THE UNNECESSARY ALTERNATE JUROR

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INTRODUCTION

Imagine that you are called for jury duty for the first time. You report to the jury-pool room at 8:30 in the morning and are told to listen for the bailiff to call the juror number printed on your postcard. The bailiff calls many juror numbers, and after a few hours you start to hope that you will be excused so that you can return to work. Unfortunately, a bailiff eventually calls your number. You report to a large room where roll is called, and then you are escorted into a courtroom.

You quickly learn that this is a criminal trial. There are two tables in the courtroom. Three people sit at one table: a young man with a suit that is so large the sleeves hang over his hands and a man and woman dressed in tailored suits. Two women occupy the other table, and they smile at the potential jurors as they enter the courtroom. The young man, apparently the defendant, sits with his eyes downcast. He looks to be about fifteen years old. You are not seated with the potential jurors who will answer the initial questions; instead, you are seated with many others in the back of the courtroom on hard benches resembling church pews.

As the day goes on, you sit, looking around the courtroom, looking at the defendant and wondering what he did, and listening as the lawyers take turns interrogating potential jurors. They ask questions about every experience imaginable. Some potential jurors are immediately excused and replaced with others randomly chosen from those still seated on the benches.

The process continues for hours, and now it is almost five o'clock in the evening. Once again, it looks like you may not end up serving as a juror, and you look forward to going home after a boring day sitting on the hard bench. Instead, you are

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one of the last people called to sit in the jury box and endure the questioning. The lawyers from both sides appear overly friendly. They ask you an abbreviated version of what they have asked everyone else during the course of the day. Peremptory challenges begin, and, to your astonishment, you remain in the jury box with twelve others when the lawyers are finished. You discover that the defendant is charged with two counts of first-degree murder and that he is not going to face the death penalty.

The trial begins. Over the next several days, you become anxious and feel the importance of your position. It is a serious and tragic trial. You do not decide whether you think the defendant is guilty and carefully reserve judgment until both sides have presented their respective cases. Finally, about a week and a half later, you have bonded with the other jurors, have eaten lunch with them, and have even exchanged phone numbers. The importance and gravity of what you will be asked to decide weighs on you and the other jurors. You lose several nights of sleep, agonizing over the decision you will make. You have missed almost two weeks of work, which is definitely not good at this point in your career. The trial comes to an end after closing arguments are made.

Then you experience a shocking disappointment. The judge looks at you after giving the jury instructions and informs you that you are the alternate juror. You are summarily excused. You are advised that, until the trial is over, you may not have any contact with the fellow jurors with whom you have bonded. The bailiff explains that you are to remain at home, "on call," until a verdict has been reached, and when that happens, he will call you.

You go home, feeling rejected, dejected, and suddenly unimportant. Two days later, the bailiff calls and informs you that a guilty verdict has been reached—and you are horrified. It is definitely not the conclusion you would have arrived at, and there is no way for you to know how your former friends could have come to such a conclusion. The verdict is far too harsh considering the circumstances of the case. Yet, there is no way you will ever know how twelve seemingly reasonable people could have reached the conclusion they did.

This real scenario[1] posits the question: why empanel alternate jurors at all? The person who is ultimately chosen as the alternate may suffer high emotional and financial costs, as well as the burden of lost time. The alternate hears the case, sacrifices her time and money, and becomes emotionally involved in the trial, but is not allowed to participate in the decision-making process. As a result, the alternate may feel as if she has been made to suffer a trauma but has been denied any way to cope with it. Jurors' faith in our legal system is consequently eroded. On the other hand, if a juror falls ill or is removed from the jury for some other reason, like discussing the case before the conclusion of the trial, the alternate serves as a replacement, preventing the necessity of a re-trial.

At common law, a jury of twelve persons was required.[2] At the time of the adoption of the United States Constitution, an essential element of trial by jury, both in this country and in England, was a jury consisting of exactly twelve men.[3] The Constitution itself, however, does not guarantee any specific number of jurors.[4] It is a historical, not a constitutional, requirement that leads to the modern practice of empanelling alternate jurors. Courts empanel alternates to ensure that if one or more of the original panel cannot serve at some point, the twelve-juror requirement can still be met.

Commentators have criticized both the practice of empanelling alternate jurors and the twelve-juror requirement itself. When a defendant is entitled to a jury trial, the United States Supreme Court has determined that the jury must consist of at least six members.[5] At least one other court has indicated that any number of jurors between six and twelve is acceptable.[6] A jury of fewer than twelve is also permitted in federal criminal trials through the revised Federal Rule of Criminal Procedure 23(b). Some critics suggest that the only reason alternate jurors remain a part of the system is that attorneys are loathe to give them up; they want to empanel as many alternate jurors

1. The above description is based on the author's personal experience with jury duty.

2. *See* Coates v. Lawrence, 46 F. Supp. 414, 423 (S.D. Ga. 1942), *aff'd,* 131 F.2d 110 (5th Cir. 1942).

3. *See id.*

4. *See* U.S. CONST. art. III, §2, cl. 3; U.S. CONST. amend. VI.

