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## TRIAL BY JURY: THE CONSTITUTIONAL RIGHT TO A JURY OF TWELVE IN CIVIL TRIALS

*Richard S. Arnold\**

### I. INTRODUCTION

Good afternoon. It's going to be hard to live up to my introduction, and if I don't I hope you won't be too hard on me. I like to hear all those high-sounding things about appointments to the bench and so forth. I suppose some judges, at least, are political appointees. That's not true with me. I was appointed on merit. My merit was that I worked for a senator! The Dean was also kind enough to refer to the fact that I am now Chief Judge of the Eighth Circuit. Let me tell you how you get to be Chief Judge: you live that long! That's all there is to it. I had the good fortune to survive my predecessor, who took senior status. Now I am Chief Judge, and that doesn't amount to nearly as much as it sounds like. The job of Chief Judge is to do what the other judges want.

I must begin by thanking the Hofstra Law School community for inviting me to make this talk. Your school has a very strong and excellent reputation, which is confirmed to me by the presence of some of my friends on the faculty who are very strong scholars. I am

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\* Chief Judge, United States Court of Appeals for the Eighth Circuit. This Article is adapted from the 1993-1994 Howard Kaplan Memorial Lecture, delivered by Judge Arnold on October 6, 1993, at the Hofstra University School of Law. The author acknowledges with gratitude the substantial assistance of his law clerk, Elizabeth Bowles, in the preparation of this Article.

referring particularly to my old friend and law school classmate, Leon Friedman, who is the world's foremost scholar on the subject of federal habeas corpus. Another law school friend of mine, John Gregory, is here, and I spent many happy hours with John in the Harkness Commons at Cambridge talking about life and the law. Two classmates who are not from law school, but from clerkship, are on the faculty here, Bernie Jacob and Malachy Mahon, the founding Dean. So I feel that I am among friends.

It is very gratifying to be associated with the name of Howard Kaplan. It's a distinguished name in legal circles, and not the only such name in the Kaplan family. But the real reason I know this is a great law school is that you've invited me to speak! No other law school has given me a similar invitation, so I now pronounce you number one in the country.

I am a little doubtful as to why I was invited. I guess the invitation, from my own point of view, should not be examined too closely. It may be because I'm from out of town. An expert, as you know, is somebody from a long way off who knows a little bit about the subject. More likely, it has something to do with my being from Arkansas, a small state, now better known than it used to be. Political comments are off-limits to judges, so I won't make any, but I have noticed that being from Arkansas gets me a lot more attention—and of the right kind—than it used to. If the events of the last year have proved anything, they've shown that at least two people from our state know how to read and write! Some people have come to suspect that there may be more where those two came from.

In any event, it's wonderful to address a group of law students—I count faculty members and practicing lawyers in that number, by the way, and also judges. Speaking of faculty members, notice how the faculty are arranged in the jury boxes—that's the way they treat judges. They routinely reverse us in the classroom, which is good for us, I guess. I am proud to be a law student. One of the great things about the law is that you learn something new every day. You can even see new things in a single case every time you look at it again. So it's really a privilege for me to be in a law school community, and I think I get a great deal more out of it than you will from hearing me.

Well, the talk is billed as "Trial by Jury." I should begin by admitting that I am for juries. Some lawyers are not; some judges are not. But I believe that juries are a good thing in civil cases and in criminal cases, in complex matters as well as simple ones. When I

served as a district judge for about eighteen months, I was fond of telling jurors in my courtroom that I would prefer to have a case decided by twelve ordinary people than by one ordinary person. In other words, I do not believe much in expertise, and if there is such a thing, I doubt if it is any match for common sense.

So what is the big deal? What is so interesting about the subject? Trial by jury is in the Constitution, and therefore we have always had it and always will. So why should we be talking about it? Because trial by jury is an institution under attack from those who are opposed to it outright and from those who think it ought to be watered down. In England, which we rightly regard, in some ways, as the source of our liberties, the institution has all but completely disappeared in civil cases. And in this country, especially in the last twenty years or so, various measures have been taken to limit or water down the right to trial by jury. In some federal district courts, you can't get your case before a jury unless you first go through a mandatory arbitration procedure. And in every federal district court in this country, if you do get a jury, it is likely to be a truncated group of six or eight instead of the traditional "twelve good people and true."<sup>1</sup> My brother—who is a judge on our court and a former law teacher, and therefore a person we listen to—says that a group of six is not a jury, it is a committee.

What I want to talk about briefly is how we got into this business of reducing the size of juries, how it got started, and make a few comments on its implications and whether or not it is a good idea. What I am going to do is describe a couple of United States Supreme Court opinions which have upheld, against constitutional attack, juries of less than twelve. Then I want to talk about some of the historical and procedural arguments on both sides of the issue. In the end, I will try to draw some observations on broader questions. I am sure a lot of you are already acquainted with some of this, and I thought I was too until I started some intensive examination of the subject. Sometimes it is just good to be reminded of things.

## II. THE WILLIAMS AND COLGROVE CASES

For over six hundred years, Western civilization took it for granted that a jury must be composed of twelve persons. This as-

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1. See, e.g., *TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800* (J.S. Cockburn & Thomas A. Green eds., 1988).

sumption was belied in 1970, when the United States Supreme Court held in *Williams v. Florida*<sup>2</sup> that a Florida rule of criminal procedure that allowed six-person juries was constitutional. The Court held that the Florida rule did not violate the Sixth Amendment to the United States Constitution as applied against the states through the Due Process Clause of the Fourteenth Amendment.<sup>3</sup> Although *Williams* was in fact limited to a discussion of whether due process required a jury of twelve in criminal cases in the state courts, it soon came to be cited for the proposition that a twelve-person jury was not constitutionally required in any case—state or federal, civil or criminal. Commentators drew this conclusion from sweeping statements made by Justice White, writing for the majority: “We conclude . . . 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.’”<sup>4</sup> The Court belittled the significance of the number twelve from both a historical and a utilitarian standpoint.

Three years later, in 1973, the Supreme Court went one step further when it held in *Colgrove v. Battin*<sup>5</sup> that the Seventh Amendment to the United States Constitution did not mandate twelve-person juries in civil cases—six would do. The Court relied predominantly on the conclusion in *Williams* that the number twelve was “a historical accident” and on empirical studies that ostensibly demonstrated that there was little difference between a six and a twelve-person jury.<sup>6</sup> The assumption was that you got the same kind of decisions, with the same or greater speed, and with less money spent. The *Colgrove* Court thereby completed the process begun in *Williams*, a process which resulted in a fundamental redefinition of a cornerstone of our legal system—the twelve-person civil jury.<sup>7</sup>

So there you have two cases. *Colgrove*, by the way, was a 5-4

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

3. *Id.* at 80-86.

4. *Id.* at 102 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)). I digress, but I do want to say that I think it is unfortunate for opinions of any court to make snide references about groups—here, mystics. I don’t know if the mystics rose up in protest over this, but a mystic is simply somebody who prays a lot and who not only talks to God but listens. That’s all there is to it; there is nothing mysterious about it. The way the Court uses the term here, it sounds like they think a mystic is someone who believes numbers are magic, and that is not the case.

5. 413 U.S. 149 (1973).

6. *Id.* at 160 n.17.

7. See also discussion *infra* part VII.

decision. Justice Brennan wrote the opinion of the Court. There was a dissent by Justice Douglas and Justice Powell which found simply that the practice violated the Federal Rules of Civil Procedure, because it was instituted simply by local rule in the district court, and the district court by local rule ought not to be able to do something that important.<sup>8</sup> Then Justice Marshall, joined by Justice Stewart, dissented on constitutional grounds.<sup>9</sup> I guess that if I had but one thing I would leave you with, it would be to take some time to read the dissenting opinion of Justice Marshall in *Colgrove v. Battin*, because it is a great exposition of constitutional law and theory.

When the Founders drafted the Bill of Rights to include the Seventh Amendment, a jury of twelve was what they contemplated: the common law of England had fixed the number at twelve over four hundred years before the drafting of the Bill of Rights. Furthermore, it was a scholarly axiom at the time the Bill of Rights was drafted that a jury was comprised of twelve. This clearly was the understanding of the Founding Generation and continued to be the understanding in this country until *Williams*.<sup>10</sup>

### III. A HISTORY OF THE JURY IN ENGLAND

Little is known for certain about the origin of the jury and how it first came to England. In 1878, the historian William Forsyth stated, "Few subjects have exercised the ingenuity and baffled the research of the historian more than the origin of the jury."<sup>11</sup> Because by the Middle Ages the jury in England was unquestionably viewed as the protector of human liberty, English scholars, out of a sense of Anglo-Saxon pride, traced the origin of the jury to Alfred the Great (871-899).<sup>12</sup> Other scholars have cited the laws of Aethelred I (865-871) and Aethelred the Unready (978-1016), as well as the judgment of twelve witnesses during the reigns of Edgar the Peaceful (959-975) and Edward the Confessor (1042-1066), as proof that the jury was

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8. *Colgrove*, 413 U.S. at 165 (Douglas, J., dissenting).

9. *Id.* at 166-88.

10. See, e.g., *United States v. Wood*, 299 U.S. 123 (1936) (jury is twelve, no more, no less, and must be unanimous); *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899) (trial by jury is trial by a jury of twelve men under the superintendence of a judge); *American Publishing Co. v. Fisher*, 166 U.S. 464 (1897) (verdict must be returned by twelve; nine is insufficient).

11. WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 2 (Lenox Hill Pub. & Dist. Co. 1971) (2d ed. 1878).

12. See, e.g., *id.* Blackstone called Alfred the Great a "superior genius." 3 WILLIAM BLACKSTONE, *COMMENTARIES* 350 (William S. Hein & Co., Inc. 1992) (1768).

English in origin.<sup>13</sup> William Blackstone himself wrote that jury trial was "co-eval" with the first civil government in England.<sup>14</sup>

After the middle nineteenth century, however, scholars acknowledged that the English jury may not have been English in origin. Some scholars traced the original jury back to ancient Greece and to the Athenian statesman Solon.<sup>15</sup> Others argued that the system of *Judices* found under the twelve tables of Rome was sufficiently similar to the English jury that the jury may have been brought over to England at the time of the Roman Conquest.<sup>16</sup> Nonetheless, these scholars have conceded that any direct influence Greek and Roman legal systems might have had on the development of the English jury was, at best, slight.<sup>17</sup>

Because there are large gaps in the trail from ancient Rome to the England of the Middle Ages, perhaps a better suggestion comes from a passage in the laws of King Aethelred the Unready, circa 997, which provided that twelve thanes—or knights—and a representative of the king would swear upon a relic that they would "accuse no innocent man, nor conceal any guilty one."<sup>18</sup> Since Aethelred the Unready's laws came from Wantage, a portion of tenth century England that had been occupied by the Danes, some scholars have looked to the parallel development of Scandinavian juries to find the roots of the English jury. Once again because of historical gaps, these scholars have met with little success.<sup>19</sup>

The best guess now seems to be that William the Conqueror brought the jury across the Channel to England with the Frankish *inquisitio* in 1066, and that the English jury finally took root at that time, eventually developing into its modern form towards the end of

13. See, e.g., LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* 27-29 (1973).

14. 3 BLACKSTONE, *supra* note 12, at 349.

15. See, e.g., MORRIS J. BLOOMSTEIN, *VERDICT: THE JURY SYSTEM* 2-3 (1968); RENÉ A. WORMSER, *THE LAW* 52, 54, 56-58 (1949).

16. See, e.g., MAXIMUS A. LESSER, *THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM* 29-46 (Rochester, The Lawyers' Cooperative Publishing Co. 1894). "[A]n institution resembling the modern jury in various respects must have existed in England—brought thither by the Romans, and originating among the Greeks—at the earliest civilized period . . ." *Id.* at 171.

17. See, e.g., *id.* at 17-18.

18. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 108 (5th ed. 1956).

19. See, e.g., *id.* at 108-09. The gaps in historical evidence of the origin of the jury led William Forsyth to quote Bourguignon: "Its origin is lost in the night of time." FORSYTH, *supra* note 11, at 2.

the fourteenth century.<sup>20</sup> Regardless of where the jury began, by the 1080s it was firmly established in England, although its function little resembled that which we consider to be the jury's today. While Sir Edward Coke cited an instance of its use in 1074,<sup>21</sup> the first recorded use of a jury in an English court occurred between 1083 and 1086.<sup>22</sup>

In the Frankish Empire, as the Court correctly pointed out in *Williams*, the number of jurors varied.<sup>23</sup> Similarly, among the French Normans, the number varied, and twelve "has not even the place of the prevailing *grundzahl* [baseline number]."<sup>24</sup> Nonetheless, in England, the number twelve was the *grundzahl* and most likely had been since the time of Henry II (1154-1189).<sup>25</sup>

During the early years of the jury, when its function was to serve as a means of gathering evidence by calling those who were familiar with the facts in issue, the usual number of family members or neighbors called was twelve.<sup>26</sup> Additionally, when a plaintiff or defendant had to "make his law," he was required to provide jurors who acted as oath-helpers, that is, men who were willing to swear upon penalty of damnation that the interested party was telling the truth.<sup>27</sup> The customary number of men required was twelve, although a noble or person of great influence might be required to produce more.<sup>28</sup> As the jury increasingly became used to evaluate and weigh

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20. E.g., EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW 47-48 (1949); 1 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 140-42 (Cambridge University Press 2d ed. 1968) (1895); JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 48 (Boston, Little Brown & Co. 1898).

21. RICHARD THOMSON, AN HISTORICAL ESSAY ON THE MAGNA CHARTA OF KING JOHN 228 (Gryphon Editions, Ltd. 1982) (1829).

22. The trial was a civil one and involved a disputed land title of the abbot of Ely. See MOORE, *supra* note 13, at 35-36; 1 POLLOCK & MAITLAND, *supra* note 20, at 143-44; JOHN REEVES, HISTORY OF THE ENGLISH LAW 84-85 (Augustus M. Kelley 1969) (2d ed. 1787). At one time in history, the most important principles of law evolved out of land disputes. At one time, constitutional law in England was a branch of the law of real property. PLUCKNETT, *supra* note 18, at 37. Therefore, it is not surprising to find that the first jury case is a dispute over a land title.

23. *Williams v. Florida*, 399 U.S. 78, 87 n.19 (1970).

24. THAYER, *supra* note 20, at 85.

25. *Id.*

26. 2 POLLOCK AND MAITLAND, *supra* note 20, at 600-01; see also FORSYTH, *supra* note 11, at 63.

27. Robert H. White, *Origin and Development of Trial by Jury*, 29 TENN. L. REV. 8, 11-13 (1961).

28. *Id.* at 11.



evidence presented by the parties, twelve men, or more specifically twelve peers,<sup>29</sup> were used to judge the evidence, although the number continued to vary if not enough men were acquainted with the parties or the facts, or if the parties consented.<sup>30</sup>

By the late thirteenth century, twelve had come to be the recognized number for juries, although numerous cases are reported where the parties agreed to fewer.<sup>31</sup> Additionally, a unanimous verdict was not yet the rule.<sup>32</sup> In 1367, during the rule of Edward III (1327-1377), the requirement of a unanimous verdict of twelve was firmly established. There is a great report in the Yearbooks of an argument before the Court of King's Bench. The case was an action of trespass in which one of the twelve jurors would not agree to the verdict. The court accepted the verdict from the eleven and imprisoned the twelfth upon learning that he would not alter his opinion. When counsel moved for judgment, he argued that the English courts had formerly approved a verdict of eleven in trespass, and that he could produce a record to prove this fact. Chief Justice Thorpe of the King's Bench responded as follows: "It is fundamental (*la ley fuit fondue*) that every inquest shall be by twelve . . . and no fewer. . . . Though you bring us a dozen records, it shall not help you at all; those who gave judgment on such a verdict were greatly blamed."<sup>33</sup> In other words, "Don't bother me with precedent, I am telling you what the law is." And with that, the rule of a unanimous verdict of twelve was established.

The unanimity requirement in civil cases continued, nonetheless, to be sporadically applied, primarily because it was easier to obtain a verdict from fewer men.<sup>34</sup> However, any variation in number ended during the reign of Edward IV (1461-1483) when the unanimous verdict of twelve unquestionably and invariably became the law of England, absent consent of the parties.<sup>35</sup> In 1410, the jury took on what would be its modern form when the jurors were limited to

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29. A noble had to be judged by nobles. Charles L. Wells, *The Origin of the Petty Jury*, 27 L.Q. REV. 347, 360 (1911).

30. THAYER, *supra* note 20, at 86.

31. *Id.* at 89-90.

32. *Id.* at 86-88.

33. *Id.* at 88 (citing Y.B. 41 Edw. 3, fol. 31, pl. 36 (1367)).

34. J.E.R. Stephens, *The Growth of Trial by Jury in England*, 10 HARV. L. REV. 150, 159 (1897) (observing that because "procuring a verdict of twelve" was difficult, "for a time the verdict of the majority [was] received").

35. THAYER, *supra* note 20, at 88-90; Stephens, *supra* note 34, at 159.

consideration of evidence presented in open court.<sup>36</sup>

Once the jury began to consider evidence presented in court rather than render verdicts based on their own knowledge, the problem of jury control was squarely presented. In the sixteenth century, political trials were common, and the English courts began to take it upon themselves to punish jurors for returning verdicts that were clearly against the evidence. Since courts could set aside verdicts and punish jurors at will, they regularly did so when they did not approve of the jury's verdict. This result severely undermined the jury protection the English had come to value, and it allowed the courts to operate as inquisitors.<sup>37</sup> One example of this appeared in a 1594 treatise on the jurisdiction of the courts. A popular Protestant folk hero who had played an active role in Wyatt's rebellion was acquitted by the jury for purely political reasons and in complete derogation of the evidence. The court severely fined many of the jurors, incarcerated some of them, and set aside the verdict.<sup>38</sup>

The practice of stringent jury control by the courts ended in 1670 in the famous *Bushel's Case*.<sup>39</sup> *Bushel's Case* was a habeas corpus action by a juror seeking his release from prison. The jury upon which Bushel sat had acquitted William Penn of unlawful assembly, despite full and manifest evidence. As a result, Bushel was committed to prison. Chief Justice Vaughan took the opportunity to clarify the position and duties of the jury. He stated that the jury was not required to do the court's bidding, because, if the jurors returned a wrong verdict, they, and not the judge who directed the verdict, would be punished by the attain, <sup>40</sup> a procedure whereby a second jury would convict and punish the first for rendering a false verdict. In his view, because the jury was operating under the shadow of the sanction of attain, it must be completely free from the directions of the bench and from other punishments meted out by the court.<sup>41</sup> Chief Justice Vaughan knew that for all intents and purposes the attain was an obsolete form; therefore, his opinion was in effect a declaration of the independence of the jury, an independence that would continue to ensure its position in English jurisprudence as

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36. FORSYTH, *supra* note 11, at 131.

