WAIVER OF JURY UNANIMITY—SOME DOUBTS ABOUT REASONABLE DOUBT

Unanimity of twelve jurors was an essential element of jury trial at common law at the time the Constitution was adopted and thus was embodied in that document.¹ Many states, however, have deprived litigants of their right to a unanimous verdict in civil cases by constitutional amendments and statutory enactments.² A statute depriving parties to a civil suit in the federal courts of their right to a unanimous verdict has been held to violate the Seventh Amendment.³ A similar statute for criminal cases would violate the Sixth.⁴ Nevertheless, majority verdicts are possible in the federal courts. Rule 48 of the Federal Rules of Civil Procedure provides that the parties in a civil action may stipulate before or during trial for a majority verdict. Thus the system recognizes a distinction between depriving the parties of the right to a unanimous verdict and allowing them to agree to a majority verdict.⁵

The possibility of waiver in civil trials might lead to the conclusion that it should be permitted in criminal cases.⁶ But in Hibdon v. United States⁷ the Court of Appeals of the Sixth Circuit recently held that a defendant in a felony case following jury disagreement could not waive the right to unanimity and accept a majority verdict. The decision leads to a consideration of the importance of the right to unanimity in jury trials. This comment will review the constitutional and practical problem of deprivation and waiver of unanimity in criminal cases in the federal courts.

I

That the accused in a criminal case may waive trial by jury has been firmly established.⁸ The early decisions encountered two obstacles to permitting such

² Consult 27 N.C.L. Rev. 539 (1949) for a summary of the state legislation. Also see 43 L.R.A. 3 (1899); 24 L.R.A. 272 (1894); Winters, Majority Verdicts in the United States, L. Soc. J. 380 (1942). In many states, statutes providing for majority verdicts were declared unconstitutional because the particular state constitutions were interpreted as requiring unanimous verdicts, e.g., Power v. Williams, 53 N.D. 54, 205 N.W. 9 (1925); Rawleigh v. Snider, 207 Ind. 686, 194 N.E. 356 (1935); Coca Cola Bottling Works v. Harvey, 209 Ind. 262, 198 N.E. 782 (1935). The Supreme Court held such enactments not to be in violation of the Federal Constitution in Maxwell v. Dow, 176 U.S. 581 (1900).
⁴ See Thompson v. Utah, 170 U.S. 343 (1898).
⁵ A similar distinction is made in Minnequa Cooperage v. Hendrick, 130 Ark. 264, 197 S.W. 280 (1917), where it was held that a statute providing for a three-fourths verdict was unconstitutional though the parties "might have agreed that a less number than the whole might render a verdict."
⁶ Various preliminary distinctions can be made at this point: The burden of proof in criminal cases is greater than in civil cases; in civil cases life or liberty is not at stake and many more opportunities for compromise are present.
⁷ 204 F. 2d 834 (C.A. 6th, 1953). The defendant was convicted on remand.
⁸ Patton v. United States, 281 U.S. 276 (1930); Adams v. United States ex rel. McCann, 317 U.S. 269 (1942); Ferracane v. United States, 47 F. 2d 677 (C.A. 7th, 1931); United States
waiver. Trial by jury was considered an element of due process of law which the accused could not waive. Since he could waive trial entirely, however, by pleading guilty, waiver of trial by jury was allowed. It was also argued that a court had no power to try a criminal case without a jury. But in Schick v. United States the Supreme Court said "... a court is fully organized and competent for the transaction of business without the presence of a jury."

