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Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials

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Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials

James Kachmar*

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* B.A., University of California, Irvine, 1992; J.D., University of the Pacific, McGeorge School of Law, to be conferred 1997. I wish to thank Professor Michael Vitiello for his advice and patience, Professor Timothy Hurley for his ideas and suggestions, and my parents for everything else. Peace.
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.

—Then Circuit Judge Anthony Kennedy

I. INTRODUCTION

In 1992, Scott Rembert and two accomplices kidnapped an Orange County college student. After robbing him of $1, the trio shot the student while he was stuffed in the trunk of his own car. Rembert's two co-defendants were convicted of all charges. However, Rembert's jury deadlocked 11-1 in favor of guilt as to the charges against him. Rembert was retried and a second jury once again deadlocked, this time 10-2 in favor of guilt. Finally, Rembert was convicted of all charges after only four hours of deliberation by a third jury.

On Friday, January 28, 1994, after six months of trial and a one million dollar price-tag, the jury in the Lyle Menendez trial could only agree on one thing—that it could not agree. The jury deadlocked only two weeks after another jury deciding the

1. United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978).
3. Id.
4. Id.; see Bryon MacWilliams, Tab for a Superior Court Trial Estimated to Be $9,900 Daily, Orange County Reg., Apr. 6, 1995, at B2 (reporting that Rembert's accomplices, Shaun K. Burney and Allen D. Burnett II, were convicted of first-degree murder, kidnapping, and robbery).
5. CDAA REPORT, supra note 2, at 3.
6. Id.
7. Bryon MacWilliams, Third Trial Brings Life Term in Slaying, Orange County Reg., June 16, 1995, at B4 (reporting that Scott Rembert was sentenced to life imprisonment without the possibility of parole); Bryon MacWilliams & Stuart Pfeifer, Third Trial Convicts Carjacker in Fatal Case, Orange County Reg., Apr. 15, 1995, at B5; see id. (estimating that Rembert's three trials cost over $700,000).

There are many interesting cases of juries ending in deadlock for bizarre, and sometimes, humorous reasons. In one case in which the defendant was being tried for the murder and attempted murder of two co-workers during a robbery of an ATM machine, the jury deadlocked 11-1 in favor of conviction. Judge Harold J. Rothwax, Guilty: The Collapse of Criminal Justice 199 (1996). The lone holdout refused to convict the defendant because she was convinced that "someone that good looking could not commit such a crime." Id.

In another case in which the defendant had been charged with conspiracy, the judge declared a mistrial after five days because one juror refused to deliberate. Id. The juror, a state worker, declared that he would not participate in the deliberation process because he did not wish to return to his hated job and that as far as he was concerned, the jury could "stay [there] until hell [froze] over." Id.

One lone holdout juror in a domestic violence case refused to convict because he felt that "the woman had not been hurt bad enough." Ed Bond, Need Jury Verdicts Be Unanimous?, L.A. Times, Aug. 1, 1995, at B3.


The jury, consisting of five men and seven women, was deadlocked as to all charges against Lyle. Id. For the killing of his father, Jose, three voted for first-degree murder, three voted for second-degree murder, and six voted for voluntary manslaughter. Id. In the killing of his mother, Kitty, three jurors voted for first-degree murder, three
fate of Lyle’s brother, Erik, had reached a similar outcome. On March 20, 1996 after only three days of deliberation, the jury in the retrial of the Menendez brothers found the brothers guilty of murder in the first degree and conspiracy to commit murder. A month later, the Menendez brothers were sentenced to life in prison without the possibility of parole.

Throughout 1995, the nation focused its attention on the trial of O.J. Simpson for the murder of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman. Legal pundits, widely predicting a jury deadlock, were shocked when a not guilty verdict was returned after only three hours of deliberation.

The Simpson and Menendez trials drew much attention to what many perceive as an obstacle to the efficient administration of justice—the unanimity requirement.

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9. Id. Erik’s jury consisted of six men and six women who also deadlocked as to all charges against Erik. Id. For the killing of Jose, five jurors voted for first-degree murder, one juror voted for second-degree murder, and six jurors voted for voluntary manslaughter. Id. For Kitty’s killing, five jurors voted for murder in the first-degree, three jurors voted for second-degree murder, and four jurors voted for involuntary manslaughter. Id.

10. Ann W. O’Neill, Menendezes Are Found Guilty of Killing Parents, L.A. Times, Mar. 21, 1996, at A1; see id. (reporting that the deliberations were interrupted when two jurors became ill requiring two alternative jurors to take their places).


12. See Sam Fulwood, III, Simpson Saga Aside, News Interest Falling, Poll Finds, L.A. Times, Apr. 6, 1995, at A4 (reporting that 59% of the American public followed news coverage of the trial, while 24% of the public followed most or all of the live trial coverage); O.J. Simpson Verdict Controversy, Time, Oct. 16, 1995, at 31 (estimating that 57% of the country watched the televised reading of the verdict); Tim Rutten & Jane Hall, Is the Public Still Hungry for Simpson News?, L.A. Times, Jan. 28, 1996, at A1 (observing that the National Enquirer had readership increases of 500,000 whenever it featured coverage of the Simpson trial).


15. Bond, supra note 7, at B3; see Reynolds Holding, Unanimous Jury Rule Is Unpopular, S.F. Chron., Sept. 12, 1995, at A13 [hereinafter Holding, Unanimous Jury Rule] (reporting on a state-wide poll which found that 71% of the state’s residents favored the elimination of unanimous juries in criminal trials which do not involve the death penalty, and 49% who favored abolishing the requirement in cases which did involve the death penalty); see also Mark Z. Barabak, Plodding O.J. Trial Has Many Americans Feeling Contempt of Courts, San Diego Union-Trib., May 14, 1995, at A3 (noting that a nationwide poll found that 45% of the American public had lost respect for the criminal justice system after observing the Simpson trial); Dan Morain, Lawyers Fear Simpson Trial Hurt Profession, L.A. Times, Oct. 2, 1995, at A3 (relating the findings of a poll conducted in Los Angeles which found that 85% of the public concluded that "the court system is in deep trouble" after watching the Simpson trial).
Although the California Constitution does not explicitly require that criminal trials be decided by unanimous verdicts, 16 California courts have concluded a verdict may be rendered in a criminal case only if all the jurors agree. 17 Recently, there have been several attempts to amend California’s Constitution to permit 11-1 and 10-2 jury verdicts in criminal trials. 18

This Comment begins by examining the historical traditions surrounding the unanimous verdict requirement in criminal trials. 19 Part II then sets forth the United States Supreme Court precedent relating to jury unanimity in criminal proceedings. 20 Part III discusses the tradition of requiring jury unanimity in California criminal proceedings. 21 Part III continues by examining the recent attempts by the California Legislature, as well as by a group of California voters, to amend the state’s constitution to permit less than unanimous verdicts. 22

This Comment then considers some of the concerns, such as the high rate of hung juries in California and the extra costs generated, that have led to the call for the elimination of the unanimity requirement—long ago termed the “preposterous relic of barbarism.” 23 In addition, this Comment examines whether the high rate of hung juries in California is due in some part to the presence of jurors who refuse to deliberate in a reasonable manner and who usually act alone in preventing a verdict from being rendered. 24 Finally, the Comment looks at the potential impact that eliminating jury unanimity will have on minority communities within California and their future participation in the criminal justice system. 25

see Jeremy Osher, Comment, Jury Unanimity in California: Should It Stay or Should It Go?, 29 Loy. L.A. L. Rev. 1319, 1364-66 (1996) (arguing that high-profile cases like the Simpson and Menendez trials should not influence the decision to eliminate the unanimity requirement).

16. Article I, § 16 of the California Constitution reads in pertinent part as follows:

“Trial by jury is an inviolate right and shall be secured to all . . . . In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court.”

17. See infra Part III.A. (discussing how California courts have interpreted the state Constitution to require jury unanimity in criminal proceedings).

18. Amending the California Constitution to permit less than unanimous verdicts in criminal trials has been attempted through legislative means and a proposed voter initiative. See infra Part III.B. (discussing the legislative attempts); infra Part III.C. (reporting on the attempt by California voters).

19. See infra notes 28-37 and accompanying text (analyzing the development of the unanimity requirement).

20. See discussion infra Part II.A. (examining the Supreme Court’s precedents regarding jury unanimity).

21. See discussion infra Part III.A. (relating the tradition of jury unanimity in California criminal trials).

22. See discussion infra Part III.B. (discussing the legislative attempts); infra Part III.C. (reporting on the attempt by voters).

23. MAXIMUS A. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM 187 (quoting the English historian Henry Hallam); see discussion infra Part IV.A. (setting forth the conditions of the criminal justice system in California which have led to the call for abandoning the unanimity requirement).

24. See infra Part IV.B. (discussing the problem of the “flake factor”).

25. See infra Part IV.D. (analyzing whether eliminating jury unanimity will adversely affect minority participation in the judicial process).
Although the call to permit less than unanimous verdicts in California criminal proceedings has ebbed for the time being, it will soon become a “hot topic” again. Therefore, this Comment aims to provide a basis for future debate concerning whether the unanimity requirement should be retained. The Comment concludes that, for the time being, the requirement of jury unanimity in criminal proceedings should be kept intact.

II. HISTORICAL FOUNDATIONS OF THE UNANIMITY REQUIREMENT

The unanimous jury requirement in criminal trials has its roots in England where a court, in 1367, refused to accept an 11-1 verdict even though the lone holdout “stated he would rather die in prison than consent to convict.” Subsequently, English courts devised various techniques by which to encourage jury unanimity. Blackstone described how jurors were “to be kept without meat, drink, fire, or candle, ... till they [were] all unanimously agreed.” If a jury had not reached a verdict by the time the judge was to leave a particular town, the sheriff was to order the deadlocked jurors to follow the judge in a cart as the judge made his circuit, denying the jurors fire and food until they agreed on a verdict. Another method, known as afforcement, kept adding jurors to the deliberating panel until twelve jurors were found who eventually could agree on an outcome.

In America, several colonies briefly permitted majority verdicts. In Connecticut, for example, a verdict could be rendered when jurors reached a simple

26. See infra notes 179-80 and accompanying text (discussing how supporters of the voter initiative have abandoned their effort until some time in the future).
28. The origin of the unanimity requirement in criminal trials is uncertain, but appears to have developed because of the medieval view that there could be only one correct version of any event. JOHN GUINTEGR, THE JURY IN AMERICA 12 (1988). Therefore, a nonunanimous jury verdict was “a legal and logical non sequitur.” Id.
29. See LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 56 (1973) (stating that majority verdicts were known to have been accepted until 1346). The author has been unable to ascertain which rule was in effect between 1346 and 1367.
31. Although juries in the English courts had to deliberate until they reached unanimity, there was one thing that weighed heavily on their minds as they ventured towards a decision—jurors could be imprisoned for erroneous verdicts. REID HASTIE ET AL., INSIDE THE JURY 3 (1983).
32. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *375 (Oxford, Clarendon 1768); see id. (reporting that jurors could be fined if they were to eat or drink before reaching a verdict).
33. Id. at 376; see LESSER, supra note 23, at 189 n.32 (reporting that if a juror became ill, the juror could receive medical attention but would still be deprived of sustenance).
34. HASTIE ET AL., supra note 31, at 2.
35. Apodaca v. Oregon, 406 U.S. 404, 408 n.3 (1972); see ABRAMSON, supra note 30, at 175 (relating that the states that permitted less than unanimous verdicts were apparently unfamiliar with common law procedures).
majority. It was not until after the Constitution had been adopted that the unanimity requirement became accepted by all the states.

However, Oregon voters, concerned that hung juries "were a frequent occurrence," voted in 1934 to amend their state constitution to permit non-unanimous verdicts in criminal trials. The change was brought about to "prevent one or two jurors from controlling the verdict or causing a disagreement." In 1928, Louisiana voters also decided to accept less than unanimous verdicts in criminal trials. Several other states have also relaxed their unanimous verdict requirements in certain criminal cases.

36. FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 16 (1969); see id. (recognizing that the magistrate was permitted to break any deadlocks); id. at 18 (noting that juries in Pennsylvania were also able to render verdicts in criminal proceedings when a simple majority had been achieved).

37. ABRAMSON, supra note 30, at 179. An early draft of the Sixth Amendment by James Madison required unanimous jury verdicts in criminal trials. Apodaca, 406 U.S. at 409. Some believe that the requirement of jury unanimity was omitted from the Sixth Amendment because of the belief that it was "implicit in the very concept of jury." Id. at 409-10. However, others contend that this clause was removed because Congress did not want to upset those Colonies that allowed for less than unanimous verdicts. Jacob Tanzer, Oregon's Jury System Could Help, ORGANICAN, Aug. 22, 1995, at B7.

