

1971

# And Then There Were None: The Diminution of the Federal Jury

Hans Zeisel

Follow this and additional works at: [http://chicagounbound.uchicago.edu/journal\\_articles](http://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

## Recommended Citation

Hans Zeisel, "And Then There Were None: The Diminution of the Federal Jury," 38 University of Chicago Law Review 710 (1971).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

## ... And Then There Were None: The Diminution of the Federal Jury

*Hans Zeisel*†

*Goneril*: Hear me, my lord. What need you five-and-twenty?  
ten? or five?

*Regan*: What need one?

*King Lear*, Act II, Scene IV

In a dramatic move sponsored by the Chief Justice of the United States Supreme Court, seventeen of the federal district courts will reduce the size of their civil juries from twelve members to six.<sup>1</sup> Immediately following the Chief Justice's announcement, Representative William Lloyd Scott of Virginia introduced a bill in Congress to provide for six-member juries in all federal trials, both civil and criminal, except in cases involving capital offenses.<sup>2</sup> On the state level, the New Jersey Supreme Court called for an amendment to the state constitution that would allow the legislature to reduce the size of all juries and to end jury trials in civil cases.<sup>3</sup> Moreover, at least one of the federal district courts has already been experimenting with six-member juries in criminal trials, albeit by encouraged agreement between prosecution and defense.<sup>4</sup>

Juries with less than twelve members, of course, are not foreign to our experience. Some state courts try small civil claims and minor criminal cases before six-member juries;<sup>5</sup> four states even try non-

---

† Professor of Law and Sociology, The University of Chicago.

<sup>1</sup> C.D. Cal., D. Colo., D.D.C., M.D. Fla., N.D. Ill., S.D. Ill., N.D. Ind., S.D. Ind., D. Kan., E.D. La., D. Minn., D.N.M., D. Ore., W.D. Pa., W.D. Tex., and D. Wyo. Two district courts have made a reduction in the size of the jury optional—E.D. Pa. and E.D.N.Y. Information available from the Administrative Office of the United States Courts.

<sup>2</sup> H.R. 7800, 92d Cong., 1st Sess. (1971).

<sup>3</sup> Information available from the Administrative Office of the United States Courts.

<sup>4</sup> E.g., the District Court for the Southern District of Illinois. *Id.*

<sup>5</sup> Minor cases include those civil and criminal cases before inferior courts, KY. CONST. art. 248; MONT. CONST. art. III, § 23; OKLA. CONST. art. II, § 19; W. VA. CONST. art. III, § 13, and those civil actions involving small claims, IDA. CONST. art. I, § 7; N.J. CONST. art. I, § 9; see UTAH CONST. art. I, § 10, which specifies eight jurors in all noncapital cases before courts of general jurisdiction. See also constitutional provisions authorizing state legislatures to pass laws limiting jury size to less than twelve persons (1) in all civil cases before inferior courts, ALASKA CONST. art. I, § 16; ILL. CONST. art. II, § 5; N.D. CONST. art

capital felony cases before juries that have fewer than twelve members.<sup>6</sup> Despite this background, experimentation with the jury was previously confined to the states. Until the present time, the federal jury appeared to be immutable.

The reasons presently given for reduction of the size of federal civil juries are to expedite jury trials and to lessen their cost. With respect to the latter, the Chief Justice has estimated that contracting the size of federal civil juries to six would result in an annual savings of four million dollars.<sup>7</sup> While this may seem to be a substantial sum, it is only 2.4 per cent of the total federal judicial budget, and little more than a thousandth part of one per cent of the total federal budget.<sup>8</sup>

With respect to minimizing delay, the smaller jury would merely decrease the time required for impaneling. Although there are no data available on the time consumed in impaneling juries, we do have accurate data indicating that federal district court judges spend eight per cent of their total working time in trying civil jury cases.<sup>9</sup> Estimating that impaneling the jurors takes, on the average, about ten per cent of the trial time,<sup>10</sup> one discovers that only eight-tenths of one per cent of the federal district judges' total working time is presently consumed by impaneling civil juries. On first impression, it might seem that reducing the twelve jurors to six would save half of that impaneling time. But in many federal courts the jurors are examined primarily by the judge, who directs most of his questions to all jurors at the same time. In this situation the savings would be minimal, since it takes no more time to ask a question of twelve jurors than to ask it of six. In any event, we are discussing an amount which is less than half of the impaneling time—at best four-tenths, more likely three-tenths, of one per cent of the judge's working time.

