1982

The Verdict of Five out of Six Civil Jurors: Constitutional Problems

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A criminal jury of fewer than 6 members and a jury in which 5 out of 6 can find a verdict were held unconstitutional by the U.S. Supreme Court for failing to meet the requirements of due process as mandated by the Fourteenth Amendment. In four states—Michigan is one of them—the 5 out of 6 jury is the standard civil jury. Two questions are raised: first, whether such a jury violates the Michigan state constitution; second, whether such a 5 out of 6 civil jury violates the federal Constitutiton even though the civil jury is not protected by the Fourteenth Amendment.

I. INTRODUCTION

In *Burch v. Louisiana*[1] the Supreme Court held that a criminal jury of 6 members of whom 5 can find a verdict does not meet the requirements of the right to trial by jury as guaranteed by the Constitution of the United States. Such a jury is now the standard civil jury in the courts of general jurisdiction in four of our states: Michigan, Minnesota, New Jersey, and New York.[2]

In the three last-mentioned states the state constitution specifically authorizes the 5-out-of-6 member jury in civil cases.[3] In Michigan, the constitutionality of that jury rests on analogy in the conjunction of two provisions: the constitution permits 10 members of a jury of 12 to find a verdict, and it authorizes juries with fewer than 12 members.

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1. 441 U.S. 130 (1979).
2. In the courts of limited jurisdiction, the 5-out-of-6 member jury is standard in six states— Arizona, Kentucky, Nebraska, Oklahoma, Oregon, and Texas. In Montana 4 out of 6 jurors can find a verdict, and in Utah 3 out of 4 jurors. In the Virginia courts of limited jurisdiction a jury of 5 must be unanimous.
3. Minn. Const. art 1., § 4; Minn. Stat. Ann. § 546.17 (West 1955); N.J. Const. art. 1, § 9; N.Y. Const. art. 1, § 2.

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In spite of a court of appeals decision that rejected a constitutional attack,[4] there remains serious doubt as to whether this 5-out-of-6 member jury meets the requirements of the Michigan constitution. And there is serious doubt as to whether such a jury meets the requirements of due process as mandated by the Fourteenth Amendment to the federal Constitution.

In *Burch* as well as in *Ballew v. Georgia,*[5] the earlier case that set the minimum size for the criminal jury at 6, the Supreme Court set out substantive reasons why a jury of fewer than 6 members, or a jury in which a majority of 5 out of 6 members may find a verdict, increases the likelihood of malfunctioning. In its decisions involving the size of the jury, the Court also recognized the functional equivalence between restriction of the jury's size and the authorization of majority verdicts. In *Williams v. Florida,*[6] which upheld the constitutionality of the 6 member criminal jury, the Court remarked that the purposes of the jury are not "less likely to be achieved when the jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained.*"[7] And again in *Burch,* referring to the prohibition of the 5 member jury in *Ballew,* the Court concluded that conviction "by only five members of a six-person jury presents a *similar threat* to preservation of the substance of the jury trial guarantee."[8] The Court correctly sensed that allowing the smallest permissible jury (of 6 persons) to bring in a majority verdict would reduce the minimum standard even further.

Our first point here will be to show that with respect to the jury functions that the Court meant to safeguard in *Ballew* and in *Burch,* the 5-out-of-6 member jury is even inferior to a 5 member unanimous jury.[9]

II. THE "SIZE" OF THE 5-OUT-OF-6 MEMBER JURY

One of the axioms from which the setting of a 6 juror minimum flows acknowledges that it is generally easier for a smaller jury to reach unanimity than for a larger jury, simply because in case of disagreement fewer jurors remain to be persuaded. A jury in which 5-out-of-6 jurors can reach a verdict would in this respect seem to fall somewhere between the 5 member unanimous and the 6 member unanimous jury, since 6 members take part in the deliberation and 5 members can find a verdict.

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4. Fisher v. Hatcher, 44 Mich. App. 541 (1973).
5. 435 U.S. 223 (1978).
6. 399 U.S. 78, 86 (1970).
7. 399 U.S. at 100 (emphasis added and note omitted).
8. 441 U.S. at 138 (emphasis added).
9. I presented the essence of this argument at a pretrial hearing in *Warner v. General Motors Corp.,* No. 75-11229-NI (Mich. Cir., Van Buren, 1981).

A little arithmetic, however, will show that the 5-out-of-6 member jury is operationally "smaller" than the 5 member unanimous jury.

