Six or Twelve?

The History, Science and Practice of the Number in the Box

by Jill P. Holmquist

In the span of a few short years, the U.S. Supreme Court overturned eight centuries of legal doctrine on the trial jury once considered fundamental in Anglo-American law. The Court dispensed with the federal requirement of a unanimous twelve-person jury based on what critics say was faulty legal and scientific reasoning. As a result, many states that had required unanimous twelve-person juries began reducing the size of their juries and modifying the unanimous decision rule. In Nebraska, since the jurisdictional maximum for county courts was raised, more plaintiffs' attorneys are filing suit in county court, presumably in part because of the six-person jury. The number in the box is a product of history, but it is also subject to revision. This article discusses the key facets of the debate: the history, the science and the practice.

I. History

The History of the Unanimous Twelve-Person Jury

For nearly 800 years, since the "Great Charter of English Liberties" known as the Magna Carta, English and, by extension, American law has enshrined for free people accused of crimes the right to trial by a jury of one's peers.[1]

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Article III of the United States Constitution provides for criminal trials by jury. One of the demands of Anti-Federalists for ratifying the Constitution was that guarantees for trial by jury in both criminal and civil cases must be extended. As a result, the Seventh Amendment was added.[2] Thomas Jefferson so revered the jury that he wrote, "I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[3] It is a fundamental right of due process applicable to the states under the Fourteenth Amendment.[4] Today, every child educated in the United States associates the jury with justice.

Twelve is the number Americans generally associate with juries. Despite the reality that juries are often smaller, twelve retains a symbolic meaning.[5] The movie title *Twelve Angry Men* instantly connotes a jury; *Six Angry Men* would not have the same effect.

A jury of twelve has great historical significance. Even before the Magna Carta extended the right to trial by jury, English law directed the sheriff to assemble a jury by requiring "twelve, legal men from the neighborhood to swear that they will make known the truth according to their conscience."[6] Some five hundred years later, Blackstone wrote, "the founders of the English law have, with excellent forecast, contrived that ... the truth of every accusation ... should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion."[7] The founders of this country drew from Blackstone's *Commentaries* when developing state constitutions and the federal government, so the link between a jury and twelve jurors was commonly known.[8]

The fundamental nature of the twelve-person jury in the U.S. was affirmed by the Supreme Court in 1898. In *Thompson v. Utah*, the Court considered whether the State of Utah could try someone under state law requiring only eight jurors when

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the felony crime was committed in the Territory of Utah, then governed by federal law. After concluding federal law applied, the Court turned to the question of whether "jury" in the Constitution and the Sixth Amendment meant "a jury constituted, as it was at common law, of twelve persons, neither more nor less".[9] The court concluded that "jury" and "trial by jury" had "the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of [the Constitution]."[10] Thus, conviction by an eight-person jury deprived the defendant, Thompson, of his Constitutional rights.[11]

The Court rejected the Utah Supreme Court's conclusion that "if a jury of eight men is as likely to ascertain the truth as twelve, that number secures the end," and that "there can be no magic in the number twelve, though hallowed by time."[12] To the contrary, the U.S. Supreme Court wrote, "the wise men who framed the Constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors."[13]

It was not until 1968, 70 years after *Thompson*, that the Court considered whether the Due Process clause of the Fourteenth Amendment required states to provide jury trials in criminal cases that, in federal court, would be tried to a jury. In *Duncan v. Louisiana*, the Court held that "the right to jury trial in serious criminal cases is a fundamental right" which the States must provide to those in its jurisdiction.[14]

The Attack on the Unanimous Twelve Person Jury [12]

The Case of Williams v. Florida

In the wake of *Duncan* came cases contesting which attributes of a jury trial were fundamental rights. One such case, *Williams v. Florida*, addressed the number of jurors serving on a criminal case. The Court held in *Williams* that "the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment" except in criminal cases involving the possible imposition of the death penalty.[16]

The Court based its decision on an analysis of the historical origin of the twelve-person jury and some "experimental" research. It concluded that the twelve-person jury "appears to have been a historical accident"[17] unrelated to the jury's purpose, which it said was "to prevent oppression by the Government", specifically, "the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.""[18]

"Given this purpose," the Court stated, "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen", a role, the Court asserted, which is "not a function of the particular number" of jurors.[19] The Court's elaboration deserves scrutiny. It said:

> To be sure, the number should *probably* be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six than when it numbers twelve -- particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a factfinder hardly seems likely to be a function of its size.[20]

To bolster its assertion that a six-person jury was functionally equivalent to a twelve-person jury, the Court asserted that the few experiments that existed "indicate that there is no discernible difference between the results reached by the two different-sized juries." The Court concluded that, "neither currently available evidence nor theory a suggests that the twelve-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members."[21]

