Fall 9-1-1971

Trial By Jury And Speedy Justice

J. Edward Lumbard

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

Part of the Constitutional Law Commons

Recommended Citation


This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.
TRIAL BY JURY AND SPEEDY JUSTICE*

J. Edward Lumbard†

In almost every urban center of the United States court records and the daily press remind us of the increasing delays in disposing of criminal charges and the many months of waiting which civil litigants must endure before their cases are reached for trial.

I propose to examine the extent to which trial by jury contributes to our present predicament and to explore the means whereby we can reduce the time required to try jury cases, within constitutional and statutory limits.

The courtroom is the bottleneck which determines the rate at which cases are tried and in large degree the speed with which they are settled. The time it takes to dispose of cases depends largely on how soon a judge will be available to hear them. The great majority of cases, both civil and criminal, will be settled, but most of these settlements will not take place until the eve of trial. In civil cases, only about 10% actually go to trial—somewhat more than 10% for accident claims and somewhat less than 10% for commercial disputes.¹

The great majority of serious criminal cases are disposed of by pleas of guilty—at least 80% in most jurisdictions and over 90% in many.² But during the past few years the federal courts and most state courts in urban centers have experienced a noticeable decline in the percentage of pleas of guilty and a corresponding increase in the cases that must be tried.³

On the criminal side, comparing 1970 with 1960, not only were more cases commenced and disposed of in the federal courts in 1970, but a much larger number of cases were tried, and it took considerably longer to try each case.⁴ This federal court experience has been duplicated in the state courts, especially in the larger metropolitan centers. In the last 10 years the number of federal criminal trials climbed from 3,510 to 6,583,

†Chief Judge, United States Court of Appeals, Second Circuit. A.B. 1922, LL.B. 1925, Harvard University.
¹See, e.g., Annual Report of the Director of the Administrative Office of the United States Courts [hereinafter cited as ARAOUSC], 1969, Table C-4 (e.g., 72,461 civil cases terminated; 7,843 civil trials held).
³See, e.g., ARAOUSC, 1960 and 1970, Table D-4. See also note 7 infra and accompanying text.
an increase of 87%. During those years federal civil trials increased only 45%.

Whereas in 1960 pleas of guilty disposed of over 86% of the federal criminal cases where guilt or innocence was determined, by 1970 the percentage disposed of by guilty plea dropped to 80%. While the percentage drop might seem small, it means about a 50% increase in the proportions of trials at a time when total volume is increasing. The principal reasons for this decrease in pleas and the corresponding increase in trials are, first, that counsel are now assigned and paid for by the government whenever defendants are financially unable to retain counsel, and second, that court decisions have added to the rights and safeguards for defendants in such a way that counsel more frequently decide that the best protection is a trial and a record for the appellate courts. An appeal presents no difficulty for the defense as the costs are also paid for. In the federal courts the appeals from conviction after trial have more than quadrupled in the last ten years.

Not only are there many more criminal trials, but each contested criminal case takes much more of the court's time, before trial and during trial. Before the jury is called, the court may be asked to hear and determine claims of illegal search and seizure, illegally obtained confession, improper identification procedures and incompetence to stand trial. Even in cases where defendants eventually plead guilty, the court may be required to spend considerable time taking evidence on one or more of these preliminary questions.

As our courts give preference to criminal business because of the great public interest in prompt disposition of criminal charges, there are fewer judges available to try civil cases, with the result that delays in reaching civil cases for trial are becoming longer and longer.

Merely increasing the number of judges and building more court houses will not be accepted as a solution to court congestion until it is clear that changes in methods and administration cannot meet the situation. Consequently, we must first examine the many proposals to change or modify our jury system in order to determine whether the proposals are feasible and the extent to which their adoption would relieve the congested conditions. These proposals include such far-reaching changes as the abolition of the jury in all civil cases, the reduction of the

---

5 Id., Table C-7.
6 Id.
7 ARAOUSC, 1960 and 1970, Table D-4. These percentages were computed by figuring the proportion of guilty pleas to the total of all criminal cases disposed of by guilty plea or by acquittal or conviction, either by a judge or a jury.
9 ARAOUSC, 1960, Table B-1, and 1970, Table B-7.
number of jurors in serious criminal cases and the acceptance of less than unanimous verdicts.

Most Americans have an emotional reaction against the idea of abolishing or curtailing the use of juries. The drama of the courtroom would be a sorry thing without a jury of twelve unpredictable characters. If a trial were to end with the judge merely saying "decision reserved" it would be an awful comedown from the suspense of waiting for the jury to agree and the excitement of the jurors filing in and, finally, the foreman's announcement of the verdict.

My own reaction is the result of experience before juries in state and federal courts; in criminal cases, as prosecutor, defense counsel, and as a federal court trial judge; in civil cases, as plaintiff's and defendant's counsel and as a trial judge in both state and federal courts. I have found that jurors have very high standards of performance. They understand the importance of their function; they give careful attention and spare no effort to carry out their duties. If a jury goes wrong, by bringing in a verdict not justified by the evidence, it is my experience that it usually results from the judge's lack of firmness and leadership or the ambiguity and lack of clarity of his instructions. One of our most revered and expert trial judges in New York for over forty years was John Knox. I doubt that a jury ever went wrong with Judge Knox presiding. He never told the jury what to do but he was a man of such obvious fairness, warmth and common sense that he established the kind of empathy with the jury which somehow made the right result easy for them to reach. All our great trial judges have those qualities in some degree. With such judges presiding it matters not whether they have the right to comment to the jury.