We begin with the trivial observation that in a 5 member unanimous jury there is only one way to obtain a verdict—all 5 members of the jury must agree on it. The 5-out-of-6 jury, in contrast, hides not fewer than 6 *different* 5 member "juries" who may find a verdict, as figure 1 illustrates. When a case is tried before a 5 member unanimous jury, the liti-
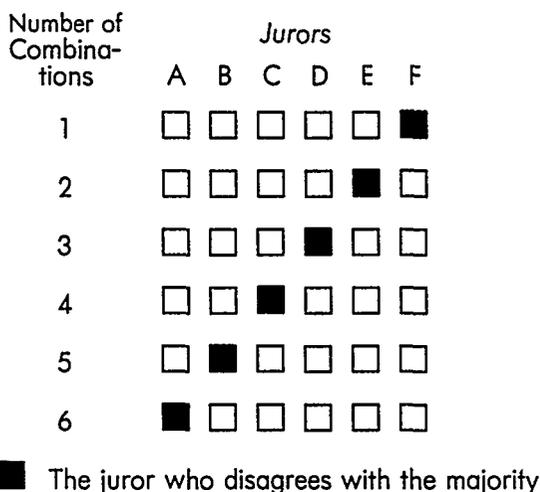
Number of Combinations	Jurors
	A B C D E F
1	☐ ☐ ☐ ☐ ☐ ■
2	☐ ☐ ☐ ☐ ■ ☐
3	☐ ☐ ☐ ■ ☐ ☐
4	☐ ☐ ■ ☐ ☐ ☐
5	☐ ■ ☐ ☐ ☐ ☐
6	■ ☐ ☐ ☐ ☐ ☐

■   The juror who disagrees with the majority

Fig. 1.   **The six different 5 member "juries" who may find a verdict in the 5-out-of-6 jury.**

gant must convince *these* 5 jurors of the justness of his claim. If he has a 5-out-of-6 member jury, he has six different 5 member juries, any one of which may be persuaded to agree on his claim. It is therefore considerably easier to obtain a verdict from the 5-out-of-6 member jury than from the 5 member unanimous jury.

The six "juries" hidden in a 5-out-of-6 member jury achieve visibility when different parts of a verdict are reached by different "juries." The courts have dealt variously with this contingency.[10] This situation, of

10. Courts requiring that the same majority agree on all issues include: McCormick v. Octopus Fresh Fish Market and Seafood Grotto, 1 Civ. 46196 (1st Cir. 1981); Ferguson v. Northern States Power Co., 307 Minn. 26, 239 N.W.2d 190 (1976).

The courts are divided on whether to insist that a required minimum majority must be composed of the same individual jurors. The standard situation arises if, for example, the law allows 9 out of 12 jurors to find a verdict, and 9 jurors agree on liability, 9 jurors agree on damages, but one juror who voted for liability failed to agree on the damages, and instead a juror who had voted against liability is now one of the 9 jurors who agreed on the damages.

course, could and occasionally does arise also with 10-out-of-12 or 9-out-of-12 member juries. And since in those juries different verdict combinations were held constitutional, one might ask why the 5-out-of-6 member jury should be treated differently. The answer is that here the absolute numbers play a role: however many hidden juries there may be in a jury of 12 of whom a majority of 9 or 10 can find a verdict, in the end at least 9 or 10 jurors must agree on the verdict; the opportunity for shopping for six different "juries" of only 5 members poses a problem of a different magnitude.

III. LIKELIHOOD OF A HUNG JURY

The obverse side of the situation I have just described is the likelihood that the jury will hang because it fails to reach the required quorum. In the 5 member unanimous jury 1 dissenting juror hangs the jury; in the 5-out-of-6 jury 2 dissenters are needed to hang it.

It is intuitively clear that given the same trial evidence and the same juror reservoir, one is less likely to find 2 dissenters in six draws than to find 1 dissenter in five draws. A "dissenter" in this context does not mean a juror who will disagree as a matter of principle quite independently of the evidence, it means a juror who, after listening to the evidence and to the arguments of his fellow jurors, feels he cannot join the majority. Table 1 sets out the respective probabilities of having a hung jury for the 5-out-of-6 member jury and for the 5 member and 6 member unanimous juries.

As mentioned above, valid comparisons of different jury rules require that the lay of the evidence remains the same and that the jurors are drawn from the same jury box. The left-hand column denotes the conditions that must remain equal to make meaningful comparison possible. The numbers on the left-hand margin are to be understood as follows: "10%" denotes that if all jurors in the reservoir watched that particular

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One court argues: "it is inferred [the juror who voted against liability] would hold out for a minimum verdict for plaintiff . . . . We see no sound reason to assume that such a juror would violate his oath." (Ward v. Weekes, 107 N.J. Sup. Ct. 351.) Similarly Forde v. Ames, 93 Misc. 2d 723 (Sup. Ct. 1978): "The appropriate assumption in such a case is that the juror who is outvoted on the question of liability will accept the outcome and continue to deliberate . . . honestly and conscientiously . . . ."

