

REFORMING MILITARY JURIES IN THE WAKE OF *RAMOS V. LOUISIANA*

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Juries in the military are smaller than civilian practice and may convict by less-than-unanimous verdicts. Although empirical research has shown larger, unanimous juries perform better by virtually every measure, military courts have not adopted them. They claim that it is inapplicable because the research was conducted on civilians. This Article explains the science supporting large, unanimous juries, courts' resistance to the science, and addresses the objections courts have raised to jury reforms. It concludes that there is no worthwhile reason to maintain the status quo for military juries.

INTRODUCTION

Francis Lieber led an incredible life. Born in Berlin in 1800, he served in the Prussian Army and fought against Napoleon at Waterloo by age fifteen.¹ In the war, he was twice-wounded and left to die.² He was captured, recovered, and was later released, earning a Ph.D. by age twenty.³ He then volunteered to fight in the Greek War of Independence for a brief spell.⁴ Afterward, he immigrated to the United States to teach at South Carolina College.⁵ He was teaching at Columbia College in New York around the time of the American Civil War and was tasked with drafting what became known as the Lieber Code, the first codification of the laws of war issued by a national army for guidance and compliance.⁶ The document heavily influenced the later Hague and Geneva Conventions.⁷ Were all that not enough, the German government adopted the Lieber Code to guide itself during the Franco-Prussian War and Lieber's son would go on to become the Judge Advocate General for the U.S. Army.⁸

Less well-remembered than his contributions to military law, Francis Lieber was also a great lover of juries. He praised them as being “the best school of the citizen, both for teaching him his rights and how to protect them, and for practically teaching him the necessity of law and government.”⁹ In his book, *On Civil Liberty*, he laid out a laundry list of admirable qualities about juries.¹⁰ But there was one point on which the jury system could be improved, in his view. He

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¹ LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 71 (2005).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ DEP'T OF THE ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 62 (1975); LEWIS R. HARLEY, *FRANCIS LIEBER: HIS LIFE AND POLITICAL PHILOSOPHY* 90, 92 (1899).

⁷ FISHER, *supra* note 1, at 71.

⁸ DEP'T OF THE ARMY, *supra* note 6, at 62.

⁹ FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 232 (Theodore D. Woolsey ed., 3d ed. 1877).

¹⁰ *Id.* at 234-37.

would write, “[I]t is my firm conviction, after long observation and study, that the unanimity principle [of juries] ought to be given up”¹¹

Though Lieber’s brilliance cannot be doubted, on this point, he was wrong. Empirical evidence may have been lacking in the nineteenth century, but in the twenty-first, we know there is a great deal of value in an unanimity requirement for juries. Non-unanimous verdicts allow minority viewpoints to be ignored during deliberation, a hallmark of bad decision making.¹²

Unfortunately, the military has adopted Lieber’s view on the matter. It is said that the Uniform Code of Military Justice (the Code) “provides many benefits not shared by civilian defendants.”¹³ This is true enough in the abstract.¹⁴ But criminal defendants in the military receive far less generous rights to juries than their civilian counterparts. Jury structure has been called “*the* major difference between military and civilian practice.”¹⁵

Servicemembers have no constitutional right to an “impartial jury.”¹⁶ It is not essential that all of the jurors hear the same evidence throughout the same trial to convict,¹⁷ and it is not fatal if several jurors drop out midway through the trial.¹⁸ Military defendants enjoy less robust peremptory strike privileges than their civilian counterparts.¹⁹ They are generally tried by a jury of their superiors, not their peers.²⁰ There is no right that the jury be drawn from a representative cross-section of the community.²¹ The Fifth Amendment guarantees the right to

¹¹ *Id.* at 238.

¹² Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 40 (1997).

¹³ *United States v. Grostefon*, 12 M.J. 431, 435 (C.M.A. 1982).

¹⁴ The appearance of improper influence by a superior upon court-martial proceedings can form the successful basis for a defense appeal. *United States v. Boyce*, 76 M.J. 242, 253 (C.A.A.F. 2017). An off-hand remark by the President can provide military defendants a windfall at sentencing. See Erik Slavin, *Judge: Obama Sex Assault Comments ‘Unlawful Command Influence,’* STARS & STRIPES (June 14, 2013), <https://bit.ly/3hTdOZm>. Not only is an accused entitled to appeal a capital case, they must appeal. 10 U.S.C. § 861(c) (2018). Military defendants were also entitled to lawyers and *Miranda*-esque warnings long before civilians were. Sam J. Ervin, Jr., *The Military Justice Act of 1968*, 5 WAKE FOREST INTRAMURAL L. REV. 223, 223–24 (1969).

