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Constitutional Law—Trial by Jury Guaranty of Seventh Amendment: Local Court Rule May Establish Number of Jurors at Six in Federal Civil Cases—*Colgrove v. Battin*, 413 U.S. 149 (1973)

Mark S. Davidson

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CONSTITUTIONAL LAW—TRIAL BY JURY GUARANTY OF SEVENTH AMENDMENT: LOCAL COURT RULE MAY ESTABLISH NUMBER OF JURORS AT SIX IN FEDERAL CIVIL CASES—*Colgrove v. Battin*, 413 U.S. 149 (1973).

In the late 1960s, dockets in federal courts were becoming increasingly crowded, the backlog of criminal cases having more than doubled in the decade 1958–68.¹ One suggestion for relieving pressure on the dockets was reduction of jury size in civil jury trials from 12 to some lesser number.² In the absence of a constitutional amendment, however, the seventh amendment appeared to bar such a reduction in jury size. Nevertheless, within the span of a few years the Supreme Court was to announce a series of decisions³ which eliminated the constitutional significance of the number 12 and permitted the adoption of the 6-member jury. This judicial revolution reached its culmination last Term in *Colgrove v. Battin*,⁴ which eliminated the requirement of a 12-member jury in civil trials in federal courts.

Colgrove's diversity case was set for trial before a jury of six in compliance with Local Rule 13(d)(1) of the United States District

1. New York Times, Feb. 9, 1969, § 4, at 8, col. 1.

2. Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120 (1962). The use of smaller juries would clearly result in a significant reduction in both the cost of jury trial and the amount of time such trials consume. When the number of jurors necessary to conduct trial proceedings is reduced by one-half, the amount of money paid out in jury fees will also be halved. Savings would also occur because such expenses as mileage, meals and accommodations would be reduced in direct relation to any reduction in the size of the jury. Administrative time and expense would be reduced because fewer persons would have to be summoned to jury duty. A significant amount of deliberation time would be conserved. See INSTITUTE OF JUDICIAL ADMINISTRATION, A COMPARISON OF SIX- AND TWELVE-MEMBER JURIES IN CIVIL CASES IN NEW JERSEY SUPERIOR AND COUNTY COURTS 7 (1972). The amount of time required to conduct voir dire would also probably be reduced. While there is some debate on this issue (see Pabst, *Statistical Studies of the Costs of Six-Man Versus Twelve-Man Juries*, 14 WM. & MARY L. REV. 326 (1972)), the consensus of the literature is that questioning 6 persons consumes less time than questioning 12 persons. See, e.g., Augelli, *Six Member Juries in Civil Actions in the Federal Judicial System*, 3 SETON HALL L. REV. 281 (1972); Croake, *Memorandum on the Advisability and Constitutionality of Six Man Juries and 5/6 Verdicts in Civil Cases*, 44 N.Y. ST. B.J. 385 (1972); Note, *Reducing the Size of Juries*, 5 U. MICH. J. L. REFORM 87 (1971). One empirical study on the reduction of civil juries to 6 members and the trial time saved thereby concluded that it required approximately 40% less judge and lawyer time to select a jury of 6 compared to a jury of 12. 1962 ILL. JUD. CONF., EXEC. COMM. ANN. REP. 64.

3. See text accompanying notes 18–26 *supra*.

4. 413 U.S. 149 (1973).

Court for the District of Montana.⁵ Colgrove sought a writ of mandamus from the Ninth Circuit Court of Appeals directing the district court judge to impanel a 12-member jury. He contended that the local rule violated the seventh amendment,⁶ violated the statutory provision in 28 U.S.C. § 2072 that court rules “shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment,”⁷ and was invalid because inconsistent with Federal Rule of Civil Procedure 48 which provides for juries of less than 12 only when stipulated by the parties.⁸ The Ninth Circuit rejected these contentions, sustained the validity of the local rule and denied the writ.⁹ The United States Supreme Court in a five to four decision affirmed, holding that the use of six-member juries in federal civil jury trials violates neither the Constitution, the statute nor the rule of procedure. Most significantly, the Court rejected both contentions offered to sustain Colgrove’s constitutional argument. First, the Court dismissed the contention that the seventh amendment preserved the incidental characteristics, as well as the substance, of trial by jury in civil cases at common law. Second, the Court held that a jury composed of exactly 12 members is not part of the substantive right which is preserved.