37. PLUCKNETT, *supra* note 18, at 131-33.

38. *See id.* at 133-34 (citing RICHARD CROMPTON, *AUTHORITIE ET JURISDICTION DES COURTS* fol. 32b (1594)).

39. 124 Eng. Rep. 1006 (C.P. 1670).

40. PLUCKNETT, *supra* note 18, at 134.

41. *Id.*

protector of the individual.

#### IV. THE REASONING BEHIND THE USE OF TWELVE JURORS

So the number of jurors became absolutely fixed some five hundred years ago, which is a pretty good length of time as human institutions go. But why twelve? What difference does it make? I suppose that if the question were "Why not eleven?" or "Why not thirteen?", it would not excite me. But the question is "Why not six?" This is a substantial difference, so we need to look at some of the historical background to determine why there were twelve.

The reason the jury's number came to be fixed at twelve is difficult to pinpoint with certainty. Various theories have been proposed. One reason suggested is based on the structure of the English courts during the Middle Ages. The largest and most important administrative, political, and judicial subdivision in England was the county.<sup>42</sup> Each county had its own courts where trials were conducted for crimes and disputes occurring anywhere within the county.<sup>43</sup> The counties were subdivided into units called hundreds, each of which also contained its own courts.<sup>44</sup> Each hundred had its own presentment jury, the forerunner to the modern grand jury, drawn from its residents.<sup>45</sup>

From this organization, scholars have extrapolated that since the presentment jury of the hundred was comprised of twelve, this formed the basis of the later creation of petit juries of twelve.<sup>46</sup> The presentment jury originally functioned much as a grand jury, "presenting" what were, in essence, indictments.<sup>47</sup> Gradually, the presentment jury began to function increasingly as a fact-finding body that rendered verdicts.<sup>48</sup> Because verdicts were to be rendered, in both civil and criminal cases, county-wide, the various presenting juries from the hundreds were combined to accomplish this and grew as large as eighty-four jurors.<sup>49</sup> They became, according to Wells, "embarrass-

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42. *Id.* at 90-94; 1 POLLOCK & MAITLAND, *supra* note 20, at 532-56.

43. PLUCKNETT, *supra* note 18, at 90-91; 1 POLLOCK & MAITLAND, *supra* note 20, at 535-37.

44. PLUCKNETT, *supra* note 18, at 87-89; 1 POLLOCK & MAITLAND, *supra* note 20, at 556-60.

45. Wells, *supra* note 29, at 348.

46. *See, e.g., id.*

47. *Id.* at 354.

48. *Id.* at 356.

49. *Id.*

ingly large and unwieldy, and the sense of the personal responsibility of each juror was in danger of being lost.”<sup>50</sup> To solve this problem, the next step was to create petit juries by taking a number of men from each of the presentment juries until twelve men were assembled. Since the petit jury was to represent the whole county in deciding cases, it stood to reason that its structure would parallel the structure of the presentment jury.<sup>51</sup> What is not clear is why the presentment jury itself numbered twelve.

Another theory as to why the number was fixed at twelve stems from the fact that twelve was the common number throughout Europe, particularly Scandinavia, and that it made its way with the Danes into England. Proffatt stated, “The singular unanimity in the selection of the number twelve to compose certain judicial bodies, is a remarkable fact in the history of many nations.”<sup>52</sup> Serjeant Stephen, who wrote in the middle of the nineteenth century, believed both the jury and the use of twelve stemmed from the Scandinavians: “The most probable theory,” he said, “seems to be that we owe the germ of this (as of so many of our institutions) to the Normans, and that it was derived by them from Scandinavian tribunals, where the judicial number of twelve was always held in great veneration.”<sup>53</sup> Once again, however, why twelve was held in such veneration is not considered.

Perhaps the most reasonable explanation comes from Lord Coke’s *Institutes of the Lawes of England* and Duncombe’s 1665 work, *Trials per Pais*. Duncombe states:

And first as to [the jury’s] number twelve: and this number is no less esteemed by our law than by Holy Writ. If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number of twelve to try our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon’s officers were twelve.<sup>54</sup>

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50. *Id.*

51. *Id.* at 357.

52. JOHN PROFFATT, TRIAL BY JURY 11 n.2 (San Francisco, Sumner Whitney & Co. 1877).

53. FORSYTH, *supra* note 11, at 4 (quoting 3 JAMES STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND 349 (London, Butterworths 1845)); *see also* 1 FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS § 24 (1949); THORL. G. REPP, TRIAL BY JURY § 33 (Edinburgh, Thomas Clark 1832).

54. THAYER, *supra* note 20, at 90 (quoting GILES DUNCOMBE, TRIALS PER PAIS. OR, THE LAW OF ENGLAND CONCERNING JURIES BY NISI PRIUS, & C. 92 (8th ed. 1766)).

Similarly, in his *Institutes of the Lawes of England*, Lord Coke, Chief Justice, stated that the "number of 12 is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc."<sup>55</sup> Even the oath taken by jurors of that time supports this theory: "Hear this, ye Justices! that I will speak the truth of that which ye shall ask of me on the part of the king, and I will do faithfully to the best of my endeavor. So help me God, and these holy Apostles."<sup>56</sup> As far back as A.D. 725, the ancient king of Wales, Morgan of Gla-Morgan, whom some credit with the adoption of trial by jury, called it Apostolic Law. He stated, "For . . . as Christ and his twelve apostles were finally to judge the world, so human tribunals should be composed of the king and twelve wise men."<sup>57</sup> It does seem true, and I think we can take it as a given, that the number twelve was picked for the English courts because of the religious background. In fact, in *Williams*, the United States Supreme Court uses this argument as a way of disparaging the use of the number twelve, calling this reasoning "mystical or superstitious insights into the significance of '12.'"<sup>58</sup> I do not think Christians and Jews would be thrilled by being called superstitious. To be sure, it is clear that Christianity likely played a role in the decision to fix the number of jurors at twelve, rather than eleven or thirteen. I suppose, nonetheless, that everyone would concede that the mere fact that the number has a religious significance does not argue one way or the other for its use in a civil institution. I would put it to you that it does not really matter where the number came from. If the number twelve was settled on five hundred years ago and was used without interruption until twenty years ago, it carries with it a certain presumption of regularity, a certain entitlement to respect, no matter what the origin may have been. The origin of the number itself in no way diminishes that there are other equally valid reasons, discussed below, for retaining that number, nor does it diminish the fact that the Founders believed a "jury" to be twelve when they drafted the Seventh Amendment.

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55. 1 SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND* 155 (Garland Publishing, Inc. 1979) (1628).

56. WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 197 (London, John W. Parker & Son 1852).

57. PROFFATT, *supra* note 52, at 11 n.2 (citing FORSYTH, *supra* note 11, at 45 n.2).

58. *Williams v. Florida*, 399 U.S. 78, 88 (1970).

## V. THE UNDERSTANDING OF THE JURY AT THE TIME OF THE ENACTMENT OF THE SEVENTH AMENDMENT

This brings us to that dreaded phrase, "the intention of the Framers." We hear a lot of debate about original intent these days. If you call it history, that's fine, but if you call it original intent, it becomes controversial. So you can call it whatever you like, but I am going to give you a few facts about what juries were like in the colonies before the Constitution was written.

It is always best to begin at the beginning, and the beginning of the civil jury was in England. There, the constitutional right to a jury trial was guaranteed by the Magna Charta, signed at Runnymede by King John on June 15, 1215. The Magna Charta provided that no freeman would be disseized, dispossessed, or imprisoned except by judgment of his peers or by "the laws of the land."<sup>59</sup> It further stated, "To none will we sell, to none will we deny, to none will we delay right or justice."<sup>60</sup> During the next hundred years, the English kings reaffirmed the Magna Charta thirty-eight times.<sup>61</sup> By the 1600s, when the thirteen colonies were founded, jury trial had become one of the great palladiums of English liberty.

The colonists brought the jury to the colonies across the Atlantic from England. The 1606 Charter to the Virginia Company incorporated the right to a jury trial, and by 1624 all trials in Virginia, both civil and criminal, were by jury.<sup>62</sup> In 1628, the Massachusetts Bay Colony introduced jury trials, and the right to a jury trial was codified in the Massachusetts Body of Liberties by 1641.<sup>63</sup> The Colony of West New Jersey implemented trial by jury in 1677, as did New Hampshire in 1680 and Pennsylvania in 1682, under William Penn.<sup>64</sup> Massachusetts (1641), Rhode Island (1647), New Jersey (1683), South Carolina (1712), and Delaware (1727) adopted the Magna Charta's specific language.<sup>65</sup>

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59. THOMSON, *supra* note 21, at 85.

60. *Id.* at 83.

61. 1 WINSTON CHURCHILL, *A HISTORY OF THE ENGLISH SPEAKING PEOPLES* 254 (1956); THOMSON, *supra* note 21, at 369-93.

62. Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History, in THE JURY SYSTEM IN AMERICA* 21, 24-25 (Rita J. Simon ed., 1975).

63. MASSACHUSETTS BODY OF LIBERTIES ¶ 29 (n.p. 1641), *reprinted in SOURCES OF OUR LIBERTIES* 151 (Richard L. Perry & John C. Cooper eds., 1959).

64. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 592 (1993).

65. 1 J. KENDALL FEW, *IN DEFENSE OF TRIAL BY JURY* 36 (1993).