In addition, unanimous verdicts are required in criminal trials held in federal courts. Fed. R. Crim. P. 31(a); see Apodaca, 406 U.S. at 369 (Powell, J., concurring) (declaring that the unanimity requirement is "one of the indispensable features of federal jury trials"). It is also widely accepted that a defendant may not waive his or her right to a unanimous jury verdict in federal criminal proceedings. United States v. Morris, 612 F.2d 483, 488-89 (10th Cir. 1979); United States v. Lopez, 581 F.2d 1338, 1342 (9th Cir. 1978); United States v. Scalzitti, 578 F.2d 507, 512 (3d Cir. 1978); United States v. Gipson, 553 F.2d 453, 456 n.4 (5th Cir. 1977) (referencing to Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953)). But see Jamardo v. United States, 587 F. Supp. 567, 571-72 (S.D. Fla. 1983) (ruled that although the language concerning waiver did not appear in rule 31(a) of the Federal Rules of Criminal Procedure, this did not mean that it was expressly prohibited).


Article I, section 11 of the Oregon Constitution reads in pertinent part as follows:

In all criminal prosecutions, the accused shall have the rights to public trial by an impartial jury . . . 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 . . . .

Id.


40. Article I, section 17 of the Louisiana Constitution reads as follows:

A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict.

41. See OKLA. CONST. art. 2, § 19 (permitting three-fourths of the jury to render a verdict in criminal cases for which the punishment does not exceed six months imprisonment); TEX. CONST. art. 5, § 13 (allowing verdicts to be rendered in misdemeanor cases when only nine out of the twelve jurors agree).

It should be noted that England also abandoned the unanimity requirement in 1967. Section 17 of the Juries Act of 1974 reads in pertinent part as follows:

(1) Subject to subsections (3) and (4) below, the verdict of a jury in proceedings in the Crown Court or the High Court need not be unanimous if:

(a) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and

(b) in a case where there are ten jurors, nine of them agree on the verdict.

....

(3) The Crown Court shall not accept a verdict of guilty . . . unless the foreman of the jury has stated
A. The Supreme Court Decisions

Prior to 1972, the United States Supreme Court consistently held that the Sixth Amendment to the U.S. Constitution, when applicable, demanded that criminal trials be decided by a unanimous jury. However, the Court in 1912 hinted that states might be able to experiment and permit less than unanimous jury verdicts in criminal proceedings.

In 1968, the Court decided the landmark case of Duncan v. Louisiana. A majority of the Court found that the Sixth Amendment right to a jury trial in criminal cases was "fundamental to the American scheme of justice." Therefore, the Court concluded that a jury trial was required in a state criminal proceeding under the Fourteenth Amendment, where the offense before the state court was one which would have warranted a jury trial if it had been brought before a Federal court. However, the Court left open the question as to whether all the previously interpreted in open court the number of jurors who respectively agreed to and dissented from the verdict.

(4) No court shall accept a verdict . . . unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case; and the Crown Court shall in any event not accept such a verdict unless it appears to the court that the jury have had at least two hours for deliberation.

CDAA REPORT, supra note 2, at app. F.

The English eliminated the unanimity requirement because of rising concern that organized crime figures were bribing or intimidating ("nobbling") jurors. Alec Samuels, Criminal Justice Act, 31 MODERN L. REV. 16, 24 (1968). But see id. at 25 (arguing that since there were so few incidents of juror intimidation, there was no compelling need to abandon the tradition of unanimous verdicts). Supporters of allowing less than unanimous verdicts note that this change is beneficial since it makes it more likely that a verdict will be rendered. MOORE, supra note 29, at 132.

Other countries permitting less than unanimous verdicts include: Scotland, Australia, and Norway. Osher, supra note 15, at 1340. In Brazil, federal juries do not deliberate, but rather, simply vote by secret ballot at the conclusion of the trial with a majority verdict accepted. ABRAMSON, supra note 30, at 205.

42. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crimes shall have been committed . . .").

43. See, e.g., Andres v. United States, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply . . ."); Patton v. United States, 281 U.S. 276, 288 (1930) (concluding that the language of the Sixth Amendment should be interpreted according to common law principles which included a jury of twelve and a unanimous verdict); Maxwell v. Dow, 176 U.S. 581, 586 (1900) ("[I]f the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury trial is held . . ."); Thompson v. Utah, 170 U.S. 343, 351 (1898) (stating that the defendant of a crime committed in Utah while it was still a federal territory possessed the "constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons"); accord American Publishing Co. v. Fisher, 166 U.S. 464, 468 (1897) (concluding that a unanimous verdict was required in a civil trial in federal court under the Seventh Amendment because "unanimity was one of the peculiar and essential features of trial by jury at common law. No authorities are needed to sustain this proposition").

44. Jordan v. Massachusetts, 225 U.S. 167, 176 (1912) ("In criminal cases due process of law is not denied by a state law which dispenses with . . . the necessity of a jury of twelve, or unanimity in the verdict").


46. Duncan, 391 U.S. at 149.

47. Id.
requirements of the Sixth Amendment, including the unanimity requirement, would be imposed on state criminal proceedings.\textsuperscript{48}

In 1972, the Supreme Court upheld the constitutionality of the Oregon and Louisiana constitutions that permitted less than unanimous jury verdicts.\textsuperscript{49} Seven years later however, the Court concluded that unanimity was required for six-member juries in the case of \textit{Burch v. Louisiana}\.\textsuperscript{50}

\textbf{1. Johnson v. Louisiana}

Frank Johnson was arrested on January 20, 1968, after his photo was picked out by the victim of an armed robbery.\textsuperscript{51} While in a line-up at the police station, Johnson was identified as the culprit by the victim of yet another robbery.\textsuperscript{52} In the trial for this second offense, Johnson was convicted although the jury deadlocked 9-3 in favor of guilt.\textsuperscript{53} Johnson challenged his conviction arguing that he had been denied due process by being convicted by a less than unanimous verdict.\textsuperscript{54} Johnson also contended that the Louisiana statute regarding nonunanimous jury verdicts violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{55} The Court, by a narrow majority of 5-4,\textsuperscript{56} rejected both of Johnson's contentions.\textsuperscript{57}

In an opinion authored by Justice White, a plurality recognized that the Court had never held that jury unanimity was "a requisite of due process of law" and had previously ruled that due process is not denied by a state law that permits less than...
unanimous verdicts in criminal proceedings.\textsuperscript{58} Justice White broke Johnson's due process challenge into two parts.\textsuperscript{59}

First, the plurality rejected Johnson's argument that the vote of nine jurors was insufficient to find guilt beyond a reasonable doubt because three jurors made a contrary finding.\textsuperscript{60} The plurality further concluded that it was unbelievable that the nine jurors in favor of conviction would refuse to perform their deliberation duties by not listening to arguments put forth by the three jurors who were in favor of acquittal.\textsuperscript{61} The plurality reasoned that a jury would cease deliberation "only after reasoned discussion ha[d] ceased to have persuasive effect" on those jurors in the minority.\textsuperscript{62} Therefore, the plurality concluded the state had not failed to satisfy the burden of proving guilt beyond a reasonable doubt despite the presence of the three dissenting jurors on the panel.\textsuperscript{63}

Second, the plurality considered whether the vote of three jurors in favor of acquittal could impeach the finding of guilt beyond a reasonable doubt by the other nine jurors.\textsuperscript{64} The plurality rejected this argument also, concluding that three dissenting jurors did not raise a reasonable doubt as to the defendant's guilt "when such a heavy majority of the jury . . . remain[ed] convinced of guilt."\textsuperscript{65} The plurality refused to equate the disagreement of rational persons with the failure of the prosecution to prove guilt beyond a reasonable doubt.\textsuperscript{66}

The plurality then considered Johnson's claim that the Louisiana law governing jury verdicts was violative of the Equal Protection Clause.\textsuperscript{67} Johnson argued that permitting less than unanimous jury verdicts in cases such as his disadvantaged him as compared to those charged with capital offenses which required unanimous jury

\textsuperscript{58} Id.; see supra note 44 (setting forth the relevant language in the case of \textit{Jordan v. Massachusetts}, 225 U.S. 167, 176 (1912)).
\textsuperscript{59} Johnson, 406 U.S. at 360.
\textsuperscript{60} Id. at 361; see In re Winship, 397 U.S. 358, 363-64 (1970) (holding that the Fourteenth Amendment required the prosecution to prove its case against a criminal defendant beyond a reasonable doubt).
\textsuperscript{61} Johnson, 406 U.S. at 361.
\textsuperscript{62} Id. at 361-62. Here, the Court was referring to the Allen or "dynamite" charge, which imposes on a dissenting juror or jurors the duty to "consider whether his doubt was a reasonable one . . . [when it made] no impression upon the minds of so many men, equally honest, equally intelligent with himself." Id. (quoting Allen v. United States, 164 U.S. 492, 501 (1896)).

Some legal experts oppose the Allen charge and fear that it encourages holdout jurors to compromise their viewpoints in order to avoid a deadlock. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 454 (1966). These experts warn that by giving the instruction, a trial judge may give the impression that he or she agrees with the majority of the jury and that the holdout jurors should capitulate. Id.

Several federal circuits have sought to allay these concerns. David M. Stanton, Note, United States v. Arpan: \textit{How Does the Dynamite Charge Affect Jury Determinations?}, 35 S.D. L. REV. 461, 467 (1990). When giving jurors the Allen charge, judges in these circuits also instruct jurors that they "should not surrender their convictions for the purpose of reaching a verdict." Id.
\textsuperscript{63} Johnson, 406 U.S. at 362.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 363; see supra note 53 (setting forth the provisions of the Louisiana Constitution at that time governing jury verdicts in the various types of criminal proceedings).
verdicts. The plurality rejected this contention, finding that the Louisiana statute served a rational basis since it had been enacted to "facilitate, expedite, and reduce expense in the administration of criminal justice."69

Justice Stewart dissented70 and concluded the Sixth Amendment was not needed to decide whether jury verdicts had to be unanimous, but rather, such a rule was required by the Fourteenth Amendment.71 Recognizing the Court's precedent in establishing the rule against systematic discrimination during jury selection,72 Justice Stewart concluded that the unanimity requirement helped "to ensure universal participation of the citizenry in the administration of criminal justice."73 Justice Stewart reasoned that a jury, representing a cross-section of the community and voting in unanimity, would help maintain the community's confidence in the criminal system, since it would lessen the opportunity for "a defendant who is conspicuously identified with a particular group [to] be acquitted or convicted by a jury split along group lines."74 He also disagreed with the plurality's reasoning that majority jurors would consider the views of minority members once a necessary majority had been achieved.75 Questioning the plurality's reliance on the reasonableness of jurors, Justice Stewart recognized that it was necessary to have rules, such as those regarding change of venue,76 to protect against juror biases.77

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68. Johnson, 406 U.S. at 364.
69. Id. at 363-64 (quoting State v. Louisiana, 56 So. 893, 894 (La. 1911)).
70. Justice Blackmun concurred to emphasize that, although he did not find less than unanimous jury verdicts to be constitutionally infirm, he disfavored such a rule as a matter of policy. Johnson, 406 U.S. at 366 (Blackmun, J., concurring). In addition, Justice Blackmun declared that a rule allowing for a majority verdict of less than three-fourths of the jury, such as a rule permitting 7-5 verdicts, would cause him great difficulty. Id. at 366. But see id. at 397 n. (Stewart, J., dissenting) (stating that "notwithstanding MR. JUSTICE BLACKMUN's disclaimer, there is nothing in the reasoning of the Court's opinion that would stop it from approving verdicts by 8-4 or even 7-5").
71. See Johnson, 406 U.S. at 397 (Stewart, J., dissenting) (reporting that Justices Brennan and Marshall joined in Justice Stewart's opinion).
72. Id. at 397 [Stewart, J., dissenting].
73. Id. at 364 (Blackmun, J., concurring). In addition, Justice Blackmun declared that a rule allowing for a majority verdict of less than three-fourths of the jury, such as a rule permitting 7-5 verdicts, would cause him great difficulty. Id. at 366. But see id. at 397 n. (Stewart, J., dissenting) (stating that "notwithstanding MR. JUSTICE BLACKMUN's disclaimer, there is nothing in the reasoning of the Court's opinion that would stop it from approving verdicts by 8-4 or even 7-5").
74. See Johnson, 406 U.S. at 397 (Stewart, J., dissenting) (reporting that Justices Brennan and Marshall joined in Justice Stewart's opinion).
75. Id. at 397 (Stewart, J., dissenting).
76. See Carter v. Texas, 177 U.S. 442, 447 (1900) ("Whenever by any action of a state . . . all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment"); Stradler v. West Virginia, 100 U.S. 303, 308-10 (1879) (holding that a West Virginia statute barring Blacks from jury service violated the Equal Protection Clause of the Fourteenth Amendment); see also Hernandez v. Texas, 347 U.S. 475, 480-82 (1954) (reversing Hernandez's murder conviction because no Mexican-Americans had served on a jury in Jackson County, Texas, during the preceding 25 years despite the fact that Mexican-Americans made up 14% of the county's population); Patton v. Mississippi, 332 U.S. 463, 468-69 (1947) (striking down Patton's conviction for murder since no Black person had served on a jury in Lauderdale County, Mississippi, during the preceding 30 years although there were at least 25 (and possibly several hundred) Black citizens who were qualified for jury service). See generally Hiroshi Fukurai et al., Race and the Jury 81-116 (1993) (detailing the development of the doctrine of cross-sectional representation by the Supreme Court).
77. Johnson, 406 U.S. at 397 (Stewart, J., dissenting).
78. Id. at 398 (Stewart, J., dissenting).
Focusing on the environment in which jurors deliberate, Justice Brennan concluded that unanimity should be required to ensure that all viewpoints are considered. According to Justice Brennan, jurors entering the jury room possess “strong opinions” as to what the outcome of the case should be and have little incentive under a nonunanimous verdict rule to consider opposing viewpoints once an acceptable majority is attained. Justice Brennan reasoned that the right to a jury drawn from a cross-section of one’s community, and the right of all groups to participate in the system of criminal justice, would be destroyed if the viewpoints of jurors in the minority could be so easily ignored.

