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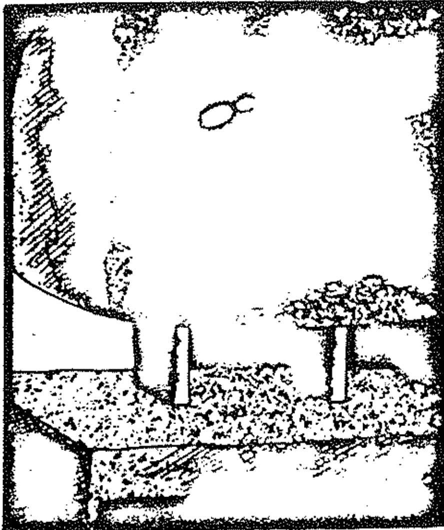

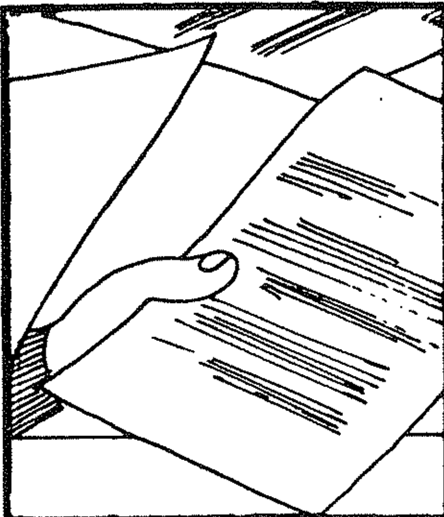

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The Case For Majority Verdicts

By Bernard Grofman

In the past decade the US Supreme Court has ruled on the constitutionality of jury size of less than 12 and of jury verdicts of less than unanimity. In *Ballew v. Georgia* (1978) the Court unanimously ruled a five-member felony jury to be unconstitutional, albeit no four justices could agree why that was so; while in *Williams v. Florida,* 398 U.S. 78 (1970), a six-member felony jury was held constitutionally permissible. In *Johnson v. Louisiana*, 406 U.S. 356, and *Apodaca v. Oregon*, 406 U.S. 404, the Supreme Court held that 10 to two and 11 to one decisions in Oregon and a nine to three decision in Louisiana did not violate the Sixth Amendment right to a jury trial.

What minimum size/unanimity requirements will be permitted is as yet unclear. For 12-member juries, no case involving a unanimity requirement below nine to three has yet come to the Supreme Court; for six-member juries, no case involving nonunanimous verdicts has yet come to the Court,[1] although one is now pending.[2]

For both juries of six and juries of 12, we believe a strong case can be made for simple majority verdicts (i.e., seven of 12, four of six). However, since most of the data we rely on is for 12-member juries, we will focus primarily on juries of that size. Furthermore, our arguments should not be interpreted in terms of the issue of six-member juries vs. 12-member juries. [Elsewhere, Grofman, TRIAL (1976), we present arguments in favor of 12-member juries.] Rather, our view is that if juries of some given size are held to be constitutionally permissible, then eliminating the unanimity requirement for such juries should also be permissible.

In judging the impact of a reduction in jury unanimity requirement to simple majority, we shall be concerned with three basic questions:

1) Will a majority verdict significantly affect the conviction rate?[3]

2) Will a majority verdict increase the likelihood that defendants who are innocent will be wrongly convicted?

3) Does a majority verdict impair the essential features of jury deliberation and decision-making?

It seems to us that if these three questions can be answered in the negative, a majority verdict should be held constitutionally permissible. If, furthermore, advantages of a majority verdict can be shown, then a strong case exists for replacing unanimous verdicts with majority verdicts.

Majority Verdict and the Conviction Rate

Intuitively, it seems that the fewer the number of jurors required to convict, the more likely is conviction—but intuition is not always a good guide. The difference between a majority verdict rule and a verdict requirement of unanimity is considerably less than we might think. This is so because whenever a majority of the jury is in accord as to the verdict, there is good reason to believe that the likelihood is very high that the deliberations will eventually give rise to a unanimous verdict with the outcome congruent with the views of the initial majority. Presumably the majority persuade (or otherwise browbeat) the minority. In the classic study of over 200 twelve-member juries, 92 percent of the verdicts accorded with the views of the initial (first-ballot) majority, five percent of the juries remained hung, and in only three percent of the cases did the Minority persuade the majority (Kalven and Zeisel (1966), reproduced as Table 1).[4]

Using the Kalven and Zeisel (1966) data (see Table 1), we see that in less than 13 percent of the trials could a shift from unanimous verdicts to majority verdicts have made a difference in verdict outcome (the five percent hung juries, plus the three percent involving jury reversals of initial majority views, plus the four percent involving initially evenly divided juries who subsequently reached a verdict).