¹⁵ S.A. Lamb, *The Court-Martial Panel Member Selection Process 2* (Apr. 1992) (unpublished thesis, The Judge Advocate General’s School, U.S. Army) (emphasis in original), <https://bit.ly/3jWiMGR>.

¹⁶ *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). Note that in this context, saying servicemembers lack the right to an “impartial jury” is shorthand for saying that servicemembers are not entitled to all of the jury rights in the Sixth Amendment that civilians are. Servicemembers *do*, however, have a right to decision makers who are not biased. *Id.* Courts’ justification for cribbing military juries beyond this is rather curious though. The Fifth Amendment provides an explicit exception for the military. The Sixth Amendment, however, says that in “all” criminal prosecutions the accused shall have the right to an impartial jury. Presumably, if the founders meant to exclude servicemembers from jury rights, they would have added the same exception to the Sixth Amendment. Instead, the Supreme Court has said that the Framers “doubtless” meant to apply the Fifth Amendment’s military exception to the Sixth, despite the fact that the Framers did not. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).

¹⁷ *United States v. Vazquez*, 72 M.J. 13, 20 (C.A.A.F. 2013) (calling the notion that all jurors must have heard the same evidence “directly contrary” to the Uniform Code of Military Justice).

¹⁸ *United States v. Sargent*, 47 M.J. 367, 368–69 (C.A.A.F. 1997) (citing *United States v. Colon*, 6 M.J. 73, 74 (C.M.A. 1978)).

¹⁹ For many years in the Army, even if there were multiple defendants in a consolidated case, the entire defense “side” had only one peremptory challenge. *United States v. Carter*, 25 M.J. 471, 474 (C.M.A. 1988). Navy defendants had no peremptory challenges until the Uniform Code of Military Justice. *Id.* Today, military defendants only get one peremptory strike. 10 U.S.C. § 841 (2018).

²⁰ 10 U.S.C. § 825 (2018).

²¹ *Carter*, 25 M.J. at 473.

a grand jury, but specifically exempts “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”²² More importantly, military accused are entitled to smaller juries with lower conviction thresholds. Whereas civilian criminal juries traditionally have twelve members who must be unanimous in conviction, military juries can be smaller and non-unanimous. For non-death penalty cases, the prosecution only needs to secure three-quarters of the jury to convict.²³ And jury sizes move on a sliding scale. Twelve jurors are required for capital cases, eight for a noncapital general court-martial, four for a special court-martial, and one decision maker for a summary court-martial.²⁴ For a noncapital general court-martial, it is acceptable for as few as six jurors to try the case.²⁵

Recently, the Supreme Court addressed jury unanimity requirements in *Ramos v. Louisiana*.²⁶ There, the Court held that the Sixth Amendment demands unanimous juries and that the right applies to the states. The decision invalidated hundreds of convictions in the two states that allowed non-unanimous jury verdicts: Oregon and Louisiana. Although the case did not address the military, military defense attorneys will likely seek to apply it.

Before *Ramos*, the Court in *Ballew v. Georgia*²⁷ and *Burch v. Louisiana*²⁸ drew red lines preventing states from going too far in shrinking juries or allowing non-unanimity in small juries. The decisions were based on hard data: numerous empirical studies showing that juries are better at fostering effective group deliberation, accurate fact-finding, consistency, and diversity among jurors.²⁹ These conclusions are well accepted among statisticians.³⁰ Empirical researchers who study juries think highly of them.³¹

But military courts have declined to adopt these precedents. No military court has offered an evidence-based defense of small, non-unanimous juries. Nor has one analytically attacked the studies supporting *Ballew* or *Burch*. Instead, they claim that because empirical research on juries is from the civilian world, it has no bearing on military courts.³² Yet, the jury expert whose work the Supreme Court cited favorably in *Ballew* and *Burch* said “the same principles [of group decision making] would apply to the military as to civilian decision makers,” and “in other areas of research, only negligible or no differences have been found

²² Article 32 of the Code does provide a “preliminary hearing” to determine if there is probable cause that a crime occurred, but this hearing is conducted by a judge-like official, not a jury. 10 U.S.C. § 832 (2018).