Criticism of Williams v. Florida

The Court's conclusions were, and continue to be, met with a great deal of criticism, not only by other justices and legal scholars, but also by scientists. Justice Harlan, dissenting, said "I consider that, before today, it would have been unthinkable to suggest that the Sixth Amendment's right to a trial by jury is satisfied by a jury of six, or less, as is left open. . . ." He described the Court's approach as a "circumvention of history" which "is compounded by the cavalier disregard of numerous pronouncements of this Court that reflect the understanding of the jury as one of 12 members. . . ."[22] Justice Marshall, dissenting in part, wrote, "As I see it, the Court has not made out a convincing case that the Sixth Amendment should be read differently than it was in Thompson, even if the matter were now before us *de novo*-much less that an unbroken line of precedent going back over 70 years should be overruled."[23]

Legal scholars disparaged both the legal reasoning and the interpretation of scientific research. Peter W. Sperlich opined there were three "casualties of *Williams*: . . . history, the American constitutional tradition, and empirical evidence."[24] He asserted that the Court's "notion of 'empirical evidence' was of embarrassing incompetence" and cited one commentator who gave the harsh opinion that "[t]he willingness of the Court to be persuaded by such flimsy evidence lays bare its lack of concern for the institution of jury trial."[25] Robert H Miller concluded that *Williams* was wrongly decided, that *Williams* and its progeny should be overruled, and that all state and federal courts should return to the twelve-person standard.[26]

Scientists lambasted the Court for its interpretation of existing studies. Most notable, perhaps, was the response of

researcher Hans Zeisel, whose work with Harry Kalven was cited by the Court in support of its decision.[27] Zeisel corrected the Court, stating that his "findings were quite different" from the Court's presentation of them.[28] In addition, he said the other studies cited provided "scant evidence by any standards" to conclude there was "no discernable difference" between six- and twelve-person juries."[29] Indeed, the Court's characterization of the "experiments", as the Court called them, was woefully inadequate. Of the six, "the first was a mere assertion with no evidence; the next three were casual observations of the verdicts rendered by [two] smaller juries. . . ; the fifth was merely a report that a smaller jury had been used; and the sixth was a discussion of economic advantages", having no bearing on the functioning of a jury.[30]

Williams' Progeny

Williams was followed by *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972), which addressed the question of unanimity, and *Colgrove v. Battin*, 413 U.S. 149 (1973), which addressed the juror number requirement for civil cases under the Seventh Amendment. Not surprisingly, *Apodaca* and *Johnson* held that the Sixth Amendment does not require unanimous jury decisions in criminal cases and *Colgrove* held that neither the Seventh Amendment nor federal statutes prohibited civil juries of fewer than twelve. Like *Williams*, these decisions were met with criticism, particularly *Colgrove*.

In *Colgrove*, the Court first erred in reaffirming the "soundness" of its conclusion in *Williams*, stating, "Significantly, our determination that there was 'no discernible difference between the results reached by the two different-sized juries,' drew largely upon the results of studies of the operations of juries of six in civil cases."[31] The Court then erred a second time by averring that new studies had "provided convincing empirical evidence of the correctness of the Williams conclusion."

The Court's assertion that its reliance on the studies in *Williams* was accurate, despite published criticisms, astonished the well-respected scholars who had thoroughly explained the Court's errors. They found even more disturbing the Court's reliance on four more studies (two of which were merely unsigned student notes in law reviews) as providing "convincing empirical evidence" when they did not.

Michael J. Saks wrote an article aptly entitled, "Ignorance of Science Is No Excuse" in which he asserted, "The quality of…scholarship displayed [by the Supreme Court] would not win a passing grade in a high school psychology class. . . ."[32] He explained,

> What the Court did not realize was that not all empirical studies are equal.... Studies using poor methods tell one nothing; but they can seriously mislead because their findings still may properly be called 'empirical.' The empirical studies cited in Colgrove v. Battin, because of their faulty methods, said much less than the Court thought they were saying.[33]

Hans Zeisel, joined by another noted researcher, Shari Seidman Diamond, responded with an article entitled, "'Convincing Empirical Evidence' on the Six Member Jury", in which they said the Court's "failure to evaluate empirical research properly raises serious questions." After analyzing the flawed research, they concluded that the Court's reliance on the "four studies and nonexistent evidence in Williams" leading to its conclusion that there is no discernible difference between six- and twelve-person juries was "a disconcerting picture."[34]

The Limits of Williams: Five is Too Few

In *Williams*, the Court commented in a footnote, "We have no occasion in this case to determine what minimum number can still constitute a 'jury,' but we do not doubt that six is *above that minimu*m."[35] In *Ballew v. Georgia*, 435 U.S. 223 (1977) the Court considered what number constituted too few jurors. The petitioner, Ballew, challenged his misdemeanor trial by five jurors.

