American College of Trial Lawyers

REPORT ON
THE IMPORTANCE OF THE TWELVE-MEMBER CIVIL JURY IN THE FEDERAL COURTS

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American College of Trial Lawyers

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I. INTRODUCTION

The civil jury of twelve persons has an ancient lineage. By some accounts, it dates back more than one thousand years. At the outset, the jury functioned not as an objective fact-finder but as a body of interested character witnesses. Over the intervening centuries the jury as a legal institution developed and evolved in manifold ways in response to society's changing needs, attitudes, and circumstances. This paper addresses the most significant recent chapter in this long history: the reduction in the size of the civil jury from twelve members to as few as six.

Two major intellectual and social forces have been instrumental in shaping the civil jury as we know it today: rationalism and democracy. Rationalism emphasizes the importance of facts, reason, and principled decision-making in the conduct of human affairs. In response to the demands of rationalism the jury evolved into an objective, disinterested finder of fact, operating under careful and detailed legal instructions. Democracy emphasizes the value of and stresses the need for universal participation in governance. In response to the spread of democracy and democratic values, the jury evolved into a microcosm of the larger society, filtering legal disputes through the sensibilities of the community as a whole.

Throughout this millennium of continuing evolution and change, however, one signal attribute of the civil jury remained invariant: size. From the fourteenth century, if not before, the English jury invariably was comprised of "twelve good men and true." The established tradition of a twelve-member jury crossed the Atlantic with the colonists and, after the revolution, became an embedded fixture of the American judicial system. In 1898 the Supreme Court expressed the understanding of the entire legal community when it described the American jury as one "constituted, as it was at common law, of twelve persons, neither more nor less."[1]

Serious proposals to reduce the jury's size to fewer than twelve members first surfaced in the 1960s. Believing that smaller juries

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[1] *Thompson v. Utah,* 170 U.S. 343, 349 (1898).

could lower the cost and increase the efficiency of litigation, some states began experimenting with juries of only six or eight members. In two decisions in the early 1970s, the Supreme Court sustained the constitutionality of this emerging trend. In *Williams v. Florida,*[2] the Court held that states may employ six-member juries in non-capital criminal cases without violating the Sixth Amendment. Three years later, in *Colgrove v. Battin,*[3] the Court further held that states also may employ six-member juries in civil cases without violating the Seventh Amendment.

The crusade for smaller juries quickly spread to the federal courts. *Williams and Colgrove* led to the adoption of local rules in many federal district courts permitting the use of civil juries with fewer than twelve members. In 1991, this new procedure was codified in Rule 48 of the Federal Rules of Civil Procedure, which now sanctions juries "of not fewer than six and not more than twelve members."

This sharp departure from traditional practice proved highly controversial. In 1996, the Judicial Conference of the United States[4] received recommendations from both its Standing Committee on Rules of Practice and Procedure and its Advisory Committee on Civil Rules that Rule 48 be revised to reinstate the traditional requirement of a twelve-member civil jury. Supporters of the proposed amendment stressed the "long tradition of such panels[,] … [the] need to involve more citizens in the judicial process[,] and … [to] encourage greater diversity in service."[5] The Advisory Committee noted, in addition, that the extra cost of twelve-member juries actually was "quite small."[6] The Judicial Conference nonetheless rejected both of its Committees' recommendations. The outgoing Chair of the Conference's executive

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[2] 399 U.S. 78 (1970).

[3] 413 U.S. 149 (1973).

[4] The Judicial Conference, which includes the Chief Justice of the Supreme Court, the chief judge from each judicial circuit and a district judge from each judicial circuit, meets annually to perform administrative functions, review general rules of practice and procedure and make recommendations as to legislation and rules of procedure. See 28 U.S.C. § 331.

[5] Marcia Coyle, *Civil Juries Won't Go Back to 12 Seats,* NAT'L L.J. Sept. 30, 1996, at A16.

[6] John Flynn Rooney, *Federal Rules Should Restore Big Juries, Open Up Voir Dire: Panel,* Chi. Daily L. Bull, Dec. 20, 1994, at 1.

committee casually dismissed the issue: "The feeling was, 'We've experimented with six and eight, and it works out fine and is a little more manageable.'"[7]

The issue is more fundamental, more complex and more important than the Chair's observation suggests. Many practitioners, scholars, and judges continue to advocate a return to the historic norm of a twelve-member civil jury.[8] The question of jury size is not simply a matter of cost or expediency. It is the representativeness and objectivity of the jury, and its function in our democracy that are at the core of the issue. It is the significant role that the jury plays in a free society, rather than considerations of cost and efficiency, that is the centerpiece of the argument. As Tocqueville observed:

> The institution of the jury, if confined to criminal causes, is always in danger; but when once it is introduced into civil proceedings, it defies the aggressions of time and man . . . . The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. And this is especially true of the jury in civil causes; for while the number of persons who have reason to apprehend a criminal prosecution is small, everyone is liable to have a lawsuit. . . . It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards

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[7] *Id.*

[8] *See, e.g.,* Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials,* 22 Hofstra L. Rev. 1, 24 (1993); Robert H. Miller, Comment, *Six of One is Not a Dozen of the Other: A reexamination of Williams v. Florida and the Size of State Criminal Juries,* 146 U. Pa. L. Rev. 621, 668-70 (1998); Note, *Unshrinking the Federal Civil Jury,* 110 Harv. L. Rev. 1466 (1997); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?,* 6 S. Cal. Interdisciplinary L.J. 1 (1997) Lucy M. Keele, *An Analysis of Six vs. 12-Person Juries,* Tenn. B.J., Jan./Feb. 1991, at 32.

> society and the part which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private selfishness which is the rust of society.[9]

In this paper, the American College of Trial Lawyers Committee on Federal Civil Procedure examines the question of jury size in its historical, legal, and social scientific dimensions. The Committee concludes and recommends that the traditional twelve-member civil jury should be reinstated in the federal courts. This conclusion rests upon concerns of a fundamental nature: **the reduction in the size of the jury from twelve members to six impairs the process of rational fact-finding that lies at the heart of civil litigation and diminishes the role of the jury as an effective instrument of democratic government.** In contrast, the principal argument in favor of smaller juries — that incremental amounts of time and money may be saved — is factually deficient and should be, in any event, given little weight when such essential interests are at stake.

II. HISTORICAL EVOLUTION OF THE CIVIL JURY

We begin with the jury's ancient origins and evolution over time. This permits the recent downsizing of the American civil jury to be assessed in a larger historical context.

1. FROM ITS MEDIEVAL ORIGINS TO THE SEVENTHEENTH CENTURY: DEVELOPMENT OF THE JURY INTO A RATIONAL AND DEMOCRATIC ADJUDICATOR

Most scholars trace the origins of the modern civil jury to a procedure called the "inquisitio," which was brought to England from Normandy in 1066.[10] Other authorities, however, find its origins in even earlier Anglo-Saxon forms of adjudication. For example, there is evidence of a pre-Norman procedure by which twelve representatives (known as "senior thanes") were drawn from the community to hear and resolve disputes in what appears to have been an early precursor to adjudication.[11] Similarly, in the

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[9] 1 Alexis de Tocqueville, Democracy In America 284-85 (Alfred A. Knopf 1945)(1835).

[10] Arnold, *supra* note 8, at 6-7.

[11] ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 27 (1973).

Anglo-Saxon "wager of law," an accused would state under oath that he was innocent and then summon certain of his fellow citizens, known as "compurgators" or "oath helpers," to vouch for his worth and credibility.[12] Such procedures, like the earlier ordeal and trial by battle, appear to have been designed more to establish the litigants' moral worth than to determine the actual facts giving rise to their dispute.[13]

The introduction of the inquisitio was a significant advance toward the model of adjudication as a search for objective truth. Dating back to the Carolingian emperors in Europe, the inquisitio was a device by which the King compelled local persons of substance, who presumably had some knowledge of the truth of a disputed matter, to swear as to the rights of the Crown when they were in question.[14] While the Anglo-Saxon compurgators were assembled by and presumably loyal to one party, members of the Norman inquisitio were summoned by the King and were at least nominally disinterested.[15] Because compelled testimony by disinterested witnesses is more likely to lead to a discovery of the truth than are statements manufactured by the litigant's allies and friends, the inquisitio was inherently more rational than the procedures it replaced.[16]

Whatever the reasons for its emergence, there is no doubt that the inquisitio — with its emphasis on a disinterested investigation into the factual questions in dispute — enjoyed growing popularity throughout the late medieval period. In the beginning, the privilege of having one's rights adjudicated by an inquisitio was sought as a royal favor. But starting in 1164, Henry II made the inquisitio generally available for all important litigation in a series of

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[12] Commentators frequently give the number of compurgators as eleven without, however, citing primary authority. *See, e.g.,* FRANCIS X. BUSCH, LAW & TACTICS IN JURY TRIALS § 4, at 6 (1949); MAXIMUS A. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM 76-78 (1894) (photo. reprint 1992).

[13] J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 63 (2d ed. 1979). *See also* THEODORE F.T. PLUNKNETT, A CONCISE HISTORY OF THE COMMON LAW 125 (5TH ED. 1956); PATRICK DEVLIN, TRIAL BY JURY 6-7 (1956).