Other courts have decided differently, apparently being less optimisitic about the ability of the outvoted juror to "accept" the majority verdict on liability: Murphy v. Sherman Transfer Co., 62 Misc. 2d 1960, Sup. Ct. App. (1970), and Ferguson v. Northern States Powers Co., 307 Minn. 26, 239 N.W.2d 190 (1976).

In Wisconsin a statute prescribes: "If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixth of the jurors must agree on all the questions" (Wis. Stat. Ann. § 805.09(2) (West 1977)).

It would be constructive to learn whether the jurors who were outvoted on liability but then voted on the damage issue did or did not start out at the lower end of the damage spectrum.

trial, 10 percent of them would have refused to join the majority in their verdict; "20%" denotes that the evidence was less clear and hence 20 per- cent of the jurors would have refused to give up their minority position; and so forth. The proper way, therefore, of comparing the effect of the jury rule on the likelihood that the jury will hang is to read the respective

TABLE 1[a]
Likelihood of a Hung Jury

% Dissenters Among All Jurors in the Venire	6 Member Unanimous Jury (One Dissenter Hangs)	5 Member Unanimous Jury (One Dissenter Hangs)	5-out-of-6 Member Jury (Two Dissenters Hang)
10	.47	.41	.11
20	.74	.67	.34
30	.88	.83	.58
40	.95	.92	.77

[a]Likehoods are expressed in fractions of 1.00.

probabilities across, separately for the four lines. These fractions—".47" of 1.00 and so forth—are the conventional form in which statisticians designate probabilities, here of 47 percent. The numbers in the first col- umn indicate the likelihood of drawing 1 dissenter (the number required to hang the jury) in a 6 member unanimous jury; the numbers in the sec- ond column indicate the corresponding likelihood for a 5 member unani- mous jury. The last column indicates the probability of drawing 2 dissen- ters, the number required to hang a 5-out-of-6 member jury.

As one might expect, it is easier to draw 1 dissenting juror in 6 draws than in 5; on each line, the likelihood fraction is smaller in the second column than in the first.

The last column confirms the intuitive perception that it is more diffi- cult to find 2 dissenters in 6 draws than 1 dissenter in 5 draws. In each line the likelihood of hanging the 5-out-of-6 member jury is far smaller than hanging the 5 member unanimous jury.

The remainder of this article deals with how well the 5-out-of-6 mem- ber jury fulfills the specific functions considered essential for the proper operation of the jury system.

IV. REPRESENTATION OF MINORITIES

It is the rule rather than the exception that the jury, on its first ballot, will not have reached unanimity. In criminal cases, the first ballot will be

unanimous in about one of every three cases.[11] No comparable figures are as yet available for the civil jury, but it is reasonably certain that initial disagreement on the size of the damage award will be frequent.

This initial disagreement between jurors leads to an important insight. Since every juror hears the same evidence, the same instructions on the law, and the same arguments by counsel, and since every juror sees all the persons involved in a trial as well as all the fellow jurors, any disagreement between jurors can come only from one source: the differences in the personalities of these jurors, their different psychological make-up, their values, and their life experiences.

The law is aware of these differences and uses various devices to prevent these differences from unduly distorting the judicial process. For an understanding of these devices, it is useful to visualize the venire of jurors from which the trial jury is selected in the form of an array, a spectrum. At the one end are the jurors whose personal make-up makes them inclined, if they heard the case, to favor strongly the one side; at the other end of the spectrum are the jurors who, if they were to serve, would favor the other side. The challenges and excuses for cause are the device for eliminating the jurors at both extremes whose leanings are so strong that they are considered prejudiced. A second device is the peremptory challenge that allows counsel (if they know how to) to continue the job of lopping off the extremes who survived the challenge for cause.

Since even the remaining jurors often will perceive and evaluate the trial evidence differently, the law has two more devices to insure a fair trial. One device aims at full community participation by insisting that jurors be randomly selected from the community, thereby giving all members an equal chance of becoming a juror. The other device is to insure a sufficiently large community representation by institing that a minimum number of jurors must agree on a verdict. To be sure, 6 or even 12 jurors can never fully represent a community. Nevertheless, however well or poorly a 12 member jury may represent the community, a 6 member jury will do so less well. The smaller the jury, the smaller the chance that it will include a member of a minority in the community. In *Williams* the court failed to acknowledge that obvious fact, but in *Ballew* Justice Blackmun corrected that error.[12]

The likelihood that a given minority in the population will be represented on the jury depends on two factors: the size of that minority in the community and the size of the jury. Table 2 illustrates how both these