On issues of fact I prefer the verdict of a jury to the single judgment of one judge. I know of no reason why a group of laymen are not equally capable of determining where the truth lies. Sifted through a group, any biases or prejudices tend to cancel out, a process which obviously cannot take place with a judge. Moreover, in a criminal case the jury has the power to acquit if it feels that the case should not have been prosecuted or that the government has acted oppressively. Used as it was in prohibition days, this power of the jury can effectively nullify the enforcement of a law which lacks public support.

The high regard of the average American for the jury system—a regard which I share—arises largely from our history and the events which led to the adoption of the Bill of Rights. Reaching full flower in England before the Revolution, jury trial was regarded in the colonies as a vital protection against the King's officers and his judges. The Declaration of Independence listed as one of the complaints against royal tyranny that the King had deprived the people "in many cases, of the benefits of Trial by Jury." With independence won, the ratification of the Constitution was in doubt because many rights of the citizens against a federal
government had not been explicitly stated, and, in order to carry the day, the Constitution’s supporters had to promise immediate attention to a Bill of Rights, including the right to trial by jury. Federalists’ draft of the proposed amendments was borrowed largely from Virginia’s bill of rights. Although article III of the Constitution had provided that the trial of crimes was to be by jury, and that such trial must be held in the state where the said crimes shall have been committed, the sixth amendment added the further protection that “the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” And for civil cases, the seventh amendment provided:

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 re-examined in any Court of the United States, than according to the rules of the common law.

In each of the former colonies and in each state as it joined the union, the state constitutions contained similar provisions regarding the right to trial by jury, usually in language which followed closely that of the sixth and seventh amendments.

Mr. Justice Story, in his Commentaries on the Constitution written in 1833, refers to jury trial in civil cases as “a privilege scarcely inferior to

---


12 Section 8 of the Virginia Bill of Rights provided:
   That in all capital or criminal prosecutions a man hath a right to . . . a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; . . . that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

Section 11 read:
   That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.


13 U.S. Const. art. III, § 2 provides:
   The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.

14 Connecticut is an exception.

15 Section 8 of the Virginia Bill of Rights, note 12 supra, is a good example of such language.
that in criminal cases, which is counted by all persons to be essential to political and civil liberty.\textsuperscript{16}

Democracy in America, written by Alexis de Tocqueville in 1835, after a visit throughout most of the United States in 1831, is generally considered to be the most accurate and objective account of our political system in Jacksonian days. De Tocqueville pointed out the importance of trial by jury in the development and conduct of public affairs in words which are often quoted: He wrote that the jury places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government.

The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage.

The jury is pre-eminently a political institution; it should be regarded as one form of the sovereignty of the people:

The jury contributes powerfully to form the judgment and to increase the natural intelligence of a people; and this, in my opinion, is its greatest advantage.

I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use that they have made of the jury in civil causes.

Thus the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well.\textsuperscript{17}

In our own day, the American Bar Association has expressed similar views. In publishing its standards of judicial administration which were formulated under the leadership of Arthur Vanderbilt of New Jersey and Chief Judge Parker of the Fourth Circuit, it emphasized language in the 1938 report of the ABA Committee on Trial by Jury, which said:

Jury service today is the chief remaining governmental function in which lay citizens take a direct and active part, and trial by jury is the best means within our knowledge of keeping the administration of justice in tune with the community.\textsuperscript{18}

\textsuperscript{16}Quoted in '1 A. deTOCQUEVILLE, DEMOCRACY IN AMERICA 292 n. 4 (P. Bradley ed. 1945).

\textsuperscript{17}De TOCQUEVILLE, supra note 16, at 293-97.

\textsuperscript{18}MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION xxxi (A. Vanderbilt ed. 1949).
As the jury system developed in most of the newer states the dominant tendency was to limit the power of the judge and to increase the power of the jury even to the point where they decided matters of law as well as of fact. But difficulties in procuring enough jurors in the rural communities led to reduction in the number of jurors required in certain courts and kinds of cases. By the 1920s many of the states had provided that, where civil juries failed to agree upon a unanimous verdict within a certain time, the court could receive a verdict by ten out of twelve or even nine out of twelve.19

By constitutional change, statute or court rule, every state has made some modification of its jury system in deference to changing needs and ideas. A summary of present day requirements in criminal cases illustrates the great diversity in the federal and state systems.

Federal jury trial requirements in criminal cases are relatively simple: Rule 31 of the Federal Rules of Criminal Procedure requires that in all district court trials for serious crimes there be a jury of twelve whose verdict must be unanimous. But Rule 23 permits the defendant to waive jury trial in writing with the approval of the court and the consent of the government. In addition, under Rule 23, the defendant and the government may stipulate in writing with the approval of the court that the jury consist of any number less than twelve.

Under recent federal legislation authorizing the district courts to appoint United States magistrates,20 the district court may designate a magistrate to try persons charged with minor offenses,21 upon the written consent of such persons, after the magistrate has advised them of their right to be tried before a judge and that they may have the right to trial by jury.

