The Twelve-Person, Unanimous Jury: Does It Have More than History to Recommend It?

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THE TWELVE-PERSON, UNANIMOUS JURY: DOES IT HAVE MORE THAN HISTORY TO RECOMMEND IT?

Richard O. Lempert*

INTRODUCTION

My focus today will be on the twelve-person unanimous jury and on the contrasts between such juries and six-person juries or twelve-person juries than can return verdicts by ten-two or nine-three votes.

Until about fifteen years ago, it appeared that the sixth and seventh amendments required all federal juries to have twelve members who reached unanimous verdicts, and it appeared possible that the Supreme Court would force the states to conform to the federal standards. Instead, the court did almost the opposite. It sanctioned juries as small as size six in state criminal cases and federal civil cases, and it allowed twelve-person juries in state criminal cases to return verdicts when only nine persons agreed.

We must take the Supreme Court’s constitutional judgment as conclusive—at least for the moment. But just because the Constitution permits a change does not mean it is wise. Today I would like to talk about the wisdom of these changes and to ask whether states and courts should use the permissions the Supreme Court has given them, or whether they should retain or return to the original understanding. To anticipate my conclusion, I believe that in all respects but one—unanimity in civil juries—the Framers knew best.

METHODS OF RESEARCH

You may well ask: How do I know about jury size? About unanimous decision rules? About how juries deliberate? I have never been on a jury. Indeed, last month was the first time in my life I was called for jury duty. I dutifully went down to the courthouse, but I wasn’t even selected at random to be put on a panel to be knocked off. That is the closest I have been.

There is, however, a very large body of social science research about juries and how juries work. It ranges from realistic simulations (that nevertheless fall short of actual trials) to less realistic simulations—at the extreme giving a group of college sophomores a questionnaire that says, “You are

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a juror. Read these two pages and tell me how you decide.” Some research involves interviews with actual jurors, with lawyers, or with judges. Some draws on basic sociological and social psychological studies which, though they have nothing to do with juries, have something to do with humans, with human reasoning. Juries are, after all, groups of humans; and if we know something reliable about how humans work, particularly how they work in groups, we have good reason to believe that juries will work in similar fashion. And when we apply our knowledge, we usually find that it is right.

For some purposes we can actually use mathematical models that have nothing to do with human beings at all, but which examine processes like random sampling, to tell us something about how juries work.

So I bring to bear on the problem not the experience that you bring but a host of other resources that seem to address the problem. It is always gratifying to me to learn from conversations with good lawyers that your practical insight, intuitive knowledge, and great experience is likely to be, in most particulars, quite consistent with what the research says and what I shall tell you. If I have an advantage it may be that I can be more precise and address matters that you have not consciously considered.

**Jury Size: Six or Twelve?**

Let me turn now to the issue of jury size. How large should a jury be? Does it matter how large a jury is? The question is usually phrased in terms of the six-person versus the twelve-person jury. Yet there are all the sizes in between, and we can go above twelve, as we do with the grand jury. I shall, however, talk about the issue in terms of six versus twelve because that is the way the question is usually posed.

**The Strongest Link**

There are two core propositions that are essential to understanding the matter of jury size. The first proposition is that the jury is as strong as its strongest link. That’s very important. Some groups are as weak as their weakest link; with them, if you add links, you’re adding weakness. But with juries, up to a point (we don’t know where it is) where coordination problems would set in so that a jury would have to begin using Robert’s Rules of Order, jury quality increases with the number of people on the jury. Quality clearly increases from size six to size twelve.

Why is the jury as strong as its strongest link? It is because the stronger people on the jury are more likely to remember, to remember well, to understand the judge’s instructions, to be able to correct other jurors who make mistakes. The jury draws on its resources in this particular way. That
doesn’t mean that the weaker links on juries are not important. They may well be. Occasionally they may remember things that the strongest links do not. But when we cut the jury from twelve to six persons, we’re cutting the potential for fine, high-quality decision making. Not that six-person juries are too small to render good decisions, but in a probabilistic sense, their deliberations and their results are likely to be of lesser quality.