One of the interesting things that occurred during this time period is that the king of England tried to water down the right to trial by jury. He issued mandates to colonial governors, who then attempted to circumvent the right to trial by jury by expanding admiralty jurisdiction.<sup>66</sup> The colonies resisted stoutly, and congresses were held to protest this oppression. From these congresses ultimately developed the Declaration of Independence, which listed the denial of "the benefits of trial by jury" as one of the grievances which led to the Revolution.<sup>67</sup> Additionally, American lawyers listed the extension of admiralty jurisdiction as one of eight violations of "immemorial rights or liberties secured by the law of the land."<sup>68</sup> The civil jury right was so important to the colonists that the guarantee of a jury trial was one of only three rights universal to all of the pre-United States bills of rights.<sup>69</sup> This was so because judges were appointed and removed by royal governors, who insisted on verdicts they favored in order for the judge to remain on the bench. Therefore, despite the fact that juries were often chosen by sheriffs, who were also tools of the governors, jury trial was the only chance for a fair trial for either an accused or a civil litigant.<sup>70</sup> By 1791 it was clear that the colonists believed a jury of fewer than twelve to be a concept both alien and ominous.

Although the civil jury played an important role throughout the growth of the colonies, a right to a civil jury trial was not included in the original draft of the Constitution. The absence of a Bill of Rights in the Constitution, specifically the right to a civil jury trial, led to some of the more stringent opposition to the Constitution's acceptance. Yet the issue of whether it was necessary to include the right of trial by jury in the Constitution was raised only twice during the entire Philadelphia Convention. The first mention of including such a right occurred five days before the Convention was to adjourn. Mr. Williamson, a delegate from North Carolina, noticed that no provision for civil juries had been made and suggested that there was

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66. See Landsman, *supra* note 64, at 595; Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 654 & n.47 (1973). There were, and are, no juries in admiralty courts. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 469 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 1836) [hereinafter DEBATES]; *infra* text accompanying note 101.

67. Landsman, *supra* note 64, at 596.

68. ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 71 (1957).

69. *Id.* at 84-85.

70. *Id.* at 85.

a necessity for such a provision.<sup>71</sup> Upon this remark, some members of the Convention suggested that a "Committee to prepare a Bill of Rights" be created.<sup>72</sup> After some debate, this motion was defeated for fear that the new Federal Bill of Rights would be supreme to the bills of rights of the individual states.<sup>73</sup> Two days before adjournment, the right to a civil jury trial was again raised by a delegate from South Carolina, who suggested that the phrase "And a trial by jury shall be preserved as usual in civil cases," be added to the end of Article III.<sup>74</sup> This motion was defeated, however, on the basis that what was considered "usual" differed from state to state.<sup>75</sup>

Why the Framers chose not to include the right to a civil jury trial in the original Constitution may be understandable. After months of debate and tinkering with the broad shape and powers of the federal government, the delegates were doubtless under a great deal of pressure to complete the task they had been sent to perform.<sup>76</sup> Some delegates argued that attempting to put a right to a jury trial in the Constitution presented drafting difficulties that were hard to overcome at such a late stage.<sup>77</sup> Modern scholars, however, have found these claims to be disingenuous and argue that, in actuality, many Federalists believed that the fledgling country could ill afford to protect liberty in such a costly way.<sup>78</sup> Due to the fact that the civil jury trial often functioned to protect debtors to the detriment of creditors, and since jury decisions were often ad hoc, they seemed to be too unreliable to protect America's financial system.<sup>79</sup> With the Revolution, the need for juries to counterbalance judges hand-picked by England had been eliminated, and many delegates believed that the elected representatives of the people would adequately protect the rights of the individual, so that civil jury protection was unnecessary.<sup>80</sup>

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71. James Madison, *Wednesday Sept. 12. 1787—In Convention*, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587-88 (Max Farrand ed., 1966) [hereinafter RECORDS].

72. *Id.* at 588.

73. Journal, *Wednesday September 12. 1787*, in 2 RECORDS, *supra* note 71, at 583; Madison, *supra* note 71, at 588.

74. James Madison, *Saturday Sept. 15. 1787—In Convention*, in 2 RECORDS, *supra* note 71, at 628.

75. *Id.*

76. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 661 (1973).

77. Landsman, *supra* note 64, at 598.

78. *See, e.g., id.*

79. *Id.*

80. *Id.*



Despite the confidence many of the drafters had that the new government would not infringe on the rights of the individual, the failure to include a right to a civil jury trial was nearly a fatal blow to the new Constitution.<sup>81</sup> The failure to provide for jury trials created a wave of protest.<sup>82</sup> Some key delegates had refused to sign the Constitution, and plans were laid to attack the document even before the Convention adjourned.<sup>83</sup> Some Anti-Federalists argued that the new Constitution had eliminated the right to a civil jury entirely—a result unacceptable to the citizens of the new republic.<sup>84</sup> These attacks forced the Federalists to defend the new Constitution and to explain that the Constitution did not eliminate the right to jury trial. Alexander Hamilton, in *The Federalist No. 83*, extolled the virtues of the jury, referring to it as “the very palladium of free government,”<sup>85</sup> and averred that the omission of the right to a civil jury was not intended to abolish the right entirely.<sup>86</sup> He continued, however, to argue that the civil jury was not inseparable from the concept of liberty and that the jury’s only function was to serve as a protection against an active judiciary.<sup>87</sup>

The Anti-Federalists’ response to Hamilton was decisively negative. They argued that the failure to include the right to a civil jury trial warranted rejection of the Constitution in its entirety. They pointed out that a jury served three functions: first, it protected against unwise laws enacted by the legislature; second, it protected debtors; and third, it protected against an overreaching judiciary.<sup>88</sup> They frequently cited Blackstone’s famous statement:

The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human

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81. Wolfram, *supra* note 66, at 661.

82. Landsman, *supra* note 64, at 598.

83. Wolfram, *supra* note 66, at 662.

84. *Id.* at 668.

85. THE FEDERALIST NO. 83, at 257-58 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1966).

86. Landsman, *supra* note 64, at 598-99.

87. *Id.* at 599.

88. *Id.*

nature, that *the few* should be always attentive to the interests and good of *the many*.<sup>89</sup>

The Anti-Federalists were unwilling to accept an unrestrained federal judiciary and insisted upon the injection of “the many” into the proceedings of “the few.” They were ever mindful that a federal judiciary that was too free from constraint could go the way of England’s Lord Mansfield, of whom a Virginia court said in 1786, his “habit of control[li]ng juries does not accord with the free institutions of this country.”<sup>90</sup>

Ultimately, the Anti-Federalists were unsuccessful in preventing the Constitution’s adoption; however, the Constitution’s drafters were reduced to pleading drafting difficulties to explain the omission of the civil jury right and promised repeatedly that a Bill of Rights would be among the first acts of the First Congress.<sup>91</sup> At least seven of the states ratifying the Constitution called immediately for an amendment to include the right to a jury trial.<sup>92</sup> Since the Anti-Federalist arguments were the driving force behind the adoption of the Seventh Amendment, commentators have argued that their statements should be accorded weight in determining the motivation behind its adoption.<sup>93</sup>

The debates surrounding the Constitution’s adoption demonstrated the strong belief of the American populace that the role of the civil jury was vital to the protection of individual liberty,<sup>94</sup> and the Seventh Amendment proved far easier to draft than the Federalists had supposed. The broad text of the Seventh Amendment, and its references to the common law, ultimately were in accord with early Anti-Federalist arguments as they appeared in the *Pennsylvania Packet* in 1787. In including the right to a civil jury trial in the Constitution, “a reference might easily have been made to the common law of England, which obtains through every state.”<sup>95</sup> Not only was the victory of the civil jury found in the Seventh Amendment, it was also to be

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89. 3 BLACKSTONE, *supra* note 12, at 379, *cited in* Landsman, *supra* note 64, at 599-600.

90. Landsman, *supra* note 64, at 600 & n.119.

91. Wolfram, *supra* note 66, at 666.

92. Landsman, *supra* note 64, at 600.

93. *See, e.g.*, Wolfram, *supra* note 66, at 672-73.

94. *Id.* at 668-69.

95. Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 297 (1966) (citing a piece in the *Pennsylvania Packet* for October 23, 1787 authored by “A Democratic Federalist”).

found in the Judiciary Act of 1789,<sup>96</sup> which held equity in check while emphasizing remedies at law and the jury trial.<sup>97</sup>

The final text of the Seventh Amendment read: "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."<sup>98</sup> Unlike the Sixth Amendment, which made no reference to the common law, the Seventh Amendment referred to the common law twice—once to define the types of cases triable before a jury, and once to specify the circumstances under which the jury's verdict could be reviewed.

To understand what the Framers considered to be included within the ambit of the civil jury, it is necessary to look to the structure of jury law in the colonies in 1791. Critics of the theory that the Framers intended juries to be comprised of twelve individuals have argued that, since vast disparities existed from colony to colony with respect to jury practice, the legal posture in the colonies cannot be consulted when determining what the Framers intended by "jury trial."<sup>99</sup> In fact, disparities did exist among the colonies with respect to the sorts of cases tried before civil juries, the dollar amount necessary to trigger the jury right, whether the jury was competent to determine law as well as facts, and the extent of judicial control over the jury process.<sup>100</sup> None of the disparities discussed at the time spoke to the issue of whether a jury is comprised of twelve members.