5. *See* Ballew v. Georgia, 435 U.S. 223, 239 (1978).

6. *See* Johnson v. Duckworth, 650 F.2d 122, 124 (7th Cir. 1981).

as possible to get more peremptory challenges, which they employ with vigor.[7]

The practice of empanelling alternate jurors should be eliminated because of the significant personal cost to the alternates and because there is no constitutional mandate of twelve jurors. Part I of this comment examines the common law, which requires twelve-juror panels, and describes its evolution into what some erroneously view as a constitutional requirement. Part II explores case law addressing the problems with seating alternate jurors. Part III explains why twelve jurors are no longer needed, and how the revised version of Rule 23 of the Federal Rules of Criminal Procedure changed the twelve-juror requirement. Applications of this new rule are also discussed in Part III. Part IV discusses the reasons attorneys and courts favor empanelling alternate jurors. Part V discusses how citizens routinely attempt to avoid jury duty because of the toll it takes on them and how being a juror emotionally affects the citizen. This Comment concludes that the practice of empanelling alternate jurors should be abolished because it is unnecessary, it is not mandated by the Constitution, and it negatively affects our legal system and its image.

I. HISTORICAL BACKGROUND: WHY OUR SYSTEM USES ALTERNATE JURORS

The primary argument for empanelling alternate jurors is that the Constitution requires a jury of twelve, and, if one or more jurors must be excused, a lack of alternates will lead to a mistrial. The Constitution, however, does not explicitly require a jury of twelve.[8] Rather, this perceived requirement stems from the common law requirement of twelve jurors that was in effect when the Constitution was adopted. Section A details different theories for why the number twelve is significant. Most of these explanations derive from mythical and religious sources. Section B discusses whether a jury consisting of exactly twelve members is an essential feature of a jury under the Constitution.

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7. *See* Morris Hoffman, *Peremptory Challenges: Lawyers Are from Mars, Judges Are from Venus,* GREEN BAG, Winter 2000, at 135, 140.

8. *See* U.S. CONST. art III, §2, cl. 3; U.S. CONST. amend. VI.

A. The Importance of the Number Twelve

Historically, juries provided a check on arbitrary law enforcement, thus preventing conviction and punishment by overzealous officials.[9] The requirement of twelve jurors was fixed in the fourteenth century.[10] No legal explanation exists for why this number was selected. Courts likely adopted the number twelve because of the importance of the jury trial and its function at common law.

Some scholars argue that the twelve-person requirement emerged from the number of jurors in a presentment jury.[11] This system involved the selection of twelve people from a group of one hundred to make a formal accusation, or presentment, against the defendant. Once the presentment was made, trial was by ordeal or battle.[12] This method involved either placing the accused in a life-threatening situation or forcing the accused to fight in hand-to-hand combat to the death. It was thought that God would take the life of the guilty person and spare the life of the innocent person, and justice would be done.

Other theories posit that the number twelve possesses mystical or religious importance. One such theory is that the number twelve has special significance in the Bible, since there are twelve apostles, twelve patriarchs, and twelve tribes of Israel.[13] In addition, the United States Supreme Court has found that the twelve-juror requirement is merely a "historical accident," unrelated to the function of the jury itself.[14] Another court has simply cited the Magna Carta as a reason why juries must consist of twelve members.[15]

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9. *See* Williams v. Florida, 399 U.S. 78, 87 (1970).

10. *Id.* at 89.

11. *Id.*

12. *Id.* at n.20.

13. *See, e.g., id.* at 88. The twelve patriarchs were the twelve sons of Jacob, and they are considered to be the founders of the twelve tribes of Israel, from which all the Israelites are descended. *See Genesis* chs. 26–35, 37–39; *Romans* 9:13.

14. *See Williams*, 399 U.S. at 89, 102.

15. *See id.* at 91 (noting Thompson v. Utah, 170 U.S. 343 (1898)). King John of England signed the Magna Carta on June 15, 1215, at Runnymede, England. The document was developed by the English barons, who wanted their grievances with the feudal system to be addressed by the King. The Great Charter, as it is sometimes called, guaranteed specific legal remedies for disputes and implemented criminal procedures that mandated due process for those accused. King

B. The Right to Twelve Jurors Is not Indispensable

Despite common law establishing the importance of twelve jurors, it is possible, even in a federal court, to proceed with less than twelve jurors if the defendant agrees to waive the twelve-juror requirement. The fact that this is possible implies that the requirement is not a vital constitutional right.[16] Moreover, the Fourteenth Amendment does not guarantee any specific number of jurors in state criminal trials.[17] Many state constitutions authorize some number fewer than twelve, and, as long as it is not fewer than six, there is no constitutional violation of due process.[18] Thus, the right to a jury of twelve is not inviolable.

