Reducing the Size of Juries

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REDUCING THE SIZE OF JURIES

I. Introduction

In recent years court dockets have become increasingly congested. The resulting delays\(^1\) place a great burden both on civil litigants\(^2\) and on the criminally accused who often await trial for more than two years.\(^3\) In responding to this problem, jurists have focused on trial by jury and have typically suggested modifications of two types: either limiting access to juries by litigants, or increasing the efficiency of the juries themselves.\(^4\) Some critics have even contended that the anachronistic procedure of jury trials is such an undue burden on the judicial system that it should be abolished in the interest of efficient dispensation of justice.\(^5\)

Most attempts at modification have been directed toward streamlining the jury process rather than further restricting the litigant’s opportunity for a jury trial.\(^6\) In this effort, several states have established provisions for reducing the number of jurors impaneled.\(^7\) The purpose of this article will be to analyze the effects of these reductions on the judicial system and to ascertain the potential impact on the process of reaching a verdict.

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\(^1\) For example, the criminal case backlog has more than doubled in the last decade. Report of the Administrative Office of the Federal Courts, discussed in Graham, Some Problems in the Safeguards for Defendants, N.Y. Times, Feb. 9, 1969, § 4, at 8, col. 1.

\(^2\) Id. In New York the backlog was so great in 1969 that the chief judge of the federal district court assigned twelve of the city’s fifteen district judges exclusively to the task of trying first degree murder cases and armed robbery cases. Thus, only three judges were available to hear civil cases.

\(^3\) N.Y. Times, April 28, 1968, at 48, col. 1. Former Chief Justice Warren commented:
For those who are unable to secure their release on bail pending trial, the delay is intolerable. But, even for those who do secure their release pending trial, the delay means that a criminal charge hangs like a cloud over a man for two years without any judicial determination of guilt or innocence.

\(^4\) See Comment, Abolition of the Civil Jury: Proposed Alternatives, 15 DePaul L. Rev. 416 (1966). The author suggests limiting jury trials to cases involving five thousand dollars or more. See also Lousberg, On Keeping the Civil Jury Trial, 43 Notre Dame Law. 344 (1968), where the author suggests restricting access to a jury to those litigants who have completed an elaborate pre-trial process.


\(^6\) See generally Joiner, Jury Trials—Improved Procedures, 48 F.R.D. 79 (1969), where Dean Joiner suggests the streamlining of trials through, among other things, the use of contingent fees, confession of judgment, audio-visual recordings, special verdicts, new evidentiary rules, mediation, partial summary judgments, consolidation of motion hearings, and insurance limits.

II. THE CONSTITUTIONAL REQUIREMENT OF THE TWELVE MAN JURY

In *Thompson v. Utah* the Supreme Court first stated that a person accused of a felony was entitled to a trial by jury of twelve members. In discussing Utah's provision for an eight man jury, the Court concluded that the sixth amendment mandated a common law jury "of twelve persons, neither more nor less." The Court's only inquiry into the merits of the reduced jury was the observation that:

[i]f . . . it was competent for the State to prescribe a jury of eight persons, it could just as well have prescribed a jury of four or two, and, perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge.

Apparently, the Court's insistence on a common law jury of twelve was founded upon the strength of historical precedent and fear of systematic erosion of the basic right to jury trial. The concern regarding possible loss of this basic right was further evidenced by the Court's refusal to permit any voluntary waiver of the constitutional right to trial by jury.

One year later, in *Capital Traction Co. v. Hof*, the Court...

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8 170 U.S. 343 (1898). The Court determined that Utah's state constitutional provision for trial by a jury composed of eight members in certain criminal cases was ex post facto in its application to a felony committed before the territory became a state. The Court noted that the provisions of the Bill of Rights relating to the right of trial by jury in suits at common law applied to territories of the United States. Since the statutes of the territory in force at the time the crime was committed provided for a twelve man jury, the holdings relating to the constitutionality of small juries may have been unnecessary.

9 *Id.*

10 *Id.* at 349-50. The Court, tracing the genesis of the constitutional reference to jury trials to the common law of England, placed primary emphasis on the Magna Carta guarantee of a twelve man jury:

[T]he word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of that instrument . . .

170 U.S. at 350.

The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

11 170 U.S. at 353.

12 *Id.* at 354-55. The seventh amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

13 174 U.S. 1 (1899). Capital Traction petitioned the supreme court of the District of Columbia for a writ of certiorari to remove a civil action being heard by a justice of the peace who had impanelled a twelve man jury to hear the case. The petition was granted by the supreme court of the District, but quashed by the D.C. Court of Appeals and petitioner sought to have it reinstated, claiming that the contemplated trial by jury was not within the meaning of the seventh amendment.
ruled that trial by jury in a civil action similarly required twelve men, the Court failing to distinguish between civil and criminal cases. In reaching the decision, the Supreme Court relied upon what it deemed to be the framers' intention to incorporate into the seventh amendment "the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the States." Since the common law of England envisioned a trial by twelve members, the District of Columbia was bound to provide a twelve man jury.

The jury trial issues in both Thompson and Capital Traction arose in a federal court; thus, the question whether a state court was bound by the twelve man jury rule was left largely unresolved until Maxwell v. Dow, which presented a challenge to Utah's constitutional provision for trial by a jury of eight members. The Supreme Court ruled that the fourteenth amendment did not make the sixth amendment binding on the states; thus each state could determine the numerical composition of the jury, so long as the standard was not discriminatorily applied to different defendants. Nevertheless, the Court reiterated that a jury of less than twelve would violate the sixth amendment in a federal case:

That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt . . . And as the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all Federal courts when a jury trial is held.

This position was reaffirmed in Patton v. United States,
where the Court enumerated the essential elements of jury trial "as they were recognized in this country and England when the Constitution was adopted":

(1) that the jury should consist of twelve men, neither more nor less;
(2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and
(3) that the verdict should be unanimous.

The Court concluded that any deviation from these prerequisites in federal courts would be unconstitutional. Although the Court acknowledged the need to modify some common law aspects of jury trial in view of changed conditions, the justification for the three enumerated requirements continued to exist. Thus, implicit in the Court's reliance on a continuing justification underlying the vitality of the "essential" twelve man jury is the proposition that it, too, could be abandoned upon proof that the purpose it served at common law no longer existed.

Until 1968, the Court consistently ruled that the jury provisions of the sixth and seventh amendments applied only to the federal courts, while state courts were not constitutionally bound to the guarantee of trial by jury. Indeed, states were free to abolish

the trial continued only after the defendant personally consented in open court. The Court, therefore, deemed waiver of any of the essential elements of jury trial (specifically jury of twelve members) equivalent to a waiver of the right to trial by jury guaranteed by the sixth amendment. The main issue of the case was whether waiver of this right was permissible.