The courts next considered whether the defendant could waive one or two jurors during the course of the trial and before deliberation. In Dickinson v. United States a circuit court held that he could not. A dissent made the argument that "our constitutional provisions in respect to jury trials in criminal cases are for the protection of the interests of the accused, and as such they may in a limited and guarded measure be waived by the party sought to be benefited." Quoting substantially from this dissent, the Supreme Court in Patton v. United States held that such a waiver was permissible if the judge and prosecutor consented. Justice Sutherland, for the majority, went further in attempting to establish a logical basis for the decision. Waiver of trial by jury and waiver of a number of the jurors were deemed equivalent. On the basis of this analysis, it could be argued that waiving any element of the jury is permissible because it


In earlier cases waiver of jury trial was frequently not permitted. "The suggestion that the effect of the sixth amendment is to modify the force and effect of the jury clause in the third article by converting a constitutional requirement into a privilege which an accused may exercise or not, as he may elect, is not tenable." Low v. United States, 169 Fed. 86, 91 (C.A. 6th, 1909). Accord: United States v. Taylor, 11 Fed. 470 (C.C. Kan., 1882); Coates v. United States, 290 Fed. 134 (C.A. 4th, 1923).

"No one has a right by his own voluntary act to surrender his liberty or part with his life." Low v. United States, 169 Fed. 86, 91 (C.A. 6th, 1909).

Bugg v. United States, 140 F. 2d 848 (C.A. 8th, 1944); Hood v. United States, 152 F. 2d 431 (C.A. 8th, 1946).

195 U.S. 65, 70 (1904).

159 Fed. 801 (C.A. 1st, 1908).

Ibid., at 821.

14 281 U.S. 276 (1930).


16 "[W]e must reject in limine the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by less number than twelve, and must treat both forms of waiver as in substance amounting to the same thing." Patton v. United States, 281 U.S. 276, 290 (1929). The Court overlooked the fact that in a bench trial, the judge trained in law determines issues of fact. In trial by jury—even reduced in number—lay jurors make this determination. Cf. 26 Geo. L.J. 762 (1938) where the Patton case was approved. "[I]t ought not have been disturbing ... because it did not involve a trial by the court instead of a jury." See Commonwealth v. Hall, 291 Pa. 341, 140 A. 626 (1928), where a distinction was drawn between trial by the judge and trial by a reduced number of jurors and the court held that the defendant could not waive the entire jury. Waiver of one or two jurors, however, seemed to be approved by the court.
is equivalent to waiving the entire constitutional jury. This was the position taken by the government in the *Hibdon* case.\(^\text{17}\)

Certain elements of criminal procedure, however, may be more necessary than others. In addition to guaranteeing the right to trial by jury, the Sixth Amendment provides that a defendant in a criminal proceeding cannot be deprived of the right to speedy and public proceedings,\(^\text{18}\) the right to have the advice of counsel,\(^\text{19}\) or the right to be confronted with witnesses against him.\(^\text{20}\)

Yet these elements are considered rights which may be waived under proper circumstances.\(^\text{21}\)

Other elements cannot be waived because their absence under any circumstances constitutes lack of due process.\(^\text{22}\) Where the courts draw the line between waivable and essential elements is difficult to discern.\(^\text{23}\) Jurisdiction over the subject matter and the necessity for charging an offense are striking examples of essential elements as defined in the federal courts. The conclusion as to the

\(^{17}\) Brief for the Government at 7.

\(^{18}\) Ex Parte Pickerill, 44 F. Supp. 741 (N.D. Tex., 1942) (right to speedy trial); Davis v. United States, 247 Fed. 394 (C.A. 8th, 1917) (right to public trial).

\(^{19}\) Glasser v. United States, 315 U.S. 60 (1942).


\(^{21}\) United States v. Sorrentino, 175 F. 2d 721 (C.A. 3d, 1949) (right to public trial may be waived); Morland v. United States, 193 F. 2d 297 (C.A. 10th, 1951) (right to speedy trial may be waived); Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) (right to counsel may be waived); Diaz v. United States, 223 U.S. 442 (1912) (right of confrontation may be waived). The prosecutor's consent often is necessary. If such consent is required, it may be seriously questioned whether these aspects of jury trial are rights. If they are rights, no prosecutor should have the power to deny to the defendant ability to waive them. Broder, *The Functions of the Jury: Facts or Fictions?*, 21 Univ. Chi. L. Rev. 386 (1954). Rees v. United States, 95 F. 2d 784 (C.A. 4th, 1938) (waiver of jury denied where government counsel refused to consent). Accord: *C.I.T. Corp. v. United States*, 150 F. 2d 85 (C.A. 9th, 1945); United States v. Dubrin, 93 F. 2d 499 (C.A. 2d, 1937).

