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SIX-MEMBER JURIES IN CRIMINAL CASES. LEGAL AND PSYCHOLOGICAL CONSIDERATIONS

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In New York the twelve member jury concept was given constitutional status at the earliest possible time. The State's first constitution in 1777 provided that ". . . [t]rial by jury, in all cases in which it hath heretofore been used in the Colony of New York, shall be established and remain inviolate forever." In language identical or substantially the same, the twelve person body comfortably traversed a series of constitutional conventions, and is now to be found in New York State Constitution Article I, § 2.

New York may not, consistent with its own constitution, reduce the class of jury trial cases below the 1777 standards, although, to be sure, the class may be expanded.

While minimum standards for jury trials are fixed by state constitutions and legislatures, it will be seen that if they fall below fourteenth amendment criteria, the federal Constitution will require conformity with "due process" levels.¹

With this in mind, we may take it that any New York State criminal defendant must today receive the same jury trial rights that were afforded to his 1777 counterpart, together with such additional rights that the United States Supreme Court has engrafted upon them.

When measured against federal constitutional jury trial requirements, New York's provisions transcend the federal standards in one respect, but were held different in another. As we shall see, this dichotomy results from the complete reversal of the United States Supreme Court's views on when, and how many, jurors are necessary. Under New York law, a twelve member jury is required upon the trial of

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¹ *Duncan v. Louisiana*, 391 U.S. 145 (1968).

indictments. The federal Constitution, however, can abide a six-member jury,² but now mandates jury trials for defendants susceptible to more than six months imprisonment, and New York cannot leave it to three-judge benches in New York City to render verdicts in those cases.³

Of course, states are free to limit their powers beyond federal constitutional requirements. New York has done so in a number of instances, by providing stricter standards than those federally mandated in voluntariness of confessions,⁴ immunity for witnesses,⁵ or jury unanimity requirements.⁶

And so it is with juries of twelve in felony cases. Under Article VI, § 18, of the New York State Constitution:

... [c]rimes prosecuted by indictment shall be tried by a jury composed of twelve persons, unless a jury trial has been waived as provided in Section 2 of Article 1 of this Constitution.

It will be seen that New York's "twelve person" jury for trials upon indictments is firmly rooted in history and decisional law. In 1858 the Court of Appeals decided *Cancemi v. People*.⁷ The defendant was there agreeable to the withdrawal of one juror, thus enabling the remaining eleven to render a verdict. After having been declared guilty by eleven, his appeal was based on the invalidity of his waiver. The court reversed the conviction, for its traditional notions of jury trials by twelve far outweighed any thoughts it had on the theory of estoppel. Other instances are few indeed in which the courts will allow a party to knowingly and intelligently adopt one course, and, when it fails him, to undo its results.⁸ Thus, the court held that no defendant, tried upon an indictment, may waive a jury trial or any part thereof. The rigidity of its views is epitomized by this language:

² *Williams v. Florida*, 399 U.S. 78 (1970).

³ *Baldwin v. New York*, 399 U.S. 66 (1970).

⁴ Compare *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 199, 255 N.Y.S.2d 838 (1965), requiring voluntariness of confession to be proven "beyond a reasonable doubt" with *Lego v. Twomey*, 404 U.S. 477 (1972), requiring only a "preponderance."

⁵ Compare New York's immunity statute, granting "transactional" immunity to witnesses, N.Y. CRIM. PROC. L. § 50.10 (McKinney 1971), with the United States Supreme Court's view that "use" immunity ("testimonial" immunity) is constitutionally sufficient (*Kastigar v. United States*, 406 U.S. 441 (1972)); *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472 (1972). See *Gold v. Menna*, 25 N.Y.2d 475, 255 N.E.2d 235, 307 N.Y.S.2d 33 (1969).

⁶ A 9 or 10 member majority is a constitutionally approved verdict for 12 member juries. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). In New York, unanimity is required. N.Y. CRIM. PROC. L. § 310.80 (McKinney 1971), formerly N.Y. CODE CRIM. PROC. §§ 428, 450, 451 (McKinney 1958).

⁷ 18 N.Y. 128 (1858).

⁸ See *People v. Schmidt*, 216 N.Y. 324, 329, 110 N.E. 945, 946 (1915).

If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone. It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated.⁹

The Court of Appeals fortified its decision by recalling the case of Lord Dacres who, during the reign of Henry VIII, was tried for treason, and was not permitted to waive a trial by his peers, in favor of a trial "by the country." At the time of *Cancemi*, the New York Constitution did not, as it does today, refer to twelve-member juries for indictment trials. The court, instead, invoked common law principles by which a legal jury was considered to be a jury of twelve.¹⁰

The figure twelve has been shrouded with its impenetrable mystique, and no New York court has ever conceded that a reduction would be permissible, short of, at least, a state constitutional amendment.¹¹ Perhaps the reluctance to allow reduction may be accounted for by a phenomenon which allows maximum diffusion of responsibility. A juror faces the risk of two grave errors: depriving an innocent man of liberty or turning a criminal loose upon society. The more serious the crime, the greater are the adverse consequences of either error. The sharing of the responsibility with others, however, allows the juror to accept with less anxiety knowledge of the consequences of his decision.¹² This need to spread responsibility was acknowledged by the United States Supreme Court in *Williams v. Florida*,¹³ when it observed that the concept of collective responsibility may well have underlain retention of the twelve-member jury for all capital cases, even in states that have adopted smaller juries for all other cases.¹⁴

Several years ago, diffusion of responsibility was suggested as a possible explanation for the greater risk endorsement by groups, as

⁹ 18 N.Y. at 138.

¹⁰ 1 Chit. Crim L. 505, 2 Bennett & Heard's Leading Cases 327.