The Court framed its review of the five-member jury in terms of "whether it inhibits the functioning of the jury as an institution to a significant degree."[36] Ignoring its erroneous reliance on dubious scientific research, the Court reaffirmed its holding in Williams and proceeded to examine more empirical studies that "raise significant questions about the wisdom and constitutionality of a reduction below six."[37]

The Court identified five research findings that caused concern:

> 1. smaller juries have less effective group deliberation;
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> 2. the accuracy of verdicts in smaller panels is in doubt because the reduced jury size and resulting verdict variability raise the risk of convicting an innocent person;
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> 3. as juries become smaller, verdicts of jury deliberation in criminal cases will fluctuate "to the detriment of" the defense (in part, because persons in small groups with minority viewpoints are less likely to adhere to them);
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> 4. smaller jurors will have less representation of minority groups in the community; and
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> 5. "several authors have identified in jury research methodological problems tending to mask differences in the operation of smaller and larger juries." [38]

After discussing these findings, the Court stated, "While we adhere to, and reaffirm our holding in *Williams v. Florida*, these studies . . . . lead us to conclude that the purpose and

functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members."[39]

Thus, although the Court had no "doubt that six is *above that* [Constitutional] *minimum*" in *Williams*, which it expressly reaffirmed, the Court in *Ballew* concluded that five is below that minimum. Since we no longer count some people as fractions, it would appear that the Court really is concluding that a six-person jury is the constitutional minimum. In addition, it implicitly recognizes that there is, indeed, a functional difference between a twelve-person jury and a smaller jury.[40]

II. The Science

It's Legal, But . . . : An Examination of the Costs and Benefits

Article I of the Nebraska Constitution is the Bill of Rights, including the right to trial by jury. It states:

> The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less [sic] number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury.[41]

Although the right to a twelve-person jury now exists in District Courts, amending the State Constitution is always possible. In this time of economic crisis and budget shortfalls, it is conceivable that jury size could become an issue. A bill pending in the Legislature this year recommended increasing the compensation to jurors to minimum wage, raising the question of what sources of funding senators contemplated and whether they considered any contemporaneous cost reductions.[42]

Any discussion of reducing the number of people required for a jury should begin with the recognition that the considerable concerns that led the Court in *Ballew* to conclude that *five-person* juries fail to meet constitutional standards arose out of comparisons of *six-person* juries with twelve-person juries. That raises serious questions about whether six-person juries serve the justice system well.[43]

According to *Williams*, the purpose of the jury is to protect people from government oppression.[44] Because that narrow definition met with substantial criticism,[45] other aspects of jury function deserve consideration as well. Indeed, since the constitutional question in reducing jury size is functional equivalence, one ought to consider that function broadly.[46]

An analysis of the Court's discussion yields some additional criteria which should be weighed. They include drawing on "the commonsense judgment of a group of laymen", "community participation and shared responsibility" in rendering verdicts in criminal cases, effective group deliberation, insulating triers of fact from outside pressure, and providing "a fair possibility for obtaining a representative cross-section of the community." Secondary purposes include allowing public participation in the administration of justice, enhancing public confidence in the law, contributing to a favorable view of judges, and strengthening the ties of the public to the government.[47] Implicit in the Court's statement that its "essential feature" of a jury arises from its "interposition between the accused and his accuser" is the notion of the jury functioning as a check on the legislative and judicial branches of government.[48]

This function may have contributed to suspicion about how the Court could dispatch with eight centuries of legal precedent. Sperlich, referring to the *Williams* line of cases as "a revolution" in American law noted, "[N]ot only was this revolution unexpected, it also was uncompelled. There were no irresistible forces of legal or societal development to which the justices were forced to pay homage."[49] This, he argues, is bound to raise suspicion.[50] Others have also questioned the Court's (and other courts') motives.[51] While conspiracy-like theories may seem somewhat irrational, the fact that they exist has potential implications for the trust with which the public views the courts.

In *Ballew*, the Court provided the benign rationale explaining, "The States utilize juries of less than twelve primarily for administrative reasons. Savings in court time and in financial costs are claimed to justify the reductions."[52] Thus, from the States' perspective, determining the number of people who should make up a jury is a cost-benefit analysis.