In the five percent of these trials which were hung, the percentage of

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Table 1
FIRST BALLOT AND FINAL VERDICT FOR TWELVE-MEMBER JURIESa

Number of Guilty on First Ballot	Final Verdict Per Cent: Not Guilty	Hung	Guilty	N
0	100 (26)	0 (0)	0 (0)	26
1-5	91 (37)	7 (3)	2 (1)	41
6	50 (5)	0 (0)	50 (5)	10
7-11	5 (6)	9 (9)	86 (90)	105
12	0 (0)	0 (0)	100 (43)	43
TOTAL	32 (74)	5 (12)	63 (139)	225

a. Source: Kalven and Zeisel (1966: Table 139, p. 488).

pro-acquittal majorities was 25 percent while in those juries which reached a verdict the percentage of acquittals was only 32 percent. Hence, if the hung juries had been decided according to a majority verdict rule on the first ballot, the result would have been a slight increase of .04 in the ratio of convictions to acquittals, from 1.88 $\left(=\frac{139}{74}\right)$ to 1.92 $\left(=\frac{139+9}{74+3}\right)$.

Of the four percent of initially evenly split juries, half went to conviction and half to acquittal, and none hung. As for the three percent of the juries where the initial minority prevailed, six of those cases had an initial pro-conviction majority and only one had an initial pro-acquittal majority. Hence, deciding these few cases according to a majority verdict vote would also slightly increase the percentage of convictions.

Overall, if the 225 cases considered by Kalven and Zeisel (1966) had been decided by majority verdict there would have been 65 percent convictions, 30 percent acquittals, and (assuming no further revotes for juries split six-six) four percent hung juries; compared to the 63 percent convictions, 32 percent acquittals, and five percent hung juries obtained under a unanimous verdict requirement. For these 225 cases the ratio of convictions to acquittals under majority verdicts would *caeteris paribus* have been 2.20, compared to the actually obtained ratio of 1.88. Thus, shifting from unanimity to majority would not appear to make a substantial difference in the aggregate distribution of verdict outcomes.[5]

Convicting the Innocent?

Looking at the Kalven and Zeisel (1966) data in Table 1, we see that in less than seven percent of trials would a change from a unanimity requirement to a majority verdict lead to the conviction of defendants who had previously been acquitted or whose juries had been hung. Similarly, in less than two percent of trials would a change from a unanimity requirement to a majority verdict lead to acquittal of defendants who had been previously convicted or whose juries had been hung.

Will a majority verdict increase the likelihood that defendants who are innocent will be wrongly convicted?

Nonetheless, for those defendants whose trials would be decided differently, we may ask, is a change from unanimity to majority one which increases or decreases the likelihood that: (a) the guilty will be punished and (b) the innocent will be acquitted? Intuitively we might think that shifting to a majority verdict will increase the likelihood of convicting the innocent because it eliminates the possibility of a small minority of jurors holding out against a wrongful conviction. Once again, intuition may not be a particularly good guide.

The most sophisticated work on the judgmental accuracy of juries is that of Gelfand and Solomon (1973, 1974, 1975, 1977), who make use of advanced statistical sampling theory and an extension of a model of the jury deliberation process developed by Davis (1973). In an article in this journal, Alan Gelfand (February 1977) has summarized recent Gelfand and Solomon findings and argued against the use of six-member juries in criminal trials:

"For 12-member juries the probability of convicting an innocent person is .0221 and the probability of acquitting a guilty person is .0615. For a six-member jury, these errors are increased by more than 50 percent—that is, the probabilities become .0325 and .1395 respectively."[6]

There is, however, a further clear implication of the Gelfand and Solomon model which seems to have been missed by the authors—to wit, that the likelihood that a jury will convict the guilty and free the innocent can be significantly increased by reducing verdict requirements from unanimity to simple majority. We show in Table 2 the expected outcomes when juries operate under a *de jure* unanimity rule,[7] according to the Gelfand and Solomon model as fitted to the Kalven and Zeisel (1966) data. We show in Table 3 the expected outcomes when juries operate under a simple majority rule.[8]

For six-member juries, the probability that a defendant who is convicted will be innocent decreases from .033 to .006 when we shift from

Table 2
VERDICT OUTCOMES AND JURY JUDGMENTAL ACCURACY FOR SIX-MEMBER AND TWELVE-MEMBER JURIES OPERATING UNDER A *DE JURE* UNANIMITY RULE[a]

Probability of	P_C conviction	P_A acquittal	P_H hung jury	$P_{G/C}$ guilt given conviction	$P_{I/A}$ innocence given acquittal	$P_{I/C}$ innocence given conviction	$P_{G/A}$ guilt given acquittal
Six-member juries	.635	.321	.045	.968	.861	.0325	.1395
Twelve-member juries	.637	.303	.060	.978	.939	.0221	.0650

[a]Taken from Gelfand and Solomon (1977), with parameters estimated from data in Kalven and Zeisel (1966) and Davis (1973).

unanimity to majority rule. For 12-member juries the probability that a defendant who is convicted will be innocent falls from .022 to .0003 when we shift from unanimity to majority rule.