11. See Harry Kalven, Jr., and Hans Zeisel, The American Jury 487 (Boston: Little, Brown & Co., 1966).
12. 435 U.S. 223 (1978).

factors affect the probability that a given minority will have at least one representative on the jury. The table shows these relationships in terms of the negative, undesirable alternative: the likelihood that the jury will *not* have even one representative of that minority. These likelihoods are given

TABLE 2
Likelihood that a Jury of the Indicated Size Will Not Have
Even 1 Member of the Indicated Minority

Jury Size	Population Minority of 10%	Population Minority of 20%
12	28	7
6	53	26

for minorities of two hypothetical sizes: one forming 10 percent, the other forming 20 percent of the population. The smaller the minority and the smaller the jury, the greater the likelihood that the minority will not be represented. The likelihood that a 6 member jury will have no representative of a 10 percent minority is more than one-half: 53 percent. In contrast, the likelihood that such a 10 percent minority is not represented on a 12 member jury is only 28 percent.[13]

V. THE DANGER OF A WRONG VERDICT

Whenever they have considered minimum standards for the jury, the courts have been concerned with the danger that a substandard jury will be more likely to arrive at a wrong verdict. The U.S. Supreme Court saw the problem correctly—the likelihood is inversely related to the size of the jury—even though the particular proof cited in the opinion was faulty.[14]

The proper proof of the likelihood of a "wrong" verdict requires that one defines first what one means by a "correct" verdict. Such a verdict might be defined as the verdict of which the majority of the universe of all potential jurors in the community would approve. The actual jury is then conceived of as a sample from that universe. The precise question as

13. In its efforts to deal with the problem of minority representation, the law by necessity fastens upon recognizable demographic characteristics of jurors such as sex, race, age, etc. These characteristics are only indirectly related to whatever minority values or perceptions may be relevant in a certain case, such as different views as to what constitutes negligence, or as to the appropriateness of certain damage awards. It is the great accomplishment of random selection to assure, automatically, optimal proportional representation of *all* minorities and minority views.

14. 435 U.S. at 236. Compare on this point David H. Kaye, And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury. 68 Cal. L. Rev. 1004 (1980), at 1026ff.

to the likelihood of a wrong verdict then is: how likely is it that the actual jury will arrive at an initial majority and thereby at a verdict that is contrary to what the community would approve.[15]

The initial majority position on the jury, as revealed in its first ballot, has been found to be a decisive determinant of the eventual verdict. In almost nine out of ten cases the initial majority will win the verdict.[16]

The likelihood of such a wrong verdict depends on two circumstances: the clarity of the evidence as reflected by the hypothetical majority vote of the community and the size of the jury. The smaller the majority vote (the less clear the evidence) and the smaller the size of the jury, the greater the likelihood of a "wrong verdict," as shown in table 3. If the

TABLE 3
Likelihood that a Randomly Selected Jury of 12 or 6 Members
Will Produce a Wrong Verdict (an Initial Majority Contrary
to the Majority View of the Community)

	% in Community Favoring Litigant		
Jury Size	60	70	80
12	.34[a]	.12	.02
6	.46	.26	.10

[a]Likelihoods are expressed in fractions of 1.00.

community's majority is great (80 percent), the likelihood that a 12 member jury will arrive at the wrong verdict is only .02, that is, 2 percent. Even in this situation, the smaller, 6 member jury will arrive at the wrong verdict in five times as many cases, namely 10 percent. Whatever the size of the majority in the community, the smaller, 6 member jury entails a much higher risk of the wrong verdict than the 12 member jury.

One aspect of the wrong verdict possibility that merits special consideration is the effect of a shrinking jury size on the amount of the awarded damages whenever their determination is left to some extent to the discre-

15. Another possible way of defining a "wrong verdict" would be comparing the jury's verdict with the decision the presiding judge would have reached had he tried the case without a jury. It might be interesting to see whether the discrepancies are more frequent with 6 member juries than with 12 member juries. The difficulty with that test is that its results require adjustment because the jury's deviation from what the judge would have done does not necessarily constitute a "wrong verdict." Occasionally the jury will deviate for a reason that represents a tenable moral position for a jury, although not for the judge who is bound to the letter of the law. (Compare Kalven & Zeisel, *supra* note 10, at 429.)

16. See Kalven & Zeisel, *supra* note 10, at 488. Henry Fonda's feat in *Twelve Angry Men* has hardly ever a parallel in real life. I would have said "none" until I happend to find an instance, albeit a highly irregular one. See Hans Zeisel & Shari Seidman Diamond, The Jury Selection in the Mitchell-Stans Conspiracy Trial, 1976 A.B.F. Res. J. 151.

tion of the jury. Normally, in such cases, each juror at some point in the deliberation will state what damages he or she considers appropriate. The end result, as a rule, will fall somewhere within the range of these figures, often around their average.