Most states require a jury of twelve in the trial of all serious crimes, other than capital offenses, for which imprisonment is more than one year, unless the defendant consents to a trial by less than twelve—as in Connecticut where the choice is between twelve and six.22 In only five states is it provided that trial of such crimes shall be by less than twelve jurors: South Carolina, Texas, Louisiana, Florida and Utah.23 In the last

21A minor offense is a misdemeanor the punishment for which does not exceed imprisonment for one year, or a fine of not more than $1,000 or both. 18 U.S.C. § 3401(f) (Supp. V 1969).
22Phillips, A Jury of Six in All Cases, 30 Conn. B.J. 354 (1956); ABA Project on Minimum Standards for Criminal Justice, Trial by Jury § 1.1(c), at 24-25 (approved draft, 1968) [hereinafter cited as ABA Jury Standards].
three of these, the jury is set at six. Many states allow trial by juries of six if the defendant consents. At least eight states provide less than twelve-man juries for the trial of misdemeanors where the maximum penalty does not exceed one year. In Virginia there is no jury in such cases tried in courts not of record, but a de novo trial may be had in the circuit court in which case there is a five-member jury. For misdemeanors or petty offenses punishable by not more than six months, several states provide that such cases are to be tried without a jury before a judge, in some instances, as in Virginia, subject to trial de novo before a jury.

Until the Supreme Court last June decided Baldwin v. New York, New York State provided in the New York City Criminal Court Act that trial of offenses punishable up to one year was to be without a jury. In Baldwin the Court held that in the trial of any offense for which the authorized punishment exceeds six months the defendant must be afforded the opportunity of a jury trial.

In Williams v. Florida, decided last June, the Supreme Court held that Florida could try a defendant before a six-man jury where the maximum sentence was life imprisonment. This was held to be in accord with the due process required of the states by the fourteenth amendment. The majority reached this result, despite their holding that the sixth amendment provisions for jury trial were incorporated into the fourteenth amendment, by finding that a twelve man jury was not an essential ingredient of sixth amendment trial by jury. Mr. Justice White stated the reasons why a jury does not require twelve members. He wrote that the...
essential feature of jury trial in criminal cases is that the common sense judgment of a group of laymen is interposed between the accused and his accuser. He pointed out that one of the values of jury trial was the community participation and shared responsibility that results from the determination of guilt or innocence by such a group. He stated that there is no virtue in a particular number although the number of jurors should 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. He concluded that there is little reason to think that the goals of jury trial are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers twelve—and he added "particularly if the requirement of unanimity is retained."33

With respect to the question of unanimity, only two states clearly permit less than a unanimous verdict in trials for serious crimes: Louisiana, which takes a verdict from nine of twelve jurors where the punishment must be hard labor,34 and Oregon, which accepts a verdict from ten of twelve jurors except in first degree murder cases.35 The constitutionality of such provisions, however, is unclear. In Williams, the Court specifically stated in a footnote that it intimated no view on whether unanimity is required by the sixth amendment.36 This Term, the Court has heard argument on the constitutionality of a nine-three verdict from Louisiana and a ten-two verdict from Oregon in major criminal cases;37 but as yet it has not rendered its decision.

For offenses below the grade of felony, Montana allows a two-thirds verdict;38 Oklahoma and Texas allow three-fourths;39 and Idaho allows five-sixths.40 There has as yet been no constitutional challenge to these provisions.

In summary, it is now settled by Williams v. Florida that there is no constitutional impediment to the trial of serious crimes, other than capital crimes, by juries of less than twelve. Six-man juries are permitted, perhaps even five-man juries. As for less than unanimous verdicts, it would seem that while there is a good case for allowing such verdicts in civil cases, I doubt the wisdom of doing so in criminal cases, except perhaps for lesser

---

33Id. at 100.
34LA. CONST. art. 7, § 41; LA. CRIM. PROC. CODE ANN. art. 782 (West 1967).
36399 U.S. at 100 n. 46.
38MONT. CONST. art. 3, § 23.
39OKLA. CONST. art. 2, § 19, OKLA. STAT. ANN. tit. 11, §§ 958.3, 958.6 (Supp. 1969-70), tit. 21, § 10 (1958); TEx. CONST. art. 5, § 13.
40IDAHO CONST. art. 1, § 7.
crimes where maximum authorized punishment does not exceed one year. Requiring unanimity in serious criminal cases means careful consideration of the views of every juror and thus constitutes some insurance that the jury will not convict unless it is satisfied of guilt beyond a reasonable doubt. In such cases, the public support and respect for the jury system, which represents the ad hoc judgment of untrained laymen, may be due in large part to the fact that all the jurors agree. We should shortly learn whether the Supreme Court agrees.

Just a few weeks ago, on April 16, 1971, the Supreme Court of New Jersey, in light of Williams v. Florida, and acting upon a report by committees of the bench and bar, called upon the Governor and the state legislature to amend the New Jersey constitution to authorize the trial of criminal cases by a jury of six.