This note examines the logic and reasoning behind the Court’s important¹⁰ determination that the Constitution does not bar federal civil juries of less than 12. It is submitted that while a convincing preponderance of the available empirical evidence supports the majority’s

5. D. MONT. R. 13(d)(1) provides: “A jury for the trial of civil cases shall consist of six persons plus such alternate jurors as may be impaneled.”

6. The seventh amendment provides: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”

7. 28 U.S.C. § 2072 (1970) provides:

The Supreme Court shall have the power to prescribe, by general rules, the form of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions. Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

8. This Rule provides: “The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.”

9. *Colgrove v. Battin*, 456 F.2d 1379 (9th Cir. 1972).

10. The Supreme Court has stated: “Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

conclusion that there is no functional difference between civil juries of 6 and 12, the Court weakened the force of its reasoning by failing to emphasize this evidence and by relying too heavily on its much criticized opinion in *Williams v. Florida*.¹¹

I. TRIAL BY JURY AND THE NUMBER "12"

In *Maxwell v. Dow*,¹² the Court had implied that not only was a jury composed of 12 jurors required by the sixth amendment¹³ in fed-

11. 399 U.S. 78 (1970). For critical reviews of *Williams*, see, e.g., Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971) [hereinafter cited as Zeisel]; Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 CASE W. RES. L. REV. 529 (1971); Comment, *Florida's Six-Member Criminal Juries: Constitutional, But Are They Fair?* 23 U. FLA. L. REV. 402 (1971). One of the most valid criticisms of *Williams* concerns the response of Justice White, writing for the Court, to the contention that if a jury can be reduced from 12 to 6 then there is nothing to prevent it from being further reduced to 4 or 2 or even 1. Justice White responded that one "can get off the 'slippery slope' before he reaches the bottom . . ." 399 U.S. at 91 n.28. However, as Justice Marshall pointed out in his dissent in *Colgrove*: "This begs the question how one knows at what point to get off . . ." 413 U.S. at 181 n.9.

Another criticism of *Williams* is the Court's failure to deal satisfactorily with the issue of the "hung" jury. The national average for jury trials in which 12-member juries fail to reach a verdict is 5.6%. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 461 (1966) [hereinafter cited as KALVEN & ZEISEL]. Data from Florida, where six-member criminal juries are used, indicates that the average for jury trials in which six-member juries fail to reach a verdict is only 2.4%. Zeisel at 720. Smaller juries "hang" less frequently for two major reasons: (1) There are fewer minority positions represented on the jury (see note 47 and text accompanying notes 49 & 50 *infra*); and (2) if a dissenter does appear, in a smaller group he is more likely to be the only dissident on the jury. Lacking any associate to support his position, he is more likely to abandon it. This second proposition is based on results of the University of Chicago jury project which demonstrate that to maintain his original position, a group member must have at least one ally. KALVEN & ZEISEL at 462-63. Obviously one is more likely to find an ally in the larger jury.

It is true that these contentions are more compelling with respect to criminal jury trials where unanimity is still generally required and one holdout can prevent conviction or acquittal; cf. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). However, even in civil jury trials, where five-sixths verdicts are frequently allowed, hung juries are not impossible; in fact, a majority of all hung jury cases divide six to six, seven to five, eight to four, or nine to three. KALVEN & ZEISEL at 460.