---

I, § 7; (2) in all cases before inferior courts, IOWA CONST. art. I, § 9; (3) in all civil cases, VA. CONST. art. I, § 11; (4) in all criminal cases before inferior courts and all civil cases, COLO. CONST. art. II, § 23; WYO. CONST. art. I, § 9; and (5) in all cases before all state courts, FLA. CONST. art. V, § 22.

<sup>6</sup> See FLA. CONST. art. V, § 22; LA. CONST. art. VII, § 41; TEX. CONST. art. V, § 13 (where juror dies or is incapacitated); UTAH CONST. art. I, § 10.

<sup>7</sup> N.Y. Times, May 17, 1971, at 1, col. 1.

<sup>8</sup> OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, THE BUDGET OF THE UNITED STATES, FISCAL YEAR 1972, at 523 (1971).

<sup>9</sup> FEDERAL JUDICIAL CENTER, DISTRICT JUDGES' TIME STUDY, Mar., 1971 (mimeographed study). Table A-5 indicates that 16% of district court judges' time is consumed by jury trials; a communication from the Center's research director relates that approximately half of that time was consumed by civil jury trials.

<sup>10</sup> This estimate is based on informal consultation with federal district judges and trial lawyers. It would be misleading to infer higher figures for impaneling from the recent widely publicized and extremely atypical voir dire proceedings in the Manson trial in California or the Black Panther trial in New Haven. Both, in addition, were criminal trials and neither was in the federal courts.

Thus, neither the amount of money nor the amount of time that would be saved can adequately explain and justify the reform recommended by the Chief Justice. However, when viewed in the broader context of the other proposals to limit the functioning of the jury, the decision of the federal district courts to adopt the six-member jury appears as a significant step toward a drastic reduction of the American jury system in general. Under these circumstances, this initial reform deserves careful scrutiny on its own merits.

### I. *Williams v. Florida*

The last pieces of the legal foundation for the six-member jury were laid in the Supreme Court's decision in *Williams v. Florida*.<sup>11</sup> Williams, accused and subsequently convicted of robbery, had made a pre-trial motion to impanel a twelve-member jury instead of the six-member jury prescribed by Florida law for non-capital cases. The motion had been denied. In affirming the conviction, the Supreme Court ruled that the sixth amendment's guarantee of trial by jury does not require that jury membership be fixed at twelve. In sweeping language, the Court removed the constitutional obstacles to decreasing the size of federal or state juries in both civil and criminal cases. First, the Court summarized its historical discussion by stating that the twelve-member jury appears to have been a "historical accident, unrelated to the great purposes which gave rise to the jury in the first place."<sup>12</sup>

History, however, might have embodied more wisdom than the Court would allow. It might be more than an accident that after centuries of trial and error the size of the jury at common law came to be fixed at twelve. A primary function of the jury was to represent the community as broadly as possible; yet at the same time, it had to remain a group of manageable size. Twelve might have been, and might still be, the upper limit beyond which the difficulty of self-management becomes insuperable under the burdensome condition of a trial. On this view, twelve would be the number that optimizes the jury's two conflicting goals—to represent the community and to remain manageable.

Having disposed of the rationality of the number twelve, the Court proceeded:

Nothing in this history suggests, then, that we do violence to the letter of the Constitution by turning to other than purely

---

<sup>11</sup> 399 U.S. 78 (1970). In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court had held that the fourteenth amendment incorporated the sixth amendment.

<sup>12</sup> *Id.* at 89-90.

historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution. *The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial.*<sup>13</sup>

After a casual reference to empirical data, to which we will devote our attention presently, the Court concluded that while the jury should comprise a cross-section of the community, a six-member jury does not perceptibly differ in this respect from a twelve-member jury:

[W]hile in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible. Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden . . . the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.<sup>14</sup>

Here, then, is the Court's reference to empirical data:

What few experiments have occurred—usually in the civil area—indicate that there is no discernable difference between the results reached by the two different-sized juries.<sup>15</sup>

The Court cites, impressively enough, six items:<sup>16</sup> (1) Judge Wiehl's article on "The Six Man Jury" in the *Gonzaga Law Review*;<sup>17</sup> (2) Judge Tamm's "The Five-Man Civil Jury: A Proposed Constitutional Amendment" in the *Georgetown Law Journal*;<sup>18</sup> (3) Cronin's piece on "Six-Member Juries in District Courts" in the *Boston Bar Journal*;<sup>19</sup>

<sup>13</sup> *Id.* at 99-100 (emphasis added).

