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The Supreme Court Allows Smaller Juries

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Having declared trial by jury a fundamental right in *Duncan v. Louisiana*, the Supreme Court began to take a closer look at some of the particular judicial rules that differed from state to state, such as jury size. In *Williams v. Florida*, the Court found that the traditional twelve-person jury was not in fact a legal necessity; a six-person jury, but no smaller, would pass constitutional muster. As Randolph N. Jonakait, a professor of law at New York Law School, explains, this finding overturned a previous ruling, in *Thompson v. Utah*, holding that citizens were entitled to a common law jury of twelve members, at least in federal court. Drawing on a number of studies, as well as his own experience as a lawyer for the New York City Legal Aid Society, Jonakait disputes the Court's finding that size is not especially significant to jury fairness. For Jonakait, twelve-person juries are fairer, more likely to contain minority members, and less inconsistent than smaller juries.

In 1968 *Duncan v. Louisiana* held that the right to a jury trial in a criminal case is fundamental and that the same right applies in both state and federal prosecutions. The federal courts had but a single model for a jury trial. A jury consisted of twelve people who had to reach unanimity in order to render a verdict, as the Supreme Court had said two year earlier. The right applied to trials of any federal crime that was not "petty," which was defined as a crime carrying a possible penalty of more than six months.

The states, in contrast, had diverse models for juries. Some states employed juries smaller than twelve; some did not require juries to be unanimous in their decisions; and although all states guaranteed jury trials, they varied concerning the kinds of crimes to which this right applied. Indeed, Louisiana law at the time of *Duncan* illustrated all these complexities. Jury trials were guaranteed, but only for crimes that carried sentences of death or hard labor. If not, the trial went to a judge without a jury. If the crime permitted, but did not require, a sentence of hard labor, the accused was entitled to a five-person jury with a unanimous verdict. If the crime required a punishment of hard labor, a twelve-person jury was required, but only nine of the jurors had to agree to reach a verdict. If the crime was punishable by death, the jury was twelve and the verdict had to be unanimous.

After *Duncan*, the Supreme Court began to consider whether the different state forms of jury trials were constitutional. The process began in 1970 when the Court in *Williams v. Florida* held that a jury of six passed constitutional muster. In doing so, the Court abandoned its precedent of *Thompson v. Utah*, set at the end of the nineteenth century.

Thompson v. Utah

A Mr. Thompson was charged in the Utah territory with calf-rustling. He was tried and convicted in the territorial courts by a jury of twelve, as federal law dictated, but his motion for a new trial was granted. This second trial was held in the state court because by then Utah had gained statehood. As the Utah constitution permitted, this jury had only eight people. In 1898 the case made its way to the Supreme Court, which first noted that the Sixth Amendment right to a jury trial applied in the territorial courts and that, whatever the normal powers of the state, any trial for a crime committed before statehood had to provide a jury consistent with the federal constitution. The Court stated that the federal jury trial right required a jury constituted as it was in the common law of this country and England. This, *Thompson* concluded, was a jury of twelve acting unanimously. "The wise men who framed the constitution of the United States and

the people who approved it were of the opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors. It was not for the state, in respect of a crime committed within its limits while it was a territory, to dispense with that guaranty simply because its people had reached the conclusion that the truth could be as well ascertained, and the liberty of an accused be as well guarded, by eight as well as by twelve jurors in a criminal case."

Williams v. Florida

Seventy years later the Supreme Court again considered the issue of jury size. This Court found that *Thompson*'s basic approach was wrong. *Williams v. Florida* agreed that the common law required juries of twelve, but the Court went on to state that "there is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." Instead, the Court concluded that no one could now know precisely what the framers meant by a jury trial.

Rather than searching history for the constitutionally required number of jurors, *Williams* concluded that a jury's characteristics should be defined by the function that the framers envisioned for juries: the prevention of governmental oppression. *Williams* continued, "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from the group's determination of guilt or innocence." Differently sized bodies could serve these functions, but "the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community."