¹¹ Even in *People v. Cosmo*, 205 N.Y. 91, 98 N.E. 408 (1912), where the court upheld a conviction upon a jury verdict, one of whose jurors was found to have lacked the requisite qualification of property ownership, the court insisted that a jury of 12 was essential to a verdict, and based its holding on the defendant's waiver, not of a jury trial by 12, but of the particular juror's qualifications.

¹² It may also account, in part, for a court's lack of power to direct a verdict of guilty. *Howell v. People*, 5 Hun 620 (App. Div. 3d Dep't 1875), *aff'd mem.*, 69 N.Y. 607 (1877).

¹³ 399 U.S. 78 (1970).

¹⁴ 399 U.S. at 103.

opposed to individuals (a phenomenon referred to by psychologists as the "risky shift").¹⁵ Although this hypothesis has receded in importance as an explanation for the "risky shift,"¹⁶ further research into diffusion of responsibility may answer some important questions about the psychological needs of jurors, e.g., when is the sharing of responsibility necessary? Is the social support of five or seven others equivalent to the social support of eleven others? Does the lack of adequate mutual support inhibit verdicts, and so forth?

The psychological need for the arbiter of fact to spread accountability may be seen in the court's refusal to allow a defendant to try a felony before a judge. Curiously, a defendant who thought it to his advantage to forego a jury trial and leave his fate to a single fact finder was staunchly prohibited from doing so. It is generally thought that the jury right was born of a desire to accord individuals a greater measure of fairness. Surely, then, if the accused seeks to return this valuable guarantee, one would not expect the state to force it down his unwilling throat, or so it might be argued. Thus, one feasible explanation for the judiciary's unalterable refusal to allow waiver was its need to hear twelve times¹⁷ the number of voices decree one's doom (or liberation). Stronger language evincing this can hardly be found than in *Vose v. Cockcroft*,¹⁸ where the Court of Appeals said:

A man may not stipulate that he may be hung in certain contingencies or upon the proof of certain facts. He cannot dispose of his life by arbitration. If his life is taken, except upon proof of the facts constituting the crime of murder, and before a tribunal qualified by law to determine the question, it is murder.

These powerful words reflect perhaps another basis for the origin of jury trials. While the jury is generally regarded as a pillar that supports the very foundation of individual rights, the development of the jury system may be seen as a mechanism by which consequential declarations were to be made by groups (*i.e.*, one's peers, or, more recently, a cross section of society) rather than to the more fragile judgment of an individual, however potent he may be.

Further evidence of this may be seen in the reluctance of the courts

¹⁵ Wallach, Kogan & Bem, *Group Influence on Individual Risk Taking*, J. OF ABNORMAL AND SOC. PSYCHOLOGY 75-86 (1962).

¹⁶ Pruitt, *Choice Shifts in Group Discussion: An Introductory Review*, 20 J. OF PERSONALITY AND SOC. PSYCHOLOGY 339-360 (1971).

¹⁷ Actually, the constitution of New York nowhere provides for "unanimity" in criminal case jury verdicts. The requirement is read in by implication, tradition, and decisional law. See N.Y. CONST. art. I, § 2 (McKinney 1969).

¹⁸ 44 N.Y. 415, 423 (1871).

to allow a waiver even after waiver of jury trial was expressly legitimized by the 1939 constitutional convention.¹⁹

WAIVER

The first significant post-amendment case that dealt with sufficiency of jury trial waiver was *People v. Diaz*.²⁰ The debate centered around the issue of a trial court's discretion in rejecting a waiver. The phrase in issue was the following:

A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before *and with the approval of a judge or justice of a court having jurisdiction to try the offense.* (emphasis supplied.)²¹

To what extent, if any, does the power of refusal lie within the discretion of the judge to whom the waiver is tendered? The Appellate Division majority, in an opinion that drew heavily upon both legislative and historical documents,²² held that the provision requiring "approval" vested the court with a discretion that could properly be exercised to deny waiver, where a defendant sought to waive but his co-defendant did not. To grant a waiver under these circumstances, would, in the majority view, allow one defendant to gain an unfair advantage, or a severance to which he was not otherwise entitled. The Court of Appeals affirmed²³ and *Diaz* established the doctrine that while the right to jury trial is absolute, there is no corresponding *right* to a non-jury trial. It might be noted here that the Federal Rules of Criminal Procedure²⁴ require both the approval of the court and the consent of the prosecution.²⁵ The latter limitation was deemed undesirable in New York,²⁶ and was not inserted.

Having determined that discretion resides with the trial judge to repudiate a waiver, the Court of Appeals later amplified its holding by circumscribing the exercise of discretion to cases in which waiver was sought in bad faith or for purposes of gaining an impermissible ad-

¹⁹ N.Y. CONST. art. I, § 2 (McKinney 1969).

²⁰ 10 App. Div. 2d 80, 198 N.Y.S.2d 27 (1st Dep't.), *aff'd*, 8 N.Y.2d 1061, 170 N.E.2d 411, 207 N.Y.S.2d 278 (1960).

²¹ *Id.* at 83, 198 N.Y.S.2d at 31-32.

²² FIFTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK 37-38, 159-174 [hereinafter FIFTH REP.]; EIGHTH ANNUAL REPORT 59. See 10 App. Div. 2d at 89, 198 N.Y.S.2d at 36-37. The opinion also contains an appendix setting forth the statutes and cases of 19 other states. *Id.* at 94, 198 N.Y.S.2d at 41-42.

²³ 8 N.Y.2d 1061, 170 N.E.2d 411, 207 N.Y.S.2d 278 (1960).

²⁴ FED. R. CRIM. P. 23(a).

²⁵ See *Mason v. United States*, 250 F.2d 704 (10th Cir. 1957).