DIVERSITY

Closely related to this is the second basic proposition about juries: The source of the jury’s strength, by and large, is its diversity. Why is that so? How can a jury of twelve ordinary lay people with no training in the law, many of whom lack not just a college education but even a full high school education, be brought together and reach good decisions—decisions that we often think are wiser than those we might have gotten from one intelligent, educated, hard-working judge?

The answer lies in the jury’s diversity. People participate differentially on juries. Some people are naturally reticent; if they’re reticent in their day to day life, they’re likely to be reticent on juries. This means that when we talk about twelve versus six-person juries, we’re not talking simply about twelve versus six people in the jury room. We’re talking about eight talkers versus four talkers, which substantially reduces the amount of diverse opinion we get in the jury room. Again, that doesn’t mean we should dismiss those quiet people; they may speak up only once in a whole deliberation, but what they may see and say may be something that no one else will see and say. And it’s more likely to be something that no one else may see and say if they come from a different background than the other jurors sitting in that jury room. Clearly we will have more different backgrounds, more different perspectives, if we have a jury which consists of twelve people than if it consists of only six.

There is another reason why the jury’s strength lies in and draws on its diversity: People are not magically transformed going into the jury room. They don’t leave their preconceptions and their prejudices behind. They may make an effort to do it. A good lawyer and a good judge and a good voir dire can help substantially, but the jurors chosen still are human beings with their various biases, prejudices, and shortcomings.

An interesting study comparing group and individual decision-making nicely illustrates how group decision-making can help overcome the distortions caused by the kinds of prejudices we all have. The study made use of syllogisms. (You all remember the classic syllogism: All men are mortal. Socrates is a man. Therefore, Socrates is mortal.) A social psychologist administered straightforward syllogistic reasoning tests to people whom he
was able to identify as very good, average, and below average in syllogistic reasoning skills. Then some of his subjects answered the syllogistic problems alone and others answered them in groups. Those who worked alone gave answers that were about as good—sometimes a little better, sometimes a little worse—as those given by the groups. It did not seem that there was great strength in the group process.

Then, however, the psychologist prepared another set of syllogisms that were logically the same as the first except that they were designed to tap emotions. If we were doing it today on a college campus, we might use syllogisms that lead to the conclusion that, for example, coed dorms should be abolished, or that the U.S. should or should not aid the Contras in Nicaragua—issues on which people have preexisting opinions. It turned out that groups composed entirely of people who were average or mediocre in their syllogistic reasoning ability did better than people working alone who were far above average in their reasoning ability. Why? Because the people working alone were misled by their prejudices. They wanted certain answers to emerge. It wasn’t that those in the groups didn’t have prejudices, but different members had different ones. Thus, a group might have someone who wanted U.S. aid to the Contras and someone who didn’t. The balance of prejudices helped keep the groups focused on the logical task at hand, not on what particular members of the groups wanted the answer to be. And that’s a very important source of the strength from diversity which juries acquire.

**Symbolic Diversity**

There is yet another aspect of diversity on juries which is all too often ignored. It is what one might call “symbolic” diversity. For many reasons a jury should look as though it represents different segments of the community—black people, for example, or Hispanics, men, women, or any group you may choose. Ideally, one should be able to look at a jury and see someone on that jury who looks like him or her. I do not suggest that there is a right here; clearly there is no absolute legal right. But the more representative the jury is of the community, the more it symbolizes that we are one nation, that we judge democratically, that we judge each other. Obviously, when you cut a jury down from size twelve to size six, you cut in half the chance there will be symbolic diversity.

