

Does Jury Size Still Matter? An Open Question¹

By Jill P. Holmquist

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Historically, Jury Size Mattered

The right to trial by jury resides deep in the American psyche. It ranks right up there with Mom, apple pie, and the First Amendment. Indeed, a 2006 survey found that more than half of Americans thought the right to jury trials was found in the First Amendment. Of course, the same survey also found that one out of five “agree[d] that the First Amendment grants citizens the right to own and raise pets.”² Nevertheless, later the same year, 83% of Americans correctly identified that the “[r]ight to fair and speedy jury trial in criminal cases” was found somewhere in the Constitution and Amendments.³

It would likely surprise many Americans to discover that the right to a jury trial does not include a jury of twelve or even a unanimous verdict. Our common law right to a jury trial predates the Magna Carta, which enshrined nearly 800 years ago the right of all free men (yes, men) to judgment by a jury of his peers in criminal cases.⁴ This principle was reaffirmed by our Supreme Court in 1898 in the case of *Thompson v. Utah*. The Court wrote,

When Magna Charta [sic] declared that no freeman should be deprived of life, etc., “but by the judgment of his peers or by the law of the land,” it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege “as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.”⁵

As the *Thompson* Court’s quote implies, the belief in the right to trial by jury in criminal cases has moral stature. The Declaration of Independence cited as one of the British Crown’s sins the denial of the right to jury trials.⁶ It is a fundamental right of due process which applies to the states under the Fourteenth Amendment.⁷

The Supreme Court Declares Jury Size Does Not Matter

In 1970, the Supreme Court held in *Williams v. Florida*, that “the 12-man panel is not a necessary ingredient of ‘trial by jury.’”⁸ The opinion created a brouhaha that has never fully been settled, even forty years later. The high esteem we hold for the right of the trial by jury likely contributed to this reaction.

The *Williams* Court, however, considered the legal history and determined, because contemporaneous debates and the final versions of the Constitution (and its Amendments) made no specific reference to the number of jurors required, “that particular feature of the jury system appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place.”⁹

Two eminent Justices dissented from the Court’s opinion and its interpretation of history. Justice Harlan castigated the Court for 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’...”¹⁰ He called it a “circumvention of history” entailing “the cavalier disregard of numerous pronouncements of this Court that reflect the understanding of the jury as one of 12 members....”¹¹ Justice Marshall similarly criticized the Court’s departure from “an unbroken line of precedent going back over 70 years.”¹²

Many legal scholars also criticized the Court’s interpretation. Raoul Berger, a Harvard scholar in American Legal History, said it “strikingly exemplified” the “increasingly free and easy judicial revision of constitutional norms....”¹³ The University of Pennsylvania Law Review published a note in which the author stated that the Court was wrong, and therefore *Williams* and its progeny should be overruled and all state and federal courts should return to the twelve-person standard.¹⁴



Peter W. Sperlich, a Berkeley professor, concurring, opined there were three “casualties of *Williams*: ... history, the American constitutional tradition, and empirical evidence.”¹⁵ The latter criticism pertained to the Court’s conclusion that the number 12 was, as noted above, “unrelated to the great purposes which gave rise to the jury in the first place.”¹⁶ In interpreting the significance of 12 jurors, the Court examined whether the jury’s function required 12 people. The Court relied in large part on its own assertions of fact with token reference to empirical evidence.

The Court determined that, historically, “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....” Its role is “to prevent oppression by the Government”, specifically, “the

corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”¹⁷ But, it asserted, that role “is not a function of the particular number” of jurors.¹⁸

Given the acknowledgment by the U.S. Supreme Court that parties might actually encounter “compliant, biased, or eccentric” judges who fail to rein in “corrupt or overzealous” prosecutors, one might expect greater concern about the effect of reducing jury size. But the Court did somewhat acknowledge its slippery slope, observing that the size “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.”¹⁹ But, again, it concluded sans evidence that a jury of six could as easily meet these goals as a group of “12—particularly if the requirement of unanimity is retained.”²⁰ The Court then added, “And, certainly the reliability of the jury as a factfinder hardly seems likely to be a function of its size.”²¹

