>Apodaca v. Oregon</em></td>
<td>3</td>
</tr>
<tr>
<td>b.</td>
<td><em>McDonald v. City of Chicago</em></td>
<td>4</td>
</tr>
<tr>
<td>c.</td>
<td><em>McDonald: An Opportunity to Revisit Apodaca</em></td>
<td>6</td>
</tr>
<tr>
<td>III.</td>
<td>History: From Dikasteries to the American Jury</td>
<td>8</td>
</tr>
<tr>
<td>a.</td>
<td>Dikast: The Ancient Jury</td>
<td>8</td>
</tr>
<tr>
<td>b.</td>
<td>The Jury According to Henry II</td>
<td>11</td>
</tr>
<tr>
<td>c.</td>
<td>Unanimity: The Fourteenth Century</td>
<td>16</td>
</tr>
<tr>
<td>d.</td>
<td>The United States: The Jury and Unanimity Preserved</td>
<td>19</td>
</tr>
<tr>
<td>IV.</td>
<td>Unanimity: A Recognized Federal Right Codified in Rule 31</td>
<td>23</td>
</tr>
<tr>
<td>V.</td>
<td>Unanimity: Empirics and Function</td>
<td>25</td>
</tr>
<tr>
<td>VI.</td>
<td>Conclusion</td>
<td>30</td>
</tr>
</tbody>
</table>
has articulated different standards of unanimity depending on whether the jurisdiction is federal or state. In federal trials, the Constitution requires unanimous jury verdicts. In state trials, however, juries that are unable to reach a unanimous decision may nonetheless reach a verdict, consistent with the constitution.

A recent Supreme Court decision, *McDonald v. City of Chicago*, 130 S. Ct. at 3020 (June 28, 2010), casts doubt on this two-tiered standard. This paper will review the two-tiered standard in light of *McDonald* and will conclude that, due to the fundamental historic nature of jury unanimity, as well as the evidence and policy supporting unanimity’s constitutional application, the two-tiered standard must be rejected and unanimity must be adopted as a right incorporated to the states.

II. BACKGROUND *APODACA & MCDONALD*

In 1968, the United States Supreme Court incorporated the Sixth Amendment, holding that the Fourteenth Amendment guarantees the right to jury trial in all criminal cases, which, if tried in federal court, would come within the Sixth Amendment’s guarantee to a jury.\(^3\) The jury presides as fact-finder. It is a body composed of common men and women “sworn to declare the facts of a case as they are delivered from the evidence placed before them.”\(^4\) The judge presides as legal moderator. She is the arbitrator, entitled to “direct the evidence; to moderate length, repetition, or impertinency of speech; to recapitulate, select, and collate the material points of that which hath been said; and to give the rule, or sentence.”\(^5\) Questions of control, conduct, composition, and contours arise with regard to each deciding body. As a result of the Sixth

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\(^{3}\) *Duncan v. Louisiana*, 391 U.S. 145, 156 (May 20, 1968) (“The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.”).


\(^{5}\) Lord Bacon, *Of Judicature* at ¶ 3.
Amendment’s incorporation, each state must observe the constitutional guarantee to a trial conducted before this body of fact-finders.

Despite the Sixth Amendment’s total incorporation, the Court has held that variances from federal jury practices are appropriate under certain circumstances. For example, the Court, in the muddled *Apodaca* decision, delivered a splintered opinion that accepted a two-tiered approach to unanimity. In other words, unanimity, though required of federal juries, is an optional practice states may observe.

**A. *Apodaca v. Oregon***

In *Apodaca v. Oregon*, three defendants had been convicted by nonunanimous verdicts in Oregon.⁶ Pursuant to Oregon’s Constitution, only harmony among ten members of the jury was, and still is, required to reach a verdict in all non-capital felony cases with exception granted to charges of first-degree murder.⁷ After unsuccessful appeals in the Oregon court system, the convicted defendants sought recourse from the United States Supreme Court. Justice White, writing for the majority, declared that unanimity was not an indispensable characteristic of a criminal trial, reasoning that the jury’s primary function, to protect against the corruption, eccentricities, or zealousness of prosecutors and judges, was not otherwise when a jury was permitted to reach a verdict that enjoyed less than unanimity among jurors.⁸

Because the majority rejected the assertion that the Sixth Amendment requires unanimity, it rendered a discussion of the Fourteenth Amendment moot. Justice Powell, casting the

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⁷ See OR Const. art. I, § 11 (providing, in pertinent part: “In all criminal prosecutions, the accused shall have the right to a public trial by an impartial jury in the county in which the offense shall have been committed; . . . provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise.”)
deciding vote, concluded that the Sixth Amendment does mandate unanimity in a federal jury trial, but despite this requirement, the Fourteenth Amendment does not require incorporation of the unanimity requirement. The four dissenting Justices concluded that the Sixth Amendment mandates unanimity and it is made wholly applicable to states by the Fourteenth Amendment. Justice Stewart, writing for the dissent, commented, “Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial. I would follow these settled Sixth Amendment precedents and reverse the judgment before us.”

**B. McDonald v. City of Chicago**

In *McDonald v. City of Chicago*, petitioners had challenged ordinances in the city of Chicago that essentially banned possession of handguns by private citizens. The seventh circuit upheld the constitutionality of these ordinances. Overruling the seventh circuit, the Supreme Court held that the Second Amendment protected the right to bear arms for the purposes of self-defense and that the Second Amendment is fully applicable to the states through the Fourteenth Amendment. The court, relying on *DC v. Heller*, which invalidated a federal ban on handguns in a home, applied the same holding to States. In doing so, the Court expanded existing precedent that had previously read the Fourteenth Amendment’s Privileges or Immunities Clause narrowly. The narrow interpretation previously adhered to by the Court protected only rights that owed their existence to the federal government.

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9 *See Id.* at 369-377 (J. Powell, concurring).
10 *Id.* at 412.
11 *Id.* at 414-15 (J. Stewart, dissenting).
14 *Id.* at 3023.
dissent, the majority held that the Second Amendment, because it is deeply rooted in the history and tradition of the American nation, was applicable to the states.¹⁷

According to the now-retired Justice Stevens in his dissent, the right to bear arms does not fall within the scope of “liberty” the Fourteenth Amendment protects, notwithstanding the majority’s contrary belief.¹⁸ Stevens argued that even if it did, the States’ rights to regulate, a core of States’ police powers, “is a quintessential area in which federalism ought to be allowed to flourish . . . whether or not we can assert a plausible constitutional basis for intervening, there are powerful reasons why we should not do so.”¹⁹

Alito, writing for the majority, rejected Stevens’ two-track incorporation analysis. He noted the case law abandoning “the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.”²⁰

The Court noted it would be incongruous to apply different standards depending on whether the claim was asserted in a state or federal court.²¹ Effectively, if a right is fundamental to “our scheme of ordered liberty”²² or if a right is “deeply rooted in this Nation’s history and tradition”²³, the same shall apply to the states.