<sup>14</sup> *Id.* at 102. Only at one point does the Court admit the possibility of a difference between twelve-member and other juries. It notes that "[i]n capital cases . . . it appears that no State provides for less than 12 jurors." *Id.* at 103. But instead of appreciating that the twelve-member jury provides better community representation, the Court merely approves size *qua* size, the number twelve being a "recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty," *id.*, just as a firing squad is superior to one executioner.

<sup>15</sup> *Id.* at 101.

<sup>16</sup> *Id.* at 101 n.48.

<sup>17</sup> Wiehl, *The Six Man Jury*, 4 GONZAGA L. REV. 35, 40-41 (1968).

<sup>18</sup> Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120, 134-36 (1962).

<sup>19</sup> Cronin, *Six-Member Juries in District Courts*, 2 BOSTON B.J. No. 4, at 27 (1958).

(4) "Six-Member Juries Tried in Massachusetts District Court," in the *Journal of the American Judicature Society*;<sup>20</sup> (5) "New Jersey Experiments with Six-Man Jury," in the *Bulletin of the Section of Judicial Administration of the American Bar Association*;<sup>21</sup> and (6) Judge Phillips' article on "A Jury of Six in All Cases" in the *Connecticut Bar Journal*.<sup>22</sup>

It is worthwhile to disinter the substance buried in these citations:

(1) Judge Wiehl approvingly cites Charles Joiner's *Civil Justice and the Jury*, in which Joiner somewhat disingenuously states that "it could easily be argued that a six-man jury would deliberate equally as well as one of twelve."<sup>23</sup> Since 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-man juries are used and found them satisfactory.<sup>24</sup>

(3) 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 such 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."<sup>25</sup> Three lawyers also testified that they could not detect any differences in verdicts, one because "the panel is drawn from the regular Superior Court panel of jurors,"<sup>26</sup> another because "[t]here seems to be no particular reason why the size of a finding would be affected by a six-man jury."<sup>27</sup> 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."<sup>28</sup>

<sup>20</sup> *Six-Member Juries Tried in Massachusetts District Court*, 42 J. AM. JUD. SOC. 136 (1958).

<sup>21</sup> *New Jersey Experiments with Six-Man Jury*, BULL. OF THE SECTION OF JUD. ADMIN. OF THE A.B.A., May, 1966, at 6.

<sup>22</sup> Phillips, *A Jury of Six in All Cases*, 30 CONN. B.J. 354 (1956).

<sup>23</sup> C. JOINER, *CIVIL JUSTICE AND THE JURY* 83 (1962), cited in Wiehl, *supra* note 17, at 39 n.16.

<sup>24</sup> Tamm, *supra* note 18, at 137.

<sup>25</sup> Cronin, *supra* note 19, at 27.

<sup>26</sup> *Id.* at 28.

<sup>27</sup> *Id.* at 28-29.

<sup>28</sup> *Six-Member Juries Tried in Massachusetts District Court*, *supra* note 20, at 136.

(5) The *ABA Bulletin* 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."<sup>29</sup>

(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.<sup>30</sup>

This is scant evidence by any standards. The several thousand verdicts by criminal juries each year in Florida, Louisiana, and Utah would have provided better evidence. Of course, no such evidence was produced at the trial court, but the Court could conceivably have asked *sua sponte* for such a study.<sup>31</sup> Even without specific data, however, it is possible to demonstrate that the six-member jury must be expected to perform quite differently than the twelve-member jury in several important respects.<sup>32</sup>

## II. SIX-MEMBER CIVIL JURIES IN A STRATIFIED COMMUNITY

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.<sup>33</sup> 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 in the first ballot in a criminal case.<sup>34</sup> We have no comparable data on the li-

<sup>29</sup> *New Jersey Experiments with Six-Man Jury*, *supra* note 21.