Here again, statistical theory allows us to make an important inference. In the long run, other circumstances being equal, the smaller the jury, the more likely it is to arrive at an extreme verdict. This is the consequence of the fact that the average damage awards of small samples will produce greater chance variations than that of larger samples. Hence, the averages of damage awards made by 6 member juries will show greater variations than those made by 12 member juries; and the awards made by 5-out-of-6 member juries, since they are "smaller" than 6 member juries and even smaller than 5 member juries, will show even greater variations. Since the distribution of awards is usually skewed toward the open end of higher awards (lower awards have the natural limit of zero), this means the extremes are more likely to be found at the open, higher end of the range.

A survey I have conducted suggested that with respect to personal injury damage claims against large corporations, jurors with high incomes are generally less generous than members of the middle- or lower-income brackets.[17] Yet, the high-income brackets as a rule form a minority in the population. The presence or absence of that minority is likely to affect the jury's damage award. And as we saw above, the smaller the jury, the less likely it is that such a restraining minority representative will be on the jury.

VI. THE QUALITY OF DELIBERATION

Finally, the courts are anxious to preserve the jury's ability to deliberate properly on its decision. This point, of course, is closely connected with the concern for minority representation and thereby with the size of the jury and the number of jurors who must agree on a verdict.

The permission for a jury to render a majority verdict automatically diminishes the potential role of the juror who represents a minority view and whose vote is not needed for the formation of the verdict. It has been argued that such a juror can nevertheless make himself heard. There can be no doubt, however, that the attention that he receives will be diminished by the knowledge that his consent is not needed. Therefore, the likelihood that the minority viewpoint will be effectively represented—that is, will not only be listened to but also affect the ver-

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17. The survey was conducted in Atlanta, Georgia, for lawyers who were looking for *voir dire* guidance.

dict—depends on whether or not unanimity is required. Table 4 shows the likelihood that a minority viewpoint will be effectively represented, that is, by at least 1 juror whose consent is needed for a verdict.

TABLE 4
Likelihood That A Viewpoint Will Have an Effective Representation on the Jury (At Least 1 Juror Whose Consent is Needed to Reach a Verdict)

	Unanimous Juries		Majority Juries	
% Jurors on the Venire Who Hold That Viewpoint	12 (1 Minority Juror Suffices)	6 (1 Minority Juror Suffices)	10-out-of-12 (3 Minority Jurors Are Required)	5-out-of-6 (2 Minority Jurors Are Required)
10	.72 (1)[a]	.47 (2)	.11 (3)	.11 (4)
20	.93 (1)	.74 (2)	.44 (3)	.34 (4)
30	.99 (1)	.88 (2)	.75 (3)	.58 (4)
40	1.00[b] (1)	.95 (2)	.92 (3)	.77 (4)
50	1.00 (1)	.98 (2)	.98 (3)	.89 (4)
60	1.00 (1)	1.00[b] (2)	1.00[b] (3)	.96 (4)
70	1.00 (1)	1.00 (2)	1.00 (3)	.99 (4)
80	1.00	1.00	1.00	1.00[b]
90	1.00	1.00	1.00	1.00

[a]Figure in parentheses shows rank (horizontal) among the four juries; 1 represents the highest likelihood.
[b]1.00 here means between .995 and 1.000.

The greater the proportion of jurors who hold the viewpoint (first column), the greater the likelihood that at least 1 such juror will be on the jury. On each level, however, as one might expect, the 12 member unanimous jury offers a far greater possibility for effective representation. The 6 member unanimous jury constantly holds rank 2, with the 10-out-of-12 member jury following. The 5-out-of-6 member jury invariably ranks last in the likelihood that it will have such a juror among its members.

VII. THE CHALLENGE IN THE MICHIGAN STATE COURTS

The Michigan Constitution of 1963, in adopting the text of the earlier constitution, reaffirmed: "the right of trial by jury shall remain." That new constitution however, added the provision that "[i]n all civil cases tried by 12 jurors a verdict shall be received when 10 jurors agree."[18] The constitution also provides that "[t]he legislature may authorize a trial by a jury of less than 12 jurors in civil cases."[19]

In 1968 the Michigan legislature made use of this authorization and reduced the size of the civil jury to 6 members. It also provided that a ver-

18. Mich. Const. of 1963, art. 1, § 14.
19. Mich. Const. of 1963, art. 4, § 44.

dict could be received when 5 of these 6 jurors agree, equating the 5-out-of-6 verdict to the 10-out-of-12 verdict provided for in the constitution.[20] It is that last step in the development that raises constitutional concerns.