This kind of diversity is even more important because it relates to the quality of the jury’s reasoning. Just to give one example: Assume a geographical area with a population that is twenty percent black. Obviously, you’re more likely to have a black on a twelve-person jury than on a six-person jury. Even more important, I believe, is that you’re much more likely to
have two black jurors. Put the other way around, you’re more likely to have one and only one black on the six person jury. Why is that important? It’s important because of another kind of prejudice: a belief that all blacks think alike, that there is one black perspective. That is not true, of course. Blacks, Hispanics, men, women—whatever the group you want to focus on—are diverse also. But if you have just one member of a minority, other members of the jury are likely to think that person knows something about the particular position. If you have more than one, which is more likely with the twelve-person jury, then you may have diversity within the minority groups. This is another reason why diversity is important.

As you know, attacks on the prosecution practice of exercising peremptory challenges on a racially-motivated basis led finally to the Supreme Court’s decision in *Batson v. Kentucky*, holding that a black defendant’s constitutional rights are violated if a prosecutor uses peremptory challenges to exclude black jurors for no reason other than their race. How one deals with this almost self-evidently valid principle without disallowing peremptory challenges for perfectly reasonable bases that may be correlated with race is a difficult question indeed. Moreover, defense counsel may have won a Pyrrhic victory if, as is possible, the system responds by limiting or cutting back dramatically on peremptory challenges, for defense counsel generally need peremptory challenges more than prosecutors, given distributions of attitudes in the overall population. But totally apart from the difficulties of implementing the decision or what the future may hold, we should note how some of the concerns reflected in *Batson* relate to the jury-size issue. When we cut the jury from twelve to six, we improve the ability of each side to knock off all representatives of a particular viewpoint it does not want on the jury.

**Do Smaller Juries Render Different Verdicts?**

These are good reasons, I believe, why we should prefer larger to smaller juries. But does it really matter? When we come to the bottom line—the verdicts juries render—does it matter whether we have a twelve-person jury or a six-person jury? Justice White, writing in *Williams v. Florida*, said there was no discernible difference between the verdicts of twelve- and six-person juries. So why not go with the savings of money and time and everything else that the smaller juries bring?

Let’s consider criminal and civil cases separately in deciding if it really matters whether we have twelve- or six-person juries in terms of verdicts.

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Criminal Juries

In criminal cases there is one clear difference. It’s well documented, can’t be hidden, and it’s intuitively obvious. Twelve-person juries in criminal cases hang substantially more often than six-person juries. Twelve-person juries tend to hang between five and six percent of the time. Six-person juries hang at a rate of between two and a half and three percent. Thus twelve-person juries hang almost twice as often. How does that cut—in favor of the larger jury or the smaller jury? The answer is not obvious. Hung juries are costly because they may require a retrial. On the other hand, they often represent effective victory for the defendant: Either the defendant gets a better plea bargain the second time around or the charges are dropped.

I would argue, however, that from the point of view of the Constitution, the hung jury was one of the protections for the criminal defendant that was built into the sixth amendment. The Court, by not recognizing any discernible difference between large and small juries, removes a substantial protection for criminal defendants in three percent of the cases juries hear—cases in which the state cannot prove its case beyond the reasonable doubt of all the jurors.

Why should there be this large difference between six- and twelve-person juries in the hung jury rate? Justice White said in Williams that one should not expect hung jury rate differences because the odds of getting one dissent in six is the same as two in twelve, and, therefore, you would expect one to hold out against five the way two can hold out against ten. The case has become celebrated among psychologists who have written about law because the opinion took one of the classic studies in all of social psychology and misinterpreted it completely. (As an aside I have a good guess why this occurred. Justice White, I expect, reached his decision without regard to the social science learning, and he assigned his law clerk, who had no social science experience, to dig out support. The clerk read the study or a reference to it, thought it supported the decision, but got it wrong.)

