Attachment 1

Article 12. [Trial by jury to be held sacred]

That when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred.

HISTORY

Source. Con. 1777, Ch. I, Art. 13. Con. 1786, Ch. I, Art. 14.

CROSS REFERENCES

Advisory jury, see V.R.C.P. 39(c).
Conduct of jury trials, see 12 V.S.A. § 1941 et seq.
Demand for trial by jury, see V.R.C.P. 38(b).
Examination and challenge of jurors in civil actions, see V.R.C.P. 47(a)-(c).
Examination and challenge of jurors in criminal proceedings, see V.R.Cr.P. 24(a)-(c).
Instructions to jury in civil actions, see V.R.C.P. 47(f) and 51(b), (c).
Instructions to jury in criminal proceedings, see V.R.Cr.P. 30.
Interrogatories, see V.R.C.P. 49(b).
Jury commission, see 4 V.S.A. § 951 et seq.
Jury of less than twelve in civil actions; majority verdict, see V.R.C.P. 48.
Jury of less than twelve in criminal proceedings, see Rule 23(b), Vermont Rules of Criminal Procedure.
Jury trials, see Ch. II, § 38.
Legal and equitable claims combined, see V.R.C.P. 39(d).
Request for trial by jury in small claims actions, see 12 V.S.A. § 5535.
Right to trial by impartial jury in criminal prosecutions, see U.S. Const. Amend. VI and Vt. Const. Ch. I, Art. 10.
Right to trial by jury in suits at common law, see U.S. Const. Amend. VII.
Special verdicts, see V.C.R.P. 49(a).

ANNOTATIONS

1. Application. On the whole, the factors in the statute dealing with penalties in an environmental enforcement action reflect a primary legislative concern with protecting the public health and safety and preventing unjust enrichment at the expense of the State and the public. These considerations strongly suggest, in turn, a legislative intent to assign the careful balancing of equities that must necessarily underlie the decision to impose such civil penalties, and the amount of any penalty to be assessed, with the agency traditionally entrusted with such decisions: a judge rather than a jury. State v. Irving Oil Corp., 2008 VT 42, 183 Vt. 386, 955 A.2d 1098.

Where a State environmental-enforcement statute has delegated the assessment of civil penalties in accordance with a highly discretionary calculation that takes into account multiple factors, this is the kind of calculation traditionally performed by judges rather than a jury, and does not require a jury trial. State v. Irving Oil Corp., 2008 VT 42, 183 Vt. 386, 955 A.2d 1098.

Attachment 2

On Lawyering

The practice and culture of practicing law

How do we Resume Civil Jury Trials in the Vermont Courts?

September 28, 2020 Rich Cassidy Leave a comment

The Justice System is Struggling to Adapt to the COVID – 19 Pandemic

Here we sit in the seventh month of the COVID–19 pandemic. When will it end? No one knows. Optimists thought that it would end with warm weather. They were wrong. Now they think a vaccine is on the horizon. Maybe. More realistic observers suggest a successful vaccine won't be administered broadly enough to bring the pandemic under control until late 2021. And we don't actually know that any vaccine under development will prove safe and effective.

OLYMPUS DIGITAL CAMERA

We hope so, but hope is not a plan.

On Friday, September 26, Johns Hopkins University confirmed 55,054 new cases, the highest single day total since August 14.

Meanwhile, the justice system is only beginning to adapt to the current circumstances. Across the country, courts are reopening in fits and starts. A few handfuls of jury trials have been conducted. Here in Vermont, the courts are searching to regain their footing after closing to all but emergencies.

The First Vermont Jury Trial Since March Took Place Last Week

Last week a federal criminal jury trial was conducted in U.S. District Court in Rutland. It's the first jury trial in Vermont since March. Jury selection is *U.S. v. S. C.* began last Monday. One hundred and fifty potential jurors were summoned. Those claiming co-morbidities likely to heighten the risks of COVID 19 were excused. Fifty jurors appeared in 3 separate waves over the day. Jury selection proceeded in the 8,000 square foot former post office space on the first floor of the courthouse. A jury of 12 was selected and trial proceeded. Counsel were masked at all times. Witnesses sat in a plexiglass enclosed witness box and cleaned up for themselves after their testimony. By stipulation, out-of-state witnesses testified by telephone. By mid-afternoon Wednesday, testimony was complete, and deliberations began. A guilty verdict was returned Thursday morning.

Although bumps may yet appear, it looks like our federal courts are back in business, albeit in a slower and more cumbersome way. But the federal courts handle only a small fraction of state cases, and they are far better resourced than our courts.

There is no Near-Term Prospect for State Civil Jury Trials

No jury trial has yet begun in state court. Civil jury trials are suspended until January, and there's reason to doubt that they will begin even then.

Particularly in criminal matters, the courts are under considerable pressure to resume jury trials. The Supreme Court Jury Restart Committee: *Report on Resumption of Criminal Jury Trials* (July 20, 2020), suggests that as many as 10 of our fourteen counties have at least one courthouse that is large enough to accommodate 12- person juries. But various other problems besides overall size, as small jury rooms, and HVAC issues, are problematic.

Even if 12-person jury cases can be managed for criminal cases it's hard to imagine that our state courts can muster the resources for civil juries of 12 until the pandemic is over. The courthouses we have that can manage 12-person juries will largely be absorbed in handling the backlog of criminal cases. Perhaps other buildings, like gymnasiums or hotel conference facilities, can be used temporarily. Even then, significant fit-up would be required. And only a few Vermont communities have such resources.

Alternative Dispute Resolution has Adapted

Meanwhile, alternative dispute resolution providers adapted quickly to the new conditions. Mediations and arbitrations have continued by videoconference with barely a stumble. These proceedings help to keep some pressure off the courts, but they rest on voluntary participation. While cases continue to settle in mediation and a few cases are being arbitrated, these processes are, by definition, alternatives to — not substitutes for — trial by jury.

Richard T. Cassidy

Search...

The Wit and Wisdom of Horace Rumpole

"As I've told him often enough, crime doesn't pay, or at any rate, not for a very long time."
— Horace Rumpole

— Sir John Mortimer

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Unless steps are taken soon, we may face years without civil jury trials. Even in normal times relatively few civil trials are conducted, but the prospect of trial drives the entire civil docket. Without the realistic expectation of a jury trial, the civil docket will quickly develop a huge backlog. In almost every case, one party will be significantly advantaged by delay. Absent the risk of a worst-case result before a jury, there is not much incentive for defendants to settle, except for a song.

Can we Move to 6-Person Civil Juries?

If we could conduct civil jury trials with 6 jurors instead of 12, the hurdles to resuming jury trials would be far lower. Unfortunately, *dicta* from an old Vermont Supreme Court case states that a 12- person jury is a constitutionally required:

> "We have no doubt, the 'right of trial by jury' spoken of in the constitution, and which it is said "ought to be held sacred," means a jury as at common law, which consists of twelve men, and that **wherever a constitution guaranties 'the right of trial by jury,' it is not competent for a legislature to reduce that number to six, or any less number than twelve**; for the very theory of a trial by jury requires the unanimous consent of twelve men to the verdict.