Having made these pronouncements, the Court referenced scientific “evidence” in support of its conclusions. The Court addressed the specific criticism that a “12-man jury gives a defendant a greater advantage, since he has more ‘chances’ of finding a juror who will insist on acquittal and thus prevent conviction.” The Court averred that the advantage could tip to the prosecution, explaining,

What few experiments have occurred -- usually in the civil area -- indicate that there is no discernible difference between the results reached by the two different-sized juries. In short, neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members.²²

The Court's opinion struck a nerve in the scientific community, prompting criticism and new research. Hans Zeisel who coauthored *The American Jury* -- a work cited by the Court in *Williams* to support its conclusion²³ -- responded with an article in which he flatly stated that his "findings were quite different" from the Court's interpretation.²⁴ He further explained why the other studies cited provided "scant evidence by any standards" for the Court's proposition that "no discernible difference" existed between six- and 12-person juries.²⁵

Two years after *Williams*, the Court decided that the Constitution permits nonunanimous verdicts in criminal cases.²⁶ As in *Williams*, *Apodaca v. Oregon* and its companion case, *Johnson v. Louisiana*, overturned hundreds of years of common law and U.S. precedent.²⁷ In his dissent in *Johnson*, Justice Douglas made that observation and further explained that dispensing with the unanimity requirement diminishes verdict reliability because, just like smaller juries, "nonunanimous juries need not debate and deliberate as fully as must unanimous juries."²⁸ Permitting a majority decision rather than a unanimous jury decision obviously has the functional effect of reducing jury size. It makes sense, therefore, that the same concerns about jury size apply to the unanimity issue. Therefore, in referencing "jury size" I also include the unanimity issue.

Three years after *Williams*, the Court decided that that six-person civil juries comport with constitutional requirements. In that case, *Colgrove v. Battin*, the court reaffirmed its conclusion in *Williams* and it cited new studies it claimed "provided convincing empirical evidence of the correctness of the *Williams* conclusion."²⁹

That assertion compelled Michael J. Saks, whose work has also been cited by the Supreme Court, to pen "Ignorance of Science Is No Excuse," in which he opined, "[t]he quality of...scholarship displayed [by the Supreme Court] would not win a passing grade in a high school psychology class."³⁰ He criticized the Court for failing to understand "that not all empirical studies are equal.... Studies using poor methods ... can seriously mislead because their findings still may properly be called 'empirical.'" Because of this error, he said, the research cited by the Court did not support its conclusions.³¹



Finally, in 1978, the Court addressed these criticisms. In *Ballew v. Georgia*, the Court had to consider whether the proverbial slippery slope created in *Williams* was too steep. There, the petitioner had been convicted on two misdemeanor counts by a jury of five and he challenged the constitutionality of such a small number.³² The Court, nominally adopting *Williams*' functional analysis, considered "whether it inhibits the functioning of the jury as an institution to a significant degree."

Despite the *Williams* holding that a jury of six performed its role as well as a larger jury,³³ the Court was confronted with the mounting evidence that small juries do not function like larger juries. The Court admitted that empirical studies "raise significant questions about the wisdom and constitutionality of a reduction below six."³⁴

The findings that raised significant questions were:

- (1) smaller juries have less effective group deliberation, so they are more error-prone (in part because jurors exhibit greater reluctance to make important contributions and, as a group, the likelihood increases that they will fail to overcome members' biases);
- (2) smaller juries produce less accurate results and greater variability. In criminal cases, the risk of convicting an innocent person grows;
- (3) as juries become smaller, verdict consistency diminishes, in part because people with minority viewpoints tend to abandon them (again, in criminal cases, this harms the defense);
- (4) minority groups have much reduced chances of being represented in smaller juries; and
- (5) as the Court finally conceded, some scholars (like Zeisel and Saks) exposed "methodological problems tending to mask differences in the operation of smaller and larger juries."³⁵

Despite acknowledging "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," the Court reaffirmed its decision *Williams*.³⁶

As a result of this apparent contradiction, *Ballew* did not dispel the criticism of the *Williams* line of cases.³⁷ Indeed, the Court's own Justice Powell, tacitly acknowledged that the Court was abandoning its functional equivalence analysis. He conceded that the Court's reasoning in *Williams* made it difficult to justify making a distinction between five and six jurors in *Ballew*, but, he said, "a line has to be drawn somewhere if the substance of jury trial is to be preserved."³⁸

The Ongoing Debate Whether Jury Size Still Matters

Today, controversy over the Court's decisions in *Williams* and progeny persists. Not only do we cherish the institution, but most scientists feel that, under the Court's test, jury size does matter.