[14] BUSCH, *supra note* 12, § 7, at 7; 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 140-41 (2d ed. 1911).

[15] PLUNKNETT, *supra note* 13, at 109.

[16] *Id.*

enactments called "assizes."[17] These assizes, as the procedure itself came to be called, were created for specific forms of action: for example, to determine the rights of a person possessing land (the "assize of novel disseisin"), and to determine the rights to land by inheritance (the "assize of mort d'ancestor"). Most momentous was the writ of right, which empowered a defendant to insist upon having the case against him decided by inquisitio.[18] These developments were followed in 1215 by the Magna Carta, which abolished the heavy fees that the Crown previously had levied for the privilege of an inquisitio.[19]

Although the inquisitio was an important step in the trend toward a more reliable and deliberative means of resolving disputes, the procedure was by no means ideal. The members of the inquisitio — known as recognitors — were chosen specifically because they had knowledge of the facts at issue. In this sense, the recognitor acted more like a witness than a modern juror. But like modern jurors, the recognitors also acted to determine the facts underlying the parties' dispute.[20]

Initially, witnesses who brought some necessary factual element to the inquiry were simply added to the panel of recognitors.[21] But by 1285, recognitors were permitted by statute to return a verdict upon their own knowledge or "upon such information as had come to them which they believed to be true."[22] This verdict initially represented no more than the majority view.[23] But by the mid-fourteenth century, majority rule at the inquisitio had been replaced by a requirement of unanimity.[24] At about the same time, the recognitor's function as a witness also began. However, over time the

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[17] *Id.* at 111.

[18] *Id.* at 111-12.

[19] MAGNA CARTA, art. 26.

[20] 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 8, at 607 (Tillers rev. 1983). *See also* BUSCH, *supra* note 12, § 13, at 13; WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 127 (1852).

[21] Stephan Landsman, *The Civil Jury Trial in America: Scenes From an Unappreciated History,* 44 HASTINGS L.J. 579, 585 (1993).

[22] 13 Edw. I (West. 2), ch. 30 (1285).

[23] Landsman, *supra* note 21, at 585.

[24] *Id.;* Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform,* 25 HOFSTRA L. REV. 377, 397 (1996).

recognitor's function as a witness diminished.[25] By the fifteenth century, the transition to the modern concept of trial by jury was more or less complete, with the roles of witnesses and juries kept separate and distinct.[26]

The jury thus emerged in its modern form as a product of rationalism, reflecting the belief that disputes should be resolved on the basis of disinterested and objective findings of fact. But the modern jury also has been shaped by increasingly expansive notions of democracy. As the centuries went by, jury service in England came to be identified with a stratum of society that has been described as the "middling sort" of man,[27] standing "between the gentry on the one hand and the laborers and smallest property owners on the other."[28] In this way, the jury came to be "the most representative institution available to the English people."[29] As Blackstone noted in his Commentaries On The Laws Of England:

> [A] competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men . . . . This therefore preserves in the hands of the people that share of which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.[30]

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[25] Landsman, *supra* note 21, at 586.

[26] BUSCH, *supra* note 12, § 13, at 13. The concept of a jury with prior knowledge of the facts persisted, however, as may be seen in Lord Ellenborough's opinion in *Rex v. Sutton,* 105 Eng. Rep. 931, 934 (4 M. & S. 540) (K.B. 1816)

[27] Stephen K. Roberts, *Juries and the Middling Sort: Recruitment and Performance at Devon Quarter Sessions,* 1649-1670, *in* TWELVE GOOD MEN AND TRUE 182, 183 (J.S. Cockburn & Thomas A. Green eds., 1988).

[28] P.G. Lawson, *Lawless Juries? The Composition and Behavior of Hertfordshire Juries, 1573-1624,* in TWELVE GOOD MEN AND TRUE, *supra* note 27, 117, 133.

[29] Roberts, *supra* note 27, at 182.

[30] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 380 (U. of Chicago Press 1979) (1768).

In politically charged cases, considerable courage was required of jurors, and they sometimes adhered to their own sense of justice. In *Throckmorton's Case,*[31] for example, a jury of twelve acquitted a popular figure, Sir Nicholas Throckmorton, of high treason, notwithstanding his unquestionable rebellion. The Star Chamber then fined eight of the jurors and imprisoned them.[32] A century later, in *Bushell's Case,*[33] one of twelve jurors who refused to convict the Quakers William Penn and William Mead for preaching in public, refused to pay his fine levied by the trial judge, and was jailed for his trouble. In a landmark of constitutional law, he was freed on the ground that jurors may not be punished for their verdict except in cases of overt corruption.[34]

The English jury thus developed as a "fundamentally democratic institution."[35] The increasing reliance on middle-class constituents led to the rise of the jury as a representative institution in which the community's sense of justice could prevail over narrow legalisms or the naked might of the state.

2. THE ROLE OF THE JURY AS A DEMOCRATIC INSTRUMENT OF GOVERNANCE IN AMERICA

The right to a trial by jury arrived in America with the first English colonists. The 1606 Charter of the Virginia Company granted the right to jury trial, as did the governing documents of several subsequently founded colonies.[36] Eventually, all of the

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[31] 72 Eng. Rep. 493 (K.B. 1554). Throckmorton's Case is discussed in PLUCKNETT, *supra* note 13, at 133-34.

[32] *Id.* The remaining four jurors "confessed that they had offended in not considering the truth of the matter." Plucknett, *supra* note 13, at 133-34.

[33] 124 Eng. Rep. 1006 (C.P. 1677).

[34] *Id.* See also, Landsman, *supra* note 21, at 590.

[35] Landsman, *supra* note 21, at 592.

[36] Arnold, *supra* note 8, at 13. *See generally* Harold N. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History,* in THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 24-25 (Rita James Simon ed., 1975); Landsman, supra note 21, at 592; Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures,* 64 N.C. L. REV. 501, 507 (1986); LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 95-98 (2d ed. 1988). Judge Arnold, Chief Judge of the United States Court of Appeals for the Eighth Circuit, is not alone among federal judges in having written in recent years on the history and importance of the American jury. *See* John V. Singleton, *Jury*

colonies embraced the right to trial by jury.[37]

The jury became a vitally important institution in colonial America — apparently even more so than in England. Indeed, the jury has been described by one scholar as the central instrument of governance in colonial Massachusetts, with an influence much greater than that of either the royal executive or the colonial legislature.[38] Besides their adjudicative role, colonial juries served a crucial political function: to restrain the excesses of the British Crown.[39] A distrust of the British government, including its judges, lay behind the significance colonists attached to the right to a jury trial.[40] The colonial jury was thus not only a legacy of the British twelve-person system from which the colonies had sprung, but also a shield against British oppression.[41]

Battles over the right to trial by jury and over the power of the jury were part and parcel of the growing political turmoil in eigh-

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Trial: History and Preservation, 32 TRIAL LAW. GUIDE 273 (1988) (article by Chief Judge of the United States District Court for the Southern District of Texas).

[37] Diverse jury practices reflected the "federalistic" nature of American colonial legal arrangements. Hyman & Tarrant, *supra* note 36, at 24. There was also great diversity within a colony. *Id.* at 24-25. In fact, "among the thirteen original states there were at least half a dozen widely differing patterns of civil practice." Edith Guild Henderson, *The Background of the Seventh Amendment,* 80 HARV. L. REV. 289, 290 (1966). Differences existed with respect to the powers of the jury and the extent of judges' control over juries. Id. at 299-320. As Alexander Hamilton noted in *The Federalist* No. 83, "It would be extremely difficult, if not impossible, to suggest any general regulation that would be acceptable to all the States in the Union, or that would perfectly quadrate with the several State institutions." The Federalist No. 83, at 507 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For recent commentaries that rely on Henderson's work, *see* Arnold, *supra* note 8, at 18; Smith, *supra* note 24, at 423.

[38] WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, *1760-1830* 3-4, 13-21 (1975).

[39] Landsman, *supra* note 21, at 593.

[40] Phoebe A. Haddon, *Rethinking the Jury,* 3 WM. & MARY BILL RIGHTS. J. 29, 41 (1994). Juries acted as a "[b]ulwark [a]gainst [i]njustice." *Id.*

[41] "The development of the jury in the American colonies reflected a curious combination of emulation of the British legal system and anti-British political sentiment." Comment, *The Civil Jury,* 110 HARV. L. REV. 1408, 1417 (1997).

teenth-century America.[42] In the famous trial of John Peter Zenger in New York in 1735, a twelve person jury acquitted Zenger of seditious libel by rejecting the judge's instruction that it must convict if it found that the statements had in fact been published (as the evidence clearly showed).[43] In response to such displays of independence, British authorities attempted to restrict the right to jury trial. New York's royal governors sought to expand the operation of the chancery court, which operated without juries, but met stiff resistance from the colonial legislature and the common law courts.[44] This was followed, in the 1760s, by attempts to expand the jurisdiction of the (nonjury) admiralty courts.[45]

The importance to the colonists of protecting the right to jury trial, especially in the face of efforts to dilute that right by narrowing the class of cases in which it would apply, is made manifest in the declarations of the various congresses that were held to protest British oppression.[46] The First Session of the Stamp Act Congress in 1765 issued a resolution declaring that "trial by jury is the inherent and invaluable right of every British subject in these colonies."[47] The Declaration of Rights of the First Continental Congress, which met in 1774, claimed for all colonists "the great and inestimable

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[42] As Professor Stephan Landsman has argued:

> In the period between the 1760's and the Revolution, the jury represented the most effective means available to secure the Independence and integrity of the judicial branch of the colonial government. Because of the jury's power, the British authorities increasingly sought to either control or avoid jury adjudications. The struggle over jury rights was, in reality, an important aspect of the fight for American independence and served to help unite the colonies.

