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Arthur Jay Silverstein

REBUTTAL: AN ALTERNATE VIEWPOINT ON THE RELATIONSHIP OF UNANIMOUS VERDICTS AND REASONABLE DOUBT

ARTHUR JAY SILVERSTEIN*

In a recent article in this *Review*,[1] Professor Anthony A. Morano argued that the holding of the Supreme Court of the United States in *Johnson v. Louisiana*[2] that jury unanimity was not mandated had destroyed what *United States v. Perez*[3] had established: namely, "the integrity and reality, not only of unanimous jury verdicts, but also of the reasonable doubt rule."[4] Professor Morano's contention was that the combination of a reasonable doubt standard and a unanimous jury requirement protects the defendant's rights and effectuates society's interest in retrying a defendant who cannot be unanimously acquitted.[5]

This rebuttal of Mr. Morano's article will focus on two particular issues which he raised and will suggest alternate conclusions to be drawn from case law and logic. Part I is a discussion of *United States v. Perez;* it offers a more limited view of the rule of law established by that case. Rather than analyze the present state of the law concerning split verdicts and hung juries as defined in such cases as *Johnson v. Louisiana* and *Apodaca v. Oregon*,[6] Part II concentrates on the inadequacy of retrial after hung juries as a mechanism to balance the interests of parties to a criminal trial.

I. THE RATIONALE OF *United States v. Perez*

Professor Morano explained in his article that until 1866 British jurors were coerced into unanimity by being forbidden their discharge and deprived of food and necessities until a verdict was reached.[7] Mr. Morano continued that American courts were faced with a dilemma when a jury was unable to agree on the unanimous verdict required. Some courts favored the British rule forbidding

*Member of the Bars of New Jersey and District of Columbia.

1. Morano, *Historical Development of the Interrelationship of Unanimous Verdicts and Reasonable Doubt*, 10 VAL. U.L. REV. 223 (1976) [hereinafter cited as Morano].
2. 406 U.S. 356 (1972).
3. 6 U.S. (9 Wheat.) 194 (1824).
4. Morano, *supra* note 1, at 224.
5. *Id.* at 229-30.
6. 406 U.S. 404 (1972).
7. Morano, *supra* note 1, at 224.

discharge of a jury before a verdict, and thus more extreme necessity was needed to justify putting the defendant to a second trial. Other courts held a hung jury might be discharged if the trial court decided further deliberation would not result in agreement, and thus a retrial would be held for the defendant. This latter approach was adopted by the Supreme Court in 1824 in *United States v. Perez.*

It is Mr. Morano's contention that "[t]he rationale of this prevailing [*Perez*] position was to assure the integrity of unanimous jury verdicts by relieving jurors of the coercive British rules."[8] However, an analysis of *Perez* fails to indicate that that decision was at all concerned with the degree of integrity inherent in unanimous jury verdicts rendered free of coercion. Mr. Morano correctly notes that the "clearest statement of this rationale appears in *People v. Olcott,*"[9] an 1801 New York case. But there is no evidence to support the existence of any influence of the *Olcott* rationale on the United States Supreme Court 23 years later when it rendered its decision in *Perez. Olcott* was not discussed or cited in the latter case, which never indicated a concern for the integrity of unanimous jury verdicts.

Perez held in substance that the failure of a jury to agree on a verdict is grounds for the discharge of that jury, but it constitutes no legal bar to a future trial. The *Perez* Court indicated:

> [I]n all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.[10]

The terse *Perez* decision never specifically mentioned the fifth amendment or double jeopardy. However, in *United States v. Haskell,*[11] decided one year before *Perez,* Mr. Justice Washington, riding circuit, analyzed the fifth amendment and perhaps provided an insight into the thinking of the Supreme Court at that time regarding double jeopardy and hung juries.

