

In the mid-1990s, the Advisory Committee on Civil Rules, with Fifth Circuit Judge Patrick Higginbotham as Chair and our honoree, Professor Ed Cooper, in the early years of his long service as Reporter, unanimously (coincidentally, by a 12–0 vote¹) proposed an amendment to Federal Rule of Civil Procedure 48 that would have required the seating of twelve-member juries in federal civil trials.² The requirement of a unanimous verdict, unless waived by the parties, and the abolition of alternate jurors would have been unaffected; attrition could reduce a jury's size below twelve members, with a floor of six unless the parties consented to a verdict rendered by a smaller jury. The Standing Committee approved the final proposal by a wide margin,³ but the Judicial Conference rejected the change.⁴ As a member of the Advisory Committee at the time I was strongly persuaded that the amendment had merit and continue to feel that way, but must admit that the chances of a renewed proposal being adopted seem virtually nil no matter its merit. This brief account is, then, a lament rather than a call to action.

The story begins with Supreme Court decisions in the early 1970s dealing with issues of criminal-jury size and unanimity under the Sixth Amendment,⁵ followed by its 1973 ruling in *Colgrove v. Battin*⁶ that the Seventh Amendment permits juries to have as few as six members in federal civil trials. The *Battin* majority cited some studies in its opinion as indicating little difference in workings of six-

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1. See ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES 19 (Oct. 20–21, 1994) [hereinafter OCT. 1994 MINUTES] (initial vote beginning proposal process).

2. See ADVISORY COMMITTEE ON CIVIL RULES, REPORT 14–15 (May 17, 1996) (final report sending proposal forward to Standing Committee).

3. See JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE & PROCEDURE, SUMMARY OF REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 13 (Sept. 1996) [hereinafter STANDING COMMITTEE REPORT] (9–2 approval with one abstention).

4. See AM. COLL. OF TRIAL LAWYERS, REPORT ON THE IMPORTANCE OF THE TWELVE-MEMBER CIVIL JURY IN THE FEDERAL COURTS 2–3 (2001) [hereinafter ACTL REPORT].

5. See, e.g., *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972) (stating that the Sixth Amendment, as incorporated to apply to states, does not forbid conviction by non-unanimous state-court jury); *Williams v. Florida*, 399 U.S. 78, 103 (1970) (stating that the Sixth Amendment permits six-member criminal juries in noncapital state criminal cases).

6. 413 U.S. 149, 160 (1973).

versus twelve-person juries⁷ (along with other studies pointing the other way), but the favorable studies have since been attacked as flawed⁸ and the Court has been criticized for misuse of social-science evidence.⁹ Considerable research and scholarship on jury size followed, and the findings strongly indicated that twelve-person juries were superior in a perhaps surprisingly large number of ways to smaller bodies.¹⁰

Pat Higginbotham was on top of the work on jury size and found it persuasive.¹¹ As far as I know, it was at least in good part at his initiative, with Ed Cooper performing as always his invaluable role of “lean, mean drafting machine,” that the Advisory Committee began considering what ultimately became the unsuccessful proposal. A special supplemental briefing book of leading studies on jury size was prepared and circulated to the Committee members,¹² some of whom must have felt like students in an upper-class seminar on the civil jury! Briefer summary materials were also included, along with treatment of other topics, in the main briefing books for the meetings at which we considered the proposal.

The supplemental briefing book was impressive and persuasive; I remember our wonderful colleague, District Judge David Doty of Minnesota, saying that he had boarded his plane in Minneapolis opposed to the proposal but did his reading on the flight and got off in Tucson favoring the amendment. Unfortunately, no one whom I have asked has been able to find a copy of that tome, in hard copy or electronic form (briefing books, even from almost twenty years ago, are generally available on the federal courts’ Web site¹³). So my efforts to reconstruct the arguments about the proposal must come from the many other sources that do remain available and from other studies, such as a 2000–2001 report by the

7. See *id.* at 159 n.15.

8. See ACTL REPORT, *supra* note 4, at 24–25.

9. See *id.* at 24 & n.126.

10. See *id.* at 29 n.149 (“[T]he superiority of twelve jurors over six may be one of the few findings about juries that does emerge with convincing clarity.”).

11. See STANDING COMMITTEE REPORT, *supra* note 3, at App. B (Memorandum from Patrick E. Higginbotham to Members of Advisory Committee on Civil Rules, Oct. 12, 1994 [hereinafter Higginbotham Memo]). A particularly influential voice was that of Richard S. Arnold, then Chief Judge of the U.S. Court of Appeals for the Eighth Circuit. See Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1 (1993).

12. See OCT. 1994 MINUTES, *supra* note 1, at 17 (reference to “separate volume of readings on jury size”).

13. See *Agenda Materials from the Rules Committee Meetings*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/rules/archives/agenda-books.aspx> (last visited Oct. 10, 2012).