20 Id. at 288.
21 Id.
22 "A constitutional jury means twelve men as though that number had been specifically named; and it follows that when reduced to eleven it ceases to be such a jury quite as effectively as though the number had been reduced to a single person." Id. at 292.
23 Among the common law restraints which had been modified were: (1) the common law denial of waiver of trial by jury in criminal actions; (2) the prohibition against an accused testifying in his own behalf; (3) the denial of counsel in felony cases; and (4) the attainder and forfeiture of official titles of inheritance upon conviction of a crime. "These conditions have ceased to exist, and with their disappearance justification for the old rule no longer rests upon a substantial basis." Id. at 307.
24 The Court quoted with approval the Supreme Court of Nevada in Reno Smelting Works v. Stevenson, 20 Nev. 269, 279 (1889): "It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a law when that reason utterly fails—cessante ratione legis, cessat ipsa lex." Id. at 306.
25 The criterion used to determine when a common law standard is no longer justified remains nebulous. The Court cited with approval Hack v. State, 141 Wis. 346, (1910), in which it was suggested that the increased procedural safeguards in modern criminal trials made some of the strict common law standards unnecessary to assure protection to the accused. Id. 307-08.
26 Id.
27 See, e.g., Fay v. New York, 332 U.S. 261 (1947), in which petitioner's conviction by a state "blue ribbon" jury was upheld. The Court stated that "the commandments of the Sixth and Seventh Amendments... are not picked up by the due process clause of the Fourteenth so as to become limitations on the states." Id. at 288.
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completely trial by jury if such action would not run afool of state constitutional provisions.  The Court could thereby consistently demand strict adherence to the common law standard of the twelve man jury in federal courts, while permitting state courts significantly greater flexibility.

In Duncan v. Louisiana the Court distinguished between sixth and seventh amendment jury trial guarantees and declared that the due process clause imposed sixth amendment standards on the states. Appellant, convicted of a misdemeanor, had been denied a jury trial pursuant to a provision of the Louisiana Constitution allowing trial by jury only in cases where capital punishment or imprisonment at hard labor could be imposed. Mr. Justice White, speaking for the Court, stated:

Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.

With the sixth amendment applicable to the states, it seemed likely that the decisions interpreting the essentials of jury composition would apply equally to state and federal courts in criminal cases.

In the recent landmark case of Williams v. Florida, the Supreme Court held, however, that Florida’s six member jury did not violate the sixth amendment as applied to the states by the fourteenth, and thereby eliminated the twelve man jury requirement for criminal cases. In its opinion the Court reexamined the intent of the founding fathers and concluded, after conceding the elusiveness of any inquiry into the framers’ intent, that the drafters had not meant to incorporate the twelve man requirement into the Constitution.

28 Snyder v. Massachusetts, 291 U.S. 97 (1934). Petitioner, who had been sentenced for murder, claimed that a Massachusetts statute which permitted the jury to view the scene of the crime without the defendant being present, constituted a denial of due process under the fourteenth amendment. The court upheld the statute stating at 105 that the state’s procedure “does not run foul [sic] of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser. ... Consistently with that amendment, trial by jury may be abolished.” (emphasis added).


30 Id. at 149. The status of seventh amendment juries was left open by Duncan, and there have been no indications that states would be required to adhere to the federal standard established in Capital Traction. See text accompanying notes 13 through 15 supra.


33 399 U.S. at 99. This conclusion was based on the contrasting versions of the sixth
Having concluded that a jury of less than twelve would violate neither the letter nor the intent of the Constitution, the Court considered whether the social and judicial functions of a jury could be served equally well by a jury of six. First, the Court investigated the origin of the twelve man jury in an attempt to determine whether the number was originally justified by any social or judicial logic. Although several possible explanations were uncovered, nothing indicated that the number twelve was reached as a result of anything other than historical accident.

Addressing itself to the jury’s function and the possible consequences of altering its size, the Court determined the essential features of jury trial to be interposition between the accused and the accusor, the common sense judgment of a group of laymen, community participation, the deliberative process of decision-making, freedom from outside intimidation, and the use of a representative cross section of the community to determine guilt. In this context, the Supreme Court concluded that modification of the jury system through reduction in the number of jurors would not significantly affect the purposes to be served:

[W]e find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained. And, certainly the relia-

34 Id. at 99.
35 Id. at 100. This inquiry has often been made by jurists proposing a modification of the size of juries and is based on the argument that if a characteristic is not logically related to the function of the jury, then it may be modified without detriment to the system. See Tamm, The Five-Man Civil Jury: A Proposed Constitutional Amendment, 51 GEO. L.J. 120 (1962); Comment, Right to Trial by Jury: Is it Necessary? 15 DEPAUL L. REV. 398 (1966); Wiehl, The Six Man Jury, 4 GONZAGA L. REV. 35, 39 (1968).
36 In reviewing the literature, the Court uncovered many possible explanations for the number twelve—twelve tribes of Israel, twelve patriarchs, twelve apostles and twelve stones. 399 U.S. at 88. On the other hand history tells of jury-like institutions of 500, 100, 66, 41, 20, 17, 11, 8, 7, and other numbers. Tamm, supra note 35, at 128. See also Wiehl, supra note 35, n.14 at 39, where it is suggested that the number twelve was a favorite number of judicial bodies in various Teutonic nations.
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The Court noted that only one characteristic of a six man jury might change the outcome in certain cases: there might be fewer "hung" juries where only six instead of twelve jurors must reach unanimous agreement.

It is true, of course, that the 'hung jury' might be thought to result in a minimal advantage for the defendant, who remains unconvicted and who enjoys the prospect that the prosecution will eventually be dropped if subsequent juries also 'hang.' Thus a 100-man jury would undoubtedly be more favorable for defendants than a 12-man jury. But when the comparison is between 12 and six, the odds of continually 'hanging' the jury, seem slight, and the numerical difference in the number needed to convict seems unlikely to inure perceptibly to the advantage of either side.

The question of constitutionality of reduced jury size for civil cases in federal and state courts was not specifically before the Court and consequently was left unresolved. In federal civil cases the seventh amendment requirement of a twelve man jury has not been relaxed. Nevertheless, to date, the Supreme Court has never ruled that the seventh amendment is applicable to the states. Thus it could be argued that the states are free to utilize less than a twelve man jury in civil cases. Although the Court in Williams did not discuss the constitutional necessity of the twelve man civil jury, its reasons justifying a reduced criminal jury compel the conclusion that a smaller civil jury would be equally acceptable. Moreover, the argument for a full-sized jury in criminal trials seems stronger than that for civil trials, for the sanctions imposed on those found guilty are greater.