¹⁷ *Id.* at 3023, 3036 (The Court affirms that “the Second Amendment right to keep and bear arms is incorporated in the concept of due process.” To answer that question, the Court “must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty, or . . . whether this right is ‘deeply rooted in this Nation’s history and tradition.’” The Court notes at 3023 that “*Heller* also clarifies that this right is ‘deeply rooted in this Nation’s history and traditions’”) (internal citations omitted).
¹⁸ *Id.* at 3109 (arguing that the right to bear arms “may be better viewed as a property right”).
¹⁹ *Id.* at 3125
²⁰ *Id.* at 3035.
²² *Duncan v. Louisiana*, 391 U.S., at 149.
C. McDonald: An Opportunity to Revisit Apodaca

The Supreme Court’s McDonald decision provides an opportunity to revisit our jury system. In this landmark decision, the Court changed the way the Fourteenth Amendment applies to the States, and thereby changed the underpinnings of an important rule about juries: the rule permitting verdicts on a less-than-unanimous jury decision. The Court authoritatively rejected traditional two track approaches to incorporation. The majority opinion held that incorporated “Bill of Rights protections ‘are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.’”24 In ruling as such, the McDonald opinion reinstates a question answered more than 30 years ago: must the States oblige jurors to convict an accused unanimously?

The answer is yes. History demonstrates that unanimity is fundamental. Policy shows that unanimity is not merely a historic accident. Even the recent McDonald decision calls the plural Apodaca outcome, “an unusual division” and the standards applied “‘incongruous’” with the objective guarantees of the Bill of Rights.25 The majority stressed that the Court has abandoned the “notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.”26 Furthermore, the Court restricted states’ rights to deviate from the Bill of Rights guarantees, noting in pertinent part, “[i]ncorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights.”27

The McDonald Court attempted to explain this unusual division. The Court reasoned

24 McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 (June 28, 2010).
25 Ibid.
26 Id. at 3035.
27 Id. at 3050.
that, because Powell’s tie-breaking concurrence asserted that the Sixth Amendment requires jury unanimity in federal, but not state cases, the decision “does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.”

Effectively, the Court extinguishes the assertion that the Apodaca decision created a two-tiered system. Instead, the Court argues that inherent in the Sixth Amendment is a two-tiered distinction, and thus the Sixth Amendment unanimity requirement is naturally applied differently to states.

The conclusion is a falsum. The Court consistently harmonizes constitutional interpretations in accord with English common law. Yet, English common law and the history of jury unanimity do not suggest that the right to a unanimous verdict applies differently. Thus, if the McDonald opinion is left without clarification, the Sixth Amendment, as it has been interpreted federally, necessitates that the Court restrict states’ local variations to the unanimity requirement.

Moreover, unanimity is fundamental to the preservation of the purposes for which the jury maintains. Because the heart of the jury function lies in deliberation among jurors, sacrificing unanimity for efficiency dilutes the jury’s effective functioning. Critics argue that unanimity hampers the efficiency of the adjudicatory processes by augmenting the frequency of hung juries; but evidence clearly demonstrates that minority views are effectively snubbed when a majority vote is sufficient to convict. Ultimately, a unanimity requirement fosters an environment that facilitates effective deliberation sans coercion, combative behavior, and perspective disregard.

28 Ibid.
The forthcoming discussion analyzes the history behind the jury and jury unanimity. Case law demonstrates that the Supreme Court has consistently held that the Sixth Amendment’s Jury Trial Clause requires unanimity. The *McDonald* decision recognized that when a right is fundamental to the American scheme of liberty or deeply rooted in the Nation’s history and tradition, that right must be incorporated.\(^{29}\)

Second, the discussion will focus on the long history of United States federal cases that recognize the right to a unanimous verdict.

Finally, the discussion will delve into jury functionality, including the purposes and the contours that make the jury system what it is today, in order to establish that, in order to preserve the purposes of the jury, unanimity is essential.

**III. HISTORY: FROM DIKASTERIES TO THE AMERICAN JURY**

The history of the jury system is thorny and nearly un navigable. The first sprigs of the system are accounted for in the ancient Greek trial system. As a matter of interest, a brief discussion will ensue regarding these origins of the jury. Subsequently, the relevant jury system at English common law will be considered.

**A. Dikast: The Ancient Jury**

Aeschylus enshrined the Greek jury system in 458 BC in *The Eumenides*, part three of the *Oresteia* trilogy. In an attempt to avenge the death of his father, Orestes kills Clytemnestra and Aegisthus.\(^{30}\) By virtue of the act, Orestes provokes the Furies, deities committed to exacting vengeance for crimes of this nature.\(^{31}\) Athena, goddess of wisdom, intervened to conduct a fair trial. Athena, acting as judge, appoints ten citizens to serve as jurors to decide the guilt of

\(^{29}\) *Id.* at 3036.

\(^{30}\) See generally Aeschylus, *The Libation Bearers* (458 B.C.).

\(^{31}\) Aeschylus, *The Eumenides*, at line 170 (458 B.C.).
Orestes.\textsuperscript{32} Perhaps the first move away from a system of execution-style vengeance, Athena marks the beginning of a court system where citizens “rule fairly . . . bound by a sworn oath to act with justice.”\textsuperscript{33}

Historically, the jury system to which Aeschylus refers is a system composed of dikasteries. The first establishment of these dikasteries coincides with the tragedy of \textit{Oresteia}, and thus, \textit{Oresteia} provides literary evidence that the Greeks used jury’s as a mark of a fair trial afforded by the Greek Goddess of Wisdom, Athena.\textsuperscript{34}

The procedural aspects of these early jury trials were indisputably different. A single dikast was composed of hundreds of citizens. For any given year, various dikasteries, consisting of 500 citizens, were chosen.\textsuperscript{35} A dikast was chosen at random, and citizens belonging to that dikast attended the trial. These citizens sat in secret and cast lots to determine the guilt or innocence of the accused. Similar to modern juries whose system is protected by various procedural precautions, the Greek system also implemented such precautions. For example, the protocol enlisting many dikasts, rather than one at a time, was a procedural safeguard. Diaksteries were always numerous to ensure that none of the dikasts could know in what causes they would be employed so that it was impossible to tamper by bribery or kickback before the trial.\textsuperscript{36} Facialy, it appears that the dikast served the same purpose of modern juries: to provide a safeguard against arbitrary government authority.