²⁶ FIFTH REP. 167.

vantage.²⁷ The court was divided, three judges, including then Chief Judge Desmond, expressing the view that "approval" means an *unfettered* discretion to disapprove.

Even where a waiver is intelligently and clearly tendered, it will be rejected, and a conviction reversed, if the waiver procedure has not been fastidiously adhered to.²⁸ Moreover, it appears that if a court, under colorable standards, refuses a waiver, the appellate courts will not disturb the exercise of discretion. Thus, in *People v. DiCostanzo*,²⁹ it was held that the trial judge properly insisted on a jury trial in order to allow adjudication of voluntariness of a confession that the court itself had earlier ruled admissible.

Case law has further confirmed that the "right" to waive is far weaker than the right to jury trial. The dimension of any given right may be measured by its inclusion within the fourteenth amendment, and whether it is obligatory on the states. A sixth amendment right to jury trial has been absorbed within the fourteenth amendment,³⁰ but the converse right to waive has certainly not been. In New York, the stature of a particular right may be considered in light of *Keitt v. McMann*³¹ which sets the threshold for state habeas corpus relief at "fundamental constitutional or statutory"³² rights in criminal prosecutions. The Court of Appeals examined the right to waive jury trials and found it to be outside of those enunciated in *Keitt*.³³

The 1939 waiver amendment is self-executing.³⁴ Absent, then, a suggestion of strategic or tactical gain — as opposed to mere convenience — a defendant may succeed in waiving trial by jury, and it is evident that courts have come to accept the practice.

It is difficult to perceive why, if a defendant is allowed to waive an entire jury, he cannot agree to a trial by some number of jurors less than twelve.³⁵ Ostensibly, this is because of the notion, so embedded in our legal jurisprudence, that a jury of less than twelve is no jury at all. The courts have consistently held that a jury is an un-

²⁷ *People v. Duchin*, 12 N.Y.2d 351, 190 N.E.2d 17, 234 N.Y.S.2d 670 (1963).

²⁸ See, e.g., *People v. Matthews*, 35 App. Div. 2d 1049, 316 N.Y.S.2d 936 (3d Dep't 1970) (mem.).

²⁹ 31 App. Div. 2d 250, 296 N.Y.S.2d 576 (4th Dep't 1969), *aff'd mem.*, 26 N.Y.2d 1014, 259 N.E.2d 925, 311 N.Y.S.2d 507 (1970).

³⁰ *Duncan v. Louisiana*, 391 U.S. 145 (1968).

³¹ 18 N.Y.2d 257, 220 N.E.2d 653, 273 N.Y.S.2d 897 (1966).

³² *Id.* at 262, 220 N.E.2d at 655, 273 N.Y.S.2d at 899.

³³ *People ex rel. Rohruich v. Follette*, 20 N.Y.2d 297, 229 N.E.2d 419, 282 N.Y.S.2d 729 (1967).

³⁴ *I.e.*, no further legislation is necessary to implement it. *People v. Carroll*, 7 Misc. 2d 581, 161 N.Y.S.2d 339 (County Court, Kings County), *aff'd*, 4 App. Div. 2d 537, 168 N.Y.S.2d 265 (2d Dep't 1957), *aff'd*, 3 N.Y.2d 686, 148 N.E.2d 875, 171 N.Y.S.2d 812 (1958).

³⁵ Under the Federal Constitution, unlike *Cancemi*, one can. *Patton v. United States*, 281 U.S. 276 (1930).

recognized entity if it is composed of less than the requisite number, even with the consent of all parties concerned. In *People v. Bent*,³⁶ the defendant was tried by a jury of five, instead of the six-member body provided for in courts of special sessions. After he was convicted, he argued that his conviction was rendered by an illegal jury and should be set aside. Ironically, the court agreed, but seized upon the fact that the judge, at the conclusion of the case, said that the defendant was guilty. This language was held tantamount to a court-rendered verdict which, in spite of the illegal jury, would not be disturbed. In *People v. Reynolds*,³⁷ the defendant was luckier, for there, while he agreed to a five-member jury, the court was not found to have made any independent determination of guilt, and for that reason there was "an attempted trial by a trier of fact not recognized by our law, to wit: a number of men not constituting a recognized jury."³⁸ The issue of "bad faith," by which judges are trapped into allowing proceedings for which the law of estoppel has no application, was touched upon, but has not served to diminish the firmness with which the courts have decided these cases.

It might be argued that both *Reynolds* and *Bent* were decided prior to the constitutional amendment of 1939, and that their holdings are the product of the staunch pre-amendment view that no waiver of any kind would be tolerated.³⁹ But as recently as 1966 the Court of Appeals expressed a similar philosophy. In *People v. Ryan*⁴⁰ an alternate juror was substituted, by consent, after five hours of jury deliberation. In spite of the consent, the court, in a 5-2 decision, held that the jury was an illegal one, and the verdict was the product of thirteen, rather than twelve jurors. Indeed, *Ryan* has been followed in two later cases⁴¹ resulting in a reversal of the conviction because an alternate juror was, by consent, substituted for a regular juror who had become ill several hours after deliberation had begun.

In one curious case⁴² a juror had taken ill after both sides rested. By consent, a new twelfth juror was acquired, who, with the other

³⁶ 151 App. Div. 734, 136 N.Y.S. 276 (3rd Dep't 1912).

³⁷ 133 Misc. 492, 233 N.Y.S. 140 (Sup. Ct. Chautauqua County 1929).

³⁸ *Id.* at 493, 233 N.Y.S. at 142.