Jury Numbers and Unanimity

A discussion of jury numbers and cost/benefit issues requires mention of unanimity requirements. As Zeisel observed, when a jury need not decide unanimously, that jury is effectively a smaller jury.[53] This reality was implicitly recognized in *Burch v. Louisiana* 441 U.S. 130 (1979), which found unconstitutional the conviction of a defendant by five out of six jurors. It found that a non-unanimous verdict in a six-person jury (where the defendant is accused of a nonpetty offense) "presents a similar threat to preservation of the substance of the jury trial guarantee" as did the five-member jury in *Ballew*.[54] The reduced number simply did not meet Constitutional requirements.

In *Burch*, the State gave economic justifications for its verdict rule, as occurred in *Ballew*. The Louisiana courts claimed the non-unanimous verdicts of five to six reduced juror deliberation time and reduced the number of hung juries.[55] These benefits, among those alleged to reduce costs, make a good starting point for examining the data.

General Scientific Consensus

Social scientists devote entire books to the discussion of the

scientific research on jury behavior. Therefore, this discussion of scientific consensus must be painted with a broad brush, glossing over nuance and dissent.

Deliberation Time

The research generally substantiates the existence of some difference in deliberation times between juries of different size and unanimity rules. A six-person jury takes less time to reach a verdict than does a twelve person jury which, as Saks and Marti put it, "is not a controversial finding."[56] Inefficiencies in the deliberation process make the larger group take longer.[57] Similarly, it should be no surprise that non-unanimous juries deliberate for shorter time periods.[58]

In both cases, the reduced time has implications for the quality of deliberations-a factor that is key to the Supreme Court's functional equivalence inquiry. The time difference in six-person juries may reflect less deliberation on the substantive issues of the case.[59] In jurisdictions requiring unanimous jury verdicts, all jurors have the opportunity to present their views and, consequently, jurors with minority opinions report greater satisfaction with their service.[60] Unanimity rules also affect the type of deliberative process used. Deliberation under a unanimous verdict rule is driven by evidence; when the majority rules, deliberation is driven by verdict.[61]

However, the actual cost savings in smaller juries may not be significant.[62] Actual average time differences tend not to be great.[63] In addition, time differences diminish when controlling for other factors, such as the amount in controversy,[64] severity of the crime, and the complexity of cases.[65]

Hung Juries

As with jury deliberation time, research substantiates that larger juries are more likely to deadlock, or "hang", than are smaller juries. The Kalven and Zeisel study cited in *Williams* came to that conclusion because a single person voicing a minority view in a group of six will have more psychological difficulty countering the opinion of the other five than would a juror who has an ally confronting ten other jurors.[66] A meta-analysis by Saks and Marti of fifteen hung jury studies from 1972-1990 found that jury size does have a statistically significant effect on the rate of jury deadlocking.[67] Similarly, a unanimous verdict rule tends to result in higher hang rates.[68]

In 2003, the National Center for State Courts (NCSC) published an extensive research project funded by the National Institute of Justice examining the rates of hung juries. The researchers gathered data from 30 urban jurisdictions and found the average hung jury rate in criminal cases was 6.2%.[69] They estimated that the national average would be somewhat lower, which would bring it closer to the national average 5.5% rate (including state and federal courts) that Kalven and Zeisel found in 1966.[70] They also learned that hung jury rates varied greatly from court to court, so while the average might be low, some jurisdictions would be high.[71]

In comparing criminal cases in state courts in four different jurisdictions, the NCSC researchers found that the hang rate varied widely from jurisdiction to jurisdiction. In contrast, federal courts had a steady low rate of hung juries, varying from an average high of 2.0% to an average low of 1.2% from 1980 to 1997.[72] They also found that criminal cases had a higher hang rate than did civil cases, which had six-person juries.[73]

However, jury size is not the only factor correlated with deadlock. Civil trials, which have a lower rate of deadlock, have a lower burden of proof, which may make it easier to achieve consensus.[74] Case ambiguity, i.e., the relative weakness of evidence, also plays a role in hung jury verdicts.[75] Locale seems to have an impact, as well; higher density and heterogeneous jurisdictions tend to have higher hang rates.[76] Thus, federal jurisdictions which encompass larger and more rural areas have a lower hang rate.