Taking the general working of the dikasteries, we shall find that they are nothing but the jury trial applied on a scale broad, systematic, unaided, and uncontrolled, beyond all other historical experience – and that they therefore exhibit in exaggerated proportions

\textsuperscript{32} Id. at line 719.
\textsuperscript{33} Aeschylus, \textit{The Eumenides}, at line 626-628 (458 B.C.).
\textsuperscript{34} 4 George Grote, \textit{A History of Greece} (1872).
\textsuperscript{35} Id. at 463.
\textsuperscript{36} Id. at 464.
both the excellences and the defects characteristic of the jury system . . . all the
encomiums which it is customary to pronounce upon the jury trial will be found
predicable of the Athenian dikasteries.37

As observed, dikasteries served the same purposes the modern jury serves: to insure
uncorrupt and public minded verdicts. Yet, many authors do not accept that the dikast system is
the origin of the modern jury. Differences exist between the Greek jury and the modern jury.
Critics point to a systemic confusion due to bad laws, corrupt influence of private information
rather than evidence presented in court, convictions based on wealth, party feelings, and private
animosities.38 At most, according to Judge Cooley, the dikasteries maintained one element of the
modern jury: the “selection of its members from the community at large.”39

Despite the recognized existence of dikasteries, authors have attributed the modern jury
system to different origins. Perhaps the size of the dikasteries, the functioning, or even the lack
of safeguards leads authors to ascribe the genesis of the jury system to alternate sources.

Many writers of authority have maintained that the entire jury system is indigenous in
England, some deriving it from Celtic tradition based on the principles of Roman law,
and adopted by the Anglo-Saxons and Normans from the people they had conquered . . .
or as derived by that nation from the customs of primitive Germany or from their
intercourse with the Danes . . . One scholar maintains that is was brought by the
Norsemen from Scandinavia; another, that it was derived from the processes of the Canon
Law; another that it was developed on Gallic soil from Roman principles; another, that it
came from Asia through the Crusades.40

Other authors observe that the modern jury system became so ubiquitous that the place of
first origin is difficult to identify. Blackstone observes that the jury system was so interwoven in
all the Northern nations that the pinpoint location of the birth of the system is unascertainable:

37 Id. at 469.
39 Id. at 28, citing Judge Cooley, Am. Cycl. IX 721.
40 1 Canon Stubbs, Constitutional History of England 655-656 (1903).
In England, we find actual mention of [trials by jury] so early as the laws of King Ethelred, and that not as a new invention, Stiernhook ascribes the invention of the jury, which in the Tuetonic language is denominated nembda, to Regner, king of Sweden and Denmark, who was contemporary with out King Egbert . . . the truth seems to be, that this tribunal was universally established among all the Northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other.\footnote{Sir William Blackstone, \textit{The American Students’ Blackstone: Commentaries on the Laws of England in four books: so abridged as to retain all portions of the original} at 787 (1882, c1877) (\textit{American Law: General Studies}).}

Ultimately, the Greek dikast system is nothing more than interesting by virtue of its archaic nature.

\textbf{B. The Jury According to Henry II}

More importantly for the discussion of jury unanimity is a discussion of English common law. The Supreme Court has consistently held that the American Constitution is framed in the language of the English common law, and in accord with this framing, must be read in light of the common law’s history.\footnote{See \textit{Moore v. United States}, 91 U.S. 270, 274 (“The language of the Constitution and of many acts of Congress could not be understood without reference to the common law.”) (1875); see also \textit{Smith v. Alabama}, 124 U.S. 465, 478-79 (“There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States . . . The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.”) (1888).} Thus, in order to determine whether unanimity is deeply rooted in the Nation’s history and tradition, a discussion of unanimity at English common law is necessary.

Some of the earliest accounts of trial systems, contextualized in a backdrop of strong religious influence, evolved around the \textit{Judicium Dei}, the ordeal.\footnote{Neil Vidmar & Valerie P. Hans, \textit{American Juries} at 22 (2007).} These ordeals entertained the idea that if one were innocent, the auspices of God would provide sanctuary. Thus, in one signature ordeal, an accused would be stripped and cast into a lake of water. If, on the one hand,
an accused floated to the top, the accused was guilty. Inversely, receipt by God into the depths of the water indicated innocence.\textsuperscript{44} Ultimately, England steered away from these practices, and eventually adopted the modern jury system.

The earliest form of the jury in England was composed of “a body of neighbors summoned by some public officer to give upon oath a true answer to some question.”\textsuperscript{45} At its inception, the jury was “nothing but the testimony of witnesses informing the court of facts supposed to lie within their own knowledge.”\textsuperscript{46} Jurors played quite a different role than what one now commonly associates with the modern juror’s duties. Effectively, jurors were witnesses of presentment. Jurors testified under oath to crimes committed in the areas from which they represented. In this manner, the jury was self-informing, relying solely on knowledge they themselves possessed to convict. Jury knowledge was ascertained, for example, through personal knowledge, investigation, and even rumors.

Perhaps the earliest uses of the jury find its place with Henry II, who reigned from 1154 until 1189. Henry II, frequently associated with the jury, is perhaps one of the first individuals to develop the jury system. Authors have noted that Henry II is, if not the inventor of the jury system in England, “the great improver.”\textsuperscript{47} Not much is clear about the earliest jury systems in England. Unanimity, for example, is not a locatable proposition. Even so, Henry II applied a jury system to nearly every description of business. Yet, the earliest jury system under Henry II maintained some of the features of the ordeals. Those accused had a right to a trial by battle, or

\textsuperscript{44} Ibid.
\textsuperscript{45} Id. at 23 citing Frederick Pollock & Frederick Maitland, \textit{The History of English Law Before the Time of Edward I} 138 (Lawbook Exchange Ltd., 2nd ed., 1996) (1898); John Dawson, \textit{A History of Lay Judges} 119 (1960).
\textsuperscript{46} William Forsyth, \textit{History of Trial by the Jury} 239, 250-52 (1852) (London)
\textsuperscript{47} Maximus Al Lesser, \textit{The Historical Development of the Jury System} at 103 (1894) (citing 9 Bluntschli’s Staats-Woerterbuch at 347).
to the alternative, an examination by twelve knights.  

