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Recommended Citation

Hans Zeisel, "The Waning of the American Jury," 58 American Bar Association Journal 367 (1972).

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The Waning of the American Jury

by Hans Zeisel

The Supreme Court used poor reasoning and misinterpreted available data to support its decision in *Williams v. Florida*, 399 U. S. 78 (1970), that the constitutional right to trial by jury does not include a requirement that the jury have twelve members. Now, with the six-member jury gaining vogue and the Supreme Court considering whether there is a constitutional right to unanimity of verdict, it is time to become concerned about the future of jury trial as we have known and enjoyed it.

SOME OF OUR STATES have six-member juries in minor civil cases, others in minor criminal cases, and three—Florida, Louisiana and Utah—even in felony trials. Nevertheless, when we think of a jury verdict, we think of the unanimous verdict of twelve jurors. The federal jury was the symbol of that notion. All that has now been changed by a landmark decision of the United States Supreme Court.

In *Williams v. Florida*, 399 U.S. 78 (1970), the Court held that the constitutional right to trial by jury does not include the right to a twelve-member jury. The fixing of the jury size at twelve, the Court found, was a "historical accident" for which no good reason could be found. The Court did not cite Sir Patrick Devlin's famous Hamlyn lectures, published as *Trial by Jury*, in which he muses: "Many romantic explanations have been offered of the number twelve—the twelve tribes of Israel, the twelve patriarchs . . . the twelve Apostles. Not all of these suggestions are equally happy; the first implies that there may be a thirteenth juror who has got lost somewhere in the corridor. . . ." But then he concludes in earnest: "It is clear that what was wanted was a number that was large enough to create a formidable body of opinion in favor of the side that won. . . ."

The Court, however, denying such wisdom to history, considers the number twelve an accident. Then by shifting to a different meaning of the word, the Court concluded that this was proof of the "accidental", meaning by that nonessential, character of the requirement of twelve.

The Seventh Amendment instructs firmly that suits at common law be tried before juries "according to the rules of the common law". It is

the only amendment that makes this specific reference to the common law. Therefore, it would seem immaterial as to how or why the jury became fixed at twelve; what alone matters is that it did become fixed at that number. About that point, history leaves no doubt. Sir Matthew Hale in his *History of the Common Law*, published in 1713, states: "Seventhly, then *twelve*, and *no less*, [emphasis added] of such as are indifferent are return'd upon the principal Panel, or the Tales, are sworn to try the same according to the Evidence."

Thus, the Court's first step in *Williams* was blemished. But it was needed to permit the *non sequitur* that the jury of six and the jury of twelve are functionally equivalent.

There are two immediate responses to this conclusion, and Justice Harlan made them in his passionate dissent. If six equals twelve, how about juries of three or two? And whence the reticence of the states that have six-member juries in felony trials to include capital cases into the provision? The majority of the Court, with what looked like an unusual deep bow to empirical evidence, cited not less than six "experiments" allegedly demonstrating the nonexistence of "discernible difference between the results reached by the two different-sized juries".¹

It is worthwhile to disinter the sub-

1. Wiehl, *The Six Man Jury*, 4 GONZAGA L. REV. 35, 40-41 (1968); Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L. J. 120, 134-136 (1962); Cronin, *Six-Member Juries in District Courts*, 2 BOSTON B. J. No. 4 at 27 (1958); *Six-Member Juries Tried in Massachusetts District Court*, 42 J. AM. JUD. SOC'Y 136 (1958); *New Jersey Experiments with Six-Man Jury*, BULL. OF SECTION OF JUD. ADMIN. OF A.B.A., May, 1966, at 6; Phillips, *A Jury of Six in All Cases*, 30 CONN. B. J. 354 (1965).



William Mares

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stance buried in these citations:

(1) Judge Wiehl approvingly cites Charles W. Joiner's *Civil Justice and the Jury*, in which Dean Joiner somewhat disingenuously states that "it could easily be argued that a six-man jury would deliberate equally as well as one of twelve". Since Dean Joiner had no evidence for his conclusion, Judge Wiehl also does not have any.