Although governments prefer to avoid hung juries, it should be noted that from the perspective of criminal defendants and their counsel, a higher hang rate is preferable, as it reduces the chances for an inaccurate verdict.[77] In fact, most hung juries in criminal cases "do not reflect a lone holdout or even two dissenters, but rather a more evenly divided final vote",[78] suggesting that alternatives to trying the case might be better. In addition, service on a hung jury appears to have a positive impact on former jurors' subsequent participation in democracy, as measured by voting. The only study to examine the relationship between jury service and subsequent voting patterns found that "previously infrequent voters who had the intense deliberative experience of a hung jury ... experienced a 6.8% increase in their voting rate in the years after completing their jury service."[79]

Quality of Deliberations: Participation

As discussed in the context of deliberation time, shorter deliberations in six-person juries may reflect shorter deliberation on substantive issues. Because a single juror in a six-person group is under greater psychological pressure conform, she might not even express her contrary opinion.[80] This pressure should not be underestimated. Saks explains that "the difference between having one ally (10-2) and having no allies (5-1) is as great a psychological difference as one is ever likely to experience in daily life."[81] In non-unanimous juries, jurors with minority positions may be marginalized because they need only deliberate until they have a majority consensus,[82] so minority views may not be thoroughly discussed. These findings are consistent with Justice Blackman's statement in *Ballew* that "progressively smaller juries are less likely to foster effective group deliberation."[83]

Quality of Deliberations: Verdict Accuracy

Another finding mentioned in *Ballew* is that the accuracy of jury verdicts tends to diminish in smaller groups. One reason for this is that larger juries collectively remember evidence more accurately.[84] Another is that a larger group more effectively counters biased individuals, yielding greater objectivity.[85] Conversely, a single persuasive or strongly opinionated person in a small jury is likely to have greater influence than in a twelve-person jury.[86] Participation is also a factor since, in smaller groups, jurors in the minority are less likely to contribute important facts or perspectives in conflict with the group discussion.[87]

In criminal cases, verdict accuracy is described in terms of Type 1 and Type 2 errors. In that context, a Type 1 error is convicting an innocent person and a Type 2 error is acquitting a guilty person. Studies relied on by the *Ballew Court* found that Type 1 errors increase as the size of the jury diminishes.[88] However, Saks has suggested that Type 2 errors are more frequent because the conviction rate is so high (near 80%) and because of the increase in variability in verdicts with small juries.[89]

Diminished Predictability of Verdicts

Greater variability in jury verdicts equates with diminished predictability. In deciding the award in any given civil case, larger juries will produce more moderate awards.[90] In other words, smaller juries will produce more awards on the extremes. From a statistical standpoint, "Saks explains that reducing the sample size by one-half (from 12 to 6) increases the variability, or standard error, by 41 percent."[91] Obviously, this makes it much harder for counsel to predict the outcome of a case. Trying cases is more of a gamble.

Less Representative Juries

In *Williams*, the Court opined that, although theoretically larger juries would yield more diverse perspectives, "in practice, the difference between the twelve-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible."[92] Saks responded by suggesting the did Court know (but ignored) what informed citizens exposed to public opinion polls know: because we are a diverse society, "the larger the sample, the more representative it is."[93] Concretely, he explained, this means that repeatedly drawing random samples of twelve jurors will ensure that defendants have one or more minority on their juries 72% of the time; when randomly drawing six, that number drops to 47% of the time-a 25% difference.[94] The conclusion: "[s]maller juries are more likely to contain *no* members of minority groups."[95]

This factor, perhaps more than any other, may explain why "[t]hose who have studied jury size almost uniformly oppose" reducing the number from twelve.[96] Our national community shares the understanding that all have a right to a trial by a fair and impartial jury of peers. From the perspective of legal history and social science, how can a trial be fair if it is not representative?

Implications for Policymakers

Policymakers have a duty to weigh the economic benefit of reducing (or retaining, in the case of small juries) the number of jurors constituting a jury against the harms caused by that reduction or retention: reduced deliberation time, fewer hung juries, diminished quality of deliberations in terms of participation and verdict accuracy, greater fluctuation in jury verdicts and less representative juries. In addition, policymakers ought to consider the consequential benefits of community participation, including greater civic engagement and confidence in and approval of the justice system.

The Nebraska juror handbook provides sage advice: "The administration of justice is not a process in which shortcuts should be taken simply to speed up the procedure. The determination of truth and the fair and equitable application of the laws are important."[97] Although the Supreme Court sanctioned such shortcuts in *Williams*, the Nebraska Supreme Court recognizes these greater purposes.

II. The Practice

Trial Attorney Preference

Harry Kalven, Jr., the law professor and Constitutional scholar who collaborated with Hans Zeisel on the groundbreaking treatise, *The American Jury*, was especially concerned about the rights of criminal defendants. But trial attorneys, whose role is to advocate for their clients may have different perspectives, depending on whom they represent.[98] Starr and McCormick stated that "[w]hen the attorney is given a choice of jury size, there is no absolute rule to follow."[99] This is due in part because the statistics show averages; they do not predict what any single jury might look like or how it would behave.