Landsman, *supra* note 21, at 596.

[43] *Id.* at 593. For other discussions of the Zenger trial, see Hyman & Tarrant, supra note 36, at 27-28. The Zenger jury also asserted its competence to decide questions of law as well as questions of fact. Landsman, *supra* note 21, at 593. Ironically, Zenger had accused Governor William Cosby of, among other things, usurpation of the right to jury trial.

[44] Landsman, *supra* note 21, at 594.

[45] *Id.* at 595; Arnold *supra* note 8, at 14.

[46] *See* MOORE, *supra* note 36, at 99; Landsman, *supra* note 21, at 595-96.

[47] Resolutions of the Stamp Act Congress, Res. 7 (1765), *reprinted in* SOURCES OF OUR LIBERTIES 270 (Richard L. Perry & John C. Cooper eds., rev. ed. 1991).

privilege of being tried by their peers of the vicinage."[48] In 1775, the Second Continental Congress issued its Declaration of the Causes and Necessity of Taking Up Arms, which challenged Parliament's expansion of admiralty jurisdiction and the resulting loss of "the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property."[49] Finally, the Declaration of Independence listed, as one of the colonists' grievances justifying revolt, the Crown's denial "in many cases, of the benefits of trial by Jury."[50] In the five years following the Declaration of Independence, at least eight of the original thirteen states provided for a right to trial by jury in their new constitutions,[51] and all thirteen of the states retained civil juries via express constitutional provision, statute, or judicial practice.[52] The Continental Congress also provided for trial by jury in the Northwest Ordinance of 1787.[53]

The new federal Constitution originally did not contain a provision guaranteeing the right to trial by jury. This drew the ire of the Antifederalists.[54] Alexander Hamilton, in The Federalist Number 83, sought to assuage Antifederalist fears, assuring them that the omission of civil jury trials from the Constitution was not an attempt to abolish such trials and acknowledging that both proponents and opponents of the Constitution highly valued trial by jury. "[T]he former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."[55] Hamilton, however, saw no "inseparable connection between the existence of

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[48] Declaration and Resolves of the First Continental Congress, Res. 5 (1774), reprinted in Perry & Cooper, *supra* note 47, at 288.

[49] Declaration of the Causes and Necessity of Taking up Arms (1775), *reprinted in* Perry & Cooper, *supra* note 47, at 296.

[50] THE DECLARATION OF INDEPENDENCE ¶ 20 (1776).

[51] Constitutional provisions for jury trials were adopted in Virginia (1776), Pennsylvania (1776), Delaware (1776), Maryland (1776), North Carolina (1776), New Jersey (1776), Vermont (1777), Georgia (1777), New York (1777), Massachusetts (1780), and New Hampshire (1784). Arnold, *supra* note 8, at 19-21; MOORE, *supra* note 36, at 99-102; Perry & Cooper, *supra* note 47, at 301-86.

[52] Smith, *supra* note 24, at 423-24; Haddon, *supra* note 40, at 41.

[53] Ordinance for the Government of the Territory of the United States Northwest of the Ohio River, art. II (1787), *reprinted in* Perry & Cooper, *supra* note 47, at 395.

[54] *See* Arnold, *supra* note 8, at 16-17; Landsman, *supra* note 21, at 598-600.

[55] *The Federalist* No. 83, *supra* note 37, at 499.

liberty and the trial by jury in civil cases,"[56] arguing that civil juries' only distinctive value — as a check against corrupt judges — did not warrant their use in all cases.[57] The Antifederalists countered that the civil jury was needed as a vital extension of democratic government: to protect against unwise laws enacted by the national legislature; to protect debtors from rigid commercial rules; and to protect against an overreaching judiciary.[58]

The Antifederalists prevailed, and the right to a jury trial in civil cases was guaranteed by the Seventh Amendment. The language of the amendment accommodated the states' diverse practices by being general and referring twice to the revered tradition of the common law:

> 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.[59]

Congress reinforced the importance of civil juries in the federal courts in the Judiciary Act of 1789. The Act provided for trial by jury of questions of fact in all cases except those arising under admiralty and maritime jurisdiction, and excluded such questions from the Supreme Court's appellate jurisdiction.[60] Over the next twenty years, as the distinctive features of the legal systems of the new republic and its component states began to take shape, the political function of juries changed. No longer a check on the power of British judges, the jury became "an instrument of compromise that tempered both the ardent Federalist desire for a strong judiciary and the Republican radicals' thirst for a simplified law without courtrooms or lawyers."[61]

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[56] *Id.*

[57] *See* Landsman, *supra* note 21, at 599.

[58] *See id.* at 599-600.

[59] U.S. CONST. amend. VII.

[60] Hyman & Tarrant, supra note 36, at 32. See also Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49 (1923).

[61] Landsman, *supra* note 21, at 600-01; *see also id.* at 601-05 (discussing cases in the Pennsylvania, Massachusetts, and federal courts).

3. HISTORIC CHANGES IN THE ROLE AND COMPOSITION OF THE AMERICAN CIVIL JURY

In response to and reflecting changing attitudes among judges, legal scholars, and the public, the face of the American civil jury has been significantly altered over the last two centuries.[62] The most obvious and important change in civil jury practice over the past two hundred years has been the extension of eligibility for jury service to virtually all adult citizens. This trend began in the first half of the nineteenth century, with "[s]harp reductions . . . in property, residence, and religious qualifications for state citizenship, suffrage, office-holding, and militia and jury service."[63] Racial and sexual qualifications for jury service were abolished during the course of the long struggle over civil rights. The "middling sort" of man who characterized earlier English juries increasingly has been joined on American juries by men and women from all walks of life and all segments of society. As a result, the modern jury is perhaps the most truly representative institution in America: it is a microcosm of democracy in action.

It may surprise the modern lawyer to learn that prior to the nineteenth century juries were empowered to decide issues of law as well as questions of fact. The jury's power to decide issues of law was a British tradition with roots in the Magna Carta, and it was kept alive in the American colonies.[64] That power obviously enhanced the colonial jury's ability to serve as a check against British abuses.[65] Following the Declaration of Independence, juries retained this power in many states, sometimes by express constitutional provision.[66]

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[62] As Professor Landsman has noted, "The jury has been anything but a simple and unchanging icon of courtroom procedure. Its most pronounced characteristic has been its adaptability." Landsman, *supra* note 21, at 580.

[63] Hyman & Tarrant, *supra* note 36, at 35. The various changes in rules regarding juror qualifications and selection procedures were not met with universal approval. The end of the nineteenth century saw "a flood of complaints about the caliber of the people who sit on juries." Note, *The Changing Role of the Jury in the Nineteenth Century,* 74 Yale L.J. 170, 191 (1964).

[64] Comment, *The Civil Jury, supra* note 41, at 1418. At the time of the Revolution, juries could decide issues of law in at least ten colonies. Moore, *supra* note 36, at 109.

[65] Comment, *The Civil Jury, supra* note 41, at 1418.

[66] *Id.*

The power of the American jury to decide issues of law persisted for some time. It was cited, for example, in instructions given by Chief Justice John Jay in a jury trial before the Supreme Court involving the state of Georgia in 1794.[67] The picture began to change by the early nineteenth century,[68] however, and the jury ultimately came to be restricted, as it is now, to finding the facts and applying the judge's legal instructions to those facts. This development came surprisingly late in the evolution of the modern civil jury: the Supreme Court did not explicitly reject the proposition that juries could decide issues of law until 1895.[69]

Today, of course, issues of law are sharply separated from questions of fact at trial, a separation that is emphasized and enforced through the use, for example, of directed and special verdicts.[70] In this way, trial has become an increasingly rational process characterized by fairness, accuracy, and adherence to the law: facts are found by disinterested, objective lay jurors representing a cross-section of society, while governing legal rules are determined and articulated by trained legal professionals. Until recently, however, the twelve person jury had been "definitely fixed" since the middle of the fourteenth century.[71]

4. THE RECENT DOWNSIZING OF THE AMERICAN JURY

The jury of twelve has unusually deep roots in Anglo-American law. As early as 962, King Edgar proclaimed that each borough and "hundred" should appoint "standing witnesses" to serve as "sureties" for all citizens and specified the number of such witnesses as twelve "for small boroughs and for every hundred, unless you

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[67] Singleton, *supra* note 36, at 276. The case was *Georgia v. Brailsford,* 3 U.S. (3 Dall.) 1 (1794).