The *Williams* Court dismissed the issue of hung juries with only brief discussion. The Court concluded that whatever advantage one party might find in the increased possibility of one or more jurors holding out for his view and thus preventing an unfavorable verdict is offset by the advantage which might just as easily belong to the other party if jurors favoring his view were in the minority. 399 U.S. at 101. While this conclusion may be valid for civil cases, it is unwarranted with respect to criminal cases like *Williams* because statistics demonstrate that in the vast majority of hung jury cases the split favors the prosecution. KALVEN & ZEISEL at 460.

12. 176 U.S. 581 (1900).

13. The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

eral criminal cases, but the availability of such a jury also was insured by the seventh amendment in federal civil cases.¹⁴ The Court reiterated this view in *Patton v. United States*:¹⁵ "A constitutional jury means twelve men as though that number had been specifically named."¹⁶ Although both cases involved juries in criminal cases and thus were limited in a strict sense to an interpretation of the sixth amendment, the Court evidenced its view in dicta as to civil cases as well.¹⁷

However, beginning with *Duncan v. Louisiana*¹⁸ in 1968 and culminating with *Colgrove* in 1973, the Court executed a complete reversal of its earlier view of the constitutional stature of trial by jury. In *Duncan* the Court reversed its holding in *Maxwell* that the sixth amendment was not made applicable to the states by the due process clause of the fourteenth amendment.¹⁹ Justice Harlan's dissent in *Duncan* foreshadowed the change in the Court's direction which was to be revealed by subsequent decisions: "[T]he rule, imposed long ago in federal courts, that 'jury' means 'jury of exactly twelve,' is not fundamental to anything: there is no significance except to mystics in the number 12."²⁰

The traditional insistence upon 12 members as an essential element of trial by jury was explicitly abandoned by the Supreme Court in *Williams v. Florida*.²¹ In *Williams*, the defendant, convicted of robbery by a Florida 6-member criminal jury, asserted that the trial judge's refusal to impanel a 12-member jury was a violation of his sixth amendment right to trial by jury. The Supreme Court held Flori-

14. 176 U.S. at 586. The Court nevertheless upheld Utah's eight-member jury because the sixth amendment was held to be not applicable to the states by the fourteenth amendment.

15. 281 U.S. 276 (1930).

16. *Id.* at 292. See also *Thompson v. Utah*, 170 U.S. 343 (1898); *Rasmussen v. United States*, 197 U.S. 516 (1905).

17. See *American Publishing Co. v. Fisher*, 166 U.S. 464 (1897); *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899).

18. 391 U.S. 145 (1968).

19. See note 14 *supra*. It should be noted that the seventh amendment is one of the few remaining provisions of the Bill of Rights which has not been held to be applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 232 (1923). Although the Court has not specifically considered the constitutionality of juries of less than 12 in state civil trials, in light of *Colgrove* the possibility of sustaining a challenge to such juries is nil.

20. 391 U.S. at 182.

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

da's use of 6-member criminal juries in noncapital cases did not violate the defendant's constitutional rights, the common law requirement of precisely 12 jurors being an historical accident,²² unnecessary to effect the purpose of the jury system.²³ This accidental feature could not have been immutably codified into the Constitution, the Court stated, because "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."²⁴

Colgrove applied the *Williams* rationale to the federal civil jury. Although significant differences exist between the facts of *Williams* and those of *Colgrove*, particularly the state-federal and criminal-civil distinctions, the *Colgrove* Court consistently deemphasized these differences. For the Court, the only constitutional issue presented in *Colgrove* which *Williams* left unanswered was "whether 'additional references to the "common law" that occur in the Seventh Amendment might support a different interpretation' with respect to jury trial in civil cases."²⁵ The Court concluded that the references do not support such an interpretation, stating: "In short, what was said in *Williams* with respect to the criminal jury is equally applicable here: constitutional history reveals no intention on the part of the Framers 'to equate the constitutional and common-law characteristics of the jury.'"²⁶