One commentator has taken issue with the Court's reasoning on this point and has shown through the use of a mathematical probability model that the likelihood of conviction may change somewhat when the number of jurors is reduced from twelve to six. Note, The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida, 22 CASE W. RES. L. REV. 529 (1971). Specifically, the author shows that for a specific percentage of potential jurors who are "guilty-prone," the probability of conviction varies somewhat depending upon the number of jurors deliberating. This theoretical model, of course, does not take into consideration any of the variety of parameters resulting from the change in the small group structure. Thus, the theory ignores changes in group cohesion, group satisfaction and number of communications which occur as a result of the reduction, and relies totally upon the premise that once a majority is formed, the verdict usually coincides with their opinion. See text accompanying note 93 infra.

Id. at 100-01.

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399 U.S. at 101.

Id., n.47. Note that Justice White's analysis was not documented and the statistical differences are open to refutation.


J. FRANK, COURTS ON TRIAL 136 (1963). Such sanctions include the stigma of
trial, therefore, should arguably maintain the strict features of the common law jury to provide greater protection for the accused, while the consequences of a smaller jury for civil cases would be of relatively less importance. Since the Williams Court permitted reduced juries in criminal actions, it follows that reduced juries should also be constitutionally permissible in civil cases.\textsuperscript{44}

III. THE TWELVE MAN JURY SYSTEM

A. Criticism of the Jury System as Presently Constituted

The principal criticisms of the jury system as presently constituted are primarily directed against the incompetence of jurors and the inefficiency inherent in the process.\textsuperscript{45} Critics point out that a jury lacks expertise in interpretation of the law and is therefore more likely to become confused than would a skilled jurist trying the same case.\textsuperscript{46} They further contend that an unskilled juror is more likely to be unduly influenced by the forensic techniques of trial lawyers, thereby incurring the possibility that jury decisions reflect an emotional reaction to the lawyer rather than a rational conviction based on the facts of the case.\textsuperscript{47} These criticisms are somewhat tempered by the deliberative methods of the jury system whereby the jury utilizes the process of contribution and analysis by the various members in reaching decisions.\textsuperscript{48}

Moreover, judges, who lack the benefit of discussion with fellow

\textsuperscript{44} The argument against the constitutionality of the smaller jury in civil cases is that the seventh amendment makes certain additional references to the common law which are not included in the sixth. The sixth amendment makes no reference at all to common law juries, whereas the seventh explicitly states that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." This reference to the common law might be interpreted as an indication by the founding fathers that the common law jury requirements should be maintained in civil actions but not in criminal cases. However, since the Court in Williams noted that most of the social policy relating to the function of the jury in criminal cases also applies to civil cases, it may be reasonably concluded that the Court would be willing to accept juries of less than twelve in civil cases. See Williams v. Florida, 399 U.S. 78, n.30 at 92 (1970): "[W]e do not decide whether, for example, additional references to the 'common law' which occur in the Seventh Amendment might support a different interpretation."

\textsuperscript{45} See, e.g., Comment, The Case for Retention of the Unanimous Civil Jury, 15 DePaul L. Rev. 403, 407 (1966); Lousberg, supra note 4.

\textsuperscript{46} Lousberg, supra note 4, at 345; Abolition of the Civil Jury: Proposed Alternatives, supra note 4, at 419–21.

\textsuperscript{47} Comment, The Case for the Retention of the Unanimous Civil Jury, supra note 45, at 409; Comment, Abolition of the Civil Jury: Proposed Alternatives, supra note 4, at 419.

\textsuperscript{48} "The give-and-take of group deliberation screens out errors, negates biases, and eliminates erroneous hypotheses to a far greater extent than individual deliberation." C. Joiner, Civil Justice and the Jury 26 (1962).
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Jurors, are not immune to the techniques of experienced courtroom lawyers. Criticisms of the jury's lack of expertise in interpretation of fact also seem of only limited validity in light of the lack of divergence between judge and jury decisions, as indicated by the Chicago jury study finding that there is judge-jury agreement in 78 percent of the cases. The critics' charge of jury inefficiency is more difficult to refute. Inefficiency results from the length of jury trials and the additional costs which they incur. The length of jury trials is estimated to be 40 percent longer than cases tried by judge alone. This reflects the time necessary to impanel the jury, conduct the voir dire, introduce exhibits, allow for entrance and exiting of the jurors, permit lengthy deliberation, and poll the jury. While a few proposals for modification have been suggested and enacted to correct individual factors of jury delay, the inefficiency problem results from the sum total of time used to conduct the trial. The economic wastes inherent in the system are attributed primarily to the per diem and subsistence expenses paid to the jurors, but there are additional costs to society which cannot be reimbursed, such as losses to the jurors due to absence from employment and losses to the employer from reduction of his work force. Although some

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49 "The judge, as well, could be affected by various trial techniques. Another possibility is that the judge will subconsciously 'bend over backwards' to avoid such a result. The judge's decision as to the facts is final, regardless of how it is reached." Comment, The Case for the Retention of the Unanimous Civil Jury, supra note 45, at 409. While a jury consisting of a panel of experts on the specific subject matter might be capable of making the most accurate determination of facts, such a proposal is seldom made as the apparent disadvantages are excessive costs, the denial of trial by peers, less likelihood of acceptance by the community and considerable problems of selection of jurors with regard to their qualifications. Finally, there is no assurance that even experts would not be highly affected by the dramatic inclinations of the lawyers.

50 H. Kalven & H. Zeisel, The American Jury 63 (1966). Of the remaining 22 percent in which there was disagreement between judge and jury, juries found for defendant in 12 percent of the cases and for plaintiff in 10 percent. Note that the trials analyzed in this study were strictly criminal, and it does not purport to speak for civil juries.

51 Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1055, 1059 (1964). This figure is somewhat speculative and is based on a series of judicial estimates. Kalven admits that cases which are more complex may tend to be channeled toward jurors rather than judges, so a direct comparison of time involved would be skewed. The only way an accurate figure could be ascertained would be to have the same cases tried by both a judge and jury. Estimates have ranged as high as 250 percent longer for trials by jury than for trials by judge.

52 See, e.g., Ill. Ann. Stat. ch. 110A, § 234 (1968). The trial judge initiates the voir dire and puts to the jurors any questions which he thinks necessary. The attorneys are allowed to supplement the examinations but may not examine jurors on matters of law or the instructions.

53 The Judicial Conference Committee on the Operation of the Jury System, Report on the Jury System in the Federal Courts, 26 F.R.D. 409, 487 (1960). In 1960 the entire cost of the federal court system was $45,000,000. Almost one-tenth of that figure involved jury costs.