(2) Judge Tamm had presided over condemnation trials in the District of Columbia in which five-member juries are used and found them satisfactory.

(3) Mr. Cronin relates that the Massachusetts legislature had authorized on an experimental basis the use of six-member juries for civil cases in the District Court of Worcester, a civil court of limited jurisdiction. Forty-three trials were conducted, and the highest verdict was for a sum of \$2,500. The clerk of the court is said to have reported that "the six-member jury verdicts are about the same as those returned by regular twelve-member juries". Three lawyers also testified that they could not detect any differences in verdicts, one because "the panel is drawn from the regular supe-

rior court panel of jurors", another because "There seems to be no particular reason why the size of a finding would be affected by a six-man jury." All those trials, it seems, were given preferential scheduling to endear them to counsel.

(4) The Court's fourth cited authority consists of an abbreviated summary of the Massachusetts experiment and concludes that "the lawyers who use the district court, as well as the clerk, report that the verdicts are no different than those returned by twelve-member juries".

(5) The Judicial Administration Section publication contains the statement that "the Monmouth [New Jersey] County Court has experimented with the use of a six-man jury in a [*sic*] civil negligence case".

(6) Judge Phillips summarizes the economic advantages derived from the Connecticut law that permits litigants to opt for a six-member jury in civil cases. He advocates a mandatory reduction in jury size but never even mentions the problem of possible differences in verdicts in comparison to the twelve-member jury.

This is the evidence the Court relies on, without even a passing reference to the possible evaluation of the many thousands of felony cases, actually tried before smaller juries each year in Florida, Utah and Louisiana. Yet even without these data, the Court could have seen that its conclusion was in error. The six-member jury must be expected to perform differently from the twelve-member jury in several important respects.

People See and Evaluate Things Differently

The jury system is predicated on the insight that people see and evaluate things differently. It is one function of the jury to bring these divergent perceptions and evaluations to the trial process. If all people weighed trial evidence in the same manner, a jury of one would be as good as a jury of twelve because there would never be any disagreement among them. In fact, we know the opposite to be true, if not from observation of our community

then from the performance of our juries. Two thirds of all juries find their vote split at the first ballot in a criminal case.

There is, therefore, good reason to believe that the jury, to some extent, brings into the courtroom the differences in perception that exist in the community.

It should not be difficult to see that however well or poorly twelve people may represent a widely stratified community, a six-member jury must do less well. In fact, we can measure the degree of this poorer representation with some precision. Suppose we state the question this way: assume that there is a significant minority in the community, amounting to, say, 10 per cent of the population. The minority need not be a demographic one; it may represent any minority viewpoint, although the obvious concern is for representation of demographically defined minorities. Assume then that our juries are drawn at random from the eligible population. How often will a representative of that minority be on a twelve-member and how often on a six-member jury, both drawn from the same population? The answer is that, on the average, seventy-two of every one hundred twelve-member juries, but only forty-seven of every one hundred six-member juries will have at least one minority representative.

One may argue, and I would, that we should not confront each other as majority and minority. But at this juncture of history, it is apparently not the accepted view to disregard such differences. And to force on the jury a view that is not accepted in other spheres would seem to be a rash move.

A somewhat different model will help us to appraise the effect of the six-member jury in civil cases. We know from experience and from many careful studies that the values different people place on the harm done in a personal injury case are likely to diverge considerably.