The classic experiment was this: Showing you two lines, A and B, I ask you which is the longer. The answer is clearly B. Every one of you, if asked alone, would tell me that B is the longer, assuming even a modicum of vision. Now imagine the following experiment: You are one of six people in a room, and each of you is asked in turn which line is longer. As you sit there, the first person says Line A is longer. (He and the other subjects—except you—are the experimenter’s “stooges.”) You think, “That person is crazy—or blind. How can Line A be longer?” The second person says, “Line A is longer.” And you think, “Two crazies.” And the third person and the fourth person. . . . And by the time the fifth person comes along, you think, “Am I crazy? Line B seems longer to me.” Some of you, indeed two out of three, would bite your lip and say, “Line B is longer.” But one
out of three would go along with the majority and would say "Line A is longer." And half of that group would have believed it; the other half would say, "I knew Line B was longer, but I didn’t want to differ with the other people." (Of course, in a jury it’s your vote that counts, not your beliefs, so in a jury room both types of conformity would count the same.)

It turns out that it takes only about three people to get it wrong for the one-third conformist effect to operate. The psychological effect is very powerful. And that’s with the simplest task. If you make the task more ambiguous, so that the correct answer is less certain (for example, reducing the difference in lengths of the lines), the effect gets stronger and stronger. That’s the core experiment.

The second part of the experiment, however, is the more important for the purpose of jury research. If the experimenter inserts one honest stooge, who says, "Line B is longer," the effect disappears entirely. That is, if the first two people say Line A is longer, then someone says Line B is longer, and the next two say Line A is longer, you, the one naive subject, will respond that Line B is longer every time. As long as there is one person siding with you, you will stand on your own perceptions, your own beliefs. It doesn’t matter if there are twenty people against you if there is one with you.

What that means is that one person versus five is not the same as two versus ten. With two out of ten, the two have a chance of holding to their belief. One out of six or one out of twelve is unlikely to resist. This is a major reason why we have this tremendous hung-jury verdict effect associated with jury size.

What about more dramatic differences—guilty verdicts with the twelve person jury where there would have been not-guilty verdicts with a six-person jury, or vice versa? These are much harder to show, because most cases are clear. In most cases, you could have a jury of twelve, or twenty or three or one, and the results would be exactly the same because, no matter what strategems we employ with juries, you and I know that nine times out of ten it’s the facts and not the people that determine which side is going to win in a jury case. The number of jurors makes no difference. In the most celebrated of all jury studies, The American Jury, Kalven and Zeisel compared the twelve-person jury with a dramatic one-person "jury," the judge; and they found an agreement rate of 75 percent. And in many of the cases when there was disagreement between judge and jury, it had to do with popular values, suggesting that the agreement rate between the judge and six-person juries would be the same.

There will, however, be some cases in which the result will turn on jury size. It may be the result of random selection procedures, or of differences in values. It may be the result of arguments that would not have been made but for a certain person being in the jury room. Or arguments that would
have been made if a certain person were not in the jury room. Whatever
the reasons, it may well be that the kinds of cases in which size makes a
difference are especially important cases; in which, for political or other
reasons, people values, the kind of prejudices I mentioned earlier, are salient.
In these cases we prefer the community’s collective values, as represented
by the jury, to those of the judge. These are also cases in which a single
judge’s values might be unconstrained, but jurors’ values might play off
against each other, permitting rational, careful decision-making that over-
comes personal values and prejudices.

Civil Juries

Civil juries are a somewhat different story. First, as you know, they hang
less often than criminal juries. Second, the frequent complexity of civil
cases gives rise to a concern that does not exist to the same extent in criminal
trials. As I said earlier, juries are as strong as their strongest link, and they
draw that strength from diversity. Obviously, the more difficult the case,
the more you need that diversity; the more you need the strength; the more
you need educated people; the more you need people who have had relevant
experience. And you cut in half your ability to get them when you go from
twelve to six. It is both ironic and frustrating that Chief Justice Burger, who
frequently has expressed a preference for six-member juries, has also expres-
sed a preference for abolishing juries in complex litigation. In Colgrove v.
Battin,\(^3\) he voted to cut the strength of the civil jury in half, and now he
claims juries are not able to handle complex cases. Why not reduce the size
of juries to three? Then the jury could be abolished because it would not
be able to handle complex cases at all. If juries are to serve in complex
cases, we should talk about making juries as good as they can be and not
diminish their resources.