²³ 10 U.S.C. § 852 (2018).

²⁴ 10 U.S.C. § 816 (2018).

²⁵ 10 U.S.C. § 829(d) (2018).

²⁶ *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

²⁷ 435 U.S. 223 (1978).

²⁸ 441 U.S. 130 (1979).

²⁹ *Ballew*, 435 U.S. at 232–39.

³⁰ Saks, *supra* note 12, at 14.

³¹ Brian H. Bornstein & Timothy R. Robicheaux, *Crisis, What Crisis? Perception and Reality in Civil Justice*, in *CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL & LEGAL PERSPECTIVES* 1, 2 (Brian H. Bornstein et al. eds., 2008); RITA J. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* xiii (1980).

³² *United States v. Guilford*, 8 M.J. 598, 601 (1979) (“[D]ata indicating that jurors supposed to represent a cross-section of a local civilian community do not adequately perform their function under certain conditions cannot be taken to mean that the purpose and function of courts-martial are similarly impaired.”); *United States v. Wolff*, 5 M.J. 923, 925 (1978) (“[W]e are unwilling to adopt and apply the empirical data referred to in *Ballew*. That data was compiled in the civilian community from juries randomly selected to represent a cross-section of the civilian community. Courts-martial are not selected in that manner.”).

between civilian and military populations.”³³ Military courts have settled into a groove of quickly dismissing appeals based on diminished jury rights.³⁴ Civilian courts, too, have declared that civilian studies do not apply to the military without providing evidence in support.³⁵

Not every civilian jury procedure needs to be imported to the military. For example, by using higher-ranking officers to try a defendant the system avoids the risk that inferiors will be afraid to convict a guilty, yet imposing, superior. Tight limits on peremptory challenges help prevent them from being abused to exclude people of color from the jury.³⁶ The military justice system must also be concerned with not encumbering commanders or preventing them from enforcing discipline in their units.

Requiring juries to be larger and unanimous, however, would not undermine the goal of discipline. Larger juries would require the convening authority to detail slightly more court-martial members, and unanimity requirements might slightly raise the incidence of a deadlocked jury. It is hard to see how adding more members would hurt discipline, and when a jury deadlocks, it is impossible to know whether it is caused by a juror being obstinate or properly refusing to convict an innocent defendant.³⁷

This issue is worthy of a fresh look. Not only because of *Ramos* but because the intervening decades have produced troves of new evidence validating juries. As such, this Article makes the argument that military juries should be larger and require unanimous verdicts to convict.

It proceeds in five Parts. Part I examines the *Ramos* decision and how it might apply to the military. Although the opinion certainly aids the cause of jury reform, it does not necessarily require the military to change. In the past, courts have said servicemembers do not have the right to “an impartial jury” as guaranteed by the Sixth Amendment. *Ramos* gives military courts the opportunity to reassess.

Part II explains research showing the sterling quality of juries. Anecdotally, it is easy to think of juries as witless. But empirically, they hold up quite well. They decide cases based on the evidence presented, the demographics of jurors does not unduly influence the outcome, and their decision strategies are logical and predictable. Moreover, study after study has shown that larger, unanimous juries perform better. Larger juries deliberate longer, more thoroughly, and with less bias. Unanimous juries must grapple with pesky gadflies, rather than ignoring dissenting views. Any drawbacks are minuscule by comparison.

Part III explores how courts have been skeptical of evidence about juries. Military judges claim that empirical research conducted on civilians is irrelevant to the military but have never provided a citation. This resistance to scientific evidence is widely observed by courts on a variety of issues.

³³ Richard J. Anderson & Keith E. Hunsucker, *Is the Military Nonunanimous Finding of Guilty Still An Issue?*, DA Pamphlet 27-50-166, ARMY LAW, 57, 59 (Oct. 1986).