54 Littlejohn, The Six-Man Civil Court Jury, 4 Trial Judges' J. 15 (July 1965).
states have required litigants to bear a portion of jury costs,\textsuperscript{55} there seems to be no way to eliminate all of the social and judicial costs short of abolishing the jury altogether.\textsuperscript{56}

\textbf{B. A Proposal for Jury Reform: The Reduced Jury}

Despite the above problems, the majority of critics concede that the value of the jury system is too great to warrant its abolition.\textsuperscript{57} In an attempt to preserve the benefits of the jury system and, at the same time, minimize the inordinate investment of time and money which it requires, many jurists have proposed\textsuperscript{58}—and many states have legislated—\textsuperscript{59} a reduction in the size of the jury. One of the benefits expected to result from a decrease in the size of the juries is a corresponding reduction in the amount of time consumed because of the jury’s involvement in the trial. First, the time required to impanel the jury could reasonably be expected to decrease because fewer jurors would need to be examined. It has been suggested, to the contrary, that with fewer jurors to choose from, the lawyers will be more critical in selecting the panel, with the result that the time used to conduct the voir dire would remain unchanged as the lawyers spent more time in questioning each potential juror.\textsuperscript{60} This objection assumes, however, that lawyers have lower standards of acceptance when choosing a panel of twelve, and must be more cautious when selecting a smaller panel. Overriding ethical and pragmatic considerations dictate against this assumption. A lawyer is charged with the responsibility of exercising utmost care in selection of the panel regardless of the size, and the degree of caution used does not generally vary with the number of jurors chosen.\textsuperscript{61} Thus, it


\footnotesubscript{56} Id. at 491-92 (1960). The Judicial Conference Committee on the Operations of the Jury System explicitly rejected the proposal to charge the jury costs to the litigants: The countervailing considerations [to such a proposal], however, are so strong as to make this step undesirable even if it would result in a saving of money.

The courts should be open and free to everyone and no special charge should be imposed on persons who prefer one form of trial as against another. The right to use the courts is a basic part of the rights of every citizen, and constitutes a part of the service that the Government furnishes to all citizens and, therefore, the expense involved should be borne out of the general fund of the Treasury. Id.


\footnotesubscript{58} See Wiehl, supra note 35; Tamm, supra note 35; Tamm, A Proposal for Five-Member Civil Juries in the Federal Courts, 50 A.B.A.J. 162 (1964).

\footnotesubscript{59} See note 7 supra.

\footnotesubscript{60} Tamm, supra note 35, at 131-32.

\footnotesubscript{61} Id. Judge Tamm notes that his experience indicates that lawyers use the same critical
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seems that significant time would be saved in the voir dire through use of a smaller jury.\textsuperscript{62} When the consideration is savings of time, it is important to note that although a large number of cases do not go through to a verdict (the parties settling out of court), most cases usually do proceed to voir dire, and, therefore, time savings during voir dire would be important.\textsuperscript{63}

Second, some time might be saved during the actual trial. Exhibits which are often passed from juror to juror for examination would require less time to be examined by, say, six jurors than by twelve, assuming the average amount of examination time by each juror remains constant.\textsuperscript{64} In addition, because certain objections can be made and argued only when the jury is absent from the courtroom, less time should be needed for jury exits and re-entries of the courtroom when the number of persons involved is reduced.\textsuperscript{65}

Although generally unsupported by statistical evidence, some writers suggest that time would be saved in reaching the verdict\textsuperscript{66} because, barring the unlikely situation in which the jury reaches agreement on the first ballot, most of the jury’s deliberation time is spent in trying to convince holders of a minority opinion to accept the opinion of the majority.\textsuperscript{67} Thus, by reducing the size of the panel, the number of jurors holding a minority opinion should be proportionately reduced, and since less time should be necessary to convince a small minority than a large minority, a consensus will be reached more quickly.\textsuperscript{68}

Finally, time should be saved in the process of polling the jury after the verdict has been returned. While the actual amount of time saved in polling, or in any other individual jury function, may be comparatively negligible in relation to the total length of the trial, when all functions are considered in the aggregate, the time

\textsuperscript{62} This problem has prompted the suggestion that the judge should conduct the voir dire in all cases to insure a fair selection of jurors within a reasonable amount of time. Comment, Abolition of the Civil Jury: Proposed Alternatives, supra note 4, at 424. See also note 52 supra.


\textsuperscript{64} Id. at 356; Tamm, supra note 35, at 132.

\textsuperscript{65} Phillips, supra note 63, at 357.

\textsuperscript{66} Id. at 357.

\textsuperscript{67} See H. Kalven & H. Zeisel, supra note 50, at 488–89.

\textsuperscript{68} However, one experiment in group psychology revealed that once a majority of three is attained, majority pressure on minority holdouts remains constant despite increases in the size of the majority. This experiment would suggest that a smaller jury does not necessarily save time in reaching a consensus. Asch, Effects of Group Pressure Upon the Modification and Distortion of Judgments, in G. Swanson, T. Newcomb, & E. Hartley, Readings in Social Psychology (rev. ed. 1952).
savings and resulting increase in efficiency are significant. In the few judicial experiments involving small juries, the results have been favorable: small jury trials have proceeded at a faster pace and helped reduce the backlog of cases.

The second aspect of jury inefficiency is the economic costs of the present system. Although certain absolute costs are inherent in the system and cannot be eliminated without eliminating the entire structure, other costs can clearly be reduced through reduction of the number of jurors. The direct jury costs in the federal court system amounted to almost four million dollars in 1960, more than half being paid as per diem expenses to the jurors. If the number of jurors receiving the per diem allotments were reduced, the allotments would, of course, be decreased proportionately. Reductions in court costs would result from the decrease in time needed to conduct the trial and savings derived

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69 Judge Herndon quotes approval of the reduced jury sizes from jurists in Utah (the Chief Justice), Florida (the Chief Justice) and Virginia (Executive Secretary to the Chief Justice). Herndon, The Jury Trial in the Twentieth Century, 32 L. A. BULL. 35, 47-50 (1956). For a list of all states having statutory provisions for juries of less than twelve in certain courts see Tamm, supra note 35, at 135-36.

70 Reports from an experiment with six man civil juries in the district court of Worcester, Massachusetts. 42 J. AM. JUD. SOC'Y 136 (No. 4, 1958). The experiment was initiated on July 1, 1957, and within a year had significantly reduced the case load of the Superior Court. The clerk also reported that verdicts had been no different from those returned by a twelve man jury. Id. Note that lawyers had taken full advantage of the expedience afforded by the innovations, and had not attempted to bypass the smaller juries in favor of Massachusett’s provisions for a twelve man panel. Furthermore, there had been no decrease in the number of cases tried without a jury. This undermined a major criticism by the opponents that the trial calendars would be filled by parties who did not want the expense of a twelve man jury, but were willing to accept a six man jury rather than have their cases tried by a judge alone.