Justice Marshall concluded that the presence of holdout jurors was clear evidence that the prosecution had failed to prove guilt beyond a reasonable doubt. Justice Marshall reasoned that a nonunanimous jury verdict demanded a retrial of the defendant in which the prosecution would have the opportunity to present a stronger case and remove the appearance of a reasonable doubt with a unanimous verdict.

2. Apodaca v. Oregon

In 1969, separate nonunanimous juries convicted Robert Apodaca, Henry Morgan Cooper, Jr., and James Arnold Madden of assault with a deadly weapon, burglary in a dwelling, and grand larceny, respectively. The three challenged their convictions arguing that jury unanimity was required by the Sixth Amendment and that this requirement had been imposed on the states by the Fourteenth Amendment.

In an opinion written once again by Justice White, the Court upheld the consti-
tutionality of the Oregon Constitution, which permitted less than unanimous jury verdicts in criminal trials.86

After an extensive review of the history of the unanimity requirement, Justice White inquired as to the function of the jury in American society.87 While recognizing that the purpose of the jury was to prevent governmental oppression "by providing a safeguard against the corrupt or overzealous prosecutor,"88 the plurality concluded that the requirement of jury unanimity did not "materially contribute" to the attainment of this goal.89 The plurality reasoned that a "commonsense judgment" would be arrived at by the jury, and this was sufficient to protect the interests of the defendant, regardless of whether the verdict was unanimous.90

The petitioners also argued that permitting less than unanimous jury verdicts violated their right under the Fourteenth Amendment to be tried by a jury representing a cross-section of the community since nonunanimous verdicts would allow for convictions "to occur without the acquiescence of minority elements within the community."91 First, the plurality ruled that, although every group had a right to participate in the legal process and could not be systematically excluded, "every distinct voice in the community [does not have] a right to be represented on every jury [or] a right to prevent conviction of a defendant in any case."92 Second, Justice White considered the proposition that majority members of the jury would ignore the viewpoints of minority members in reaching a less than unanimous verdict, solely on the basis of prejudice, to be untenable.93

Although Justice Powell agreed with the plurality that states could permit less than unanimous verdicts in criminal proceedings, his reasons were different from the plurality's.94 While recognizing that the Sixth Amendment required unanimous verdicts, Justice Powell believed that not all of the elements of the Sixth Amendment right to a jury trial were to be incorporated into the Due Process Clause of the Fourteenth Amendment.95 Justice Powell further reasoned that states were entitled

86. Id.; see supra note 38 (setting forth the provisions of the Oregon Constitution).
88. See id. (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).
89. Apodaca, 406 U.S. at 410.
90. Id. at 410-11. The trio also argued here that jury unanimity was required by the Sixth Amendment to give effect to the beyond a reasonable doubt standard. Id. at 411-12. However, the Court, relying on its reasoning in Johnson, quickly rejected this argument. Id. at 412; see supra notes 60-66 and accompanying text (discussing how the defendant in Johnson raised the claim that nonunanimous verdicts showed the failure of the prosecution to prove guilt beyond a reasonable doubt and how the Court dismissed this contention).
91. Apodaca, 406 U.S. at 412-13; see supra note 72 (describing the development of the cross-sectional representation requirement by the Supreme Court).
92. Apodaca, 406 U.S. at 413.
93. Id. at 413-14.
95. Id. at 369-73 (Powell, J., concurring).
to experiment with "valuable innovations with respect to determining—fairly and
more expeditiously—the guilt or innocence of the accused."96

Justice Powell also rejected the contention that nonunanimous jury verdicts
deprieved the defendants of their right to be judged by a cross-section of their com-
munity.97 He concluded that by permitting less than unanimous verdicts, Oregon was
not encouraging those jurors in a majority to abandon their duty to engage in
reasonable deliberation and ignore the viewpoints of those jurors in the minority.98

Justice Douglas, however, found that permitting nonunanimous verdicts was a
"radical departure from American Traditions";99 believing it was contradictory to
hold that federal trials required jury unanimity while state criminal proceedings did
not, since both decisions stemmed from the Sixth Amendment.100 In addition, Justice
Douglas believed that civil rights, including those conferred by the Sixth Amend-
ment, were of great benefit to the "lower castes of society" and that states should not
have "the power to experiment in diluting [these] rights."101

Justice Douglas was also concerned that nonunanimous jury verdicts would
diminish jury reliability.102 Verdict reliability would be lessened because thorough
deliberation would cease once a majority had been achieved and only "polite and
academic conversation" would then ensue.103 Justice Douglas also believed that a
nonunanimous jury revealed the existence of reasonable doubt concerning the
defendant's guilt.104 He set forth a hypothetical jury which was evenly deadlocked
at the onset of deliberations, and then after much discussion shifted to 9-3 in favor
of guilt.105 Justice Douglas reasoned that the three jurors who still would not vote to
convict represented a reasonable doubt that would be ignored nevertheless under a
nonunanimous verdict rule.106 He concluded that upholding the validity of nonunani-
mous jury verdicts was not in the American tradition of justice, but rather, "more in
the tradition of the inquisition."107

96. Id. at 376 (Powell, J., concurring).

Justice Powell found it significant that the people of Oregon had voted to amend the state constitution to
permit majority verdicts, that England had also abandoned the unanimity requirement, and that this change had
received the support of the American Law Institute and the American Bar Association's Criminal Justice Project.
Id. at 376-77 (Powell, J., concurring).

97. Id. at 378-80 (Powell, J., concurring).

98. Id. at 379 (Powell, J., concurring).


100. Id. at 383 (Douglas, J., dissenting).

101. Id. at 387 (Douglas, J., dissenting).

102. Id. at 388 (Douglas, J., dissenting).

103. Id. at 388-89 (Douglas, J., dissenting); see id. at 389 (Douglas, J., dissenting) (emphasizing that
Apodaca's conviction was handed down after only 41 minutes of deliberation and despite the fact that two jurors
voted not to convict).

104. Id. at 390-94 (Douglas, J., dissenting).

105. Id. at 392 (Douglas, J., dissenting).

106. Id.

107. Id. at 394 (Douglas, J., dissenting).

Justice Stewart also submitted a short dissent to the Apodaca decision in which he concluded that since the
Duncan decision had found the Fourteenth Amendment to require states to abide by the Sixth Amendment right
to a jury trial, the Court was in effect overruling that decision by not requiring states to observe the Sixth
3. Burch v. Louisiana

Daniel Burch was convicted of exhibiting two obscene motion pictures and sentenced to seven months in prison and fined $1000. After the verdict had been read, the judge polled the jury and discovered that the jury had split 5-1 in rendering its verdict against Burch. Appealing his conviction, Burch argued that permitting a six-member jury to render a nonunanimous verdict violated his right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments. The Supreme Court of Louisiana affirmed Burch's conviction and reasoned that since a verdict could be rendered by three-fourths (75%) of the jury, a verdict by five-sixths (83%) of the jury must be permissible.

However, the United States Supreme Court was unanimous in finding that Burch's right to a trial by jury had been violated by his conviction by a non-unanimous six-member jury. The Court began by reviewing its precedent regarding jury size and unanimity. The Court first recognized its decision in Williams v. Florida, in which it held that the Constitution did not prohibit states from providing for less than twelve-member juries in criminal trials. Williams reasoned that the twelve-member jury was a "historical accident" and that the framers of the Constitution did not expect this tradition to continue. Mindful of the jury's role as protector, Williams further concluded that six-member juries were adequate since they were of "sufficient size to promote group deliberation, free from outside intimidation, and they provide a fair possibility that a cross section of the community would be represented."
The Court then reviewed the decisions in *Apodaca v. Oregon*[^120] and *Johnson v. Louisiana*,[^121] in which it had held that less than unanimous jury verdicts did not violate the Sixth or Fourteenth Amendments.[^122] The Court completed its review by addressing the decision in *Ballew v. Georgia*,[^123] which held that a five-member jury did not pass constitutional muster[^124]. In *Ballew*, the majority recognized that there was no clear difference between five- and six-member juries[^125]. However, the *Ballew* Court concluded that reducing a jury to five members raised sufficient doubt as “to the fairness of the proceeding and proper functioning of the jury to warrant drawing the line at six.”[^126]

The *Burch* Court then employed reasoning similar to that employed in *Ballew* to strike down the Louisiana statute permitting a verdict to be rendered by five-sixths of a six-member jury.[^127] The Court once again recognized there was no bright line between what was acceptable and what would be unconstitutional, but nevertheless, concluded that such a line had to be drawn since permitting five members to render a verdict would threaten the jury’s proper role and the fairness of the proceedings.[^128]

In addition, the Court rejected Louisiana’s contention that the need for cost-savings should justify nonunanimous verdicts in six-member juries.[^129] The Court decided that any savings claimed by the state were speculative at best and reasoned that the reduction in jury size posed a sufficient threat to “constitutional principles” that outweighed the cost-savings interest put forth by the state.[^130]

The United States Supreme Court has held that, although unanimous jury verdicts are required in federal criminal trials, states are free to allow for nonunanimous verdicts. However, states may permit nonunanimous verdicts only in cases when there are more than six members on the jury. Unlike Oregon and Louisiana, California has refused to permit nonunanimous verdicts in criminal trials.

### III. The Unanimity Requirement in California

California courts have interpreted the state’s constitution to require unanimous verdicts in criminal proceedings.[^131] The California Legislature, however, recently

[^120]: 406 U.S. 404 (1972); see discussion supra Part II.A.2. (discussing the *Apodaca* case).
[^121]: 406 U.S. 356 (1972); see discussion supra Part II.A.1. (explaining the Court’s decision in *Johnson*).
[^122]: *Burch*, 441 U.S. at 136.
[^124]: *Burch*, 441 U.S. at 136.
[^125]: Id. at 137.
[^126]: Id.
[^127]: Id. at 137-38.
[^128]: Id.; see id. at 138 n.11 (declaring that the Court was not deciding whether nonunanimous verdicts rendered by juries comprised of seven to eleven jurors is unconstitutional).
[^129]: Id. at 138-39.
[^130]: Id. at 139.
[^131]: See discussion infra Part III.A. (relating how California courts have held that the state constitution requires jury unanimity); see also supra note 16 (setting forth the provision of the California Constitution dealing with criminal jury verdicts).
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attempted to amend the state's constitution to permit less than unanimous jury verdicts. Additionally, the Public Safety Protection Act of 1996 sought to change the state's constitution at the ballot box to permit less than unanimous verdicts in criminal trials.

A. The Unanimity Requirement and California Courts

Whether to permit nonunanimous verdicts was one of the most vigorously debated issues of the 1878 California Constitutional Convention. Proposals to allow for less than unanimous verdicts for less serious criminal offenses were heavily criticized. Even the constitutional provision permitting civil trials to be decided by three-fourths of the jury was strenuously opposed by the constitutional delegates.

With regard to allowing less than unanimous verdicts in misdemeanor cases, proponents of the unanimity requirement argued that drawing a line between felonies and misdemeanors was “making a distinction that is beneath the dignity of a Constitution.” Others opposed accepting a majority verdict for misdemeanor cases, arguing that “liberty appears as sweet to a man who has committed a misdemeanor as it is to a man who commits a higher offense.”

In 1929, a California court ruled for the first time on whether a defendant had the right to a unanimous verdict in People v. Garcia. Reviewing whether a defendant charged with grand theft and a violation of the Motor Vehicle

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132. See discussion infra Part III.B. (analyzing the legislative attempts to amend the state constitution).
133. See discussion infra Part III.C. (discussing the attempt by California voters to amend the state constitution).
134. Mitchell v. Superior Ct. (San Francisco), 43 Cal. 3d 107, 119, 729 P.2d 212, 219, 232 Cal. Rptr. 900, 907 (1987) [hereinafter Mitchell I]. Please note that the California Supreme Court vacated this decision and, after rehearing the case, issued a new ruling, which can be found at 49 Cal. 3d 1230, 783 P.2d 731, 265 Cal. Rptr. 144 (1989). However, this second opinion provides only a cursory glance at the history of the unanimity requirement in California, so the first opinion is used for its historical perspective.
135. Mitchell I, 43 Cal. 3d at 107 n.13, 729 P.2d at 219 n.13, 232 Cal. Rptr. at 908 n.13. A delegate by the name of Barnes argued:

It is the unanimous conclusion of twelve good citizens that brands a man as a criminal. But why has not the man who is liable to be fined five hundred dollars . . . the same right to a trial by jury as the man who is to be sent to San Quentin.