<sup>30</sup> Phillips, *supra* note 22.

<sup>31</sup> When the Supreme Court granted certiorari in the World War II treason case of *Cramer v. United States*, it "invited reargument addressed to specific questions," *Cramer v. United States*, 325 U.S. 1, 7, 8 (1945), whereupon "[t]he Solicitor General engaged scholars not otherwise involved in conduct of the case to collect and impartially to summarize" the historical background of the issue in the major legal systems, *id.* at 8 n.9. For the compilation of American law, see Hurst, *Treason in the United States*, 58 HARV. L. REV. 226 (1944).

<sup>32</sup> These proofs are derived from well established elementary statistical theory, from simple models, and from some empirical data; it is the best evidence presently available. To acquire more complete evidence would require additional research along two lines: (1) controlled simulated experiments that would allow six- and twelve-member juries to view and judge the same case and, more accessible if more tenuous, (2) retrospective performance analysis of actual six-member juries in the states that employ them.

<sup>33</sup> This is perhaps more true today than it was at the time the jury grew into a legal institution. Originally, the emphasis was directed more toward the difference between the jury and the judges as the representative of the King, and less toward the differences among jurors.

<sup>34</sup> H. KALVEN, JR. & H. ZEISEL, *THE AMERICAN JURY* 487 (1966).

ability vote of the civil jury, but we do know that the evaluation of damages usually covers a broad range.

There is, therefore, good reason to believe that the jury, to some extent, brings into the courtroom the differences in perception which exist in the community. To see how the six-member jury performs this function in comparison with a twelve-member jury, it will be useful to begin with a simple model of a stratified society. We shall assume that 90% of the community share identical viewpoints and that the remaining 10% have a different viewpoint.<sup>35</sup> Even a jury of twelve, of course, is too small to represent all community views, but it can be shown that the smaller the size of the jury, the less frequently it even approaches community representation.

Juries, especially federal juries,<sup>36</sup> are chosen by lottery from the pool of available jurors. Suppose, now, we were to draw 100 twelve-member juries and 100 six-member juries from a population that had a 10% minority. Of the 100 twelve-member juries, approximately 72 would have at least one representative of that minority; while of the 100 six-member juries, only 47 would have one. It is clear, then, that however limited a twelve-member jury is in representing the full spectrum of the community, the six-member jury is even more limited, and not by a "negligible" margin.

Whether this difference in degree of community representation results in a difference in civil verdicts is, of course, even more important. To explore this question we will slightly complicate our stratification model of the community. 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. Table I assumes that with respect to the evaluation of a particular claim the community is divided into six groups of equal size. We shall make a further assumption, very close to reality, that whatever the composition of the jury, the damages it awards will lie around the average of the evaluations of all individual jurors. Again, we shall simulate 100 random selections of the two types of juries—the twelve-member and the six-member jury. This time, however, we shall be

---

<sup>35</sup> 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. 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 by the population in other spheres would seem to be a rash move.

<sup>36</sup> See generally 28 U.S.C. §§ 1861-71 (Supp. IV, 1968), amending 28 U.S.C. §§ 1861-71 (1964). See also Zeisel, *Dr. Spock and the Case of the Vanishing Women Jurors*, 37 U. CHI. L. REV. 1, 16-17 (1969).

TABLE 1  
COMMUNITY EVALUATION OF PERSONAL INJURY CLAIM

	Fraction of Community	Dollar Evaluation
	1/6	1,000
	1/6	2,000
	1/6	3,000
	1/6	4,000
	1/6	5,000
	1/6	6,000
Average	1/1	3,500

interested in the average of the individual evaluations of all members of any given jury. Thus, we shall record a twelve-member jury consisting of 6 persons who would evaluate an injury at \$1,000, and 6 who would evaluate the same injury at \$2,000, as \$1,500—the average of  $6 \times \$1,000 + 6 \times \$2,000$ . Table 2 indicates the relative spread of these averages around the middle value for all juries of \$3,500.