\(^{22}\) "The doctrine of waiver does not extend to those matters that are made essential; and the reason is that a strict compliance with all essential formalities in a felony case is necessary to constitute a proceeding by 'due process of law.'" *Spurgeon v. Commonwealth*, 86 Va. 652, 655, 10 S.E. 979, 980 (1890). Also see *Simons v. United States*, 119 F. 2d 539 (C.A. 9th, 1941), where the court said any waiver would be ineffectual if it deprived the defendant of due process of law.

\(^{23}\) Several standards seem to be applied: (1) Does the public have an interest? *State v. Loveless*, 62 Nev. 17, 136 P. 2d 236 (1943), defect in the verdict (designation of degree of crime) not waivable. (2) Does it effect the court's jurisdiction? *Stewart v. State*, 41 Ohio App. 351, 181 N.E. 111 (1932), grand jury indictment not waivable. (3) Is it an essential element? *Spurgeon v. Commonwealth*, 86 Va. 652, 10 S.E. 979 (1890), proper summoning of jurors not waivable. Such verbalism, of course, does not aid in discovering any underlying distinctions. Each element must be considered in its own context to determine whether its absence violates due process and thus whether or not it may be waived.


\(^{25}\) "A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court." *Albrecht v. United States*, 273 U.S. 1, 8 (1926).
essentiality of the unanimity requirement depends on an analysis of its role in the context of the jury’s function in criminal cases.

II

The Sixth Amendment guarantees the right to trial by jury in criminal cases. Yet in the Hibdon case Judge Simons seems to rely on the due process clause of the Fifth. Justice cannot be done to his argument without setting it out in full:

The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms. We are of the view that the right to a unanimous verdict cannot under any circumstances be waived, that it is of the very essence of our traditional concept of due process in criminal cases, and that the verdict in this case is a nullity because it is not the unanimous verdict of the jury as to guilt.

There seem to be two assumptions implicit in this argument: (1) The unanimity requirement guarantees proof beyond a reasonable doubt. (2) Proof beyond a reasonable doubt is an element of due process in criminal cases. The present posture of the Supreme Court of the United States would appear to support the second assumption. But the first proposition is open to question.

It is logically possible to distinguish the necessity for convincing an individual juror and the necessity for convincing the jury as a group. Proof beyond a reasonable doubt may be the criterion in either case. As applied to the individual juror, proof beyond a reasonable doubt means the subjective psychological standard which must be met in order for him to vote for a guilty verdict. Judge Simons’ concept of proof beyond a reasonable doubt is cast in terms of the necessity for convincing a group. To constitute proof beyond a reasonable doubt, the entire group of twelve jurors must be convinced. He seems to say that an “objective” reasonable doubt as to guilt exists if one or more of the jurors entertain subjective reasonable doubts.

26 Hibdon v. United States, 204 F. 2d 834, 838 (C.A. 6th, 1953).

27 “It is the duty of the government to establish his guilt beyond a reasonable doubt. This notion . . . is a requirement and a safeguard of due process of law in the historic, procedural content of ‘due process.’” Frankfurter, J., dissenting in Leland v. Oregon, 343 U.S. 790, 802 (1952). In the Leland case the assumption underlying both the majority and dissenting opinions was that proof beyond a reasonable doubt was an element of due process.