Beyond this issue of quality, which is similar in civil and criminal cases,
there is the point of consistency. In criminal cases, the decision is usually
binary: guilty or not guilty (or, at most, a range of options like manslaughter,
murder two, or murder one). But civil cases have a damage element which
is quite indeterminate, with a range of outcomes, for example, from $100,000
to $10,000,000, or, if it’s a small case, from $500, say, to $20,000. We
would like to obtain from our civil juries verdicts that are consistent, in the
sense that the recovery is not determined by who is on the jury—that whatever
jury you have is going to arrive at about the same amount.

How do juries work in fixing the level of damages in civil cases? You
will recall the familiar problem of the quotient verdict. After the case is

\(^3\)413 U.S. 149 (1973).
over, you go to the jury room and find slips of paper scattered about. One of them says $320,000, another says $175,000. You look through the twelve, and then there’s a thirteenth sheet with all those numbers on it that adds them up and divides by twelve. Or six numbers and divides by six. That’s horrible. That’s reversible error. That is not allowed. That is a quotient verdict. 

Yet from the social science viewpoint the quotient verdict is a good way of doing things. It is likely to get a more accurate result than trying to fix on some Platonic ideal. In fact, without writing it down, that’s pretty much what most juries do. Someone says, “You know, I think this is about $300,000.” Another says, “No, that’s too much. I think it’s about $200,000.” And lo and behold, you come out with a verdict of $250,000. I suggest that that’s not a bad thing for a jury to do. It is likely more accurate in the long run than any individual judgment. That is also an argument for larger juries, because the more figures that are averaged, the less eccentric, the less weird, the less extreme the verdict of the jury will be.

Let me suggest another experiment. Suppose we have a medical malpractice case in which the malpractice is clear. Negligence is not an issue. As a result of the malpractice, the plaintiff was in the hospital for three weeks; when he got out of the hospital, he experienced gradually diminishing but serious pain for six months; and because of a pronounced limp, he cannot engage in his hobby of mountain climbing, he can hardly play tennis, and he can hobble through only a few holes of golf before fatigue sets in. How much is that case worth?

None of us knows. There’s no clear value. It will be worth different amounts in different parts of the country. How do we go about deciding what it is worth? Let me suggest a way that, to my mind, is as satisfactory as any. You all know about the new TV’s that permit the viewers to “talk back,” to vote on some proposition presented on the screen. Suppose that we put the malpractice trial on TV and asked all the viewers in the area to register their views of how much the damages should be, and then we averaged them all. I submit that we cannot do better in setting a value on a case than we could do in an experiment like that, which assesses the community’s feeling.

If we wish our juries to reflect that central tendency in the community, we will do a lot better job if we have twelve-person juries than six. That simply is straight mathematics. In sampling theory, when we’re trying to predict votes in an election, going from a sample of 500 registered voters to 1,000 substantially diminishes the amount of error in our poll results. Similarly, larger juries will do better than smaller ones in approaching the figure that would represent the average judgment of the community from which they are drawn.
UNANIMOUS VERSUS NON-UNANIMOUS VERDICTS

The question of unanimous versus non-unanimous verdicts is, from a normative standpoint, a more complicated issue than jury size. It is an issue that has not gotten the thoughtful attention it deserves.

By non-unanimous juries we mean juries that can decide by nine to three or ten to two or, in civil cases in some jurisdictions with six-person juries, five to one. There are other variants, but these are the most common.