The constitutionality of the rule allowing a 5-out-of-6 verdict was raised and addressed by the Michigan Court of Appeals in *Fisher v. Hatcher*.[21] That panel upheld the constitutionality of that rule. However, one of the judges, now Justice Levin of the Michigan Supreme Court, wrote separately to express his doubts about the constitutionality of the 5-out-of-6 rule.[22]

The majority in *Fisher* relied upon the United States Supreme Court decision in *Williams v. Florida,* which upheld a 6 person jury in a criminal case.[23] Since that decision, the U.S. Supreme Court has held that both a 5-out-of-6 verdict in a criminal case (*Burch v. Louisiana*)[24] and a 5 person jury in a civil case (*Ballew v. Georgia*)[25] do not meet the minimum standards of due process. Justice Levin suggested that the constitutional provision for 10-out-of-12 jurors was self-executing and did not authorize legislative action that could modify it. Moreover, the Convention Comment in article 1, section 14, of the Michigan Constitution of 1963 states that there is "[n]o change from Sec. 13, Article II, of the present [1908] constitution, except for the addition of a second sentence which permits verdicts in civil (not criminal) actions *when at least 10 jurors agree*" (emphasis added). This was the only change to the long-standing guarantee, carried from the 1850 Michigan Constitution to the present one, that "the right of trial by jury shall remain." The Michigan Supreme Court has repeatedly held that this provision has incorporated and preserved all common law attributes of the jury including, prior to the one 1963 change, the rule requiring unanimity.[26]

20. Mich. Comp. Laws Ann. § 600.1352.

21. 44 Mich. App. 541 (1973).

22. 44 Mich. App. at 549–52. Justice Levin in fact concurred in the court's decision, however, only on the limited ground that in the particular case at bar the 5-out-of-6 provision had not been operative, since the jury's verdict had been unanimous.

23. 399 U.S. 78 (1970). We may note that the New Hampshire Supreme Court disregarded and thus by implication rejected *Williams* and *Colgrove* when asked by the state's senate whether the authorization of a jury of fewer than 12 members would violate the United States or the New Hampshire constitutions. The justices unanimously referred to an opinion their court had rendered in 1860 on this issue: "'no body of less than twelve men, though they should be by law denominated a jury, would be a jury within the meaning of the constitution . . . . nor [has the legislature the power] to provide that a number of the petit jury, less than the whole number, can render a verdict.'" The justices add: "We reaffirm this [1860] decision, believing that the vitality of its conclusion remains today, especially in light of the number of empirical studies that have questioned the impact of the six-member jury on our court system" (Opinion of the Justices, No. 81-196, N.H. Sup. Ct., 431 A.2d 135, 137).

24. 441 U.S. 130 (1979).

25. 435 U.S. 223 (1978).

26. McRae v. Grand Rapids, Lansing & Detroit R.R., 93 Mich. 399, 53 N.W. 561 (1892); Swart v. Kimball, 43 Mich. 443, 5 N.W. 635 (1880). Cf. Chicago & Michigan Lake Shore R.R. v. Sanford, 23 Mich. 418 (1871); Paul v. Detroit, 32 Mich. 108 (1875).

In *McRae v. The Grand Rapids, Lansing and Detroit Railroad Company,* for instance, the Court considered the constitutionality of a statute allowing a civil case to be submitted to less than 12 jurors if during the course of the proceedings a juror died or became ill.[27] In analyzing the statute, the court reconciled the two passages from the 1850 Michigan Constitution providing that the civil jury trial right shall remain and that the legislature could reduce the number of jurors from 12. The court struck down the statute, despite the constitutional authority given to the legislature, as an unauthorized attack on the unanimity requirement that was preserved by the constitutional guarantee that "the right of trial by jury shall remain." Thus, the guarantee was held to incorporate the unanimous verdict requirement of the common law.

The Michigan Court of Appeals majority in *Fisher,* in the absence of a specific constitutional provision for a 5-out-of-6 jury, relied also upon Michigan Supreme Court Rule, GCR 1963, 512.1 as amended, and standard Jury Instruction No. 1.05, which provide for such a jury. Justice Levin, citing extensive authority,[28] cogently argued that promulgation of evidentiary or procedural rules does not insulate such rules from constitutional attack.

The strength of *Fisher* is further diminished by the fact that although the court relied on the U.S. Supreme Court's decision in *Williams,* it failed to note the Court's remark that the 6 member jury is likely to perform as well as the 12 member jury "particularly if the requirement of unanimity is retained."[29]

In the survey of Michigan law in 1974, published by the *Wayne Law Review,* the authors commented on the opinion of Justice Levin, who now sits on the Michigan Supreme Court, and anticipated that the question would be litigated further and ultimately end in the 5 juror verdict being declared unconstitutional.[30] I concur in that expectation.