Furthermore, the United States Supreme Court has questioned whether every aspect of the common law jury, including unanimity and the requirement that the jurors must be residents of the neighborhood or "vicinage" of the accused, must be applied in every instance in which the Constitution refers to a "jury."[19] The Framers' intent is difficult to discern. These issues regarding juries were not discussed at length in the proceedings of the Constitutional Convention, with the exception of brief arguments about whether the right to a jury should apply in civil cases.[20]

The Sixth Amendment omitted many of the specific requirements of the common law jury because the Amendment's Framers wanted to leave the specifics to the legislature's discretion.[21] The United States Supreme Court has held that a

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John was pressured into signing the document when his barons renounced allegiance to him and England was on the verge of revolt. *See* A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY v–22 (1964). The Magna Carta requires judgment by an accused's peers, however, historians debate whether this actually refers to a "jury" in the common law sense. "Jury" in the common law sense would mean a jury of twelve. *See* Williams v. Florida, 399 U.S. 78, 92 n.27 (1970).

16. *See* Coates v. Lawrence, 46 F. Supp. 414, 423 (S.D. Ga. 1942).

17. *See* Johnson v. Duckworth, 650 F.2d 122, 124 (7th Cir. 1981).

18. *See id.*

19. *Williams*, 399 U.S. at 96–97.

20. *See id.* at 93.

21. *See id.* at 96 n.37. This footnote reveals that originally many in the House of Representatives wanted to include requirements that the jury return unanimous verdicts and other specifics, but the Senate deleted every clause that the House proposed except that indictment should be by grand jury. The Senate was concerned that if the amendment was too specific, circumstances in individual counties, such as rebellions, could make the requirements impossible to meet, and trial by jury thus impracticable.

"jury" in a constitutional sense does not necessarily embrace all the features of the jury at common law.[22] Because it is impossible to know the true intent of the Framers on this issue, the Court has provided that the relevant inquiry is whether the function that a particular feature of the jury performs is essential to the purpose of a jury trial.[23] The twelve-juror requirement is not "an indispensable component of the Sixth Amendment,"[24] meaning that a jury of twelve is not necessary for a verdict that complies with the Constitution.

II. CASE LAW CONCERNING THE TWELVE-JUROR REQUIREMENT

The leading case discussing the appropriate number of jurors is *Williams v. Florida,*[25] a 1970 Supreme Court case. According to the Court, the fact that most juries consist of twelve persons is merely a "historical accident,"[26] and the Sixth Amendment does not require a twelve-juror panel.[27] Although *Williams* addressed the twelve-juror requirement in state courts, its holding extends to federal courts as well, illustrated by the many subsequent federal cases following the *Williams* rationale.

In *United States v. Stratton,*[28] the Second Circuit found that a jury of eleven could return a verdict within the bounds of the Constitution. In *Stratton,* a juror had to be excused for religious observances. Defense counsel objected to the substitution of the alternate juror, apparently thinking that the alternate was not sympathetic enough to the defendant.[29] The judge sustained the defendant's objection, and citing the revised Federal Rule of Criminal Procedure 23(b), allowed the case to proceed with the remaining eleven jurors.[30] The court held that a jury of fewer than twelve was acceptable and constitutional,

22. *See id.*
23. *See id.* at 99–100.
24. *Id.* at 100.
25. 399 U.S. 78 (1970).
26. *See id.* at 89, 102.
27. *See id.* at 100.
28. 779 F.2d 820 (2d Cir. 1985).
29. *See id.* at 830.
30. *See id.* at 831. The court cited a passage from Rule 23 as follows: "Juries shall be of twelve but . . . if the court finds it necessary to excuse a juror for any just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining eleven jurors." FED. R. CRIM. P. 23(b).

citing *Williams v. Florida*.[31] The court determined that there is no significant difference in the chances of conviction or harm to the jury process when there are eleven jurors instead of twelve.[32] Moreover, if there were such a difference, it was only miniscule and did not affect the defendant's constitutional rights.[33]

United States v. Ahmad is another example of a federal criminal case where a verdict was returned by fewer than twelve jurors.[34] In this case, a juror had to be excused because the trial lasted much longer than anticipated and he was leaving on a family vacation. After a conference with attorneys on both sides, the trial court decided to proceed with eleven jurors if a verdict was not returned by the time the juror had to leave for the airport.[35] On appeal, the defendant contended that the verdict returned by eleven jurors violated his constitutional rights. The Ninth Circuit rejected the defendant's appeal, holding that the Constitution did not require a twelve-person jury.[36]

The three cases discussed above demonstrate the willingness of courts to accept juries of fewer than twelve. Federal courts have consistently followed the reasoning of *Williams* to find that a jury of fewer than twelve is constitutional, despite defendants' arguments that it is not. Therefore, twelve-juror panels are not required in federal courts. Since twelve-juror panels are not required, alternate jurors are not necessary.

III. ARGUMENTS AGAINST THE HISTORICAL BASIS FOR THE REQUIREMENT AND THE REVISED RULE 23

The Supreme Court has stated that the requirement of a twelve-member jury is merely a "historical accident" and has held that a twelve-member jury is not indispensable to the constitutional guarantee of a trial by jury.[37] Additionally, the Court has held that it is constitutional for state criminal trials to have a jury of fewer than twelve people.[38] This has led commentators to question why it is still thought that the Constitu-

31. *See id.* at 832.
32. *See id.* at 834.
33. *See id.*
34. 974 F.2d 1163 (9th Cir. 1992).
35. *See id.* at 1164.
36. *See id.*
37. Williams v. Florida, 399 U.S. 78, 89, 100, 102 (1970).
38. *See id.*

tion guarantees a jury of twelve in federal trials. As discussed in Section A below, the committee notes to Rule 23 of the Federal Rules of Criminal Procedure provide a background for eliminating the mandate that all juries consist of twelve persons. The revised Rule 23(b) renders the requirement unnecessary. Section B then examines how courts have applied the new Rule 23.