Presumably, like the abovementioned ordeal, victory was assured for the innocent under the auspices of God.

The number of jurors, twelve knights, deciding a case has often been remarked as an odd coincidence. Blackstone attributes the number of jurors to the feudal system, commenting that, “we may find traces of juries in the laws of all those nations which adopted the feudal system . . . who had all of them a tribunal composed of twelve good men and true, “boni hominess,” usually the vassals or tenants of the lord, being the equals or peers of the parties litigant.” The United States Supreme Court has taken the stance that the tribunal of twelve was merely an accident: “the size of the jury at common law came to be fixed generally at 12, that particular feature of the jury system appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place.”

Some accounts demonstrate that twelve was not any more or any less of an accident than any other number. Authors claiming that Henry II was not the inventor of the jury system, argue that in early times, the inquisition did not have a fixed number. According to Thayer, it was not until the reign Henry II in 1154 that the number of jurors was set at twelve. Thayer contends that, even then, the number was not uniform.

The jury as an institution under Henry II had considerably different tasks than jurors do today. The assise, or session, of Henry II was “in its original constitution nothing more than a body of twelve knights, empanelled to determine by their testimony a disputed question of seisin

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48 Id. at 104.
49 Sir William Blackstone, The American Students’ Blackstone: Commentaries on the Laws of England in four books: so abridged as to retain all portions of the original at 786 (1882, c1877).
50 Williams v. Florida, 399 U.S. 78, 89-90 (1970) (a jury composed of 6 members, rather than the traditional composition of 12 members, met the constitutional requirements of the Sixth Amendment).
51 1 James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law at 86.
of land, right to an advowson, or villenage.” These twelve knights, appointed due to their cognizance of the facts, most often paid no attention to the evidence in court, instead relying on their own previously formed view of the facts in dispute. Thus, quite contrary to modern potential jurors, often excluded if anything less than absolutely ignorant of the facts at bar, the jurors of Henry II consisted of freeholders well aware of the evidence to be determined, as they often functioned as the grand jury. Moreover, evidence of future statutes and evolutions to the jury indicate that the jury was not a body independent from coercion.

After the church forbade the trial by ordeal, the jury system, though gaining increasing popularity, had still not become the uniform trial system. English legal historian William Frederick Maitland demonstrates that, at least from a case in 1221, the jury system had questionable legal standing. When twelve jurors were asked under oath for their verdict of a defendant in 1221, they concluded that the defendant was guilty. Notwithstanding the verdict, the defendant was set free by the judge when an individual gave the king currency in exchange for the defendant’s privilege to leave the kingdom. By its nature, the jury system was subject to compromise at this point.

It was not until several decades after the reign of Henry II that the trial by jury became the dominant centerpiece of the justice system in England. In 1225, the Magna Carta was issued declaring the trial by jury for all criminal cases to be a right. Yet, despite the issuance of the Magna Carta, the jury system did not actually become a mandatory feature of the English justice system for some time. Beginning in 1275 with the Statute of Westminster, criminal defendants

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52 Maxiums A. Lesser, The Historical Development of the Jury System at 102 (1894) (villenage and advowson are questions of real estate and status).
53 Id. at 119 (citing William Forsyth, History of Trial By Jury at 131 (1852)).
55 Magna Carta Art. 36.
who refused to submit to a jury trial or plead guilty were “put in strong and harsh imprisonment.” This remedy was later altered to the harsh consequence of “peine forte et dure.” The defendant was chained to the prison floor with a platform covering his or her chest. Heavy stones were added to the platform until the accused agreed to submit to a jury trial.

Individuals accused of crimes frequently chose the consequence of peine forte et dure in lieu of a trial by jury for, if convicted, the alternative might be worse. In fact, most often, peine forte et dure was less severe than other grisly, imposable penalties. For example, beginning in 1283, defendants convicted of treason were drawn, that is, tied to a horse and dragged to the gallows, hanged, disemboweled, beheaded, and subsequently quartered (in laymen’s terms: divided into four parts).

The jury began to evolve over the next several centuries. In 1352, during the reign of Edward III, the grand jury or the indicting body and the petit jury became separate entities pursuant to Statute 25 Edw. III. At the time, the grand jury was composed of 23 persons, almost double the size of the petit jury, and an indictment required agreement by at least 12 individuals. By the rule of Henry VI (1366-1413), the number of jurors became discretionary with the court. Initially, bodies of jurors lacked independence, often chosen from the same indicting body and even punished occasionally by the Crown for their verdicts. Moreover, contrary to the modern jury system in the United States, it is almost historically certain that those

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58 Encyclopedia Britannica Online, *Drawing and Quartering*, (EB Online)
60 Ibid.
accused were guilty until proven otherwise. Eventually, the jury evolved to overcome barbarous customs of battle, the religious ordeal, and other executive forces to become the ordinary mode of determining fact and delivering a verdict. Unanimity finds its origins in less a historic accident. Rather, unanimity supplanted majority verdicts for purposes specific to the nature of the convicting body.

C. Unanimity: The Fourteenth Century

The historic background of unanimity is murky. The common law’s insistence that a verdict of a trial jury be unanimous first appears in a judgment of the Common Bench. Unanimity was not originally a universal concept. Originally, “a doctrine had a considerable application in Normandy and survived in England, that it was enough if eleven agreed.” However, by the fourteenth century, Thayer notes that in all inquests, twelve jurors in agreement was required for a good verdict.

Early jurors were witnesses and thus, keeping that in mind, “to require that twelve men should be unanimous was simply to fix the amount of evidence which the law deemed to be

63 Id. at 33 citing Beattie, Crime and the Courts in England, note 3, at 316-18.
64 Maxiums A. Lesser, The Historical Development of the Jury System at 150 (1894).
65 1 James Bradley Thayer, A Preliminary Treatise on Evidence at Common Law at 86 (1896).
66 Id. at 89, citing 41 Ass. 11 (1367) (“In another assize before the same justices at Northampton, the assize was sworn. They were all agreed, except one, who would not agree with the eleven. They were remanded and stayed there all that day and the next, without drink or food. Then the judges asked him [the one who stood out] if he would agree with his associates, and he said never, -- he would die in prison first. Whereupon they took the verdict of the eleven, and ordered him to prison, and thereupon a day was given upon this verdict in the Common Bench . . . Thorpe [the Chief Justice] said, they were all agreed that this verdict, taken from eleven, was no verdict, and that a verdict could not be taken from eleven . . . It was declared by all the justices that this was no verdict. It was therefore awarded that this panel be quashed and annulled, and that he who was in prison be enlarged . . . the justices said they ought to have taken the assize [instead] with them in a wagon until they were agreed.”).
conclusive of a matter in dispute.” However, by the reign of Edward III, a non-unanimous verdict was insufficient. Justice White points to other possible instances of the inception of unanimity:

At least four explanations might be given for the development of unanimity. One theory is that unanimity developed to compensate for the lack of other rules insure that a defendant received a fair trial. A second theory is that unanimity arose out of the practice in the ancient mode of trial by compurgation of adding to the original number of 12 compurgators until one party had 12 compurgators supporting his position . . . A third possibility is that unanimity developed because early juries, unlike juries today, personally had knowledge of the facts of a case; the medieval mind assumed there could be only one correct view of the facts, and, if either all the jurors or only a minority thereof declared the facts erroneously, they might be punished for perjury. Given the view that minority jurors were guilty of perjury, the development of a practice of unanimity would not be surprising. The final explanation is that jury unanimity arose out of the medieval concept of consent . . . Even in the 14th-century Parliaments there is evidence that a majority vote was deemed insufficient to bind the community or individual members of the community to a legal decision.

Given the initial makeup and duties of the jury, it is at least fair to say that the purpose for which unanimity was coined essential is quite different than the purpose to which we ascribe unanimity today.

The method of obtaining unanimity has also evolved considerably. Due to the fact that the jury could not be discharged until a verdict was reached, harsh remedies were pursued to force efficiency. Withholding food, fire, drink, and candlelight were all appropriate methods. However, Chief Justice Thorpe, Chief Justice in 1367 of the Common Bench, noted that if jurors could not agree, a juror could not be thrown in prison and his vote disregarded as such. Instead, the appropriate remedy was to take the entire jury with the judges in a wagon until the jurors agreed upon a verdict. Blackstone similarly comments that “the jury . . . are to be kept without

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67 William Forsyth, *History of Trial by the Jury* at 239 (1852) (London: John W. Parker and Son, West Strand).
68 *Id.* at 241 citing 41 Assis. 11.
meat, drink, fire, or candles unless by permission of the judge, till they are all unanimously agreed.”\textsuperscript{70} Blackstone also reiterates Thorpe’s remedy to jury indecision: “the judges . . . may carry them round the circuit from town to town in a cart.”\textsuperscript{71} In effect, jurors were starved and dragged around to the point of agreement. However, at least by the sixteenth century, according to Blackstone, the practice of withholding food, drink, and fire in order to obtain a verdict fell out of practice.\textsuperscript{72} Justice Harlan notes, “as early as the reign of Henry VII (1457-1509) one of the essential checks upon royal power was that ‘the fact of guilt or innocence on a criminal charge was determined in a public court, and in the county where the offence was alleged to have occurred, but a jury of twelve men, from whose unanimous verdict no appeal could be made.’”\textsuperscript{73}

Thus, by the latter half of the 14th century, the features of the modern jury had taken shape.

Unanimity was clearly a relevant aspect to English common law. In 1866, \textit{Winsor v. The Queen}

\textsuperscript{70} Sir William Blackstone, \textit{The American Students’ Blackstone: Commentaries on the Laws of England in four books: so abridged as to retain all portions of the original}, 800, 801 (1882, c1877) (\textit{American Law: General Studies}) (“The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candles unless by permission of the judge, till they are all unanimously agreed. If our juries eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is finable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties or their agents, after they are gone from the bar; or if they receive any fresh evidence in private; or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict).

\textsuperscript{71} \textit{Id}. at 801 (“if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart.”).

\textsuperscript{72} \textit{Id}. at 801 (“These rules in regard to the treatment of jurors while determining upon the verdict have been to a considerable extent changed in modern times by statute. Such harsh measure as depriving them of food, fire, and other necessary comforts are no long thought necessary or reasonable.”).

\textsuperscript{73} \textit{Maxwell v. Dow} 176 U.S. 581, 609 (1900).
authoritatively established that the jury could be discharged in cases of evident necessity, and thus, the historic requirement that a jury must come to a verdict dissolved.\textsuperscript{74}

\textbf{D. The United States: The Jury and Unanimity Preserved}

Jury trials made their way to the United States with the First Charter of Virginia, dated April 10, 1606. The first ordinance adopted by the Plymouth Colony in 1623 was one stating that all criminal facts should be tried by the verdict of twelve in form of a jury upon their oaths.\textsuperscript{75} Within the next century, juries became an integral part of most of the colonies. In the First Continental Congress’s Declaration of Rights of 1774 the right to trial by jury was an instituted law.\textsuperscript{76}

In 1787, just after the Revolutionary War, the superior court of North Carolina declared a legislative act seeking to disregard the right to a jury in civil cases unconstitutional, maintaining that every citizen, under the constitution of the state, was entitled to “a decision of his property by a trial jury.”\textsuperscript{77} The legislature’s attempt to disregard the right described as so fundamental by the North Carolina Court perhaps can be attributed to increasing Federalist concerns about civil trials.

During this era, civil juries were composed of “men embittered against the English government and the destruction caused by English and Hessian troops during the Revolutionary War.”\textsuperscript{78} These individuals frequently refused to recognize pre-Revolution debts incurred to

\textsuperscript{74} Arizona v. Washington, 434 U.S. 498 (1978) (citing Winsor v. The Queen, L. R. 1 Q. B. 289, 306 (1866) (Cockburn, C.J.)).
\textsuperscript{75} Ibid.
\textsuperscript{76} Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 870 (1994) (citing 1 Journals of the Contintental Congress: 1774-1789, at 69 (1774)).
\textsuperscript{77} State v. Singleton, 1 NC 5, Mart. 48.
\textsuperscript{78} Neil Vidmar & Valerie P. Hans, American Juries at 53 (2007).
English merchants and Americans with Tory leanings.\textsuperscript{79} And even if the debts were recognized, it was not uncommon for a jury to drastically discount the alleged debts.\textsuperscript{80} Despite these concerns, the jury maintained. James Madison’s original draft of the Constitution required unanimity. Ultimately, the Seventh Amendment passed and civil juries as well as a supplemental requirement, to wit, unanimous verdicts, were preserved.\textsuperscript{81}

Indeed, included in Madison’s draft was a similar requirement of unanimity for criminal convictions.\textsuperscript{82} Despite Madison’s proposal, the requirement was removed in the final draft of the Constitution. In \textit{Apodaca}, the Court took this to be indicative of a substantive effect.\textsuperscript{83} In light of the Seventh Amendments unanimity requirement, it appears intentional. However, no good reason explains this criminal-civil distinction in terms of threshold requirements. Even as it may be that Madison’s draft of the Sixth Amendment was not accepted with unanimity, the Court recognized that unanimity became normative as “Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems.”\textsuperscript{84}

The ratified Constitution preserved what became the indelible right to a trial by jury for criminal accusations in both Article III and the Sixth Amendment. Article III of the Constitution provides that, “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.” Meanwhile, the Sixth Amendment guarantees that all criminal defendants are entitled to a trial “by an impartial jury of the State and district wherein the crime shall have been committed.”