28 “A reasonable doubt may be defined to mean such a doubt as will leave the juror’s mind, after a candid and impartial investigation of all the evidence, so undecided that he is unable to say that he has an abiding conviction of the defendant’s guilt, or such a doubt as in the graver and more important transactions of life, would cause a reasonable and prudent man to hesitate and pause.” Egan v. United States, 287 Fed. 958, 967 (App. D.C., 1923) (emphasis added).

29 This view also seems to have been present in 22 Cornell L.Q. 415 (1937).

30 The notion is not entirely new. The following instruction labors under the same view:

“A distinguished judge . . . once said that where a large majority were in favor of acquittal, it was a reasonable and moral duty of a small minority in favor of conviction to yield their views and concur with a decided majority of their fellow jurors on the ground of a reasonable
In applying the concept of reasonable doubt to the need for convincing the entire jury, Judge Simons seems to analogize the group of jurors to the mind of the individual juror. But if this analogy were carried to its logical conclusion and were to have legal significance in the situation where the jury cannot agree, it would seem that the jury as a group should have the same two alternatives as the individual juror. He can vote guilty, or if he entertains a reasonable doubt, not guilty. If any juror has a reasonable doubt, then the "group mind" has a reasonable doubt, and the group should also vote a not guilty verdict. But the law is that the jury is "hung" and a new trial is necessary. This inconsistency seems to indicate that the analogy is faulty, because it is valid only where all the jurors agree on guilt or innocence. Proof beyond a reasonable doubt should be confined to the subjective standard applied by the individual juror, and unanimity—a group concept—must be justified in some other terms.

That majority verdicts and the individual reasonable doubt standard can coexist is illustrated by the fact that constitutional provisions in Louisiana and

The analogy between the mind of a single individual and the "group-mind" of an entire jury has been made before in a slightly different context. Consult 14 A.B.A. Rep. 281 (1891) where the mind of a judge in attempting to reach a decision is compared to the jury as a group attempting to reach a verdict. The suggestion there is that the judge reaches what amounts to a majority verdict (a majority of his thoughts), whereas the jury must always reach a unanimous verdict.

Of course, the prosecutor may elect to drop the proceedings. A new trial does not put the defendant in jeopardy a second time. Dreyer v. Illinois, 187 U.S. 71 (1902).

The distinction between the subjective individual standard known as proof beyond a reasonable doubt and the unanimity concept is succinctly stated in 137 A.L.R. 394 (1942): "The reasonable doubt to which the foregoing rule refers is, of course, a reasonable doubt in the mind of any juror rather than a collective doubt shared by the majority of the jury. If one juror has a reasonable doubt of the guilt of the accused he cannot vote for a conviction, with the result under the rule requiring a unanimous verdict, that there can be no conviction so long as one juror has a reasonable doubt of the guilt of the defendant." (Emphasis added.)

In Louisiana, nine men out of a twelve man jury may render a verdict in felonies necessarily punishable at hard labor.
Oregon make it possible to deprive defendants of the right to a unanimous verdict in non-capital felony cases. Yet the necessity for convincing the individual juror beyond a reasonable doubt is preserved. The judge's instruction, as in all other jurisdictions, is addressed to the individual juror.

It is possible to recognize the distinction between unanimity and proof beyond a reasonable doubt and still agree with Judge Simons when he later states that permitting waiver of the unanimity requirement would lead to a lightening of the prosecutor's burden of persuasion. Because the system has always equated the prosecutor's burden of persuasion with the requirement of proof beyond a reasonable doubt, it is semantically difficult to distinguish these elements. But the prosecutor's burden of persuasion can also be divided into two elements: the necessity for convincing the individual juror beyond a reasonable doubt and the need for convincing all twelve of them. If the second element is removed by permitting waiver of unanimity, it can be said, in a very real sense, that the prosecutor's burden of persuasion is lessened. But it does not destroy the requirement of proof beyond a reasonable doubt if that concept is limited to the necessity for convincing an individual juror by a certain degree.