A. Revision of Rule 23

In 1983, the Federal Rules of Criminal Procedure were revised. The committee that revised the Rules questioned the twelve-juror requirement in cases where there either was no alternate juror, or, despite the presence of an alternate, a jury of fewer than twelve deliberated. For the first time, the revised rule permitted a jury of fewer than twelve to return a verdict. The amended text of Rule 23(b) reads, in pertinent part:

> Juries shall be of twelve but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than twelve or that a valid verdict may be returned by a jury of less than twelve should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining eleven jurors.[39]

The advisory committee's notes illustrate the purpose behind the change. The notes specifically state that allowing the court discretion in excusing a juror and receiving a verdict from fewer than twelve jurors is helpful when there is no alternate available; therefore, no alternate is required.[40] Moreover, the notes mention that it is common practice in West Virginia for both parties to waive the empanelling of an alternate juror, so that a jury of fewer than twelve will be valid.[41] This has been the practice there for some time.

Furthermore, the notes reveal that allowing courts to remove a juror without the defendant's consent and then accept-

39. FED. R. CRIM. P. 23(b).
40. *See* FED. R. CRIM. P. 23(b) advisory committee's note.
41. *See id.*

ing a verdict returned by fewer than twelve jurors does not violate the Constitution.[42] The committee cited the *Williams* case, which held that there are two "essential features of a jury": the jury must consist of ordinary people from the community, and this group must only be large enough to be fair and representative of the community. As long as these two features are preserved, a jury of fewer than twelve passes constitutional muster.[43]

The Advisory Committee believed that it was preferable to allow for a jury of fewer than twelve rather than allowing courts to face the unattractive choice of either declaring a mistrial or allowing an alternate juror to join the jury after deliberations had already begun.[44] The committee stated that substitution of an alternate after deliberations have begun is highly undesirable because it would be necessary for the alternate to either join in the deliberations late or participate in the deliberations from the beginning, scenarios that the Supreme Court advised the committee are likely both unconstitutional.[45] The alternative solution, allowing the alternate to join the jury and instructing the jury to begin deliberation anew, is equally unattractive because it would be almost impossible for the prior discussions not to influence the original jurors.[46] Further, the alternate would likely be "intimidated," since he or she would be joining the deliberations late.[47]

In addition, it is almost impossible for the court to determine whether a jury followed its instructions, given the mandate for private deliberations.[48] Since no one is allowed to question the jurors about how they reached their verdict, no one knows how closely they follow the jury instructions. Therefore, the committee believed there were drawbacks to the use of alternate jurors and determined that it would be preferable to continue the trial with the remaining original jurors. Thus, under the new Rule 23, there is no need to empanel alternate jurors.

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42. *See id.* (citing *Williams*, 399 U.S. at 100).
43. *See id.*
44. *See id.*
45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.*

Rule 23(b) of the Federal Rules of Criminal Procedure allows a jury of less than twelve to return a valid verdict when it becomes necessary to remove a juror. The court has discretion as to whether there is "just cause" for removal.[49] If removal occurs before the jury begins deliberations, the parties must stipulate their acceptance of the smaller jury in writing. If the jury has already begun deliberations, however, no such stipulation is required.[50]

B. The Revised Rule Applied

Federal courts have found that the revised Rule 23(b) does not violate the Constitution,[51] and the Eleventh Circuit, in *United States v. Gabay*, has provided that, "under appropriate circumstances, twelve member juries are not required."[52] The Eleventh Circuit has also found that it is not an "abuse of discretion" for a court to allow a jury to continue deliberating with fewer than twelve jurors, especially when "a mistrial would be burdensome."[53] *Gabay* involved a lengthy trial with many exhibits and witnesses.[54] Gabay was tried as the ringleader of a group that made and distributed almost forty billion dollars in counterfeit traveler's checks. At the conclusion of the trial, the district court stopped jury deliberation to hold a hearing concerning a juror who reportedly discussed the case with several people outside of court. The juror apparently told co-workers and other jurors that she had formed the conclusion that Gabay was guilty. Consequently, the court dismissed her.[55] The deliberations continued with the remaining eleven jurors, who eventually convicted Gabay.

On appeal, the defendant argued that the court did not have the required "just cause" to continue deliberations with eleven jurors after one juror was excused for misconduct. The appellate court, however, stated that the trial court clearly had

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49. *See id.* (finding that "just cause" is any reason that is demonstrable, such as religious reasons, medical problems, or the juror leaving on vacation).

50. *See* FED. R. CRIM. P. 23(b).

51. *See* FED. R. CRIM. P. 23(b) advisory committee's notes. The committee cites *Williams* for the proposition that the revised rule is constitutional.