There are other ways in which the length of time now required to dispose of criminal trials can be considerably curtailed. At the head of the list I would put empowering the trial judge to supervise and conduct the examination of the jurors regarding their qualifications to sit in the case, which we call the voir dire. Once counsel are permitted directly to question the jurors themselves, the examination is extended beyond the necessities and is made an occasion for stressing arguments and facts thought to be helpful to the parties. It is enough that counsel be permitted to suggest questions to the judge. All that the state and the defendant are entitled to is an impartial and qualified jury, not a favorable one. Recently in New York City at the joint trial of thirteen defendants, it took nineteen court days to examine 241 jurors before the trial began. In the Bobby Seale case now being tried in New Haven, it took three months to select a jury and two alternates. This consumed fifty-one court days during which more than 1,550 veniremen were called and 1,037 questioned. Once a juror was chosen he waited in a room down the hall, day after day, with the result that two jurors already selected took sick and had to be replaced. To be sure, because of the publicity regarding both cases, it was of utmost importance that some time be taken carefully to select impartial jurors; but in each case the time spent was out of all proportion to what was really needed. Such extended examination by counsel wastes valuable time of the court, it incurs great expense, it inconveniences hundreds of jurors and it must inevitably result in many good jurors responding to

---

*But see ABA Jury Standards § 1.1(d), at 25-28.


questions in such a way that they will escape service. An unfortunate consequence of such marathon jury selection is that the public and many prospective jurors entertain a very low opinion of how the courts manage their business. The standards recently adopted by the American Bar Association for trial by jury in criminal cases provide that the judge should initiate and conduct the voir dire examination, also permitting such additional questions by the defendant and prosecutor as he deems reasonable and proper. This system is permissible in the federal courts where it seldom takes more than one day to select a jury.

Of course the greatest saving of court time comes from waiver of a jury by the defendant. No defendant ever waives a jury until just before trial is about to commence and he knows the judge who will preside. In the federal courts Rule 23 provides that the defendant must execute a written waiver, to which the government must consent and which the court must approve. While only rarely does the government withhold its consent or the judge his approval, the provision is useful. Because of the issues involved, the government may prefer a decision by a jury. In addition, there are cases where the judge withholds approval because he feels that the responsibility of fact finding and final judgment should be borne by a group representative of the community rather than by himself.

Waiver of jury has become fairly common in federal criminal trials. During 1970 defendants waived juries in 37% of cases tried. This increase from 28% in 1960 is accounted for primarily by the large number of 1970 selective service trials in which 75% of the defendants chose judge trials in preference to juries. I had hoped to be able to make some comparisons between use of juries in federal and state criminal trials, but the available figures are not sufficiently defined.

Tentatively, the figures seem to indicate that a higher percentage of state trials of serious crimes are tried to a jury than is the case in the federal courts. That is true in New York County and in the states of New Jersey, Florida and Michigan, the latest figures being 94%, 86%, 77% and 66% respectively, compared to 63% for federal courts in 1970. What is

\[^{a}ABAJURYSTANDARDS\ § 2.4at2,63-67.\]
\[^{b}FED.R.CRIM.PROC.24(a).\]
\[^{c}FED.R.CRIM.PROC.23(a).\]
\[^{d}ARAOUSC,1970,TableC-7(4,226criminaljurytrials;2,357criminalnonjury trials).\]
\[^{e}ARAOUSC,1960,TableC-7(2,502jurytrials;1,008nonjurytrials).\]
\[^{f}ARAOUSC,1970,TableC-8(207jurytrials;597nonjurytrials).\]
\[^{g}N.Y.CountystatisticsfromtelephonicinterviewwithofficeofFrankHogan,District AttorneyforNewYorkCounty,April26,1971(249jurytrials,sixteennonjurytrials); ReportoftheAdministrativeDirectoroftheCourts,StateofNewJersey,fortheCourt Year1969-70,TableD-8(2,530jurydispositions,277nonjurydispositions);Sixteenth\]
perhaps of greater significance is that the trend in the past few years in New Jersey, Florida, Illinois and Michigan is toward a higher percentage of trials by jury. Thus, in New Jersey criminal trials, the percentage of jury trials has increased in the ten years from 1959-60 to 1969-60 from 72% to 86%.\textsuperscript{53} In Florida the statewide percentage of jury trials rose from 39\% in 1959 to 77\% in 1970.\textsuperscript{54} From available statistics, then, it is clear that the great majority of trials for serious crime, both in state and federal courts are to a jury. Thus the increased time and expense involved in criminal jury trial is a major factor in slowing the disposition of criminal cases throughout the United States.

If the case is to be tried to a jury, court time is saved by any means which assists the jury to understand better the evidence as it goes in and thus to be able to reach a verdict without undue delay. I see no good reason why the jurors should not take notes if they wish to do so.\textsuperscript{55} In many cases it is helpful to see that counsel provides sufficient copies of important exhibits so that each juror has his own copy when the trial is focusing on the particular exhibits. Counsel should be instructed to have exhibits marked by the clerk before or after jury sessions as it is unnecessary to have court and jury present for such bookkeeping. In complicated cases the jury is usually assisted by being required to bring in special verdicts, for example where there must be a finding that acts were done within a statutory period.

In a lengthy trial it is of greatest importance for the judge to do whatever is reasonable to prevent a hung jury which would mean a lengthy retrial. The court should be empowered to have as many alternate jurors selected as seems advisable. The federal rules now permit six alternates in a criminal trial.\textsuperscript{56} In my opinion, the judge should also be empowered to keep one or two alternates in attendance during the jury deliberations, to replace any juror who may become incapacitated.

When the jury reports that it is unable to reach a verdict, the judge

\textsuperscript{53}New Jersey Reports, supra note 52, 1959-60 and 1969-70, Tables D-8 (1959-60—1,138 jury dispositions, 439 non-jury dispositions).