TABLE 2  
PER CENT DISTRIBUTION OF THE AVERAGE EVALUATION  
BY 100 RANDOMLY SELECTED JURIES

Interval	Twelve-member	Six-member
\$1,000-1,499	—	0.1
\$1,500-1,999	0.1	1.4
\$2,000-2,499	2.0	6.4
\$2,500-2,999	13.7	16.4
\$3,000-3,499	34.2	25.7
\$3,500-3,999	34.2	25.7
\$4,000-4,499	13.7	16.4
\$4,500-4,999	2.0	6.4
\$5,000-5,499	0.1	1.4
\$5,500-6,000	—	0.1
Totals	100.0	100.0

It is easy to see that the six-member juries show a considerably wider variation of "verdicts" than the twelve-member juries. For instance, 68.4% of the twelve-member jury evaluations fall between \$3,000 and \$4,000, while only 51.4% of the six-member jury evaluations fall in this range. Almost 16% of the six-member juries will reach verdicts that will fall into the extreme levels of more than \$4,500 or less than \$2,500, as against only a little over 4% of the twelve-member juries. The appropriate statistical measure of this variation

is the so-called standard deviation.<sup>37</sup> The actual distribution pattern will always depend on the kind of stratification that is relevant in a particular case, but whatever the circumstances, the six-member jury will always have a standard deviation that is greater by about 42%. This is the result of a more general principle that is by now well known to readers of such statistics as public opinion polls—namely, that the size of any sample is inversely related to its margin of error.<sup>38</sup>

Lest it be thought that standard deviation is merely part of a statistician's game that has no counterpart in reality, it will be useful to provide the appropriate translation of the term into lawyer's language. It is the measure of the gamble the lawyer takes when he goes to trial. The "gambling" notion is seldom made explicit because normally each case is tried only once, but lawyers are quite conscious of the degree to which jury verdicts may vary. To obtain a measure of this variability, trial lawyers were asked to think about their next civil case and to estimate how they would expect ten different juries to decide.<sup>39</sup> These estimates show, as a rule, a considerable amount of variation, which should not come as a surprise since a case goes to the jury on the very ground that reasonable men may differ in its resolution. Whatever the extent of the "gamble" incurred through the twelve-member jury, we must expect that it will be significantly greater with a six-member jury.<sup>40</sup>

This increase in the "gamble" might well have an interesting side effect; it could increase the incidence of jury waiver and thereby

<sup>37</sup> The standard deviation is the square root of all squared deviations from the group average.

<sup>38</sup> A reduction of the size of a sample by  $\frac{1}{2}$  increases the margin of error by the square root of 2/1, or simply of 2—that is, by a factor of 1.42, or by 42%.

<sup>39</sup> Data collected by the University of Chicago Jury Project, on file at the University of Chicago Law School. The following is an excerpt from the questionnaire and a sample answer:

Which, in your estimate, will be the most likely award in this case after trial?  
\$25,000

Of course, you cannot be certain that this will be the verdict. If you had to try this case ten different times before ten different juries, you would expect some variation in the verdicts. What do you think these verdicts would look like?

\$ 0	\$ 20,000	\$ 25,000	\$ 25,000
<u>\$ 35,000</u>	<u>\$ 35,000</u>	<u>\$ 50,000</u>	<u>\$100,000</u>
<u>\$100,000</u>	<u>\$100,000</u>		

Another way of providing an estimate of the variability of jury verdicts would be to allow properly selected extra-juries—for instance by observation of closed-circuit television screens—to try the same case after simulated deliberations.

<sup>40</sup> The juries in our model have not undergone voir dire challenges which, when conducted by competent counsel, would tend to eliminate the extreme value positions. Nevertheless, it is fair to assume that such challenges would affect both types of juries equally and consequently would not eliminate the differences between them.

reduce the frequency of jury trials. The trial lawyer survey also suggests that lawyers expect the variation of verdicts returned by twelve-member juries to be of about the same magnitude as the variation expected if the same case were tried in bench trials before different judges.<sup>41</sup> If the jury size is reduced from twelve to six, this perception of the approximate balance between jury and bench trial will be disturbed. Henceforth, the "gamble" with a jury will be significantly greater than the "gamble" with a judge and, as a result, more lawyers might waive their right to a jury, perhaps a consequence not unexpected by those who initiated the reform.