Id. (quoting 1 DEBATES 295).
136. Id. (quoting a Mr. McCallum from 3 DEBATES 1175).
137. Id. (quoting a Mr. Howard from 1 DEBATES 296). A delegate by the name of Herrington employed a similar line of reasoning:

I submit that the rule that there shall be a unanimous verdict in all criminal cases should not be departed from . . . In criminal cases, a man's liberty is just as dear to him when considered in connection with the County Jail as with reference to the State Prison.

Id. (quoting 3 DEBATES 1174).
138. Id. (quoting a Mr. Howard from 1 DEBATES 702, 277 P. 747 (1929).
Act had waived his right to a jury trial, the court stated in dicta that there is an "inviolable constitutional right to a trial by twelve of his peers, whose verdict upon conviction must be unanimous, [and] is secured to every person charged with a felony."141

Six years later, in People v. Bruneman,142 another court considered whether a criminal defendant had the right to a unanimous verdict. Again in dicta, the court concluded that "[w]ithout doubt, one of the essentials of a jury at common law is that it be composed of twelve persons, and that twelve persons, not more nor fewer, shall pass upon and determine the issues of fact."143

The California Supreme Court finally addressed the issue in 1967, and declared that the state constitution "guarantees the fundamental right to a unanimous jury verdict."144 In that case, Antonia Llabora Thomas was on trial for the murder of her seven-day old son.145 After a day of deliberation, the jury reportedly returned to the court with a guilty verdict of murder in the first degree.146 However, in polling the jury, the judge discovered that there was uncertainty concerning whether one of the jurors agreed with the verdict.147 Uncertain as to whether the juror believed that the

142. 4 Cal. App. 2d 75, 40 P.2d 891 (1935).
143. Bruneman, 4 Cal. App. 2d at 79, 40 P.2d at 893 (quoting Jennings v. State, 114 N.W. 492 (Wis. 1908)).
144. People v. Superior Ct. (Thomas), 67 Cal. 2d 929, 322, 434 P.2d 623, 625, 64 Cal. Rptr. 327, 329 (1967); accord People v. Jones, 51 Cal. 3d 294, 321, 792 P.2d 643, 658, 270 Cal. Rptr. 611, 626 (1990) ("[W]e acknowledge that the requirement of unanimity in criminal cases is of constitutional origin."); People v. Wheeler, 22 Cal. 3d 258, 265, 583 P.2d 748, 753, 148 Cal. Rptr. 890, 895 (1978) (declaring that "[i]t is settled that in criminal cases . . . [there is] in this state the right to a unanimous verdict"); People v. Collins, 17 Cal. 3d 687, 693, 552 P.2d 742, 745, 131 Cal. Rptr. 782, 785 (1976) ("Among the essential elements of the right to trial by jury are the requirements that a jury in a felony prosecution consist of 12 persons and that its verdict be unanimous.").
145. Thomas, 67 Cal. 2d at 930, 434 P.2d at 624, 64 Cal. Rptr. at 328.
146. Id. at 930, 434 P.2d at 624, 64 Cal. Rptr. at 328.
147. During the polling of the jury, the following exchange took place after the first four jurors had agreed that the verdict was theirs:

The Clerk: Joseph Schissler, is this your verdict?
Mr. Schissler: I—I don't know how to tell you this. Should I tell you or—.
The Court: Is that your verdict?
Mr. Schissler: I didn't vote on it, your Honor.
The court then polled the remaining jurors, and all agreed that the verdict was theirs. The court once again questioned Mr. Schissler:

The Court: Mr. Schissler, did you vote for this verdict?
Mr. Schissler: I went with the majority, sir.
[Defense Counsel]: Well then, the verdict doesn't reflect his individual opinion.
Mr. Schissler: That was the way I— I went along with the majority. I said I would go with the majority but I didn't write that on the paper. That's why I made that statement.
The Court: Mr. Schissler, does this verdict express your individual opinion?
Mr. Schissler: I still go with the jury, sir.
The Court: Does this verdict express your individual opinion?
Mr. Schissler: It does, sir. It does, sir.
The Court: What is your individual opinion?
Mr. Schissler: I went along with the majority of the jury and—.
The Court: The court declares a mistrial in this case.
Id. at 930-31, 434 P.2d at 624, 64 Cal. Rptr. at 328.
defendant was guilty, the judge declared a mistrial. The prosecution appealed the ruling of the mistrial, arguing that the verdict had been unanimous.

The California Supreme Court found that the trial court had acted within its discretion by declaring a mistrial since the determination whether a juror has freely assented to the verdict presents a question of fact for the trial judge. The court recognized that the California Constitution grants criminal defendants the fundamental right to a unanimous jury verdict and reasoned that the unanimity requirement mandated that each juror vote for the verdict. Further, a defendant’s right to a unanimous verdict would be meaningless if a juror did not employ his or her individual judgment and acquiesced in the verdict simply because it had been reached by a majority of the jury. The court concluded that the trial court had acted appropriately in declaring a mistrial because of the uncertainty created by the juror's comments.

In 1991, the California Supreme Court addressed another aspect of jury unanimity in People v. Mickle. Mickle had been arrested for the 1983 murder of a twelve-year-old girl. The jury sentenced Mickle to death because the murder had occurred while he was engaged in the commission of a lewd and lascivious act upon a minor. In filling out the jury verdict form, the jury explained that it believed the special circumstance (the commission of the lewd and lascivious act upon a minor) was “witnessed by the victim's nudity and obvious use of force.” Mickle contended that the jury had to agree unanimously as to the nature of the act. Mickle argued that his right to a unanimous jury verdict had been denied since the jury had been ambiguous in defining the lewd act—whether it was the victim’s nudity or the defendant’s use of force. In dismissing Mickle’s contention, the California Supreme Court found that although California’s Constitution required unanimous jury verdicts, this requirement did not extend “to the minute details of how a single, agreed-upon act was committed.” Since California courts have

148. *Id.* at 931, 434 P.2d at 624, 64 Cal. Rptr. at 328.
149. *Id.* at 931, 434 P.2d at 625, 64 Cal. Rptr. at 329.
150. *Id.* at 932, 434 P.2d at 625, 64 Cal. Rptr. at 329.
151. *See* Osher, *supra* note 15, at 1334-35 (describing how the California Constitution has been interpreted to require the “preservation of the essential elements of a jury trial” as developed from English common law tradition).
152. Thomas, 67 Cal. 2d at 932, 434 P.2d at 625, 64 Cal. Rptr. at 329.
153. *Id.*
154. *Id.* at 932-33, 434 P.2d at 625-26, 64 Cal. Rptr. at 329-30.
156. Mickle, 54 Cal. 3d at 158, 814 P.2d at 298, 284 Cal. Rptr. at 518.
157. *Id.* at 155, 814 P.2d at 295, 284 Cal. Rptr. at 516.
158. *Id.* at 177, 814 P.2d at 309-10, 284 Cal. Rptr. at 530-31.
159. *Id.* at 178, 814 P.2d at 310, 284 Cal. Rptr. at 531.
160. *Id.*
161. *Id.; see* People v. Crow, 28 Cal. App. 4th 440, 445-46, 33 Cal. Rptr. 2d 624, 626 (1994) (holding that the defendant was not deprived of his right to a unanimous jury when he was convicted on three counts of child molestation out of eight counts charged even though it was uncertain as to which counts the jury had agreed had been committed by the defendant since there was substantial evidence to support the convictions); People v. Davis,
interpreted the state constitution to require jury unanimity in rendering a verdict, any change in the unanimity requirement must come by an amendment of the state’s constitution.\footnote{Boyarsky, supra note 13, at A18.}

**B. The Unanimity Requirement and the California Legislature**

In 1995, two California legislators proposed amendments to the state’s Constitution to permit less than unanimous verdicts in criminal proceedings.\footnote{Ken Leiser, Jury-Reform Legislation Looks Shaky, SAN DIEGO UNION-TRIB., June 28, 1995, at A3; see Osher, supra note 15, at 1324 n.23, 1336-38 (noting that former Los Angeles County District Attorney, Robert Philibosian, unsuccessfully attempted to get a bill eliminating the jury unanimity requirement through the California legislature in 1984).} The proposals by Assemblymember Richard Rainey and Senator Charles Calderon enjoyed mixed, but eventually unsuccessful results.\footnote{Harriet Chiang, Assembly Panel Stalls Plan to End Unanimous Verdicts, S.F. CHRON., May 10, 1995, at A22 (Rainey); Leiser, supra note 163, at A3 (Calderon).}

Senator Calderon introduced Senate Constitutional Amendment Number 24 [hereinafter “SCA No. 24”] in May 1995.\footnote{SCA No. 24 would have amended Article I, section 16 of the California Constitution to read in pertinent part as follows: Eleven-twelfths of the jury may render a verdict in any criminal action except the following: (1) An action in which the death penalty is sought. (2) An action in which the defendant may be sentenced to confinement in the state prison for a term of life without the possibility of parole.} Senator Calderon decided that it was time to abolish the unanimity requirement because of “bizarre juror behavior” such as that which resulted in the acquittal of the four Los Angeles police officers charged...
with beating Rodney King despite video evidence of the beating. Senator Calderon believed that a majority-verdict rule was necessary to "revive the public's trust in the criminal justice system." However, SCA No. 24 did not have much success, failing to clear the Senate's Committee on Criminal Procedure.

Assemblymember Rainey introduced his proposal, Assembly Constitutional Amendment Number 18 [hereinafter "ACA No. 18"], in February, 1995. ACA No. 18 was intended to amend Article I, section 16 of the California Constitution to permit a conviction or acquittal in a noncapital criminal trial when five-sixths of the jury agreed upon a verdict.

Although receiving the support of California Governor Pete Wilson and the California District Attorneys Association, Rainey's proposal failed to make its way out of the Assembly's Public Safety Committee during 1995. However, thanks to a change in the political control of the Assembly, ACA No. 18 was approved by that

166. Tom Dresslar, Nonunanimous Verdict Bill Nears Defeat, L.A. DAILY J., June 28, 1995, at 3; see Richard A. Serrano & Tracy Wilkinson, All 4 in King Beating Acquitted, Violence Follows Verdicts, L.A. TIMES, Apr. 30, 1992, at A1 (detailing the verdicts of not guilty in the Superior Court criminal trial of the four officers accused of beating Rodney King and the violence which erupted shortly thereafter); see also John L. Mitchell, Punitive Damages from Police in King Beating Rejected, L.A. TIMES, June 2, 1994, at A1 (reporting how a jury in a civil action awarded Rodney King $3.8 million in damages but refused to impose punitive damages on the officers responsible for the beating); Jim Newton, 2 Officers Guilty, 2 Acquitted, L.A. TIMES, Apr. 18, 1993, at A1 (discussing how officers Stacey C. Koon and Laurence M. Powell were found guilty by a federal jury of violating Rodney King's civil rights while officers Theodore J. Briseno and Timothy E. Wind were acquitted of the same charges).

Note that had a rule permitting 11-1 jury verdicts been in effect for the original Rodney King trial, the outcome would not have been affected as the jury was unanimous in its acquittal of the four officers. Serrano & Wilkinson, supra.

167. Dresslar, supra note 166, at 3; see Leiser, supra note 163, at A3 (providing an additional quote from Senator Calderon that "[i]n a society where majority is the rule, the will of one should not prevail over the will of 11"). But see Leiser, supra, at A3 (reporting that Senator Quentin Kopp disagreed with Senator Calderon that hung juries were the reason people were losing faith in the criminal system, arguing that "people are losing faith in the justice system [because of] the conduct of the lawyers—and the media").

168. Dresslar, supra note 166, at 3; see Leiser, supra note 163, at A3 (observing that Senator Calderon's proposal also had very little support from the law enforcement community).

169. See Bond, supra note 7, at B3 (comparing Assemblymember Rainey as saying the amendment was necessary because it was being found that "when there are one or two people resisting the majority, they typically are doing it for their own reasons and own prejudices").

170. ACA No. 18 would have amended Article I, section 16 of the California Constitution to read in pertinent part as follows:

In a criminal action in which either a felony or a misdemeanor is charged, five-sixths of the jury may render a verdict. However, in a criminal action in which the death penalty is sought, only an unanimous jury may render a verdict.

Although the text of Rainey's proposal permits verdicts when only five-sixths of the jury agree, in light of the United States Supreme Court's decision in Burch v. Louisiana, this amendment could only allow for 10-2 verdicts, not 5-1 verdicts. See discussion supra Part II.A.3. (examining the Burch decision).

171. Dresslar, supra note 166, at 3; see Ken Chavez, Wilson for Letting Jury Convict on 10-2 Vote, SACRAMENTO BEE, July 18, 1995, at A3 (suspecting that Rainey's proposal had failed to pass the Assembly's Public Safety Committee because the Committee was controlled by Democrats); Mark Curriden, Jury Reform, A.B.A. J., Nov. 1995, at 72, 76 (quoting from a speech given by Governor Wilson to the National District Attorneys Association: "It has become apparent that to put 12 strangers behind closed doors, to expect that one of them will not act unreasonably, is itself no longer a reasonable assumption."); see also Carl Ingram, Bill on Jury Anonymity Touches Off Legal Debate, L.A. TIMES, Jan. 14, 1996, at A3 (noting that ACA No. 18 was also supported by prosecutors and peace officers).