The *Colgrove* Court's interpretation of the constitutional issue was both clear and logical. The majority reasoned that the language of the seventh amendment preserving the right to trial by jury in suits at common law is not directed to jury characteristics such as size, but rather defines the kind of cases for which jury trial is preserved. The Court pointed out that by referring to the "common law" the framers of the seventh amendment were concerned with preserving the substantive right of trial by jury in civil cases where it existed at common law, rather than with mere matters of form and procedure. In deter-

22. This conclusion has not gone unchallenged. One commentator has suggested that the number 12 is not an historical accident, but rather the result of centuries of trial and error, seeking a number that optimizes the jury's two conflicting goals—to represent the community as broadly as possible, yet at the same time to remain a group of manageable size. Zeisel, *supra* note 11, at 712.

23. 399 U.S. at 89. See text accompanying notes 34 & 35 *infra*.

24. 399 U.S. at 99.

25. 413 U.S. at 152.

26. *Id.* at 156.

mining whether a 12-member jury is a substantive aspect of the common law right of trial by jury, the Court declared that the relevant inquiry is whether jury performance is a function of jury size. The Court concluded: “[I]t cannot be said that 12 members is a substantive aspect of the right of trial by jury.”²⁷

The dissenting opinion of Justice Marshall vehemently objected to the majority’s disposition of the constitutional issue.²⁸ Joined by Justice Stewart,²⁹ Justice Marshall contended that the majority is responsible for the wholesale abolition of the civil jury, and for its replacement by a different institution, one “which functions differently, produces different results, and was wholly unknown to the Framers of the Seventh Amendment.”³⁰ His argument rests upon the inclusion in the seventh amendment of the specific language, “*In suits at common law . . . the right of trial by jury shall be preserved . . .*” (emphasis added). He interpreted this language to suggest strongly that the content of that right is to be judged by historical standards.³¹ Justice Marshall pointed out that the majority abandoned a long line of pre-

27. *Id.* at 157.

28. Justice Marshall was the lone dissenter on the 6-member jury issue in *Williams v. Florida*, where he first expressed his opposition to the view that the constitutional guaranty of trial by jury does not include the characteristic of exactly 12 jurors. 399 U.S. at 116.

29. Justice Stewart voted with the majority in *Williams*, but on the separate concurring ground that the constitutional guaranty of trial by jury in criminal cases is not applied to the states by the fourteenth amendment. *Id.* at 143. See also *Duncan v. Louisiana*. 391 U.S. 145, 171 (1968) (Harlan & Stewart, JJ., dissenting).

30. 413 U.S. at 166–67 (footnotes omitted). Justices Marshall and Stewart also disagreed with the majority’s holding that the statute does not bar six-member federal civil juries. Their dissent contended that Congress intended to preserve the specific characteristics of trial by jury at common law. *Id.* at 185. The majority rejected this view in its finding that Congress’ sole purpose in using the language in question was to create a statutory right coextensive with that right guaranteed by the seventh amendment. *Id.* at 162–63. The majority rested its finding on the belief that Congress would not saddle the federal courts with archaic and unworkable common law procedures. *Id.* at 161.

Justices Marshall and Stewart further dissented from the majority’s determination that D. MONT. R. 13(d)(1), *supra* note 5, providing for federal civil juries of six members, is not inconsistent with FED. R. CIV. P. 48, *supra* note 8. 413 U.S. at 185. This view was shared by Justices Douglas and Powell, each of whom dissented on this ground alone without reaching the constitutional issue. The minority view was that the federal rule and the local rule do not mesh, but rather collide. According to this view, the only way a federal civil case can be tried before a jury of less than 12 is by stipulation of the parties. *Id.* at 165.

The majority rejected this interpretation, contending that the implication that FED. R. CIV. P. 48 directs the impanelment of juries of 12 in the absence of stipulation is valid only if the seventh amendment requires a jury of 12. Having found no such constitutional requirement, the majority rejected the implication and held, “there is nothing in the Rule with which the Local Rule is inconsistent.” 413 U.S. at 163.

