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M. Michelle Dunning

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## DISCERNIBLE DIFFERENCES: A SURVEY OF CIVIL JURY DEMANDS

M Michelle Dunning\*

Under Washington State’s historic default rules, the civil jury consisted of twelve persons unless both parties expressly consented to a “less number.”<sup>1</sup> The Washington Legislature reversed this presumption in 1972.<sup>2</sup> Washington’s civil jury now consists of six persons, unless one of the parties files a specific demand for twelve.<sup>3</sup> It appears, however, that litigants have refused to embrace this change; a survey of 2883 civil jury demands filed in King County Superior Court in 2009 to 2010 demonstrates that litigants overwhelmingly prefer twelve-member juries. This paper presents this survey’s results<sup>4</sup> and explores what they might mean, positing seven considerations that may explain litigants’ shared preference for traditional juries. I hope that the survey and accompanying exploration will remind us of the “great purposes that gave rise to the jury in the first place.”<sup>5</sup>

### I. BACKGROUND

Until 1972, Washington’s lawmakers found particular value in the twelve-person jury. When the first Legislative Assembly of the Territory of Washington instituted the civil jury in 1854, it declared: “The jury shall consist of twelve persons, unless the parties consent to a less

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\* Law Clerk to Hon. Mary E. Fairhurst, Justice, Washington State Supreme Court. I would like to thank both of my assistants for their help with this project: Arnold Bahr, Data Dissemination Manager of the King County Department of Judicial Administration, and Ken Stanton, Technical Consultant. The author retains the copyright in this article and authorizes royalty-free reproduction for non-profit purposes, provided any such reproduction contains a customary legal citation to the Washington Law Review.

1. Act of Apr. 28, 1854, § 185, 1854 Wash. Laws 129, 164 (later codified as Code of 1881, § 206).

2. Act of Feb. 21, 1972, ch. 57, § 3, 1972 Wash. Sess. Laws 1st Ex. Sess. 128, 129 (codified at WASH. REV. CODE § 4.44.120 (2010)).

3. WASH. REV. CODE § 4.44.120.

4. For the results of this survey, see *infra* app.

5. Williams v. Florida, 399 U.S. 78, 89–90 (1970).

number. The parties may consent to any number, not less than three, and such consent shall be entered by the clerk on the minutes of the trial.”<sup>6</sup> In other words, civil litigants could agree to have their case heard by fewer than twelve jurors, but the court provided a smaller jury only if the opposing parties expressly consented and their consent was properly documented. The framers of the Washington State Constitution also recognized the value of the twelve-member jury. When they enshrined the civil jury right in the Declaration of Rights, they required special action—a legislative enactment—to decrease jury size.<sup>7</sup>

While “there has scarcely been a time when elimination or reformation of the civil jury system has been far from the minds of its critics,”<sup>8</sup> jury detractors focused particularly negative attention on the civil jury beginning in the late 1950s.<sup>9</sup> Critics blamed the jury for “the pressing problem of court congestion and litigation delay”<sup>10</sup> and argued that the civil jury was “an expensive luxury”<sup>11</sup> society could ill afford. Studies were conducted, one of which estimated that a bench trial was “on the average, 40 to 50 percent less time-consuming than a jury trial.”<sup>12</sup> After jury detractors successfully depicted jury cases as “the greater time-consumers and . . . the more expensive type of trial,”<sup>13</sup> even jury supporters began to ask, “[w]hat may be done to economize on time and money in the trial of lawsuits?”<sup>14</sup>

In response to this narrow question, a growing number of legal commentators recommended that the civil jury should be reduced from twelve members to either five or six. They argued that the twelve-member jury was not a necessary component of justice, but merely “an

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6. Act of Apr. 28, 1854, § 185, 1854 Wash. Laws 129, 164 (later codified at Code of 1881, § 206).

7. See WASH. CONST. art. I, § 21 (“The right of trial by jury shall remain inviolate, *but the legislature may provide* for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.” (emphasis added)). Although the framers of the Washington State Constitution did not expressly authorize legislators to reduce the civil jury to six, no one has argued that the reduction in WASH. REV. CODE § 4.44.120 violates WASH. CONST. art. I, § 21, presumably because litigants may still demand their traditional rights.

8. Anthony T. Augelli, *Six-Member Juries in Civil Actions in the Federal Judicial System*, 3 SETON HALL L. REV. 281, 287 (1972).