For six-member juries the probability that a defendant who is acquitted will be guilty decreases from .140 to .031. For 12-member juries, the probability that a defendant who is convicted will be guilty falls from .062 to .0016.

Reexamining the data in Gelfand and Solomon, we see that for both 12-member and six-member juries, shifting from unanimity to majority verdicts greatly improves the judgmental accuracy of the jury deliberation process.[9] Indeed, according to Gelfand and Solomon, a lower percentage of defendants convicted by the six-member majority rule jury are innocent than is true for the 12-member jury operating under a *de jure* unanimity rule (.0060 vs. .0221)! Thus, the quite counterintuitive result is that a six-member majority verdict jury is more likely to protect the innocent than a 12-member jury operating under the unanimity requirement.[10] The clearest policy implication of the Gelfand and Solomon modeling efforts reported in this journal is that the jury unanimity requirement impairs justice.[11]

Deliberation and Decision-making

"The purpose of the jury trial is to prevent oppression by the government....Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and the 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." (*Williams v. Florida*, 399 U.S. at 100 (1077))

We do not see a reduction in jury decision requirements from unanimity to majority as affecting this fundamental jury role.

> The difference between a majority verdict rule and a verdict requirement of unanimity is considerably less than we might think.

We have already dealt with the argument that a reduction in verdict requirement would increase the likelihood of wrongful conviction.[12] The other major attack on nonunanimous and especially majority verdicts is the claim that they would eliminate the need for jury deliberation and would foreclose the possibility of the minority persuading the majority. We believe this claim to have merit, and Justice White, speaking for the majority in Johnson, is only partly correct in rebutting this claim when he asserts that:

"We have no grounds for believing majority jurors, aware of their responsibility and power over the liberty of the defendant would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict. On the contrary, it is far more likely that a juror presenting reasoning arguments in favor of acquittal would either have his arguments answered or would carry enough jurors with him to prevent conviction."

The best available evidence for juries which do not require unanimous verdicts is that the presence of minority jurors after the necessary votes are identified "causes continued deliberation and occasional further votes. *But what happens in the epilog interval has no effect on the outcome of the trial.* The minimum vote decision is as psychologically binding on the nonunanimous jury as the unanimous consensus is for a unanimous jury." (Saks, 1977: 94 with some change in terminology and emphasis ours.)

Thus, Justice White is right that nonunanimous juries can continue deliberation when there is a minority as yet unconvinced, but he is wrong when he suggests such further deliberation could reverse the verdict. Furthermore, as is shown in Grofman (1976), the likelihood that juries will walk into the jury box with enough members in agreement to reach a verdict when unanimity is not required can be quite high, especially for smaller juries.

Intuitively we might think that juries which are permitted to deliberate and share ideas would

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reach better verdicts than juries which are simply polled without the opportunity to interact. However, there is very little psychological evidence that this is true (cf. Grofman, 1980(a); Gustafson, Shukla, Delbecq and Halster, 1973; Laughlin, *et al.*, 1976), and in any case we have already seen that jury deliberations are unlikely to change verdict outcomes. Nonetheless, for nonunanimous verdict juries we would certainly wish to guarantee a period of jury deliberation before any balloting is done.[13] If the arguments given in the first part of this paper are accepted, providing a minimum guaranteed period of jury deliberation before polling should

'The purpose of the jury trial is to prevent oppression by the government....'

remove the principal remaining objection to majority verdicts. However, one important consideration remains to be addressed.

Even a period of guaranteed deliberation would not remove one potentially important drawback of a nonunanimous verdict—reduced jury confidence that the verdict reached was a fair one, and thus potentially reduced community consensus that the legal process has been just. As Nemeth[14] points out, when unanimity was not required in six-member mock juries, very few deliberated to a unamimous consensus, fewer opinions were changed during the course of the deliberation, there was, of course, less agreement by jurors with the final verdict, and jurors reported less confidence that justice had been administered. These are not trivial flaws. He stated in 1978, "The ritual of robust deliberation to full consensus may be deeply engrained in our notions of justice and relates to the confidence with which the public regards our system of justice. This is of considerable importance even if the procedural change to nonuanimity [does] not appreciably alter verdict outcome."[15] The question of jury (and community) confidence in verdict outcomes is one which needs to be addressed.