Lincoln v. Smith, 27 Vt. 328, 358-9 (1855) (emphasis added). *See also, State v. Machia*, 155 Vt. 182, 194 (1990) (criminal cases).

Some Vermont lawyers are suggesting that the Vermont Supreme Court adopt an administrative rule limiting jury size to 6 persons. Will the Court exercise its administrative authority in that way in the face of the language of *Lincoln*? Any such rule would almost certainly face a constitutional challenge. That would leave the Court in the uncomfortable posture of determining the constitutionality of its own rule.

There's another approach to advancing 6-person juries. Some brave lawyers must persuade Superior Court judges to order a 6-person jury trials.

No doubt any significant verdict would be appealed. Given the age of the decision in *Lincoln*, the outmoded thinking its language reflects, and the exigent need to get jury trials back on track, the prospects for success on appeal seem realistic.

Who is willing to give it a try?

Rich

Jury Trials, COVID-19, Legal Culture, The Future of Law Practice, Uncategorized 12-person jury trials, 6-person jury trials, COVID-19, Jury Trials, Lincoln v. Smith, U.S. v. S. C.

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Attachment 3

Click here for information regarding the Coronavirus Disease 2019 (COVID-19) and court operations, including participating in remote hearings.

Electronic filing via Odyssey File & Serve (OFS) is available in all Vermont Superior Courts and the Judicial Bureau. For more information about OFS and the new fee structure for eFiling, please visit the eFiling webpage.

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Home > **Jurors**

Jurors

Jury service may be the most serious obligation of citizenship.

The jury is one of the most important parts of our American legal system. The right to a trial by jury is written in the United States and Vermont Constitutions. It is a fundamental right guaranteed to every citizen.

In order for everyone to have the right to a trial by jury, it follows that citizens must be willing to accept the responsibility of jury service. Our system of justice depends on the willingness of private citizens to serve on juries and to make important decisions in the trial of cases. While being a juror is considered a duty of citizenship, it is really a service you are being asked to perform for your fellow citizens. It is your opportunity to participate directly in our legal system and to have an essential voice in the administration of justice.

Juror Questionnaire

Jury Services

Court Specific Reporting Instructions

Jury Orientation in Vermont

ORIGINS AND HISTORY OF THE JURY

Historians are unsure whether the jury system existed in England prior to 1066. It is well established that William the Conqueror brought to England from Normandy a system of having witnesses who knew about a matter to tell a court of law what they knew (to "swear" under oath). The English word juror comes from the Old French jurer which means to swear. However and wherever the jury system began, it has now spread from the British Isles to the United States, Africa and Asia.

In 12th Century England, juries were a tool for the king; the earliest recorded juries were employed to discover and present facts in answer to questions addressed to them directly by the king. The jury gave evidence, but only the king or his ministers made the final decision.

During the next two centuries, English juries moved from this advisory role to their current role as the decider of facts. By the end of the 15th century, the jury system had come to be regarded as the most valuable feature of English common law. Courts at that time began to allow parties to object to certain persons being seated on a jury, usually because they were personal enemies. It was not until the late 17th century that a jury could return a verdict of not guilty and not be in fear of fines and/or imprisonment for themselves. Hardly the impartial jury we now rely upon!

In the United States, the jury system became more important than ever after the Revolutionary War. The right to trial by a jury of one's peers became a symbol of the overthrown power of the king. From that time to this, the jury has become the central tenet of American law. Our ideal of equal justice for all probably could not have evolved without this strong belief in the wisdom of the jury.

The jury system combines together the rules of law with the common sense of the private citizen. Both the law and the community benefit from this interaction.

Attachment 4

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BOLCH JUDICIAL INSTITUTE

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Better by the Dozen

Bringing Back the Twelve-Person Civil Jury

BY PATRICK E. HIGGINBOTHAM, LEE H. ROSENTHAL & STEVEN S. GENSLER

A jury of 12 resonates through the centuries. Twelve-person juries were a fixture from at least the 14th century until the 1970s.[1] Over 600 years of history is a powerful endorsement.[2] So too are the many social-science studies consistently showing that a 12-person jury makes for a better deliberative process, with more predictable (and fewer outlier) results, by a more diverse group that is a more representative cross-section of the community. To that, add the benefit of engaging more citizens in the best civics lesson the judiciary offers. To all of that, add our common sense telling us that 12 heads are better than six, or eight, or even ten.

History. Social science. Civics. Common sense. That's a powerful quartet. And yet, most federal judges today routinely seat civil juries without the full complement of 12 members. Why? Because in 1973 the United States Supreme Court said it was okay. Since then, the smaller-than-12-person jury has become a habit. For many courts, it has become the default.

To test our shrunken-jury hypothesis, we gathered data from 15 federal districts over the three years from 2016 to 2018. The results are dramatic and confirmed our worst fears. Over 60 percent of the trials in our study were to juries of eight. It is the new normal. No other size jury comes close. Only one in eight civil trials is still heard and decided by the traditional 12-person jury. At the same time, the percentage of civil cases that end in a jury trial continues to plummet, dropping to less than 0.5 percent last year.[3] The result is that we are trying ever fewer civil cases to ever fewer jurors.

Federal judges often put the most complicated, high-stakes cases in the hands of smaller juries. Of the ten largest damage awards in civil cases tried to juries in federal courts in 2019, seven were by eight-person juries; one was by a seven-person jury; one was by a nine-person jury; and one was by a six-person jury.[4] None of those cases was tried to a 12-person jury. We are not saying any of these cases was wrongly decided. These examples simply show that the smallest juries can be, and are, asked to decide some of the biggest cases.

History, social science, civics, and common sense all tell us we have lost our way. Smaller juries should be the exception, and larger juries the rule. We can change course, and we should do it quickly. At the end of this essay, we offer three concrete steps we think can help.

To be clear, we don't propose requiring a 12-person jury in all civil cases. Rule 48 — which provides that ▸

This might seem an odd time for an article about restoring 12-person civil juries. As we went to final editing, most courts had put civil jury trials on hold due to the pandemic. We considered delaying publication, but after thinking about it, we came to believe that this is a critical moment.

Civil jury trials are already starting to return. As they do, some may urge us to use smaller juries to reduce the size of venires and make social distancing easier. We cannot ignore these practical points. But neither should we let these short-term concerns overtake all else or chart our long-term path. We have an opportunity, and a need, to remind ourselves why twelve jurors was for centuries the standard, and why it remains so in criminal cases. The civil jury post-2020 may run a little differently than it has before, but it remains a group tasked with making consequential judgments through a collaborative process. Whether those people are together in a courthouse or on a computer screen, that process works best when jurors deliberate by the dozen.

a "jury must begin with at least 6 and no more than 12 members," and that a verdict be returned unanimously "by a jury of at least 6 members" — rightly allows more flexibility than that. We want to remind judges, emphatically, that the choice is theirs to make. We ask that judges carefully consider the benefits of 12 as the gold standard, and not simply default to six, or eight, or ten. And we hope that, for most cases, 12 will be the number.