\textsuperscript{55}See ABA JURY STANDARDS § 4.2 at 97-100.

\textsuperscript{56}FED. R. CRIM. PROc 24(c).
should be permitted to give an additional instruction pointing out the desirability of reaching a verdict and suggesting to the minority that they should give weight to the fact that a majority of their colleagues take a different view, so long as they do not surrender their honest convictions solely for that reason.\textsuperscript{57} Requiring unanimity in criminal cases has certain values referred to above, but once sufficient time has passed to ensure a full discussion, I submit the paramount objective then becomes to avoid a hung jury, which is the result in something over 5\% of criminal jury trials.\textsuperscript{58}

As we have seen, the jurors themselves are frequently put on trial in criminal cases of public interest. In some cases this process has been continued after trial by questioning the jurors and asking them to make public statements. In my opinion, no court or judge should permit any questioning of jurors after the trial, except in those rare instances where counsel present to the court some good reason to believe that there has been criminal or grossly improper conduct which may have tainted the verdict. Jurors should be free to express their views freely and completely, whatever those views may be short of constituting criminal conduct such as bribery, coercion, or assault. The jury system can work satisfactorily only if jurors know and are assured that what they say in the jury room is confidential and not subject to exposure by any juror, except as the court may order for good reason. Accordingly, I recommend that by statute or court rule, trial judges should be required to instruct juries that they are under a duty to keep secret everything that happens in their deliberations, and to instruct counsel not to question jurors without court order, and that failure to observe these instructions will be treated as contempt of court.

In civil cases in the federal courts, Rule 38 of the Federal Rules of Civil Procedure, after restating the seventh amendment right to trial by jury, requires that a party having a right to jury trial must serve a demand for jury trial within ten days after pleadings have been served which are directed to a jury issue. Failure to serve such demand constitutes waiver of the right to trial by jury.

There has been a considerable decline in the use of juries in federal civil cases due to several factors. First, much present day litigation, particularly that arising out of business transactions, presents complicated questions which are viewed by both parties as unsuitable for jury decision. Second, much litigation regarding rights newly created by statute are of an equitable nature and are not suits at common law.\textsuperscript{59} Most

\textsuperscript{57}See ABA JURY STANDARDS \S 5.4(a) at 145-47. \textit{See also} the concurring opinion of Lumbard, C.J., in \textit{Grace Lines, Inc. v. Mottley}, No. 35,581 (2d Cir. Mar. 1, 1971).

\textsuperscript{58}H. Kalven \& H. Zeisel, \textit{The American Jury} 453 (1966).

\textsuperscript{59}See 5 J. Moore, \textit{Federal Practice} \S 38.11 [7], at 122-25 (2d ed. 1969).
of the current civil rights litigation is in this category. Other cases are exempt from the jury guarantees either by express language of the statute or by judicial construction.60 A third factor is the desire to avoid the greater expense of a jury trial which, on the average, takes twice as long as trial before a judge.61

On the other hand Congress has from time to time made express provision that claims be tried by a jury. Thus, suits brought by seamen against shipowners would not have been jury cases under the common law, but by the Jones Act of 1920 they are tried to a jury.62

In the federal courts in 1970, only 36% of civil cases were tried to a jury.63 This represents a decrease in trials to a jury from 47% in 1960.64 The difference is largely accounted for by the great increase in civil rights cases and state prisoner habeas corpus hearings which ordinarily are tried to a judge.65 In addition, most commercial cases are tried without a jury. But in all types of accident cases there is still a decided preference for trial by jury—70%.66

As the bulk of state court civil business consists of accident cases, it is to be expected that a majority of civil trials are to a jury. From the latest reports available, New York has 56% jury trials, New Jersey 68%, Illinois 78% and Massachusetts 81%.67 In these states, the percentages of jury trials are even higher for automobile negligence and personal injury cases.68 Massachusetts and New Jersey showed a definite trend over the

60The Federal Tort Claims Act, for example, specifically provides for trial without jury. 28 U.S.C. §§ 1346(b), 2402, 2471-2480 (1964).
61See B. Botein & M. Gordon, THE TRIAL OF THE FUTURE: CHALLENGE TO THE LAW 106 (1963). Moreover, the time from filing to trial in civil jury cases is much greater than in nonjury cases. For example, in Michigan in 1969, the average number of months from filing to trial in automobile negligence cases was 30.5 months for jury cases and 17.2 months for nonjury cases; in other civil cases the average was 27.6 months for jury cases and 12.2 months for nonjury cases. Michigan Annual Report, 1969, supra note 52.
63ARAUSC, 1970, Table C-7 (3,371 civil jury trials, 6,078 civil nonjury trials).
64ARAUSC, 1960, Table C-7 (3,035 jury trials, 3,453 nonjury trials).
66ARAUSC, 1970, Table C-8. In motor vehicle personal injury cases, for instance, there were 1,219 jury trials and 332 nonjury trials in 1970. Id.
67New York Annual Report, supra note 2, 1969-1970, Table 9 (43,891 jury dispositions, 34,079 nonjury dispositions); New Jersey Report, 1969-70, supra note 52, Table D-3 (2,453 jury dispositions, 1,233 nonjury dispositions); Illinois Annual Report, 1968, supra note 54 (23,800 jury dispositions, 6,700 nonjury dispositions); Thirteenth Annual Report to the Justices of the Supreme Judicial Court of Massachusetts, 1968-69 (1,794 jury trials, 421 nonjury trials).
68In New Jersey, for example, the percentage of jury trials in automobile negligence cases in 1969-70 was 87% (1,746 jury dispositions, 236 nonjury dispositions). New Jersey Report, 1969-70, supra note 52, Table D-3. In Michigan, the percentage of jury trials in such
past ten years toward a higher percentage of trials by jury,—from 72% to 81% in Massachusetts,69 and from 58% to 68% in New Jersey.70 On the other hand, New York's percentage declined from 68% to 56% in those ten years,71 probably because of the great increase in divorce and separation cases as a result of more liberal laws regarding marriage and the preference in those cases for judge trials. As stated previously, civil jury trials take considerably longer than trials to a judge; and in addition, all civil trials take somewhat longer than they did ten years ago.72 Figures in New York County show that it now takes about 36% more time to try accident cases, apparently because of the increased use of expert medical testimony.73