52. United States v. Gabay, 923 F.2d 1536, 1543 (11th Cir. 1991).

53. *Id.*

54. *Id.*

55. *See id.* at 1541–42.

the discretion to determine whether or not just cause exists.[56] The Eleventh Circuit found that a mistrial would involve a second expenditure of resources for the prosecution, defense, and the court—the result that Rule 23(b) was designed to prevent. The Eleventh Circuit held that the trial court did not abuse its discretion by continuing deliberations with only eleven jurors when a juror suddenly became unavailable and a mistrial would have been "burdensome."[57] There was no mention of alternate jurors; it seems that none were empanelled, yet the court permitted the return of a verdict from only eleven jurors.

Another case that discusses amended Rule 23(b) is *United States v. Quiroz-Cortez,*[58] a Fifth Circuit case. In *Quiroz-Cortez,* the defendant appealed his conviction for drug crimes on the ground that the district court erroneously replaced one of the jurors with an alternate after deliberations had begun. The defense counsel asked for a mistrial and refused to consent to the replacement, but the district court, using its discretion under Rule 23(b) of the Federal Rules of Criminal Procedure, denied the motion for a mistrial and declared that the replacement would take place.[59]

On appeal, the Fifth Circuit held that this substitution was harmless error.[60] Regarding Rule 23(b), the court held that the proper procedure for the district court would be to proceed with an eleven-person jury instead of making the replacement.[61] The court explicitly stated that the "defendant was not entitled to twelve jurors."[62] This statement alone elucidates that revised Federal Rule of Criminal Procedure 23(b) allows a jury of less than twelve in the federal courts.

IV. COMMON ARGUMENTS FOR REQUIRING ALTERNATE JURORS

As previously discussed, many judges believe that a jury of twelve is mandated by historical practice and the common law. These arguments have been debunked by the courts, especially in the *Williams* case, which contains extensive discussion about

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56. *See id.*
57. *See id.*
58. 960 F.2d 418 (5th Cir. 1992).
59. United States v. Quiroz-Cortez, No. CR M-90-287-02 (S.D. Tex. May 10, 1991).
60. *Quiroz-Cortez*, 960 F.2d at 421.
61. *See id.* at 420.
62. *Id.*

why twelve jurors were required at common law. Reasons for the twelve-person jury range from a purely mystical belief in the number twelve to reliance on more concrete historical practices.[63] After considering these many reasons, the court in *Williams* concluded that a jury of twelve is not essential to the function of the jury process, and is not necessary under the Sixth Amendment to the Constitution.[64] Section A below examines cases where courts declined to follow the *Williams* rationale. In Section B, the reliance on peremptory challenges as a reason to continue seating alternate jurors will be discussed. Section C then discusses other arguments that twelve jurors are critical.

A. Courts That Reject the Williams *Rationale*

Some state constitutions explicitly require a twelve-person jury, reasoning that a jury of fewer than twelve disadvantages defendants. In *State v. Hamm*,[65] the convicted defendant argued on appeal that a Minnesota statute allowing a jury of six in misdemeanor cases violated the state constitution, which specified that all juries should have twelve members.[66] The court struck down the statute, stating that twelve jurors was as essential an element of a jury as impartiality and unanimity.[67] The court cited historical reasons for requiring a twelve-person jury, and "decline[d] to overrule 700 years of English common law history . . . ."[68] The court declined to follow *Williams v. Florida,* finding that although the United States Supreme Court found that a jury of less than twelve does not violate the federal constitution, that decision did not affect interpretation of the state constitution.[69] The Minnesota Supreme Court noted that the state constitution is valid as long as it provides its citizens with more protections than the federal constitution.[70]

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63. *See* Williams v. Florida, 399 U.S. at 78, 87–88 (1970).

64. *See id.* at 100.

65. 423 N.W.2d 379 (Minn. 1988), *superseded by constitutional amendment as stated in* Women of State of Minnesota by Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995).

66. *See id.* at 379.

67. *See id.* at 382.

68. *Id.*

69. *Id.*

70. *Id.*

A situation similar to *Hamm* arose in *Byrd v. Arkansas*,[71] where the Arkansas Supreme Court considered an appeal from a conviction of a misdemeanor charge of driving while intoxicated, rendered by a jury of six. Citing *Hamm*, the Arkansas court found that a jury should always consist of twelve persons for historical reasons.[72] The court decided that the very definition of "jury" is a body of twelve,[73] and that to change this feature, the citizens of Arkansas must vote to amend the state constitution.[74] The court was not persuaded by the arguments given in *Williams v. Florida* because it considered a jury of twelve to be not merely a historical accident, but part of the very nature of a jury.[75]

In *State v. Stegall*, the Washington Supreme Court held that a jury of twelve is important to a defendant's right to a jury trial under the state constitution in felony cases.[76] The court, however, allowed the defendant to waive this right if the state could prove that the defendant made a "knowing, intelligent" waiver, a high standard according to the court.[77] In *Stegall*, the court found that the defendant had not waived his right to a jury of twelve after ten jurors returned a verdict. The defense attorney told the judge he would accept first an eleven, and then a ten, member jury because he wanted to end the jury selection process.[78] He explained to the court that the zipper on his pants had broken and he wished to adjourn as soon as possible.[79] The court found on appeal that a defendant must personally consent to a reduced number of jurors, and that his attorney cannot agree to a jury of fewer than twelve without first gaining his client's consent.[80] Thus, the defendant had not made a knowing, intelligent waiver of a jury of twelve.