What can we say about non-unanimous juries? Hans Ziesel, preeminent among jury researchers, has called the non-unanimous jury “reduction in size with a vengeance.” And in one sense it is. Compare a criminal jury that can return a verdict by a ten to two vote with a jury of ten that must be unanimous. Obviously, it is much easier to get a ten to two vote than it is to get ten out of ten votes. With the ten of twelve jury you can forget about two people in that jury room, whereas with ten of ten you have to worry about everyone. So from the point of view of hung juries and protection of defendants, the defendant might be better off with a nine-person unanimous jury than with a ten to two, non-unanimous jury.

But in another sense, the non-unanimous jury is not quite a “reduction in size with a vengeance,” because even though the final vote may be ten to two, which is easier to get than ten of ten, at least there are twelve people in that jury room to deliberate, to discuss, to give different points of view. Thus you might get a higher quality discussion out of twelve-person jury that can decide by a ten to two vote than out of my nine-nine jury, because the larger jury has three additional points of view.

However—and here I cannot be precise because we do not know precisely—we do not fully benefit from the extra jurors in the jury room when we have nonunanimous verdicts. It is often true that after a non-unanimous verdict majority is reached, let’s say ten to two, the jury doesn’t return immediately with a verdict, but continues deliberating with the minority for a half hour or so. (I predict this is particularly likely to happen if the jury reaches ten to two right before lunch.) But it’s almost never the case that any votes change after the necessary majority has been reached. The people in the majority never go back and say, we should rethink the case. At least it has never been reported. The further discussion is ritualistic; the majority is saying, “We don’t want to cut you off even though you lost, because you’re our friends now that you’re on the jury.”

More troublesome yet is a report from what is probably the best, most elaborate jury simulation to date, Inside the Jury, by Reid Hastie, Steven Penrod, and Nancy Pennington. This book reports the results from a study based on a several-hour video tape of a trial shown to people who had been called for jury duty and were sitting in a courtroom—as realistic a setting
as one can reasonably create in a laboratory framework. Hastie found that 
the discussion in non-unanimous juries was simply less thorough than it was 
in unanimous juries. Without that pressure to convince everyone of where 
the truth lay, there was not quite the intensity, not quite the give and take 
that there is in unanimous juries.

It was also the case—an important dimension that we seldom consider—
that the jurors themselves were less satisfied, both the majority and the 
minority, in the non-unanimous condition. They feel they have accomplished 
something when they reach unanimity. They don’t like to leave saying, “We 
find the defendant guilty beyond a reasonable doubt, except two people 
think he’s innocent.” Apart from voting and, one hopes never again, being 
drafted in a war, jury service is the principal way ordinary people participate 
in their own governance. The experience should be as rewarding, pleasant, 
and inspiring of faith in self-government as possible. When we go from a 
unanimous verdict of twelve to a ten to two verdict, we are, at least for two 
jurors and sometimes for more, diminishing the meaning of that particular 
experience.

Should we allow non-unanimous juries? Do they make a difference? Again 
one has to look separately at criminal and civil cases.

Criminal Juries

The non-unanimous jury almost certainly makes less difference in verdicts 
than does the switch from twelve- to six-person juries. The likely difference—
and it’s a small one—is in hung jury rates. The reason is that once a jury 
reaches the position of, say, ten of twelve, it virtually never will reverse 
itselves even if a verdict requires twelve votes. And if the jurors end with ten 
of twelve because we allow a non-unanimous verdict, the minority may say, 
“I never would have given in”; but the fact is that almost always that minority 
under the pressure of deliberation would have given in. Every once in a 
while, perhaps once a year, a Henry Fonda Twelve Angry Men kind of 
scenario may occur, but by and large there won’t be many verdict differences. 
However, this doesn’t mean that the hung jury is not an important protection. 
It doesn’t mean that we shouldn’t demand a more thorough kind of discussion. 
It doesn’t mean that in a criminal case we should allow non-unanimous juries.

Let me be a law professor for a moment. I’m going to give you a pop 
quiz with one question: What does it mean to convict someone beyond a 
reasonable doubt? Write your answer. How many think you got an A? How 
many think you passed?