9. See, e.g., David Peck, *Do Juries Delay Justice?*, 18 F.R.D. 455 (1956).

10. George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 164 (1990).

11. CHARLES W. JOINER, *CIVIL JUSTICE AND THE JURY* 73 (1962).

12. Lloyd L. Wiehl, *The Six Man Jury*, 4 GONZ. L. REV. 35, 35 (1968).

13. *Id.*

14. *Id.*

accident”<sup>15</sup> of history.<sup>16</sup> Certain proponents then conducted limited studies of six-member civil juries to test their theories in state courts.<sup>17</sup> According to these researchers, a smaller jury would provide all the benefits of a larger jury, while conserving time, saving money and reducing court congestion.<sup>18</sup> After the U.S. Supreme Court affirmed these studies in the Sixth Amendment context, declaring that there was “no discernible difference between the results reached by the two different-sized juries,”<sup>19</sup> it signaled the jury’s widespread diminishment.<sup>20</sup>

Two years after *Williams v. Florida*<sup>21</sup> was decided, the Washington State Legislature voted to diminish the civil jury without much thought. There was some limited debate in the Senate, but it centered on time of service.<sup>22</sup> There was no debate and only one question in the House of

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15. JOINER, *supra* note 11, at 82.

16. They did not, however, “explain why this accident had endured for seven centuries.” WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE* 168 (2002).

17. *See, e.g.*, Phillip M. Cronin, *Six-Member Juries in District Courts*, 2 BOSTON B.J. 27 (1958); *Six-Member Juries Tried in Massachusetts District Court*, 42 J. AM. JUD. SOC. 136 (1958).

18. Augelli, *supra* note 8, at 287.

19. *Williams v. Florida*, 399 U.S. 78, 101 (1970). The Court’s statement and reliance on these studies have been widely criticized for two reasons. The right to a jury trial is governed by “three different sets of rules that apply in three different types of cases,” and the rules are not interchangeable. *Juries In-depth: Right to a Jury Trial*, AM. JUDICATURE SOC’Y, [http://www.ajs.org/jc/juries/jc\\_right\\_overview.asp](http://www.ajs.org/jc/juries/jc_right_overview.asp) (last visited Jan. 23, 2011). The right to a jury trial in a criminal case is governed by the Sixth Amendment, which protects the right of the accused in any criminal prosecution to “a speedy and public trial, by an impartial jury.” U.S. CONST. amend. VI. The right to a jury trial in a federal civil case is governed by the Seventh Amendment, which preserves “the right of trial by jury” in “[s]uits at common law, where the value in controversy shall exceed twenty dollars.” U.S. CONST. amend. VII. The right to a jury trial in a state civil case is governed by state law. *See, e.g.*, *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 644, 771 P.2d 711, 716 (1989). (noting that the right to jury trial in civil proceedings is protected solely by the Washington State Constitution in article 1, section 21; therefore, the relevant analysis must follow state doctrine). Because *Williams* is a criminal case governed by the Sixth Amendment, and the cited studies involve civil cases governed by state law, the Court’s reasoning is unsound. In addition, critics of the *Williams* decision argue that the studies relied upon by the Court are seriously flawed because they are based on insufficient empirical evidence. *See, e.g.*, ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 214 (2001); Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 713–15 (1971).

20. Fewer than half of the states now require twelve-person juries in civil cases. *Juries In-depth: Jury Decision Making*, AM. JUDICATURE SOC’Y, [http://www.ajs.org/jc/juries/jc\\_decision\\_overview.asp](http://www.ajs.org/jc/juries/jc_decision_overview.asp) (last visited Feb. 4, 2012).

21. 399 U.S. 78 (1970).

22. Debate ensued about a proposed amendment limiting jurors’ time of service. The proposed amendment read: “In class AA counties no jury panel and members thereof shall serve for a period exceeding two weeks unless a member of a jury has been drawn to sit on a case the trial of which extends beyond the two week period.” S. JOURNAL, 42nd Leg., 2nd Ex. Sess., at 185 (Wash. 1972). The amendment was not adopted on a rising vote. *Id.* at 186.

Representatives: Representative Martinis<sup>23</sup> asked, “Axel,<sup>24</sup> is there any provision in this bill that allows the computer selection of a jury?”<sup>25</sup> Representative Julin replied, “The answer to your question is no, Mr. Martinis. We did not have time to perfect that particular amendment at this time.”<sup>26</sup> It indeed appears that legislators took little time to ponder the matter; the bill was proposed by the judicial committee and in a bit more than a month, it was passed by the Senate, passed by the House, approved by the Governor, and filed with the Secretary of State.<sup>27</sup>

As a result of this change, Washington’s civil jury now “consist[s] of six persons, unless the parties in their written demand for jury demand that the jury be twelve in number or consent to a less number.”<sup>28</sup> In other words, the law now automatically limits the civil jury to a panel of six members, unless one of the parties<sup>29</sup> takes affirmative action to preserve the traditional right.