³⁹ In *Maeseck v. Noble*, 9 App. Div. 2d 19, 189 N.Y.S.2d 748 (3rd Dep't 1959), a civil case, eleven jurors, with the consent of both parties, rendered a unanimous verdict, after one sick juror withdrew. Despite the acceptability of a 5/6 verdict under CPA 463(a) (presently CPLR 4113(a)), the 11 member verdict was invalidated because, although 10 of 12 would have been enough, the 10, 11 or 12 jurors must be part of a legal jury, which can only be a 12 member body.

⁴⁰ 19 N.Y.2d 100, 224 N.E.2d 710, 278 N.Y.S.2d 199 (1966).

⁴¹ *People v. Sosnicki*, 30 App. Div. 2d 576, 291 N.Y.S.2d 197 (2d Dep't 1968) (mem.); *People v. Leon*, 28 App. Div. 2d 912, 282 N.Y.S.2d 301 (2d Dep't 1967) (mem.).

⁴² *People v. Toledo*, 150 App. Div. 403, 135 N.Y.S. 49 (1st Dep't 1912).

eleven, was sworn in to complete a new jury, and, as such, heard the entire trial testimony read back. The conviction was upheld on the ground that the second jury was a valid twelve-member body. Doubtless, the court said, that defendant could have insisted that all the evidence be presented anew, but the defense agreed to re-reading the stenographic transcript, and accordingly, there was a waiver.

STATE VS. FEDERAL STANDARDS

It may be seen that New York's unremitting commitment to full sized juries stems from interpretations of our state's own Constitution. In defending its size and totality, it was never felt necessary to look to any other document.

Had the courts and the draftsmen of our state constitution been able to predict the proclamation of the 1970 United States Supreme Court, the cases might have been decidedly different. Under *Williams v. Florida*,⁴³ we have seen that a state is free to provide for a jury of less than twelve members in felony cases. Whether or not New York would have changed its views, the question that remains to be answered is whether, now given constitutional license, it will do so.

In concluding that a state could, without offending the United States Constitution, provide for a fact finding tribunal of less than twelve, the Court rejected a number of arguments, among them the assertion that a twelve-member jury is necessary because it provides the defense with a larger body, of which only one person is necessary to prevent conviction. By that reasoning, the court said, a 100-member jury might be preferable for an accused, but that reductions from 12 to 6 pose no constitutional impediment. It was thought that a six member jury could provide the necessary community cross-representation, and that the decisions forbidding arbitrary exclusion of diverse groups or classes guarantee the existence of fair tribunals.

Williams did come as something of a surprise. In earlier cases juries were defined as 12-member bodies. When Utah was still a territory, an alleged calf thief was tried and convicted of grand larceny by a jury of twelve. A new trial was granted but it was not conducted until after Utah's admission into the union. At the second trial he was tried by a jury of eight as provided by the Utah state constitution. Defendant consented but later complained that he should have been tried by a jury of twelve, because, at the time of the alleged crime, Utah territorial law provided for a jury of twelve. The United States Supreme Court

⁴³ 399 U.S. 78 (1970).

agreed⁴⁴ and held that as for him, a jury of eight, although contemplated under the Utah state constitution, would be in violation of *ex post facto* principles. The high Court reasoned that the provisions of the United States Constitution relating to criminal trials applied to *territories* of the United States, and that the territory of Utah was required to provide a trial, as it did, by a twelve-member jury. The precise issue was therefore whether Utah, upon its admission to the Union, could constitutionally give *this* defendant an eight-member jury trial while the territory of Utah could not. The Supreme Court of Utah first decided the case, upholding the conviction, on the ground that "there can be no magic in the number twelve, though hallowed by time."⁴⁵ By way of dictum, the United States Supreme Court flatly disagreed, but based its decision on narrower grounds, *viz*: *ex post facto* doctrines. The *Thompson* court, for the moment, avoided deciding whether Utah, once having become a state, could constitutionally provide for eight-member juries for crimes committed after statehood.⁴⁶

In *Williams* the high Court conceded that its earlier decisions assumed that the number twelve was immutably codified into the United States Constitution, even though that conclusion was not necessary to the decisions.⁴⁷

For example, in *Maxwell v. Dow*⁴⁸ the Court reiterated that although a "jury" means a body of twelve, the due process portion of the fourteenth amendment does not make jury trials obligatory on states. As in *Thompson*, the Utah state constitution was in issue. In *Maxwell*, the Court concluded that the sixth amendment contemplated twelve-member jury trials in federal cases, but that this particular sixth amendment right was not absorbed under the fourteenth amendment.

Thus, we have recurring examples of the Court refusing to concede that a jury could mean anything less than twelve persons, but allowing Utah to apply its own views. Certainly it was difficult for the Court to acknowledge the existence of juries of any other number, given the almost mystical adherence to the number twelve. Indeed, in *Maxwell*, the dissent pointed out that the first ordinance adopted by Plymouth Colony in 1623 was the one declaring, among other things, that "[a]ll

⁴⁴ *Thompson v. Utah*, 170 U.S. 343 (1898).

⁴⁵ Utah relied on an earlier case, *State v. Bates*, 14 Utah 293, 301, 47 P. 78, 80 (1896), from which this quotation was taken.

⁴⁶ Two years later, this question was answered in the affirmative in *Maxwell v. Dow*, 176 U.S. 581 (1900).

⁴⁷ See, e.g., *Patton v. United States*, 281 U.S. 276 (1930); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Maxwell v. Dow*, 176 U.S. 581 (1900); *Thompson v. Utah*, 170 U.S. 343 (1898).

⁴⁸ 176 U.S. 581 (1900).

criminal facts" should be tried "by the verdict of twelve honest men to be empaneled by authority in form of a jury upon their oaths."⁴⁹

With that sort of precedent, it is not surprising that five years later, in *Rasmussen*⁵⁰ a jury of twelve was held mandatory for criminal trials in the territory of Alaska. Ironically, if Alaska, at the time of the decision, had been a state, the *Maxwell* principle would have applied and Alaska, as a state, would have been outside of the sixth amendment.