³⁴ *United States v. Edwards*, NMCM 93 00935, 1995 CCA LEXIS 412, at *7 (N-M Ct. Crim. App. Dec. 14, 1995); *United States v. Viola*, 26 M.J. 822, 830 (A.C.M.R. 1988); *United States v. Rojas*, 15 M.J. 902, 919 (N-M.C.M.R. 1983); *United States v. Seivers*, 9 M.J. 612, 615 (A.C.M.R. 1980); *United States v. Yoakum*, 8 M.J. 763, 768 (A.C.M.R. 1980).

³⁵ *E.g.*, *Sanford v. United States*, 567 F. Supp. 2d 114, 119–20 (D.D.C. 2008).

³⁶ *E.g.*, *Snyder v. Louisiana*, 552 U.S. 472 (2008).

³⁷ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 (2020).

Part IV responds to the argument that civilian juror research is worthless in the military. First, the evidence is consistent that large, unanimous juries are better across an enormous number of test subjects and decision-making settings. Second, research on servicemembers shows that they behave much like civilians on a cognitive functioning level. Third, racial bias can affect everyone, not just people of ill-will. Fourth, history shows that the original justifications for small, non-unanimous juries no longer holds up. And fifth, the policy and legal arguments advanced to maintain the status quo do not outweigh the reasons to change.

Part V concludes with a call for the military justice system to embrace empirically validated jury reforms.

I. *RAMOS V. LOUISIANA* AND ITS APPLICATION TO THE MILITARY

A. *The Decision*

Defendant Evangelisto Ramos was sentenced to life without parole after his jury voted to convict 10 to 2.³⁸ In 48 states, Mr. Ramos would have walked out of court a free man. But because he was tried in Louisiana which, along with Oregon, allowed non-unanimous juries, he was guilty.³⁹ The Supreme Court overturned the conviction, thereby striking down Louisiana and Oregon's jury systems. Justice Neil Gorsuch wrote the majority opinion overturning the conviction, joined in various parts by Justices Stephen Breyer, Ruth Bader Ginsberg, Sonia Sotomayor, Clarence Thomas, and Brett Kavanaugh, and over a dissent by Justice Samuel Alito, joined by Chief Justice John Roberts and Justice Elena Kagan.

The majority began with the racist origins of non-unanimous juries. The nineteenth-century constitutional convention where Louisiana adopted non-unanimous juries was convened with the professed mission of "establish[ing] the supremacy of the white race."⁴⁰ The non-unanimous requirement was a covert means to discriminate against Black jurors, ensuring that the occasional token Black juror allowed on a jury would not be enough to derail a prosecution.⁴¹ Oregon's 1930 non-unanimity rule can also be traced to the Ku Klux Klan and an effort to dilute the racial, ethnic, and religious minority influence on juries.⁴² In their arguments, the states did not deny these facts.⁴³

By its text, the Sixth Amendment guarantees defendants an "impartial jury." Taken at face value, it does not mention an unanimity requirement. But the Court said the text and structure of the Constitution suggested that unanimity must be part of the right.⁴⁴ After all, juries have been unanimous since fourteenth century England, six founding states explicitly required jury unanimity, and the common law demanded the same.⁴⁵ Taken together, these historical antecedents impart meaning to James Madison's phrase "impartial jury."⁴⁶ What is more, nineteenth-century commentators, such as Nathan Dane and Joseph Story, also

³⁸ *Id.* at 1394.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1395.

⁴⁵ *Id.* at 1395–96.

⁴⁶ *Id.* at 1396.

held this view, and the Supreme Court has commented on the jury’s unanimity requirement 13 times over the years.⁴⁷

Apodaca v. Oregon,⁴⁸ and its companion case *Johnson v. Louisiana*,⁴⁹ were the controlling precedents that *Ramos* had to overcome. In them, Justice Lewis Powell, resolved a 4–4 split by making jury unanimity mandatory for the federal government but optional for the states.⁵⁰ Addressing *Apodaca*’s “breezy” analysis that gave short shrift to unanimity requirements among the states, the *Ramos* majority noted unanimity can promote “more open-minded and more thorough deliberations.”⁵¹ Pushing back against the frequent anti-unanimity argument that it increases the rate of hung juries, the Court observed that a hung jury may well be “an example of a jury doing exactly what the [*Apodaca*] plurality said it should—deliberating carefully and safeguarding against overzealous prosecutions.”⁵² The Court ultimately overturned the defendant’s conviction as violative of the Sixth Amendment.⁵³

1. The Application of *Ramos v. Louisiana* to the Military

Ramos undoubtedly helps those seeking to reform the military’s jury system. The case directly struck down Oregon and Louisiana’s fractured jury system and it probably spells doom for Puerto Rico’s majority verdicts.⁵⁴ As it stands, a court-martial is now the only place in America where a criminal defendant can be convicted without consensus among the jury.