\textsuperscript{79} \textit{Ibid.}
\textsuperscript{80} \textit{Ibid.}
\textsuperscript{81} \textit{Id.} at 54.
\textsuperscript{82} \textit{Apodaca v. Oregon}, 406 U.S. at 409 (referring to 1 Ann. of Cong. at 435 (1789)).
\textsuperscript{83} \textit{Id.} at 410.
\textsuperscript{84} \textit{Id.} at 408, note 3.
The United States did not adopt jury unanimity for some time. However, by 1897, the Supreme Court ruled that civil trials, pursuant to Seventh Amendment guarantees, carried with them a right to a unanimous jury verdict.\(^{85}\) The Court noted that unanimity was peculiar, yet essential, to the trial by jury at common law. Similar to North Carolina’s understanding of the unanimity requirement, the Supreme Court noted that, “a statute which destroys this substantial and essential feature thereof is one abridging the right.”\(^{86}\)

The Supreme Court, more than 150 years after the framers devised the constitution, held that the 14\(^{th}\) Amendment included “a right of jury trial in all criminal cases which –were they to be tried in a federal court – would come within the Sixth Amendment’s guarantee.”\(^{87}\) This holding, subject to restriction\(^{88}\), was merely a silhouette; case law has since transformed the definition of the Duncan holding, developing defining contours, establishing a minimum foundation, distilling the adjudicatory function, and determining the verdict constitution.

History assures that the right to a unanimous jury is a fundamental aspect of a trial at English common law. But even despite the historic underpinnings, Blackstone refers to the requirement of juror unanimity as a peculiar historic feature characteristic of the British Constitution.\(^{89}\) Perhaps this statement is best explainable by its origins.

But frankly, the unanimity requirement was quite distinct to England at the time. For example, in Scotland, England’s sister country, “the jury system existed from an early date through the influence of English precedent and was re-affirmed by appropriate legislation after


\(^{86}\) Ibid.

\(^{87}\) Duncan v. Louisiana, 391 U.S. 145 (1968).

\(^{88}\) See e.g. Baldwin v. New York, 399 U.S. 66 (1970) (petty crimes are not subject to the Sixth Amendment jury trial provision); see also Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) (typically, offenses with a maximum sentence of six months imprisonment or a $5,000 fine will be petty offenses).

\(^{89}\) See id. at 800.
the union of the two countries in 1603.”\textsuperscript{90} However, in Scotland, the jury always consisted of 15 persons, a \textit{majority} of whom agreed was sufficient to convict the accused in criminal cases.\textsuperscript{91} Moreover, in Portugal, the number of the jury was abased to six and a two-thirds agreement is sufficient to convict an accused.\textsuperscript{92} Ultimately, the judge has the authority to annul the verdict, however.\textsuperscript{93} Italy also guaranteed a trial by jury, once again, requiring a mere majority to convict the accused.\textsuperscript{94} Similarly, in Norway, a majority jury concurrence was sufficient to convict.\textsuperscript{95}

Even as it may be, the provisions of the American Constitution are framed in the language of the English common law, and in accord with this framing, must be read in light of the common law’s history.\textsuperscript{96} Yet, noted, \textit{supra}, when one examines the early roots of the jury institution, as it was when it became a pertinent aspect of justice in England, the requirement of unanimity served a far different purpose. In the same moment, this is not a persuasive argument for the jury itself served a different purpose at the time of its inception.

Ultimately, the evolution of jury unanimity in England is exactly what Blackstone described it as, peculiar. “The origins of the unanimity rule are shrouded in obscurity, although it was only in the latter half of the 14th century that it became settled that a verdict had to be

\textsuperscript{90} Maximus A. Lesser, \textit{The Historical Development of the Jury System} at 155 (1894).
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.} at 156.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.} at 157.
\textsuperscript{95} \textit{Id.} at 158.
\textsuperscript{96} \textit{See Moore v. United States}, 91 U.S. 270, 274 (“The language of the Constitution and of many acts of Congress could not be understood without reference to the common law.); \textit{see also Smith v. Alabama}, 124 U.S. 465, 478-79 (“There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States . . . The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.”).
unanimous.” The reasons for which, as demonstrated by Justice White, are perhaps quite distinct for the reasons espoused by modern critics of *Apodaca*. The history of the jury most clearly demonstrates that unanimity carried with it a different purpose at its genesis, and yet, it became a concept so fundamental to English common law.

The contours of the jury evolve. The English common law does not, though. Unanimity in criminal trials, though not provided for specifically in the Constitution, became a fundamental part of early American law. To date, only two States have departed from the institution of unanimity. In fact, verdict unanimity has been a right recognized consistently throughout the history of the United States Supreme Court.

IV. UNANIMITY: A RECOGNIZED FEDERAL RIGHT CODIFIED IN RULE 31

The Court has long recognized that, in federal courts, the Sixth Amendment requires jury unanimity. Federal Rule of Criminal Procedure 31 states, “the verdict must be unanimous.” This rule is enshrined in Supreme Court case law as a guarantee of the Bill of Rights. The Court has consistently recognized that a requirement of unanimity at the federal level is an indispensable right. In *Patton*, the Court considered the nature of the right to a jury trial: “we

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98 To wit, Louisiana and Oregon.
99 *See Hawaii v. Mankichi* 190 U.S. 197, 211-12 (1903), *see also* (Harlan, dissenting) (the question is one “of the fundamental rights of every person living under the sovereignty of the United States in respect of that Government. And among those rights is the right to be free from prosecution for crime unless after indictment by a grand jury, and the right to be acquitted unless found guilty by the unanimous verdict of a petit jury of twelve.”); *see Patton v. United States* 281 U.S. 276, 287-90 (1930) (*see footnote, infra*); *Andres v. United States* 333 U.S. 740, 748-49 (1948); *Swain v. Alabama* 380 U.S. 202, 211 (1965) (“In providing for jury trial in criminal cases, Alabama adheres to the common-law system of trial by an impartial jury of 12 men who must unanimously agree on a verdict, the system followed in the federal courts by virtue of the Sixth Amendment”) (*note bene*: overruled on grounds other than jury unanimity). Also *see Johnson v. Louisiana* 406 U.S. 356, 369 (J. Powell, concurring) (1972) (“virtually without dissent . . . unanimity is one of the indispensable features of federal jury trial”); *United States v. Chavis* 719 F.2d 46, 48 (1983); *United States v. Smedes* 760 F.2d 109, 113 (1985); also *see c.f.*
first inquire what is embraced by the phrase "trial by jury." That it means 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, is not open to question. Those elements were -- (1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.”