31. 413 U.S. at 171.

cedent supporting the requirement of 12-member juries³² and adopted instead a functional analysis which asks whether some substitute for the common law jury adequately performs the same functions as a jury. Putting aside the inquiry whether, under a functional analysis, there is a difference between the results reached by the two different-sized juries, the dissent questioned the validity of using a functional approach to resolve this constitutional issue. Justice Marshall preferred the simple historical test of the constitutionality of a civil jury: whether the jury is composed of 12 members. He rejected the majority opinion because it requires an arbitrary line-drawing between what is and what is not sufficient satisfaction of the goals of trial by jury. He contended that the "fixed bounds of history" provide a more reliable standard.³³

A careful evaluation of the purpose of the jury system supports the majority's conclusion. In *Williams* the Court stated that the essential feature of a jury 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 that group's determination of guilt or innocence."³⁴

The Court continued: "[T]he number [of jurors] 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."³⁵ Clearly, these goals can be achieved as well by a jury of less than 12 as by a jury of 12. Certainly a group need not be composed of precisely 12 in order to deliberate effectively or provide the mere possibility of representing a cross section of the community. Instead of labeling the issue irrelevant, the dissent would have been on stronger ground had it concentrated argument on the dispositional differences which it concluded

32. The majority justified its divergence from the *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899), line of cases by stating that its canvass of relevant constitutional history both here and in *Williams* casts considerable doubt on the easy assumption in past decisions that if a feature existed in a jury at common law, then it was necessarily preserved in the Constitution. The Court held that references in *Hof*, *American Publishing Co. v. Fisher*, 166 U.S. 464 (1897), and *Maxwell v. Dow*, 176 U.S. 581 (1900), were clearly dicta and not decisions upon a question presented or litigated. 413 U.S. at 157. The Court concluded that these earlier decisions must be denied the authority of decided precedent.

33. *Id.* at 182.

34. 399 U.S. at 100.

35. *Id.*

exist between the two different-sized juries.³⁶ There is evidence supporting both sides of the controversy over the effect of jury size on jury results. The remainder of this note will evaluate that evidence.

II. THE FUNCTIONAL APPROACH TO THE DETERMINATION OF JURY SIZE

The Supreme Court's ultimate determination that the 12-member requirement cannot be regarded as an indispensable component of the constitutional guaranty of trial by jury in either criminal or civil cases is based on a functional approach. Such an approach focuses on the effect of jury size on jury performance.³⁷ Using this approach, the *Williams* Court reached the conclusion, essential to the holdings in both *Williams* and *Colgrove*, that "certainly the reliability of the jury as a fact-finder hardly seems likely to be a function of its size."³⁸ Unfortunately, this conclusion rests upon the absence of evidence presented to the Court to demonstrate a functional relationship between jury size and jury reliability, rather than the presence of evidence proving no such relationship exists. To support its conclusion that "there is no discernible difference between the results reached by the two different-sized juries . . ."³⁹ the *Williams* Court relied upon the results of several experiments with less than 12-member juries.⁴⁰ The evidence provided by these experiments is not, however, highly persuasive. None of the articles cited by the Court was based on empirical investigation, instead each consisted exclusively of the personal opinion of judges, attorneys or court clerks possessing only limited experience with juries of less than 12 members. Further doubt is cast upon the authority of these sources for a decision regarding a criminal jury trial such as that held in *Williams* by the fact that in every case these experiments concerned civil jury trials. Yet, on the basis of this

36. 413 U.S. at 167-68 n.1; see notes 47-48 *infra*.

37. See text accompanying note 27 *supra*.

38. 399 U.S. at 100-01.

39. 399 U.S. at 101.