## II. THE KING COUNTY SURVEY

With the help of two assistants, I conducted a survey to determine how civil litigants have responded to the change in default jury size. I first submitted public information requests to the King County Department of Judicial Administration, seeking to determine the number and nature of all civil jury demands filed in King County Superior Court in two consecutive years—2009 and 2010. After organizing the demands by type of case (*e.g.*, personal injury; condemnation), I analyzed the data to determine whether litigants in each category preferred smaller or larger juries.

Before describing the results, I should note that the survey is limited in many respects. First, I did not seek to analyze case outcomes, but only litigants’ demands for smaller and larger juries. I also examined only one aspect of the collected data—the number of jurors demanded—and did not seek to determine which party initiated the demand. Further, I only reviewed civil jury demands filed in King County Superior Court during

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23. John Martinis was a Democratic member of the House of Representatives from Snohomish County. 1 H. JOURNAL, 42nd Leg., 2nd Ex. Sess., at 1399 (Wash. 1972).

24. Axel C. Julin was a Republican member of the House of Representatives from King County. *Id.* at 1397.

25. *Id.* at 919.

26. *Id.*

27. Act of Feb. 21, 1972, ch. 57, § 3, 1972 Wash. Sess. Laws 1st Ex. Sess. 128, 131 (codified at WASH. REV. CODE § 4.44.120 (2010)).

28. WASH. REV. CODE § 4.44.120.

29. Any party may demand a twelve-member jury. WASH. SUPER. CT. R. 38(b).

two recent calendar years. Thus, while it may be reasonable to infer that similar results would be found in other counties at other times, the study does not affirmatively confirm this inference.

Keeping these limitations in mind, the survey indicates that civil litigants overwhelmingly prefer twelve-member juries. Of the 2883 total jury demands filed in King County during 2009 and 2010, 2734 demands specified twelve-member juries. When viewed as a percentage, the statistic is dramatic; 94.83% of all King County civil litigants filed demands for traditional twelve-member juries. Further, in five of twenty case-type categories, 100% of civil jury demands specified traditional juries, and in fourteen of twenty categories, 90% of jury demands specified twelve-member juries. Additionally, in all but one category, administrative law review, a majority of litigants opted out of the default six-member rule.<sup>30</sup>

### III. EXPLORATION

The King County survey raises more questions than it answers. Perhaps the most intriguing question is *why*—why do civil litigants favor twelve-member juries? To explore the survey's implications, I conclude this paper with a discussion of the differences between small and large juries, positing possible explanations as to why jury size might matter to civil litigants.

Before I begin, I would like to note an important assumption: I assume that when a litigant (acting either pro se or through his or her attorney) chooses a traditional jury, the choice is deliberate. Three factors support this assumption. First, opting out of the default rule requires several affirmative acts.<sup>31</sup> Second, a party demanding a larger jury must pay twice as much as a party demanding a smaller jury;<sup>32</sup> even though the \$125 difference is relatively small, I assume that litigants would not pay for larger juries unless they actually wanted them. Finally, because “the court may view the larger jury as an added burden,”<sup>33</sup> a litigant choosing a traditional jury may risk irritating the

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30. The survey results would be even more dramatic if administrative law review cases were reclassified as appellate decisions and removed from consideration. Without administrative law cases, 2715 of 2823 (or 96.17%) of civil jury demands specify twelve-member juries.

31. See WASH. SUPER. CT. R. 38(b) (“At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury *by serving upon the other parties a demand therefor in writing, by filing the demand with the clerk, and by paying the jury fee required by law.*” (emphasis added)).

32. WASH. REV. CODE § 36.18.016(3)(a) (2010).

33. Hans Zeisel & Shari Seidman Diamond, “*Convincing Empirical Evidence*” on the Six

court. In light of these factors, I think it is reasonable to assume that litigants' demands for traditional juries are intentional.

The following seven considerations may help explain why litigants affirmatively choose twelve-member juries. They are presented in no particular order.

