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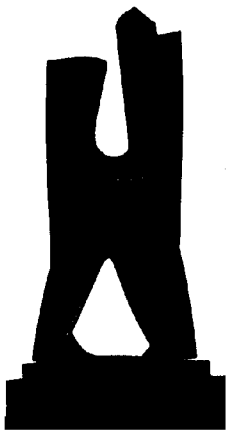

Six Man Juries, Majority Verdicts — What Difference Do They Make?

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Our jury has had its opponents ever since its inception, but it is only within the last decade that this opposition has reached what one might call the activist level. The first major dent came in 1970 with *Williams* v. *Florida* which stripped the 12-member jury of its constitutional protection by declaring 6-member juries constitutional, and for that matter smaller juries, too. A sequel came this last term, when the Supreme Court dispensed with the unanimity requirement. Two traditional properties of the jury were thereby stripped of their constitutional protection—at least in state criminal trials—and both these moves were based on the premise that these properties are of little significance. A moment's consideration will show this premise to be wrong.

Six Man Juries, Majority Verdicts — What Difference Do They Make?

By Hans Zeisel*

I

The Court in *Williams* v. *Honda* quite correctly emphasized community representation as an essential ingredient of our juries. By now, we know that in the crucial twenty percent of all jury trials in which the jury's verdict differs from what the presiding judge would have done, it is precisely the injection of the community's sense of justice which makes the jury verdict what it is. We also know, that in most every jury deliberation, something like an early first ballot takes place. Only about one-third of these first ballots are unanimous, the other two-thirds are split, some jurors voting for conviction, others for acquittal, and some jurors not yet committed. This, in spite of the fact that all jurors in a case have seen and heard the very same evidence, the same lawyers, and the same judge. This means that jurors perceive and evaluate the evidence differently, which should not surprise us. If jurors would never differ in their perception and evaluation, there would be no need to have ever more than one juror. But since in the real world jurors do differ, we are wise to have several of them.

The question is how, if at all, reducing their number from twelve to six will affect the verdicts. We might begin by conceiving of the jury as a sample from the eligible adult population, something like a Gallup Poll. Everybody knows that 12 jurors cannot really represent the whole community; but however

*This paper is based upon a presentation made by Hans Zeisel, Professor of Law and Sociology, The University of Chicago, at the July 1972 Conference of the Ninth Judicial Circuit.

poorly they do it, 6 jurors do it less well. An example will make this clear. Think of a ten percent minority in the population. You might think of the blacks, but you might also think, for instance, of people who are more tolerant toward deviant sexual behavior, or of people particularly incensed about the use of drugs. You then ask yourself: what are the chances in a random selection of jurors from this population, of having at least one member of this 10 percent minority on the jury? Simple calculus reveals that, on the average, 72 out of 100 randomly selected 12-member juries will have at least one such minority member. But among 100 juries of 6-members, only 47 will have such a minority representative. Hence, less frequent representation of minorities on our juries is one inevitable result of cutting down their size from 12 to 6.

A second result of this reduction in size is an increase in the gamble which litigants or defendants take in going before a jury; reduction of their size will reduce the predictability of jury verdicts. It will help if we think of the jury decision in personal injury cases, which form the bulk of the business that comes before our civil juries. In these cases, the individual jurors' differences in perception and evaluation express themselves in different ideas of what constitutes negligence, of how much an injury hurts, and of what an injury is worth. And we know that the final verdict in a case will be somewhere in the middle, some kind of average, of these different evaluations of the individual jurors.

An elementary statistical calculation again reveals that these averages of juror evaluations in comparable cases will fluctuate more in 6-member juries than they do in 12-member juries. To be precise, they will fluctuate by 41 percent more than the average evaluations of 12-member juries.* Again, the analogy with the Gallup Poll will help. We know that the smaller the size of a sample, the greater will be its margin of error. And here again we learn

* $\sqrt{2} - 1 = .41$

from calculus that reducing the sample size by one-half (e.g., from 1500 to 750—but also from 12 to 6) will increase the margin of error by some 41 percent. Translated into our jury problem, "margin of error" means wider fluctuations, reduced predictability—greater gamble.

Third, the 6-member juries produce fewer hung juries. From what we know about how hung juries develop, we should expect this result, and figures from the Miami, Florida, criminal court confirm this expectation. There the proportion of hung juries—Florida tries its felonies before 6-member juries—is two and a half percent, compared to five percent for the states using 12-member juries. One should have expected this result on two grounds. Think again of the hypothetical 10 percent minority in the population, only this time assume it is a minority of "stubborn dissenters." We know already that 6-member juries, on the average, will have such a dissenter only on 47 out of every 100 juries, compared to 72 out of 100 12-member juries. Thus on this ground alone, we should expect the 6-member jury to have but two-thirds as many hung juries as the 12-member jury. This difference is enhanced by a second element. Hung juries are hardly ever the result of one lone juror holding out from the beginning of the deliberation to its end. Normally, the hung jury develops from a sizable minority that keeps shrinking until one or two jurors decide to hang. A single, lone juror has not the strength of holding out unless he had, at the outset, some brothers with him in his dissent. And since there is a greater probability that "more than one stubborn dissenter" is being found on a 12-member jury than on a 6-member jury, the larger jury will convert more initial disagreements into hung juries than the smaller jury.