The one minor point on which I am inclined to disagree with Justice Levin is his position that a case in which the 6 member jury was unanimous could not be the proper vehicle for attacking the 5-out-of-6 rule. Aside from the awkwardness of having to file and refile a motion for a unanimous verdict in case after case, in the hope that sooner or later the

27. 93 Mich. 399 (1892).
28. Fisher v. Hatcher, 44 Mich. App. at 544, 551 n.13.
29. See text at note 5 *supra.*
30. "The language of the 1963 constitution which specifically authorizes verdicts by ten jurors in a case tried to a 12 member jury and specifically authorizes the legislature to provide for juries of less than 12 members in civil cases, but is silent as to whether a non-unanimous verdict might be received in such cases, would seem to provide a substantial argument that the five juror verdict is unconstitutional." Jeffrey G. Heuer & Brian G. Shannon, Constitutional Law, 20 Wayne L. Rev. 325, 344 (1974).

jury will not be unanimous, there is another argument for reviewing the rule even in a case in which the jury was unanimous. Once the required majority of jurors have agreed on a verdict, there is likely to develop a colloquy between the foreperson and the holdout juror: "As you see, we now have a verdict without your vote. The only question is whether you want to make it unanimous or whether you care to persist in your disagreement." If the juror agrees to make the verdict unanimous, the harm done by the 5-out-of-6 rule may not surface. Such cosmetic unanimity may unjustly deprive a litigant of the right to challenge the 5-out-of-6 jury rule.

VIII. THE FEDERAL QUESTION

While the states are required to follow the dictates of the Sixth Amendment's right to jury trial in criminal cases, the U.S. Supreme Court has held that the Seventh Amendment applies only to the federal government, not to the states.[31] The position aims at providing freedom for the states to experiment in civil cases with other forms of decision making. The ultimate question remains, however, whether this gives the states leave to adopt any imaginable decision-making process for civil cases.

Whatever procedures a state chooses to provide must comply with the Fourteenth Amendment's requirement of due process in jury trials as well as in other cases. In *Hawkins v. Bleakly,* for example, although the U.S. Supreme Court held that the right to a jury trial is not required of the states in civil cases, it also held that where other procedures were adopted they must accord due process. The Court upheld a state workmen's compensation act, which did not allow for jury trials, only because it accorded due process. In *Woods v. Holy Cross Hospital,*[32] the Court of Appeals for the Fifth Circuit upheld a state mediation act only when it found that due process was accorded by the act. Although a state is free to replace jury trial by other procedures or even to abolish jury trials, it may not adopt a form of jury trial that violates the requirements of due process. The jury trials provided by a state must meet the basic fundamental requirements of fairness encompassed in the Fourteenth Amendment of the United States Constitution.

The due process clause of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." What constitutes due process has been the subject

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31. Curtis v. Loether, 415 U.S. 189 (1974); Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931); Hawkins v. Bleakly, 243 U.S. 210 (1916).
32. 591 F.2d 1164 (5th Cir. 1979).

of much commentary and analysis, but there is no dispute that due process requires a fundamentally fair procedure by a fair tribunal.[33]

In jury trial, the requirement of a fair tribunal has been defined to mean a random selection of jurors from the community.[34] The U.S. Supreme Court has further added the requirement that the jury be composed of at least 6 persons returning a unanimous verdict. A 5 person jury and a 5-out-of-6 person verdict in criminal cases were held defective precisely because they pose a danger of nonrational, unfair decision making. When the Court in *Ballew v. Georgia* decided that a 5 person jury did not satisfy the right to a jury trial, its reasoning was based not on the right to a jury trial per se but on the right to due process. After citing *Williams v. Florida*[35] and *Colgrove v. Battin*[36] (upholding 6 person juries under the Sixth and Seventh Amendments, respectively), the Court drew the line at any number below 6. It based its decision not on the formal requirements of the Sixth Amendment but on substantive concerns that go far beyond these formal requirements. It found that juries smaller than a 6 member jury that must be unanimous were unlikely to provide adequate representation of the community, were unlikely to provide adequate opportunity for proper deliberation, and for both those reasons were more likely to arrive at a wrong verdict.[37]

In *Colgrove* the Court also stressed the fairness requirement underlying due process. That court noted that the concern for the right of jury trial is not a concern with the preservation of the "form" of the common law jury trial but of its "substance," that is, "to assure a *fair and equitable* resolution of factual issues."[38]

The federal Constitution does not require the states to retain the civil jury. But if they retain the jury, the Fourteenth Amendment may well require that it be of a form that meets the minimum standards the Supreme Court has established in *Ballew* and *Burch*. The civil jury, too, might require a minimum size, so that the standards under which it administers justice conform to those set by the Constitution.[39]