The success of the Worcester experiment prompted some jurists to suggest that the six man jury be extended to certain criminal cases; especially those involving driving while under the influence of alcohol, which were being tried extensively by twelve man juries due to the harshness of the mandatory penalty imposed on the guilty. Cronin, Six-Member Juries in District Courts, 2 BOSTON BAR J. 27 (April 1958).

71 Clearly there are some costs which will exist so long as the jury system is maintained. These include the costs of juror selection and expenses paid to bailiffs and deputies.

72 A breakdown of the 1960 jury costs is as follows:

- Per Diem .......................................................... $2,475,000
- Subsistence ....................................................... 200,000
- Mileage ............................................................. 1,160,000

Total: $3,835,000

- Meals and Lodgings ............................................. 63,500
- Fees of Jury Commissioners .......................... 9,500
- Travel and other (jury view) ...................... 4,000

Subtotal: $3,912,000

Excluding the $9,500 paid to jury commissioners, the remaining total of $3,902,000 is divided between $3,214,000 (85 percent) paid to petit jurors and $588,500 (15 percent) paid to grand jurors. The Judicial Conference Committee on the Operation of the Jury System, Report on the Jury System in the Federal Courts, 26 F.R.D. 409, 487 (1960).

73 Similar savings would result from reductions in allotments paid directly to the jurors—mileage, meals, travel, etc.
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from reduction of the amount of work for clerks and marshals. One authority suggests that reducing the number of jurors to six would result in at least a one-third savings of public funds.\textsuperscript{74} Smaller juries would also significantly reduce the indirect costs borne by society, such as time losses in working hours for both employees and employers.\textsuperscript{75}

IV. EXPERIMENTAL RESULTS OF REDUCING THE SIZE OF SMALL GROUPS

Although reduced jury size is clearly advantageous in terms of efficiency, questions remain about the effect of smaller size on the dynamics and quality of jury decisions. Despite the fact that a relatively large number of states and municipalities have instituted some form of reduced juries,\textsuperscript{76} very little statistical analysis has

\textsuperscript{74} Wiehl, \textit{supra} note 35, at 40. One Connecticut judge estimated that a six man jury would save the state $75,000 per year. Phillips, \textit{supra} note 63, at 357.

\textsuperscript{75} Judge Littlejohn analyzed the work load and resulting expense of a typical work week using twelve jurors in his South Carolina circuit court. During a five day week, thirty-six jurors lost $50 each by virtue of lost working hours. Additional losses were incurred by their employers as a result of their absence. The county paid the jurors $1440 to dispose of three cases, an amount which could be cut in half by instituting a reduced jury with “no less justice than the twelve-man jury brings into being.” Littlejohn, \textit{supra} note 54, at 15.

Although litigants often bear a share of the jury expenses, much of the burden, either directly or indirectly, falls on the county or state. Herndon, \textit{supra} note 69 at 53. To this extent, the taxpayer, not the litigant, bears the burden of the expense of jury trial.

Judge Littlejohn stated: “The litigant no matter how meritorious or spurious his claim, pays little towards the over-all cost of operating the court. Sometimes the court expenses exceed the prayer for relief in the complaint, and even more often the cost of operating the court exceeds the amount to which the claimant is entitled.” Littlejohn, \textit{supra} note 54, at 15.

Although all jury costs could be assessed to litigants, the prospect of increasing the already exorbitant costs of litigation is hardly an appealing alternative. It would seem more appropriate to reduce the expense of jury trials by modifying the system rather than redistributing the cost burden.

A number of states have required pre-payment of the jury fees by the party demanding a jury trial. The JUDICIAL CONFERENCE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, \textit{REPORT ON THE JURY SYSTEM IN THE FEDERAL COURTS}, 26 F.R.D. 409, 539 (1960). Note that the pre-paid fees range from $3 to a high of $72 per diem compensation for the jurors.

The Judicial Conference Committee on the Operation of the Jury System rejected the idea that costs should be reduced by placing a greater burden on the litigants since such a provision was contrary to the basic theory of the Magna Carta. See note 56 \textit{supra}.

\textsuperscript{76} Judge Herndon reported in 1956 that at least thirty-six states had made statutory provisions for juries of less than twelve in some of their courts. Herndon, \textit{supra} note 69, at 47.

Furthermore, in recent months the United States District Courts for Minnesota, New Mexico, Southern Illinois, Southern Florida, and Indiana have reduced the size of civil juries to six members. N.Y. Times, March 17, 1971, at 32, col. 7. Chief Justice Burger reported that the Judicial Conference for the United States had voted to reduce the size of federal civil juries to a number less than twelve. Criminal juries were not covered by the announcement, but recent discussions of the criminal branch indicate that a similar change may be forthcoming: \textit{Id.} at 1, col. 1.

Beginning June 1, 1971, six member juries will try all civil cases in the U.S. District Court for Kansas, although criminal trials will maintain twelve man juries. N.Y. Times, March 21, 1971, at 58, col. 2.
been forthcoming. Social psychologists engaged in analysis of small group decision-making, however, have accumulated a limited amount of data which appears applicable to examinations of jury size. Although critics of the use of psychological studies argue that there are special characteristics of a jury (such as the participants' awareness of their status as jurors, the experience of watching the problem unfold in a courtroom, and the importance of their verdict) which cannot be reproduced in an experimental situation, a comparison of the results of actual jury analysis with analysis of carefully controlled experimental groups does not support this criticism. There is therefore no reason to believe that the dynamics of the deliberative process of decision-making in small group experiments should differ from the same process occurring in a jury room. While a completely accurate analysis of a jury's time spent in deliberation would require a precise replication of the same trial using varying numbers of jurors, a study of

77 While many judges, lawyers and clerks say that the modifications have proved satisfactory and should be continued, the concrete data to support their opinions are lacking. See note 70 supra. See also Wiehl, supra note 35, at 41; Tamm, supra note 58, at 165.

78 The difference between civil and criminal trials may become important in analogizing to experimental data. While a jury's task in a civil trial may be generally viewed as a question of whether there is a cause of action and if so, the amount of damages to be awarded, the task in a criminal trial is to determine guilt and thereby directly influence the defendant's future rights and privileges. The suggestion has been made that the jury in a civil trial may consider its task relatively academic, whereas the responsibility for determining the future of a defendant's life may weigh heavily upon the collective conscience of the jury. This deeper sense of responsibility could not be replicated in an experimental situation unless the subjects actually believed that they were trying a defendant.