The dichotomy between *Rasmussen* and *Maxwell* is all the more interesting because in *Rasmussen* the invalid six member jury was operable, under Alaska territorial law in misdemeanor cases only. Thus, the *Alaska-Rasmussen* situation was precisely the same as it had been for over 100 years in New York State. Under New York law misdemeanors were triable in courts of special sessions where juries were composed of six members. Indeed, in New York City, in courts of special sessions, misdemeanor trials were conducted by a three-judge bench without a jury. The constitutionality of six-member jury trials in courts of special sessions was raised early in the day. New York's appellate courts considered the point, before 1900, in at least three cases, and in all instances the conclusion was the same. In *Dawson v. Horan*,⁵¹ and in *Knight v. Campbell*,⁵² the courts, construing a jury to mean a 12-member body⁵³ pointed out that the state constitutional right to trial by jury did not exist in the courts of special sessions in 1777, and, therefore, our first Constitution (1777), by preserving jury trials as they theretofore existed, did not include jury trials for those courts. Indeed, the courts of special sessions had been functioning without jury trials as early as 1737.⁵⁴

The very same assumption was made by the Court of Appeals in 1878⁵⁵ in deciding that a jury does indeed mean a 12-member body, but that trials for petty offenses, triable in courts of special sessions, are not embraced within the scheme of jury trials as constitutionally guaranteed. The court noted that in 1824,⁵⁶ the legislature made provision for six-member jury trials in courts of special sessions, and, accordingly, a defendant has no right to complain about the six-member jury when, in fact, he is not entitled to any jury at all.

The law on that point was quite well settled until the United

⁴⁹ *Id.* at 609.

⁵⁰ 197 U.S. 516 (1905).

⁵¹ 51 Barb. 459 (1868).

⁵² 62 Barb. 16 (1872).

⁵³ See, e.g., *Wynchamer v. People*, 13 N.Y. 378, 458 (1856); *Cruger v. Hudson River R.R. Co.*, 12 N.Y. 190, 198 (1854).

⁵⁴ LAWS OF NEW YORK ch. 656 (1691-1773).

⁵⁵ *People ex rel. Murray v. Justices*, 74 N.Y. 406, *aff'g*, 13 Hun. 533 (1878).

⁵⁶ *Id.* at 407.

States Supreme Court decided *Duncan v. Louisiana*⁵⁷ in 1968. *Duncan* overruled *Maxwell* to the extent that *Maxwell* denied the absorption of the sixth amendment into the fourteenth amendment in cases that carry penalties of six months or more. Thus, after the Court in *Duncan* required that "jury trials" be held in state courts for offenses other than petty crimes, the only issue remaining was the size of the jury itself, and this question was reserved for *Williams v. Florida*.⁵⁸ On the same day that *Williams* was decided, the Court, in *Baldwin*, upset New York's statutory scheme by declaring unconstitutional so much of New York's City Criminal Court Act⁵⁹ as deprived jury trials to defendants who, as misdemeanants, were amenable to punishment of up to one year in prison. For one thing, the Supreme Court noted the disparity between New York City, where misdemeanants are tried by a three-judge bench, and the rest of New York State which provides for six-member jury trials for the same offenses. The court noted that, in the entire nation, New York City alone "denies an accused the right to interpose between himself and a possible prison term of over six months, the common sense judgment of a jury of his peers."⁶⁰ In sum, then, as of this writing, jury trials are required in every jurisdiction of the United States if the accused is punishable by imprisonment of six months or more. New York has since enacted statutes in conformity with *Duncan* and *Baldwin* (CPL 340.40).

The Court in *Williams* made a point of saying that some legislatures may have good reason to conclude that a twelve-man jury is preferable to a smaller one, or that it is desirable to spread the collective responsibility for the determination of guilt among the larger group. The holding simply leaves these considerations to Congress and the states, unrestrained by an interpretation of the sixth amendment that would forever dictate the precise number that can constitute a jury.

That being the case, it is now appropriate to determine whether a jury of six would be in any respect inferior to one of twelve. From a strictly utilitarian viewpoint, management of six-member juries would be decidedly more efficient and less expensive, but it remains for us to consider whether fairness, effectiveness, or accuracy would be at all sacrificed.

PSYCHOLOGICAL CONSIDERATIONS

It is difficult to obtain valid psychological evidence of the effects of jury size. In the first place, actual juries are relatively inaccessible.

⁵⁷ 391 U.S. 145 (1968).

⁵⁸ 399 U.S. 78 (1970).

⁵⁹ NEW YORK CITY CRIM. CT. ACT § 40 (McKinney Supp. 1969).

⁶⁰ 399 U.S. at 72.

Deliberations take place in secret, so that all knowledge of what happens in the jury room can come only from the memories of individual jurors. Mock juries may be used, although they may differ importantly from real ones. In particular, mock criminal juries lack the confrontation with the defendant, an individual whose life will be unalterably affected by the verdict. Reassuringly, social scientists who have extensively studied mock juries, for example, members of the University of Chicago Jury Project⁶¹ report that these artificial bodies, nevertheless, take their task seriously.