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committee on January 9, 1996.172 Although Rainey predicted that he would have enough support from both parties to get the amendment out of the Assembly, his bill was rejected by the Assembly Judiciary Committee on May 15, 1996.173

C. The Public Safety Protection Act of 1996

While the legislative push to amend the state’s constitution to permit less than unanimous jury verdicts in criminal trials had apparently stalled, the idea remained popular in California.174 Declaring that the judicial system was “badly broken” after witnessing the defendant suspected of murdering his son go free, Fred Goldman proposed the Public Safety Protection Act of 1996.175 The Public Safety Protection Act would have amended Article I, section 16 of the California Constitution to read that “[i]n a criminal action in which either a felony or a misdemeanor is charged, five-sixths of the jury may render a verdict. However, in a criminal action in which the death penalty is sought, only a unanimous jury may render a verdict.”176 Goldman’s initiative received strong support from the law enforcement community.177 Los Angeles District Attorney Gil Garcetti backed the initiative, declaring that it would save taxpayers millions of dollars in retrial costs, spare victims and their families the grief which accompanies attending trials, and restore the public’s confidence in the criminal system which had been “tarnished by the O.J. Simpson trial.”178

172. Mike Lewis, Non-Unanimous Jury Amendment Receives Committee Approval, DAILY RECORDER, Jan. 12, 1996, at 1; see id. (reporting that ACA No. 18 was approved by the Committee with a vote of 5-3).

173. Dan Bernstein, Lawmakers Reject Jury Verdict Measure, SACRAMENTO BEE, May 16, 1996, at A3; see id. (reporting that the bill died by a vote of 4-6, with eight votes necessary to pass the measure out of the committee).

174. See Lewis, supra note 172, at 1 (reporting that 71% of California voters when polled declared that they were in favor of permitting less than unanimous jury verdicts in criminal trials); Josh Meyer, Small Vanguard Presses Its Case for Jury Reforms, L.A. TIMES, Sept. 28, 1994, at A1 (relating the findings of a poll that discovered that 50% of the public who had served on jury duty before felt that eliminating the unanimity requirement would improve the justice system); see also Reynolds Holding, Criminal Obsession, S.F. CHRON., Feb. 5, 1995, at Z1 (hereinafter Holding, Criminal Obsession) (reporting that Mike Reynolds considered proposing a voter initiative to amend the state constitution to permit nonunanimous verdicts).


176. Public Safety Protection Act of 1996, Proposition, § 2 (amending CAL. CONST. art. I, § 16) (copy on file with the Pacific Law Journal). This voter initiative was not assigned a number because it was never placed on the ballot.

In addition, the Public Safety Protection Act was also intended to repeal California’s Prisoner’s Bill of Rights, thereby limiting prisoner rights to those conferred by the U.S. and California Constitutions. Michael D. Harris, Law and Order Initiative Gets Goldman’s Aid, L.A. DAILY J., Nov. 17, 1995, at 2. The initiative also provided for increasing the penalties for certain parole violations and permitted the civil commitment of violent sexual predators. Id.


178. Michael Fleeman, DA Endorses Nonunanimous Verdicts, S.F. DAILY J., Jan. 18, 1996, at 3; see id. (stating that the public’s confidence in the judicial system would be restored by eliminating the possibility that a single irrational juror could force a hung jury). But see Alan Abrahamson, Garcetti Joins Drive Against Unanimous Verdict Requirement, L.A. TIMES, Jan. 18, 1996, at B3 (reporting that Garcetti did not believe that less than
Citing a lack of funding and time, proponents of the Public Safety Protection Act abandoned their effort to place the initiative on the November 1996 ballot. However, backers of eliminating the unanimity requirement intend to put the issue to California voters in the “near future.”

IV. ISSUES SURROUNDING THE PROPOSAL TO ELIMINATE THE UNANIMITY REQUIREMENT

If another attempt is made to amend the state’s constitution to permit non-unanimous jury verdicts, the debate surrounding the issue will intensify. This part examines whether the number of criminal trials that end in deadlock is sufficient to warrant the elimination of the unanimity requirement. It also sets forth the debate surrounding what is referred to as the “lone holdout juror” factor. The part then explores the potential for convicting defendants who would otherwise be found not guilty under a unanimity requirement. It concludes by illustrating the concerns about whether permitting less than unanimous jury verdicts will adversely affect the quality of jury deliberation by permitting majority members of a jury to ignore minority viewpoints.

A. The Need to Eliminate the Unanimity Requirement

The greatest impetus to eliminate the unanimity requirement is the perception that juries cannot reach a verdict in a growing number of criminal trials. Proponents of eliminating the unanimity requirement emphasize that the current system is not working since almost 1500 of California’s criminal jury trials end in deadlock each year. unanimous jury verdicts should be accepted in death penalty cases since “a life is at stake”); Fleeman, supra, at 3 (recognizing that had the initiative’s changes been in effect, the outcome of the O.J. Simpson trial would have been the same); see also Maura Dolan, Key State Panel to Consider Major Changes for Trials, L.A. TIMES, Oct. 31, 1995, at A1 (quoting Santa Clara University law professor Gerald F. Uelmen as declaring that “[i]f people did not like the O.J. [Simpson] verdict, then they should hate this initiative. If the initiative were in effect, we would have had a verdict in one hour instead of four hours, and ... with two [jurors] dissenting”). 179. Effort to Change Jury Law Abandoned, SACRAMENTO BEE, Feb. 15, 1996, at A6.

180. Id. In addition, the California Judicial Council has likewise refused to recommend that the state constitution be amended to permit less than unanimous verdicts. Claire Cooper, Court Panel: Let TV Cameras Roll, SACRAMENTO BEE, May 18, 1996, at A1.

181. See infra notes 185-208 and accompanying text (analyzing the hung jury rate in California and comparing it to those observed in other jurisdictions).

182. See discussion infra Part IV.B. (discussing the problem of the “flake factor”).

183. See discussion infra Part IV.C. (examining the potential for miscarriages of justice under a less than unanimous verdict rule).

184. See discussion infra Part IV.D. (relating how minorities may be adversely impacted by the elimination of the unanimity requirement).

185. Patrick Hoge, Nonunanimous Verdicts Proposed, SACRAMENTO BEE, Sept. 13, 1995, at B3. But see Osher, supra note 15, at 1358-60 (doubting that eliminating the jury unanimity requirement will do much to reduce the number of hung juries in the state).
However, the available numbers show no major increase in the rate of hung juries over the last several years. Rather, there has been almost no increase in the percentage of criminal trials ending in deadlock. The most reliable figures are from the California District Attorneys Association’s report on the subject, *Non-Unanimous Jury Verdicts: A Necessary Criminal Justice Reform*. The report includes statistics gathered from nine Californian counties between 1992-1994. In the nine counties, the rate of hung juries has remained consistent over this three-year period. In 1992, the hung jury rate for criminal trials was 14%; the rate was 12% in 1993; and in 1994, the rate was 13%.  

In California’s largest county, Los Angeles, the rate of hung juries also remained constant. In 1992, the hung jury rate for the county was 14%, in 1993, 13%, and in 1994, the rate returned again to 14%. These results, however, are lower than the 15.5% hung jury rate in Los Angeles County during the early-1980s.

Stanislaus County had the highest rate of hung juries among the counties surveyed, but has actually seen its rate decline over the three year period. In 1992, 34% of the criminal trials heard before a Stanislaus County jury resulted in deadlock; in 1993, the rate was 30%; and in 1994, the rate had decreased to 23%. The rate of hung juries in four other counties also declined over this period. Kern County has seen its rate drop from 12% in 1992 to only 3% in 1994. Orange County’s rate declined from 11% in 1992 to 7% in 1994. Riverside County saw its rate drop sub-

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186. CDAA REPORT, supra note 2, at app. C.
187. Id. The nine counties are: Los Angeles (felony trials only), Kern, Monterey, Orange (felony trials only), Riverside, Stanislaus, Ventura, Contra Costa, and Alameda (felony trials only). Id.
188. Id. These percentages translate into 594 hung juries out of 4229 criminal jury trials in 1992; 549 hung juries out of 4577 in 1993; and 614 hung juries out of 4830 in 1994. Id.
189. Id. Note, however, that the hung jury rates reported include all hung juries, not just those juries which deadlocked at 11-1 or 10-2. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SCA 24, at 3 (June 27, 1995) [hereinafter SCA 24 COMMITTEE ANALYSIS].
190. Boyarsky, supra note 13, at A18.
191. CDAA REPORT, supra note 2, at app. C. In 1992, 26 out of 77 criminal jury trials in Stanislaus County ended in deadlock; 19 out of 63 trials ended with hung juries in 1993; and in 1994, there were only 29 hung juries out of 124 jury trials. Id.
192. Id. In 1992, Kern County had 29 criminal trials out of 245 end with the jury deadlocked. Id. In 1993, 18 trials out of 208 ended with hung juries; and in 1994, only eight out of 235 trials resulted with the jury unable to agree on a verdict. Id.
193. Id. Forty criminal felony trials out of 375 ended in deadlock in Orange County in 1992. Id. There were 32 trials out of 349 which ended with hung juries in 1993; and in 1994, 32 trials out of 431 ended with the jury deadlocked. Id.
stantially from 17% in 1992 to 9% in 1994.\textsuperscript{194} Finally, Ventura County witnessed its rate decrease from 11% in 1992 to 8% in 1994.\textsuperscript{195}

Only two counties surveyed saw their hung jury rates increase during this period. Contra Costa County’s rate increased negligibly from 18% in 1993 to 19% in 1994.\textsuperscript{196} Alameda County witnessed its rate almost double over the same period from 8% in 1993 to 15% in 1994.\textsuperscript{197}

Los Angeles’s hung jury rate of 13% is much higher than that observed in other large cities around the nation. In 1993, only 2.3% of felony trials in New York’s Manhattan Borough resulted in deadlocked juries.\textsuperscript{198} Dade County, Florida, saw only 1.8% of its felony trials end with the jury unable to reach a unanimous verdict.\textsuperscript{199} The high rate of hung juries in criminal trials in California is not limited to its state courts. The rate of federal criminal trials ending in deadlock in California is double the rate of federal trials ending with hung juries nationwide.\textsuperscript{200}

Some legal analysts believe the rate of hung juries in California is higher than other states due in part to the state’s culturally diverse population.\textsuperscript{201} Others contend that the rate is attributable to the changes in California’s law resulting from the 1990 Proposition 115 ballot initiative.\textsuperscript{202} Intended to speed up criminal trials, Proposition 115 changed the way voir dire is conducted by permitting the trial judge to conduct almost all of the questioning of potential jurors.\textsuperscript{203} Many critics of Proposition 115

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\begin{enumerate}
\item[194.] Id. Riverside County had 54 trials out of 311 end without a verdict in 1992; in 1993, 25 trials out of 355 ended in jury deadlock; and in 1994, 30 trials out of 319 ended with hung juries. Id.
\item[195.] Id. In 1992, 30 criminal jury trials out of 279 resulted in hung juries in Ventura County. Id. In 1993, there were 18 jury deadlocks out of 241 jury trials; and in 1994, 24 out of 319 criminal jury trials ended without a jury verdict. Id.
\item[196.] Id. In Contra Costa County, 65 criminal jury trials out of 369 ended with the jury deadlocked in 1993. Id. In 1994, 76 trials out of 400 ended with hung juries. Id.
\item[197.] Id. In 1993, ten out of 125 Alameda County criminal jury trials ended with juries unable to agree on a verdict. Id. Sixteen out of 107 criminal jury trials ended with hung juries in 1994. Id.
\item[199.] Id.
\item[200.] Id. The hung jury rate for federal criminal trials held in California was 4.5%. Id. This is almost twice as high as the national rate of 2.6%. Id.
\item[201.] Weighing the Necessity of Change; How One Case May Reshape Criminal Justice in America, L.A. TIMES, Oct. 8, 1995, at S4 [hereinafter Weighing the Necessity of Change]; see Leiser, supra note 163, at A3 (reporting that Senator Calderon believed that juries tended to “reflect society’s gender and ethnic diversity and put unanimity out of reach in certain cases”); see also Weighing the Necessity of Change, supra, at S4 (observing that states with more homogeneous populations tend to have lower hung jury rates).
\item[202.] Dolan, Judging the Jury System, supra note 198, at A1.
\item[203.] Proposition 115 was codified as § 223 of the California Code of Civil Procedure and reads in pertinent part as follows: In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. . . . \textsuperscript{[\i] Examinations of prospective jurors shall be conducted only in aid of the exercise of challenges for cause. \textsuperscript{[\i]} The trial court’s exercise of its discretion in the manner in which the voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice . . . .
\end{enumerate}
\end{footnotesize}
argue that judges do not probe as deeply for possible juror biases or prejudices, which may surface during jury deliberations leading to the jury reaching an unbreakable impasse.\textsuperscript{204} However, this argument may not be plausible. The voir dire procedures mandated by Proposition 115 are not followed in federal courts, yet the hung jury rate for federal trials held in California is double the rate for federal trials held in other states.\textsuperscript{205}

The high rate of hung juries within the state has critics of the unanimity requirement looking with envy to California’s northern neighbor, Oregon, which permits nonunanimous verdicts.\textsuperscript{206} Between 1993-1995, the hung jury rate for felony criminal trials held in Oregon was a mere 0.4%\textsuperscript{207} In 1994, out of the hundreds of criminal jury trials conducted in Multomah County, Oregon, only three ended with deadlocked juries.\textsuperscript{208}

California’s high hung jury rate is also having an impact on judicial resources, which are quickly becoming strained under the demands of the state’s Three Strikes law.\textsuperscript{209} Felony criminal defendants are now increasingly demanding jury trials since

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  \item Proposition 115's potential for speeding up criminal trials was evidenced in the case of \textit{People v. Segura & Diaz}, No. SC 11240 (Marin County Sup. Ct., June 17, 1991). The two defendants, charged with murder, were tried separately, with one trial using the old system of voir dire, and the other employing the changes brought about by Proposition 115. Gordon Van Kessel, \textit{Adversary Excesses in the American Criminal Trial}, 67 \textit{NOTRE DAME L. REV.} 403, 537 (1992). The trial employing the old method took two months to select a jury, whereas the trial conducted under the new procedures required just two days to empanel a jury. \textit{Id.}

  However, judicial reaction to the change has been mixed. Although some judges eagerly accept their new power to conduct voir dire, others are evidently bored by the process and leave the duty of conducting voir dire to the attorneys. \textit{Id.} at 504 n.445.

