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Trials, the Means to a Just End

By Michael P. Judge

The wrongheaded idea that we should abolish juries in criminal cases where the punishment does not exceed six months is prompted by two unmeritorious concerns. One is that because the court system is underfunded, certain efficiencies (i.e. elimination of due process) must be imposed. The other is that some do not trust the people in the community, they have lost touch or never established an effective bond with the community. Therefore, they feel uncomfortable with people from the community having the power to judge their fellow citizens. Who's fault is that? The government exists by and for the people; the community does not exist for the benefit of government.

There is a lack of ethnic diversity on the bench, which is exacerbated by the dearth of background diversity. Lawyers appointed and elected to the bench for the first time come primarily from government agencies, and almost all of those are from prosecutors' offices. That model gives credence to the urban wisdom that instead of justice it's "just us." Eliminate the jury so the case can be prosecuted in front of the prosecutor's former office mate.

Why shouldn't one have a jury, as the consequences of any conviction are greater now than they have ever been? They may include the revocation of a professional license, suspension or revocation of a driver's license, forfeiture of property, loss of or disqualification from employment, cancellation of insurance or bonding, exclusion from naturalization, admissibility of the judgment in later litigation, a fine of many thousands of dollars and 180 days imprisonment in the county jail.

The proposals to eliminate the requirement that verdicts in criminal cases in California be unanimous would remove the necessity that jurors actually deliberate, that is, carefully consider each others views prior to reaching a verdict.

In *Mitchell v. Superior Court*, 49 Cal.3d 1242 (1989) the court emphasized: "Of all the provisions of the Declaration of Rights considered at the 1879 Constitutional Convention, [S]ection 7, pertaining to the right to jury trial, was the most vigorously debated. Proposals that would have allowed conviction by less than a unanimous jury, or that distinguished between types of criminal offenses based on the severity of punishment, were strongly denounced."

It is not the purpose of trials to achieve the maximum number of verdicts, rather the purpose of trials is to achieve a just result.

Very few cases in which Californians are charged with crimes even proceed to trial.

According to the statistics of the Los Angeles Superior Court, historically less than 5 percent (4.7 percent of the felony cases go to trial. According to statistics of the Los Angeles County Public Defender's Office, less than 1 percent of the misdemeanor cases go to trial. The reasons that cases go to trial are:

The defendant is entirely innocent,

The defendant is significantly overcharged,

The defendant is guilty and refuses to accept full responsibility for his/her actions.

If it's one of the first two reasons, there are likely to be legitimate disputes about what happened and/or who was involved. In such situations one would expect some juries to hang if the system is operating properly. Despite this, according to the Los Angeles County Superior Court statistics, from 1985-1995, unanimous verdicts were reached in 87 percent of the felony cases that went to trial.

The Superior Court has indicated that of the 13 percent that mistried, an amount equal to 2 percent were due to miscellaneous reasons, and the amount that hung was 11 percent. Consequently, hung juries are truly a rare phenomenon in our criminal justice system. Assuming a 4.7 percent trial rate and an 11 percent hang rate, .5 percent of all felony cases result in hung juries in Los Angeles.

However, the above figures include all hung juries irrespective of the count in the superior court, which overinflates the number of hung juries that would be addressed by the non-unanimous jury proposals.

In a survey of 515 hung jury cases between July 1, 1994 to May 11, 1996 conducted within the Los Angeles County Public Defender's Office, it was discovered that 60 percent of the cases that hung were split: 6-6, 7-5, 8-4 and 9-3. The proposal to use a 10-2 verdict would apply to only the infinitesimal .2 percent of total felony dispositions that result in 11-1 and 10-2 hung juries (.047 x .11 x .40 = .0021). Conversely 99.8 percent of felony dispositions do not result in juries hung 11- 1, 10-2.

Hung juries send a powerful message to all parties to reappraise the strengths and weaknesses of their positions, after seeing for the first time how all the witnesses performed, and learning all the equities in the situation.

In the survey of 515 hung juries there were 145 that hung in favor of guilt by a count of 10-2 or 11-1. Of these, as of the latest compilation 36 had actually been tried a second time.

Of those 36 cases, eight resulted in findings of innocent (not guilty) in the second trial, nine of the cases hung again, and 19 resulted in findings of guilt. Of the nine that hung again, two were dismissed, three were settled by negotiated pleas satisfactory to both sides and approved by the judge, and four were set for a third trial.

Under the 10-2 verdict proposal, of the 36 original cases, guilty verdicts would have been rendered and sentence imposed on the eight who were subsequently found innocent, on the two whose cases were dismissed and on the four who have a third trial pending.

Those case histories should be compelling enough, but it is appropriate to reason through this issue even further. Retaining unanimity encourages a more thorough review of the evidence, hence verdicts resulting from unanimous juries are more likely to be reliable and accurate. The innocent are less likely to be convicted with the requirement of unanimity than if a lesser standard is used.

Elimination of unanimity would significantly erode the ability of a juror(s) who discern the truth to change the minds of other jurors who have not. It reduces the opportunity of those who accurately perceive what really occurred from preventing emotional, blind, bigoted, precipitous verdicts which the other jurors may regret the rest of their lives.

A portion of this letter is excerpted from Michael P. Judge's keynote address at the commencement ceremony of the University of West Los Angeles School of Law (June 9, 1996), 29 U. West. L.A. L. Rev. 215, available on LexisNexis.

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