If, as Judge Simons believes, the unanimity requirement is an element of due process under the Fifth Amendment, then the Louisiana and Oregon provisions for majority verdicts are violations of the due process clause of the Fourteenth Amendment. It has been shown that his argument that the unanimity requirement guarantees proof beyond a reasonable doubt is open to question. It still may be argued, however, that the prosecutor's traditional burden of persuasion can also be divided into two elements: the necessity for convincing the individual juror beyond a reasonable doubt and the need for convincing all twelve of them. If the second element is removed by permitting waiver of unanimity, it can be said, in a very real sense, that the prosecutor's burden of persuasion is lessened. But it does not destroy the requirement of proof beyond a reasonable doubt if that concept is limited to the necessity for convincing an individual juror by a certain degree.

*Oregon Const. Art. 1, § 11. Ten men out of a twelve man jury may render a verdict except where the verdict is guilty of first degree murder.*

*In two recent comments on the Hibdon case the distinction between burden of proof and burden of persuasion was not observed. Consult 49 Va. L. Rev. 1101 (1953); 1 U.C.L.A. L. Rev. 106 (1953). Statements that the burden of proof is lessened by acceptance of majority verdicts are incorrect. The burden of proof (beyond a reasonable doubt) is not affected unless Judge Simons' group concept is accepted. Then it is destroyed, not lessened. This is true whether burden of proof refers to the objective facts necessary to be shown or to the degree of proof in the mind of each juror. Only the burden of persuasion can be lessened.*
suading twelve jurors is so lightened by permitting majority verdicts, that they violate due process. But an Oregon case construing the constitutional provision held that it did not violate the requirement of due process. And in *Maxwell v. Dow*, the Supreme Court of the United States, referring to the power of the states in both civil and criminal cases, said in obiter:

[It] is in entire conformity with the character of the federal government that they [the states] should have the right to decide for themselves what shall be the form of procedure in such trials ... and whether the verdict must be unanimous or not.

These cases are not authoritative holdings. Other considerations are still relevant if they indicate that the unanimity requirement is not as sacrosanct as Judge Simons supposes. In theory there are no compromise verdicts in criminal cases. Yet there are situations where the jurors may reach agreement just to end deliberation—not because all of them are convinced beyond a reasonable doubt that the defendant is guilty or innocent. Opportunities for compromise verdicts also occur where the jury is allowed to determine or recommend punishment. A recalcitrant juror may give in provided that a certain punishment shall or shall not be imposed. Other opportunities for compromise occur when the jury is permitted to find the defendant guilty of a crime within a crime. In both these situations there is the possibility that the jurors will not reach true unanimity. Of course this possibility is always present but the chance is greater when an alternative conclusion is available to the jury.

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43 State v. Osbourne, 153 Ore. 484, 57 P. 2d 1083 (1936).
44 176 U.S. 581 (1900).
45 Ibid., at 605.
46 Consult generally Barnett, op. cit. supra note 32.
47 E.g., 62 Stat. 760 (1948), 18 U.S.C.A. § 1201 (1950). Some states complicate the situation by permitting a majority of the jury to determine punishment. See Fla. Stat. Ann. § 919.23 (1951). "Whoever is convicted of a capital offense and is recommended to the mercy of the court by a majority of the jury in their verdict shall be sentenced to imprisonment for life... ." The Supreme Court construing a federal statute has held that the jury's decision upon both guilt and whether punishment of death should be imposed must be unanimous.
48 See People v. Rogan, 1 Cal. 2d 615, 36 P. 2d 631 (1934), where the prosecutor urged the jurors not to surrender their convictions by way of compromise and agree to a verdict with a lesser penalty merely for the sake of reaching agreement.
49 Reed v. State, 2 Ga. App. 153, 58 S.E. 312 (1907). A verdict of guilty of manslaughter was manifestly a compromise, six believing defendant a murderer and six believing him innocent. The Georgia Court of Appeals ordered a new trial. Such compromises are not always discovered.
50 Another argument, if valid, indicates that the unanimity requirement has been encroached upon. Rule 23b of the Federal Rules of Criminal Procedure provides that “Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with approval of the court that the jury shall consist of any number less than 12.” It has been argued that this rule is but a step in the direction of majority verdicts in that it is “a method to eliminate the juror who might hold out for a not guilty verdict. Anyone with experience knows that often the judge and prosecutor have information as to how the jury stands, while the defense is in the dark upon the subject.” Stewart, Federal Rules of Criminal Pro-
A factor not considered by Judge Simons is that the unanimity requirement also guarantees a certain minimum deliberation prior to the verdict. Ordinarily there is not immediate agreement when a jury goes out to deliberate. "The very object of the jury system is to secure unanimity by a comparison of views and by agreement among the jurors themselves." Where a defendant is permitted to waive the unanimity requirement, a minority view, though intelligent and reasonable, may never be heard. There is always the possibility that such an intelligent minority may be able to persuade the majority. By waiving the unanimity requirement, the defendant loses the benefit of a view which might ultimately acquit him. This difficulty was avoided in the Hibdon case since prior deliberation had occurred. If waiver of unanimity were to be permitted, a rule requiring minimum deliberation could easily be devised.