Several remarks made during the ratification debates casually alluded to the civil jury as being comprised of twelve. Governor Edmund Randolph of Virginia commented that admiralty cases at common law were not decided by a jury since "[t]hese depend on the law of nations, and no twelve men . . . could be equal to the decision of such a matter."<sup>101</sup> With respect to criminal trials he remarked, "There is no suspicion that less than twelve jurors will be thought sufficient."<sup>102</sup> Chief Justice Thomas McKean of the Pennsylvania Supreme Court referred to the jury as being twelve in his de-

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96. Judiciary Act, ch. 20, 1 Stat. 73 (1789).

97. Landsman, *supra* note 64, at 600.

98. U.S. CONST. amend. VII.

99. See, e.g., Henderson, *supra* note 95, at 299.

100. *Id.* at 299-320.

101. 3 DEBATES, *supra* note 66, at 469.

102. *Id.* at 467.

fense of the Constitution's provision for appellate review.<sup>103</sup>

Additionally, while jury practice in the colonies did vary with respect to the jury's domain, cases concurrent with or immediately following the debates about the adoption of the Seventh Amendment conclude that a jury of twelve must be provided in every case in which a jury was required by a state's constitution. In the 1780 case of *Holmes v. Walton*,<sup>104</sup> the New Jersey legislature had passed a law providing for seizure of goods traded from New Jersey, which was controlled by the Continental Army, and New York City, which was controlled by the British.<sup>105</sup> Although trade between New Jersey and New York was objectionable from a military standpoint, it was quite profitable for the people of New Jersey, and therefore, the law forbidding it and providing for seizure of the profits was not popular with the public.<sup>106</sup> Nonetheless, the New Jersey legislature deemed the seizures important and was therefore anxious to make this unpopular statute work. To this end, it had provided for juries of six, thinking a jury of six to be more easily controlled by the courts.<sup>107</sup> It was a very simple idea—if you have fewer people, it is easier to get them to agree, and then it is more likely that the state is going to win. That seems self-evident to me, but as you will see if you read *Williams*<sup>108</sup> and *Colgrove*,<sup>109</sup> it was not self-evident to the Supreme Court. In any event, the defendant in *Holmes v. Walton* argued on certiorari to the New Jersey Supreme Court that the trial was in violation of his right to trial by jury as guaranteed by the New Jersey Constitution.<sup>110</sup> The New Jersey Constitution provided “that the inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without repeal, forever.”<sup>111</sup> On the basis of this language, the New Jersey Supreme Court ruled Holmes's trial unconstitutional and ordered his goods restored to him.<sup>112</sup>

In 1808, the Pennsylvania Supreme Court interpreted its state's constitution by reference to the laws of William Penn in 1682, which

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103. 2 *id.* at 539-40.

104. (N.J. 1780) (unreported case).

105. POUND, *supra* note 68, at 97.

106. *Id.*

107. *Id.*

108. 399 U.S. 78 (1970); see discussions *supra* part II and *infra* part VII.

109. 413 U.S. 149 (1973); see discussions *supra* part II and *infra* part VII.

110. POUND, *supra* note 68, at 97.

111. N.J. CONST. of 1776, art. XXII, cited in POUND, *supra* note 68, at 190.

112. POUND, *supra* note 68, at 97-98.

declared that a jury trial should be by twelve men.<sup>113</sup> Clearly the court believed that the Commonwealth's constitution had incorporated this provision. The debates surrounding the adoption of the Pennsylvania Constitution of 1873 similarly shed light on the intent of the Framers in 1791. The delegates to the Pennsylvania Convention debated whether to alter the substance of the constitutional right to a jury trial as found in the Pennsylvania Constitution of 1776. As the delegates debated the changes in jury law an amendment would make, one delegate said, "It is scarcely necessary to remark that a trial by jury means a jury of twelve men . . . . No less number can satisfy the requirement in the Bill of Rights. It is necessary to have a jury of twelve men. That is a jury; the only legal jury."<sup>114</sup> All of the delegates agreed that the Pennsylvania Constitution of 1776 required a jury of twelve.<sup>115</sup> Even those delegates in support of the changes to the Pennsylvania Constitution recognized that "when we speak about juries, we usually remember that twelve men constitute a jury, and we have been constantly carrying on cases in our courts before that number of men."<sup>116</sup>

In 1795, the Virginia Supreme Court stated in *Bennet v. Commonwealth*<sup>117</sup> that it would look to the common law of England to determine which cases must be tried to a jury of twelve. Since the act under which the suit was brought in *Bennet* did not exist at common law, a jury of twelve was not required; however, twelve would have been required in any case triable to a jury at common law.<sup>118</sup> The North Carolina Supreme Court held in 1800 in *Whitehurst v. Davis*,<sup>119</sup> which was tried before a panel of thirteen, that it was a constitutional error to try a case to more than twelve jurors.<sup>120</sup> The South Carolina Supreme Court stated in 1844 that the structure of the jury was as it had been at the adoption of the original South Carolina Constitution—twelve jurors<sup>121</sup>—and cited as support for this proposi-

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113. *Emerick v. Harris*, 1 Binn. 416 (Pa. 1808).

114. Jerome L. Edelstein, Comment, *The Jury Size Question in Pennsylvania: Six of One and a Dozen of the Other*, 53 TEMP. L.Q. 89, 112 (1980) (citing 2 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 296 (Harrisburg, B. Singerly 1873)).

115. *Id.* at 111-12 & n.99.

116. *Id.* at 112 n.99.

117. 2 Va. (2 Wash.) 154 (1795).

118. *Id.* at 154-55.

119. 3 N.C. (2 Hayw.) 110 (1800).

120. *Id.* at 110.

121. *State ex rel. Kohne v. Simons*, 29 S.C.L. (2 Speers) 761, 767 (1844).

tion the 1794 case *Zylstra v. Corporation of Charleston*.<sup>122</sup> In 1805, the Delaware Court of Common Pleas reiterated that all of its civil jury verdicts must be unanimous,<sup>123</sup> and in 1815 the Delaware Supreme Court referred to the unanimity requirement as being a unanimous verdict of twelve.<sup>124</sup> Massachusetts also required a unanimous verdict.<sup>125</sup>

Although each of these cases reflect the early states' interpretation of their individual constitutions, they also reflect the commonly held view among the people of the early Union that a civil jury was comprised of no more and no less than twelve members. There were, to be sure, efforts in some of the colonies to have juries of less than twelve for cases that were considered somehow second class. A very interesting example is a South Carolina statute that provided that juries in cases involving slaves should have no less than three members, but no more than five.<sup>126</sup> That is a very clear implication, it seems to me, that the six-person jury was thought of as a kind of second-rate institution, and I just wonder how much of that history was brought to the attention of the Supreme Court when they made their decision in *Colgrove*.

Well, what about treatises? One of the great ways to determine what the legal atmosphere of a certain time period was is to look at its law books. I have the great good fortune of having in my possession a list of law books that were in my grandfather's law office in 1895 in a little town called Washington, Arkansas. They were predominantly treatises: Blackstone, Kent, Story, Cooley. There was very little change in the law then. You could buy a treatise and be pretty sure that ten years later it would still be the law. Of course, that is far different from how we live now, but in the days of the Framers you had Lord Coke, you had Matthew Hale, and you had Bracton, and they all concurred that juries meant twelve.<sup>127</sup>

In his book, *The Development of Constitutional Guarantees of*

122. 1 S.C.L. (1 Bay) 382, 384 (1794).

123. *Gillaspy v. Garrat*, 2 Del. Cas. 225 (1805).

124. *Pierce v. Patterson*, 1 Del. Cas. 541 (1815) (noting *Gillaspy*, 2 Del. Cas. at 225).

125. *Commonwealth v. Tuey*, 62 Mass. (8 Cush.) 1, 4 (1851); cf. *Apthorp v. Backus*, 1 Kirby 407, 416-17 (Conn. 1788) (requiring a unanimous verdict in Connecticut).

126. Terry W. Lipscomb & Theresa Jacobs, *The Magistrates and Freeholders Court*, S.C. HIST. MAG., Jan. 1976, at 62, 62.

127. See *infra* notes 133-34 and accompanying text (views of Coke and Hale); for Bracton's view, see 2 HENRY OF BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 328-29 (Samuel E. Thorne trans., 1968).

*Liberty*,<sup>128</sup> Roscoe Pound wrote that eighteenth century colonial lawyers were "steeped" in the teachings of Lord Coke, the "most authoritative law books available to them."<sup>129</sup> It was these teachings that caused the colonial lawyers to rebel against England's claim to absolute and authoritative rule.<sup>130</sup> When these lawyers opposed the manipulation of the jury by colonial courts, they were upholding the traditional teachings of their law books.<sup>131</sup> In this light, the requirements for jury trial stated by Lord Coke in his *Institutes of the Lawes of England*<sup>132</sup> become weighty evidence as to the number of jurors the colonists, and, by extension, the Framers, believed necessary. Lord Coke clearly understood the jury to be comprised of twelve individuals.<sup>133</sup> Sir Matthew Hale stated that a jury was "twelve, and no less, of such as are indifferent."<sup>134</sup> In 1736, Matthew Bacon stated that the petit jury consisted "of twelve, and can be neither more nor less."<sup>135</sup> Duncombe also referred to a jury as being twelve in his treatise, *Trials per Pais*.<sup>136</sup>

All of this evidence demonstrates that it was the settled understanding at the time the Seventh Amendment was drafted that a jury was comprised of twelve, no more and no less.<sup>137</sup> Nonetheless, the *Williams* Court made much of the fact that the Framers had declined to put a "vicinage" requirement into the Seventh Amendment, although, as the Court noted, that feature was as much a part of the common law as was the number twelve.<sup>138</sup> The Court drew from this fact that the Framers did not intend to elevate every aspect of the common law jury right to a constitutional level, and, therefore, twelve jurors were not required by the reference to the jury in the Constitution.<sup>139</sup> I suggest that the Court may have misapprehended the significance of this omission. Unlike the requirement of a twelve-person

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128. POUND, *supra* note 68.