[68] Singleton, *supra* note 36, at 276. For example, the 1789 Georgia constitution, unlike its 1777 predecessor, did not give juries the right to decide issues of law, and Maryland took this right away from juries in 1804. Moore, *supra* note 36, at 109.

[69] *Sparf v. United States,* 156 U.S. 51 (1895).

[70] Note, *The Changing Role of the Jury, supra* note 63, at 170 n.2.

[71] A. Scott, *Fundamentals of Procedure in Actions at Law,* at 75-76 (1922).

desire more."[72] King Aethelred similarly invoked the number twelve in a proclamation issued in 997:

> And a court shall be held in every wapentake, and the twelve leading thegns along with the reeve shall go out and swear on the relics that are given into their hands that they will not accuse any innocent man or shield any guilty one.[73]

After the Normans brought the inquisitio to England, these panels too were formed in groups of twelve.[74]

The precise underlying reasons for the choice of the number twelve are, in all probability, lost in the mists of history. Scholars have speculated that "some old Norse or Danish superstition lurks under the modern preference for the number twelve for a jury."[75] Others believe that "Christianity likely played a role in the decision to fix the number of jurors at twelve, rather than eleven or thirteen,"[76] because the "number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc."[77] As early as 1665, it was suggested that "this number is no less esteemed by our own law than by holy writ. If the twelve apostles on the twelve thrones

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[72] IV Edgar cap. 1-5, in A.J. ROBERTSON, THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I 35 (1925). The "hundred" was a social unit composed of ten "tithings." A tithing was ten families. PLUCKNETT, *supra* note 13, at 108 n.l.

[73] III Aethelred cap. 3, §1, in ROBERTSON, *supra* note 72, at 65. Aethelred's law was apparently intended for a part of England controlled by Danes. "Wapentake" is the Danish word for "hundred."

[74] *See* CONSTITUTIONS OF CLARENDON, Art. 6, in M.M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 185 (1942); PLUCKNETT, *supra* note 13, at 111-12.

[75] 1 LUKE OWEN PIKE, A HISTORY OF CRIME IN ENGLAND 122 (1873). Pike also notes that "[t]welve and multiples and fractions of twelve are, of course, treated with favour in laws of Germanic origin on the continent." *Id.;* see also 3 JAMES FITZJAMES STEPHEN, NEW COMMENTARIES OF THE LAWS OF ENGLAND 349 (Burt Franklin 1883)(1845). It may be that the peoples of northern Europe venerated the number twelve "for no reason or even cause that has been discovered." 1 W.F. FINLASON, REEVES' HISTORY OF THE ENGLISH LAW, FROM THE ROMANS TO THE END OF THE REIGN OF ELIZABETH 332 (M. Murphy 1880) (1869).

[76] Arnold, *supra* note 8, at 12.

[77] 1 EDMUND COKE, INSTITUTES OF THE LAWS OF ENGLAND *155a (1st Amer. ed. 1812).

must try us in our eternal state, good reason hath the law to appoint the number of twelve to try our temporal."[78]

But the number twelve also must have been deemed suitable because it was neither too large nor too small for the task at hand. Take, for example, the early procedure of wager at law. A mere handful of compurgators might have been insufficient to satisfy the community that a litigant was morally worthy of a favorable verdict. On the other hand, the narrow confines of medieval life, coupled with the solemnity attached to the oath that the compurgators were required to take, may have made it both unnecessary and impractical to require more than twelve. With the inquisitio, objective truth replaced moral worth as the dispositive principle. What then was wanted was a number that, while not so large as to be unwieldy, "was large enough to create a formidable body of opinion in favor of the side that won."[79]

The number twelve is extraordinarily prominent in history and in the English systems of measurement: inches in a foot, hours on a clock, pennies to a (pre-decimal) shilling, or dozens of eggs. In brief, twelve was the mid-sized number toward which early English thinking gravitated. And that number fixed the size of the English common law jury from its earliest beginnings on through the great sweep of history. American colonial practice continued the tradition of the twelve-person jury, which then became a fixture of the American legal system under the new Constitution.

Although the Constitution does not expressly state the number of jurors required in civil or criminal trials, for nearly 200 years American jurists and practitioners assumed, based on a wealth of precedent, that the jury guaranteed by the Sixth and Seventh Amendments was one composed of twelve persons.[80]

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[78] GILES DUNCOMBE, TRIALS PER PAIS, OR THE LAW OF ENGLAND CONCERNING JURIES BY NISI PRIUS c. 92 (8th ed. 1766).

[79] Devlin, *supra* note 13, at 8.

[80] Early cases decided contemporaneously with or immediately after the adoption of the Sixth and Seventh Amendments made it clear that the English requirement of a twelve-person jury continued under American common law. *See, e.g., Emerick v. Harris,* 1 Binn. 416 (Pa. 1808) (interpreting the Pennsylvania Constitution to require a jury of twelve); *Whitehurst v. Davis,* 3 N.C. (2 Hayw.) 110 (1800) (holding that it was violation of the North Carolina Constitution to try a case before a jury of more than twelve).

In 1898, the Supreme Court explicitly held in *Thompson v. Utah* that the jury guaranteed by the Constitution "is a jury constituted, as it was at common law, of twelve persons, neither more nor less."[81] One year later, the Court reiterated that "'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions . . . is a trial by a jury of twelve men, in the presence and under the superintendence of a judge."[82] For the next 72 years that interpretation remained essentially unchanged.

However, in 1970, in an abrupt reversal of judicial thinking, a divided Supreme Court held for the first time in *Williams v. Florida*[83] that a twelve-person jury is not a constitutional requirement. *Williams* involved a Sixth Amendment challenge to a Florida rule of criminal procedure allowing six-person juries in non-capital criminal cases.[84] The Court held the Florida rule did not violate the Sixth Amendment. In so holding, the Court dismissed the earlier interpretation of the Sixth Amendment in *Thompson* as "[a]rguably unnecessary for the result" and criticized *Thompson* for its failure to consider whether every feature of the jury as it existed at common law, including the requirement of twelve members, "was necessarily included in the Constitution wherever that document referred to a 'jury.'"[85]

Finding that "there is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury," the Court noted that "[t]he relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial."[86] The Court articulated this purpose in the following, key passage:

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[81] 170 U.S. 343, 349 (1898) (holding that conviction by a jury of eight persons in U.S. territory was void under the Sixth Amendment); *see also American Publ'g Co. v Fisher,* 166 U.S. 464 (1897).

[82] *Capital Traction Co. v. Hof,* 174 U.S. 1, 13 (1899).

[83] 399 U.S. 78 (1970)

[84] *Id.* at 79-80.

[85] *Id.* at 90-91. The Court likewise dismissed its precedents on the civil jury by stating that "cases interpreting the jury trial provisions of the Seventh Amendment generally leap from the fact that the jury possessed a certain feature at common law to the conclusion that that feature must have been preserved by the Amendment's simple reference to trial by 'jury.'" *Id.* at 92 n.30.

[86] *Id.* at 99-100.

> 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. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12 — particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a factfinder hardly seems likely to be a function of its size.[87]

The issue in *Williams* was whether a smaller jury of only six persons is constitutionally permissible. But in deciding this issue, the Court, perhaps inevitably, appeared concerned with the analytically separate question whether a six-member jury is desirable as a matter of policy. The Court drew upon a number of real-world "experiments" and psychological studies that, the Court believed, showed that six persons really do function just like twelve.[88] The

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[87] *Id.* at 100-01.

[88] *Id.* at 101-02 ("In short, neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members.") & n. 48 (citing Edward A. Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment,* 51 GEO. L.J. 120, 134-36 (1962); Lloyd L. Wiehl, *The Six-Man Jury,* 4 GONZAGA L. REV. 35, 40-41 (1968); Cronin, Six-Member Juries in District Courts, 2 BOSTON B.J. No. 4, p. 27 (1958); *Six-Member Juries Tried In Massachusetts District Courts,* 42 J. AM. JUDICATURE SOC'Y 136 (1958); *New Jersey Experiments with Six-Man Jury,* 9 BULL. OF SECTION OF JUD. ADMIN. OF ABA (May 1966); Phillips, *A Jury of Six in All Cases,* 30 CONN. B.J. 354 (1956)) & n. 49 (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 462-63, 488-89 (1966); Charles W. Hawkins, Interaction and Coalition Realignments in Consensus-Seeking Groups: A Study of Experimental Jury Deliberations 13, 146, 156 (Aug. 17, 1960) (unpublished thesis) (on file at Library of Congress); Solomon E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments,* in READINGS IN SOCIAL PSYCHOLOGY 2 (G.