The idea of permitting defendants to waive the unanimity requirement is not completely new. Rule 29 of the proposed First Draft of the Federal Rules of Criminal Procedure provided that, "verdict shall be unanimous but by the written stipulation of the parties approved by the court it may be a stated majority of jurors." As Judge Simons points out, this rule was never approved. Yet some commentators thought the rule constitutional on the authority of the Patton case.

Zeißler, op. cit. supra note 32, at 60.


"It is unquestionably true that the greater the number of persons entertaining a conclusion the greater the probability of that conclusion being sound and true." Clark, Should Verdicts Be Unanimous in Criminal Cases?, 46 A.B.A. Rep. 591 (1921).

"But this means the views of a minority, as well as the views of the majority, of the jurors, should be given careful consideration by their fellows." Counts v. Commonwealth, 137 Va. 744, 748, 119 S.E. 79, 81 (1923).

Of course by waiving the unanimity requirement, the defendant is gambling that the majority will vote for him and that the minority against.

Even the Hibdon case was rather extreme. The jury went out for only twenty-seven minutes (during the lunch hour) before they returned and reported their disagreement.

Scotland permits majority verdicts in civil cases after six hours of deliberation. Minnesota and Nebraska also permit majority verdicts in civil cases after a minimum period of deliberation.

Orfield, Criminal Procedure from Arrest to Appeal 483 n. 641 (1947). "Its validity seems implicit in Patton v. United States." See Report to Judicial Conference of the Committee on Selection of the Jurors (1942) 11 Appendix 2-3, where a committee of federal judges recommended such a provision. Also see 27 J. Am. Jud. Soc. 47 (1943), where Rule 29 is approved and the Patton case is cited in support of the rule.
The Hibdon case raised the problem of waiving unanimity for the first time. Because it appears to operate against the defendant in every case, it seemed unlikely that the problem would ever arise. Yet there may be factors which will move a defendant to waive unanimity. When the jury disagrees, the defendant may be willing to gamble to avoid a new trial. He may also evaluate his case and decide it has convinced a majority of the jury. But the prosecutor's consent is necessary. He will agree to the waiver only when he believes that a majority of the jury will convict. It is doubtful that both parties will reach diametrically opposed views as to the probable result; therefore waiver of unanimity will rarely occur. Yet waiver occurred in the Hibdon case.

Whenever the possibility of waiver exists, the danger of coercion is also present. The possibility of coercion is strongest in situations like the Hibdon case where the judge initiates the waiver suggestion in the presence of the jury after it has disagreed. The defendant's refusal may not only incur the judge's disfavor but may prejudice the jury. By his refusal they are being kept from their homes. If the judge makes the suggestion out of the presence of the jury the possibility of prejudicing them is lessened. Yet judicial disfavor—which will operate against the defendant at the sentencing stage—may be present. A rule preventing the judge from making the suggestion at any stage of the trial might avoid this difficulty. But the possibility remains that he will consider the defendant's lack of cooperation in not offering to waive the unanimity requirement.