Except for juries, most decision processes in the US are majoritarian or nearer to majoritarianism than to unanimity. As long as unanimity remains the norm for jury decision-making, it is not surprising that nonunanimous verdicts will be seen by jurors as possibly less just than verdicts which required unanimity. We believe that public confidence in majoritarian or supramajoritarian (e.g., 5/6 or 10/12) jury decision rules will rise as these rules become more familiar to the public. Of course, we cannot be certain that this will prove true.

Conclusion

We have shown that a change from unanimity to majority verdicts: (1) would not substantially alter the expected ratio of convictions to acquittals or even the expected overall percentage of convictions; (2) would,

...if juries of some given size are held to be constitutionally permissible, then eliminating the unanimity requirement...should also be permissible.

if the Gelfand and Solomon (1978) model is to be believed, actually increase the likelihood that innocent defendants would be acquitted, while simultaneously increasing the likelihood that guilty defendants would be convicted; and (3) would not impair the principal *raison d'etre* for the existence of juries—protection against government oppression.

Furthermore, a majority verdict requirement would reduce the number of hung juries considerably, thus avoiding costs of retrial; and it would also to at least some extent reduce jury deliberation time. Thus, if we provide a minimum period of deliberation before allowing the jury to reach a verdict, why not majority verdicts? T

see References, p. 47

Table 3
VERDICT OUTCOMES AND JURY JUDGMENTAL ACCURACY FOR SIX-MEMBER AND TWELVE-MEMBER JURIES OPERATING UNDER MAJORITY RULE[a]

Probability of	P_C conviction	P_A acquittal	P_H hung jury	$P_{G/C}$ guilt given conviction	$P_{I/A}$ innocence given acquittal	$P_{I/C}$ innocence given conviction	$P_{G/A}$ guilt given acquittal
Six-member juries	.684	.316	0	.994	.970	.0060	.0305
Twelve-member juries	.690	.310	0	.999+	.999	.0003	.0016

[a]Taken from Gelfand and Solomon (1977: Table 4, 217).

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Grofman, p.23

[1] In *Williams* the six-member jury in question operated under a unanimity requirement.

[2] We are indebted to Richard Lempert (University of Michigan Law School) for calling a pending case involving a 5-1 verdict to our attention. *Burch v. Louisiana.*

[3] To attribute reductions in jury size/unanimity requirements to a desire to up the conviction rate may seem like liberal paranoia. Such a rationale is nowhere mentioned in any of the Supreme Court cases mentioned above. Nonetheless, such a motivation is implied by no less an authority than a Justice of the U.S. Supreme Court. In his dissenting opinion in *Johnson v. Louisiana,* 406 U.S. 356 at 389, Justice Douglas (joined by Justices Marshall and Brennan) asserted that "a 'law and order' judicial mood causes these barricades [jury unanimity requirements] to be lowered."

[4] The assertion that the majority view in the jury usually becomes the unanimous view is supported by a number of other studies (Davis, 1973; Davis, et al., 1975, 1977; Padawer-Singer and Barton, 1975; Nemeth, 1976; Saks, 1977; Grofman, 1975).

[5] Given the small N on which this conclusion is based, we should be somewhat cautious about it. However, it does seem clear that a majority verdict rule would leave the ratio of acquittals to convictions at roughly 2 to 1.

[6] As Gelfand (1977:12) notes "certainly empirical verification of these estimates of jury conviction error is not possible; one can never deduce the guilt or innocence of a defendant. Rather, they emerge from a complex statistical model of the jury decision-making process...."

[7] In juries operating under a *de jure* unanimity rule, there is nonetheless a social deliberation process operating which has a strong majoritarian component. For details see Davis (1973), Gelfand and Solomon (1977), and Grofman (1979(a) and 1979(b)).

[8] In this model, evenly split juries are treated as equally likely to convict as to acquit, and never to hang. This is perfectly consistent with the Kalven and Zeisel (1966) data shown in Table 1. For the twelve-member jury, the results in Table 3 are based on parameters for jurors obtained by applying the Gelfand and Solomon (1977) model to the Kalven and Zeisel (1966) data.

[9] Cf. discussion of closely related issues in Grofman 1980 Forthcoming.

[10] We have some qualms about the empirical grounding of the Gelfand and Solomon (1977) model for the six-member jury case. See Grofman 1979(a) for a full discussion.