The *Haskell* case involved a hung jury caused by the alleged insanity of one of the jurors. Among other grounds the defendant cited the fifth amendment as a bar to retrial. Justice Washington wrote:

8. *Id.* at 226.
9. *Id.* at 226 n.19.
10. 6 U.S. (9 Wheat.) 194 (1824).
11. 26 F. Cas. 207 (No. 15, 321) (C.C.E.D. Pa. 1823).

> [W]e are clearly of the opinion, that the jeopardy spoken of in this article [fifth amendment] can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon. This was the meaning affixed to the expression by the common law, notwithstanding some loose expressions to be found in some elementary treatises, or in the opinions of some judges .... [T]hat article does not apply to a jeopardy short of conviction.[12]

It should be noted that neither *Perez* nor *Haskell* discussed the policy arguments of forcing a jury to agree. Rather, these cases were concerned with the meaning of the term "jeopardy" in the fifth amendment and the intended scope of the amendment, and they emphasized the trial court's responsibility to exercise carefully its discretionary power to grant retrials.

The only legal issue considered by the *Perez* Court was when jeopardy attached for the purposes of barring another trial by virtue of the fifth amendment. In the United States, several state courts (whose views are acknowledged in *Perez* and *Haskell*) had formulated a rule to the effect that jeopardy attaches at the moment the jury is sworn and empanelled. Under such a formulation, the defendant could not be tried again for the same offense without violating the double jeopardy clauses of state constitutions.[13] *Perez* was the medium through which the Supreme Court would resolve the issue of whether a hung jury had the effect of barring a subsequent prosecution. That this was the only purpose and impact of *Perez* has been mentioned in other writings. In a more recent case,[14] Mr. Justice Frankfurter cited *Perez* and stated:

> Mr. Justice Story had himself taken a non-literal view of the constitutional provision in *United States v. Perez* . . . where, writing for the Court, he found that discharge of a jury that had failed to agree was no bar to a second trial.[15]

Furthermore, Mr. Justice Story himself also cited the *Haskell* and *Perez* decisions as merely standing for the proposition that certain retrials are not barred by double jeopardy because jeopardy had not yet attached.[16]

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12. *Id.* at 212.
13. F. WHARTON, CRIMINAL LAW § 395 (12th ed. 1932).
14. Green v. United States, 355 U.S. 184 (1957).
15. *Id.* at 198, 203 (Frankfurter, J., dissenting).
16. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1787 n.3 (3d ed. 1858).

Thus, there is no evidence to support Professor Morano's contention that the *Perez* decision was intended to produce uncoerced, unanimous jury verdicts. Rather, *Perez* was concerned with the time of the attachment of jeopardy during a criminal trial in light of the defendant's fifth amendment protections.

II. A Balancing of Interests — The Hung Jury as Evidence of the Existence of Reasonable Doubt

Professor Morano's preference for retrial after a hung jury to achieve a unanimous verdict is reflected in his statement that:

> It is difficult to imagine a more perfect reconciliation of the community's interest in incapacitating criminals and its desire that the innocent be secure from conviction than that resulting from an integrated, interdependent unanimous verdict—reasonable doubt standard.[17]

Thus, Professor Morano advocates retrials after hung juries, since he believes this procedure will bring uncoerced unanimity to the verdict. He recommends unanimity to insure a verdict which is beyond a reasonable doubt, because he feels that a verdict rendered by a substantial majority of jurors increases the probability of both erroneous acquittals and convictions.[18]

Such an approach is by no means the most compelling or persuasive method of advancing societal interests. As an alternative, this rebuttal proposes that a hung jury does indeed reflect the existence of reasonable doubt and that retrials should not be granted after a hung jury.

An analysis of 161 hung juries by Professors Kalven and Zeisel has led them to conclude that hung juries are, for the greatest part, a response to the genuine questions of proof in the case.[19] In the case of hung juries, both the majority and minority jurors are exercising the intelligence needed for a proper deliberative verdict, but they are deadlocked because the evidence for some of them is insufficient to negate the presumption of innocence beyond a reasonable doubt. Consequently, even one hung juror should justify an immediate acquittal since he reflects the existence of reasonable doubt.