  In addition, Proposition 115’s potential for streamlining the jury selection process has also been stymied as a result of peremptory challenges, which have been retained by attorneys. In Los Angeles, smaller jury panels are being summoned for voir dire due to budget cuts. Richard Barbieri, \textit{Judges Eye Plan to Cut Peremptory Challenges}, \textit{RECORER}, Nov. 17, 1992, at 2. These panels are quickly depleted by attorneys who utilize their peremptory challenges to remove suspect jurors. \textit{Id.} The result has been that it takes much longer to empanel juries than proponents of Proposition 115 had predicted. \textit{Id.}


  \textsuperscript{206} See supra note 38 (setting forth Oregon’s constitutional provision that permits less than unanimous jury verdicts).

  \textsuperscript{207} CDAA \textit{REPORT}, supra note 2, at app. E. This statistic is based on the hung jury rate in eight counties: Clackamas (0%), Jackson (0.8%), Lane (0%), Marion (0%), Multomah (0.4%), Polk (2.4%), Washington (0.5%), and Yamhill (0%). \textit{Id.}

  \textsuperscript{208} Holding, \textit{Criminal Obsession}, supra note 174, at Z1.

  \textsuperscript{209} Section 667 of the California Penal Code reads in pertinent part as follows:

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  \item \textsuperscript{(a)} (1) \textit{[A]ny person convicted of a serious felony who previously has been convicted of a serious felony \ldots} shall receive \ldots a five-year enhancement for each such prior conviction \ldots .

  \item (b) It is the intent of the legislature \ldots to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious or violent felony offenses.

  \item \ldots.

  \item (e) \textit{[T]he following shall apply where a defendant has a prior felony conviction:}

  \begin{itemize}
    \item (1) If a defendant has one prior felony conviction \ldots the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

    \item (2)(A) If a defendant has two or more prior felony convictions \ldots the term for the current felony conviction shall be an indeterminate term of life imprisonment.

  \end{itemize}

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The Three Strike law received overwhelming voter support in 1994 with over 70% of the voters approving
every conviction can lead to increased penalties in the future. In Los Angeles County, requests for jury trials in criminal proceedings increased 35% from 1994 to 1995, putting an incredible strain on its jury pool. Other counties are also feeling the strain. Santa Clara County witnessed a 52% increase in the number of felony criminal cases going to trial. San Diego County has seen its rate of 2700 criminal trials a month increase dramatically to almost 4000 a month. Proponents of eliminating the unanimity requirement contend that trials will run quicker and more smoothly under a majority-verdict rule which will help to relieve the congestion caused by the Three Strikes cases.

Proponents of eliminating the unanimity requirement also contend that it is necessary to keep the number of retrials to a minimum because of the costs associated with these additional trials. Observers estimate that a criminal trial in a Superior Court in Los Angeles County costs almost $10,000 a day—over $1500 an hour. Similar figures have also been observed in Orange County’s criminal courts. Santa Clara County court observers report that trials there cost almost $2800 a day. Eliminating the potential for second trials, proponents argue, will reduce these costs and allow for the diversion of the money to other programs, like education.

In addition, proponents of nonunanimous verdicts argue that eliminating the unanimity requirement will prevent many first trials. They argue that by eliminating the ability of a single juror to hang a jury, defendants will be more willing to accept plea bargains since they will no longer be able to rely on the hope that one irrational juror will deadlock the proceedings.
B. The "Flake Factor"

Critics of the unanimity requirement argue that it permits defense attorneys to play upon the "flake factor"—when a lone holdout juror clings to an irrational point of view and hangs the jury. In People v. Wyatt, the jury deadlocked 11-1 in favor of guilt concerning whether the defendant had stabbed an unarmed man. The lone holdout argued that she believed that there was reasonable doubt based on the testimony of the defendant's ex-felon girlfriend that someone other than the defendant had committed the offense. The lone juror refused to budge from her position, even in light of the fact that the defense attorney conceded that the defendant had committed the stabbing. Other interesting instances of lone holdout jurors have been described above.

Some defense attorneys try to use the "flake factor" to their advantage by manipulating the sentiments of vulnerable or predisposed jurors. However, the "flake factor" is doubtfully as problematic as critics of the unanimity requirement claim. Further, there are measures available to help deal with the presence of irrational jurors on jury panels.

Harry Kalven, Jr. and Hans Zeisel conducted research on how juries deliberate and published the results in the widely-regarded book The American Jury. Kalven and Zeisel polled criminal juries in two metropolitan areas at the beginning of the deliberating process (first ballot) and again when the deliberating process ended. In 23 cases studied, there were no hung juries where the first ballot was 11-1 in favor of guilt. In fact, juries did not hang when the first ballot was 10-2 or 9-3 in favor of guilt. Only when juries were split on the first ballot at 8-4 or 7-5 in favor of guilt

225. CDAA REPORT, supra note 2, at 3.
226. Id.
227. Id.; see id. at 4 (observing that the defendant was finally convicted by a second jury after another 14-day trial).
228. See supra note 7 (providing examples of cases that deadlocked because of a lone holdout juror).
229. Osher, supra note 15, at 1349-51; see id. at 1350 (noting how some attorneys, like those in the Simpson trial, attempt to divert the jury's attention from the defendant to the conduct of other people or institutions involved in the case).
230. See infra notes 232-45 and accompanying text (discussing how the problem of irrational holdout jurors may be overstated).
231. See infra notes 246-54 and accompanying text (illustrating the methods by which courts may deal with irrational jurors).
233. Id. at 462.
234. Id. Studied juries also did not hang when the first ballot was 11-1 in favor of acquitting the defendant.
235. Id. There were 56 juries studied in this group. Id.
did five out of the twenty six juries studied hang. Similar results were achieved from juries which initially favored acquittal. Three out of sixteen juries, which initially favored acquitting the defendant by first ballots of 7-5 or 8-4, ended in deadlock.

Kalven and Zeisel concluded that, although the "hanging juror" could be a factor, a juror needed "companionship at the beginning of the deliberations" to avoid pressure exerted by the majority jurors. The two researchers found that juries tended to hang only when there was a "massive minority of four or five jurors" on the first vote. Therefore, in order for a lone irrational juror to deadlock a jury, it was "necessary for him [or her] to have at least one ally." 

Kalven and Zeisel also found that the more complex the issues presented, the more likely the chance of a hung jury. The study revealed that only two percent of the juries studied ended in deadlock when the issues of the case tried were both clear and easy. However, this rate of deadlock increased to ten percent when the issues presented were difficult and the outcome close.

Therefore, the fear of an irrational juror holding up the deliberation process may be exaggerated given the other factors involved in the process. The notion of a lone holdout juror does not seem significant enough to warrant the elimination of the unanimity requirement. In fact, a hung jury may be, according to Los Angeles County Public Defender Michael Judge, the "reflection of conscientiously held rational differences regarding the adequacy of the evidentiary proof in such cases."

To minimize the "flake factor," courts may dismiss a juror who refuses to deliberate in a rational manner, even though jury deliberations have commenced. An example of the court's power to dismiss a juror during deliberations occurred when Devin Feagin and Terrill Ross were on trial for a murder which occurred during the commission of a residential robbery. During jury deliberations, the

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236. Id.
237. Id.
238. Id. When the jury was split 9-3 or 10-2 in favor of acquittal on the first ballot, three out of twenty-two cases ended in deadlock. Id.
239. Id. at 462.
240. Id. at 463.
241. Id. at 463. Kalven and Zeisel determined that their results were consistent with those observed by Solomon E. Asch in his inquiries into group psychology. Id.; see Solomon E. Asch, Effects of Group Pressure upon the Modification and Distortion of Judgments, in READINGS IN SOCIAL PSYCHOLOGY 174, 179-81 (Maccoby et al. eds., 1958) (concluding that a person will tend to disbelieve his or her own viewpoint if all the other people in the group claim that the viewpoint is mistaken; however, that person will stick to his or her viewpoint if there is at least one other person in the group who supports it). Jury researcher Michael J. Saks similarly concluded that "the presence of a fellow dissenter [on a jury panel] vastly improves one's ability to resist the majority." MICHAEL J. SAKS, JURY VERDICTS 17 (1977).
242. KALVEN & ZEISL, supra note 62, at 457.
243. Id.
244. Id.
245. SCA 24 COMMITTEE ANALYSIS, supra note 188, at 8.
246. Id. at 6; see CAL. PENAL CODE § 1089 (West 1985) (permitting the replacement of a juror by an alternate juror if the juror dies, falls ill, or is unable to perform his or her duty).
judge received a note that there was one juror impeding the deliberations.248 The juror in question was accused by the others of "not explaining her viewpoints and [having] indicated to the others that her mind was already made up and [that] she was not going to change her mind, even on issues that had not yet been discussed."249

After interviewing the other jurors and permitting the counsel to present arguments, the trial judge decided to excuse the juror, finding that her refusal to deliberate in a rational manner constituted juror misconduct.250 The judge then requested the remaining jurors to begin deliberating anew and the jury eventually rendered a verdict of guilty.251

On appeal, Feagin argued the trial court abused its discretion in removing a juror after the deliberation process had begun.252 Concluding that the trial court did not abuse its discretion in excusing the juror for misconduct, the appellate court affirmed Feagin's conviction.253 The court reasoned that the trial court acted appropriately, not dismissing the juror until after sufficient evidence of her conduct had been procured.254

In conclusion, when a jury hangs, the complexity of the case, rather than the irrational behavior of a single juror, is usually the cause.255 Removing a juror who refuses to deliberate is one way to deal with the problems posed by lone "irrational" jurors who end up on panels in criminal trials. However, since the presence of a juror who refuses to engage in rational deliberation is a rare occurrence, the use of juror removal will probably be uncommon.

C. Justice Sacrificed?

Opponents of eliminating the unanimity requirement are concerned that justice may be sacrificed in the rush to cut costs.256 The Public Defender’s office of Los

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248. Id. at 1435, 40 Cal. Rptr. 2d at 921.
249. Id. at 1435, 40 Cal. Rptr. 2d at 922. The juror in question was reported to have believed that, after the Rodney King affair, police officers were prejudiced against African-Americans and could have framed the defendant. Id. at 1436, 40 Cal. Rptr. 2d at 922.
250. Id. at 1437, 40 Cal. Rptr. 2d at 923; see id. at 1437 n.7, 40 Cal. Rptr. 2d at 923 n.7 (reporting that the trial judge had also dismissed two other jurors: one for prejudging the evidence and the other for looking up the meaning of the term "preponderance of the evidence").
251. Id. at 1430, 1437, 40 Cal. Rptr. 2d at 919, 923.
252. Id. at 1431, 40 Cal. Rptr. 2d at 919.
253. Id. at 1437, 40 Cal. Rptr. 2d at 923.
254. Id.; see id. (finding that the significant facts that warranted the dismissal were that the juror had prejudged the testifying officers' credibility and could not cast aside her personal biases). But see People v. Castorena, 47 Cal. App. 4th 1051, 1066-67, 55 Cal. Rptr. 2d 151, 159-60 (1996) (reversing the defendant’s conviction of second-degree murder when the judge dismissed a juror for misconduct during the deliberations). The appellate court ruled that the trial judge abused her discretion in dismissing the juror since the judge failed to inquire further into the matter after receiving a 15-page note that showed the juror was justified in refusing to budge from her position regarding the issue of malice aforethought. Id.
256. See Fleeman, supra note 178, at 3 (quoting Assistant Los Angeles County Public Defender Robert Kalunian that nonunanimous verdicts will "make it easier to convict individuals . . . because there will not be a full deliberation of jurors in the jury room").
Angeles County conducted a survey of misdemeanor and felony criminal trials it handled between 1994-1995, and it raised some unsettling questions. The survey found that the majority (55%) of trials that ended with hung juries were deadlocked at 6-6, 7-5, 8-4, or 9-3, splits which would not be affected by the proposed constitutional amendments.