Although there is no data to support the contention that the deliberative processes may differ with civil and criminal juries, and that the experimental situation is analogous only to the civil jury, the Williams court recognized that some state legislatures might decide that "it is desirable to spread the collective responsibility for the determination of guilt among the larger group." 399 U.S. at 103.

For purposes of discussing the dynamics of small group decision-making, the distinction seems speculative at best, and civil and criminal juries will be considered jointly.

79 Compare the results of the Chicago jury study (H. Kalven, supra note 50) and other studies of jury composition (see Holbrook, Composition of Juries as a Group, in C. Joiner, supra note 48) with the experimental results of Strodtbeck (Strodtbeck James, & Hawkins, Social Status in Jury Deliberations, 22 Am. Soc. Rev. 713 (Dec. 1957). Nevertheless, in order to make a constructive use of social psychological experimental data to study the jury system, certain characteristics of the control groups must be similar in nature to jury situations. For example, certain problems given to an experimental group for consideration would require different capabilities of the group members than would be required by a typical jury to reach a verdict. Also, the composition of some experimental groups may be so unlike the composition of a jury that an analysis of the former would not prove valuable to a study of the latter. With these caveats in mind, a review of the literature should be instructive in determining how small groups differ from larger groups.

80 This, of course, would be virtually impossible, because precisely the same case would be unlikely to arise in two jurisdictions—one of which used twelve jurors and the other using fewer. Even if it did, the participants would be different, and therefore no accurate comparison could be made. There would be value, however, in comparing the average amount of time for a case to be tried before and after a particular jurisdiction changed from twelve jurors to a lower number. Data of this type are lacking. See Strodtbeck, Social
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psychological experiments using different-sized groups to solve the same problem presents a fair analogy to the jury situation. In one experiment, groups of 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 16, 18, and 20 were used to play a game of “Twenty Questions” in which each group had to discuss the proper questions to be used before actually propounding them. The experiment revealed that the larger groups took longer to reach decisions, and the larger the group’s size, the more reluctant were members to express their opinions. Similarly, another study of groups composed of from five to twelve members revealed that the larger groups consistently required more time to reach a decision.

With respect to the quality of deliberation of smaller juries, critics have contended that there would be less stimulation of profitable discussion and the jury would be more easily dominated by a strong and aggressive member. Professor Strodtbeck, working in conjunction with the Chicago jury study, examined the deliberations of twelve man groups that were set up as experimental reproductions of actual juries. The groups listened to a recorded trial and were allowed to retire and reach a verdict while their deliberations were recorded. Results of the study showed that in 82 percent of the “juries,” the three most dominant participants accounted for one-half or more of the total communications. Thus it appears from these studies that in

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81 N. Miller, The Effect of Group Size on Decision-Making Discussions, 1951 (unpublished Ph.D. Dissertation in University of Michigan Graduate Library). “Twenty Questions” is a common parlor game in which one person has in mind a physical object and the others are required to ascertain what the object is. The questioners may ask only twenty questions answerable by a simple “yes” or “no” in their discovery process.

82 The deliberative process required was analogous to a jury’s task in several ways. Since the number of questions was limited, group discussion and agreement was required to decide which question would be asked. Opinions of all members had to be solicited and final approval may have been reached by a voting process. Presumably, if the group was divided on a decision, the majority would attempt to persuade the minority to its point of view. Finally, once the question was agreed upon, only one member could present it to the experimenter, the leader being roughly analogous to a jury foreman.

83 Hare, A Study of Interaction and Consensus in Different Sized Groups, 17 AM. SOC. REV. 261 (June 1952). The experiment used small groups of Boy Scouts who were presented with a problem involving a “camping game.” They were required to reach a group decision on the best solution. There is no indication that the results achieved by using Boy Scouts differed significantly from use of adults.


85 Strodtbeck, James, & Hawkins, Social Status in Jury Deliberations, 22 AM. SOC. REV. 713 (Dec. 1957). This study is one of the few in which the experimental groups were created with the intent of reproducing a jury situation. The participants were chosen from regular jury pools. They listened to a recorded trial and were told they were to reach a verdict just as if they had been the jurors in the case. Bailiffs of the court were present to enhance the realism of the situation.

86 Id. at 715.
juries of twelve members, most of the discussion is carried on by a very limited number of the jurors.

In one of the studies comparing the deliberations of large and small groups, it was revealed that there were more opportunities to talk in the smaller groups, whereas in the larger groups there was a wider divergence in the amount of participation among the members. As the high participators spoke more, there was less opportunity for a low participant to discuss his views, and he therefore felt less pressure from the other members to participate. The researcher hypothesized that in larger groups the high participators were attempting to overcome the feelings of frustration created by the diminished opportunity to talk, while the number of low participators increased as the pressure to speak decreased. Another experimenter discovered similar results, but attributed the decrease in participation by most of the group members to their self-conscious feelings that their opinions were not so important to the group when there were more members.

Analogous results were also discovered by Professor Bales (a leader in small group studies) who, in experimenting with groups of sizes two to seven found that as group size increased, the number of persons who participated at absolutely minimal rates increased. Bales attributed this result to the fact that larger groups afforded shy or tense persons a greater amount of anonymity which permitted them to avoid discussion.

These studies would appear to support the view that discussion is stimulated by reducing the size of the group, since group members are less likely to consider the other members as an audience when they participate with fewer people. While the critics believe that reducing the size of a jury will limit the constructive participation of a wide variety of members of contrasting backgrounds representing the "community conscience," studies

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87 See Miller, note 81 supra.
88 Id. at 45.
89 Id.
90 See Hare, note 83 supra.
91 Bales and Borgatta, Size of Group as a Factor in the Interaction Profile, in SMALL GROUPS 495 (A. Hare, E. Borgatta & R. Bales eds. 1965). The experiment involved an application of Bales' interaction process and analysis to group discussion of a complex human relations problem. Essentially the interaction process and analysis involves a running log of all overt actions by all members of the group. These are then categorized into twelve groups which Bales claims represent most interpersonal actions occurring during the problem-solving process. The human relations problems used in the study bore some resemblance to the types of problems a jury faces. After the experimenter recited the facts of the "case," the group members were asked to recommend the most desirable action to be taken to resolve the problem.
indicate that in fact the larger groups tend to inhibit discussion, and more active participation by all members is achieved as a result of the reduction.