Ramos hinged on the meaning of “an impartial jury” in the Sixth Amendment.⁵⁵ But the Court of Appeals for the Armed Forces has said that servicemembers do not enjoy the right to “an impartial jury.”⁵⁶ This is the consequence of servicemembers occupying a rather odd position in our justice system. The military’s high court first stated that the Bill of Rights applies to courts-martial in 1960;⁵⁷ the Supreme Court never has. There remains “substantial scholarly debate on applicability of the Bill of Rights to the American servicemember.”⁵⁸

Military courts often look to federal civilian courts, including United States Supreme Court cases dealing with civilians, in defining military rights.⁵⁹ This includes analyzing other rights contained within the Sixth Amendment with

⁴⁷ *Id.* at 1396–97.

⁴⁸ 406 U.S. 404 (1972).

⁴⁹ 406 U.S. 356 (1972).

⁵⁰ *Ramos*, 140 S. Ct. at 1397–98.

⁵¹ *Id.* at 1401.

⁵² *Id.*

⁵³ *Id.* at 1408.

⁵⁴ P.R. CONST., art. II, § 11.

⁵⁵ *Ramos*, 140 S. Ct. at 1395.

⁵⁶ *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). As used here, “impartial jury” means all of the jury rights embedded in the Sixth Amendment, not a jury comprised of fair-minded individuals.

⁵⁷ *United States v. Jacoby*, 29 C.M.R. 244, 246–47 (C.M.A. 1960). (“While the dissenting Judge apparently disagrees . . . it is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.”).

⁵⁸ *United States v. Graf*, 35 M.J. 450, 460 (C.M.A. 1992), cert. denied, 510 U.S. 1085 (1994); Frederic I. Lederer & Frederic L. Borch, *Does The Fourth Amendment Apply to the Armed Forces?*, 3 WM. & MARY BILL OF RTS. J. 219 (1994).

⁵⁹ *E.g.*, *United States v. Rodriguez*, 60 M.J. 239, 247–49 (C.A.A.F. 2004) (Fourth Amendment); *United States v. Kemp*, 32 C.M.R. 89, 98–99 (1962) (Fifth Amendment); *United States v. Webster*, 65 M.J. 936, 946 (A. Ct. Crim. App. 2008) (First Amendment); *United States v. Smith*, 56 M.J. 711, 716 (A.F. Ct. Crim. App. 2001) (Second Amendment).

regards to servicemembers.⁶⁰ Jury rights are virtually the only ones not available to servicemembers.

So, while *Ramos* may not require military courts to change course, it gives them a good opportunity to do so. Past cases have relied, at least in part, on the now-overturned *Apodaca* and its companion case to justify the military's jury system.⁶¹ Given that *Apodaca* is no longer good law, military courts may have a clear opportunity rethink the conclusion that fractured juries are acceptable. *Apodaca* was not the only reason military courts have declined to extend unanimous jury rights to servicemembers, but it has played a part in military courts' reasoning.⁶²

If the military moves away from fractured juries, it would be in good company. On the eve of the *Ramos* decision, Oregon was the only state that countenanced fractured juries,⁶³ as Louisianans amended their own constitution to get rid of fractured juries in 2018, before the decision was announced.⁶⁴ Even while the Oregon law was still in effect, there was "widespread agreement among defense lawyers and prosecutors in Oregon that the law [was] deeply flawed, and may have sent innocent people to prison."⁶⁵ It also meant that minority defendants rarely had a true jury of their peers.⁶⁶ There is no evidence that the military adopted its jury system based on racial animus, but the harm the fractured jury system has caused to defendants of color elsewhere should give us pause.