In addition to the tendency to be less representative and to produce more varied damage verdicts, the six-member jury is likely to yield fewer examples of that treasured, paradoxical phenomenon—the hung jury.<sup>42</sup> Hung juries almost always arise from situations in which there were originally several dissenters. Even if only one holds out, his having once been the member of a group is essential in sustaining him against the majority's efforts to make the verdict unanimous. Fewer hung juries can be expected in six-member juries for two reasons: first, as discussed earlier, there will be fewer holders of minority positions on the jury; second, if a dissenter appears, he is more likely to be the only one on the jury. Lacking any associate to support his position, he is more likely to abandon it.

In *Williams* the Court cites the studies conducted in connection with *The American Jury* to support its proposition that "jurors in the minority on the first ballot are likely to be influenced by the proportional size of the majority aligned against them."<sup>43</sup> It is only fair to point out that the findings were quite different:

Nevertheless, for one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations. The juror psychology recalls a famous series of experiments by the psychologist Asch and others which showed that in an ambiguous situation a member of a group will doubt and finally disbelieve his own correct observation if all other members of the group claim that he must have been mistaken. To maintain his original posi-

---

<sup>41</sup> Data collected by the University of Chicago Jury Project, on file at the University of Chicago Law School.

<sup>42</sup> The hung jury is treasured because it represents the legal system's respect for the minority viewpoint that is held strongly enough to thwart the will of the majority. The paradox lies in the fact that the hung jury is only tolerable in moderation; too many hung juries would impede the effective functioning of the courts.

<sup>43</sup> *Williams v. Florida*, 399 U.S. 78, 101 n.49 (1970), citing H. KALVEN, JR. & H. ZEISEL, *supra* note 34, at 462-63, 488-89.

tion, not only before others but even before himself, it is necessary for him to have at least one ally.<sup>44</sup>

The distinction is crucial in this respect: If it is only the *proportion* that matters, then one versus five is the equivalent of two versus ten; but if the original companionship of an ally is essential, then one versus five is far less likely to produce a hung jury than two versus ten. As stated previously, the probability of having at least one member of a minority (which comprises 10% of the population) on the twelve-member jury is 72 out of every 100, as against 47 on six-member juries. The discrepancy is aggravated by the fact that the expectation of having *more than one* minority member on the twelve-member jury is 34 out of every 100, as against only 11 on six-member juries.

This was one hypothesis, among those developed in this article, that could be put to an immediate test. A survey was initiated to establish the frequency of hung juries in criminal jury trials that had gone to verdict since January 1, 1969 in the Miami Circuit Court, the largest Florida court. The results were 7 hung juries in 290 trials before six-member juries. The comparison with the national average provides startling and gratifying confirmations of this prediction:

TABLE 3  
HUNG JURIES IN CRIMINAL JURY TRIALS

Twelve-member .....	5.0% <sup>a</sup>
Six-member .....	2.4% <sup>b</sup>

*Sources:*

<sup>a</sup> H. KALVEN, JR. & H. ZEISEL, *supra* note 34, at 56.

<sup>b</sup> Data collected by the University of Chicago Jury Project, on file at the University of Chicago Law School.

On grounds of economy, one might welcome any reduction in the number of hung juries. One should understand, however, that such reduction is but the combined result of less representative, more homogeneous juries and of a reduced ability to resist the pressure for unanimity.

From the foregoing discussion, it would appear that the Court's holding in *Williams* rests on a poor foundation. In several important respects, the six-member jury performs differently than the twelve-member jury. The Court probably suspected that some differences in composition and performance would exist between the types of juries but thought them negligibly small. It would seem that the Court has underestimated their magnitude.

<sup>44</sup> H. KALVEN, JR. & H. ZEISEL, *supra* note 34, at 463.

### III. CRIMINAL SIX-MEMBER JURIES AND MAJORITY VERDICTS

Neither the reduction of the size of the criminal jury nor the adoption of majority verdicts are presently being considered by the federal courts. Yet it is not premature to explore the consequences that would accompany these two changes. Despite the Court's emphasis of the importance of the unanimity requirement in *Williams*, there are indications, as Justice Harlan has recognized,<sup>45</sup> that this requirement could fall, and the reduction of the criminal jury may similarly be within purview.<sup>46</sup>

The above analysis of the six-member civil jury applies with minor variations to the criminal jury, where the stratification does not pertain to the dollar-evaluation of a claim, but to the perception of the gravity of the charged crime and, more importantly, to the differing standards of "reasonable doubt." To obtain a conviction under the unanimity rule, the prosecutor must persuade the juror with the highest standard. Considering the class of jurors who are most difficult to convince as a "minority" in terms of our model, it is evident that fewer six-member juries will contain representatives of that minority.<sup>47</sup> Consequently, a six-member jury provides a lesser safeguard for the defendant than a twelve-member jury. Careful study of the operation of juries with less than twelve members in such states as Florida, Louisiana, and Utah should confirm this hypothesis by revealing that these juries yield fewer hung juries,<sup>48</sup> more findings of guilt, and among them relatively fewer convictions for the lesser included offense<sup>49</sup> than are rendered in comparable cases by twelve-member juries.