Saks continues to vociferously advocate for a return to the 12-person jury.³⁹ His criticisms stem from the perspectives of both the Court's legal analysis and the empirical data that has been amassed. He argues that if "the functional equivalence test is the proper test, there must be a meaningful burden to convincingly establish that a smaller-sized jury is indeed the functional equivalent of a twelve-person jury."⁴⁰ But in finding that a jury of six is the functional equivalent of a jury of 12, yet a jury of five "seriously impair[s] the purpose and functioning of juries in criminal trials 'to a constitutional degree,'" the Court, in his view, "substituted their own naked intuition that a six-person jury was the minimum size of a constitutional jury."⁴¹ Therefore, "no sound basis exists to determine the constitutionally permissible minimum jury size."⁴²

He also argues that the empirical evidence fails to support the *Williams* conclusion that a jury of six is as good as a jury of 12.⁴³

One of several goals for juries the Court articulated in *Williams* was providing "a fair possibility for obtaining a representative cross-section of the community."⁴⁴ But, research demonstrates that small juries are more likely to have no minority representation, regardless of how "minority" is defined.⁴⁵ Although the Court has never interpreted the requirement that an impartial jury be drawn from a cross-section of the community to mean every jury must contain representatives of all community groups,⁴⁶ research suggests that the absence of minority members does affect the nature, content and outcome of jury deliberations.⁴⁷

Jury size affects the quality of deliberations, which is relevant to the *Williams* goal that juries be “large enough to promote group deliberation.”⁴⁸ Smith and Saks state that, although jurors talk more in smaller juries, larger juries allow “more total discussion, more vigorous and contentious discussion, more human resources brought to the discussion, [and] more accurate recall of evidence.”⁴⁹

The *Williams* Court also discussed the ability of jurors with minority views to express them, which is relevant to both the goals. In small groups, it is more difficult for jurors with minority views to express them. It becomes much easier for a person to speak up if they have an ally.⁵⁰ In *Williams*, the Court misunderstood this point; it thought “that the critical factor was the ratio of majority to minority members, which would not change merely by cutting the jury size in half.”⁵¹ Jurors holding minority viewpoints will also have greater influence on the majority as their numbers increase.⁵²

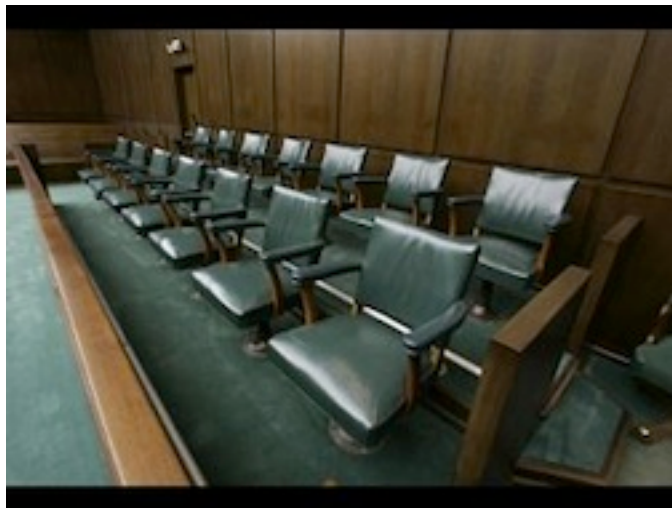
The *Williams* Court ultimately rested the constitutionality of a smaller jury on its conclusion that a jury’s factfinding reliability “hardly seems likely to be a function of its size.”⁵³ However, scientists have long argued that larger juries should have more predictable, and therefore, more accurate results.⁵⁴ Because a larger jury is more likely to represent the views of the broader community, that has also been considered a measure of a jury’s reliability.⁵⁵ In addition, research has demonstrated that larger juries tend to moderate awards, in contrast to smaller juries, which produce more extreme awards.⁵⁶

These same factors come into play when considering unanimity requirements. In *Apodaca*, the Court adopted the *Williams* functional equivalence test. Not surprisingly, the same concerns that attend jury size reduction attend the adoption of majority verdicts. And scholars state that empirical evidence “raise[s] serious questions about the trend toward dispensing with the unanimity requirement.”⁵⁷ One of the most disturbing is the concern that nonunanimous verdicts not only shut out minority views about the appropriate verdict, but may actually operate to exclude the views of ethnic and social minorities.⁵⁸

Does Jury Size Still Matter to Trial Lawyers?