II. JURY RESEARCH

A. *Juries Are a Highly Reliable Form of Adjudication*

Juries offer many benefits—both for the individual case and society at large. They impart republican values upon jurors by allowing them to see the legal system up close.⁶⁷ In every trial that a jury sits, it is a trial "of and by the people, and not just for them."⁶⁸ The effect is so great that deliberating on a criminal jury causes infrequent voters to vote more often—an effect that lasts for years after the case is gavelled out, and is more powerful than face-to-face get-out-the-vote drives.⁶⁹ Jury service was also associated with increased attention to news media and increased conversations with neighbors about community issues

⁶⁰ *United States v. Danylo*, 73 M.J. 183, 187 (C.A.A.F. 2014) (right to speedy trial); *United States v. Squire*, 72 M.J. 285, 286 (C.A.A.F. 2013) (Confrontation Clause); *United States v. Murphy*, 50 M.J. 4, 8 (C.A.A.F. 1998) (ineffective assistance of counsel); *United States v. Reynolds*, 25 C.M.R. 761 (A.F.B.R. 1957) (right to counsel).

⁶¹ *United States v. Murray*, 48 C.M.R. 331, 333 (N-M.C.M.R. 1973); *United States v. McCarthy*, 2 M.J. 26, 30 (C.M.A. 1976); *United States v. Simoy*, 46 M.J. 592, 626 (A.F. Ct. Crim. App. 1996); *United States v. Philidor*, No. ACM 33644, 2001 CCA LEXIS 251, at *7 (A.F. Ct. Crim. App. Sep. 11, 2001).

⁶² *See, e.g., United States v. Philidor*, No. ACM 33644, 2001 CCA LEXIS 251, at *7 (A.F. Ct. Crim. App. Sep. 11, 2001); *United States v. Simoy*, 46 M.J. 592, 626 (A.F. Ct. Crim. App. 1996); *United States v. McCarthy*, No. 30,560. CM 432875., 1976 CMA LEXIS 6931, at *6 n.3 (C.M.A. Sep. 24, 1976).

⁶³ Timothy Williams, *In One State, a Holdout Juror Can't Block a Conviction. That May Not Last.*, N.Y. TIMES (Feb. 23, 2020), <https://nyti.ms/3gmz2hY>.

⁶⁴ *See* LA. CONST. art. I, § 17.

⁶⁵ Williams, *supra* note 63.

⁶⁶ *Id.*

⁶⁷ I ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 448 (James T. Schleifer trans., 2012).

⁶⁸ NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 104 (1937).

⁶⁹ JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 9–10 (2010).

for months after the trial.⁷⁰ Trust in the justice system is also improved when people serve on juries.⁷¹

Research tells us juries do a remarkable job ferreting out the truth at trial. A Harvard researcher analyzed 11,000 insurance claims and concluded that jury awards for pain and suffering were neither arbitrary nor capricious.⁷² Research supervised by a Nobel laureate found the facts of a case were the biggest factor for juries in deciding cases, and emotion played little role.⁷³ A jury's approach to damage calculation tends to be "rational and evidence-based, taking into account relevant evidence such as the severity of the plaintiff's injury (for compensation) and the reprehensibility of the defendant's conduct (for punitive damages)."⁷⁴ Studies of jury deliberations show that juries spend more time talking about the evidence, particularly the plaintiff's injuries, than anything else.⁷⁵ This pattern is observed in mock jury studies, post-trial interviews, and analysis of actual jury deliberations.⁷⁶

Juries handle complex cases as well as any other case and they do not get thoughtlessly swept up by expert opinions.⁷⁷ They obey a judge's instructions to consider liability first and, then, independently assess damages.⁷⁸ Jurors are more skeptical of hearsay evidence than eyewitness testimony,⁷⁹ which aligns with the legal system's disfavor of the former.⁸⁰ Punitive damages are meted out judiciously and proportionately to compensatory damages—contrary to the claims of anti-jury alarmists.⁸¹

Little evidence exists that jurors' preexisting attitudes and beliefs have an important impact on their decisions as these things only explain a small amount of the disagreement between jurors.⁸² Race, gender, education, and psychological profiles are all poor predictors of how a jury will vote, supporting the conclusion that jurors vote based on facts, not primal prejudice.⁸³ The effects of evidence and arguments play a considerably bigger role in decision making, and the clearer

⁷⁰ *Id.* at 10.