A Brief History: The Path from Twelve to "Six to Twelve"

The 12-person jury is a tradition tracing back to at least 1066, when William the Conqueror brought the practice of trial-by-jury in civil and criminal cases to England.[5] Initially, jurors were more like witnesses in that they were picked because they knew something about the facts at issue.[6] By the 1500s, jurors no longer decided cases based on their own knowledge, but based on the information they received in court.[7] Over time, jury service in England came to be viewed as "the most representative institution available to the English people."[8] Throughout the evolution of the English civil jury, the traditional number of jurors held constant at 12. William Blackstone summarized the importance of trials by 12 jurors in his *Commentaries*:

> [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* . . . .[9]

The Court held that smaller juries were constitutional so long as they provided the same function as a traditional 12-person jury. Based on its reading of the social-science literature of the day, the Court saw no loss of functionality . . . . [T]he consensus among social scientists then and since is that this was lousy social science and unwise policy.

The English colonists brought the jury-trial right, with 12-person juries, with them. In the colonies, the right became even more important than in England because it served as a shield and protection against British oppression.[10] The Declaration of Independence listed Britain's efforts to deny the colonies "in many cases, of the benefits of trial by Jury" as one of the reasons justifying the revolt.[11] During the colonial period, the traditional number of jurors remained constant at 12.[12]

After the Revolution, all of the 13 original states continued the right to a civil jury trial in different fashions.[13] The original Constitution, of course, contained no express provisions guaranteeing civil juries in the federal courts, and that omission proved costly as it gave the Anti-Federalists one of their strongest arguments against ratification.[14] The omission was rectified by the adoption of the Seventh Amendment, which preserves civil jury rights as they existed at common law.[15] And "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."[16]

For the next 180 years, the constitutional requirement of a traditional 12-person jury in federal civil cases was virtually unchallenged. The Supreme Court did not often discuss civil juries during this period, but whenever it did, it clearly had 12-person juries in mind.[17] In 1938, the 12-person-jury assumption became enshrined in Rule 48 of the Federal Rules of Civil Procedure, which told parties that they could "stipulate that the jury shall consist of any number less than twelve."[18] By all accounts, judges and litigants alike took it as gospel that a civil jury in federal court would have 12 members unless the parties agreed to a lesser number, and few ever did.[19]

Things changed in the early 1970s, dramatically, quickly, and unexpectedly. The 12-person standard started to erode when the Supreme Court upheld the constitutionality of a six-person state-court criminal jury in *Williams v. Florida*.[20] In *Williams*, the Court held that the tradition of 12-person juries was a "historical accident, unnecessary to effect the purposes of the jury system, and wholly without significance 'except to mystics.'"[21] The Court held that smaller juries were consti-

tutional so long as they provided the same function as a traditional 12-person jury.[22] Based on its reading of the social-science literature of the day, the Court saw no loss of functionality, and therefore no reason to prevent states from pursuing the cost savings many claimed smaller juries would deliver.[23] As discussed below, the consensus among social scientists then and since is that this was lousy social science and unwise policy.

While *Williams* involved criminal juries in state courts, it was clear to everyone that the decision's rationale would apply equally to civil juries in federal court. Working from that premise, in 1971 the United States Judicial Conference took the position that civil juries should have six members unless the parties stipulated to an even *smaller* number.[24] By the end of 1972, 56 of the 94 federal districts had changed their local rules to permit six-person juries in civil trials.[25] In 1973, the Court held in *Colgrove v. Battin* that the Seventh Amendment permitted six-person juries in civil cases, embracing the same functional approach it developed in *Williams*.[26] Here too, the Court read the social science as supporting (or at least not contradicting) the conclusion that six-person juries were just as good as 12-person juries, formally freeing districts from any constitutional obligation to seat 12-person civil juries.[27]

After *Colgrove*, the rout was on. The Judicial Conference pressed Congress for legislation setting the size of civil juries at six.[28] By 1978, just five years after *Colgrove*, 80 of the 95 districts had adopted local rules authorizing juries of as few as six.[29] Awkwardly, Rule 48 continued to speak in terms of allowing parties to *stipulate* to juries of fewer than 12, though the clear practice in the field was for courts to make the choice for them. In 1991, the text of Rule 48 was amended to catch up with the reality on the ground, providing: "A jury must begin with at least 6 and no more than 12 members."[30] During the mid-1990s, the Civil Rules Advisory Committee (chaired by Judge Patrick Higginbotham) led an effort to amend Rule 48 to return to tradition and require 12-person juries. But that effort came up just short of the finish line when the proposal was narrowly rejected by the Judicial Conference.[31]

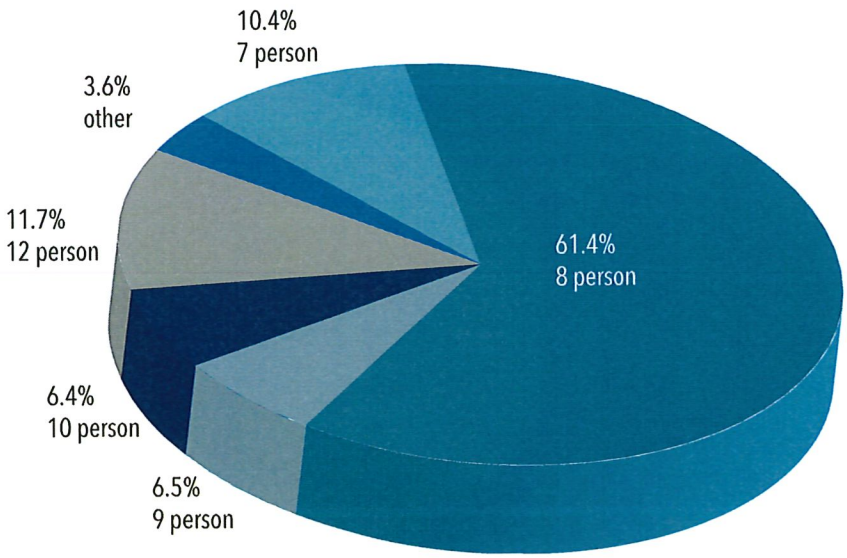
And that's where things stand today. But it is important to understand just where things stand. The Supreme Court has never said that the Seventh Amendment *requires* smaller juries. Nor has the Court ever spoken *against* the traditional 12-person jury.[32] All the Court has ever said is that the Constitution *permits* judges to empanel smaller juries if they choose. Rule 48 sends the same message. That's the key point. Whether to empanel six or 12 or some number in between is a choice for the judge to make.

Civil Juries Today

How are federal judges using the discretion the Supreme Court has twice given them — first through its interpretation of the Seventh Amendment, and then again through the 1991 amendment to Rule 48? The longstanding sense is that smaller juries have become the norm. That was our sense, too. But when we went to look at the data, we found none. Nobody had collected it.[33] We decided to change that.

Thanks to extraordinarily helpful Clerks of Court, we collected jury-size data from 15 federal districts from January 1, 2016, to December 31, 2018. We selected the districts to get a representative sample considering geography, the size and mix of the district's civil docket, and population. Our sample includes districts covering major coastal cities like the Southern District of New York and the Central District of California; smaller districts like the Middle District of Florida and the Western District of Oklahoma; and districts mixing large urban and widespread rural areas like the District of ▸

CIVIL JURY SIZE 2016-2018



Arizona, the District of Minnesota, and the Southern District of Texas.