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71. 879 S.W.2d 435 (Ark. 1994); *see also* State v. Hamm, 432 N.W.2d 379, 382 (Minn. 1988), *superseded by constitutional amendment as stated in* Women of State of Minnesota by Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995).

72. *Byrd*, 879 S.W.2d at 438.

73. *See id.* at 437. The court stated, "[T]here is no question in our minds that both the framers of the Arkansas Constitution and the people voting on it read 'jury' to mean a twelve-person panel. Indeed, that was the early definition of the term . . . and that definition continued well into the 20th century." *Id.*

74. *See id.*

75. *See id.* at 437–38; *see also Hamm*, 423 N.W.2d at 435.

76. 881 P.2d 979, 981 (Wash. 1994).

77. *See id.* at 982.

78. *See id.* at 980.

79. *See id.*

80. *See id.* at 984.

The three state courts discussed above held that a twelve-member jury was essential in criminal cases. The Minnesota and Arkansas Supreme Courts both relied on history for reasons why the number of jurors mattered. The Washington Supreme Court held in *Stegall* that there was something so important about a twelve-member jury that a defendant must explicitly waive his right to twelve jurors for any fewer number of jurors to return a constitutional verdict. In these examples, courts expressly declined to follow the reasoning of *Williams*. Attorneys have numerous reasons for wanting to empanel alternate jurors in an effort to satisfy the twelve-juror requirement. The next section discusses one of these reasons.

B. Peremptory Challenges and Alternate Jurors

Denver District Court Judge Morris Hoffman, a well-known critic of peremptory challenges, has provided a rather controversial reason as to why attorneys favor empanelling alternate jurors.[81] Judge Hoffman claims that lawyers like alternate jurors because it gives them more peremptory challenges under Rule 24 of the Federal Rules of Criminal Procedure.[82] Because lawyers enjoy the process of trying to guess potential jurors' biases through peremptory challenges, they will never want to eliminate alternate jurors.[83] He argues that peremptory challenges should be abolished because they are an irrational and unfair process for eliminating potential jurors.[84] Judge Hoffman claims that this "damage[s] the integrity of our system."[85]

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81. *See* Hoffman, *supra* note 7, at 140.

82. *See id.* The text of Rule 24(c)(2), which is the pertinent provision, reads as follows:

> Peremptory Challenges. In addition to challenges already provided by law, each side is entitled to one additional peremptory challenge if one or two alternate jurors are empanelled, two additional peremptory challenges if three or four alternate jurors are empanelled, and three additional peremptory challenges if five or six alternate jurors are empanelled. The additional peremptory challenges may be used to remove an alternate juror only, and the other peremptory challenges allowed by these rules may not be used to remove an alternate juror.

FED. R. CRIM. P. 24(c)(2).

83. *See* Hoffman, *supra* note 7, at 140.

84. *See id.*

85. *See id.*

Judge Hoffman has also written a lengthy discourse on peremptory challenges[86] in which he examines the "irrational" history of such challenges. Hoffman concludes that in America, peremptory challenges were historically used to keep African-Americans off of juries.[87] In *Batson v. Kentucky,*[88] the practice of using peremptory challenges to perpetuate racial bias was declared unconstitutional. However, such challenges may be used to eliminate people of other distinct backgrounds, such as eliminating a prospective juror because of his or her religion.

Judge Hoffman goes on to explain that peremptory challenges are upsetting to potential jurors and undermine the public's faith in the system.[89] He recalls that during his years as a practicing attorney, people who made it through the challenges for cause only to be eliminated from the jury panel by a peremptory challenge looked at him with surprise and betrayal.[90] The public perceives peremptory challenges as an arbitrary and discriminatory measure, and as a result, public opinion of the criminal justice system is eroded.[91]

In addition, Hoffman sees peremptory challenges as a way for attorneys to make decisions based on group stereotypes. As an example, he cites the removal of all potential jurors with pocket protectors by the defense, because such people are thought to be highly educated and thus pro-prosecution.[92] Such use of stereotypes, Hoffman says, is unacceptable in our system, where the individuality of every person is supposedly recognized.[93] The impartiality aspect of the jury is best guaranteed by judging jurors on an individual basis, not by stereotyping them according to group characteristics.[94]

Judge Hoffman concludes that American courts should follow England's example. The English eliminated the use of peremptory challenges long ago. Now the English courts simply assume that all who are called for jury duty are eligible to

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86. Morris Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997).

87. *See id.* at 829.

88. 476 U.S. 79 (1986), *holding modified by* Powers v. Ohio, 499 U.S. 400 (1991), *and limitation of holding recognized by* Pruett v. Thompson, 771 F. Supp. 1428 (E.D. Va. 1991).