⁷¹ *Id.*

⁷² Stan V. Smith, *Why Juries Can Be Trusted*, VOIR DIRE, Summer 1998, at 19, 21.

⁷³ *Id.* at 20.

⁷⁴ BRIAN H. BORNSTEIN & EDIE GREENE, THE JURY UNDER FIRE: MYTH CONTROVERSY, AND REFORM 15 (2017).

⁷⁵ *Id.* at 191.

⁷⁶ *Id.*

⁷⁷ Neil Vidmar, *Juries, Judges, and Civil Justice*, in THE JURY AS FACT FINDER AND COMMUNITY PRESENCE IN CIVIL JUSTICE: REPORT OF THE 2001 FORUM FOR STATE APPELLATE COURT JUDGES, ROSCOE POUND INST. 8, 10 (2001).

⁷⁸ Smith, *supra* note 72, at 20.

⁷⁹ Margaret Bull Kovera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703, 703 (1992). It should be noted that eyewitness testimony is not always accurate, even if it is compelling. See generally Dana Walsh, *The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness*, 54 B.C. L. REV. 1415 (2013); Frederick Emerson Chemay, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721 (1985); William David Gross, *The Unfortunate Faith: A Solution to the Unwarranted Reliance Upon Eyewitness Testimony*, 5 TEX. WESLEYAN L. REV. 307 (1999).

⁸⁰ E.g., Fed. R. Evid. 802.

⁸¹ Theodore Eisenberg et al., *The Relation between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards*, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL & LEGAL PERSPECTIVES 106, 115 (Brian H. Bornstein et al. eds., 2008).

⁸² Saks, *supra* note 12, at 10 (citing four studies).

⁸³ See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY XI, 173 (2000); John Guinther, *The Jury in America*, in THE AMERICAN CIVIL JURY: THE 1986 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY, ROSCOE POUND FOUND. 52 (1987).

the story told by the evidence, the less individual differences between jurors matter, to the point of vanishing.⁸⁴

Though juries are commonly mocked, their superiority in decision making is logical. Consider how juries are structured. Unlike most decision makers, jurors are screened for impartiality by two opposing sides and a judge.⁸⁵ They are forced to sit through a presentation of *all* of the evidence, rather than being free to only consider the evidence they initially agree with.⁸⁶ The evidence is delivered by professional attorneys whose job is to provide a clear narrative. Evidence is subjected to cross-examination to point out weaknesses.⁸⁷ The courtroom is open to verify that the proceedings are fair but deliberations are closed to ensure jurors speak their mind.⁸⁸ And the process is governed by a sweeping evidentiary code that ensures jurors are not given irrelevant or prejudicial information.⁸⁹ That is a far better system than how most decisions are made in life. It may be a better system than how *any other* prominent public or private body makes decisions.⁹⁰

This is not to say juries are perfect, of course. Juries frequently struggle to understand pattern jury instructions.⁹¹ Better educated jurors may be *less* likely to understand the instructions, according to one study.⁹² Such widespread confusion, even among educated jurors, strongly suggests the fault lies with the judges and lawyers who wrote the instructions, not the jurors who must apply them. Pre-trial publicity can also bias jurors against a defendant, and curative instructions did not help.⁹³ That means, at least on some occasions, jurors may have been considering information they learned outside of the courtroom. But experts still think juries work well on the whole,⁹⁴ and judges have their own share of problems.⁹⁵

B. Unanimous, Large Juries Are Superior to Other Forms of Adjudication

Going back eons, the traditional criminal jury had twelve members. When the Greek god Ares was tried for the murder of Halirrhothius—son of Poseidon—twelve gods sat in judgment.⁹⁶ In the mortal realm, Orestes was given

⁸⁴ Saks, *supra* note 12, at 10 (citing four studies).

⁸⁵ *E.g.*, Fed. R. Crim. P. 24(a).

⁸⁶ This is very different than how human beings ordinarily tackle a problem. The natural course is to begin searching for information to support a theory, and once they feel satisfied, stop looking for more. Paul Bennett Marrow, *Behavioral Decision Theory Can Offer New Dimension to Legal Analysis of Motivations*, 74 N.Y. St. B.J. 46, 47 (2002). This also means that the consideration of alternatives will be abandoned. *Id.*

⁸⁷ *E.g.*, Mil. R. Evid. 611.