---

<sup>45</sup> *Williams v. Florida*, 399 U.S. 78, 122 (Harlan, J., concurring in result).

<sup>46</sup> The Court will soon hear reargument on this issue in *Johnson v. Louisiana*, 230 So.2d 825 (La. 1970), *prob. juris. noted*, 39 U.S.L.W. 3199 (U.S. Nov. 9, 1970) (No. 5338), and *Apocado v. Oregon*, 462 P.2d 137 (Ore. 1970), *cert. granted*, 39 U.S.L.W. 3199 (U.S. Nov. 9, 1970) (No. 5161), involving the two states that allow majority verdicts in felony jury trials.

Rumblings on this theme came from the recent London meeting of the American Bar Association:

From the remarks that have been made in speeches so far, it appears that five features of the British system are prime candidates for tryouts in the United States:

One is nonunanimous verdicts in jury trials. For several years British courts have been permitting jury actions on votes of 10 to 2, and statistics show that there have been more convictions, more acquittals and fewer hung juries than before. The United States Supreme Court is expected to decide during its next term if it would be constitutional for United States juries to rule by less-than-unanimous votes.

N.Y. Times, July 19, 1971, at 14, col. 3.

<sup>47</sup> See H. KALVEN, JR. & H. ZEISEL, *supra* note 34, at 182-90.

<sup>48</sup> See text at note 42 *supra*.

<sup>49</sup> See note 46 *supra*.

With respect to the abandonment of the unanimity rule, there is again considerable experience in the state courts. Many states allow majority verdicts in civil trials before both twelve- and six-member juries;<sup>50</sup> some states permit such verdicts in minor criminal trials,<sup>51</sup> and two states allow majority verdicts even in felony trials for non-capital offenses.<sup>52</sup> The important element to observe is that the abandonment of the unanimity rule is but another way of reducing the size of the jury. But it is reduction with a vengeance, for a majority verdict requirement is far more effective in nullifying the potency of minority viewpoints than is the outright reduction of a jury to a size equivalent to the majority that is allowed to agree on a verdict. Minority viewpoints fare better on a jury of ten than on a jury of twelve where ten members must agree on a verdict.

An example will elucidate this proposition. Suppose we again assume a minority position held by 10% of the population, and that two sets of juries are drawn: 100 twelve-member juries and 100 ten-member juries. In Table 4 are the frequencies with which the minority view can be expected to be represented.

TABLE 4  
EXPECTED NUMBER OF MINORITY JURORS\*  
ON 100 RANDOMLY SELECTED JURIES

Number	Twelve-member	Ten-member
None	28	35
One	38	39
Two	23	19
Three or more	11	7
Totals	100	100

\* Representing 10% of the population.

<sup>50</sup> See ARK. CONST. art. II, § 7, amend. 16; CAL. CONST. art. I, § 7; IDA. CONST. art. I, § 7; MINN. CONST. art. I, § 4; MONT. CONST. art. III, § 23; NEB. CONST. art. I, § 6; NEV. CONST. art. I, § 3; N.J. CONST. art. I, § 9; N.M. CONST. art. II, § 12; N.Y. CONST. art. I, § 2; OHIO CONST. art. II, § 5; 2 UTAH CONST. art. I, § 10; WIS. CONST. art. I, § 5.

<sup>51</sup> See, e.g., MO. CONST. art. I, § 22(a); MONT. CONST. art. III, § 23; OKLA. CONST. art. II, § 19.