American College of Trial Lawyers making the case for the twelve-person federal civil jury.¹⁴

The arguments in favor of the traditional, larger jury size are many but largely straightforward. Perhaps most importantly, with juries supposed to have a reasonable chance of containing a representative cross-section of the community, the likelihood that a jury of six will not contain any members of a significant minority group is not just twice that for a jury of twelve but considerably higher.¹⁵ (It also appears that smaller juries are more likely to contain unrepresentatively large numbers of minority groups.¹⁶) Lack of diversity from seating a smaller jury is likely to mean less consideration of different views and overcoming of biases. But the advantages of larger juries are not limited to probable greater representativeness. Studies indicate that their verdicts tend to be more reliable, consistent, and moderate,¹⁷ and that they—by their somewhat greater predictability—perhaps even encourage settlements.¹⁸ More jurors means a greater chance of someone recalling relevant trial evidence,¹⁹ and larger juries are less likely to be dominated by a single assertive juror.²⁰

The studies and briefing materials presented to the Advisory Committee also tried to anticipate possible counterarguments. Two of the principal ones were higher cost and the possibly higher incidence of hung juries. It is undeniable that using larger juries would be somewhat more costly; at a time when those happy to honor Ed Cooper at an Advisory Committee meeting must themselves pay their own way, this higher cost would be a significant problem! But the estimates of *marginal* cost difference were relatively tiny,²¹ and it also appeared that the practice of putting considerable numbers of venire panelists through voir dire at the same time meant very little difference in time to seat a jury.²² Furthermore, the figures on hung

14. ACTL REPORT, *supra* note 4.

15. See AGENDA BOOK FOR MEETING OF ADVISORY COMMITTEE ON CIVIL RULES Agenda Item V-B, at 2–3 (Oct. 22–24, 1994) [hereinafter 1994 AGENDA BOOK] (drawing on AM. BAR ASS'N, ABA REPORT NO. 129 (1990)).

16. See ACTL REPORT, *supra* note 4, at 27 (quoting Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 JUDICATURE 263, 264 (1996)).

17. See 1994 AGENDA BOOK, *supra* note 15, at 4 (noting as well the likely higher variability from smaller juries in close cases).

18. See ACTL REPORT, *supra* note 4, at 32.

19. See, e.g., OCT. 1994 MINUTES, *supra* note 1, at 18.

20. See, e.g., *id.*

21. See *id.* (stating that this cost is well under 1 percent of the total cost of the judicial system).

22. See Higginbotham Memo, *supra* note 11, at 4.

juries indicated only a small increase in the percentage of cases ending that way with larger juries.²³

We may have fallen into the common trap of feeling that with our immersion in the subject, we had superior knowledge and that only those who did not have the time or inclination to learn as much about it as we had could possibly differ. Still, any fair-minded reader of the summarized comments on the proposal received from sitting federal trial judges must concede that they heavily opposed it largely on practical grounds of workability and cost (they showed virtually no interest in more theoretical concerns such as the virtues of civic participation);²⁴ practicing lawyers, bar organizations, and academics tended to be more sympathetic.²⁵

A significant and unanimous voice in opposition was another Judicial Conference group, the Committee on Court Administration and Case Management (CACM). Its succinct statement of its view favored the flexibility of being able to seat juries smaller than twelve and expressed concern for the imposition of jury duty on more members of the public.²⁶ It also sounded a theme heard from many of the individual judges: since smaller juries became permissible, some jury boxes in new federal courtrooms had been built too small to seat twelve jurors.²⁷ At hearings on the proposal, I think I resisted the temptation to ask judges making that argument whether the courts had carpenters at their disposal,²⁸ but the problem did appear to have some significance in that the numbers of courtrooms in new courthouses might have to be smaller if every courtroom needed a twelve-person jury box.

A further point in the discussions was that actual practice often seemed not to involve seating juries of the six-juror constitutional and rule minimum, but rather juries of eight or ten. For us, that seemed a reason not to oppose the change since the difference would not be so great. That argument, of course, can be a double-edged sword: to whatever extent twelve-person juries are better in

23. See STANDING COMMITTEE REPORT, *supra* note 3, at 12 (summarizing Advisory Committee response to concern for increase in hung juries with larger juries).

24. See STANDING COMMITTEE REPORT, *supra* note 3, at App. E (Prepublication Comments and Comments After Publication).

25. See *id.* *passim*.

26. See STANDING COMMITTEE REPORT, *supra* note 3, at App. D (Letter from Hon. Ann C. Williams, Chair, Committee on Court Administration and Case Management, to Hon. Patrick E. Higginbotham 2 (Dec. 21, 1994)).

27. See *id.*

28. *But cf.* ADVISORY COMMITTEE ON CIVIL RULES, MEETING MINUTES (Apr. 18–19, 1996) (discussion of proposed Rule 48) (stating that “[c]arpentry costs’ should not stand in the way” of adopting the proposal), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv4-1896.htm>.

their various ways than smaller ones, juries not that much smaller may not be *that* much worse.²⁹ It was acknowledged that “[t]he more apt comparison is between 8- and 12-person juries, not 6- and 12-person juries.”³⁰ But if my reading and recollection of the studies on which we relied are correct, those studies mostly contrasted juries of six with those of twelve. Those contrasts are striking, but to the extent that federal civil juries have eight or ten members, they are not the contrasts that occur in actual federal civil trials today.

Still, the advantages of larger juries (up to the traditional twelve—no one suggests more, except some hostile critics trying to make *reductio ad absurdum* arguments) are many and significant, with very limited down sides. Solid research and argument did underlie our proposal to require initial seating of a twelve-person jury. Even without such a requirement, the same foundation supports federal district and magistrate judges in seating larger rather than smaller juries—to whatever extent the design of their courtrooms and jury boxes lets them do so!

29. But they can still be significantly worse. See 1994 AGENDA BOOK, *supra* note 15, at 3 (citing study comparing minority representation on actual eight- and twelve-member California juries, which found 17 percent of twelve-member juries with zero or one black juror and 43 percent of eight-member juries with zero or one black juror).

30. OCT. 1994 MINUTES, *supra* note 1, at 18. *But see* ADVISORY COMMITTEE ON CIVIL RULES, REPORT OF ADVISORY COMMITTEE ON CIVIL RULES TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 6 (Dec. 13, 1994) (emphasizing differences between six- and twelve-person juries).