As shown in Table 1 [below], in the 15 districts in our study, there were a total of 1,831 civil jury trials from 2016 to 2018 (and 22 in 2019). Of those, just 11.7 percent (214) began with juries of 12. Even adding in those that began as juries of 13 or 14, the total percentage of juries that began with at least 12 members was still just 12.3 percent (226).[34] Taking it one step further and adding in juries of 10 and 11, the percentage of juries that began with 10 or more members still totals only 20.0 percent (366). That means that only one in five juries began with ten or more members.

At the other end of the spectrum, juries that began with just six members were rare. Just 1.6 percent (30) of the juries began with only six members, perhaps because of the fear of a mistrial if any of the jurors was discharged and the parties would not stipulate to a verdict by fewer than six.[35] Moving higher on the scale, 10.4 percent (191) of the juries began with juries of seven. And, most significantly, 61.4 percent (1,125) of the juries began with eight members. Completing the spectrum, 6.5 percent (119) of the juries began with nine jurors.

In total, four out of every five civil juries begin with nine or fewer members. By far, the most common size of civil juries today is eight.

The numbers tell a clear story. In total, four out of every five civil juries begin with nine or fewer members. By far, the most common size of civil juries today is eight. It is the number in the majority of cases (over 60 percent), and no other number even comes close. Courts are over five times more likely to empanel a jury of eight than they are to empanel a jury of 12. In short, juries of eight are the new normal, and anything else is the exception.

These statistics hold up when analyzed across the type of suit. As shown in Table 2 (next page), for example, civil-rights cases make up the largest cate-

TABLE 1. JURY PANEL SIZE BY DISTRICT (2016-18)

	JURY PANEL SIZE									
DISTRICT	6	7	8	9	10	11	12	13	14	TOTAL
Arizona	0	8	55	14	0	0	2	0	0	79
California Central	1	11	240	12	3	1	1	0	0	269
California Northern	1	3	100	11	4	0	1	0	0	120
Colorado	0	21	49	30	32	1	22	0	0	155
Florida Middle	6	42	76	4	1	3	12	1	0	145
Florida Southern	4	32	114	13	4	0	0	0	1	168
Illinois Northern (includes 22 cases from 2019)	3	10	120	11	32	15	83	1	2	277
Minnesota	0	0	4	1	1	0	27	0	1	34
New York Southern	1	12	148	16	23	1	3	0	0	204
Ohio Northern	0	0	17	0	0	0	29	4	0	50
Ohio Southern	2	3	26	2	5	0	0	0	0	38
Oklahoma Western	1	9	29	0	1	0	0	0	0	40
Oregon	0	19	30	3	3	1	0	0	0	56
Texas Southern	9	21	83	2	4	1	30	1	1	152
Washington Western	2	0	34	0	4	0	4	0	0	44
TOTAL	**30**	**191**	**1125**	**119**	**117**	**23**	**214**	**7**	**5**	**1831**
% of Cases by Panel	1.64	10.43	61.44	6.5	6.39	1.26	11.69	.38	.27	

gory in the data set, with a total of 703 jury trials. Of those, 74.1 percent (521) began with juries of eight or fewer, while only 13.9 percent (98) began with juries of 12 or more. Contract cases make up the next largest category, with a total of 308 jury trials. Of those, 68.8 percent (212) began with juries of eight or fewer, while only 14 percent (43) began with juries of 12 or more. The same pattern emerges with torts (personal injury and personal property) cases, the third largest category with a combined total of 298 jury trials. Of those, 71.8 percent (214) began with juries of eight or fewer, while only 11.7 percent (35) began with juries of 12 or more. In virtually every subject category, juries of eight or fewer were used a majority of the time. In no subject category does the rate of 12-person juries come close to the rate of eight-person juries.

These trends also hold up across most of the individual districts we examined, with some notable exceptions. In 12 of the 15 districts in our study, juries of eight or fewer were used in at least half of the cases. Eight of those districts used juries of eight or fewer more than 80 percent of the time. Two districts (CA-C and OK-W) used juries of eight or fewer more than 90 percent of the time. In contrast, eight districts used juries of 12 or more less than three percent of the time. In those eight districts, the total numbers of juries with 12 or more members were three (NY-S), 2 (AZ), 1 (CA-C, CA-N, FL-S), and zero (OH-S, OK-W, OR).

But the data also reveal that a culture of using 12-person juries has held firm in some districts. The District of Minnesota, for example, used juries of 12 or more in 82.4 percent of its civil jury trials during our study period. Juries of 12 or more were also the majority in OH-N (66 percent). Those were the *only* districts in our study in which juries of 12 or more outnumbered juries of eight or fewer.

What's Wrong With this Picture?

So now we know. Juries have shrunk. Most of the time, eight is the number. But is it the right number? The answer from the social-science community has always been a resounding no. For nearly 50 years, social scientists have been saying that the Supreme Court got it wrong when it said that smaller juries were "just as good" as larger ones. It's worth reminding ourselves what we lose when courts seat shrunken juries.

The Supreme Court cited to several social-science "experiments" in *Williams* as supporting its conclusion that there were "no discernible dif-

TABLE 2. JURY PANEL SIZE BY NATURE OF SUIT (2016-18)

	JURY PANEL SIZE											
NATURE OF SUIT (NOS)	6	7	8	9	10	11	12	13	14	# OF PANELS	% OF PANELS	% OF 12-PERSON PANELS
Contract	7	31	174	25	25	3	43	0	0	308	16.82	13.96
Real Property	1	1	20	1	1	0	1	1	0	26	1.42	3.85
Torts: Personal Injury	4	36	145	25	14	4	33	0	0	261	14.25	12.64
Torts: Personal Property	2	4	23	3	3	0	2	0	0	37	2.02	5.41
Bankruptcy	0	0	3	0	0	0	0	0	0	3	0.16	0.00
Civil Rights	6	68	447	30	44	10	92	3	3	703	38.39	13.09
Other Statutes	5	6	54	7	7	2	17	2	1	101	5.52	16.83
Prisoner	0	14	72	10	9	3	7	0	0	115	6.28	6.09
Forfeiture/Penalty	0	0	5	0	0	0	0	0	0	5	0.27	0.00
Labor	4	24	85	7	4	0	9	0	0	133	7.26	6.77
Property Rights	1	7	90	9	10	1	9	1	1	129	7.05	6.98
Federal Tax Suits	0	0	7	2	0	0	0	0	0	9	0.49	0.00
Miscellaneous Case	0	0	0	0	0	0	1	0	0	1	0.05	100.00
TOTAL	**30**	**191**	**1125**	**119**	**117**	**23**	**214**	**7**	**5**	**1831**	**100**	**11.69**
% of Cases by Panel	1.64	10.43	61.44	6.50	6.39	1.26	11.69	0.38	0.27			

ference[s]" between 6- and 12-person juries on the factors that mattered.[36] That assertion was deeply flawed. As leading jury expert Professor Hans Zeisel showed, the items the Court cited were not empirical studies but rather conclusory statements by the authors, supported at best by limited experience and anecdote.[37] Indeed, as Zeisel explained, the Court's assertions were not merely unsupported — they were wrong.[38] Yet three years later, the Court doubled down on its "no discernable difference" hypothesis in *Colgrove*, this time citing additional studies it said provided "convincing empirical evidence" that it was right.[39] Once again, the social science community voiced its disapproval.[40]