I can tell you a couple of things. First, I think the spouses here probably 
did a better job than the lawyers. You lawyers probably put down some sort 
of formula, like “A reasonable doubt is not a mere doubt, not a capricious
doubt, but the kind of doubt that would cause you to hesitate before taking
a stance in a matter of some personal importance to you.” If you wrote this,
you really haven’t thought about the problem; you just remembered a formula
that you had heard. If I am feeling generous, I’d give you a C, because it
means you’ve been to court and you’ve read the pattern instructions; and
that’s something, but not very much. You nonlawyer spouses thought more
about the problem because you don’t have any formulas, but even you
probably had a difficult time answering the question.

I would never ask this question on an exam, however, because I can’t
write a satisfactory model answer. The answer that I would write would
make the students think it had been a trick question, because it would read:
“‘Beyond a reasonable doubt’ is when twelve people agree, taking things
as seriously as they can, that the defendant is guilty.” That’s the best defi-
nition we have for “guilt beyond a reasonable doubt.” Sometimes the standard
gives too much protection. There have been criminal juries with one member
who thinks that God said that this defendant is innocent and who goes off
in a corner of the room and says, “You can deliberate as long as you want,
I’m not going to participate.” And that means an unreasonably hung jury.
It shouldn’t happen, but it does, although rarely. By and large, however,
jurors take their jobs seriously, and act rationally. Their unanimous, seri-
ously-held belief is the best single definition of “beyond a reasonable doubt.”
To allow non-unanimous criminal juries is, to my mind, to water down the
degree of collective conviction which must and should exist before we
convict someone of a crime.

Civil Juries

Civil cases are more complicated, partly because the values involved seem
less clear and partly because we call on juries to assess damages as well as
to reach a liability judgment.

The requirement of unanimity gives a juror who disagrees on the liability
issue tremendous leverage on the damage issue. Assume a case which, by
our television poll, is a half million dollar case; and assume that’s generally
how jurors will value it. But suppose one member of the jury that hears the
case thinks it’s a zero case. He thinks there’s no liability at all, even though
all the other jurors disagree. That juror may say to the others, “I tell you
what, I’ll go along if you agree to a $100,000 verdict. If you don’t, I’ll
hang the jury and for the moment the plaintiff will get nothing.” If this
argument prevails, as it might in a non-unanimous jury, the deviant juror
counts for the purpose of the quotient not as one-twelfth but as four-fifths
of the jury.

The leverage can be applied in the opposite direction also. Assume a case
where all the jurors but one say no liability. The one says, “I think there’s liability, and I think it’s a million dollar case. But give him $25,000 and I’ll go along.” Again one juror has tremendous leverage.

The conclusion that I as a law professor who has no particular interest in defending one side or the other draw from these examples is that there is a place for non-unanimous verdicts in civil cases. But the place we give them has to take account of the virtue of unanimity, that is, the virtue of full discussion. Therefore, we should not instruct jurors when they go out that they can return a non-unanimous verdict. We should require them to deliberate for a substantial period of time. Let them try for unanimity for, let’s say, five hours or even ten hours—the time should vary with the length and the complexity of the case. But after that, if they cannot reach a verdict there is some sense to allowing an eleven to one verdict, or perhaps even a ten-two verdict. I wouldn’t go below that. And I’m not sure this analysis applies to allow a six-person jury to reach a verdict by a vote of five to one. We’re getting just too few opinions that have to be considered.

As I close, I want to tell you a true jury story. At the end of the day, a group of jurors who had just finished their month-long jury duty were riding in the courthouse elevator, and they were talking about their term. One of them said to the others, “I’m really proud of the job we did; I believe we decided every case the way the judge wanted us to.” The jurors may have felt proud, but if this was their attitude they did not comprise what I consider a good jury. Juries are designed to stand between judges and the state on the one hand and ordinary people like you and me on the other. When we diminish the size of the jury, and when we retreat from unanimity, especially in criminal cases, then to some extent we are undermining the classic and important function of the American jury.