But based on the research, criminal defense counsel should prefer larger juries, both for predictability reasons and for representativeness, particularly when race or ethnicity is a potential issue. For those in civil practice, in theory, plaintiffs should prefer smaller juries, as they are more likely to go high (although they are also more likely to render a defense verdict.)

However, as Starr and McCormick point out, the research does not indicate how jury size and pro-plaintiff and pro-defense attitudes interact.[100] Strongly held attitudes may affect jury behavior at a level not measured in the research. And attitudes change over time. This is true for criminal trial attorneys, as well. Thus, an attorney's need may change over time, as well as from case to case, depending on whom they represent.

Certainly the research demonstrates that jury size does matter on a macro level. But, for the practicing attorney, who has to deal with individual juries, experience and intuition count. If lawyers perceive different jury sizes yield different verdicts, jury size matters at that level, too.

Several attorneys shared their perspectives on the jury size they prefer when advocating for their clients. Nebraska defense attorney Stephanie Stacy prefers twelve person juries because she can better assess the risk of going to trial for her client; there is more predictability in a group of twelve. Ken Suggs, a former ATLA (now AAJ) President who practices all over the U.S., prefers six person juries, because he has fewer to persuade. Guy Kornblum, a highly respected California attorney who joined the plaintiff's bar after serving as insurance defense counsel for many years, still prefers a twelve-person jury for his clients. Tony Shafton, also defense-counsel-turned-plaintiff's counsel and a formidable trial adversary, offered a different perspective. When asked whether he prefers smaller juries or larger juries, he responded, "I'm such a ham-give me twelve. I want an audience!"

Endnotes

1 Lysander Spooner, *An Essay On the Trial By Jury* (1852), re-publication, Project Gutenberg, 1999, at 2.

2 Paul D. Carrington, *The Civil Jury and American Democracy*, 13 Duke Journal Of Comparative & International Law 79, 83 (2003).

3 Thomas Jefferson, Letter to Thomas Paine (July 11, 1789).

4 *Duncan v. Louisiana*, 391 U.S. 145 (1968).

5 It is possible that most Americans are unaware that juries are sometimes smaller; a recent online poll found that over half the population has never attended jury selection and three-quarters have never served on a jury. The Harris Poll® #9, January 21, 2008, available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=861 (last retrieved June 1, 2009).

6 Spooner, *supra*, at 55 (citing Crabbe's *History of the English Law*, 119. 1 Reeves, 87. Wilkins, 321 323).

7 *Duncan*, at 151-152 (1968)(citing 4 W. Blackstone, *Commentaries on the Laws of England* 349, 349-350 (Cooley ed. 1899).

8 Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, Foreword by Forrest McDonald (2nd ed.), Chapter: 22: "Trial by Jury": Six or Twelve Jurors? (1997), available at http://oll.libertyfund.org/title/675/106981 (last retrieved June 1, 2009).

9 *Thompson v. Utah*, 170 U. S. 343, 349 (citing 2 Hale's P.C. 161 (c. 1736); 1 Chitty's Cr.Law 505) (1898).

10 *Id*. at 350.

11 *Id*. at 351.

12 *Id*. at 353 (citing *State v. Bates*, 14 Utah 293).

13 *Id*.

14 *Duncan*, 391 U.S. at 154 (1968).

15 The Court's decisions have been characterized as an attack by a number of authors, including Stephan Landsman, The Civil Jury In America, 62 Law & Contemp. Probs. 285, 291 (Spring 1999) and the eminently respected researcher Hans Zeisel, quoted by Peter W. Sperlich, *And Then There Were Six: The Decline of the American Jury*, 63 Judicature 262 (1980) Reprinted in Elliot E. Slotnick, Ed., *Judicial Politics*, 172 at 181 (1999) ("One must see the reduction of the jury size in civil cases in the federal courts as but one move in a major attack on the jury system....")(citation omitted).

16 *Williams v. Florida*, 399 U.S. 78, 100 (1970).

17 *Id*., at 89 and 102.

18 *Id*., at 100 (citing Duncan, 391 U.S. at 156).

19 *Id*.

20 *Id*. at 100-101. (Citations omitted; emphasis added. Query just what the Supreme Court means when it uses the word "probably" in reference to characteristics of a Constitutional institution.)

21 *Id*.at 101-102 (citing, among others, Harry Kalven, Jr. & Hans Zeisel, *The American Jury*, 462-463, 488-489 (1966).)