Court concluded that "the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance except to mystics."[89]

The Court recognized that its analysis of the Sixth Amendment in *Williams* might "be thought to bear equally on the interpretation of the Seventh Amendment."[90] This led many federal district courts to amend their local rules to allow six-person juries in civil cases.[91] Likewise, the Judicial Conference of the United States, acting on the recommendation of its Committee on the Operation of the Jury System, threw its support behind federal legislation requiring six-person civil juries.[92] Citing "juror utilization" and cost efficiency as reasons for the change, the Judicial Conference estimated that reducing the number of jurors to six could save three million dollars per year.[93] Although subsequent legislative attempts to institute a mandatory six-person jury failed, by the end of 1972 fifty-six of the ninety-four federal judicial districts had adopted local rules calling for the use of six-person civil juries.[94]

Three years after *Williams*, the Supreme Court addressed the size of the civil jury in the current setting. In *Colgrove v. Battin,*[95] the Court in a 5-4 decision sanctioned this development by holding that the Seventh Amendment does not require a twelve-person civil jury. Again noting that "the purpose of the jury trial . . . [is] to prevent government oppression, . . . [and to] assure a fair and equitable resolution of factual issues," the Court undertook "to adapt the ancient institution to present needs and to make of it an efficient

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Swanson et al. eds., 1952); Note, *On Instructing Deadlocked Juries,* 78 YALE L.J. 100, 108 n.30, 110-11 (1968); CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY 31, 83 (1962)).

89 *Id.* at 102.

90 *Id.* at 92 n.30.

91 Arnold, *supra* note 8, at 24.

92 *Id.* at 24-25.

93 *Id.* at 25. The Judicial Conference conceded, however, that for judicial districts that had already adopted six-member juries, the savings were "less than could be realized" because the number of people called for panels had not changed. *Id.*

94 *Id.*

95 413 U.S. 149 (1973).

instrument in the administration of justice."[96] As in *Williams,* the *Colgrove* majority determined that the dispositive issue was "whether jury performance is a function of jury size."[97]

The Court cited with approval "four very recent studies [that] have provided convincing empirical evidence of the correctness of the *Williams* conclusion that 'there is no discernible difference between the results reached by the two different-sized juries.'"[98] The historical argument again received short shrift. The Court dismissed the argument that the Federal Rules Enabling Act[99] established the right to a jury "as at common law," stating that it was wrong to "impute to Congress an intention to saddle archaic and presently unworkable common-law procedures upon the federal courts."[100] The majority found "nothing that persuades us to depart from the conclusion reached in *Williams,*" and accordingly held that "a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases."[101]

The result in *Colgrove* was sharply criticized by the four dissenting justices. Justices Douglas and Powell were concerned that the local rule providing for six jurors conflicted with Federal Rule of Civil Procedure 48, which at the time provided that the only way to obtain a trial of less than twelve jurors was by stipulation.[102] Justices Marshall and Stewart further questioned "the interstitial rulemaking power of the majority of the district court judges sitting in a particular district to rewrite the ancient definition of a civil jury."[103] They characterized the majority's decision as an attempt to

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[96] *Id.* at 157.

[97] *Id.*

[98] *Id.* at 159 n.15 (citing Lawrence R. Mills, Note, *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results,* 6 U. MICH. J.L. REFORM 671 (1973); INSTITUTE OF JUDICIAL ADMINISTRATION, A COMPARISON OF SIX- AND TWELVE-MEMBER CIVIL JURIES IN NEW JERSEY SUPERIOR AND COUNTY COURTS (1972); Joan B. Kessler, Note, *An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes,* 6 U. MICH. J.L. REFORM 712 (1973); Gordon Bermant & Rob Coppock, *Outcomes of Six- and Twelve-Member Jury Trials: An Analysis of 128 Civil Cases in the State of Washington,* 48 WASH. L. REV. 593 (1973)).

[99] 28 U.S.C. § 2702 (since amended).

[100] *Colgrove,* 413 U.S. at 161.

[101] *Id.* at 159-60.

[102] *See id.* at 165 (Douglas & Powell, JJ., dissenting).

[103] *Id.* at 168 (Marshall & Stewart, JJ., dissenting).

establish "a proper balance between competing demands of expedition and group representation,"[104] but without providing a nonarbitrary basis for deciding how much of a departure from the historic norm the Constitution would allow.[105] In *Thompson,* the Court had expressed concern that "[i]f . . . it was competent for the state to prescribe a jury of eight persons, it could just as well have prescribed a jury of four or two, and, perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge."[106] In allowing a six-person criminal jury, the *Williams* majority had responded that one could get "off the 'slippery slope' before he reaches bottom."[107] Justices Marshall and Stewart, however, noted that "[t]his begs the question of how one knows at what point to get off — a question for which the Court apparently has no answer."[108]

The Supreme Court subsequently drew a constitutional line for criminal juries at six. In *Ballew v. Georgia,*[109] the Court addressed Sixth and Fourteenth Amendment challenges to a state misdemeanor conviction obtained pursuant to a state statute allowing trial by a five-person jury.[110] It is important, the Court noted once again, that the jury be of "sufficient size to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community."[111] The Court acknowledged that recent literature and empirical studies raised "significant questions" concerning the use of smaller juries.[112] The Court considered these studies "carefully because they provide the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment."[113]

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[104] *Id.* at 181.

[105] *See id.* at 180.

[106] *Thompson,* 170 U.S. at 353.

[107] *Williams,* 399 U.S. at 91 n.28.

[108] *Colgrove,* 413 U.S. at 181 n.9.

[109] 435 U.S. 223 (1978).

[110] *Id.* at 225-27 & n.5.

[111] *Id.* at 230.

[112] *Id.* at 231-43 nn.10-37.

[113] *Id.* at n.10. Justice Powell disagreed with the majority's application of the Sixth Amendment to state court practice and had "reservations as to the wisdom — as well as the necessity — of . . . heavy reliance on numerology derived from statistical studies." *Id.* at 245-46 (Powell, J., concurring). Justice Powell nonetheless

Such studies persuaded the Court that "progressively smaller juries are less likely to foster effective group deliberation."[114] The Court reasoned that larger juries would be more likely to remember important evidence and arguments, more likely to overcome individual biases, and more likely to engage in self-criticism.[115] The Court noted in particular that "the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case."[116] While admitting that it did "not pretend to discern a clear line between six members and five," the Court held that any further reduction in the size of juries "seriously impaired . . . to a constitutional degree" the right to trial by jury.[117]

The Court's reasoning could equally have supported a return of the constitutional requirement to twelve.[118] The Court nonetheless maintained the line at six. The Court recognized that "little time is gained by the reduction from 12 to 6" but concluded, with relatively

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concurred in the judgment, determining that convictions by five-member juries involved "grave questions of fairness." *Id.* Finding the line between five and six-member juries difficult to justify, Justice Powell resolved that "a line has to be drawn somewhere if the substance of jury trial is to be preserved." *Id.* at 246.

[114] *Id.* at 232.

[115] *Id.* at 233.

[116] *Id.* at 234. The Court also noted that the studies raised doubts about the reliability of smaller juries' findings of facts, *id.,* and that the interests of minority groups in the community would encounter "additional barriers" with "[f]urther reduction" in the size of the jury. *Id.* at 237.

[117] *Id.* at 239. The Court determined that a further reduction in the size of the jury would "promote[ ] inaccurate and possibly biased decisionmaking, . . . cause[ ] untoward differences in verdicts, and . . . prevent[ ] juries from truly representing their communities." *Id.*

[118] *See* SAUL M. KASSIN & LAWRENCE S. WRIGHTMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 197 (1988) ("It is ironic that studies on the differences between 6- and 12-person juries were used to justify a ruling about 5- versus 6-person juries. Based on the Court's review of this research, it logically should have reversed *Williams* and reinstated the full 12-person tribunal . . . . [T]he Court got off the slippery slope but was unwilling to climb back up."); Dana Richard Katnik, *Statistical Analysis and Jury Size: Ballew v. State of Georgia,* 56 U. DENVER L. REV. 659, 676 (1979) ("The relative change between six- and five-member juries seems so small compared to that in going from twelve- to six-member juries that it seems incredible that the Court found the former to be of constitutional significance whereas the latter was not. The Court should have overturned *Williams* or affirmed *Ballew;* to do neither was inconsistent with the evidence.").

little empirical support, that the financial benefits from a reduction from twelve to six jurors were "substantial."[119]

The Supreme Court has never determined the constitutionally minimum size for juries in civil cases. Nevertheless, shortly after the *Ballew* decision, the Judicial Conference stopped seeking legislation requiring six-person juries for civil trials.[120] By that time, however, eighty-five of the ninety-five federal districts had local rules permitting the use of juries of fewer than twelve.[121] It was in recognition of this trend that Rule 48 of the Federal Rules of Civil Procedure[122] was amended to allow federal district courts to select juries "of not fewer than six and not more than twelve members."[123] Citing *Ballew,* the Advisory Committee Notes to Rule 48 caution against stipulating to less than six jurors, "because smaller juries are more erratic and less effective in serving to distribute responsibility for the exercise of judicial power."[124]

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[119] *Ballew,* 435 U.S. at 244.

[120] Arnold, *supra* note 8, at 27-28 & n.187 (referencing Judicial Conference report of Sept. 21-22, 1978).

[121] *Id.* at 27-28.