The years following the *Williams* and *Colgrove* decisions saw a flurry of social-science experiments on whether reducing panel size affected jury function.[41] Virtually all of these studies show, contrary to the Court's conclusions, that larger and smaller juries are not functionally equivalent.[42]

One major difference is that larger juries are more predictable and less likely to render outlier awards. Six-person juries are four times more likely to return extremely high or low damage awards compared to the average.[43] If a juror has an extreme view on damages, that view can pull the group's award in that direction. The smaller the jury, the greater the force of a single juror's pull, and the greater the chance the jury will return an outlier award on both the low and high ends. In contrast, damage awards by larger juries are more likely to cluster toward the middle range of awards.[44]

The outlier problem is significant. First, juries are the voice of the community.[45] They are perhaps the most important way for the community to express its views on who has been wronged, who should be held accountable, and how. Since the community can't participate as a whole, we select a representative group of people and let them speak for the community. A jury's decision is best, then, when it hews closely to the views of the community it represents. Larger juries are more likely to reach verdicts closer to the consensus view.[46] Second, the increased chance that a small jury might return a verdict outside of community norms undermines faith and trust in the system. One of the major complaints of those deciding whether to file and try a civil dispute is whether the court system produces intolerably unpredictable and variable results.[47] Greater unpredictability is the predictable result when courts use shrunken juries.

One of the major complaints of those deciding whether to file and try a civil dispute is whether the court system produces intolerably unpredictable and variable results. Greater unpredictability is the predictable result when courts use shrunken juries.

Larger juries aren't just more predictable; they likely make better decisions. Social science shows that for many kinds of decision tasks, the larger a workable decision-making group, the better the decisions will be because of the increased resources more group members provide. If six heads are better than one, 12 are in most respects better than six or eight. Larger juries recall the evidence more accurately, recall more probative information, and rely less on conclusory statements and nonprobative evidence.[48] The studies do show a slight increase in deliberation time, and some have cited that as a disadvantage of larger juries.[49] But the effects are small and unlikely to significantly increase costs. And given that the parties' fates and fortunes are on the line, evidence that larger juries spend more time deliberating might be seen as a virtue, not a vice.

Larger juries are also more inclusive and more representative of the community. In *Williams* and *Colgrove*, the Court acknowledged the value of minority representation on juries but concluded that reducing the size of juries would have at most a negligible impact.[50] Basic statistical modeling shows that conclusion to have been glaringly wrong. In reality, cutting the size of the jury dramatically increases the chance of excluding minorities.[51] The increase depends on the percentage of that minority in the community. For a minority group that is 30 percent of a community, there is about a 1.4 percent chance that a 12-person jury will not include a member of that group. But if you cut the jury in half to six, the chance of exclusion doesn't just double, it goes up to 11.8 percent, making exclusion eight times more likely. For a minority group that is 20 percent of a community, there is about a 6.9 percent chance that a 12-person jury will have no member of that group. Cut the jury to six, and the chance goes up

to 26.2 percent. For a minority group that is 10 percent of a community, cutting the jury to six results in over half of the juries (53.1 percent) having no member of that group.

The studies that have looked at the impact of jury size on minority representation have confirmed that smaller juries are more likely to have no member of the minority group in question.[52] The effect is most pronounced when a jury has only six members. But it is also highly significant when a jury is reduced to eight members (the modal number in the districts in our study).[53] Here are two examples. A study from California found that 20 percent of eight-person juries had no black juror, compared to 8.7 percent of 12-person juries. In another study, a Cook County Circuit Court judge systematically tracked jury composition data from 277 civil jury trials held over six years from 2001 to 2007.[54] Because 25 percent of the venire pool was black, one might imagine that every jury (whether six or 12) would include at least one black juror. But, in fact, 28.1 percent of the six-person juries lacked even a single black juror.[55] In contrast, only 2.1 percent of the 12-person juries had no black jurors.

The Court made another serious social-science mistake in *Williams* and *Colgrove* when it assumed that the value of community representation would be functionally served so long as a single minority member was on the jury.[56] The social-science research, then and now, tells us otherwise. Studies show that the ability of a dissenting voice to withstand group pressure is greatly increased when a second dissenting voice is added.[57] On their own, people who see things differently tend to buckle and conform. With even a single ally, they are much less likely to cave to the group. In other words, a single person who sees things differently than five others is in a much weaker position than two people who see things differently than ten others.[58] Though the point is obvious, it is worth stating: it is statistically much harder for a dissenting juror to find an ally in a six- or eight-person jury than in a 12-person jury.[59]

The last remaining argument against larger juries is that they are more likely to hang. Interestingly, the available studies show that while that is true, the effect is much smaller than expected.[60] But the more important question is what conclusion we should draw when a jury does hang. Should we take it as signal that the system failed or that it succeeded?[61] Should we assume that the holdout(s) stopped the others from getting it right, or should we acknowledge the possibility that the holdout(s) stopped the others from making an unjust decision? No empirical analysis has ever answered, or is ever likely to answer, those questions. For that reason, we cannot know whether a lower incidence of hung juries is a virtue of smaller juries or a vice. And if we should ever conclude that "holdouts" are a bug in the system rather than a feature, it would be better to deal with the matter directly by altering the unanimity requirement than by sacrificing the uncontested benefits of larger juries.

The Jury-Size Debate Redux: 2020

In 2020, the case for returning to the 12-person jury is stronger than ever. In this era of vanishing civil trials, the arguments in favor of 12-person juries are even more compelling. In contrast, the supposed benefits of smaller juries, never strong, grow weaker every year as courts find more efficient ways to administer the few jury trials we still have.

First, whatever doubts people may have had before about the negative effects of smaller juries, the ongoing social-science and empirical research should make clear that those negative effects are real. Every study since 1996 has supported the prior research and the underlying statistical and decision-making theories. No new study or new theory refutes them. The jury-research community remains steadfast in concluding that smaller juries are composed differently and act differently than larger juries. It's time to stop doubting those findings. It's time to fully resist the appeal to anecdotes and individual observations. Larger juries are better than smaller juries in ways important to the process and the product.

Second, in an age when fewer and fewer civil cases are tried, each civil jury trial takes on added importance. In 1970, when *Williams* was decided, 4.3 percent of federal civil cases were tried to a civil jury.[62] By 1995, when the Advisory Committee proposed amending Rule 48 to require 12-person juries, the civil jury-trial rate had dropped to 1.8 percent.[63] It now stands at just 0.5 percent.[64] Of the 306,304 civil cases that terminated during the 12-month period ending December 31, 2019, only 1,534 of them reached a jury.[65] As Professor John Langbein put it, "we have gone from a world in which trials, typically jury trials, were routine, to a world in which trials have become 'vanishingly rare.'"[66] Fewer jury verdicts means fewer data points on liability and damages. These are critical signals to parties and lawyers about how to evaluate similar cases, whether to settle, and on what terms. Outliers — in either direction — exert an even greater influence as the number of verdicts shrinks. We should avoid them if we can. Returning to 12-person juries will help do that. ▸

Third, fewer jury trials also means fewer opportunities for citizens to serve as jurors. Civil jury service is one of the truly exceptional features of the American justice system.[67] Civil jury service is the closest most Americans ever get to having their own say in expressing and defining community norms.[68] People who serve on juries consistently say that the experience makes them more appreciative and more trustful of the court system.[69] In this era of declining jury-trial rates, we should fill every jury chair we can, every chance we get. Every empty jury chair is a missed opportunity to strengthen the bonds between the people and the courts.