22 *Id*. at 122 and 126. Justice Harlan chastised the Court for "liberat[ing] itself from the 'intent of the Framers'"(*Id*. at 122), determining that twelve persons "is a historical accident-even though one that has recurred without interruption since the 14th century-and is in no way essential to the 'purpose of the jury trial'..." (*Id*. at 125, citations omitted), and thus suggesting "history... is no guide to the meaning of those rights whose form bears no relation to the policy they reflect." (*Id*. at 126.)

23 *Id*. at 117.

24 Sperlich, *supra*, at 174.

25 *Id*. (citations omitted).

26 Robert H. Miller, *Six of one is not a dozen of the other: the size of state criminal juries*.(Case Note), 146 U. Pa. L. Rev. 621 (1998) [at 1 online] available at http://findarticles.com/p/articles/mi_hb3573/is_199801/ai_n8414225/ (last retrieved June 1, 2009).

27 *Williams*, fn. 49 (citing Kalven & Zeisel, *supra*, at 462-463, 488-489).

28 Hans Zeisel, ... *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710, 719 (1971) (cited in Sperlich, supra, at 184.)

29 *Id*. at 715.

30 Michael J. Saks, *Jury Verdicts: The Role of Group Size and Social Decision Rule*, 10 (1997) Hereafter "Saks, *Jury Verdicts*".

31 *Colgrove v. Battin*, 413 U.S. 149, 158 (citing *Williams*, 399 U.S. at 101).

32 Michael J. Saks, *Ignorance of Science Is No Excuse*, Trial, Nov.-Dec. 1974, 18, 18.

33 *Id*.

34 See, e.g., Hans Zeisel and Shari Seidman Diamond, "'*Convincing Empirical Evidence' on the Six Member Jury*", 41 U. Chi. L. Rev. 281, 290 (1974).

35 *Williams*, 170 U.S. at 353 (fn. 28).

36 *Ballew v. Georgia*, 435 U.S. 223, 231 (1977).

37 *Id*. at 232.

38 *Id*. at 232-238.

39 *Id*. at 239.

40 Sperlich observed, "For the first time in the jury decisions of the 1970s, the Court correctly used empirical evidence to establish a social fact: deliberative bodies of five and of 12 are not equivalent." Sperlich, *supra*, at 178.

41 Neb. Const. art. I, sec. 6 (1875), amended 1920, Constitutional Convention, 1919-1920, No. 1.

42 101st Legislature, First Session, 2009 LB 4; the financing information suggests that the Supreme Court deemed the increase to be insubstantial.

43 Justice Blackmun's explanation for the court's decision suggested that a line had to be drawn somewhere. (Citation omitted.) The research Blackmun relied on, however, suggests that the line should have been drawn at twelve, not between five and six.

44 *Williams*, 170 U.S. at 100.

[45] Stephan Landsman called it "an act of analytical oversimplification". Landsman, *supra*, at 285.

[46] *Williams* stated "certainly the reliability of the jury as a factfinder hardly seems likely to be a function of its size", 170 U.S. at 100-101, i.e., as long as a smaller group of jurors is sufficiently large enough to function the same way as a twelve-person jury, it will effect the purpose of a jury.

[47] See, Carrington, *supra*, at 85-86 (Concluding, "It is quite possible that Americans tolerate the enlarged role of the judiciary in their political system because of the trust derived from the existence of the civil jury."). A recent study on the correlation between jury service and voting found that "one can expect an increase of roughly four-to-seven percent" in post-service voting rates of previously infrequent voters who have deliberated on a criminal jury. Perry Deess and John Gastil, *How Jury Service Makes Us Into Better Citizens*, The Jury Expert, Volume 21, Issue 3, May 2009, available at http://www.astcweb.org/public/publication/article.cfm/1/21/3/How-Jury-Deliberation-Makes-Us-Better-Citizens (last visited June 1, 2009).

[48] Carrington, *supra*, at 85-86 ("Law departing too far from the common understanding, from common sense, or from commonly shared moral values tends to be modified in its enforcement by civil juries to fit common habits of mind.").

[49] Sperlich, *supra*, at 174. Justice Harlan said "[t]he historical argument by which the Court undertakes to justify its view ... is, in my opinion, much too thin to mask the true thrust of this decision", which he thought to be "a recognition that the 'incorporationist' view of the Due Process Clause of the Fourteenth Amendment ... must be tempered to allow the States more elbow room in ordering their own criminal systems.") *Williams* (J. Harlan dissenting) at 118.

[50] *Id*.

[51] *See, e.g.*, Miller, *supra* [at 9 online], and Sperlich, *supra*, at 181 (quoting Hans Zeisel's speculation).

[52] *Ballew*, 435 U.S. at 243-244.

[53] Zeisel, ... *And Then There Were None: The Diminution of the Federal Jury*, supra, at 772.

[54] *Burch*, 441 U.S. at 138.