[122] Rule 23(b) of the Federal Rules of Criminal Procedure maintains a requirement of twelve jurors for criminal trials, yet allows a verdict to be returned by eleven jurors if a court finds "just cause" to excuse a juror. FED. R. CRIM. P. 23(b). The rationale for the exception is to remedy the circumstances where the jury has retired to consider its verdict, alternate jurors have been dismissed, and a juror becomes seriously incapacitated or otherwise unable to continue jury service. See FED. R. CRIM. P. 23(b) advisory committee's note to 1983 amendment. A number of circuit courts have upheld the constitutionality of the exception, based primarily on the *Williams* premise that twelve jurors are not required under the Sixth Amendment. *See, e.g., United States v. Gabay,* 923 F.2d 1536, 1543 (11th Cir. 1991); *United States v. Smith,* 789 F.2d 196, 205 (3d Cir. 1986); *United States v. Stranon,* 779 F.2d 820, 830-36 (2d Cir. 1985). *See generally* Tim A. Thomas, Annotation, *Constitutionality and Application of Federal Rule of Criminal Procedure 23(b) Allowing 11-Person Jury to Return Verdict Absent Stipulation to that Effect by Parties When One Juror Has Been Excused After Start of Deliberations,* 107 A.L.R. FED. 508 (1992).

[123] FED. R. CIV. P. 48. See also FED. R. CIV. P. 48 advisory committee note to 1991 amendment ("The former rule was rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury."); Judge David Hittner & Eric J.R. Nichols, *Jury Selection in Federal Civil Litigation: General Procedures, New Rules, and the Arrival of Batson,* 23 TEX. TECH. L. REV. 407, 421-22 (1992) (noting reasons for rule amendment).

[124] FED. R. CIV. P. 48, advisory committee note to 1991 amendment.

III. THE TWELVE-PERSON CIVIL JURY SHOULD BE REINSTATED

1. THE TWELVE-PERSON JURY ACTS AS A MORE RATIONAL AND REPRESENTATIVE FACT-FINDER

The Supreme Court's decisions in *Williams* and *Colgrove* reflected the belief, based upon a handful of empirical studies, that "there is no discernible difference between the results reached by the two different-sized juries."[125] Scholars have been harshly critical of the Court's adventure into social science and non-evidentiary empirical studies.[126] Hans Zeisel noted that none of the six studies cited in *Williams* for that proposition actually provided empirical evidence that twelve- and six-member juries produce the same outcomes: three were no more than statements of personal opinion based on individual experience by judges, lawyers and court personnel; one relied on a purely speculative statement from another authority; and the remaining two made no statement regarding differential outcomes at all.[127] Similarly, Michael J. Saks found that the behavioral studies cited by the Court as evidence that a one-in-six minority could defend its views as well as a two-in-twelve minority, in point of fact actually supported the *opposite* conclusion.[128]

Moreover, the four social studies conducted in the period between *Williams* and *Colgrove* and cited in the latter opinion were

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[125] *Williams,* 399 U.S. at 101; *Colgrove,* 413 U.S. at 158.

[126] *See, e.g.,* Michael J. Saks, *Ignorance of Science Is No Excuse,* TRIAL, Nov./Dec. 1974, at 18-20; Hans Zeisel & Shari Seidman Diamond, *"Convincing Empirical Evidence" on the Six Member Jury,* 41 U. CHI. L. REV. 218 (1974); Hans Zeisel, *The Waning of the American Jury,* 58 A.B.A. J. 367 (1972); Hans Zeisel, *And Then There Were None: The Diminution of the Federal Jury,* 38 U. CHI. L. REV. 710 (1971). The *Ballew* Court cited all four critiques. 413 U.S. at 231 n.10. See also Robert Buckhout et al., *Jury Verdicts: Comparison Of 6- vs. 12-Person Juries and Unanimous vs. Majority Decision Rule In a Murder Trial,* 10 BULL. PSYCHONOMIC SOC. 175, 175 (1977) ("The Supreme Court has displayed a profound ignorance of the meaning and value of empirical research in its recent decisions affecting juries."). The criticism has been cited repeatedly, and has never been serious refuted. *See, e.g.,* Note, *Developments in the Law-The Civil Jury,* 110 HARV. L. REV. 1408, 1479-84 (1997); Keele, supra note 8, at 33-34; Peter W. Sperlich, ... *And Then There Were Six: the Decline of the American Jury,* 63 JUDICATURE 262, 269-71 (1980).

[127] Zeisel, *And Then There Were None, supra* note 126, at 714-15.

[128] Saks, *Ignorance of Science, supra* note 126, at 18-19.

badly flawed.[129] Three suffered from the researchers' failure to control or account for the effects of a "confounding variable," *i.e.,* another, independent variable (besides jury size) that could have affected the outcome being studied (verdicts).[130] The fourth study, involving mock juries, was unreliable for other reasons: it was based upon a video trial heavily weighted against one of the parties (so that juries of all sizes could be expected to reach the same result), and the number of mock juries participating was so small that the study lacked statistical significance.[131]

It may be that jury dynamics and such broadly phrased characteristics as "group deliberation" are simply too complex to permit measurement and analysis by the normal methods of social science.[132] On the other hand, more narrowly tailored studies can focus on more discrete factors. For example, it is fairly easy to determine the effect of jury size on the ability of the jury to serve as a "community cross-section." Indeed, as a matter of basic statistical theory, juries of twelve will have more members of any given minority than juries of six, and a six-member jury is far more likely to have no members of a given minority group than one of twelve:

> If we draw juries at random from a population consisting of 90 percent one kind of person and 10 percent another kind of person (categorized by politics, race, religion, social class, wealth, or whatever), 72 percent of juries of size 12 will contain at

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[129] *Id.* at 19-20; Zeisel & Diamond, *"Convincing Empirical Evidence," supra* note 126, at 281-90.

[130] *Id.*

[131] *Id. See also* Shari Seidman Diamond, *A Jury Experiment Reanalyzed,* 7 U. MICH. J.L. REFORM 520 (1974).

[132] *See, e.g.,* Paul Lermack, *No Right Number? Social Science Research and the Jury-Size Cases,* 54 N.Y.U. L. REV. 951, 952-53 (1979) ("In contrast to jury-costs research, studies of whether jury size affects constitutional rights deal with ephemeral concepts.... Furthermore, these studies have serious methodological problems, because researchers may not study actual juries and must therefore rely on indirect study or simulation, and because researchers cannot use commonly accepted techniques and units of measurement."); Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases,* 73 MICH. L. REV. 644, 647 (1975) ("[T]ypical strategies of legal-impact research, such as those utilized in the Colgrove real-world studies, are unlikely to uncover differences associated with jury size however well they control for those plausible rival hypotheses that form the usual threats to the validity of impact research. The reason lies in the unamenability of the jury-size problem to the usual techniques of aggregate data analysis.").

> least one member of the minority group, compared to only 47 percent of juries of size six.[133]

Not surprisingly, this point is confirmed by actual experience. A two-year study of 133 municipal court trials commissioned by the Judicial Council of California and carried out by the National Center for State Courts determined that eight-person juries were more than twice as likely as twelve-person juries to include either no black jurors or only one black juror.[134]

The ability of the jury to function as a valid cross-section of the community is essential to the role of the jury system as an institution of democratic government. This issue is not limited to such high-visibility characteristics as race and gender. It covers the gamut of human qualities and character traits. These include not just objective social characteristics such as income and educational background, but also personal characteristics of a moral or attitudinal nature, which are more subtle and difficult to measure: generosity or stinginess, respect for or distrust of authority, gratitude or hostility toward specific groups in society, to identify only a few among the virtually infinite number of relevant human traits. Common sense tells us that a larger jury is more likely to be truly representative of the many and varied views and attributes of the community from which it is drawn. Only a larger jury, in other words, can speak with the authentic voice of the community at large.

In addition to being more genuinely democratic, larger juries also are thought to be more consistent and predictable in their verdicts.[135] As Professor Saks explained:

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[133] Michael J. Saks, *The Smaller the Jury, The Greater the Unpredictability*, 79 JUDICATURE 263, 264 (1996). *See also* Lempert, *Uncovering "Nondiscernible" Differences, supra* note 132, at 668-79.

[134] G. THOMAS MUNSTERMAN, ET AL., A COMPARISON OF THE PERFORMANCE OF EIGHT- AND TWELVE-PERSON JURIES (1990).

[135] *See* FED. R. CIV. P. 48 advisory committee's note to 1991 amendment (cautioning against stipulating to fewer than six jurors "because smaller juries are more erratic"); *Ballew,* 435 U.S. at 234-35. For discussions of the interaction between representativeness and consistency, *see* Saks, *The Smaller the Jury, supra* note 133, at 264; Lempert, *Uncovering "Nondiscernible" Differences, supra* note 132, at 679-81; Zeisel, *And Then There Were None, supra* note 126, at 716-19; Zeisel & Diamond, *"Convincing Empirical Evidence," supra* note 126, at 294.