Whatever the trend may be in any state, the fact that the majority of trials in state courts are to a jury underscores the necessity of considering possible modifications of the jury system to save time and expense in processing civil business.

Until Williams v. Florida there had never been any question that in the federal courts the right to jury trial in suits at common law, as guaranteed by the seventh amendment, meant a jury of twelve.74 The Federal Rules of Civil Procedure provide only that the parties may stipulate that the jury consist of less than twelve.75

For some years such stipulations have been suggested to the litigants by the judge before trial begins. Frequently the stipulation is that a verdict

70New Jersey Reports, supra note 52, 1959-60 and 1969-70, Tables D-3 (1959-60—1,832 jury dispositions, 1,310 nonjury dispositions).
72For example, statistics provided by Leland L. Tolman, Jr., Director of Administration, First Judicial Department, New York State, on April 23, 1971, show that the average length of personal injury jury trials in the New York County Supreme Court rose from 13.78 hours in 1961 to 18.83 hours in 1970.
73Id. The average interval from filing to trial in civil jury cases has also greatly increased. In Michigan, for instance, the average interval rose from twelve months in 1960 to twenty-nine months in 1970. Michigan Annual Reports, 1960 and 1969, supra note 52. Similarly, in New York County, the jury delay in personal injury cases rose from twelve months in 1964 to forty-four months in 1970, and there is a similar trend in most of the other counties in New York. New York Annual Reports, supra note 2, 1963-64 at 185, and 1969-70 at 306. In Los Angeles County the interval rose from 25.5 months in 1967 to thirty-four months in 1970. Annual Report of the Administrative Office of the California Courts for 1969-70 at 117, Table XXVI.
may be returned by a jury of ten or eleven, if the court finds it necessary during trial to excuse one or two jurors. Recently some judges in the Southern District of New York have secured stipulations from the parties which provide that the case "may be tried to a jury of six members, and that a verdict may be rendered when five-sixths of the jurors constituting the jury have agreed." Experience with such trials has been entirely satisfactory.

On the other hand, Federal Rule 39 permits the judge in his discretion to order trial by jury of any or all of the issues, even where the parties have not demanded a jury or have no right to a jury.76

Under the impetus of the Supreme Court's approval of six-man juries in state felony trials, at least eight federal district courts have recently provided by rule for trial of civil cases by six-man juries. Following the lead of the Minnesota district court, the rules in several districts now provide that all juries in diversity cases, FELA cases and Jones Act suits will be six-man juries.78 These categories include a majority of jury trials in most federal districts.

In some districts, such as the District of Columbia, the new rule is that all civil trials shall be by juries of six.79 And in the Eastern District of Pennsylvania, the district court, after conferring with the bar, promulgated a rule, effective May 1, 1971, which provides that unless a party shall demand 12, civil juries shall be composed of 8 members, with no alternates, a verdict to be accepted from a jury which may have as few as six members as a result of incapacity or excuse during trial.80

In recent years the Supreme Court has shown some tendency to decide doubtful cases in favor of jury trial. For example, where legal and equitable relief is sought from the same operative facts and there is some doubt as to which are predominant, the Court has held that the case must

76Rule 48, Fed. R. Civ. P. 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.


79Fed.C. R. 18 (effective June 1, 1971) (except in cases of eminent domain). The new rule for the Southern District of Illinois, which became effective May 1, 1971, provides for a jury of six in all cases "except as may be otherwise expressly required by law or controlling rule." S.D. Ill. R. 18. The District of New Mexico now provides for a jury of six in all civil jury cases. D.N.M.R. 18. (effective May 1, 1971).

be tried by a jury. The Court also held as to a stockholder's suit for damages, that although there was no such action at common law, the suit more nearly resembles an action at law, and a jury may be demanded.

The Judicial Conference of the United States, at its meeting in March 1971, approved in principle a reduction in the size of juries in all civil cases and referred to two of its committees the matter of effecting the change. This action reflects the feeling that by what it said in Williams v. Florida, the Supreme Court by implication construed the seventh amendment to permit juries of six in civil cases.

It might be thought that such a change in the federal system could be initiated by the Judicial Conference under the rule-making power. As you know, after rules are formulated and the bench and bar have studied the proposals, the Judicial Conference must approve and then the Supreme Court, if it approves, sends the rules to Congress. The rules take effect only after some months, provided of course that meanwhile Congress has not acted otherwise.