[55] *Id*., 441 U.S. at 139.

[56] Michael J. Saks and Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 Law and Human Behavior No. 5, 451, 457 (1997).

[57] *Id*. at 458.

[58] Paula L. Hannaford-Agor, Are Hung Juries a Problem?, Final Report, National Center for State Court, to National Institute of Justice, 14 (Sept. 30, 2002); Thomas L. Brunell, et al., *Time to Deliberate: Factors Influencing the Duration of Jury Deliberation*, 2nd Annual Conference on Empirical Legal Studies Paper, 18 (June 24, 2007).

[59] Saks and Marti, *supra*, at 458.

[60] Hannaford-Agor, *supra*, at 14.

[61] *Id.* ("As Abramson characterized the process, juries operating under unanimity requirements strive to understand the evidence and apply the judge's instructions; juries that are not required to return a unanimous verdicts, strive for a sufficient number of votes.")

[62] ABA Jury Principles - Final Commentary, The 2006 National Symposium on the American Jury System, 20 (1996) (Citing sources that show "six person juries are only minimally more efficient or cheaper than twelve person juries.")

[63] Saks and Marti, *supra*, at 458.

[64] Zeisel and Diamond, *supra*, at 286.

[65] Thomas L. Brunell, et al., *Time to Deliberate: Factors Influencing the Duration of Jury Deliberation*, 2nd Annual Conference on Empirical Legal Studies Paper, 18 (June 24, 2007).

[66] Saks and Marti, *supra*, at 459 (citing Kalven & Zeisel, at 463). The *Williams* Court, however misconstrued the study's finding, concluding instead that a juror's ability to resist is proportional to the majority aligned against her (i.e., a 1-5 split would be the same as a 2-10 split). *Williams*, 399 U.S. at 101-102 and fn. 49.

[67] *Id*.

[68] Shari Seidman Diamond, et al., Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury, 100 Northwestern University Law Review 1, 4 (2005).

[69] Hannaford-Agor, *supra*, at 25.

[70] *Id*.

[71] *Id*. (E.g., from 1996-1998, "rates ranged from a low of 0.1% in Pierce County, Washington to a high of 14.8% in Los Angeles County, California.")

[72] Hannaford-Agor, *supra*, at 22.

[73] *Id*.

[74] *Id*.

[75] Hannaford-Agor, *supra*, at 55.

[76] Hannaford-Agor, *supra*, at 24.

[77] Hannaford-Agor, *supra*, at 14.

[78] Shari Seidman Diamond, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, supra, at 28.

[79] Deess and Gastil, *supra*.

[80] Nicole L. Waters, *Does Jury Size Matter? A Review of the Literature*, 6 (2004)(citation omitted).

[81] Saks, *Jury Verdicts*, *supra*, at 17.

[82] Paula L. Hannaford-Agor, *Are Hung Juries a Problem?*, Final Report, National Center for State Court, to National Institute of Justice, 14 (Sept. 30, 2002).

[83] *Ballew*, 435 U.S. at 232.

[84] Saks and Marti, *supra*, at 458. The authors noted that only two studies existed on the topic, but they were consistent with previous findings in studies of group decision tasks.

[85] *Ballew*, 435 U.S. at 233-234 (citing, among others, Lempert, Uncovering "Nondiscernible" Differences: Empirical Research and the Jury Size Cases, 73 Mich.L.Rev. 643, 687-688 (1975)).

[86] Saks and Marti, *supra*, at 464 (Discussing an experiment that revealed the "inordinate power of a single juror in smaller juries.").

[87] *Ballew*, 435 U.S. at 233 (citations omitted).

[88] *Ballew*, 435 U.S. at 234 (citations omitted).

[89] Waters, *supra*, at 5 (citing Michael J. Saks, *The Smaller the Jury, The Greater the Unpredictability*, 79 Judicature 263, 264 (1996).

[90] *Id*.

[91] *Id*.

[92] *Williams*, 399 U.S. at 102

[93] Michael J. Saks, *Jury Verdicts*, at 19.

[94] *Id*.

[95] Saks and Marti, supra, at 465 (emphasis added).

[96] Randolph N. Jonakait, *The American Jury System* (2003) at 92.

[97] *Serving on a Jury: Handbook for Nebraska Jurors*, Nebraska Supreme Court Office of Public Information, 12, July 2008.

[98] When trial attorneys weigh in on the debate, policymakers ought not lose that perspective: the attorneys' duties are to their clients and their perspectives may be biased in their favor.

[99] V. Hale Starr and Mark McCormick, *Jury Selection*, §3.06 at 104 (2000)

[100] *Id*.