It is true that the Supreme Court impliedly refused this argument in *Johnson v. Louisiana*,[20] when it rejected the assertion

17. Morano, *supra* note 1, at 229.
18. *Id.*
19. *See* Kalven & Zeisel, *The American Jury*, 48 Chi. Bar Rev. 195, 201 (1967).
20. 406 U.S. 356 (1972). *See generally* Morano, *supra* note 1.

that a non-unanimous jury demonstrated the prosecution's failure to prove its case beyond a reasonable doubt and noted that in federal court a hung jury results in a retrial, not an acquittal.[21] Mr. Justice Marshall's dissent in *Johnson* offered some validity to the argument for acquittal, however, when it noted that the disagreement among the jurors in a hung trial is merely a showing that the prosecution had not proven its case beyond a reasonable doubt.[22] Marshall pointed out that to permit a second trial with new evidence before a new jury would give the prosecutor a second chance to present a stronger case for conviction, if he were able to do so; but that ignores the fact that the doubt of some of the original jurors automatically creates a constitutional bar to conviction at a subsequent trial.[23] It is suggested that courts in the future should follow Mr. Justice Marshall's lead and interpret the double jeopardy clause as one which denies the prosecution a second opportunity to convict after a hung jury.

Permitting a retrial after a hung jury detracts from the objective of minimizing the possibility of convicting one who has not commited any crime. If the state is permitted to try the issue before enough juries, conviction is arguably inevitable.[24] The government with its unlimited resources can make repeated attempts to convict the accused, thus enhancing the possibility that an innocent man will be found guilty. Lacking the resources of the state prosecutor, defense's presentation in retrials would degenerate in comparison. Successive retrials after hung juries begin to make the proceedings resemble a trial by attrition.[25]

Protection against double jeopardy is also designed to put to rest the fear of future prosecution or repeated prosecutions for harassment purposes. Hung juries and retrials, however, continue to prolong the agony and doubt. Although the trial ends in a hung jury, the defendant throughout the trial has been completely exposed to the risk of conviction. Also, a criminal action creates an inherent stigma on the defendant which ought to be kept to a minimum.[26] A person should not be required to suffer more than a single intrusion into his life by trial for each alleged infraction. Retrials after hung juries require a presentation of the entire case all over again: accusation,

21. 406 U.S. at 362-63.

22. 406 U.S. at 399, 401-10 (Marshall, J., dissenting).

23. *Id.* at 402.

24. *See* Carsey v. United States, 392 F.2d 810, 812-16 (D.C. Cir. 1967) (concurring opinion).

25. United States v. Castellanos, 349 F. Supp. 720, 723 (E.D.N.Y. 1972), *rev'd*, 478 F.2d 749 (2d Cir. 1973).

26. United States v. Jorn, 400 U.S. 470, 478 (1971).

cross examinations, and all the other unpleasantries of a criminal trial. The prosecution has had its day in court. If a trial on the merits has resulted in a hung jury, then the verdict should be acquittal. Apparently, the evidence has simply failed to persuade all the jurors that the defendant was guilty.

CONCLUSION

Professor Morano concluded his article by stating that if the *Perez* Court had held,

> that trial courts should instruct hung juries to acquit because of the prosecution's failure to satisfy its burden of persuading each member of the jury beyond a reasonable doubt . . . [then] it would have left the Court open to criticism for being unresponsive to society's interests in the administration of criminal justice.[27]

On the contrary, this rebuttal has demonstrated that the *Perez* Court was not concerned with bringing about uncoerced unanimity in jury verdicts. Furthermore, the empirical study of Kalven and Zeisel[28] and the persuasive logic of Mr. Justice Marshall's dissent in *Johnson*[29] indicate that acquittal after a hung jury is the alternative which is most responsive to society's interests in the realm of criminal justice.

27. Morano, *supra* note 1, at 230.
28. *See* note 19 *supra*.
29. *See* note 22 *supra*.

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