Another aspect of the deliberation process which merits investigation is the relative influence of the more active members on the group decision. A possible drawback of the smaller jury is that an active participator would have fewer members to convince, thus increasing the likelihood that the more aggressive member could impose his opinion on the group. One experiment tends to support this charge, since the analyst found that leaders in small groups have more influence on the final decision than leaders of large groups. While no studies have directly refuted this study's findings, the impact may be weakened by results of Strodtbeck's experiment. He found that the more active members of his twelve man "juries" were almost always able to persuade less active ones to their point of view. Therefore, while the critics of smaller juries may be correct in theorizing that an active member is more likely to have a greater influence on the group deliberations, the decision-making process in either a twelve man jury or a reduced jury is essentially the same: the more active members almost always have ultimate influence in determining the final verdict.

A final consideration of the deliberative process is the quality of the discussion and ultimate decision. Professor Fox conducted an experiment with different sized groups of United States Air Force officers in which the groups were given a complex human relations problem to solve. In rating the solution's quality, Fox concluded that "in a 50-minute period a large ad hoc staff of 12-13 officers was able to organize and establish channels of communication to produce a written group product superior in quality to those produced by small staffs of 6-8 officers in the same length of time." However, Professor Thomas, in reviewing

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92 Hare, supra note 83, at 265.
93 The question then becomes whether the nature of the reduced jury would change the nature of the group of potential jurors who are most active. That is, since the low participators tend to increase the amount of their participation as the size of the group is reduced, they may begin to replace the high participators and subsequently deprive them of their influence. Thus, a juror who would be a low participator in a twelve man jury, might become a high participator in a reduced jury with a consequent increase in influence. Therefore, the ultimate verdict might differ when the size of the jury is reduced, the difference representing the increased influence of a group of jurors which was previously powerless. No difference is assured, however, and precisely the same verdict might be reached even after a realignment of high participators.
94 Fox, Lorge, Weltz, & Herrold, Comparison of Decisions Written by Large and Small Groups, 8 THE AMERICAN PSYCHOLOGIST 351 (August, 1953).
95 Id. at 351.
experiments regarding group size, noted that studies of quality of group decisions have rendered mixed reports:96

Considering the group performance findings as a whole, it appears that both quality of performance and group productivity were positively correlated with group size under some conditions, and under no conditions were smaller groups superior. In contrast, measures of speed showed no difference or else favored the smaller groups.97

The quality of jury deliberations, of course, is highly subjective in nature and not conducive to analysis. In some of the experiments which Thomas reviewed, the group problem involved finding a solution to a riddle or problem of logic.98 Solutions of this type of problem can be easily rated as right or wrong, yet the problems upon which jurors deliberate are seldom of this nature since juries deal with problems which can be solved only by judging the credibility of witnesses and weight of the evidence. To this extent, the experiments dealing with the quality of group decisions are probably not applicable to an analysis of jury verdicts. A more accurate measure might be made by comparing the jury verdicts to a decision by the presiding judge, or by comparing the verdicts of small juries to those of larger juries hearing the same case.99 Since no such experiments have yet been carried out, at present the conclusions regarding the quality of decisions are highly tenuous.

A third area of experimentation has been conducted in regard to the satisfaction of the jury members with the group experience. Satisfaction of the jury members is an important factor in community acceptance of the judicial system.100 In his experimental jury

96Thomas and Fink, Effects of Group Size, in SMALL GROUPS 495 (A. Hare, E. Borgatta & R. Bales eds. 1965).
97 Id. at 527.
98 Id. at 534-36.
99 A comparison of the verdicts of small juries to those of larger juries hearing the same case might show some divergence. See notes 39 and 93 supra. The quality of the differing verdicts, however, is unclear. If the increased influence of formerly powerless jury members may be viewed as enhancing the "cross section of the community" aspect of a jury, then perhaps the verdict would be more representative regardless of quality. On the other hand, some critics may contend that the high quality of verdicts rendered by twelve man juries is attributable to the highly influential professional persons (see text accompanying note 106 infra.) who are generally more highly educated than clerks, laborers, or skilled workers. This criticism, of course, erodes the concept of trial by one's peers.
100 Dean Joiner has discussed the consequences of lack of public acceptance by the community: "The law requires community-wide acceptance. If the community as a whole did not accept law, people would be very unhappy. There could be widespread disregard for or even revolt against the government that created the law." C. JOINER, supra note 48, at 37.
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studies, Strodtbeck found that the level of an individual's satisfaction with the verdict was positively correlated with the level of his own participation.\textsuperscript{101} Since the number of persons participating at absolutely minimal levels increases as the size of a group increases, the satisfaction of the group as a whole should increase as the group is reduced in size. One social scientist, noting a strong tendency for larger groups to divide into cliques, attributed the result to the juror's attempt to search out and associate with other jurors most similar to himself. He concluded:

If members feel frustrated about their lack of participation, it is quite possible that they will begin communicating with people sitting near them in the group (if they can't talk to the whole group, they will whisper to neighbors), and/or give tacit support to those people who do express their unexpressed ideas.\textsuperscript{102}

If members of larger groups are more likely to become frustrated and dissolve into smaller cliques which are not conducive to group deliberation and are more likely to promote competition and disagreement among the members, member satisfaction with the deliberative process must decrease. Moreover, if strong competition develops among the cliques regarding the final verdict, a compromise verdict may have to be rendered which is wholly satisfactory to none.

Finally, in *Williams* the Supreme Court suggested that, in terms of the cross section of the community represented, the differences between a six man and a twelve man jury seemed negligible.\textsuperscript{103} Empirical studies of the composition of juries indicate that in fact juries seldom represent a true cross section\textsuperscript{104} and are most often overrepresented by housewives\textsuperscript{105} and persons with some college background. In addition, Strodtbeck found that the opinions of

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Public acceptance may be attributed in part to the satisfaction derived from serving on juries, but in a larger sense the public seems to believe that their peers are better able to understand the human elements involved in a case. Both litigants and jurors are more likely to accept a jury verdict than an administrative opinion. In order that public acceptance of the judicial system continue, it is crucial that the system be supported by public opinion, and without such support, social dissatisfaction and disregard of the judiciary will be fostered. C. JOINER, *supra* note 48, at 65. In the Ford Foundation study at the University of Chicago Law School, 94 percent of the jurors polled responded that they would like to serve again. Only 3 percent said they would not like to serve again. The Chicago jury study indicated that 70 percent of the public favored jury trial and only 9 percent favored trial by judges. Summers, *supra* note 57, at 8.

\textsuperscript{101} Strodtbeck, *supra* note 85, at 716.

\textsuperscript{102} Miller, *supra* note 81 at 12–13. See also Hare, *supra* note 83, at 266–67.

\textsuperscript{103} Williams v. Florida, 399 U.S. 78, 100 (1970).

\textsuperscript{104} Holbrook, *Composition of Juries as a Group*, in C. JOINER, *supra* note 48 at 195.