33. Michigan and federal courts have held that due process requires a fair hearing by a fair tribunal. Meshriy v. Sun Oil Co., 67 Mich. App. 709 (1976), *cert. denied,* 429 U.S. 1043 (1977); Armstrong v. Manzo, 380 U.S. 545 (1965); Bradford Audio v. Pious, 392 F.2d 67 (2d Cir. 1968); Knapp v. Kinsey, 232 F.2d 458 (6th Cir. 1956). The Michigan Supreme Court has stated that due process requires an impartial tribunal. Kar v. Hogan, 399 Mich. 529 (1976); Milford v. People's Community Hosp. Auth., 380 Mich. 49 (1968). *Milford,* in fact, specifically recognizes the application of Fourteenth Amendment due process to Michigan tribunals.
34. See the Federal Jury Selection Act of 1968.
35. 399 U.S. 78, 86 (1970).
36. 413 U.S. 149 (1973).
37. See text at note 5.
38. 413 U.S. at 157 (emphasis added).
39. Otherwise there is the danger that failures of these minijuries will be used in turn as arguments against the jury itself. The federal minijury of 6 is already being used for that purpose, if for the present only with respect to the so-called complex cases. See Richard O. Lempert, Civil Juries and Complex Cases: Let's Not Rush to Judgment, 80 Mich. L. Rev. 68 (1981).

APPENDIX 1

THE VARIETIES OF THE CIVIL JURY IN THE COURTS OF UNLIMITED JURISDICTION

The varieties of juries in the following table are available to a litigant without consent from the other side. Most states allow smaller juries or majority verdicts through consent or stipulation by both sides. Some states, not all, set a minimum size (6 or 3) for the stipulated jury. One state requires a unanimous verdict if the stipulated jury consists of 3 jurors.

I *Unanimous Juries*	II *Majority Verdicts*
12 Jurors (15 States)	**10 out of 12 (10 States)**
Alabama	Alaska
Delaware	Hawaii
Georgia	Iowa
Illinois	Massachusetts
Indiana	Nebraska
Kansas	New Mexico
Maryland	Pennsylvania
New Hampshire	Texas
North Carolina	Washington
North Dakota	Wisconsin
South Carolina	
Tennessee	**9 out of 12 (12 States)**
Vermont	Arkansas
West Virginia	California
Wyoming	Idaho
7 Jurors (1 State)	Kentucky
Virginia	Louisiana
	Mississippi
	Missouri
6 Jurors (4 states & Federal)	Nevada
Colorado	Ohio
Connecticut	Oklahoma
Florida	Oregon
Rhode Island	South Dakota
Federal	
	8 out of 12 (1 State)
	Montana
	6 out of 8 (3 States)
	Arizona
	Maine
	Utah
	5 out of 6 (4 States)
	Michigan
	Minnesota
	New Jersey
	New York

APPENDIX 2

DETERMINATION OF THE PROBABILITIES

The probabilities are based on the so-called Binominal Theorem found in every statistical standard text. Stripped of their more formalized appearance, the computations are based on simple, commonly shared experiences.

If an event has a certain probability of occurring, then the likelihood of its occurring twice in a row is equal to the square of that probability, the likelihood of its occurring three times in a row is equal to the third power of that probability, and so forth. For example, the likelihood of throwing a six with one die is one-sixth (1/6) because the die has six numbers altogether. The likelihood of throwing two sixes in a row is $1/6 \times 1/6 = 1/6^2 = 1/36$ or one in 36 throws. The likelihood of three sixes in a row is $1/6 \times 1/6 \times 1/6 = 1/6^3 = 1/216$, or 1 in 216 throws, and so forth.

Applied to our jury computations, the rules translate as follows. Assume, for instance, 70 percent of the jurors in the jury box, if they were all called upon to sit on the jury, would vote on the first ballot for the defendant in that case. Therefore, the probability of drawing such a juror is 7 out of 10, or 7/10, or 0.7. What is the likelihood that the draw will select *only* jurors from that 70 percent majority who will vote for the defendant, and none from the 30 percent who would dissent, so that the jury will be unanimous for the defendant on the first ballot?

Answer: $0.7 \times 0.7 \times 0.7 \times 0.7 \times 0.7 \times 0.7$ or $0.7^6 = 0.118$.

This means that on the average, 11.8 percent of the 6 member juries drawn from the jury box, or a little more than 1 out of 9 juries (9×11.8 is approximately 100.0), will be unanimous for the defendant on the first ballot. The corresponding figure for the 12 member jury 0.7^{12} will be 0.014, or 1.4 percent, or roughly 1 jury in 70 draws (1.4×70 is approximately 100.0).