The Court, citing but a few experiments and mostly using its own instincts, concluded that juries of six would little affect how well juries performed. The Court intuited that the change in community representation between juries of six and

twelve "seems likely to be negligible," and while juries of six might be less likely to hang than juries of twelve, this "seems unlikely to inure perceptibly to the advantage of either side. . . . And, certainly the reliability of the jury as a factfinder hardly seems likely to be a function of its size." The Court concluded that the twelve-person jury was merely "a historical accident." A jury of six, the Court held, is constitutional.

Studies of Jury Size

Williams engendered a storm of controversy by concluding that halving the historical jury would not affect group deliberations and community participation. Scholars quickly produced a flurry of studies about how size affects jury performance. Three years after *Williams*, however, that research did little to alter the Supreme Court's view of smaller juries. In 1973 *Colgrove v. Battin* held that six-person civil juries did not violate the Seventh Amendment's right to juries in civil cases. Consigning its discussion of the studies to a footnote, the Court noted that since 1970, "much has been written about the six-member jury, but nothing that persuades us to depart from the conclusion reached in *Williams*."

In 1978, however, while reviewing Claude Ballew's misdemeanor obscenity conviction by an Atlanta jury of five, the Court took more note of the scholarship regarding jury numbers. The Court now stressed that social science studies showed smaller juries had a negative effect on deliberations. "The smaller the group, the less likely are members to make critical contributions necessary for the solution of a given problem. . . . Memory is important for accurate jury determinations. As juries decrease in size, . . . they are less likely to have members who remember each of the important pieces of evidence or argument. Furthermore, the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result. When individual and group decision-making were compared, it was seen that groups performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted."

These studies also showed that accuracy decreased and inconsistency increased with smaller panels. Moreover, because

juries generally hang because one or two jurors hold out against the remainder favoring conviction, the decrease in hung juries resulting from a smaller jury size disproportionately harms criminal defendants by increasing the conviction rate. Finally, the Court noted, smaller juries will not represent the community as well as larger ones. "If a minority viewpoint is shared by 10% of the community, 28.2% of 12-member juries may be expected to have no minority representation, but 53.1% of 6-member juries would have none."

Although these data suggested that the assumptions underlying the acceptance of six-person juries were wrong, the Court did not overturn its earlier decision. Instead, without "pretend[ing] to discern a clear line between six members and five," the Court reaffirmed that six-person juries were constitutional but held that juries of less than six were not.

Research on how size affects jury performance has continued. The studies consistently show that larger juries are more likely to contain minority members, recall more of the evidence, spend more time deliberating, and bring more informational resources to those deliberations than are six-person juries. Just as individuals render more variable decisions than groups, juries of six produce more variability than do juries of twelve. In civil cases, studies generally agree, smaller juries show an increased variability in damages, with a higher average award. . . .

The Supreme Court's Faulty Intuition

Juries can be, and in some places are, smaller than six. In concluding that halving the traditional jury would not significantly affect how juries perform, the Supreme Court cited only a few empirical studies without probing their validity. Instead, it relied almost entirely on its own instincts. Competent studies, however, show these judicial assumptions to be wrong. In other words, the justices did not know what they were talking about.

This may be surprising, but it should not be. Few Supreme Court judges have had much contact with juries. The bar, like almost any human institution, has its own hierarchy. As a general rule, the less a lawyer deals with "common people,"

the more prestigious the position she holds. The lawyer involved with mergers and acquisitions stands on a higher rung than one dealing with personal injuries or crimes. Supreme Court justices do not represent a cross-section of the bar. They generally come from the bar's elite, and this gentry seldom has much experience with juries. Because the Supreme Court's intuitions about juries do not come from any depth of experience, they should not automatically be trusted.

There is, of course, a broader point here. Supreme Court Justices are educated and thoughtful. If this group's intuitions about juries should be viewed skeptically, surely suspicion is also in order for the views of many others about the jury system, no matter how smart, prestigious, or knowledgeable, when those opinions are based only on intuitions, assertions, and anecdotes and not on extensive experience or serious study.