\textsuperscript{105} Forty-one percent of the jurors in this study were housewives. *Id.* at 200.
professional persons were more influential in reaching a verdict than the opinions of skilled workers, clerical employees or laborers. These findings indicate that rarely is an accused truly judged by a panel of his peers, nor does the panel presently represent a cross section of the community. Therefore, a reduction in the size of the jury would not necessarily have an adverse effect on the “community conscience” aspect of the jury’s function.

Nevertheless, an important problem is highlighted: underrepresented minority groups are even less likely to be included on a smaller jury. Although the problem can be rectified in part through the voir dire process, it suggests that the courts must become increasingly alert to the problem of minority representation among potential jurors.

V. Conclusion

As trials are delayed for extended periods of time and the costs of the judicial process become increasingly burdensome, reform of the jury system is imperative. Reduction of jury size would eliminate many problems while retaining the fundamental benefits of the jury trial. Specifically, juries of less than twelve will not significantly affect the deliberative quality of the jury system nor undermine the jury's function as the conscience of the community. Most judges and lawyers who have dealt with smaller juries

\[106\] Strodtbeck, supra note 85, at 716.

\[107\] See Comment, Florida's Six-Member Criminal Juries: Constitutional, But are They Fair?, supra note 32, at 408:

"Based on voter registration figures for Florida . . . one of every nine potential jurors is black. Computing probability from that ratio, a defendant in Florida has less than a fifty percent chance of trial by a six-member jury that includes a black person. . . . Expanding the jury to twelve members would more than double the likelihood of a black juror . . . ."

Furthermore, the general composition of the twelve man jury is likely to change. That is, while a male professional (who tends to be a dominant figure in jury decision-making, see text accompanying note 106 supra) may often be included in a twelve man jury, the chances of his inclusion on a smaller jury are reduced. Such a change in the composition may promote a different verdict (see note 93 supra), yet the nature of the difference is unclear, and in view of the other parameters which would change, there is no certainty of any difference whatsoever.

\[108\] The solution to this problem is not to be found through maintaining a twelve man jury or even through increasing the size of the jury. The problem does suggest, however, that other means of increasing minority representation should be investigated.

\[109\] C. JOINER, supra note 48, at 31. Not only do the smaller juries retain the advantages of the larger juries, but in many cases the modifications enhance the value of the system. Smaller groups are likely to be more cohesive, they spend less time on a single problem than do larger juries, and the participating jurors have a more favorable impression of the judicial system.
have been satisfied with the verdicts,\textsuperscript{110} and the empirical data available indicate that the verdicts returned by small juries have not been significantly different from those rendered by twelve man juries.\textsuperscript{111} 

While a search for the ideal reduced jury size may seem elusive,\textsuperscript{112} available experimental data suggest that an odd number\textsuperscript{113} greater than three\textsuperscript{114} is required. Nevertheless, the jury size should be the lowest number consistent with the effective functioning of the panel.\textsuperscript{115} Although several methods of implementing the proposal have been offered,\textsuperscript{116} the most expedient alternative is through legislation mandating use of the small jury in all cases tried by jury.\textsuperscript{117} States which have introduced the modification in

\textsuperscript{110} Wiehl, supra note 35, at 41. Tamm, supra note 58, at 165. Judge Tamm reported a favorable experience with five man juries in the District of Columbia.

\textsuperscript{111} 42 J. AM. JUD. SOC'Y, supra note 70. Based upon a report of the clerk of the District Court of Worcester, Massachusetts.

\textsuperscript{112} Judge Tamm has proposed a five man jury. Tamm, supra note 35, at 136. Judge Wiehl was most satisfied with the number six. Wiehl, supra note 35. States which have implemented a mandatory jury of less than twelve in civil cases have used juries of six, seven and eight. Tamm, supra note 35, n. 60 at 135. Since no reasons are offered for the choice of any specific number, one may deduce that the selection is arbitrary.

\textsuperscript{113} Bales, in experiments with groups ranging in size from two to seven members, found that the two man groups stifled discussion, because the members sought to avoid direct confrontation, and argumentation. Generally, groups with an even number of members were higher in “showing disagreement” and “antagonism,” and split evenly without a majority. Thus even-numbered groups may persist in a deadlock, whereas odd-numbered groups are more conducive to majority pressures, and so arrive at a decision sooner. Bales & Borgatta, supra note 91, at 503, 509.

\textsuperscript{114} Bales found three man groups to be peculiarly unstable: if two members disagreed, the third had a great deal of power to side with one or the other. He concluded that this situation breeds a “power politics” approach which is not conducive to substantive deliberations. Id. at 509.

\textsuperscript{115} Tamm, supra note 35, at 136.

\textsuperscript{116} In the federal system, rule 48 of the Federal Rules of Civil Procedure and rule 23(b) of the Rules of Criminal Procedure permit juries of less than twelve upon stipulation of the parties. “The parties may stipulate that the jury shall consist of any number less than twelve. ...” FED. R. CIV. P. 48 “Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with approval of the court that the jury shall consist of any number less than 12.” FED. R. CRIM. P. 23(b). State procedures generally either follow the federal example [see, e.g., WASH. REV. CODE ANN. § 4.44,120 (1956): The jury shall consist of twelve persons, unless the parties consent to a less number. The parties may consent to any number not less than three, ...] or make the smaller juries mandatory [see MICH. COMP. LAWS ANN. § 600.1352 (1970), supra note 7] or establish the smaller juries by statute, but allow increase in size upon payment of a special jury fee [see, e.g., COLO. REV. STAT. ANN. 78-7-4 (1963), “The jury shall consist of six persons, unless the parties agree to a smaller number, not less than three. Any party may have the right to increase the number of jurors to twelve by depositing with the clerk an additional jury fee, ...”]

\textsuperscript{117} The federal approach has proved ineffective as a means of instituting smaller juries. Judge Tamm reported that in his fourteen years on the bench, no case was tried before him in which the parties voluntarily stipulated to a jury of less than twelve. Tamm, supra note 35, at 140. Judge Phillips reported that after three years of operating under the Connecticut statute which provided for election of larger jury on payment of a fee, most of the six man juries were used in the Common Pleas Court, while in the Superior Court—where most of the delay existed—litigants continued to demand the larger juries. Phillips, supra note 63, at 355.
this manner have reported no public antagonism toward or dissatisfaction with the smaller jury. Much evidence, therefore, points to the conclusion that implementation of a smaller jury would make a significant contribution to improving the American system of justice.

—David M. Powell

118 Cronin, supra note 70, at 28-29. The general reaction to the proposal in those jurisdictions which have fully instituted it is apparent from Judge Herndon's statement: "So far as we have been able to ascertain, curtailment of the size of civil juries has operated very successfully in the states where it has been tried." Herndon, supra note 69, at 47.