Another problem surrounding the study of juries is the determination of an adequate criterion by which to evaluate the jury's decision in a criminal case. How does one determine the "correct" decision when the jury itself is the final arbiter of fact? Unlike the civil jury which lends itself to quantitative comparisons through the size of damage awards, the criminal jury renders a verdict that represents a dichotomous choice (*i.e.*, either "guilty" or "not guilty"). When the criminal jury is given a series of lesser included crimes of which the defendant may be convicted, its verdict may be placed on an ordinal scale, but usually a sufficient number of cases for a single set of lesser included charges are not available for comparison. The best one can do, perhaps, in the evaluation of dichotomous verdicts, is to declare six-member juries equal in quality to 12-member juries when both produce the same proportion of acquittals to convictions, hoping that one jury does not convict the innocent while the other convicts the guilty.

As some jurisdictions adopt the six-member juries, records of verdicts may provide data by which to compare the two sized juries. Several comparisons are possible. None of them are useful by themselves, but taken together they may provide important information. For example, one might compare verdicts in states that use smaller juries with those that use twelve-member juries, but this is confounded by possible geographical differences in jury leniency. Comparisons of cases tried by smaller juries with those tried by larger juries within a single jurisdiction are confounded by differences in the types of cases involved. (It is unlikely that cases will ever be randomly assigned to different-sized juries.) Comparisons of verdicts before a change from twelve to six was instituted with those afterwards are confounded by any other changes that may have occurred in the interim, although the validity of these comparisons can be increased by examining the normal pattern of year-to-year fluctuations as well. The use of many different comparisons, each

⁶¹ H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

with a different source of error, will increase the validity of any conclusions that are drawn.⁶²

The chief argument in favor of a jury of twelve as opposed to one of six members has been that of increased resources. The more people that hear a set of arguments and weigh evidence, the greater the probability that the group will reach a correct solution. This argument has been supported by psychological studies of group problem solving situations that are analogous, but not identical, to the task of the jury. For example, groups were superior to individuals working alone for problems that required the overcoming of prejudices⁶³ and the detection of errors in recall.⁶⁴ Groups of 12 or 13 surpassed those of six or seven in the quality of solutions to a human relations problem.⁶⁵

The superiority of group to individual and of a larger group to a smaller group can be predicted on a purely statistical basis. Pooling of individual judgments reduces random error. The distribution of pooled judgments will be closer to the true value than will that of individual judgments. "Four judgments are better than one for the same non-social reasons that four thermometers are better than One."⁶⁶

On the same purely statistical basis, Hans Zeisel⁶⁷ has argued that an experienced lawyer will be better able to predict the verdict in a given case for a 12-member than for a six-member jury. The 12-member jury will be less of a "gamble" because its verdicts will be less variable. That is, the distribution of pooled judgments of larger groups will be closer to the true value than that of smaller groups due to greater elimination of random error, hence they will vary less. An appropriate statistical index of this variation is the standard deviation.⁶⁸

⁶² The evaluation of change within natural (non-laboratory) settings through the combination of imperfect comparisons is described in greater detail in Campbell, *Reforms as Experiments*, 24 AMER. PSYCHOLOGIST 409-29 (1969).

⁶³ Barnlund, *A Comparative Study of Individual, Majority, and Group Judgment*, 58 J. OF ABNORMAL AND SOC. PSYCHOLOGY 55, 59 (1959).

⁶⁴ J. Dashiell, *Experimental Studies of the Influence of Social Situations on the Behavior of Individual Human Adults*, in A HANDBOOK OF SOCIAL PSYCHOLOGY 1097-1158 (C. Murchison ed. 1935).

⁶⁵ Fox, Lorge, Weltz, Herrold, *Comparison of Decisions Written by Large and Small Groups*, 8 AMER. PSYCHOLOGIST 351 (1953).

⁶⁶ D. JOHNSON, *THE PSYCHOLOGY OF THOUGHT AND JUDGEMENT* (1955).

⁶⁷ Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710-24 (1971); *The Waning of the American Jury*, 58 A.B.A.J. 367-70 (1972).

⁶⁸ The formula of the standard deviation is $\sqrt{\frac{E(X - M)^2}{N}}$ where E = the sum of; X = each judgment; M = the mean (average); and N = the number of cases (juries). It is easy to see that if the pooled judgments of twelve-member groups tend to be closer to the mean of the distribution than those of six member groups due to greater elimina-

This argument applies to group decisions that can be expressed by numbers that vary along a continuous scale (such as the size of damage awards in a civil lawsuit). It cannot, however, apply to decisions that are the result of a dichotomous choice such as those rendered by a criminal jury. The variability of a distribution of dichotomous decisions is expressed not by the standard deviation but by the standard error of the proportion.⁶⁹ This latter index cannot be affected by the number of persons comprising the jury that reaches each verdict because it depends only upon the proportion of guilty to innocent verdicts and the number of juries that are sampled. Hence, the issue of variability or predictability of dichotomous verdicts is reduced to nothing more than the same question that is posed in assessing the quality of the verdicts: do the six-member juries render the same proportion of convictions to acquittals as the 12-member juries?

Furthermore, the statistical pooling argument ignores the contribution of social processes. Group decisions are not always identical to those that would be predicted by the simple averaging of pre-discussion individual decision. For example, group decisions have been shown to be more risky than the initial individual decisions of the discussion participants.⁷⁰ Group discussion tends to produce expressions of attitudes that are more extreme and more polarized than those of the participants prior to discussion.⁷¹ Should this tendency toward extremity be one that varies directly with the size of the group, the decisions of 12-member groups might be more extreme and more variable than those of six-member groups, a result quite opposed to that which would be predicated on the basis of statistical pooling alone. Although to date there is no evidence that extremity varies with group size, the potential effect of social factors should not be ignored.

Several social processes in groups have been shown to vary with group size. For example, as group size increases so does the inequality of the members' participation. The difficulty of the group in coordinating participation increases. The groups will show less consensus and will have a greater tendency to break into factions.

In one of the few comparisons of group size to use 12-member

tion of random error, $E(X - M)^2$ will be smaller and hence the standard deviation, as an index of variability, will be smaller.