Fourth, we should choose inclusiveness and broader representation. We know that smaller juries are more likely to be more homogenous and lack even a single member of a minority group that constitutes a significant part of the community. We should move in the direction of making sure that the few jury trials we do have are more representative of the community, not less. As Professor Shari Diamond put it, "[i]f increasing diversity in order to better represent the population is a goal worth pursuing for the U.S. jury, the straightforward solution — the key — is a return to the 12-member jury."[70]

Fifth, the cost arguments against larger juries have always been weak. Jury trials consume a tiny fraction of the court's budget. This is not the place to pinch pennies. That was true in the 1970s when the Court and the Judicial Conference first latched onto the cost-savings rationale for smaller juries,[71] and it remains true today. But even the most cost-conscious should consider modern factors that have already slashed the amount federal courts spend on civil juries. Most obviously, we are already spending comparatively less on civil juries because we have fewer of them. Since 1970, the civil jury-trial rate has dropped from 4.3 percent to 0.5 percent. We can afford to invest in the few civil jury trials we are fortunate enough to still have, while we still have them.

As new judges begin to adopt their own jury-trial practices, they should know that there is a choice to be made and that they can choose to seat 12-person juries, even if the culture and practice in their court is to seat smaller juries.

Moreover, seating a smaller jury just doesn't save the judge or the parties much time or expense.[72] Studies show that the time saved during voir dire and selection is negligible, at most a matter of a few minutes.[73] And changes in technology have already reduced the cost of assembling venire panels and picking juries, far more than shrinking jury size ever could. From delivery of the jury summons and jury questionnaires to applications to be excused or have jury service postponed, much of the time- and labor-intensive "paperwork" is now done electronically. It just takes fewer court personnel less time to manage juries than it used to take.

"Let's Seat Twelve This Time"

To recap, we know that larger juries are better than smaller juries in ways that really matter. And we know that the time and expense saved by seating a smaller jury is minimal at best. But our data clearly show that most judges are not choosing to seat full juries. How do we change that? How do we flip the model and make 12-person juries the default and not the exception? An essential first step is to keep reminding judges and lawyers of what is at stake.[74] During the heyday of the jury-size debate, articles like this were common. Not anymore. We don't want to let all that we've learned about the benefits of 12-person juries fade away and become forgotten. It is not yesterday's news. The topic is as timely and important today as it was in the 1970s or the 1990s, even more so in this age of vanishing civil jury trials. As a starting point, we have three suggestions:

Add Civil Jury Size to the Curriculum of Baby Judge's School. Our first suggestion is simple and could be implemented immediately. We can't think of a better place to start than to have jury size added to the curriculum of "Baby Judge's School," the training sessions for new (and pretty new) federal judges. This may be the best way to make a difference in the long run. Experience shows that judges are reluctant to alter their jury-trial practices once they become fixed.[75] That makes it vital to reach judges when they will be most open to considering all of the alternatives.

As new judges begin to adopt their own jury-trial practices, they should know that there is a choice to be made and that they can choose to seat 12-person juries, even if the culture and practice in their court is to seat smaller juries. It is equally crit-

ical that new judges know the social science demonstrating what is gained when judges seat a full 12-person jury. Without this information, we expect many new judges would understandably follow past practice in their home district, without giving much thought to what their own practices *should* be, and perhaps without even realizing that the choice is theirs to make. And as new judges make informed decisions for themselves, it is essential that they learn the history, social science, and civics that will allow them to make a fully informed choice.

Revise the *Benchbook*, the *Civil Litigation Management Manual*, and the *Handbook on Jury Use*. Reminded of the jury-size debate, trial judges at all levels of experience can and should make their own informed choices, and not just follow what they otherwise may see as the norm. Unfortunately, if a judge were to seek guidance from the federal judicial resources available today, those resources would not be of much help.

For example, a federal district judge might turn to the *Benchbook for U.S. District Court Judges*, a resource billed as "a concise, practical guide to situations federal judges are likely to encounter on the bench."[76] It includes a helpful chapter on how to select a civil jury, but it contains no discussion of how large the jury should be or the factors the judge might consider in making that choice.[77] That same judge might also turn to the *Civil Litigation Management Manual* developed by the Judicial Conference's Committee on Court Administration and Case Management.[78] It too contains a helpful discussion of jury trials, but it is devoted to techniques for judicial management of what happens during the trial, with no discussion of the process for seating the jury in the first place.[79]

A truly intrepid judge might track down a 1989 Federal Judicial Center publication titled *Handbook on Jury Use in the Federal District Courts*.[80] That would seem like an ideal resource to learn about jury size issues. The *Handbook* does address jury size, but it says only this: "Rule 48 of the Federal Rules of Civil Procedure allows parties in civil cases to agree to a jury of any size and to a non-unanimous verdict. Almost all of the federal district courts have local rules that provide for 6-member juries in civil cases, and such rules have been upheld by the U.S. Supreme Court."[81] There is no mention of the jury-size debate or the choice to be made. On the following page, the *Handbook* provides an example of how to calculate how many panel members to call to seat a jury, considering challenges for cause, peremptory challenges, and the seating of alternates (still the practice then). The example leads to a 6-person jury and implies that it is the norm in "routine civil cases."[82]

To be clear, we don't fault any of these publications individually for what they say. The problem lies in what they collectively do not say. None reminds judges that Rule 48 gives them a choice on the size of the jury to empanel. None addresses the pros and cons of jury size. Not a single word. We hope that, at the very least, the *Benchbook* and the *Manual* would be revised to remind judges that they may choose to seat a traditional jury of 12 and include some meaningful discussion of jury size. We also encourage the Federal Judicial Center to consider issuing a new edition of the *Handbook* to include a full discussion of the benefits of larger juries and to revamp the illustrations, so as not to send unintended signals that smaller juries are preferred.

Add Civil Jury Size to the Programs at Bench/Bar Conferences, Workshops, and Similar Exchanges. We encourage judges and lawyers to add this topic to the menu of topics addressed at different bench and bar events, continuing education programs, and similar exchanges. Lawyers can be reminded that they can ask for a jury of 12. It's their voice. Judges can be reminded that they have the authority to seat a jury of 12, even if the lawyers don't ask for it. It's their choice. Everyone can be reminded of the many reasons why the jury system works better with 12. A good conversation is rarely a bad thing; here, it could really help.

***

Over the last 40-plus years, the 12-person civil jury has gone from being a fixture in the federal courts to a relative rarity. We should all be concerned. That the Supreme Court has *allowed* us to use smaller juries *does not require* us to use them. We can use 12-person juries. The benefits are large; the disadvantages marginal. We're not suggesting this as a rule or a requirement. We are simply suggesting that judges not reflexively pick six, or eight, or even ten, and instead remember their authority to seat 12. And the great benefits of doing so.