However, the Enabling Act of 1934, which gave the Supreme Court its first rule-making authority which resulted in the Federal Rules of Civil Procedure, specifically provided that in the rules to be drafted, "the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate." This proviso strongly suggests that Congress may want to determine whether such a fundamental change should be brought about in federal court procedure. Congress may prefer to pass upon such a fundamental change without waiting for the Rules Committee, the Judicial Conference and the Supreme Court. So far as one may prophesy now, it would appear that the change to six-man juries in civil jury trials in federal courts would meet with general acceptance.

A substantial number of states provide for civil jury trials of less than twelve jurors in some instances. A common provision is for juries of less

---


The Judicial Conference's resolution provides:

BE IT RESOLVED by the Judicial Conference of the United States that it adopts the recommendations of the Committee on the Operation of the Jury System that the Conference approve in principle a reduction in the size of juries in civil trials in United States district courts, and upon such reduction that there be a diminution in the peremptory challenges normally allowed. It is also resolved that the means to effectuate the objectives set forth in this resolution, i.e., by rulemaking or statute, be referred to the Committees on the Operation of the Jury System and Civil Rules.


than twelve upon consent of the parties. Many states distinguish between courts of general jurisdiction on the one hand, and county courts, justice of the peace courts, and courts not of record on the other. In Arizona, for example, there are twelve jurors in courts of record, and six jurors in courts not of record; the parties by consent can provide for a lesser number in each court. Kentucky, Texas, and Washington, to mention only a few examples, are similar. A few provide for a jury of less than twelve, but allow a party to demand a full twelve-man jury. At least two states have differing requirements for the size of the jury contingent upon the amount in controversy. Idaho provides for a jury of twelve unless the parties agree to fewer if the amount in controversy exceeds $500. For smaller amounts, there are six or fewer jurors. Virginia's provision is unique: for cases involving an amount less than $300, there is a five-man jury, whereas a jury of seven is provided for cases involving a larger sum in controversy. Unlike most other states described above, then, Virginia makes no provision for a jury of twelve in any civil cases. Florida follows Virginia in this regard, providing for a jury of six in all civil cases. We can see from this survey that a substantial majority of states have cast aside the twelve-man jury in at least certain civil cases, and by all accounts the results have been satisfactory.

The further modification to provide that the court shall receive less than unanimous verdicts in civil jury cases, whatever the size of the jury,

---


E.g., Iowa Code Ann. § 603.34 (1950) (six in superior court, unless twelve demanded); Ohio Rev. Code Ann. § 1901.24 (Baldwin 1964) (six unless parties agree to a less number or demand is made for jury of eight or twelve).


Ga. Stat. Ann. § 53.041 (1969). In New York City Civil Court, which generally speaking has jurisdiction of civil actions wherein the amount in controversy does not exceed $10,000, N.Y.C. Civ. Ct. Act §§ 201-212 (McKinney 1963), all juries will be composed of six persons pursuant to recent legislation, which takes effect on September 1, 1971. N.Y.L.J., Apr. 26, 1971, at 1, col. 4. Previously, the Act provided for juries of six, but either party could demand a jury of twelve in actions to recover possession of real property or of a chattel, and actions for money damages only, where the amount or value in controversy exceeded $300. N.Y.C. Civ. Ct. Act § 1305 (McKinney 1963).

would also serve to save court time and greatly reduce the number of hung juries. As the Supreme Court has not yet decided the constitutionality of less than unanimous verdicts in criminal cases, it must be said that the constitutionality of less than unanimous verdicts in federal civil jury trials may also be in doubt. In several states, such verdicts have been used for many years with desirable results, particularly in reducing the number of hung juries. For example, Arizona, Kentucky, and Ohio each provides that in civil actions the verdict may be taken if three-fourths of the jurors concur; New York accepts a verdict from five-sixths of the jurors in civil cases; and the Michigan constitution provides that in such cases a verdict shall be received when ten of twelve jurors agree. In addition, Delaware, Maryland, and New Jersey provide that the parties may stipulate that a verdict of a stated majority of the jurors shall be taken as the verdict of the jury.

As to the constitutionality of such verdicts, the Supreme Court in 1916 upheld the constitutionality of a five-sixths verdict in a state civil case, stating expressly that the seventh amendment applies only to the federal courts; and this Term the Supreme Court dismissed, for want of a substantial federal question, an appeal from Louisiana involving the issue whether the seventh amendment applies to the states. In any event, the satisfactory experience with fractional verdicts in state civil cases is strong support for the proposition that they comply with the due process provision of the fourteenth amendment.

There are some who think that we should abolish jury trials in all civil cases. The New Jersey supreme court has recently called on the Governor and the state legislature to consider amendments to the New Jersey constitution which would either reduce the number of jurors required or eliminate altogether the right to jury trial in civil cases.

In England, trial by jury in civil cases has become very rare, by reason of acts of Parliament in 1933 and 1934 which limited jury trials to cases of

---

94In 1897, the Supreme Court ruled that the seventh amendment requires a unanimous verdict. American Publishing Co. v. Fisher, 166 U.S. 464 (1897).
95ARIZ. REV. STAT. ANN. § 21-102 (1956); KY. REV. STAT. ANN. § 29.015 (1963); OHIO CONST. art. 1, § 5, implemented by OHIO REV. CODE ANN. § 1901.24 (Baldwin 1964).
96N.Y. CONST. art. 1, § 2, implemented by N.Y. CIV. PRAC. LAW R. 4113 (McKinney 1963).
97MICH. CONST. art. 1, § 14.
101Memorandum of Edward B. McConnell, supra note 43.
libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise, or where the court orders a jury. Thus during a recent three-year period only 4% of the trials at Queens Bench in London were to a jury, and outside of London at the Assizes less than one in every 200 trials was to a jury.