⁶⁹ The formula for the standard error of the proportion is where p = the proportion of times one response is given. (e.g. proportion of guilty verdicts); $q = 1 - p$; and N = number of cases (juries).

⁷⁰ Wallach, Kogan, & Bem, *Group Influence on Individual Risk Taking*, 65 J. OF ABNORMAL AND SOC. PSYCHOLOGY 75, 76 (1962).

⁷¹ Moscovici & Zavalloni, *The Group as a Polarizer of Attitudes*, 12 J. OF PERSONALITY AND SOC. PSYCHOLOGY 125 (1969).

groups,⁷² Boy Scouts attending a summer camp were asked to rank each of ten items of equipment in the order of its importance to a lone camper lost in the woods. The boys ranked each item immediately before and after discussion, and, in discussion groups of five or 12, they produced group rankings. Discussion produced greater agreement in rankings among members in both groups, but the amount of agreement was much greater for the smaller groups. In addition, groups of 12 showed a greater tendency to break into factions.

In mock civil juries (all consisting of 12 members) inequality of participation among jurors has been observed.⁷³ Members of higher social status (determined by occupation) and men (regardless of occupation) contributed more than their share of participation than did persons of lower status and women respectively. The inequality of participation was so great that half or more of the total items of communication in 82 percent of the juries could be accounted for by three persons of the 12. Individuals who participated more expressed greater satisfaction with the deliberation, and they shifted their positions less often in the process of arriving at a verdict. Hence, the more active jurors may be construed to have been the more influential.

One reason for the increasing imbalance in participation with group size is the difficulty that each group member has in seeing each of his fellow members as individuals. A. P. Hare⁷⁴ has proposed that six may be the cut-off point for the maintenance of one-to-one relationships among all the members of a group. As group members have increasing difficulty relating to each other individually, they will tend to relate to each other in terms of factions or coalitions in order to relieve the cognitive burden. Groups larger than six, are, therefore, more likely to produce decisions (verdicts) based on the strength or vociferousness of factions of three or four members. If this be the case, then a verdict of six will represent a greater consensus of the group than will a verdict of 12.

The effect of coalition formation or factionalism on jury verdicts was studied by C. Hawkins⁷⁵ in mock civil juries. Two strategies may be undertaken by juries: deliberating in unity or deliberating in factions. In the latter strategy, factions were identified by an immediate

⁷² Hare, *A Study of Interaction and Consensus in Different-Sized Groups*, 17 AMER. SOC. REV. 261-62 (1952).

⁷³ Strodbeck, James & Hawkins, *Social Status in Jury Deliberations*, 22 AMER. SOC. REV. 713, 715 (1957).

⁷⁴ A. HARE, *HANDBOOK OF SMALL GROUP RESEARCH* (1962).

⁷⁵ C. Hawkins, *Interaction and Coalition Realignment in Consensus-Seeking Groups*, Unpublished doctoral dissertation, Univ. of Chicago (1960).

poll or vote, and the deliberation proceeded among coalitions rather than among individuals. Of the juries that adopted the former strategy, deliberating in unity, more than half eventually shifted to factions before the deliberations concluded. They were distinguished, however, by having delayed any poll until they had discussed the issues as individuals, attempting thereby to reach a consensus without splitting into opposing groups. Although the verdicts of the two types of juries were not significantly different from one another, the initial strategy markedly affected deliberation time and member satisfaction. The delayed-vote juries took longer to reach their verdict and showed higher member satisfaction afterward. That is, a smaller proportion of the delayed-vote jurors expressed private disagreement in a subsequent questionnaire. If true unanimity is to be desired, the private post-verdict agreement may provide a clue to the quality of the verdict even though there may be no observable difference in the verdicts themselves. Because the members of a six-person jury should be better able to relate to each other as individuals, they should also be better able to deliberate in unity and to utilize the resources contributed by each member. This advantage may well outweigh the advantage that the 12-person jury possesses in resources.

Another prominent argument in considering jury size is that the 12-member jury is more likely to contain one juror who, through sincere belief or sheer stubbornness, will disagree with the others. This juror, dubbed the "hanging juror" by Kalven and Zeisel,⁷⁶ may persuade the other 11, but will more likely prevent any verdict at all.

In a criminal case, a hung jury can legitimately be considered to benefit, or at least do less harm to the defense than to the prosecution. In the first place, as the United States Supreme Court acknowledged in *Williams v. Florida*, "[i]t is true . . . that the 'hung jury' might be thought to result in a minimal advantage for the defendant, who remains unconvicted and who enjoys the prospect that the prosecution will eventually be dropped if subsequent juries also 'hang'."⁷⁷ Secondly, the proportion of instances in which the majority of jurors in a hung jury favors conviction is roughly the same as the ratio of convictions to acquittals in juries that reach a verdict. Kalven and Zeisel⁷⁸ reported that almost two-thirds of the juries they observed in criminal cases favored conviction. Furthermore, on the final ballot 24 percent of the

⁷⁶ H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

⁷⁷ 399 U.S. at 101, n.47. See also *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824); *United States v. Castellanos*, 349 F. Supp. 720 (E.D.N.Y. 1972).

⁷⁸ H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

hung juries that they studied resulted in votes of 11 for conviction to one for acquittal, while there was no instance of an 11 to one final ballot in the other direction.