89. *See id.* at 859.

90. *See id.* at 861.

91. *See id.* at 871.

92. *See id.* at 861.

93. *See id.* at 860.

94. *See id.*

serve.[95] Some may be excused for cause if they are related to the defendant or there is some other very obvious reason why they cannot be impartial. On the whole, however, the English judicial system assumes that any person called for jury duty can be impartial. Since fewer people need be called this way, fewer people overall are inconvenienced.[96]

Judge Hoffman's view of why attorneys enjoy alternate jurors is rather disturbing, as it gives a basis for having alternate jurors that is completely unrelated to constitutional requirements. Rather, under this view courts allow alternate jurors simply because the process appeals to attorneys, who find it to be a game. This certainly does not provide a rational basis for empanelling alternate jurors, yet it is a potential explanation as to why both prosecutors and defense attorneys defend the practice.

A California case, *People v. Trejo*,[97] illustrates how attorneys use peremptory challenges. Trejo was prosecuted for selling heroin to an undercover agent. During the trial, Trejo's attorney requested that a jury of only six be empanelled, waiving the right to a jury of twelve under California law.[98] The defense attorney explained this unusual request by saying that if there were only six jurors, he could replace all of them with peremptory challenges if he felt it would help his client's chances. If there were twelve, however, he could only replace ten of them, decreasing his chances of prevailing in the case.[99] This illustrates how attorneys use peremptory challenges to try to guess the prejudices of potential jurors and to tinker with jury composition in a way that they believe will benefit their client. This process offends the integrity of potential jurors, since it is assumes that the jurors have hidden prejudices that would result in their verdict being based on their secret biases that only the attorneys doing the voir dire can identify.

Attorneys may never want to eliminate alternate jurors because the use of alternate jurors allows them to play the game of guessing biases and using peremptory challenges to eliminate as many potential jurors as possible. It seems that

95. *See id.* at 865.

96. *See id.* at 865 (quoting Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1133–34 (1995)).

97. 217 Cal. App. 3d 1026 (5th Dist. 1990).

98. *See id.* at 1028.

99. *See id.* at 1028–29.

attorneys rely on peremptory challenges instead of the strength of their case and their talents to give them an advantage over the opposing party. In the next section other arguments for a twelve-juror requirement and the necessity of empanelling alternate jurors are discussed.

C. Additional Arguments for Twelve Jurors

Some attorneys—usually defense counsel—claim that having a jury of fewer than twelve is unfair to the defendant because the prosecutor must convince fewer people of the defendant's guilt, and it is thus easier for the prosecutor to get a conviction. Others argue that a jury of less than twelve is not large enough to represent a cross-section of the community, and that with a smaller jury, decision-making is not as effective or balanced as it is with a twelve-person jury.

In rebutting these arguments, two commentators argue that the jury is not required to be composed of members representing a cross-section of the community; only the jury *pool* is.[100] These commentators discuss evidence that twelve and six juror panels deliberate similarly. The authors cite studies indicating that there is no discernable difference between verdicts returned by six or by twelve jurors.[101]

Moreover, one Seventh Circuit case states why the substitution of an alternate juror could harm a case. In *Johnson v. Duckworth*,[102] the court found that when a substitution is made after deliberations have already started, the jurors must summarize their deliberations up to that point for the alternate so that he or she may equally participate in the rest of the deliberations. This summary, however, could lead to the alternate's vote being based on "a less-than-thorough examination of all the evidence and its inferences," because the alternate has not been present to dissect all of the information in the same way that the other jurors have.[103] *Johnson* found that "the same risk exists when an alternate is dismissed but is later recalled due to a juror's illness" or for some other reason.[104] The court

100. Adam M. Chud & Michael L. Berman, *Six Member Juries: Does Size Really Matter?*, 67 TENN. L. REV. 743, 750 (2000).

101. *See id.* at 756.

102. 650 F.2d 122, 126 (7th Cir. 1981).

103. *See id.*

104. *Id.*

suggested that instead of allowing an alternate to join the deliberations, it would be better to let the remaining jurors reach a verdict on their own.[105] Thus, the court argued that alternate jurors are not only unnecessary, but could lead to an undesirable result.

In arguing for twelve-person juries, attorneys have emphasized that the prosecution would gain an unfair advantage and that deliberation processes would be stunted as reasons why there must be twelve jurors. These assertions have been answered with studies indicating that there is no difference between verdicts returned by twelve person juries and six person juries. Furthermore, the Seventh Circuit has held that empanelling an alternate juror can disrupt the deliberation process enough to cause the verdict to be less than well thought out because when an alternate is substituted after deliberations have begun, the alternate does not have the same opportunity as the other jurors to consider and discuss the information. All of the reasons given by attorneys mentioned above do not address the Seventh Circuit's concerns about empanelling alternates.

V. THE TOLL OF JURY DUTY AND ATTEMPTS TO AVOID IT

The following discussion examines common problems caused by jury service. Allowing a jury of fewer than twelve ensures that these problems will only occur when absolutely necessary, avoiding the empanelling of alternate jurors and thus improving public perception of jury duty and increasing the public's willingness to serve on a jury. Jury service may be viewed in a more favorable light if the public perceives that courts care about the hardships of jury service. Also, if fewer people are ultimately empanelled on juries, fewer people will be subject to the damaging effects of jury duty.