> Of course, in all, the same proportion of people from the minority group will serve whether the juries are small or large. But they will more often be over-represented on some juries and underrepresented on others. Think about what this means for juries when the minority in question is people who hold extreme views about what constitutes liability or what the correct amount of damages should be. More of the smaller juries than larger juries will contain both none of these folks or many of these folks. That contributes to more unexpected verdicts (in both directions) and more unexpected awards (in both directions).[136]

Moreover, even when a smaller jury does include one member of a pertinent minority, studies of jury group dynamics suggest that this may not be enough to ensure that the minority viewpoint is vigorously presented. A juror who is a minority of one on a jury of six is less likely to resist the majority than is a minority of two jurors on a jury of twelve.[137] Having at least one ally (10-2) versus having no ally (5-1) makes an enormous difference in the influence of a minority faction in a small group:

> in an ambiguous situation a member of a group will doubt and finally disbelieve his own correct observation if all other members of the group claim that he must have been mistaken. To maintain his original position, not only before others but even before himself, it is necessary for him to have at least one ally.[138]

One empirical study using mock juries confirmed that "[t]he early majority is reversed by the minority more often in twelve-

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[136] Saks, *The Smaller The Jury, supra* note 133, at 264.

[137] Saks, *Ignorance of Science, supra* note 126, at 18-19. The seminal work in this area was conducted by Solomon Asch in the 1950s in the area of "conformity research." See Solomon E. Asch, *Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority,* PSYCHOLOGICAL MONOGRAPHS vol. 70, no.9, Whole No. 416 (1956). *See also* Norbert L. Kerr & Robert J. MacCoun, *The Effects of Jury Size and Polling Method on the Process and Product of Jury Deliberation,* 48 J. PERSONALITY AND SOC. PSYCH. 349, 351 (1985); Norbert L. Kerr & Barbara L. Watts, *After Division, Before Decision: Group Faction Size and Predeliberation Thinking,* 45 SOC. PSYCH. Q. 198, 203 (1982).

[138] KALVEN & ZEISEL, *supra* note 88, at 463 (citing Asch, *supra* note 137, at 2).

member than in six-member juries; this suggests greater group and minority participation in twelve-member juries."[139]

A related point concerns the relative vulnerability of six- and twelve-member juries to being taken over by a single dominant or aggressive juror. No real-world jury studies have addressed this issue, but simulation studies suggest that smaller juries are more susceptible to being swayed by a single assertive member.[140] This is a matter of concern, for domination by a single juror threatens the rationality and fairness of the jury's decisionmaking process.[141]

Jury size affects rationality and fairness in other ways as well. The collective ability of a group accurately to recall the evidence increases as the size of the group increases: "if memory is important, a larger group is more likely to contain members who recall crucial facts at each stage of the problem-solving activity. Thus, larger juries are likely to be superior to smaller juries where memory or a good understanding of facts and instructions is crucial to the deliberative process."[142] In other words, a larger jury is more likely to contain more persons who remember significant pieces of evidence and thus is more likely, as a collective entity, to be able to deal responsibly with all of the questions arising from the evidence. Smaller juries, in contrast, have less reliable recall of the facts.[143]

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[139] Alice M. Padawer-Singer et al., *Legal and Social-Psychological Research in the Effects of Pre-Trial Publicity on Juries, Numerical Makeup of Juries, Non-Unanimous Verdict Requirements,* 3 LAW & PSYCHOL. REV. 71, 78 (1977).

[140] See John R. Snortum et al., *The Impact of An Aggressive Juror in Six- and Twelve-Member Juries,* 3 CRIM. JUSTICE & BEHAVIOR 255 (1976) (study using high school students); Norbert L. Kerr & Juin Yih Huang, *Jury Verdicts: How Much Difference Does One Juror Make?,* 12 PERSONALITY & SOC. PSYCH. BULL. 325 (1986) (effect in six-person juries as much as two to three times that seen in twelve-person juries, but absolute magnitude of effect not very large in either group).

[141] Robert D. Foss, *Group Decision Processes in the Simulated Trial Jury*, 39 SOCIOMETRY 305, 314 (1976). *But see* David M. Estlund, *Opinion Leaders, Independence, and Condorcet's Jury Theorem,* 36 THEORY & DECISION 131 (1994) (informed and partial deference to opinion leader can enhance individual and group competence).

[142] Lempert, *Uncovering "Nondiscernible" Differences, supra* note 132, at 686-87.

[143] *Id.* at 685-87 & n.120 (citing studies of group performance); Peter H. Schuck, *Mapping the Debate, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 306, 321 (Robert E. Litan ed., 1993) ("Some evidence shows that reduced size impairs

Both theory and empirical studies support the conclusion that larger juries are superior to smaller juries at reaching the objectively correct result with respect to questions of fact.[144] Such an effect may be related to the superiority of larger groups in balancing out individual biases.[145] This may be most evident in complex cases, where both collective problem-solving ability and the efforts of an especially intelligent juror (who is more likely to be found on a larger jury) may be important.[146] Twelve-person juries generate more discussion and greater exchange of ideas and information,[147] whereas six-person juries deliberate "more quickly and less thoroughly."[148] Thus, the teaching of existing social science literature is that twelve persons make a better jury than six.[149]

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juries' collective memory.") (citing Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model,* 13 CARDOZO L. REV. 519 (1991)).

[144] *See* MICHAEL J. SAKS, SMALL-GROUP DECISION MAKING AND COMPLEX INFORMATION TASKS 38 (National Center for State Courts, 1981) ("For certain kinds of tasks, of which jury decision making appears to be one, larger groups (within limits) perform better than smaller groups . . ."); Estlund, *supra* note 141 (decision model showing that collective competence increases as group size increases); Lempert, *Uncovering "Nondiscernible" Differences, supra* note 132, at 685 & n.118.

[145] *See* Carol M. Werner et al., *The Impact of Case Characteristics and Prior Jury Experience on Jury Verdicts,* 15 J. APP. SOC. PSYCH. 409, 423 (1985).

[146] *See* Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181, 228 (Robert E. Litan ed., 1993) ("Increasing the number of jurors increases the likelihood that one or more will have a good understanding of the law and evidence."); Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment,* 80 MICH. L. REV. 68, 115 (1981) ("A jury is in many ways as strong as its strongest link. Limiting juries in complex cases to six members halves the resources that the jury can bring to bear on difficult problems.").

[147] MICHAEL J. SAKS, JURY VERDICTS; THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE 107 (1977); Lempert, *Uncovering "Nondiscernible" Differences, supra* note 132, at 685 (principal advantage of large groups over small is "the participation of a greater number of individuals with more diverse viewpoints").

[148] Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries,* in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137, 161 (Robert E. Litan ed., 1993).

[149] Indeed, the superiority of twelve jurors over six may be one of the few findings about juries that does emerge with convincing clarity:

> At this time in history, of course, and perhaps for a long time to come, there are many questions to which the sciences, particularly the social sciences, cannot give

It is manifest, moreover, that we as a society have assimilated this conclusion into our national psyche. Criminal juries in federal trials must have twelve members, absent stipulation of the parties, and the court may excuse no more than one juror for cause after deliberations begin.[150] In death penalty punishment-phase hearings, twelve jurors are required, and the excuse even of one juror is not permitted.[151] These arrangements stand as an institutional admission that six jurors are not just as good as, or the functional equivalent of, twelve. When the federal system is called upon to act in cases involving liberty or life, twelve jurors are used regardless of *Williams'* holding that six is constitutionally sufficient. In those situations, our system of justice requires the use of twelve jurors because we are more confident in the fairness and accuracy of the verdicts reached by twelve-member juries. There is every reason to believe that twelve-member juries will produce fairer and more accurate results in civil litigation as well.

In summary, theory, empirical studies, and common sense combine to tell us that just as "two heads are better than one," twelve heads are better than six. Twelve-person juries work better than six-person juries, whether as fact-finders, repositories of social norms, voices of the community, integrators of individual viewpoints, or in all roles combined.

2. THE INCREMENTAL COSTS OF THE TWELVE-PERSON JURY ARE INSUBSTANTIAL

Only two reasons have been advanced in favor of the six-member jury: that it is cheaper and that it will save time.[152] Neither reason withstands close scrutiny.

> unequivocal answers. Not all details have been filled out in the studies of jury behavior. There is much that is not known about just how different juries differ. This much, however, is well-established: Juries of different sizes and decision rules are *not* functionally equivalent. The protections offered by smaller and majority-rule juries are not the same as those offered by the traditional common law jury — 12 persons deciding unanimously.

Sperlich, *supra* note 126, at 269 (emphasis in original) (internal citation omitted).

[150] FED. R. CRIM. P. 23(b).

[151] 19 U.S.C. § 3593.

[152] In response to hostile questioning before Congress, Hans Zeisel challenged proponents to name even one interest besides cost and time that

(a) Smaller juries save little if any court time

The claim that smaller juries make for faster, more efficient litigation is largely wishful thinking. Careful statistical studies demonstrate that the time saved by courts and litigants by reducing the size of the jury is de minimus.[153] Due to the widespread practice in federal district courts of permitting little or no lawyer voir dire to the panel as a whole, and in some instances providing only limited individual voir dire, scant time is saved during the empaneling of the jury.[154] In turn, no significant amount of time can be saved during argument and presentation of witnesses and evidence. And although six-person juries may deliberate more quickly, this actually saves court and counsel little if any time. In any event, time saved in deliberations is more than offset by the concomitant loss in fairness, accuracy, and broader community participation.