#### A. *Predictability*

First, litigants may choose twelve-member juries to help them predict the outcome of their cases. Studies have shown that larger juries return more predictable verdicts, and smaller juries return more unpredictable ones.<sup>34</sup> In fact, "[t]he smaller the group, the greater the variability in its decisions."<sup>35</sup> This conclusion is drawn from both general math principles and jury experiments. Under general principles of statistical analysis, reducing sample size increases variability; for example, "if a sample size is cut in half, variability will increase by exactly forty-one percent."<sup>36</sup> This increased variability has been specifically demonstrated in jury trials. Mock jury experiments demonstrate "that on the same evidence smaller juries produce distributions of awards with wider dispersion than do larger juries."<sup>37</sup> According to one study, over 67% of traditional juries award damages close to what the community awards on average, compared to only 50% of mini-juries.<sup>38</sup> In addition, smaller juries are four times more likely to award damages that are either extremely low or extremely high.<sup>39</sup> This fluctuation may be alarming for litigants making strategic choices about their cases, because it increases "the gamble that litigants take"<sup>40</sup> in going to trial.

#### B. *Quality of Deliberations*

Civil litigants may also choose traditional juries because they deliberate more effectively. Social scientists have determined that juries generally take one of two deliberative approaches. "Evidence-based juries usually don't even take a vote until after they've spent some time

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*Member Jury*, 41 U. CHI. L. REV. 281, 283 (1973).

34. *Id.* at 294.

35. Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 JUDICATURE 263, 263 (1996).

36. *Id.*

37. *Id.*

38. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 167 (1986).

39. *Id.*

40. Zeisel & Diamond, *supra* note 33, at 294.

talking over the case, sifting through the evidence, and explicitly contemplating alternative explanations.”<sup>41</sup> In contrast, verdict-based juries work to reach decisions as quickly as possible by voting before any discussion. Once the vote is taken, debate within a verdict-based jury “tends to concentrate on getting those who don’t agree to agree.”<sup>42</sup>

No matter which approach a particular jury takes, twelve-member juries are more likely than six-member juries to experience positive group dynamics. A traditional jury is less likely to be dominated by one aggressive member. Domination by a single juror is dangerous, because it “threatens the rationality and fairness of the jury’s decision-making process.”<sup>43</sup> This danger is lessened in a larger jury, where there are more people available to oppose a potential takeover.

In addition, because minority alliances are more likely to develop in twelve-member juries, traditional juries are more likely to consider minority opinions. Alliances are crucial in juror deliberations; two out of twelve is much more powerful than one out of six. Because a juror who has even one ally with whom to confront a majority is in a much stronger psychological position to resist the majority,<sup>44</sup> the minority jurors are more likely to voice their opinions and to hold on to them longer. Minority viewpoints promote positive group dynamics in two ways. First, “the presence of a minority viewpoint, all by itself, makes a group’s decisions more nuanced and its decision-making process more rigorous.”<sup>45</sup> The view need not even be correct; even a mistaken view compels the majority to scrutinize its reasoning more carefully.<sup>46</sup> Second, the presence of a minority viewpoint also helps juries avoid group polarization<sup>47</sup>—movement to an extreme position.

### C. Diversity

Civil litigants may also choose twelve-member juries because they are more diverse. Both common sense and empirical studies suggest that there is greater diversity on larger juries. For example:

If we draw juries at random from a population consisting of 90 percent one kind of person and 10 percent another kind of

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41. JAMES SUROWIECKI, *THE WISDOM OF CROWDS* 178 (2005).

42. *Id.*

43. Albert D. Brault, *Jury Trial How Many Jurors?*, 37 MD. B.J. July–Aug. 33, 37 (2004).

44. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 463 (1966).

45. SUROWIECKI, *supra* note 41, at 183–84.

46. *See id.* at 184.

47. *Id.*



person (categorized by politics, race, religion, social class, wealth, or whatever), 72 percent of juries of size 12 will contain at least one member of the minority group, compared to only 47 percent of juries of size six.<sup>48</sup>

Diversity is important for two reasons: it adds perspectives that would otherwise be absent, and “it takes away, or at least weakens, some of the destructive characteristics of group decision making,”<sup>49</sup> as discussed above.

#### *D. Accuracy*

Litigants may also choose traditional juries because they are able to assess facts more accurately. Although both large and small groups share the common ability to make decisions and solve problems, when it comes to accurate fact assessment, “the bigger the crowd the better.”<sup>50</sup> First, the size of the group determines the amount of collected background information available to aid jurors in the assessment process. Therefore, a larger group is able to assess facts more accurately simply because it has more background information in its “collective brain.”<sup>51</sup> Second, traditional juries are more likely to make accurate assessments in cases involving “complex value-laden choices,”<sup>52</sup> because “the counterbalancing of individual biases promotes objectivity.”<sup>53</sup> Finally, studies have shown that “smaller juries have poorer recall of the evidence and arguments” presented during trial.<sup>54</sup> This may be because six-person juries examine evidence less accurately or because members of six-person juries are less likely to correct other jurors with inaccurate recall.<sup>55</sup>

#### *E. Validation*

Civil litigants may choose traditional juries to validate the importance of their causes. Particularly after profound personal loss, many people who believe they have been wronged feel a deep human need to tell their

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48. Saks, *supra* note 35, at 264.