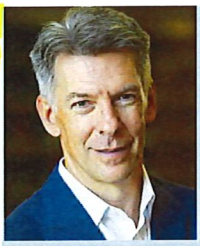
***Postscript:* Civil Jury Size While We Recover from the COVID-19 Pandemic.** As civil jury trials resume, some may urge us to bring them back in even smaller form. These arguments are easy to understand. Smaller juries require smaller venire panels. Jury selection and trial with social distancing may be easier to achieve with a smaller jury. We cannot ignore these points. Nor can we minimize the important role of social distancing ▸

in these difficult times. But we should be careful not to let these short-term concerns overtake everything else or chart our long-term path.

First, we have to be able to seat 12 in order to have a criminal jury, and that means we can do it in civil cases as well. What we learn in one setting will help with the other.

Second, during the transition period and as the pandemic wanes, civil trials will be even fewer and rarer than before. That makes the ones we will have even more critical, for all of the reasons explored above. We urge courts to carefully consider the strong reasons to, and the ways they can, pick and seat full juries while also responsibly managing social distancing.

The pandemic will end. When it does, we should be ready, including by having a robust, thriving civil jury system that will serve us all, in 2021 and well beyond.



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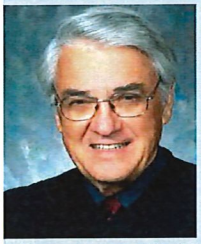

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1 *See* Richard S. Arnold, *Trial By Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 3 (1993) ("For over six hundred years, Western civilization took it for granted that a jury must be composed of twelve members.").

2 *See* Hans Zeisel, *. . . And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 712 (1971) ("History . . . might have embodied more wisdom than the Court would allow. It might be more than an accident that after centuries of trial and error the size of the jury at common law came to be fixed at twelve.").

3 *See U.S. District Courts—Civil Statistical Tables for the Federal Judiciary (December 31, 2019), available at* https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2019/12/31 (table showing jury-trial rates for 12-month period ending December 31, 2019).

4 *McMillion v. Rash Curtis & Associates*, No. 4:16-cv-3396 YGR (N.D. Cal. May 13, 2019) ($267,349,000; 8-person jury); *Opticurrent LLC v. Power Integrations, Inc.*, No. 3:19-cv-3563 (N.D. Cal. Mar. 4, 2019) ($222,216,519; 8-person jury); *Bayer Healthcare LLC v. Baxalta Inc.*, No. 1:16-cv-1122-RGA (D. Del. Feb. 5, 2019) ($155,190,264; 7-person jury); *Enslein v. Di Mase*, No. 4:16-cv-9020-ODS (W.D. Mo. Nov. 15, 2019) ($117,900,000; 8-person jury); *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, No. 5:14-cv-217-BO (E.D.N.C. Feb. 12, 2019) ($95,536,846; 8-person jury); *Vectura Limited v. GlaxoSmithKline LLC*, No. 1:16-cv-638-RGA (D. Del. May 3, 2019) ($89,712,069; 8-person jury); *Hardeman v. Monsanto Co.*, No. 3:16-cv-525 (N.D. Cal. Mar. 27, 2019) ($80,267,634; 9-person jury); *Taha vs. County of Bucks*, No. 12-cv-6867 (E.D. Pa. May 28, 2019) ($66,799,000, class action with 67,000 members; 8-person jury); *Intellectual Ventures I LLC v. T Mobile USA, Inc.*, No. 17-cv-577-JRG (E.D. Tex. Feb. 8, 2019) ($43,000,000; 8-person jury); *Boltex Manufacturing Company, L.P. v. Ulma Forja, S. Coop.*, No. 17-cv-1400 (S.D. Tex. Sept. 27, 2019) ($30,950,000; 6-person jury).

5 *See* Arnold, *supra* note 1, at 6.

6 *See* Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 584 (1993).

7 *Id.* at 585–87.

8 Stephen K. Roberts, *Juries and the Middling Sort: Requirement and Performance at Devon Quarter Sessions, 1649–1670*, in TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, *1200–1800*, at 182 (J.S. Cockburn & Thomas A. Green eds., 1988).

9 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *380 (1768) (emphasis added).

10 *See* Landsman, *supra* note 6, at 595–96.

11 THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).

12 *See* Arnold, *supra* note 1, at 14.

13 *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 (1973).

14 *See id.* at 662.

15 U.S. CONST. AMEND. VII.

16 Arnold, *supra* note 1, at 22.

17 *See Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 397 (1913) (stating that the right to jury trial preserved by the Seventh Amendment is the right to have issues of fact "tried by a jury of twelve"); *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899) (discussing "trial by a jury of 12 men").

18 FED. R. CIV. P. 48 (1938) (repealed 1993).

19 *See* Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 139 (1997).

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

21 *Id.* at 102.

22 *Id.* at 99–100.

23 *Id.* at 101–02.

24 *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITES STATES 5–6 (Mar. 15–16, 1971); Arnold, *supra* note 1, at 25.

25 *See* Arnold, *supra* note 1, at 25; H. Richmond Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507, 535–42 (1973) ("List of U.S. District Courts that Have Adopted Rules Reducing the Size of Civil Juries.").

26 *Colgrove v. Battin*, 413 U.S. 149, 157–58 (1973).

27 *Id.* at 158–60.

28 *See* Resnik, *supra* note 19, at 141.

29 *See* Report of the Proceedings of the Judicial Conference of the Unites States 78 (Sept. 21–22, 1978).

30 Fed. R. Civ. P. 48(a).

31 *See* Thomas D. Rowe, Jr., *The Twelve-Person Federal Civil Jury in Exile*, 46 U. Mich. J.L. Ref. 691, 691 (2013).

32 In *Williams*, the Court emphasized that legislatures might "have good reasons for concluding that the 12-man jury is preferable to the smaller jury." 399 U.S. at 103. And in what reads like a de facto mea culpa, the Court's opinion in *Ballew v. Georgia* includes a lengthy discussion of the social science demonstrating the benefits of larger juries. 435 U.S. 223, 233–39 (1978).

33 Unfortunately, detailed jury-size information is not accessible from CM/ECF or any other national-level federal-court database.

34 In theory, starting juries with 13 or 14 members could provide judges who prefer a 12-person jury with a cushion if jurors are discharged before the jury renders its verdict. However, Rule 48 states that "a jury must begin with . . . no more than 12 members." Fed. R. Civ. P. 48(a). Presumably, the courts that began with 13 or 14 did so with the parties' consent.

35 *See* Fed. R. Civ. P. 48(b) ("Unless the parties stipulate otherwise, the verdict must be unanimous and be returned by a jury of at least 6 members.").

36 *Williams*, 399 U.S. at 101.

37 *See* Zeisel, *supra* note 2, at 714–15 ("This is scant evidence by any standards."); *see also* Stephan Landsman, *In Defense of the Jury of 12 and the Unanimous Decision Rule*, 88 Judicature 301, 301 (May–June 2005) (stating that the Supreme Court made its finding "on the basis of a smattering of preliminary studies and a casual approach to history").