The possibility of prejudice in the Hibdon case distinguishes it from the Patton case. In the Patton situation the defendant's refusal to waive causes a mistrial and the jurors go home. They will not be prejudiced. But in the Hibdon

17 Fla. L.J. 234 (1943), a comment on the original Rule 29 of the Federal Rules. "The adoption of such rule would be time and ink thrown away. No attorney of any judgment or discretion . . . will sign a stipulation that a verdict may be returned by a majority unless he believes that a majority favors acquittal." That particular commentator would probably have been horrified by the Hibdon case.

It has been suggested that disagreement will be reported only when a majority are for conviction. Where a majority are for acquittal, the jurors will usually resolve their differences and reach a not guilty verdict. See Clark, op. cit. supra note 53. If this suggestion is valid, then few defendants will ever realistically decide that a majority is in their favor.

61 Note 21 supra.
62 Bishop, New Criminal Procedure § 121 (1895).
63 The waiver of unanimity in the Hibdon case was plainly the result of judicial coercion or at least an attempt to secure judicial favor. See Brief for Defendant at 15. "The trial court's query whether the parties would be willing to accept a majority verdict is not claimed to be coercive upon the defendant but it was 'inducive' and an 'impelling' force or motive for appellant to consent." There is no doubt then that on the basis of its own particular facts, the Hibdon decision was correct.

Such prejudice may never be manifest. Yet no rule of procedure can completely eliminate it. A crowded docket and a prolonged disagreement may well cause the judge to cast stony glances at the defendant.
situation, the judge may send the jurors back for further deliberation. The possibilities of prejudice are great. This may be a further reason for permitting waiver in the *Patton* situation but not in the *Hibdon* case.

IV

*Hibdon v. United States* conflicts with the *Patton* doctrine that any element of the jury can be waived. The Louisiana and Oregon constitutional and statutory provisions indicate that unanimity is not necessary to guarantee proof beyond a reasonable doubt. Another possible interpretation of the *Hibdon* case is that unanimity is an essential element of due process because it is part of the prosecutor's traditional burden of persuasion. But other courts have indicated a contrary view. In addition, other elements in the legal system indicate that unanimity is not as pervasive or essential as is commonly supposed. On constitutional grounds, then, waiver of unanimity is not distinguishable from waiver of other procedural guarantees and should be permitted.

The possibility is slight that the defendant guided by intelligent counsel will waive unanimity. Most waivers would be coerced by the fear of prejudice. Since this possibility is ever present, waiver of unanimity should not be permitted under any circumstances. This would be a just and reasonable rule of administration for the federal courts.

"At this point waiver of unanimity is distinguishable from waiver of other elements. It is unlikely that refusal to waive other elements will cause frustrating delay as occurs when a jury is "hung.""

""Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.... Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts." *McNabb v. United States*, 318 U.S. 332, 340 (1943).

THE EN BANC PROCEDURES OF THE UNITED STATES COURTS OF APPEALS

In each of the eleven Federal Judicial circuits there is established a United States Court of Appeals composed of from three to nine circuit judges. It has been the custom of the courts of appeals in trying cases to divide into panels of three judges. In 1941, however, the Supreme Court in *Commissioner of Internal Revenue v. Textile Mills Securities Corporation* ruled that the judges of the courts of appeals had the power to convene all of the active circuit judges to try


In addition to the circuit judges of the circuit any other circuit or district judge in the country and any supreme court justice appointed to the circuit are competent to hear cases in any court of appeals. 28 U.S.C.A. §§ 42, 292(a) (1949).

2 314 U.S. 326 (1941), aff'g 117 F. 2d 62 (C.A. 3rd, 1940).