Despite the saving in time and expense, I doubt that total abolition of juries in civil cases can win substantial support in this country. First, I do not believe that claimants in accident cases would be content to have liability and damages assessed by a judge; and certainly much of our trial bar would be opposed to it. When we find some different and better way of handling automobile accident claims than by jury trial, most of our problems of crowded calendars and jury trials will be solved. Such a drastic change as abolition of jury trial can only come about gradually, as it did in England following long experience prior to 1917 and the abolition of jury trial as a war measure during World War I. Moreover, the independence of the English judges and their total freedom from political pressures cannot be matched in any American jurisdiction. By the same token the availability of a jury is looked upon by many litigants as a more evenhanded method of deciding facts than leaving such a decision to one man whose impartiality and susceptibility to political or other pressures may, in some communities where judges are elected for short terms, be open to question. I believe there is considerable merit to this point of view. Moreover, a judge may himself prefer to have a jury decide factual issues in certain kinds of cases.

Finally, there is the important question whether abolition of jury trial in civil cases would be constitutional. It is clear that in federal courts the seventh amendment would preclude abolition. But if a state decided to do away with jury trials in civil cases, it is not so clear that that provision would be struck down as violative of the due process clause of the fourteenth amendment. Indeed, in several cases decided before the advent of the incorporation theories, the Supreme Court stated that the denial by a state of trial by jury is not inconsistent with due process. Of course, under the total incorporation doctrine, which would make the seventh amendment guarantee an integral part of due process, approval of abolition by a state would be very doubtful. But if the view expressed by Justices Harlan and Stewart in Williams v. Florida, should prevail, or if

103Id. at 73, Table IV.
104Id. at 72-73.
106399 U.S. at 117 (Harlan, J., concurring) and at 143 (Stewart, J. concurring).
selective incorporation is not extended to the seventh amendment, and the Court thus adheres to its prior decisions, then abolition of jury trial in civil cases might well be found to conform to due process. The Court's dismissal this Term of the Louisiana case involving the applicability of the seventh amendment to the states may indicate that the latter is more likely.

Any study of the jury system, as it operates today in the courts of this country, is seriously handicapped by the inadequate reports and statistics, except those of the federal courts. None of the states assembles and publishes information in sufficient detail regarding the classes of cases and the variety of situations involved so that any conclusion can be drawn as to what procedural measures or substantive changes might accomplish in the saving of court time and expense. The total cost of operating the jury system in any state fully justifies the relatively small expense of keeping the kind of records necessary for better administration and planning. In the federal system jurors' fees and expenses alone now exceed $14,000,000 per year.

From this cursory study of the operation of our jury system I suggest the following conclusions:

1. By statute, or by court rule, or, where necessary, by constitutional amendment, six-man juries should be authorized in the trial of all civil cases and in all criminal cases, except capital crimes. I would not abolish jury trial in civil cases but would leave it to the legislature to require the party demanding a jury to pay for the cost of trial by jury, if he can afford it. This would tend to eliminate the use of juries in many cases.

2. In civil cases verdicts should be received when five jurors out of six are agreed.

3. Waiver of jury trial should be permitted in all civil and criminal cases. In criminal cases, the government's consent to waiver should be required, and the approval of the court.

4. In addition, most small claims up to $500 should be tried without a jury, and petty offenses where the punishment does not exceed imprisonment for six months and fine of $500 should be tried without a jury.

5. In any civil or criminal case the court should have the power, on its own motion, to have the issues tried to a jury.

6. Court rules should provide that the examination of jurors be conducted by the court, and the court should be given broad powers to empanel any number of alternate jurors and use as many as may be needed up to the time of verdict.

Note 100 supra and accompanying text.


Perhaps the option of demanding a jury trial should be preserved in landlord-tenant disputes, consumer credit cases, and the like.
7. The bench and bar in each state and metropolitan center should study means whereby jury trials may be shortened.

8. Appellate courts should allow trial judges wide discretion in their control of the courtroom, the examination and selection of jurors and all reasonable means in assisting the jurors to arrive at a verdict. In light of the generally high quality of performance by juries, appellate courts reviewing judgments rendered in cases tried to a jury should not lightly assume that minor errors committed at the trial had a prejudicial impact on the jurors.

9. Jurors and counsel should be instructed that jury discussions are to be kept secret and no disclosure is to be made unless the court, by written order, permits this to be done for good cause. Any disobedience of such court instructions would be treated as contempt of court.

With the jury system modified as suggested, I believe that the time now taken in the use of juries can be materially reduced—perhaps by as much as one-half. This much time saved would be a mighty spur toward more speedy justice. I believe all this can be done without any loss in the quality of jury determinations. In our concern about mounting delays and escalating costs, we must always keep in mind that no system of justice can win that public support and respect without which it cannot continue to function, unless it allows to all litigants the time and the means to have their side of any litigated matter fully and fairly heard and determined.