More interestingly, the survey found that there were 32 juries which were deadlocked at 11-1 in favor of conviction. Of these 32 mistrials, only 12 were retried. In the retrials of the twelve defendants, only five resulted in guilty verdicts while two hung again and five ended in acquittals. The potential consequences of permitting nonunanimous verdicts are evident. If an 11-1 or 10-2 rule had been in effect, the costs of only 12 retrials would have been saved, but five defendants, who juries concluded were not guilty, would have been convicted.

That unanimity protects against the wrongful convictions of innocent defendants was portrayed in the 1957 film, 12 Angry Men. Henry Fonda, playing a lone dissenter on a jury that had voted 11-1 on the first ballot to convict the defendant, gradually won over the other jurors until finally the jury acquitted the defendant.

In real life, Oakland attorney John Burris represented a young defendant charged with murder whose first trial ended with the jury deadlocked at 11-1 in favor of guilt. However, a jury in the defendant’s second trial voted unanimously to acquit that defendant since it was questionable whether the defendant was the shooter. Nevertheless, experts emphasize that this “12 Angry Men”-scenario is quite rare.

D. Silencing the Minority

Critics of eliminating the unanimity requirement worry that by permitting a less than unanimous verdict, a jury will strive to achieve the necessary majority and then
quit deliberation without considering the viewpoints of its minority members.\textsuperscript{269} This concern could have grave consequences where a jury panel is made up of one or two minority members, whose votes may have little impact if a 10-2 verdict rule is in effect.\textsuperscript{270} Sentiments among the minority communities, that their voices are being silenced in the jury room, might lead to them becoming less willing to participate in the judicial process.

Historically, minorities were denied the opportunity to sit on juries.\textsuperscript{271} It took several United States Supreme Court decisions to create, and increase, the opportunity for minorities to sit on juries.\textsuperscript{272}

One result of the tradition of excluding minorities from jury panels is that there is a significant lack of confidence in the system among the state’s minority com-

\textsuperscript{269}. SCA 24 COMMITTEE ANALYSIS, supra note 188, at 5.

Although just about any viewpoint could be considered a “minority” viewpoint, the terms “minority” and “minority viewpoints” are used to refer to the racial or ethnic nonwhite minorities in California. It is possible, as was evident in the O.J. Simpson trial, that a jury panel might be composed predominately of minority members and that in these cases the “white” view becomes the minority view.

Referring to “viewpoints,” it is clear that views of justice and the judicial system, in certain cases, tend to break down along racial lines. ABRAMSON, supra note 30, at 194. For instance, in response to the O.J. Simpson verdict, 77% of African-Americans agreed with the verdict whereas only 28% of white people surveyed agreed. Cathleen Decker, The Times Poll: Most in County Disagree with Simpson Verdicts, L.A. TIMES, Oct. 8, 1995, at A1. Further, white jurors are more likely than African-American jurors to believe a police officer-witness is telling the truth due to “their disparate experiences of law enforcement.” Tanya E. Coke, Note, Lady Justice May Be Blind, But Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries, 69 N.Y.U. L. REV. 327, 355 (1994).

The crux of my discussion here is that eliminating the unanimity requirement could effectively silence the viewpoints of minority jurors in those cases in which these different views of justice become relevant and in which only a few or none of the jury members belong to a minority group.

\textsuperscript{270}. Imagine what the reaction would have been if the original Rodney King trial had been conducted under an 11-1 verdict rule and the lone Hispanic juror voted to convict the officers; or if the O.J. Simpson trial had been conducted under a similar rule and the lone white juror had voted to convict.

\textsuperscript{271}. There were many methods employed to prevent minorities from serving on juries. Until 1880, West Virginia statutorily limited jury service to “all white male persons.” Strauder v. West Virginia, 100 U.S. 303, 305 (1880).

In 1933, a county jury commissioner in Alabama testified that blacks were intentionally left off the county’s jury roll since, according to him, blacks could not satisfy the statutory requirement that the jury roll was to be composed of:

All male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is ... an habitual drunkard, ... or who cannot read English, or who has ever been convicted of any offense involving moral turpitude.


Another method used to select the jury venire involved printing up the names of white taxpayers on white tickets and black taxpayers on yellow tickets, placing the tickets into a box, and then drawing the tickets to establish a jury panel. In a reported case, 60 tickets were drawn—all were white. Avery v. Georgia, 345 U.S. 559, 560-61 (1953).

Until recently, preemptory challenges were also used to systematically exclude minorities from jury panels. See Batson v. Kentucky, 476 U.S. 79, 97 (1986) (ruling that the use of preemptory challenges to exclude jurors on account of their race was violative of the Fourteenth Amendment).

\textsuperscript{272}. See supra note 72 (setting forth several Supreme Court decisions concerning the systematic exclusion of minorities from jury panels); see also Nancy J. King, Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection, 68 N.Y.U. L. REV. 707, 712-19 (1993) (discussing the reasons for continued minority under representation on jury panels).
munities.\textsuperscript{27} Eliminating the unanimous verdict requirement and thereby permitting minority viewpoints to be ignored in the jury room, may increase the level of minority dissatisfaction with the criminal justice system in California.

As studies have indicated, juries that have to achieve unanimity tend to spend more time deliberating as compared to when nonunanimous verdicts are permitted.\textsuperscript{274} In addition, juries tend to spend less time deliberating after a “sizeable faction” has been attained.\textsuperscript{27} Considering eight jurors as a sizeable faction, Hastie found that with a rule permitting eight out of twelve jurors to render a verdict, jurors typically deliberated for less than five minutes after the minimum of eight jurors agreed to a verdict.\textsuperscript{276} When ten out of the twelve jurors had to agree, ten percent of the deliberation occurred after reaching a point where eight members of the jury could agree.\textsuperscript{277} However, where all twelve jurors were required to agree to a verdict, about twenty percent of the total time spent deliberating occurred after an eight member faction had been reached.\textsuperscript{278}

Hastie’s study also showed that the level of “nonparticipation” in the deliberation process by certain jury members increases under a nonunanimous verdict rule.\textsuperscript{279} Hastie found that the juror foreperson dominated the deliberations in the majority-rule juries.\textsuperscript{280} Considering various factors by which to measure juror participation,\textsuperscript{281} Hastie found that there tended to be more than twice as many “nonparticipating” jurors on those juries which required only eight jurors to render a verdict, than those juries which required unanimity.\textsuperscript{282}

\begin{itemize}
\item \textsuperscript{273} See David Cole, \textit{A Catch-22 Ruling on Selective Prosecution}, \textit{L.A. Times}, May 26, 1996, at M5 (“The black community views the criminal justice system with deep-seated and widespread distrust [which] has its roots in a long history of racial discrimination . . .”); Holding, \textit{Unanimous Jury Rule, supra} note 15, at A13 (noting that 39\% of surveyed African-Americans and 43\% of Latinos surveyed stated that they did not have much confidence in the jury system).
\item \textsuperscript{274} \textit{Hastie et al., supra} note 31, at 60. Hastie discovered that, in mock trials which required twelve out of twelve jurors to reach a verdict, the jury needed over two hours to deliberate on average. \textit{Id.} In mock trials which permitted less than unanimous verdicts, the time required to deliberate dropped proportionately. Juries which required ten out of twelve jurors to agree took on average one hour and forty minutes to reach a verdict. \textit{Id.} Juries which needed only eight out of twelve jurors to agree deliberated just over one hour on average. \textit{Id.}
\item \textsuperscript{275} \textit{Hastie et al., supra} note 31, at 95-97.
\item \textsuperscript{276} \textit{Id.} at 95.
\item \textsuperscript{277} \textit{Id.} at 95-96.
\item \textsuperscript{278} \textit{Id.} at 95.
\item \textsuperscript{279} \textit{Id.} at 91-94.
\item \textsuperscript{280} \textit{Id.} at 92. Hastie found that foreperson domination of deliberations was especially pronounced in the juries that required only eight jurors to agree as to a verdict. \textit{Id.}
\item \textsuperscript{281} Hastie measured the number of times a juror “participated” during the deliberation process, giving the juror one point for every time the juror voiced an opinion or participated in the voting on the verdict. \textit{Id.} Hastie considered all juries with less than ten entries per deliberation to be “nonparticipating.” \textit{Id.}
\item \textsuperscript{282} \textit{Id.} Of the juries studied by Hastie, there were 24 “nonparticipating” jurors on juries deliberating under the unanimity requirement. \textit{Id.} The number of nonparticipating jurors increased to 33 on juries permitting 10-2 verdicts, and to 56 on juries permitting 8-4 verdicts. \textit{Id.}
\end{itemize}
Thus, implementation of a nonunanimity rule will impair the quality of jury deliberations. Deliberations will last only long enough to reach a sufficient number of jurors who can render a verdict. Minority viewpoints can, therefore, be ignored. Further, eliminating the unanimity requirement may also result in more jury members abstaining from the deliberating process as the deliberations come to be dominated by the jury foreperson. Not only should the judicial system utilize a process by which more jurors are encouraged to participate, the system must also avoid giving majority jury members the ability to ignore minority juror viewpoints.\textsuperscript{283} The problem of a jury majority ignoring minority viewpoints is compounded by the fact that minority members of the community might become less willing to serve on juries and their confidence in the judicial system will be further eroded.\textsuperscript{284}

Eliminating the unanimity requirement will also weaken the ability of certain jurors to exercise their right of jury nullification. Typically, jury nullification involves a jury voting to acquit a defendant, despite evidence presented at trial that points to the defendants guilt, "because the jury objects to the law that the defendant violated or to the application of the law to that defendant."\textsuperscript{285} Although jury nullification is generally considered to occur when the jury acts in unison to acquit the defendant, nullification also occurs when only one or two jurors refuse to convict thereby deadlocking the jury.\textsuperscript{286}

\textsuperscript{283} See Coke, supra note 269, at 350, 357 (arguing that a diverse jury is necessary to enhance the quality of deliberations since it allows for "a jury that draws upon the varied experiences of its members [and one that] is less likely to rely upon complacent but uninformed assumptions in its deliberations"); Charles L. Lindner, Lesson of the King Case: The Risk of Shuttle Justice, L.A. Times, Apr. 25, 1993, at M1 (explaining that "an integrated jury is necessary, not because it will be unprejudiced, . . . but because putting minority groups in the jury room hopefully offsets prejudice by suppressing its expression").

\textsuperscript{284} For example, Hastie found that jurors who served on less than unanimous juries had less confidence in their verdict than did those jurors who sat on juries that had to render a unanimous verdict. \textsc{Hastie et al.}, supra note 31, at 70.


Jury nullification has its roots in 17th Century England when a jury voted to acquit the Quakers William Penn and William Mead of unlawful assembly and disturbance of the peace despite being instructed by the judge to find the defendants guilty. \textsc{Abramson}, supra note 30, at 68-73. The first case in the United States to involve jury nullification occurred in 1735 when a jury acquitted John Peter Zenger of printing seditious libel. \textit{Id.} at 73-75. In 1895, the U.S. Supreme Court recognized that although jurors had the "physical power" to engage in jury nullification, such power was not desirable or necessary in a democratic society. M. Kristine Creagan, Note, Jury Nullification: Assessing Recent Legislative Developments, 43 \textsc{Case W. Res. L. Rev.} 1101, 1111 (1993) (referring to \textsc{Sparf & Hansen v. United States}, 156 U.S. 51 (1895)).

After \textsc{Sparf & Hansen}, the controversy surrounding jury nullification ebbed until the "politically troubled Vietnam era" when the use of jury nullification increased as the federal government began prosecuting antigovernment activists under criminal conspiracy laws. \textit{Id.} at 1101 n.4. Recent cases involving the use of jury nullification include the acquittals of Dr. Jack Kervorkian for illegally assisting with a suicide, Washington D.C. Mayor Marion Barry for several narcotics offenses, and Oliver North for lying to the United States Congress. \textsc{Abramson}, supra note 30, at 65-67.

\textsuperscript{286} \textsc{Rothwax}, supra note 7, at 218; see Butler, Racially Based Jury Nullification, supra note 285, at 679 n.9 (recognizing that although a single vote for acquittal will not free the defendant, it is sufficient to prevent conviction).
Arguably, decreasing the opportunity for jury nullification might be beneficial to the judicial process. Jury nullification has been criticized as undemocratic since it allows twelve jurors (or even less in some cases) to substitute their view of what the law should be, instead of respecting the law as set forth by Congress or the legislature, bodies that seek to represent the views of all the people. However, for minorities, jury nullification may provide the only means for them to have some sort of “check” on the judicial process since they might have little influence in the electoral process by which legislators and executives are chosen. The result is that

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288. Id. at 512-13; see id. at 517 (arguing that jury nullification might be unconstitutional as violative of the separation of powers by allowing the judiciary, through a jury’s verdict, to exercise legislative powers in dictating what the law “should be”). Professor Simson also argues that jury nullification is unfair, as defendants accused of similar crimes may receive different punishments (or no punishment at all) as a result of whether their jurors decide to engage in jury nullification. Id. at 515.