The psychological toll on the person who ends up being a juror is profound. One study found that the stress of jury duty could cause long-term emotional and physical maladies.[106] Citing this study, one commentator suggests that it would be beneficial to debrief jurors after trials so that the jurors could more easily make the transition back into their everyday

105. *See id.*

106. Marion Zenn Goldberg, *Debrief Jurors After Stressful Trial, Study Says*, TRIAL, Oct. 1991, at 86.

lives.[107] Of the forty jurors interviewed for the study, nearly two-thirds reported psychological and physical illness related to their jury service.[108] Their symptoms included "stomachaches, nervousness, heart palpitations, headaches, decreased sex drive, depression, and loss of appetite."[109] More serious illnesses were also reported: "ulcers, phobia, anxiety attacks, increased alcohol use, hypertension, chills and fever, and posttraumatic stress disorder."[110] The authors of the study found that the degree of stress experienced depended on the severity of the crime charged and the nature of the evidence, but concluded that any type of decision-making that affects another's life is extremely stressful.[111] The author notes that debriefing jurors is rare, but valuable, and that the justice system should become more sensitive to jurors' needs.[112]

Another study examined the effect of jury aversion on voter registration. Two political scientists cited a 1993 study that found that drawing jury rolls from voter lists depressed voter registration and affected voter turnout in the 1988 election by at least seven percent.[113] They drew this conclusion from the finding that in states in which jury lists were drawn from voter registrations, people were less likely to be registered than in states where jury lists were drawn from other sources.[114] The scientists repeated the experiment using a 1991 study in which respondents were asked about their beliefs regarding jury sources and their willingness to serve on a jury.[115] The analysis applied rational choice theory, which posits that people will register to vote and vote only if the benefits outweigh the costs. The authors considered many costs of jury duty: lost time, boredom, physical and emotional disturbances, and loss of income.[116] They quoted one woman who removed

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107. *See id.* Debriefing would involve allowing to jurors to talk with psychiatrists about their experience. Stress relief and the possible symptoms of long-term trauma from jury duty would be discussed. The psychiatrists could then refer jurors for medical or psychological care if needed as a result of their service.

108. *See id.*

109. *Id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. J. Eric Oliver & Raymond E. Wolfinger, *Jury Aversion and Voter Registration*, 93 AM. POL. SCI. REV. 147, 147 (1999).

114. *See id.* at 149.

115. *See id.* at 147.

116. *See id.* at 148.

her name from voter registration lists after being called for jury duty three times in eighteen months. This woman said that she felt as if it was a choice between jury duty and her family, and she chose her family.[117]

A *Washington Post* article states that Maryland citizens routinely give up their right to vote when they renew their driver's licenses, simply to avoid being put on the jury duty rolls. Some citizens interviewed cited financial and business losses, medical problems, and discomfort at having to decide someone else's fate as reasons why they wished to avoid jury duty.[118] Another article, from the *Dallas Morning News*, discusses many of the ways in which people try to avoid jury duty, including confessing to all kinds of prejudices such as extreme racial prejudice.[119] The possibility that one could end up being an alternate juror only makes the impulse to seek exclusion from the process stronger. The legal system is already maligned, and we should avoid discouraging citizens from participating in it. Eliminating the alternate juror system is one way to ensure that only those who must be affected are affected by their participation in the jury system.

CONCLUSION

There are various reasons why it is sometimes understood that a jury of twelve persons is required in criminal trials, making alternate jurors necessary. Most of the reasons offered for the twelve-person jury are historical, not legal. Many state and federal decisions have found this reliance on historical practice unpersuasive. Traditionally, courts have found that a blind reliance on history is not a good reason to ignore potentially useful reforms in the law.[120] Moreover, neither the Supreme Court nor the Federal Rules of Criminal Procedure requires juries of twelve.

Alternate jurors are therefore legally unnecessary, and the practice of seating them causes undue hardship for those se-

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117. *See id.*

118. Stephen Buckley, *Some In Maryland Use Polling Booth Detour to Escape Jury Duty*, WASH. POST, Feb. 17, 1991, at B1.

119. Allen Pusey, *Excuses, Excuses, When Summoned, Some Claim Illnesses, Prejudices Prevent Them From Serving*, DALLAS MORNING NEWS, Oct. 22, 2000, at 22A. One potential juror admitted to lying after he repeatedly claimed he was a member of the Nazi party to avoid jury duty.

120. *See, e.g.*, Williams v. Florida, 399 U.S. 78, 102–03 (1970).

lected. The effects of jury duty on citizens can be quite severe, and courts are often criticized for not having more empathy for jurors. Furthermore, the perceived futility and waste associated with serving on a jury causes those who are eligible for jury duty to attempt to avoid it, even if it means giving up other civic duties and rights, such as voting. Courts and legislatures should find ways to make jury duty more palatable. Ensuring that citizens are not burdened with the role of the alternate juror is one step in the right direction.