[11] Let us also note that the Gelfand and Solomon (1977) results reported in Tables 2 and 3 buttress our earlier claim that shifting from unanimity to majority verdicts would not greatly affect aggregate verdict statistics. For twelve-member juries, the percentage of convictions goes from 65% to 69% and the ratio of convictions to acquittals from 2.1 $\left(= \frac{.637}{.303}\right)$ to 2.2 $\left(= \frac{.690}{.310}\right)$ as we shift from unanimity to majority verdict, and the results for six-member juries are very similar.

[12] Elsewhere, Grofman (1980(b)), we have shown that the Douglas claim in *Johnson,* 406 U.S. 356 at 391, that "the use of the non-unanimous jury stacks the truth determining process against the accused" rests on a complete misreading of the data in Table 125 of Kalven and Zeisel (1966:460).

[13] As noted above, in Grofman (1976) we provide exact calculations of the likelihood (for six-member and twelve-member juries operating under various verdict requirements) that jurors will walk into the jury box with a sufficient number of jurors in accord as to be able to reach a verdict immediately should the majority choose to cut off further debate.

[14] Nemeth, Charlan. "Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules." *Journal of Applied Social Psychology,* Vol. 7 (1977), pp. 38-56.

[15] Nemeth, Charlan. "Group Dynamics and Legal Decision-Making." In Abt and Stuart (Eds.), *Social Psychology and Discretionary Law.* New York: Van Nostrand, 1978.

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[1] Francis H. Musselman, "Computers Used Mostly For Timekeeping: Survey," *The National Law Journal* (June 11, 1979), pp. 25, 30.

[2] *Id.*, p. 30.

[3] *Id.*

[4] Richard Loftin, "Guide to Word Processing For the Small to Medium Sized Firm," *District Lawyer*, Vol. 3, No. 4 (February/March 1979), p. 51.

Faust, p. 40

[1] The full text of the revised voir dire rule was:

"The judge presiding in a criminal action shall initiate the voir dire examination. The judge shall begin by identifying the parties and their respective counsel, and briefly outlining the nature of the case, to all the prospective jurors in the courtroom. The judge shall then put to the members of the panel who have been sworn pursuant to subdivision one of section 270.15 of the Criminal Procedure Law to answer truthfully questions asked them relative to their qualifications, and to any prospective jurors subsequently sworn, questions affecting their qualifications to serve as jurors in the action.

"The judge shall then permit both parties, commencing with the people, to examine the prospective jurors. Counsel shall be accorded a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications, but the judge shall not permit questioning that is repetitious or irrelevant, or questions as to jurors' knowledge or attitudes regarding rules of law, such as the presumption of innocence, the burden of proof, reasonable doubt and the meaning and purpose of an indictment or information. If necessary to prevent improper questioning as to any matter, the judge shall himself examine the prospective jurors as to that matter. After counsel have concluded their examinations of the prospective jurors, the judge may ask such further questions as he deems proper regarding the qualifications of the prospective jurors."

[Revised Administrative Board Rule 20.10 on Jury Selection (22 N.Y.C.R.R. 20.10, effective September 1, 1975)]

[2] *People v. Boulware*, 29 N.Y.2d 135 (1971).

[3] The IJA study was funded by the Robert Wood Johnson Charitable Trust. Barbara Flicker was project director; Richard Faust, research director; Felipe Tejera, research associate; Debra Klee, Susan Wolfe and John Fitzgerald, reseach assistants; and David Gilman and Karen Shatzkin, project coordinators.

[4] For recent statements of opposing views on the voir dire, see Arthur J. Stanley, Jr., "Who Should Conduct Voir Dire? The Judge," 61 *Judicature* 70 (1977); Robert G. Begam, "Who Should Conduct Voir Dire? The Attorneys," 61 *Judicature* 71 (1977).

[5] New York law allows 10 peremptories for each side if the highest charge is a D or E felony, 15 if a B or a C felony, and 20 if an A felony.

[6] Completed questionnaires were returned by 21 of 38 judges, 33 of 57 prosecutors and 27 of 55 defense attorneys.

[7] Levit, W., D. Nelson, V. Ball, R. Chernick, "Expediting Voir Dire: An Empirical Study," 44 *Southern California Law Review* 916 (1971). Unfortunately, the authors of this study simply assumed, without evidence, that juries selected by the federal method were no less fair than those selected by attorney-conducted voir dires. Interestingly, they also report that fast judges are faster regardless of which voir dire method they use, though they do not give the figures. These results support our finding of the strong impact of judicial style on the length of voir dire.

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