II

In *Williams* v. *Florida*, we were consoled by dicta that no evil could come from this reduction in the number of jurors as long as we have unanimous verdicts. But then it took but a short while before una-

nimity went by the boards. In *Johnson* v. *Louisiana* and *Apodaca* v. *Oregon*, the Court allowed Louisiana to continue its 9 to 3 verdicts in major crimes, and Oregon its 10 to 2 verdicts. Unanimity was no longer a constitutionally protected element of the trial by jury.

In Louisiana, where 9 jurors can simply outvote the other 3, at least four representatives of a dissenting minority are needed before the majority is forced to talk to them. In the instant case before the Court, the deliberation had lasted only 41 minutes which, as anyone knows, is about the bare minimum for a polite jury to come back after a decisive first ballot; jurors do not want to appear as not having properly discussed the case, even if in fact they had not.

Justice White said the minority on a jury will always argue its position and if it has anything to say, its view will be accepted; if it has nothing to say, it deserves to be rejected. The Court here fails to reckon with the realities of the deliberation process. A juror may be articulate with respect to his clear notion as to what in justice, the verdict should be; but he is not necessarily an eloquent advocate able to argue his position well.

In *Johnson* v. *Louisiana*, the Court had a particularly difficult hurdle to overcome, because the defendant claimed to have committed a lesser crime, classified only as misdemeanor. In Louisiana, a misdemeanor is to be tried before a 5-member jury whose verdict, however, must be unanimous. The defendant claimed that he had a better chance of escaping conviction before such a jury than before a 12-member jury, of which only 9 jurors had to agree on a verdict. The Court gave short shrift to this claim, branding it simply as a challenge of the "judgment of the Louisiana Legislature." Maybe that is what it was, but the substance of the challenge had merit. Again, simple calculus shows that the chances for effective dissent are greater on the 5-member unanimous jury; it is far more probable to find one member of a 10-percent population minority on a 5-member jury, than to find four such minority persons on a 12-member jury.

The Court, in these two cases, admitted that majority verdicts reduce the number of hung juries; there are good statistics from Oregon proving the point. But the Court was not bothered, because it expected the ratio between acquittals and convictions to be unaffected. Even if this expectation were correct, the defendant who under the unanimity rule would have had a hung jury but is convicted under the new rule, will find little consolation in the assurance that there is likely to be a balancing case in which a defendant who would have had a hung jury is now acquitted by a majority vote.

There is an amusing historical footnote to the Court's view that majority verdicts will not result in more convictions. In the eighteen-twenties, the French jury was composed of 12 members, and the defendant stood convicted if a majority of jurors found him guilty, otherwise he was acquitted. But if the number of guilty votes was just the bare majority of seven, the presiding collegium of judges could set the verdict aside and acquit the defendant. No such intervention was possible if the number of guilty votes was 8 or more. In 1830, the law was changed, requiring henceforth at least 8 guilty votes and removing thereby also the possible intervention by the tribunal. At that time, the great mathematician Poisson, a student of the performance of juries, was able to trace accurately by how much this slight increase in the required number of guilty votes would reduce the number of convictions. Yet the United States Supreme Court, one-hundred-fifty years later thought the much broader jump from unanimity to a 9-to-3 majority would make no difference.

III

Williams was a state criminal case. But there was a clear indication that the six-man jury would be deemed permissible in federal criminal cases. The interesting question was whether the six-man jury would be permissible in federal civil cases, for there the Court had to cope with the language of the

Seventh Amendment. In footnote 30 of *Williams* the Court stated:

> ...while much of our discussion in this case may be thought to bear equally on the interpretation of the Seventh Amendment's jury trial provisions, we emphasize that the question is not before us; we do not decide whether, for example, additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation.

After this statement, it was fair to assume further Supreme Court adjudication of the issue. But the Judicial Conference of the United States could not wait, and in March 1971 passed the following resolution:

> Be it resolved...That...the Conference approve in principle a reduction in the size of juries in civil trials in United States district courts, and upon such reduction that there be a diminution in the peremptory challenges normally allowed. It is also resolved that the means to effectuate the objectives set forth in this resolution, i.e., by *rulemaking* [emph. added] or statute, be referred to the Committees on Civil Rules and on the Operation of the Jury System.

One wonders from where the Judicial Conference obtained the power to effectuate the change in this manner, in light of Fed. R. Civ. P. 48, which explicitly assumes a 12-man jury, and of 28 U.S.C. § 1870, which guarantees three peremptory challenges to each side. These doubts have not been shared by the local district courts. Today, a majority of the district courts have extended *Williams* by local rulemaking to federal civil cases.