The final award of a jury is very much related to these initial individual evaluations; in the end it is some kind of average. The size of the jury, therefore, matters a great deal in the deter-

mination of these awards. It can be shown that reducing the jury from twelve to six increases what one might call the "gamble" the litigants take by about 40 per cent. The term is not found in the law, but it describes a very real phenomenon—the fact that not all juries will decide a given case alike, while the litigants can have only one of these many possible jury trials. The extent of the "gamble" is easily established by asking any lawyer about to try a personal injury case two questions. What do you think will be the most likely verdict in this case? If you had to try this same case before ten different juries, what do you think their verdicts would look like? The second question will, as a rule, produce a very wide range, often from zero-verdicts (for the defendant) to considerable awards for the plaintiff. Well-established statistical analysis,² shows that this dispersion of verdicts for six-member juries will be about 40 per cent greater than for the twelve-member juries, hardly an "insignificant difference", as the Court called it. This is best understood by seeing the jury as a "sample" from the pool of all eligible jurors. As Gallup poll watchers, we know by now that the smaller the sample the greater the "sampling error", that is, the dispersion about the mean.

Number of Hung Juries May Be Reduced

In addition to being less representative and increasing the "gamble", smaller juries are also likely to reduce the number of hung juries. The hung jury is an expression of respect for a strongly held dissenting view; it is one of the many noble features of our jury system. And since, on the average, not more than 5 per cent of all trials end that way, it is a tolerable burden. Efficiency experts might welcome a still smaller percentage, but those concerned with the justice of our system should be wary.

The Court in *Williams* suggested that one juror against five is not worse off than two against ten, since it is the proportion that matters, not the absolute size. In support, the Court cited

The American Jury—but in error. There on page 463 my coauthor and I said the exact opposite—that it is not the proportions that matter but the numbers: "[For a juror] to maintain his original position [of dissent] . . . it is necessary for him to have at least one ally."

There was a quick way of testing whether the Court or we are correct. I obtained a special count from the Miami circuit court of the proportion of hung juries among its felony trials before six-member juries. As expected, the proportion was 2.5 per cent, exactly one half of the 5 per cent of hung juries obtained in regular twelve-member jury trials.

But after *Williams* and the diminution of the federal jury, an even more serious potential blow is now before the Court: the issue as to whether unanimity is essential in verdicts of criminal juries. The Court has noted probable jurisdiction (400 U.S. 900) in *Johnson v. Louisiana*, 230 So. 2d 825 (1970), and granted certiorari (400 U.S. 901) in *Apodaca v. Oregon*, 462 P. 2d 691 (1969), which involve the two states that allow majority verdicts in felony jury trials.

Offhand, the unanimity requirement appears to be just another way of reducing the size of the jury; allowing ten out of twelve jurors to find a verdict would seem to be tantamount to a ten-member jury. But it is much worse. Once one sees the problem with precision, the answer is quite clear. In a twelve-member jury, in which ten are allowed to find a verdict, one or two minority dissenters can simply be disregarded. It requires a minority of at least three before the majority is forced to take note of them. In a ten-man jury that must find unanimity, even a single minority dissenter must be taken into account.

One must ask—for example, with respect to a 10 per cent minority in the population—what is the probability that there will be at least three on a twelve-member jury and at least one on a ten-member jury? The answer is that the probability of at least one minority member on a jury of ten is 65 per cent, and the probability of at

least three minority members on a jury of twelve is 11 per cent.

The majority rule, aside from reducing the number of hung juries, should result also in more convictions. To obtain a conviction under the unanimity rule, the prosecutor must convince the last doubting juror of the defendant's guilt. We know individual jurors differ with respect to what they consider "proof beyond reasonable doubt". Some require more proof than others, and the two jurors who require most cease to count under a rule that allows ten jurors to find a verdict. During the American Bar Association meeting in London in the summer of 1971, *The New York Times* reported: "For several years British courts have been permitting jury actions on votes of ten to two, and statistics show that there have been more convictions, fewer acquittals and fewer hung juries than before."

In one remote corner of our law, we already have the powerful combination of both these features: juries of fewer than twelve members that can decide with majority vote. Under military law, a court-martial jury need consist of not more than five members, two thirds of whom can find a verdict. Lieutenant Calley and Colonel Henderson were tried before this kind of jury.