49. SUROWIECKI, *supra* note 41, at 29.

50. *Id.* at 4.

51. *Id.* at 11.

52. Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 439 (1995).

53. *Id.*

54. SWARD, *supra* note 19, at 217.

55. *Id.*

stories. Jury trials satisfy this human need, because they provide litigants with “a formal opportunity to explain to a group of average citizens why their position is just.”<sup>56</sup> If a jury trial is likened to a theatrical production,<sup>57</sup> jury members first function as an audience; they watch and listen as the drama unfolds in the courtroom. During the second trial phase, jury members function as actors or critics; they take part in the production by providing comment (deliberation) and feedback (verdict). In both trial phases, because every additional juror “is proof that something important is happening,”<sup>58</sup> juries of twelve provide stronger validation than juries of only six.

#### F. *Formality*

Civil litigants may also prefer traditional juries because they perceive them to be more formal. According to a study conducted by the Institute for Civil Justice, litigants’ satisfaction with court proceedings is most strongly correlated with the perceived dignity of a particular procedure and the perceived carefulness of the process.<sup>59</sup> Litigants associate these qualities with fairness.<sup>60</sup> While this study has no direct bearing on litigants’ perception of juries, it does suggest a general perspective; if it can be assumed that the number of jurors affects the tone of judicial proceedings—by making them seem more formal—it is not unreasonable to speculate that litigants prefer larger juries because a larger group conveys a greater sense of dignity.

#### G. *Tradition*

Perhaps litigants choose twelve-member juries simply because of tradition. “From time immemorial, each jury had twelve members,”<sup>61</sup> and the twelve-member jury has served as an “institution of distinctive importance in American society.”<sup>62</sup> The twelve-member jury is one of our oldest and most deeply rooted institutions, and is closely linked to principles of citizenship and democracy. “To many it is the most revered

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56. Charles R. Nesson & Michael J. Leotta, *The Fifth Amendment Privilege Against Cross-Examination*, 85 GEO. L.J. 1627, 1688 (1997).

57. See MILNER S. BALL, *THE PROMISE OF AMERICAN LAW* 57 (1981).

58. SUROWIECKI, *supra* note 41, at 43.

59. E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS’ VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* 23 (1989).

60. *Id.*

61. DWYER, *supra* note 16, at 168.

62. Priest, *supra* note 10, at 161.

[institution] of all.”<sup>63</sup> Litigants choosing twelve-member juries may do so simply because they are unwilling to experiment with a six-member jury, which is, after all, a relatively new idea.

#### CONCLUSION

In sum, although the King County survey leaves many unanswered questions, it makes one thing clear: civil litigants overwhelmingly prefer twelve-member juries. I hope these dramatic results will inspire further discussion.

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63. JOINER, *supra* note 11, at xvii.

TABLE 1: CIVIL JURY DEMANDS FILED IN KING COUNTY SUPERIOR COURT—JANUARY 1, 2009, TO DECEMBER 31, 2010

Cause of Action	Number of Demands	12 Member Jury Demands	12 Member Jury Demand as a % of Cause	6 Member Jury Demands	6 Member Jury Demand as a % of Cause	Total % of All 2009–10 Civil Jury Demands
Administrative Law	60	19	32%	41	68%	2%
Collection	10	9	90%	1	10%	<1%
Commercial	179	141	79%	38	21%	6%
Condemnation	40	39	98%	1	3%	1%
Foreclosure	5	3	60%	2	40%	<1%
Injunction	3	2	67%	1	33%	<1%
Medical Malpractice	144	143	99%	1	1%	5%
Miscellaneous	102	96	94%	6	6%	4%
Other Malpractice	11	10	91%	1	9%	<1%
Personal Injury	452	438	97%	14	3%	16%
Civil Commitment	6	6	100%	0	0%	<1%
Property Damage	44	40	91%	4	9%	2%
Quiet Title	18	13	72%	5	28%	1%
Property Seizure	1	1	100%	0	0%	<1%
Tort – Other	156	146	94%	10	6%	5%
Tort Motor Vehicle	1611	1589	99%	22	1%	56%
Unlawful Detainer	9	7	78%	2	22%	<1%
Unlawful Harassment	2	2	100%	0	0%	<1%
Wrongful Death	19	19	100%	0	0%	1%
Other	11	11	100%	0	0%	<1%
TOTAL	2883	2734	94.83%	149	5.17%	100%