Undoubtedly, the larger the sample of individuals that is drawn from a given population, the larger will be the probability of that sample's containing one individual who will disagree with his fellows. "[W]ith an increase in size there will be more varied talents, more individuals with requisite skills and knowledge for performing specialized tasks, and more individuals who are likely to be liabilities."⁷⁹

The evidence indicates, however, that a single juror who differs from all the others at the outset of the deliberations is unlikely, without support from others, to persist to the point of deadlock. In a sample of over 200 criminal cases in Chicago and Brooklyn courts, studied by the Chicago Jury Project, all of the hung juries observed possessed a minority on the first ballot of at least three. In most of them, the initial minority was four or five. (Likewise, an initial minority almost never prevailed in persuading the initial majority unless it, too, numbered at least three.) Thus, although the final ballot often showed one lone juror holding out for acquittal, it is only after several others had previously shared that opinion. Thus, the "hanging juror" rarely exists except as one who tenaciously refuses to desert an unpopular view after others have fallen away.⁸⁰

Psychological evidence helps to explain this observation. To see things differently from others makes a person uncomfortable and he is likely to conform to a majority even against the evidence of his own senses. When one naive individual is placed among others who are instructed to give erroneous judgments in a simple perceptual task, he errs as well. If just one other person disagrees with the group, the subject conforms drastically less. Unlike the remaining "hanging juror" however, the naive subject conforms anew after desertion by his comrade whether the other changes his judgment or merely leaves the room.⁸¹

In a thorough analysis of group interaction, Robert Bales describes the importance of agreement to the individual participant: "[t]he need for assent . . . is more primitive and less discriminating than the need for higher status. The assent of some others, even though not of the highest status, reinforces one's power, and may even begin to

⁷⁹ Thomas & Fink, *Effects of Group Size*, 60 *PSYCHOLOGICAL BULL.* 371, 381 (1963).

⁸⁰ Broeder, *Jury Project*, 26 *S. DAK. B.J.* 133-146 (1957); Broeder, *University of Chicago Jury Project*, 38 *NEB. L. REV.* 744-60 (1959); H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

⁸¹ Asch, Solomon, *Opinions and Social Pressures*, 193 *SCI. AMER.* 81 (1965).

create some new source of legitimacy—a dissident subgroup. Failing to receive assent, one may still persist completely alone. But trying to win one's way alone by sheer force of talk, without the assent of *any* others, is a last resort, and hardly ever wins for long."⁸²

All members of a group, majority as well as minority, desire agreement. When one group member deviates from the others, the others will direct an increasing amount of their discussion toward him so long as there appears to be a possibility of conversion. When the deviant is not at all amenable to persuasion, the members reject him and direct no further communication toward him.⁸³ Jurors, however, cannot afford the luxury of isolating a deviant member so long as they retain hope of ultimately reaching a verdict. If an individual is to remain the sole dissenter, he must isolate himself. Hawkins⁸⁴ observed in mock civil juries that the representatives of two opposing factions seemed to have a tacit agreement to sustain approximately equal portions of the discussion. Members of the minority faction were, thereby, required to speak proportionately more than the members of the majority. This placed an almost intolerable burden on a single dissenter. In Hawkins's sample, only two juries hung on the basis of one person. In both instances, the lone dissenter prevailed only after withdrawing from the deliberation — one by refusing to talk further, the other by making a joke of the proceedings.

In spite of the burdens placed on the potential lone dissenter, 12-member juries may be more prone than six-member juries to end in deadlock. Zeisel⁸⁵ reported that six-member juries hearing felony cases in the Miami Circuit Court resulted in hung juries 2.5 percent of the time as opposed to the five percent typically observed for 12-member juries. Should this difference be replicated by more systematic comparisons, the reason for it is unlikely to be, as is commonly supposed, the chance that a lone dissenter will appear on the jury. It will, more likely, be due to the greater probability that the potential dissenter will obtain some social support for his disagreement.

CONCLUSION

Before *Williams* was decided in 1970, the Supreme Court proclaimed that a jury of six was not a jury, but that in state trials it

⁸² R. Bales, *PERSONALITY AND INTERPERSONAL BEHAVIOR* 87 (1970) (italics in original).

⁸³ Schachter, *Deviation, Rejection and Communication*, 46 *J. OF ABNORMAL AND SOC. PSYCHOLOGY* 190, 195 (1961).

⁸⁴ C. Hawkins, *Interaction and Coalition Realignment in Consensus-Seeking Groups*, Unpublished doctoral dissertation, Univ. of Chicago (1960).

⁸⁵ Zeisel, *The Waning of the American Jury*, 58 *A.B.A.J.* 367, 369 (1972).

made no difference, because the right to trial by jury was not obligatory upon the states.

In 1970, we learned that a jury of six is indeed a jury, and that jury trials are necessary ingredients of state due process. In New York, juries of six have never been known for trials upon indictments, but the federal Constitution, unlike the New York Constitution, would now permit it. If New York were to reduce the size of its juries for trials in cases prosecuted by indictment, a state constitutional amendment would have to be passed.

It is generally believed, and it seems reasonable to assume, that reduction in the size of juries would decrease the expenditure of time, energies, and money, in the administration of criminal trials. While it is not the purpose of this study to predict the extent of those savings, it is safe to conclude that if these gains are not accompanied by losses in the just disposition of criminal cases, the amendment should be effected.

We have seen that studies in group psychodynamics tend to demonstrate that traditional size jury affords, as its two chief features, a wider selection of intellectual resources, and a greater diffusion of responsibility. On the other hand, the six member jury affords a superior and more permanent consensus of opinion.

Thus, the task confronting the legislature is clear yet difficult. It will require a value judgment, in which a selection will have to be made, between the discharge of responsibilities by an entity that is broad in number and scope, or one that is smaller and more cohesive.

It will be called upon to choose between qualities that cannot be comfortably compromised or objectively assessed. The replacement of the traditional body with one half the size would trade a jury's depth for its cohesiveness, and its greater collective responsibility in proclaiming a verdict, for its increased participation in reaching one.