38 *See* Zeisel, *supra* note 2, at 715–20; *see also* Michael J. Saks, *Ignorance of Science Is No Excuse*, Trial 18, 19 (Nov.–Dec. 1974) (explaining that the Court completely misinterpreted some of the studies it cited and "ignored what is obvious to every social scientist").

39 *Colgrove*, 413 U.S. at 159 & n.15.

40 *See* Hans Zeisel & Shari S. Diamond, *"Convincing Empirical Evidence" on the Six Member Jury*, 41 U. Chi. L. Rev. 281, 282 (1974) ("Again the Court was misled; the four studies do not support this proposition."); Saks, *supra* note 38, at 20 ("[B]ecause of their glaring shortcomings, these studies contribute nothing to establishing the answer.").

41 *See* Dennis Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psych., Pub. Pol'y, & L. 622, 669 (stating that *Williams* "sparked criticism . . . and a flurry of empirical research by social scientists").

42 *See* Michael J. Saks & Mollie W. Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 L. & Hum. Behav. 451 (1997) (examining findings from 17 studies examining differences between 6- and 12-member juries).

43 *See* Zeisel, *supra* note 2, at 17.

44 *See* Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 Judicature 263, 263–64 (1996); Irwin A. Horowitz & Kenneth Bordens, *The Effects of Jury Size, Evidence Complexity, and Note Taking on Jury Process and Performance in a Civil Trial*, 87 J. Applied Psychol. 121, 128 (2002) (confirming hypothesis that damage awards of 12-person juries would be more predictable and less variable than those of 6-person juries).

45 *See* Valerie P. Hans, *Jury Damage Awards as Community Judgments*, 55 Wm. & Mary L. Rev. 935, 936–37 (2014) (stating that "the damage award is a key part of the civil jury's political activity" and that "damage awards and community values are deeply intertwined").

46 *See* Saks, *supra* note 44, at 263–64; *see also* Valerie P. Hans & Neil Vidmar, Judging the Jury 167 (1987) ("[T]he twelve-person jury should provide a more accurate and more reliable reflection of the community's assessment.").

47 *See* Saks, *supra* note 44, at 264.

48 *See* Saks & Marti, *supra* note 42, at 458–59; Horowitz & Bordens, *supra* note 44, at 124; *see also Ciulla v. Rigny*, 89 F. Supp. 2d 97, 103 n.6 (D. Mass. 2000) ("[T]his Court seats twelve person juries in every case to assure greater diversity and to improve small group decision making.").

49 Saks & Marti, *supra* note 42, at 457–58.

50 *See Williams*, 399 U.S. at 102; *Colgrove*, 413 U.S. at 159–60 & nn.15–16.

51 *See* Saks, *supra* note 44, at 264; Zeisel, *supra* note 2, at 716.

52 *See* Saks & Marti, *supra* note 42, at 455–57.

53 *See* Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decisionmaking*, 4 Del. L. Rev. 1, 14–19 (2001) (discussing a California study comparing 8-person and 12-person juries).

54 *See* Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. Emp. Leg. Stud. 425, 434 (2009).

55 *See id.* at 442. The authors confirmed that the findings were not the result of challenges for cause or peremptory challenges. *Id.* at 445.

56 *See Williams*, 399 U.S. at 101–02 & n.49.

57 *See* Saks, *supra* note 44, at 265; Zeisel, *supra* note 2, at 719–20 (pointing out that the Supreme Court had misinterpreted his own work on this subject).

58 The most authoritative study, building on other studies, stated: "[F]or one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations. . . . [I]n 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." Harry Kalven, Jr. & Hans Zeisel, The American Jury 463 (1966).

59 *See* Saks, *supra* note 44, at 265; Zeisel, *supra* note 2, at 720.

60 *See* Barbara Luppi & Francesco Parisi, *Jury Size and the Hung Jury Paradox*, 42 J. Leg. Stud. 399, 402–04 (2013); Saks & Marti, *supra* note 42, at 459–60.

61 *See* Committee on Federal Civil Procedure, Report on the Importance of the Twelve-Member Civil Jury in the Federal Courts, 205 F.R.D. 247, 272 (2002) (noting that when the party with the burden of proof can't persuade a sufficiently diverse group of people a result that neither side prevails may be the most appropriate); *see also Ramos v. Louisiana*, __ S. Ct. __, 2020 WL 1906545, *9 (2020) ("[W]ho can say whether any particular hung jury is a waste, rather than an example of a jury doing exactly what the plurality said it should — deliberating carefully and safeguarding against overzealous prosecutions?").

62 *See* Ellen E. Sward, The Decline of the Civil Jury 13 (2001) (table showing jury-trial rates).

63 *See id.*

64 *See U.S. District Courts—Civil Statistical Tables for the Federal Judiciary* (December 31, 2019), *available at* https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2019/12/31 (table showing jury-trial rates for 12-month period ending December 31, 2019).

65 *See id.*

66 John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 Yale L.J. 522, 524 (2012).

67 *See* Alexis de Tocqueville, Democracy in America 285 (Bradley ed., 1946) (describing the civil jury as a type of free "public school" in self-governance that allowed ordinary citizens to become acquainted with the law and participate in its development).

68 *See* Patricia Lee Refo, *The Vanishing Trial*, 30 Litigation 1, 4 (Winter 2004) ("The jury trial — with all of its faults — is democracy and self-governance in action. Beyond the passive act of voting, jury service may be the only opportunity most citizens have to participate in any aspect of self-government.").

69 *See* Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, *in* Verdict: Assessing the Civil Jury System 282, 285–86 (Robert E. Litan ed., 1993).

70 Diamond et al., *supra* note 54, at 449.

71 *See* Zeisel, *supra* note 2, at 711–12 (questioning the Court's cost-savings rationale and calculating that any savings would be de minimis).

72 *See* American College of Trial Lawyers, Report on the Importance of the Twelve-Member Civil Jury in the Federal Courts 32–34 (2001) (discussing and rejecting a range of cost-savings arguments).

73 *See* Peter W. Sperlich, *. . . And Then There Were Six: the Decline of the American Jury*, 63 Judicature 262, 276 (1980); William R. Pabst, Jr., *Statistical Studies of the Costs of Six-Man Versus Twelve-Man Juries*, 14 Wm. & Mary L. Rev. 326, 327 (1972) (52.1 minutes to empanel a 12-person jury compared to 52.0 minutes to empanel a 6-person jury).

74 As Judge Richard Arnold put it, also in this context, "[s]ometimes it is just good to be reminded of things." Arnold, *supra* note 1, at 3.

75 *See, e.g.*, Seventh Circuit American Jury Project: Final Report 11 (Sept. 2008) (reporting difficulty of getting judges to experiment with 12-person juries, compared to other proposed techniques for improving civil jury trials).

76 Benchbook for U.S. District Court Judges, preface iii (6th ed. 2013).

77 *See id.* § 6.04.

78 Committee On Court Admin. & Case Mgmt., Civil Litigation Management Manual (2d ed. 2010).

79 *See id.* at Chapter 6.B.1, 109–13.

80 Jody George et al., Handbook on Jury Use in the Federal District Courts (1989).

81 *Id.* at 44.

82 *Id.* at 45.