129. *Id.* at 57.

130. *Id.*

131. *See id.*

132. 1 COKE, *supra* note 55.

133. *Id.* at 155; *see supra* text accompanying note 55.

134. 2 SIR MATTHEW HALE, *THE HISTORY OF THE COMMON LAW* 141 (photo. reprint 1993) (London, G.G. & J. Robinson 5th ed. 1794).

135. 3 MATTHEW BACON, *A NEW ABRIDGMENT OF THE LAW* 727 (London, A. Strahan, 6th ed. 1807).

136. *See supra* note 54 and accompanying text.

137. Larry T. Bates, *Trial by Jury After Williams v. Florida*, 10 *HAMLIN L. REV.* 53, 63-64 (1987).

138. *Williams v. Florida*, 399 U.S. 78, 96 (1970).

139. *Id.* at 96.

jury, which was retained by each of the colonies,<sup>140</sup> many of the colonies had declined to adopt a vicinage requirement, and those that had such a requirement each treated the vicinage as encompassing a different area.<sup>141</sup> Like the other discrepancies in the right to a civil jury referred to by opponents of the twelve-member jury, the failure to include the vicinage requirement in the Seventh Amendment does nothing to negate the fact that the Framers understood the civil jury to be comprised of twelve men.

In fact, prior to *Williams*, the Supreme Court had adopted this understanding. In *Capital Traction Co. v. Hof*,<sup>142</sup> decided in 1899, the Supreme Court stated, "'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."<sup>143</sup> In *American Publishing Co. v. Fisher*,<sup>144</sup> decided in 1897, the Court likewise determined that the right to jury given by the Seventh Amendment included the right to a unanimous verdict—a verdict by nine with the rest disagreeing was insufficient.<sup>145</sup> In 1913, the Court held in *Slocum v. New York Life Insurance Co.*,<sup>146</sup> that the right to jury trial "preserved is the right to have the issues of fact presented by the pleadings tried by a jury of twelve, under the direction and superintendence of the court."<sup>147</sup> The Court reaffirmed its conclusion that the fact that the common-law jury was comprised of twelve meant that the Seventh Amendment required twelve several times, although often in dicta.<sup>148</sup>

In *Williams v. Florida*,<sup>149</sup> the United States Supreme Court discussed its precedents on the civil jury. Although *Williams* was a criminal case construing the applicability of the Sixth Amendment to the states, much of its discussion focused on the intent of the Framers and the contents of the word "jury."<sup>150</sup> Therefore, the Court felt constrained to address its own determinations of what a jury entailed.

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140. See Bates, *supra* note 137, at 65-68.

141. See Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 814-16 (1976).

142. 174 U.S. 1 (1899).

143. *Id.* at 13.

144. 166 U.S. 464 (1897).

145. *Id.* at 468.

146. 228 U.S. 364 (1913).

147. *Id.* at 397.

148. See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932); *Herron v. Southern Pac. Co.*, 283 U.S. 91 (1931); *Webster v. Reid*, 52 U.S. (11 How.) 437 (1850).

149. 399 U.S. 78 (1970).

150. *Id.* at 92-101.



It dismissed *Capital Traction* and *Fisher* in a footnote 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.’”<sup>151</sup> Despite this language, the *Williams* Court expressly left open “whether . . . additional references to the ‘common law’ that occur in the Seventh Amendment might support” an interpretation different from that accorded the Sixth Amendment in *Williams*.<sup>152</sup>

Although the *Williams* Court specifically recognized that its reasoning might “be thought to bear equally on the interpretation of the Seventh Amendment[.]”<sup>153</sup> and sought to dispel that conclusion, promptly following the *Williams* decision, many federal district courts moved quickly to amend their local rules to allow six-person juries in civil cases.<sup>154</sup> *Williams* additionally served as the genesis of an idea in the Judicial Conference to require six-person juries in all federal civil cases.<sup>155</sup>

## VI. THE JUDICIAL CONFERENCE

So, where did the movement come from to change juries from twelve to six? I can tell you that in the federal courts it did not come by law, because Congress refused to pass, and has never passed, a law providing for juries of less than twelve. It did not come by amendment to the Federal Rules of Civil Procedure. It was not until 1991 that the Federal Rules were amended to refer even to the possibility of a jury of fewer than twelve.<sup>156</sup> The change came from local rulemaking in federal district courts backed up by resolutions of the Judicial Conference of the United States (the “Conference”).<sup>157</sup>

Following the *Williams* decision, in early 1971 the Committee on

151. *Id.* at 92 n.30.

152. *Id.*

153. *Id.*

154. See *infra* notes 164, 167, 174, 187 and accompanying text.

155. *Three Judge Court and Six-Person Civil Jury: Hearings on S. 271 and H.R. 8285 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 93d Cong., 2d Sess. 30 (1974) [hereinafter *Hearings*] (statement of Hon. Edward Devitt, Chief Judge, District of Minnesota).

156. See *infra* notes 188-91 and accompanying text.

157. The Judicial Conference is a body of twenty-seven judges: the chief judge of each judicial circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, a district judge selected from each circuit, and the Chief Justice of the United States, who presides over the Conference. It is the body that governs the lower federal courts for administrative purposes. 28 U.S.C. § 331 (1988).

the Operation of the Jury System recommended that the Judicial Conference adopt the position that federal civil juries should be composed of six members unless the parties themselves stipulated to fewer than six.<sup>158</sup> The Conference adopted this resolution in March of 1971.<sup>159</sup> In its second meeting of that year, however, the Conference determined that the best way to effectuate its resolution would be to seek passage of a statute and specifically considered a bill<sup>160</sup> then pending in the House.<sup>161</sup> While the Conference approved the bill to the extent that it affirmed the Conference's position on civil juries, it refused to extend its reasoning to criminal juries.<sup>162</sup> The Conference specifically referred to juror utilization and cost efficiency as reasons to require the change and estimated that three million dollars could be saved by the Judiciary by adopting six-person juries.<sup>163</sup> Despite these optimistic figures, the Conference acknowledged that the savings in 1971 in the twenty-nine districts that had moved to six-person juries were "less than could be realized" because the courts continued to call the same size panels as they had when they were using twelve-person juries.<sup>164</sup>

The House bill did not pass, and the following year the Conference reiterated its support for six-person juries. The Conference approved<sup>165</sup> of another pending House bill<sup>166</sup> that provided for six-person juries and a reduction of peremptory challenges in civil cases. This bill also failed to pass, but by the end of 1972, fifty-six of the ninety-four federal districts had, nonetheless, adopted six-person juries.<sup>167</sup> In April of 1973, the Conference again pledged its support for pending six-person jury legislation.<sup>168</sup> In June of that year, the United States Supreme Court held in *Colgrove v. Battin*,<sup>169</sup> a 5-4

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158. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5-6 (Mar. 15-16, 1971).

159. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 41 (Oct. 28-29, 1971).

160. H.R. 7800, 92d Cong., 1st Sess. (1971).

161. REPORT, *supra* note 159, at 41.

162. *Id.*

163. 1971 DIR. ADMIN. OFF. U.S. CTS. ANN. REP. 198.

164. *Id.*

165. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5-6 (Apr. 6-7, 1972).

166. H.R. 13496, 92d Cong., 2d Sess. (1972).

167. 1972 DIR. ADMIN. OFF. U.S. CTS. ANN. REP. 169, 176-181.

168. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 13 (Apr. 5-6, 1973).

169. 413 U.S. 149 (1973).

decision, that the Seventh Amendment to the United States Constitution did not require the civil jury to be composed of twelve.<sup>170</sup>

Armed with the *Colgrove* decision, the Conference reviewed two new bills<sup>171</sup> pending before the 93d Congress and endorsed a bill<sup>172</sup> that preserved unanimity and limited the number of peremptory challenges in civil cases.<sup>173</sup> By 1973, seven additional districts had reduced their civil juries to six.<sup>174</sup> At the hearing before a Subcommittee of the Committee on the Judiciary, District Judges Devitt and Stanley testified that a reduction in the size of the civil jury would save the Judiciary both time and money<sup>175</sup>—up to four million dollars could be saved by the move.<sup>176</sup> They argued that a reduction in jury size would mean that less money would be needed to maintain the court system; additionally, the time spent by judges, lawyers, clerks, and jurors would be more efficiently utilized if the jury were smaller.<sup>177</sup> Proponents also argued that the judge's expertise could take the place of the jury's, and, following *Colgrove*, that the difference between using juries of six rather than twelve was insignificant.<sup>178</sup>

Now, the United States Supreme Court is not the only organ of constitutional law. Just because the Supreme Court says that an action is proper under the Constitution—such as reducing the size of the jury—does not mean that Congress has to do it, of course. It does not even mean that Congress has to agree with the constitutional proposition, and none of the *Colgrove* arguments were particularly persuasive to members of the congressional subcommittee. The subcommittee members were unwilling to take a step of such constitutional magnitude on the basis of what was, ultimately, the determination of only five members of the Supreme Court.<sup>179</sup> This reluctance

170. *Id.* at 160.