In our general jurisdiction, we are yet one step removed from this possibility, but it should give us pause. A six-member jury in which five jurors can find a verdict may still be a jury in name, but in fact it would be an institution very different from the twelve-member unanimous jury.

The Chief Justice, in his other capacity as presiding officer of the Judicial Conference, was quick to apply *Williams*. By now at least nineteen of the federal district courts have reduced the size of their civil juries from twelve to six in civil cases, and the Northern District of Illinois is experimenting with six-member juries in criminal cases, albeit with consent of both sides.

2. For a more detailed exposition of some of these thoughts, see Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710-724 (1971).

One wonders what is behind this new zeal for cutting into the jury. The ostensible argument is reducing costs and delay. But the money saved by having six-member civil juries in the federal court amounts to about 2.5 per cent of the federal judicial budget and to a little more than a thousandth part of 1 per cent of the total federal budget. As to the time likely to be saved, the best estimate is three tenths of 1 per cent of the judge's working time.³ There is obviously more to this concerted drive at this point of time.

Unconsciously, perhaps, the motives are likely to be similar to those that went into the rewriting of the military code of procedure; not only more effi-

ciency, but also less tolerance toward a dissenting minority. At present only about 10 per cent of the defendants prosecuted for a felony are acquitted; 90 per cent either plead guilty or are found guilty after trial. Is this too small a percentage? Will the country be safer if it is 91 per cent or 92? One wonders.

By reducing the chances of effective dissent from what the judge would do, we are attacking the jury itself. If we continue to reduce the power of the jury as it stood at common law, we may soon confront the question as to why a jury at all, or why so much of it. Not that this is an improper question. Most countries never had juries, and many of those that had them do

not have them any longer. To be sure, also their mode of selecting judges differs radically from ours.

My purpose is not to advocate or oppose any particular solution. It is merely to make clear that the changes imposed on our jury system are more serious than we are led to believe. They are effected, moreover, by the unobtrusive means of rule of court, instead of by the overt acts of the Congress or the state legislatures, which on second thought might consider these changes or their prevention to be their prerogative.

³ Zeisel, *supra* note 2, at 711.

Law Office Administration Course Is Announced

A ONE-WEEK institute on law office administration will be offered July 24-28 at the University of Minnesota in Minneapolis by University of Minnesota Continuing Legal Education in co-operation with the American Bar Association Committee on Legal Assistants. The institute is under the direction of Austin G. Anderson, a member of the Association's Committee.

The course of study at the institute will include:

I. The role of the managing partner, including the effective use of (1) law office managers, (2) clerical su-

pervisors, (3) financial managers, (4) outside consultants and (5) a librarian, as well as management by committees and multioffice management.

II. The role of nonlawyer administrators, including (1) physical plant, (2) personnel (clerical), (3) equipment, (4) scheduling, dockets and calendar control and (5) records management, filing and file conversion.

III. Making the practice pay, which will include consideration of accounting systems for law firms: (1) time records, (2) setting the fee, (3) converting time into dollars, (4) effective billing practices, (5) managing ac-

counts receivable and (5) payrolls.

IV. Effective use of the library: (1) staffing, (2) maintenance and (3) location.

The institute is designed for managing partners, law office administrators, comptrollers, personnel directors and others concerned with the managerial aspects of law practice in all sizes of firms. Registration is limited to one hundred, and the tuition fee of \$150 is transferable. For further information: Continuing Legal Education, University of Minnesota, 338 Nolte Center, Minneapolis, Minnesota 55455, telephone 612/373-5386.

Attorney-C.P.A.s Schedule Meeting

THE ANNUAL convention of the American Association of Attorney-Certified Public Accountants will be held May 24-28 at the Harbor Sheraton, San Diego, California. The program will include "Economic and Tax Costs of Operating as a Professional Corporation", "Buy-Sell Problems of Professional Corporations", "General Survey of Retirement Plans" and "Distribution from Qualified Retirement Plans". Further information may be obtained from the organization at 1900 Fourth National Bank Building, Tulsa, Oklahoma 74119.