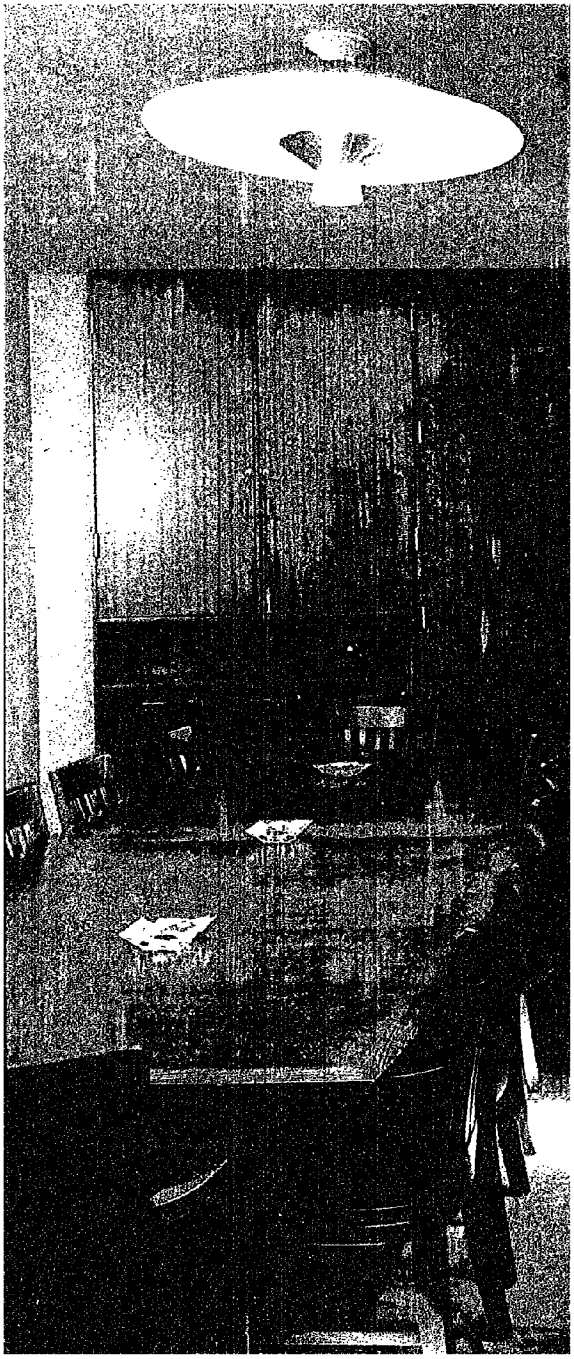
Will *Apodaca* be so extended? I do not think so. Once again, *Apodaca* involved a state criminal case, but in this instance the Court was more closely divided; only four Justices joined Justice White's opinion. Justice Powell, the fifth Justice needed to eliminate the unanimity requirement in state criminal cases, made it clear that he would not subscribe to the *Apodaca* rule in federal criminal cases. In those cases he would insist on unanimity. But extension to the Federal Courts would add only a small fraction to the cases now under the *Apodaca* rule,

since the overwhelming bulk of all criminal cases goes through the state courts. And, indeed, juries that combine both the less-than-twelve and the non-unanimity feature are not far off. The legislatures of several of our states are teeming with such proposals, and in one remote corner of our law, such a jury already exists, namely the military court-martial jury.

You might remember the jury that tried Lieutenant Calley; there, four jurors out of six were allowed to render a verdict. I do not know the author of the court-martial statute, but I wonder he did not intend to design a jury that reduced to a minimum the ability of a dissenting minority to foil the will of the majority. It is perhaps significant in this context, that by a strange rule, found nowhere else in the American law, the exact vote of these court-martial jurors remains secret. This is how the Calley verdict was announced: "The jury, in the presence of six jurors found..." To this day, we do not know whether or not the verdict was unanimous.

It is only fair to report that in *Johnson* v. *Louisiana* and *Apodaca* v. *Oregon*, the Court's mind was not entirely at ease. Justice Blackmun felt constrained to note that he supported the Court's view as long as it allowed a majority verdict of 9 out of 12 jurors; he would hesitate to allow a 7-to-5 majority (he skipped the 8-to-4 possibility). Justice Powell consoled us with a safeguard—the cross-section character of juries, protected by the wide availability of peremptory challenges. But as you know, that safeguard is not very safe either; moves are abroad to cut down the number of peremptory challenges.

It is by no means certain that the Court meant these decisions to be steps in the erosion of the jury. The jury's extension at the lower end of the spectrum in *Duncan* v. *Louisiana* points in a different direction. But effects are sometimes unintended. Ever smaller juries, because they are less homogenous, will make verdicts more erratic, and it is just possible that the ever smaller majorities will make jury verdicts more conforming to what the judges would do. Under the impact of both these changes, the jury could wilt away, simply because there would no longer be any point in having one.



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