Adding clarity to this decision, Justice Reed, writing for the majority opinion in a death penalty case pursuant to Federal law in *Andres v. United States*, later added, “unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues – character or degree of the crime, guilt and punishment – which are left to the jury.”

After years of established precedent, Justice White, delivering the opinion for the majority, wrote that the Sixth Amendment did not include the abovementioned rights. Justice Stewart, in his dissent, retorted that, “until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial.” However, it is untrue that the cases noted above were decidedly overruled. Only four justices wrote for the majority opinion agreeing that the Sixth Amendment did not include the right to a unanimous

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*Thompson v. Utah* 170 U.S. 343, 351, 355 (1898) (“In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so”); *Maxwell v. Dow* 176 U.S. 581, 586, 609 (1900)


trial. Thus, federally, unanimity is a recognized right at trial. Practically, there are very good reasons for recognizing the right to unanimity among jurors.

V. UNANIMITY: EMPIRICS & FUNCTION

Turning now from the historical to the practical, the jury has been preserved, notwithstanding jurisprudential debate, not solely for its historic value, but more importantly for its pragmatic, democratic effects. In 1822, one French author described the jury as a spontaneous creation and an inspiration shared by all people who are neither blinded by ignorance nor compromised by terror or availed of servitude. Aignan described the jury as an expression of the societal contract because the jury represents law made by the people and justice rendered by the people.103

Decisions in the U.S. Supreme Court in years proceeding attached similar principles to the school of thought enshrouding the jury system. The Court has pointed to various aspects of the jury as vital to the system of justice. Among other reasons, Courts have expressly dictated that the single most important jury function is its practical ability to overcome government oppression and arbitrary decision-making.104 Other sources point to the jury’s demonstrable preservation of a democratic element of law.105 Perhaps superficially, the Court reasons that the

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104 Duncan v. Louisiana 391 U.S. 145, 156 (“The purpose of the jury trial . . . is to prevent oppression by the Government . . . ‘providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.’”).

105 Powers v. Ohio, 499 U.S. 400, 411 (1991) (“Jury service preserves the democratic element of the law, as jury service guards the rights of the parties and insures continued acceptance of the laws by all the people; in a criminal case, the purpose of the jury system is to impress upon the
jury’s purpose is to impress upon the community that a verdict is given in accordance with the law by persons who are fair. “One of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system a link without which the determination of punishment could hardly reflect the evolving standards of decency that mar the progress of a maturing society.”

The mode of verdict making is through a process of deliberation. Perhaps the most essential feature of the jury is this process of procuring a verdict. The Supreme Court has justified various landmark decisions on this concept, stressing that when the deliberation process is inhibited, the jury fails its function. For example, in Ballew v. Georgia, the Court held that a 5-member jury was not sufficient to meet the constitutional requirements guaranteed by the Sixth Amendment. The Court noted that smaller juries are less likely to foster effective group deliberation and that, accordingly, the verdicts of jury deliberation in criminal cases will vary to the point of imbalance and detriment to the defendant. Yet, eight years earlier, in Williams v. Florida, the Court held that a six-person jury was sufficient to meet constitutional rigor, concluding that “the size of the jury at common law came to be fixed generally at 12, that particular feature of the jury system appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place.”

Extrapolating from these two opinions, the Court places less value on what appear to be historic accidents, but stresses the importance of jury functionality. This is almost a stark

\[\text{106 Witherspoon v. Illinois, 391 U.S. 510 (1968).} \]

\[\text{107 See generally Ballew v. Georgia, 435 U.S. 223 (1978).} \]

\[\text{108 Ibid.} \]

\[\text{109 Williams v. Fla., 399 U.S. 78, 89-90 (1970) (a jury composed of 6 members, rather than the traditional composition of 12 members, met the constitutional requirements of the Sixth Amendment).} \]
contrast to the *McDonald* decision, which wholly embraces the historic valuation to the Nation’s founders.

In order to foster deliberation and the democratic values essential to the jury’s nature, the Supreme Court has dictated that the jury venire cannot be composed of a specific segment of the population.\footnote{Teague *v.* Lane 489 U.S. 288 (1989) ("The requirement that the jury venire be composed of a fair cross section of the community is based on the role of the jury in the system. Because the purpose of the jury is to guard against arbitrary abuses of power by interposing the commonsense judgment of the community between the state and the defendant, the jury venire cannot be composed only of special segments of the population.").} Instead, the jury must be drawn from a fair cross section of society. It is within the ambit of delegated power that the jury, made up of this fair cross-section of the community, determines the veracity and the falsity of evidence.\footnote{Barefoot *v.* Estelle, 463 U.S. 880, 902 (1983) ("It is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party’s expert witnesses than another’s.").} By sorting through the evidence presented before them, the jury assures a fair and equitable resolution of factual issues.\footnote{Gasoline Products Co. *v.* Champlin Co., 283 U.S. 494, 498 (1931) ("The purpose of the jury trial in . . . civil cases is to assure a fair and equitable resolution of factual issues.").} According to the Supreme Court, this is the fundamental premise of the American system of criminal jurisprudence.\footnote{Barefoot *v.* Estelle, 463 U.S. at 902.} Ultimately, the hope is that the jury will be a boon to justice, discriminating between those who are innocent and those who are guilty. Thus, it can be said that the jury serves a final, important function: to prevent the conviction of an innocent person and to likewise prevent the acquittal of a guilty individual.\footnote{Ballew *v.* Georgia, 435 U.S. 223 (citing Nagel and Neef, *Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict* 933, 945 (1975 Wash.U.L.Q.).}

One clear, empirically proven advantage of a unanimity requirement is the impact on deliberation. If one juror, with power to veto an entire verdict, dissents, the other eleven jurors...
must yield to discussion. Some authors have noted that “the sole advantage attributable [to unanimity] is the opportunity which it gives each individual juror to be heard.”