40. Wiehl, *The Six Man Jury*, 4 GONZAGA L. REV. 35, 40-41 (1968); Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L. REV. 120, 134-36 (1962); Cronin, *Six-Member Juries in District Courts*, 2 BOSTON B.J. No. 4 at 27 (1958); *New Jersey Experiments with Six-Man Jury*, 9 BULL. OF THE SECTION OF JUD. AD. OF THE A.B.A. (May, 1966); Phillips, *A Jury of Six in All Cases*, 30 CONN. B.J. 354 (1956).

evidence alone, the *Williams* Court sustained the contention that the reliability of the jury as factfinder is not a function of its size.

In *Colgrove*, the Court persisted in resting its holding on the supposed absence of evidence disproving its determination, despite the fact that there were some significant new studies lending substantial support to its conclusion⁴¹—as well as some tending to refute it.⁴²

Although available evidence as to the operational effect of reducing the number of jurors was limited to personal opinion at the time of the *Williams* decision, by the time of *Colgrove* a significant amount of empirical evidence existed supporting the Court's position. Although four recent studies⁴³ provide convincing evidence that there is no difference between the verdicts rendered by 6-member and 12-member civil juries,⁴⁴ the Court chose not to rest its decision on this empirical evidence, relegating the studies to a footnote.⁴⁵

41. Note, *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results*, 6 U. MICH. J. L. REFORM 671 (1973); Note, *An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes*, 6 U. MICH. J. L. REFORM 712 (1973); Bermant & Coppock, *Outcomes of Six- and Twelve-Member Jury Trials: An Analysis of 128 Civil Cases in the State of Washington*, 48 WASH. L. REV. 593 (1973); INSTITUTE OF JUDICIAL ADMINISTRATION, *A COMPARISON OF SIX- AND TWELVE-MEMBER JURIES IN CIVIL CASES IN NEW JERSEY SUPERIOR AND COUNTY COURTS* (1972).

Professor Hans Zeisel has criticized sharply the methodologies employed by these four studies. Zeisel & Diamond, "Convincing Empirical Evidence" on the *Six Member Jury*, 41 U. CHI. L. REV. 281 (1974) ("It would be unfair, however, to place the blame for accepting unsatisfactory evidence entirely on the Supreme Court. If lawyers and scientists write poor studies, and if legal journals publish them, the courts should be entitled to cite them." *Id.* at 292).

42. See generally Zeisel, *supra* note 11; Comment, *Florida's Six-Member Criminal Juries: Constitutional, But Are They Fair?* 23 U. FLA. L. REV. 402 (1971); see text accompanying notes 47-50 *infra*.

43. See note 41 *supra*.

44. These studies merit detailed attention. *An Empirical Study of Trial Results*, *supra* note 41, is based on the results of civil cases in the Wayne County, Michigan, Circuit Court for two one-year periods. The first saw 12-member juries utilized by the court, the second 6-member juries. The author's evidence supports the hypothesis that a 6-member jury renders verdicts in favor of plaintiffs and defendants in the same proportion as the 12-member jury renders its verdicts. The evidence also supports the hypothesis that in rendering a money judgment for the plaintiff, the 6-member jury's damage awards are identical to the 12-member jury's awards. In *An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes*, *supra* note 41, the author's hypotheses are directed at more specific aspects of the functioning of the jury. For example, the author states that the number of issues discussed by a jury is an indication of its function as a factfinder, and then points out that the evidence supports the conclusion that no difference exists between the number of issues discussed by 6- and 12-member juries. Most importantly, the evidence of this study supports the hypothesis that there is no difference between the verdicts rendered by 6- and 12-member juries.