Certainly, some research has contradicted the concerns raised about reducing jury size and allowing majority verdicts. In addition, countervailing concerns about cost and efficiency play a role.⁵⁹ The reduction in hung jury rates is one expected effect, although some researchers think that is not likely to yield great benefits because hung juries occur relatively infrequently.⁶⁰

However, trial lawyers—both counsel for plaintiffs and defendants—have greater concern about prevailing, at least in the short term, than about the societal costs of differing jury sizes. Indeed, their advocacy concerns might outweigh any concerns about the constitutionality of the *Williams* line of cases.



Starr and McCormick acknowledged the practitioner’s perspective in advising, “When the attorney is given a choice of jury size, there is no absolute rule to follow.”⁶¹ The composition of each individual jury is relatively uncertain before voir dire begins and, as jurors are eliminated, its complexion changes. It may be difficult to determine whether, in *this* case, jury size matters, particularly when the parties and jurors are homogeneous.

Although the research seems definitive for criminal defense attorneys and possibly attorneys representing clients who are minority members—larger size does matter—does it matter for civil trial lawyers? Does it

matter in cases in which minority status may be less important? Does it matter when bias is largely a matter of pro-defense or pro-plaintiff proclivities? Starr and McCormick observe that the research does not indicate how jury size and pro-plaintiff and pro-defense attitudes interact.⁶² How does attorney skill or judge propensity in jury selection affect it? These are complex questions and there is little research that sheds light on them. Thus, we are left with speculation and anecdotal evidence.

Anecdotal evidence, though not empirical, is a start. Previously, I interviewed four attorneys about their preferences and (perhaps predictably) they gave four different responses. So, I welcome your comments and observations.

- Does the 12-person jury still matter to you (or your clients)?
- Does jury size make no difference?
- Do smaller juries confer advantages that you like?
- Do you prefer having nonunanimous verdicts?
- Does your preference differ depending on which party you represent, the venue you're in, or the time allowed for voir dire?
- Do you have strong feelings about the constitutional issues involved?

We want to know: what do you, our readers, think? It's an open question.

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- ⁴ Lysander Spooner, *An Essay On the Trial By Jury* (1852), re-publication by Echo Library, 2006, 2, 16. Not until *Ballard v. United States*, 329 U.S. 187 (1946), did the Supreme Court question “the fundamental fairness of denying women the right to serve on juries.” *J. E. B. v. Alabama Ex Rel. T. B.*, 511 U.S. 127, 133 (1994).
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- ⁷ *Duncan v. Louisiana*, 391 U.S. 145 (1968).
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- ⁹ *Id.* at 90.
- ¹⁰ *Id.* at 125, citations omitted.
- ¹¹ *Id.* at 126.
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- ¹⁶ *Williams*, *supra*, at 90.
- ¹⁷ *Id.*, at 100 (citing *Duncan*, 391 U.S. at 156).
- ¹⁸ *Id.* at 100.
- ¹⁹ *Id.*
- ²⁰ *Id.*
- ²¹ *Id.* at 100-101 (indicating in a footnote that it was not opining on whether unanimity was constitutionally required) (citations omitted).
- ²² *Id.* at 101-102 (citations omitted).
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- ²⁵ *Id.* at 715 (emphasis added).
- ²⁶ *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972).
- ²⁷ *Johnson* at 382 (J. Douglas dissenting).
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- ²⁹ *Colgrove v. Battin*, 413 U.S. 149, fn. 15 (1973).
- ³⁰ Michael J. Saks, *Ignorance of Science Is No Excuse*, *Trial*, Nov.-Dec. 1974, 18, 18.
- ³¹ *Id.* See also, Hans Zeisel and Shari Seidman Diamond, ‘*Convincing Empirical Evidence*’ on the Six Member Jury, 41 U. Chi. L. Rev. 281 (1974).
- ³² *Ballew v. Georgia*, 435 U.S. 223, 227 (1978) (after a 38 min. deliberation).
- ³³ *Williams*, 170 U.S. at 353 fn. 28 (The Court wrote, “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 minimum.”)
- ³⁴ *Ballew*, 435 U.S. at 232.
- ³⁵ *Id.* at 232-238.
- ³⁶ *Id.* at 239.
- ³⁷ Neither did the Court’s comment a year later, despite holding that a nonunanimous decision in a six-person criminal case was unconstitutional, repeating without disavowing its conclusion in *Williams* that a 12-person jury is no better than a jury of six. *Burch v. Louisiana*, 441 U.S. 130, 135 fn. 7 (1979).