<sup>52</sup> LA. CONST. art. VII, § 41; ORE. CONST. art. I, § 11. In 1967, the British House of Commons enacted a statute that allowed majority verdicts of ten in all criminal juries. The Home Secretary had requested the change to prevent a potentially bribed juror from thwarting an otherwise certain conviction. See H. KALVEN, JR. & H. ZEISEL, *THE AMERICAN JURY: NOTES FOR AN ENGLISH CONTROVERSY*, (University of Chicago Round Table No. 228, April, 1967); *The Times* (London), Apr. 4, 1967, at 71. See also 745 HOUSE OF COMMONS OFFICIAL REPORTS (Hansard), No. 188 (April 27, 1967).

Looking first at the 100 twelve-member juries, we expect to find 38 juries with one minority representative, 23 with two, and 11 with three or more. If these twelve-member juries must be unanimous to reach a verdict, the majority will have to reckon with at least one minority member in  $38 + 23 + 11 = 72$  out of the 100 cases. If these juries are permitted to reach a verdict by agreement of ten jurors, then the majority will be able simply to disregard the minority position in  $38 + 23 = 61$  of the 72 cases. Only in the 11 cases in which we must expect three or more minority jurors will they be able to influence the verdict.

Let us now turn to the ten-member juries. Here only  $39 + 19 + 7 = 65$  of the 100 juries are expected to have at least one minority member. But if we assume that the ten-member jury must be unanimous, then the ten-member jury will give the 10% minority a chance to influence the verdict almost six times as frequently (65:11) as in the case of the twelve-member jury with majority rule.

No present proposals envisage combining size reduction and majority rule for federal juries. Yet the two jury-enfeebling measures do exist jointly in some of our state civil courts of limited jurisdiction, and there no longer appears to be any constitutional guarantee against such an extension even to federal criminal juries. This powerful combination has been brought to dramatic public attention by the special military court martial jury which tried Lieutenant Calley after the My Lai affair in Vietnam.<sup>53</sup> Calley was tried on a criminal charge—a capital one at that—before a six-member jury authorized to reach a verdict by the agreement of only four jurors, a form which allows the majority to disregard a minority position as long as it does not have at least three representatives on the jury.<sup>54</sup> In our hypothetical community with a 10% minority, fewer than 2 out of every 100 Calley-type juries will have more than two minority representatives if the juries are randomly selected from the population. Even if we assume a minority position that is held by 30% of the eligible jurors, only about every fourth Calley-type jury will effectively represent that minority. One might wonder why the men who drafted the rules for this type of court martial jury went to the extreme. Might one of their motives have been that such a jury, more than any other, could be expected to circumvent or conceal a disturbing minority position?

A significant characteristic of the Calley-type jury is its ability to hide the fact that the jury's findings may not have been unanimous; whether the verdict of the Calley jury was unanimous is still unknown.

---

<sup>53</sup> N.Y. Times, Mar. 30, 1971, at 1, col. 1.

<sup>54</sup> See 10 U.S.C. 852 (1964).

The formula for announcing the verdict reads merely: "Upon secret written ballot, two-thirds of the members present at the time the vote was taken . . ." <sup>55</sup> Only one voting constellation out of seven possible ones (from 6:0 to 0:6) results in a hung jury—the 3:3 constellation. All the others result in a verdict. The reason for the extraordinary length of the Calley jury's deliberation may have been its desire to achieve unanimity in a trial for a capital offense, even if that aspect of the verdict remained unpublished.

#### IV. CONCLUSION

We have shown that the change in verdicts that might be expected from the reduction of the twelve-member jury to six members is by no means negligible. We have also considered another potential modification of the federal jury, the majority verdict, and the possible combined application of both. However, the thrust of this article must not be misread. Its purpose is not to advocate any of the possible forms of federal juries. It pleads neither for the twelve-member jury nor for the smaller one, neither for the unanimity requirement nor for the majority verdict. All these solutions are possible, as is shown by the variety of rules adopted by our states. The legal systems of most countries do not have any jury trials; to be sure, their mode of selecting judges differs radically from ours.

The purpose of this article, rather, is simply to make clear that all these modifications make for differences in adjudication that appear to be negligible only to superficial scrutiny. Both in the short and in the long run our judicial system has many options, but every solution has its own balance sheet of advantages and costs. What is necessary is that we, and with us the United States Supreme Court, see both with equal clarity.

---

<sup>55</sup> N.Y. Times, Mar. 30, 1971, at 1, col. 1.