In the Washington State study, *supra* note 41, the cases considered arose under the Workmen's Compensation Act and all were tried during the calendar year 1970. After

Not only did the Court fail to consider this favorable evidence, but it neglected unfavorable evidence as well. Referring to its rejection in *Williams* of the assertion that the reliability of the jury as factfinder is a function of jury size, the *Colgrove* Court stated, "nothing has been suggested to lead us to alter that conclusion."⁴⁶ This contention is dubious. The Court evidently attached little import to a study by Professor Hans Zeisel, a leading authority on the civil jury. Based upon an impressive statistical demonstration, the study concludes that reducing the size of the jury will make it less likely to represent a fair cross section of the community.⁴⁷ Professor Zeisel contends that this difference in representation of various community viewpoints is likely to result in significant dispositional differences.⁴⁸ Furthermore, a student writer has clearly indicated the effect that utilization of six-member juries has upon minority representation.⁴⁹ As an example,

studying the results of ninety-five 12-member jury cases and thirty-three 6-member jury cases, the authors found the distribution of decisions between plaintiffs and defendants were virtually identical in 6- and 12-member juries. They concluded that the use of the smaller jury introduced no systematic bias into the trial outcomes. The New Jersey study. *supra* note 41, concludes that the use of six-member juries in civil cases does not affect the conduct or outcome of trials. The evidence from this empirical study tends to show that there is little difference in the soundness of verdicts awarded by 6- and 12-member juries.

45. 413 U.S. at 159-60 n.15. Furthermore, the Court could have relied upon empirical small group studies which have demonstrated that as the size of a group increases, the percentage of those members participating at a minimal level also increases. *See, e.g.,* Håre, *A Study of Interaction and Consensus in Different Sized Groups*, 17 AM. SOC. REV. 261, 266 (1952). Whether the reason for this behavioral change is the individual's fear of a relatively larger audience, or the belief that his opinion is not important in so large a group, or some other reason, the fact remains that when the size of the group is reduced group discussion is stimulated, thereby improving the quality of the deliberative process.

46. 413 U.S. at 157. Making specific reference to its earlier reliance on the results of the experiments with civil juries of less than 12, the Court noted: "Since then, much has been written about the six-member jury, but nothing that persuades us to depart from the conclusion reached in *Williams*." 413 U.S. at 158-59.

47. Professor Zeisel uses a model in which he assumes that 90% of a hypothetical community shares the same viewpoint, while 10% have a different viewpoint. Of 100 12-member juries randomly selected from such a community, 72 would have at least one member of the minority group, while of 100 6-member juries so selected, only 47 would have a minority member. The chance of having more than one minority member is 34 out of 100 with the 12-member jury system, but only 11 out of 100 with the 6-member system. Zeisel, *supra* note 11, at 716.

48. *Id.* at 716-20. Justice Marshall in his dissent in *Colgrove* cites the Zeisel study to support his contention that variations in jury size produce variations in function and result. 413 U.S. at 167-68 n.1. The majority opinion, however, merely includes the article in a rather extensive listing of arguments pro and con the effectiveness of a jury of 6 compared to a jury of 12. 413 U.S. at 159-60 n.15.

49. Comment, *Florida's Six-Member Criminal Juries: Constitutional, But Are They Fair?*, 23 U. FLA. L. REV. 402 (1971).

he presents the case of the State of Florida, where one out of nine potential jurors is black. Under a six-member jury system there is less than a 50 percent chance a particular jury will include a Black. Under a 12-member jury system the likelihood of a black juror increases significantly.⁵⁰

These statistical studies indicate a real basis for the concern that the cross section will be significantly diminished if the jury is decreased in size from 12 to 6. They could have been expressly rejected by the Court had it reasoned that findings regarding the representative nature of various-sized juries are simply irrelevant. The argument could have been made that because the constitutionally mandated goal of the judicial process is merely to provide an adequate cross section of the community consistent with the needs and demands of the process,⁵¹ it is acceptable that the jury is never truly representative of the community. The major reason why juries, regardless of size, do not provide a true cross section of the community is the effect of social status on the representativeness of the jury.⁵² Although the working class contributes the greatest percentage of jurors, white-collar workers and professionals are selected as foremen three and one-half times more often than members of the working class. The amount of participation is sharply differentiated between higher than expected percentages for white-collar and clerical workers, and lower than expected percentages for skilled and unskilled laborers. In all levels men participate in the deliberations more than women, and women are selected as foremen only one-fifth as often as would be expected by chance. The importance of this relation between social status and participation is highlighted when viewed in conjunction with the parallel relation between participation and influence. Detailed examinations of predeliberation awards of individual jurors with the subsequent group awards in 29 deliberations reveal that the more active jurors shifted their predeliberation positions less than inactive jurors in the process

50. *Id.* at 408.