³⁸ *Ballew*, 435 U.S. at 245-246 (J. Powell dissenting).

³⁹ Steven Calabresi and Michael Saks, *Justice Requires 12 Angry Men: Small juries are less likely to get the verdict right*, The Wall Street Journal, January 6, 2009 (advocating that the Supreme Court hear the case of *Deltoro v. Florida* which challenged the validity of smaller juries). The Court ultimately refused to hear it. (See Michael Saks, “Twelve Angry Men”, at *DailyMotion* (accessed at http://www.dailymotion.com/video/x86vxv_michael-saks-twelve-angry-men_news on May 4, 2010).

⁴⁰ Alisa Smith and Michael J. Saks, *The Case For Overturning Williams v. Florida and The Six-Person Jury: History, Law, And Empirical Evidence*, LEXSEE 60 Fla. L. Rev. 441 at 15, 60 Fla. L. Rev. 441 (2008).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* (He also noted that Justice Blackmun, in his *Ballew* opinion, recognized the dearth of evidence supporting functional equivalence.)

⁴⁴ *Williams* at 100.

⁴⁵ Smith and Saks, *supra n. 40*, at 11, (citing 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)).

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⁵⁰ Nicole L. Waters, *Does Jury Size Matter? A Review of the Literature*, 6 (2004) (citation omitted); Michael J. Saks, *Jury Verdicts: The Role of Group Size and Social Decision Rule*, 17 (1997).

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⁵⁸ Hans, *supra n.55*, at 8.

⁵⁹ Waters, *supra n. 50*, at 1-2.

⁶⁰ Hans, *supra n.55*, at 10. *Cf.* Saks and Marti, *supra n. 45*, at 456 and Diamond, et al., *supra n. 57*, at 230.

⁶¹ V. Hale Starr and Mark McCormick, *Jury Selection*, §3.06 at 104 (2000)

⁶² *Id.*

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Editor's Note

Welcome to the May 2010 issue of [The Jury Expert](#)! It's spring (although in Texas it definitely feels like summer)! This issue we have reptiles in the courtroom (and in a departure from tradition, we have four trial lawyers responding to the article rather than trial consultants); a *Batson* update; a piece on juror intimidation inside the jury deliberation room; an article from two journalists on pre-trial publicity and what defense advocates can learn from the Duke lacrosse case (with responses from three trial consultants); a piece using sense-making theory to discuss how Supreme Court Justices behave like jurors; that age-old question of whether size matters when it comes to juries; an essay on persuasive communication and attorney likability; and finally--a trip across the country (and, kind of, through time) as consultants tell stories about rural courthouses time forgot (and stories about a few other things too).

Of course, we also have a couple of Favorite Things and want to remind you about the upcoming [ASTC conference](#) in beautiful Minneapolis, Minnesota. The theme this year is '[Perfecting Your Game](#)' and it's always a good time for that.

This is the first issue in which we have benefitted from visual graphics experts in pulling together the issue. Special thanks to Jason Barnes ([Barnes & Roberts](#)), Ted Brooks ([Litigation-Tech](#)) and Nate Hatch ([Resonant Legal Media](#)). Click anywhere in this issue of [The Jury Expert](#) for challenging, educative and fun reading for Spring 2010. You'll see us again in July and 24/7 on-line. Read us. Tell your friends and colleagues.

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