171. H.R. 8285, 93d Cong., 1st Sess. (1973) & S. 288, 93d Cong., 1st Sess. (1973).

172. S. 2057, 93d Cong., 1st Sess. (1973).

173. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 54-55 (Sept. 13-14, 1973).

174. *See Hearings, supra* note 155, at 17 (statement of Hon. Edward Devitt, Chief Judge, District of Minnesota).

175. *Id.* at 17-18 (statement of Hon. Edward Devitt, Chief Judge, District of Minnesota); *id.* at 18-23 (statement of Hon. Arthur J. Stanley, Chairman of the Judicial Conference Committee on the Operation of the Jury System).

176. *Id.* at 160 (statement of Prof. Hans Zeisel, University of Chicago Law School).

177. Lucy M. Keele, *An Analysis of Six vs. 12-Person Juries*, TENN. B.J., Jan.-Feb. 1991, at 32, 33.

178. *Id.* at 33-34.

179. *See, e.g., Hearings, supra* note 155, at 30 (remarks of Rep. Robert F. Drinan).

was increased in light of evidence demonstrating that time savings had been negligible in the districts already using six-person juries. In fact, according to a 1972 study, the average time for voir dire of a six-person jury was 52.0 minutes; the average time of voir dire for twelve-person juries was a mere tenth of a minute longer, 52.1 minutes.<sup>180</sup> Additionally, overall time savings were related not to the number of jurors on the petit jury, but rather to the size of the panel from which the jurors were drawn.<sup>181</sup> The conclusion that the time saved was negligible was confirmed by a separate study conducted in 1971, which showed that just under one percent of a judge's total working time was spent impaneling juries.<sup>182</sup> Even cutting impaneling time in half would save a judge only four-tenths of one percent of his or her total working time.<sup>183</sup> Finally, the four million dollars that could be saved by reduction of the jury, while not an insignificant sum, was only two percent of the 1973 judicial budget and less than one-thousandth of one percent of the total federal budget.<sup>184</sup>

The judges' argument that a number of federal district courts had adopted this new rule was unavailing. Members of Congress felt that the Judiciary had simply assumed the power to alter the jury to six members, regardless of congressional action.<sup>185</sup> Finally, no justifications beyond time and money saved were offered in support of the six-person jury, and proponents could not explain why they had arbitrarily chosen six, as opposed to four or eight, as the proper number.<sup>186</sup>

Due to congressional misgivings, neither this bill nor two subsequent bills passed either house of Congress, despite the best efforts of the Conference to support the legislation and to resubmit bills for consideration. In 1978, after many failed attempts to get Congress to adopt legislation permitting six-person juries, the Judicial Conference agreed to stop seeking legislation on the subject, a result not completely at odds with its goals, since eighty-five of the ninety-five federal district courts had rules permitting the use of fewer than

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180. Keele, *supra* note 177, at 33.

181. *Id.*

182. *Id.* (citing a 1971 Federal Judicial Center Study).

183. *Id.*

184. *Hearings, supra* note 155, at 160 (statement of Prof. Hans Zeisel, University of Chicago Law School).

185. *Id.* at 36-37 (remarks of Rep. Robert F. Drinan).

186. *See, e.g., id.* at 30 (statement of Hon. Edward Devitt, Chief Judge, District of Minnesota, acknowledging uniformity as the primary purpose of the bill).

twelve jurors.<sup>187</sup> Ultimately, since many districts had adopted six as the standard size for civil juries, in 1991 the Conference amended Federal Rule of Civil Procedure 48 to allow the district courts to seat juries of no less than six and no more than twelve.<sup>188</sup> Believing that the minimum size of the civil jury had been constitutionally set at six by the Supreme Court,<sup>189</sup> the Conference ensured that Rule 48 would allow juries of less than six only when the parties so stipulated.<sup>190</sup> Rule 48 also preserved the unanimity requirement, absent consent of the parties.<sup>191</sup> Although far from the mandatory six-person civil jury rule advocated by the Conference in the early 1970s, Rule 48 nonetheless represented the culmination of what the Conference had been attempting to accomplish for twenty years in the federal courts—the six-person civil jury.

## VII. THE SUPREME COURT'S RELIANCE ON EMPIRICAL EVIDENCE

After the *Colgrove* holding, the Conference appeared to be on constitutional terra firma in its pursuit of six-person federal juries. Indeed, the Supreme Court has not reevaluated the position it took in *Colgrove*. The *Colgrove* Court interpreted the Seventh Amendment's references to "common law" to mean that the right of trial by jury had been preserved, although not the "various incidents of trial by jury."<sup>192</sup> Citing its holding in *Williams*, the Court continued: "[C]onstitutional history reveals no intention on the part of the Framers 'to equate the constitutional and common-law characteristics of the jury.'"<sup>193</sup> The Court then stated that the inquiry turned on "whether a jury of 12 is of the substance of the common-law right of trial by jury," which in turn came down to the question of whether jury performance, in assuring a fair and equitable resolution of factual issues, is a function of jury size.<sup>194</sup> In other words, the Supreme Court said that the number of jurors did not make a difference.

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187. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 78 (Sept. 21-22, 1978).

188. FED. R. CIV. P. 48.

189. *Ballew v. Georgia*, 435 U.S. 223, 245 (1978) (disallowing five-person criminal juries).

190. FED. R. CIV. P. 48 advisory committee's note accompanying 1991 amendment.

191. FED. R. CIV. P. 48.

192. *Colgrove v. Battin*, 413 U.S. 149, 155-56 (1973).

193. *Id.* at 156 (quoting *Williams v. Florida*, 399 U.S. 78, 99 (1970)).

194. *Id.* at 157.

Distinguishing *Capital Traction Co. v. Hof*<sup>195</sup> and other prior Supreme Court cases by stating that their references to civil juries of twelve<sup>196</sup> were dicta, the Court proceeded to analyze whether the jury of six satisfied the Seventh Amendment.<sup>197</sup> To make this determination, the Court referred to statistical studies, much as it did in *Williams*, and concluded that there was no difference in the function of six versus twelve-person juries.<sup>198</sup> Since there was no difference, the requirement of twelve could not be a substantive one. In rejecting the conclusion that the Seventh Amendment jury right included the right to twelve jurors, the Court misplaced its reliance on empirical evidence.

The *Colgrove* Court cited the six “experiments” relied on in *Williams*<sup>199</sup> that the Court said demonstrated there were “no discernible differences” between six and twelve-person juries.<sup>200</sup> One such experiment was an unsupported assertion that there would be no differences between the two.<sup>201</sup> Three of the studies were reports of courtroom officials’ casual observations of six-person juries, and a fifth was a statement that a jurisdiction was considering switching to six-person juries.<sup>202</sup> The final experiment was an article on the cost savings expected from the change to six-person juries.<sup>203</sup>

The Court then concluded that the minority’s ability to defend its position in the face of a 5-1 split is equivalent to its ability to do so in a 10-2 split because both result in an 83% to 17% ratio.<sup>204</sup> However, the studies cited by the Court to support this proposition found precisely the opposite. In fact, it is the absolute, not the relative, size of the opposition that determines the minority’s ability to defend itself.<sup>205</sup> The presence of even the single ally in the 10-2 split makes an enormous difference in the ability of the minority to resist pressure to conform.<sup>206</sup>

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195. 174 U.S. 1 (1899).

196. See *supra* notes 142-48 and accompanying text.

197. *Colgrove*, 413 U.S. at 158.

198. *Id.* at 158-60.

199. *Williams v. Florida*, 399 U.S. 78, 101 n.48 (1970).

200. *Colgrove*, 413 U.S. at 158 & n.14.

201. Michael J. Saks, *Ignorance of Science is No Excuse*, TRIAL, Nov.-Dec. 1974, at 18, 18.

202. *Id.*

203. *Id.*

204. *Williams v. Florida*, 399 U.S. 78, 101 n.49 (1970).

205. Saks, *supra* note 201, at 19.

206. *Id.*

The *Williams* Court also asserted that there would be a negligible difference in the amount of minority representation and participation when jury sizes were reduced.<sup>207</sup> But sample size will always affect the extent to which minority groups are represented. A 1974 statistical study showed that in a community with a 10% minority population, it could be expected that one or more minority members would be present on 72% of twelve-person juries; however, this statistic changes dramatically when the number of jurors is reduced to six.<sup>208</sup> On a six-person jury, one or more minority members would be expected to be present on only 47% of the panels. Not only is this projected disparity significant, an empirical study of actual minority representation on six and twelve-person juries demonstrated that, rather than the predicted 72% to 47% contrast, minorities were represented on twelve-person juries 82% of the time and on six-person juries only 32% of the time.<sup>209</sup> Not only are minorities underrepresented on the six-person jury, women are as well. Women constitute 52% of the population of the United States, but they constitute only 30% of all six-member jury panels; they comprise 57% of the twelve-member panels.<sup>210</sup> These differences are not negligible. If one of the objectives is for the jury to be representative of the community—and that clearly is one of the things that juries are supposed to do—then part of being representative is having minority members, if there are some in the community.

Subsequent studies have further demonstrated that the differences between six and twelve-member juries are significant. Judge Victor Baum argued in 1973 that six-person juries were more likely to give what he termed “haywire” verdicts, verdicts that are less predictable and more indefensible than those rendered by twelve-person juries.<sup>211</sup> Additionally, he found that six-person juries were far more likely to fall under the influence of a single juror.<sup>212</sup>

Judge Baum’s first-hand observations have been borne out by subsequent studies. First, when the size of a jury is reduced from twelve to six, the variability in awards increases by 41%, leading to

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207. *Williams*, 399 U.S. at 102.