51. See text accompanying notes 34–35 *supra*.

52. Consistent with this assertion are statutes which exempt or excuse from jury service individuals who are in particular occupations. See, e.g., WASH. REV. CODE § 2.36.080 (Supp. 1973) (persons over 60); § 2.36.120 (1963) (telegraph company employees); § 38.40.090 (1963) (state militia); § 72.23.050 (1963) (employees of institutions for the mentally ill).

of agreeing with the group verdict.⁵³ The inevitable conclusion of these findings is that influence is a function of social status.

Thus even accepting Professor Zeisel's contention that a jury of 12 provides a *better* cross section of the community than does a jury of 6, the parallel contention that the smaller jury provides a constitutionally *adequate* cross section, when all factors are considered, is difficult to refute.

Other reasons exist which the Court might have weighed in reaching its ultimately defensible determination in *Williams* that there is no discernible difference between the results of the two different-sized juries. An example is the possibility of increased variability in verdicts rendered by smaller juries. One of the features of a larger group is that it will tend to moderate and brake eccentric opinions. Extreme views are more likely to affect group discussion significantly if the group is small. Furthermore, the increased possibility that a six-member jury will deviate from a predictable norm for juries means a larger "gamble" in requesting a jury. This increased risk could well result in an increase in the incidence of jury waiver and thereby reduce the incidence of jury trials.⁵⁴

The contentions offered to persuade the Court to depart from the conclusion it reached in *Williams* are strong. The Court, apparently determined not to alter its resolution, could have refuted those contentions more effectively had it relied upon existing empirical evidence to support its position.

53. Strodtbeck, James & Hawkins, *Social Status in Jury Deliberations*, 22 AM. SOC. REV. 713, 715-16 (1957).

54. Zeisel, *supra* note 11, at 718-19. One commentator, writing in response to the decision in *Williams*, contends that as the number of jurors is lowered, the jury's decision becomes more a matter of chance and less a product of the community's values. The writer contends further that the *Williams* Court erred in concluding that criminal juries of different sizes would return identical verdicts; instead the number of jurors significantly affects the likelihood of conviction. The methodology which led to the writer's conclusion was to compare the fraction of those potential jurors who had actually observed the trial and were inclined to consider the defendant guilty at the conclusion of the courtroom proceedings to the probability of conviction, for each of the two different-sized juries. The results demonstrate that where the fraction is greater than one-half, the defendant has a better chance of acquittal with a six-member jury. Where the fraction is less than one-half, the likelihood of conviction is increased with a six-member jury. Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 CASE W. RES. L. REV. 529 (1970).

III. CONCLUSION

The Supreme Court's holding that neither the Constitution, the statute nor the Federal Rules of Civil Procedure bar a reduction in the number of jurors to six is commendable for the relief it will provide to crowded court dockets.⁵⁵ The problem with the decision lies in the analysis which brought the Court to the determination that federal civil juries of six are constitutional. While the Court's contention that the substantive right of trial by jury is determined by jury performance is sound, the Court did not adequately prove its finding that such performance is not a function of jury size. Yet such proof does exist, for convincing empirical evidence, as well as the plethora of legal opinion cited by the Court, provide an adequate body of support for the conclusion that there is no difference in the results of the two different-sized juries. The Court is to be applauded for its conclusion, if not for the analysis which led to its determination.

Mark S. Davidson

55. Local court rules providing for juries of less than 12 have been adopted in some 55 federal district courts, at least as to some civil cases. 413 U.S. at 150 n.1.