In 1830, the Commissioners appointed to report upon the Courts of Common Law, addressing the criticisms of unanimity made an alternative proposal:

It is essential to the validity of a verdict that the jury should be unanimous; and regularly are not allowed to be discharged until such unanimous verdict has been returned . . . It seems absurd that the rights of a party, in questions of a doubtful and complicated nature, should depend upon his being able to satisfy twelve persons that one particular state of facts is the true one. As it is notorious that upon such questions a body of men so numerous are often found to differ irreconcilably in their views, it is obvious that the necessity of returning in every case a verdict, and an unanimous one, before they separate, must frequently lead to improper compromise among the jurors of their respective opinions . . . On the other hand, however, the necessity for the unanimity of the jury carries with it one most valuable advantage. In the event of any difference of opinion it secures a discussion . . . any one dissentient person can compel the other eleven fully and calmly to reconsider their opinions . . . we propose, therefore, that the jury shall not be kept in deliberation longer than twelve hours, unless at the end of that period they unanimously concur to apply for further time, which in that case shall be granted; and that at the expiration of the twelve hours, or of such prolonged time for deliberation, if any nine of them concur in giving a verdict, such verdict shall be entered on the record.

The Commissioner’s report reflects the judiciary’s concern that jury deliberation is sacrificed when a less than unanimous verdict is required. In fact, this intuition is empirically corroborated. Mock juries required to reach unanimous verdicts spend more time deliberating, discussing, and culling the evidence. Jurors who were told they would not be required to reach a unanimous verdict refused to consider the deliberative process of the minority view. Moreover, the minority view is less likely to voice its opinion when the verdict is based on a

115 Maximus A. Lesser, The Historical Development of the Jury System at 188 (1894).
116 William Forsyth, History of Trial by the Jury at 250-52 (1852) (London: John W. Parker and Son, West Strand).
117 Reid Hastie, et al., Inside the Jury 108 (1983)
majority decision.  

Hastie observes that one possible reason for the social climate of the jury under a majority verdict rule is that majority rule jurors tended to be more adversarial and combative. This social climate, as opposed to a pondering climate, is probably a product of jury tactics: jurors arguing for verdicts requiring unanimity will likely attempt to be more persuasive, rather than argumentative. The 9th Circuit notes, “a rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict.”

Critics of unanimity argue that no evidence indicates that a unanimous jury verdict secures a more accurate verdict as opposed to a majority verdict. In fact, trial verdicts empirically are not greatly altered by utilization of majority rule, because the verdict favored by the majority before deliberations begin is the final verdict of nine out of ten cases. Other criticisms offered included efficiency and cost. Kalven and Zeisel, famous for their research on the American jury, observed that around five percent of state criminal juries failed to reach unanimous verdicts. Not surprisingly, the numbers of hung juries increases when the unanimous rule is applied. In fact, the difference is substantial: juries required to reach

121 United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978).
124 Ibid.
126 Ibid.
unanimous decisions had a 5.6 percent rate of hanging compared to the 3.1 percent rate of majority rule juries.\(^{127}\) Evidence also tends to demonstrate that non-unanimous verdicts are reached at much quicker rates than unanimous verdicts.\(^{128}\)

Despite these criticisms, “[c]onvenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government”\(^ {129}\) Allowing the efficiency of majority verdicts to outweigh the pragmatic considerations of juror deliberative quality would literally cheapen the process. Furthermore, the fundamental purposes enshrined in a system of justice, which prefers juries to judges, receive better force under a unanimity rule. Unanimity is more representative of the democratic jury function espoused by the Supreme Court as each citizen serving as a juror has a stronger voice on a jury which require as such. A jury in complete agreement is also more likely to be satisfied with the outcome of the verdict, rendering each juror a stronger bulwark against arbitrary government oppression. Finally, each cross-section has a valid voice on a unanimous jury. In a system that provides for a jury in order to promote the evolution of fresh legal perspective, the philosophy is hindered when one, alternative perspective is discounted, perhaps a perspective representing a cross-section of society substantially underrepresented and unconsidered.

VI. CONCLUSION

The right to a trial by jury is a hallmark of criminal procedure in the United States of America, oft considered the “jewel and the centerpiece”\(^ {130}\) of American jurisprudence. In 1788, Thomas Jefferson, remarking on his apprehension that the trial by jury would not be adopted, noted the jury “as the only anchor ever yet imagined by man, by which a government can be


held to the principles of its constitution.”

Others have commented that the jury “who must pass upon the questions of guilt or innocence, being drawn from the people, will naturally strive at once to preserve the law inviolate and shield the prisoner from injustice.” Shielding the accused from injustice requires more than just one decision-maker. In the American adjudicatory system, that number has been set to a minimum of six. Requiring unanimity assures that the accused receives the highest standard of legal justice by buttressing the verdict with democratic consensus among jurors. Unanimity ensures that the safeguard against corruption is preserved because it enables the minority to represent an opinion, it fosters discussion, and it requires careful evaluation of the evidence.

Historically, the jury system far predates the American Constitution. In 1769, William Blackstone called the jury the “glory of the English Law.” Yet, the creation of the jury is merely a historical fact. According to Justice Harlan, “The right to a trial by jury . . . has no enduring meaning apart from historical form.” Every detail of the jury is an establishment far predating the American Constitution. Hearkening back to the history of the jury, unanimity became a central feature of the jury system by the latter half of the fourteenth century. The United States, recognizing the influence of English common law, has one insignificant reason to disregard this history: to decrease the rate of hung jury verdicts. Despite the history and the rationale preserved by empirical data, the Court upheld Oregon’s Constitutional implementation of majority verdicts in Apodaca. Yet, at federal law, the United States Supreme Court has

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131 Thomas Jefferson to Thomas Paine, *The Papers of Thomas Jefferson* at 266 (Barbara B. Oberg and J. Jefferson Looney, Editors in Chief) (July 11, 1789).
consistently recognized the necessity of unanimity. In light of the recent *McDonald* decision, which abandoned the concept of State experimentation and mandates States to mirror Constitutional standards of federal interpretations, unanimity once again becomes a relevant question to American jurisprudence. Considering the aforementioned data, history, and policy considerations, *McDonald* dictates that Oregon’s failure to echo the federal Sixth Amendment standards is inconsistent. Accordingly, to allow Oregon to apply a watered-down Sixth Amendment standard as compared to its federal counterpart is to apply the two-track approach that defies the Court’s recent ruling in *McDonald*. Thus, unanimity ought to be preserved as a right essential to the Sixth Amendment and incorporated by the due process clause.