289. Butler, *Racially Based Jury Nullification*, supra note 285, at 709-12; see Alexander Hamilton, Debate of Monday, June 18, 1787, in *DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 111, 116 (1920) (“Give all power to the many, they will oppress the few. Give all power to the few, and they will oppress the many. Both, therefore, ought to have the power, that each may defend itself against the other. . . .”).

James Madison was also a strong supporter of a system of “checks and balances” to protect against tyranny by the government. See, e.g., *THE FEDERALIST NOs. 47, 48*, at 138-51 (James Madison) (Roy P. Fairfield ed., 1981). But see Creagan, supra note 285, at 1113 (noting that the doctrine of jury nullification has been criticized for permitting small groups, “unsuccessful in having their policies promoted and endorsed by Congress or their state legislatures, to sneak their political agendas in the backdoor by making the jury the new determinant of public policy”).


In addition to the legislative branch, similar racial disparity can be found in other segments of the state’s government. The racial composition of California’s law enforcement agencies tends not to be reflective of their surrounding communities. See, e.g., Clarence Johnson, *Black Officers in 3 Other Bay Cities*, S.F. Chron., Feb. 25, 1993, at A18 (noting that although the cities of Oakland and Richmond are 43% African-American, their police departments are 25% and 30% African-American, respectively); The Simpson Legacy; Just-Under the Skin; LAPD’s Cultural Awareness Course, L.A. Times, Oct. 10, 1995, at S5 (observing that the Los Angeles Police Department is 26% Latino although Latinos make up 40% of the city’s population); see also Reynolds Holding, *Sitting in Judgment*, S.F. Chron., Oct. 29, 1995, at Z7 (reporting that minorities are similarly underrepresented in the state’s judiciary with less than 23% of California’s 1864 judges being non-white).

The failure to defeat recent voter initiatives such as Proposition 187 and 209 is further evidence of the lack of influence minorities have upon the state’s electoral process. Proposition 187 was intended to deter illegal immigration by denying the children of illegal aliens access to the state’s public schools and by barring illegal immigrants from obtaining certain welfare aid and nonemergency, taxpayer-funded medical care. Isabel Williams, *Prop. 187 Challenged In Court*, S.F. Chron., Nov. 10, 1994, at A1. Proposition 187 was passed by the Californian electorate in 1994 by a margin of 59% to 41%. Id. Proposition 209, also known as the California Civil Rights Initiative, was aimed at dismantling the state’s affirmative action programs in governmental employment and contracting as well as in admissions to the state’s university system. Edward Epstein, *Poll Finds Unfamiliarity Over Preferences Ban*, S.F. Chron., June 21, 1996, at A18. Proposition 209 was passed by the state’s electorate in 1996 by a margin of 54.3% to 45.7%. Dave Lesher, *Battle Over Prop. 209 Moves to the Courts*, L.A. Times, Nov. 7, 1996, at A1.

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minorities feel the law is unfairly applied toward them.\textsuperscript{290}

Therefore, jury nullification may be the only means by which minorities may voice their opinions about the operation of the judicial system.\textsuperscript{291} Permitting less than

Implementation of both propositions has been delayed while the courts consider the validity of their provisions. William Claiborne, \textit{Californians Sue to Block Proposition 209}, WASH. POST, Nov. 7, 1996, at A41.

290. Butler, \textit{Racially Based Jury Nullification}, supra note 285, at 695-96. Commentators have seized upon the disparity in sentences for crack and cocaine possession as an example of how the criminal justice system is unfairly applied to minorities. See generally Knoll D. Lowney, \textit{Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?}, 45 WASH. U. J. URB. & CONTEMP. L. 121 (1994). Although the U.S. Sentencing Commission found that Caucasians constitute 65\% of those who use crack cocaine, federal crack prosecutions have almost exclusively involved minority defendants. Cole, \textit{supra} note 273, at M5; see \textit{A Series of Misfires in the War on Drugs}, L.A. TIMES, June 4, 1995, at M4 (observing that minority defendants were prosecuted in 96.5\% of federal crack cases in 1994). This disparity has severe consequences because one would have to possess an amount of powdered cocaine 100 times greater than that of crack to receive a similar sentence. \textit{Id. But see} Jim Newton, \textit{Harsher Crack Sentences Criticized as Racial Inequity}, L.A. TIMES, Nov. 23, 1992, at A1 (arguing that the difference in sentence length is necessary because crack is "far more addictive and socially destructive because of the way it is marketed and ingested" than is powdered cocaine).

In the recent case of \textit{United States v. Armstrong}, the United States Supreme Court held that even though all 24 federal crack prosecutions in Los Angeles involved African-American defendants, the petitioners failed to establish a claim of unconstitutional race-based selective prosecution. United States v. Armstrong, 116 S. Ct. 1480, 1489 (1996).

In California, African-American males in their 20s are incarcerated at a rate eight times higher than that of Caucasian males in their 20s. Clarence Johnson, \textit{Racial Gap in Sentences Is Growing: New Figures Show Blacks Jailed More}, S.F. CHRON., Feb. 12, 1996, at A1; see \textit{id.} (reporting that 39\% of African-American males in the 20-29 age group are incarcerated in the state's prisons, or on parole or probation, compared to 11\% of Latinos and only 5\% of Caucasians in this age group). California's Three Strikes law has a disparate impact on the state's minority population also. Dan Walters, \textit{Three Strikes' Application Varies}, SAN DIEGO UNION-TRIB., June 20, 1995, at B6; \textit{see id.} (noting that 70\% of those defendants sentenced under the Three Strikes law during its first year were either African-American or Latino).

291. \textit{See generally} Butler, \textit{Racially Based Jury Nullification}, supra note 285 (arguing that due to the historical and current discrimination present in the criminal justice system, African-American jurors should consider jury nullification in certain cases involving African-American defendants). Professor Butler's approach calls for African-American jurors to consider the defendant's race in deciding whether to nullify in cases concerning nonviolent malum prohibitum crimes (presumption in favor of nullification) as well as nonviolent malum in se offenses (no presumption in favor of nullification). \textit{Id.} at 715. However, Professor Butler urges that the defendant's race should not be considered in cases involving violent malum in se crimes. \textit{Id.}

Professor Butler's premise is based on the belief that the African-American community might be better benefitted by having the nonviolent offender returned to the community, rather than sending that offender to prison. \textit{Id.} at 716-17. Professor Butler also encourages jurors, who engage in this type of nullification, to participate in community programs designed to rehabilitate the offender and to deter future criminal activity. \textit{Id.} at 717 n.214.

In proposing racially-based nullification, Professor Butler hoped to facilitate "dialogue among all Americans in which the significance of race will not be dismissed or feared, but addressed." \textit{Id.} at 725.

Professor Butler's proposal has been criticized on several grounds. First, there is concern that Professor Butler based his proposal upon incorrect factual assumptions regarding how African-Americans view the criminal justice system. Andrew D. Leipold, \textit{The Dangers of Race-Based Jury Nullification: A Response to Professor Butler}, 44 UCLA L. REV. 109, 112-27 (1996). Second, Professor Butler's proposal might have a detrimental impact on the African-American community. \textit{Id.} at 128-40. There are at least two prongs to this argument. First, African-American defendants who are set free as a result of nullification would have no incentive to avoid crime in the future since they could count on being set free again if caught. \textit{Id.} at 128-29. Second, police and prosecutors, faced with the prospect that African-American defendants might be set free, will be less likely to attack aggressively criminal activity in African-American neighborhoods. \textit{Id.} at 132. Yet, even Professor Leipold recognized that Professor Butler's proposal was beneficial in encouraging "a more healthy and productive discussion about race and criminal justice." \textit{Id.} at 141. For Professor Butler's response to Professor Leipold's criticism, see Paul Butler, \textit{The Evil of American Criminal Justice: A Reply}, 44 UCLA L. REV. 143 (1996).

Harvard Law Professor Randall Kennedy has also criticized the use of race-based jury nullification. Randall
unanimous verdicts, however, will decrease the opportunity for minority jury members to exercise their power of nullification. For example, consider the case of an African-American defendant before a jury panel consisting of eleven white jurors and one African-American juror. The minority juror might bring a unique perspective to the deliberating process that can be ignored by the other jurors. Permitting a less than unanimous verdict would prevent this juror from exercising his or her power to nullify the verdict. Shutting out minority viewpoints may further erode minority confidence in the judicial system. Therefore, the unanimous verdict requirement should be retained because of the obvious need to prevent majority factions on jury panels from deliberately ignoring minority viewpoints. Eliminating the unanimity requirement "at a time when juries are supposed to be representative of a community, [would be] ironic [in] that a minority viewpoint [could] be so easily ignored." 

V. CONCLUSION

Supporters of amending the state's constitution to permit nonunanimous verdicts argue that the rate of hung juries in California is too high. They contend that this rate must be lowered to help the state's judicial system deal with the burden of California's Three Strikes law, which is straining judicial resources. These proponents argue that the state's hung jury rate is due in large part to the presence of lone jurors who refuse to deliberate in a rational manner, which allows these jurors to prevent verdicts from being rendered. Therefore, proposals have been introduced to eliminate the unanimity requirement to reduce the hung jury rate. However, eliminating the unanimity requirement may sacrifice too much for too little benefit. First, the unanimity requirement helps protect criminal defendants from

Kennedy, The Angry Juror, WALL ST. J., Sept. 30, 1994, at A12. Professor Kennedy argues that this type of nullification is "self-destructive" since those defendants that are "saved" for the supposed good of the black community mainly prey on the black community." Id. 

292. See, e.g., supra note 74 and accompanying text (describing how Justice Stewart, dissenting in Johnson v. Louisiana, believed the unanimity requirement helped to foster confidence in the criminal justice system).

293. SCA 24 COMMITTEE ANALYSIS, supra note 188, at 5 (quoting G. Thomas Munsterman, Director of the Center for Jury Studies at the National Center for State Courts).

294. See supra notes 185-208 and accompanying text (setting forth the state's hung jury rate and comparing it to rates observed in other jurisdictions).

295. See supra notes 209-15 and accompanying text (discussing how the implementation of the Three Strikes law has resulted in an increase in the number of trials in the state).

296. See supra notes 7, 223-28 and accompanying text (providing examples of how lone, irrational jurors have deadlocked jury deliberations).

297. See discussion supra Part III.B. (describing the legislative effort to permit nonunanimous verdicts); discussion supra Part III.C. (reporting on the voter initiative that sought to eliminate the unanimity requirement).

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wrongful conviction. Second, the problem of lone, irrational jurors is overstated. Further, courts may remove jurors who refuse to deliberate in a rational manner, thereby allowing juries to continue meaningful deliberations and to avoid deadlock.

Finally, and most importantly, the unanimity requirement should be retained to ensure that minority viewpoints will be considered during jury deliberations. Jury unanimity encourages more thorough jury deliberations and increased participation in the deliberating process by jury members. In addition, eliminating the unanimity requirement might lessen the opportunity for minority jurors to exercise their power of jury nullification, further decreasing their influence on the criminal justice system.

This Comment began with a quote from then Circuit Judge Kennedy, who recognized that jury unanimity "furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury." Later, having ascended to the Supreme Court, Justice Kennedy wrote:

Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life... Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

Justice Kennedy’s words sum up the importance of the jury in our democratic society. Changes to the jury system should improve the deliberative process and encourage participation in the system by all members of society. Changes should not undermine the democratic ideal by allowing some viewpoints to be excluded from the deliberation process. Having invited the minority members of society into the

298. See supra notes 257-63 and accompanying text (discussing a study conducted by the Los Angeles Public Defender’s Office that found that some defendants who had been found not guilty would have been convicted had nonunanimous verdicts been accepted).

299. See supra notes 232-41 and accompanying text (noting that studies have shown that juries usually hang when there is a large faction of dissenting jurors at the outset of deliberations, not because a single juror refuses to deliberate in a rational manner).

300. See supra notes 246-54 and accompanying text (providing the California statute that permits the court to remove a juror for misconduct and how courts have used this law to remove jurors who refuse to deliberate in a rational manner).

301. See discussion supra Part IV.D. (arguing that the unanimity requirement prevents verdicts from being rendered over the objections of minority jury members, and protects the power of jury members to exercise jury nullification).

302. See supra notes 274-82 and accompanying text (describing various studies that have reached these conclusions).

303. See supra notes 285-92 and accompanying text (discussing the development of the power of jury nullification and how this power might be useful for minority jury members).

304. United States v. Lopez, 581 F.2d 1338, 1341-42 (9th Cir. 1978); see supra note 1 and accompanying text.

jury room, one should not say that their views do not matter. Therefore, to prevent the majority members of a jury from silencing the minority, the unanimity requirement should be retained.