208. Saks, *supra* note 201, at 19; see also Hans Zeisel, *The Waning of the American Jury*, 58 A.B.A. J. 367, 368 (1972).

209. Saks, *supra* note 201, at 19.

210. Keele, *supra* note 177, at 34.

211. Judge Victor J. Baum, *The Six-Man Jury—The Cross Section Aborted*, JUDGES’ J., Jan. 1973, at 12, 12.

212. *Id.* at 13.

more unpredictable verdicts.<sup>213</sup> Second, a 1976 study demonstrated that a six-person jury is far more likely to fall under the influence of an aggressive juror than is a twelve-person jury.<sup>214</sup> A 1988 study showed that personality characteristics of individual jurors are far more likely to control a six-person jury than a twelve-person jury, leading to determinations based on personality rather than the evidence.<sup>215</sup>

Third, numerous recent studies have demonstrated that the quality of the jury's discussion and deliberation is better in larger groups than in smaller ones.<sup>216</sup> As mentioned previously, minority viewpoints are far more likely to be present on a larger jury.<sup>217</sup> Jury members in the minority are far more likely to maintain their viewpoint if they are certain that at least one other member of the jury agrees with them. This is far more likely in the twelve-member jury than in a six-member jury.<sup>218</sup> Since, according to the *Williams* and *Colgrove* Courts, one of the requirements of the jury is effective deliberation, and since the jury is predicated on the notion that a cross-section is crucial to a fair outcome, the fact that more viewpoints are available in twelve-person juries than six-person juries is all the more significant.<sup>219</sup> An early majority in the twelve-person jury is reversed far more often than in six-member juries, suggesting that in twelve-person juries there is greater group and minority participation.<sup>220</sup>

Individual juror bias is reduced by an increase in jury size,<sup>221</sup> and verdicts are less severe in twelve-person juries.<sup>222</sup> In the crimi-

213. Michael J. Saks, *If There Be a Crisis, How Shall We Know It?*, 46 MD. L. REV. 63, 76 n.51 (1986), cited with approval in David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1022-23 (1989).

214. John R. Snortum et al., *The Impact of an Aggressive Juror in Six and Twelve-Member Juries*, 3 CRIM. JUST. & BEHAV. 255 (1976).

215. Norbert L. Kerr & Juin Y. Huang, *Jury Verdicts: How Much Difference Does One Juror Make?*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 325 (1986).

216. See, e.g., Keele, *supra* note 177, at 36, 40; R. Scott Tindale et al., *Asymmetrical Social Influence in Freely Interacting Groups: A Test of Three Models*, 58 J. PERSONALITY & SOC. PSYCHOL. 438 (1990).

217. See *supra* notes 208-09 and accompanying text.

218. See *supra* notes 205-06 and accompanying text.

219. Keele, *supra* note 177, at 34-35.

220. 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 L. & PSYCHOL. REV. 71, 78 (1977).

221. Carol M. Werner et al., *The Impact of Case Characteristics and Prior Jury Experience on Jury Verdicts*, 15 J. APPLIED SOC. PSYCHOL. 409 (1985).

222. Robert Buckhout et al., *Jury Verdicts: Comparison of 6- vs. 12-Person Juries and*



nal context, six-person juries have been shown to be far more likely to convict than twelve-person juries, and twelve-person juries' deliberations are more likely to result in a hung jury.<sup>223</sup>

In my opinion, the empirical evidence now available demonstrates unequivocally that there are significant differences between six and twelve-member juries. These differences affect the nature of civil verdicts, the ability to obtain an adequate cross-section of the population, the ability of minority jurors to hold fast in their opinions, and the quality of the decision-making process.

### VIII. CONCLUSION

Well, what am I saying? Am I saying that the Supreme Court is wrong and ought to be overruled? Of course not. One of the most irrelevant things in the world, maybe the most irrelevant thing, is a lower-court judge who does not agree with the United States Supreme Court. It is only slightly less insulting for me to say that they are wrong than for me to say that they are right! You remember that famous quote from Justice Holmes that it irritated him somewhat for law reviews to write articles saying he was wrong in an opinion he had written, but it really drove him up a wall when they said he was right.<sup>224</sup> So my purpose is not to say whether the Supreme Court was right or wrong. The Supreme Court is the Supreme Court and that is the end of that. They decided what the Constitution means, and I am bound by that decision.

But let me remind you that courts are not the only source of rights in this country. The Court does not say you *must* have a six-person jury; the Court says you *may* have a six-person jury. Congress by statute, or the Judicial Conference and the Congress by rule, or the local district courts by rule, or the Judicial Conference by resolution, all have the authority to raise the size of juries to twelve if they so desire. In fact, individual district judges have that authority. When I was on the district court, I refused to try cases with juries of less than twelve, and the lawyers did not protest. But then I have found that lawyers do not usually protest what the judge does.

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*Unanimous vs. Majority Decision Rule in a Murder Trial*, 10 BULL. PSYCHONOMIC SOC'Y 175 (1977).

223. Angelo Valenti & Leslie Downing, *Six Versus Twelve Member Juries: An Experimental Test of the Supreme Court Assumption of Functional Equivalence*, 1 PERSONALITY & SOC. PSYCHOL. BULL. 273 (1974).

224. See Charles E. Hughes, *Foreword*, 50 YALE L.J. 737, 737 (1941).

So what is the point here? I have heard it said that a good speech should make one point, and I want you to know I have not made that point yet. The point is not that every incident of the jury as it existed in 1791 should be preserved. If that were the point, we would have twelve jurors, but they would all be men, they would all be white, and they would all own real estate. And no one argues that those qualifications, if that is what they are, are enshrined in the Constitution, or even that they are a good thing. Why not? Because conditions have changed. In the case of gender and color, you have explicit constitutional change. You have the three Civil War Amendments and the Nineteenth Amendment, and maybe the Equal Rights Amendment someday, that say that this is a different world from 1791.

So I'm not arguing that juries should look exactly the way they looked in 1791. But my question is this: what has changed with respect to the number? There is no social condition that exists now that did not in 1791 that has a thing to do with how many people are to be on a jury. There is no social condition that existed then that no longer exists now that has to do with how many people are to be on a jury. Often, we use the phrase "evolving Constitution," and we all know that it does evolve. It evolves because facts change, because conditions change. But sometimes we should ask ourselves if it always evolves in the right direction. Change is going to occur, but all change is not change for the better. I suggest to you that a change to "water down" juries from twelve members to six is not for the better.

Justice Marshall's dissenting opinion in *Colgrove* makes exactly these points. He says, first of all, that what matters is the intention of the Framers.<sup>225</sup> Of course, the jury-trial provision is a little more specific than some of the others in the Constitution and it is possible to engage in some meaningful and fairly detailed historical research about what a jury trial meant in 1791, whereas a phrase like "due process" or "equal protection" is much more general. One of the things that Justice Marshall says deserves to be quoted. He writes, "[W]hen constitutional rights are grounded in nothing more solid than the intuitive, unexplained sense of five Justices that a certain line is 'right' or 'just,' those rights are certain to erode and eventually disappear altogether."<sup>226</sup> The difference is "the difference between inter-

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225. *Colgrove v. Battin*, 413 U.S. 149, 167, 176-77 (1973) (Marshall, J., dissenting).

226. *Id.* at 181.

preting a constitution and making it up as one goes along."<sup>227</sup>

So the debate in *Williams* and *Colgrove* is about the intention of the Framers. There is no one saying, "We don't care what the Framers intended." The Justices on both sides argued from the historical record as to what that intention was. And the assumption is that if you know what the intention was, then you follow it. That is an assumption that I think every judge on those Courts would have agreed with. So when someone argues that the interpretation of the Constitution should change, you have to ask yourself, "Is this a change for the better?" Is it really something that is happening because of modern conditions, or is it something that is happening, as in the case of the reduction of the number of jurors, because you are going to save a little money and arguably become a little more efficient? I would remind you that efficiency, although it is a value, is not the only value that we expect out of our government. In fact, the Framers deliberately constructed a system that would not be completely efficient. They did not trust government, and the jury is one of the institutions designed to put a check on it.

Alexis de 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 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.<sup>228</sup>

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227. *Id.* at 182.

228. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284-85 (Alfred A. Knopf 1945) (1835).

Well, by now you may have guessed that I feel fairly strongly about this subject. And I guess that I come to it with some degree of emotion. And here is the thing I wanted to tell you—the point: emotion is not a bad thing. In law or anywhere else, we do not often think of it that way, perhaps. We say that the life of the law is reason, but there is more to it than cold rationalism. As Pascal said, “The heart has its reasons, which reason does not know.”<sup>229</sup> In legal matters, if you have strong feelings, if you become emotional about them, there is nothing wrong with that so long as your feelings and your emotions can be tested by reason.

When I hear the words “the Bill of Rights” and when I hear the names of James Madison or the other great Founders of our constitutional order, I get a whole set of emotional responses. I take alarm at the effort to do away with one jot or tittle of the cherished freedoms they gave us. We hear a lot these days about unenumerated rights, and we know that there are such rights, but let us also preserve those rights that are enumerated, like the right to trial by jury. And when you defend those rights do not be afraid to let your heart have a say as well as your head. Thank you.

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229. BLAISE PASCAL, *PENSEES* 95 (William F. Trotter trans., Random House, Inc. 1941) (1669).