Much discussion of the purported efficiency to be gained from reducing the size of the jury has mistakenly focused on the amount of time individuals are required to expend in performing their civic duty to serve as jurors. Larger juries naturally consume more individual juror-time. Thus, one study found, quite unsurprisingly, a 41.9% reduction in total juror person-hours when the federal district court for the District of Columbia underwent a transition from twelve- to six-person juries in 1971.[155] This should not be regarded as a positive step in the improvement of the jury system. It is not necessarily in society's interest to have fewer people spending less time serving as jurors. Moreover, it does not follow that less time spent per juror will yield the same quality of jury deliberations. Nor does a reduction in the amount of time individuals spend serving as jurors necessarily translate into a savings of time for the judicial system itself:

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might be served by a reduction of jury size, to no response. *Three-Judge Court and Six-Person Civil Jury: Hearing on S. 271 and H.R. 8285 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 93d Cong. 164-65 (1974) (*"Jury Hearing"*).

[153] William R. Pabst, Jr., *Statistical Studies of the Costs of Six-Man Versus Twelve-Man Juries,* 14 WILLIAM & MARY L. REV. 326 (1972).

[154] According to Hans Zeisel, the main savings that might result from a reduction in jury size would stem from a reduction in the time it takes to empanel the jury. But because empaneling civil juries takes up such a small fraction of federal judges' time — and also because of restrictions on voir dire — Zeisel estimated the savings to be much less than one percent of the judges' working time. Zeisel, *And Then There Were None, supra* note 126, at 711.

[155] Pabst, *supra* note 153; *see* Keele, *supra* note 8, at 33.

> By contrast, the reduction in direct man-hours with the six-man jury does not reduce judge time, lawyer time, or witness time, since the time spent to empanel a jury and try a case was almost equal regardless of whether the six- or twelve-man jury was used. The reduction in jury size, therefore, could have little effect on trial time or court delay.[156]

It is telling, moreover, that the study finding a reduction in total juror person-hours nonetheless found no reduction in average trial time.[157] Another study that did initially appear to find significantly shorter trial times for six-person juries pointed out that the non-random allocation of cases between six- and twelve-person juries made that finding virtually meaningless, since "[o]ne important reason that trials before twelve-member juries take longer is that the cases tend to be more complicated."[158] A study of trials in federal district courts in four New England states between 1970 and 1972 found that trials before twelve-person juries took only slightly longer than trials before six-person juries, even though there was reason to believe "that the cases heard by the larger juries were more complex."[159] Moreover, "[o]ther anticipated savings of time did not occur."[160]

Indeed, it can be argued that, in the long run, the twelve-member jury actually saves substantial time of both court and counsel. To the extent that verdicts of twelve-member juries better reflect community norms and values and thus are more predictable, use of larger juries should foster more pre-trial settlements.[161] At least two empirical studies indicate that this is precisely what does happen.[162] A small increase in trial time per case may be more than

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156 Pabst, *supra* note 153, at 330.

157 *Id.*

158 INSTITUTE OF JUDICIAL ADMINISTRATION, *supra* note 98, at 7.

159 Edward N. Beiser & Rene Varrin, *Six-Member Juries in the Federal Courts,* 58 JUDICATURE 428 (1975).

160 *Id.* at 431.

161 Saks, *The Smaller The Jury, supra* note 133, at 265.

162 Beiser & Varrin, *supra* note 159, at 428 (33% settlement rate with juries of 12 versus 28.4% with juries of 6); INSTITUTE OF JUDICIAL ADMINISTRATION, *supra* note 98, at 21 (41.2% versus 28.8%). These results may be even more significant in light of the authors' admissions that the cases assigned to 12-person juries were more complex.

offset by the savings to the judicial system that accrues if even a few additional cases are settled before trial.

On the other hand, the likelihood of a hung jury does appear to increase with jury size.[163] This simply follows, however, from the fact that a twelve-person jury more authentically represents the diverse nature of the community at large. A hung jury results when one or more dissenters have sufficient conviction and strength of mind to withstand the persuasion of the majority; the traits, experiences, or attitudes that contributed to the dissenting vote might not be represented on a smaller jury. Be that as it may, a hung jury is not necessarily an inefficient result: a hung jury means that one or more jurors cannot be persuaded that the plaintiff has carried his or her burden; in these circumstances, the defendant may not enjoy the res judicata effect of a favorable verdict, but neither should the plaintiff prevail. Moreover, if a hung jury leads to a subsequent settlement, the real objectives of the judicial system have been validly and efficiently served.

(b) Smaller juries save comparatively little money

It is widely assumed that the use of smaller juries saves money. But even were that assumption correct, the amount of savings is open to serious question. The most widely cited overall estimate of the savings to be realized from the reduction in jury size from twelve to six was offered by Chief Justice Burger in 1971, who put the figure at four million dollars per year.[164] Although there is little hard evidence to support this number, it is still cited, nonetheless. There is no other persuasive evidence demonstrating a savings of comparable size.[165]

Studies conducted by the Administrative Office of the United States Courts in the early 1970s concluded that the use of smaller juries will result in cost savings, but the results were difficult to extrapolate into overall national figures, and the studies themselves have been criticized as methodologically flawed.[166] The argument

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[163] *See,* e.g., Zeisel, *And Then There Were None, supra* note 126, at 720 (data from criminal jury trials); Kerr & MacCoun, *supra* note 137, at 353 (data from mock jury study).

[164] *See* Zeisel, *And Then There Were None, supra* note 126, at 711 & n.7.

[165] *See,* e.g., Arnold, *supra* note 8, at 27; Keele, *supra* note 8, at 33.

[166] *See Jury Hearing, supra* note 152, at 25-29, 39-80; Lermack, *supra* note 132, at 961 n.55.

that money is to be saved, or at least that there are major sums involved, warrants the Scottish verdict of "not proven." Furthermore, even if the savings are as a large as the Chief Justice believed, the amount involved represents only a minute fraction of the federal judicial budget.[167]

IV. CONCLUSION

By any measure of history and precedent, the twelve-person jury has been a fundamental institution of American democracy, a primary bulwark of our judicial system. The recent experiment with six-person panels cannot be permitted to obscure its long history and the critical role it has played in our nation's life, or make its underlying rationale obsolete in modern society.

The central question should not be whether there are compelling reasons, at present, for altering the present situation, but, rather, whether the traditional twelve-person jury better serves the needs and objectives and better reflects the values of a rational and democratic system of justice. The real question, which the original proponents of jury size reduction were never required to answer, is whether there are any legitimate reasons for departing from centuries of precedent. The opponents of the twelve-member jury have yet to demonstrate that a six-member panel can maintain the essential and historic characteristics of the twelve-person jury of guarding against the excesses and intrusions of government, of reflecting the diversity and views of all members of the community, and being less susceptible to direction or control of one or two individual jurors.

There have been changes in the role and character of the jury, since the institution first began to take shape a full millennium ago. It has steadily evolved as an institution, first in England and then in the United States, in ways that have made it more objective, independent and a rational finder of facts, while at the same time converting it into a truly representative and democratic body. The most recent development, however — reducing the size of the jury for the first time in its long and venerable history — runs counter to these historic trends.

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[167] Zeisel, *And Then There Were None, supra* note 126, at 711. Focusing on juror fees, one proponent of smaller juries in 1971 estimated total annual savings of $1.6 million. See Sperlich, supra note 126, at 276 & n.104 (citing Edward J. Devitt, *Six-Member Civil Juries Gain Backing,* 57 A.B.A. J. 1111, 1112 (1971)).

In 1994 and 1995, the Advisory Committee on the Federal Civil Rules, in the course of preparing its recommendation to the Standing Committee and Judicial Conference, held a series of hearings around the country at which comments were received on the proposal to amend Rule 48 to return the federal civil jury to its historic compliment of twelve members. The proposal received an overwhelming endorsement from the trial Bar throughout the country, many of whom represented trial societies and Bar associations. On many issues involving civil procedure rules and evidence, the trial Bar has been known to divide along the lines of plaintiff and defense views. On the twelve-person jury issue, however, the plaintiff and defense Bars were of one voice. A number of federal judges speaking to the issue favored six- or seven-person juries on the theory that the panels are easier to manage and save money.[168] While the Advisory Committee and Standing Committee of the Judicial Conference unanimously endorsed the proposal to return federal juries to twelve persons, the Judicial Conference, itself, rejected the recommendations in 1995.

We believe that with the beginning of the new millennium, it is time to have another look at this most basic of issues in the federal civil justice system. The federal civil trial is the poorer with six-person panels. Simply stated, six-person panels are inferior to twelve-person juries in their ability to find facts objectively, accurately, and independently, and as well, they are less capable of representing the values and interests of the community at large.

It is well to recall what Winston Churchill had to say about the importance of the role that the twelve-person jury plays in civilized society.

> The jury system has come to stand for all we mean by English justice, because as long as the case has to be scrutinized by twelve honest men, defendant and plaintiff alike have a safeguard from arbitrary perversion of the law.[169]

When a case is submitted to and scrutinized by a shrunken jury of six, this historic safeguard is threatened and diminished.

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[168] Comment No. 95 CV-100.

[169] 1 WINSTON S. CHURCHILL, A History of the English-speaking Peoples, 219 (1956).