⁸⁸ *E.g.*, A.B.A. Standards Relating to Trial by Jury, Part V.

⁸⁹ *E.g.*, Mil. R. Evid.

⁹⁰ For example, although Congress has voluminous rules of *debate*, nothing actually forces members to consider both sides of an issue or have frank conversations with the other party, and members are not excluded from debate if they have prejudged an issue. Facebook's community standards that govern its 2.2 billion users—a quarter of the globe—are made and revised in secret, so we have no idea what information they consider, who is making the decision, and what the rules of the process are. Simon van Zuylen-Wood, "*Men Are Scum*": Inside Facebook's War on Hate Speech, VANITY FAIR (Feb. 26, 2019), <https://bit.ly/3gl0MDN>.

⁹¹ Guinther, *supra* note 83, at 51.

⁹² *Id.*

⁹³ Tarika Daftary-Kapur et al., *Are Lab Studies on PTP Generalizable?: An Examination of PTP Effects Using a Shadow Jury Paradigm*, JURY EXPERT (May 7, 2014), <https://bit.ly/3hZLLYw>.

⁹⁴ *E.g.*, authorities cited *supra* note 31.

⁹⁵ *E.g.*, Michael Berens & John Shiffman, *Special Report: Thousands of U.S. Judges Who Broke Laws, Oaths Remained on the Bench*, REUTERS (June 30, 2020), <https://reut.rs/31ajrM7>.

⁹⁶ LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 1 n.* (2d ed., 1988).

a jury of twelve citizens of Athens after he was accused of killing his mother Clytemnestra 3,000 years ago.⁹⁷ William the Conqueror brought the basic contours of the jury to England in 1066,⁹⁸ and a century later Henry II decreed that twelve men from each hundred in each county would be summoned for jury service.⁹⁹ Over time, a few stable traditions calcified, including unanimity requirements, a fairly random selection of jurors, and that juries would have twelve members.¹⁰⁰ These traditions have held fast the world over,¹⁰¹ and among the vast majority of the states, at least for felonies.¹⁰²

Though the exact origin of the twelve-person jury in Western jurisprudence is unknown, it is believed to have been inspired by the special role for the number in the Bible: twelve apostles, twelve Tribes of Israel, the twelve stones from the Book of Joshua.¹⁰³ An ancient king of Wales, Morgan of Glamorgan, said “as Christ and his twelve apostles were finally to judge the world, so human tribunals should be composed of the king and twelve wise men!”¹⁰⁴

The unanimity requirement is also divinely inspired. The original requirement of unanimity partially flowed from the idea that juries replaced legal systems, such as trial by combat or ordeal.¹⁰⁵ God was thought to ordain the outcome of these contests, and God’s will could not be divided.

As providence would have it, both of these features improve outcomes. Unanimous verdicts mean that dissenters must be consulted rather than steamrolled.¹⁰⁶ And twelve is an ideal number for a jury. Studies have found that juries of twelve perform better than six.¹⁰⁷ Six jurors, in turn, are better than a single judge.¹⁰⁸ Larger groups were more contentious, debated more vigorously, and, perhaps as a result, recalled more evidence, were more consistent, and more predictable.¹⁰⁹

A later meta-analysis of jury size reconfirmed this conclusion. It looked at seventeen studies on jury size which included 2,061 juries comprising 15,000 individuals. It found that larger juries are more likely to contain minorities, deliberate longer, and recall testimony more accurately.¹¹⁰ The extra time deliberating was spent sharing thoughts, proposing ideas, and challenging each

⁹⁷ *Id.* at 1.

⁹⁸ Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 392 (1996).

⁹⁹ Leonard W. Levy, *The Medieval Origins of Trial by Jury*, in THE RIGHT TO A TRIAL BY JURY 23, 23 (Robert Winters ed. 2005).

¹⁰⁰ Douglas G. Smith, *supra* note 98, at 396. Twelve-member juries became the norm throughout Continental Europe and Scandinavia, WILLIAM FORSYTH, HISTORY OF THE TRIAL BY JURY ch. 1, § 2; ch. 2 (Morgan ed. 1875).

¹⁰¹ Neil Vidmar, *A Historical and Comparative Perspective On the Common Law Jury*, in WORLD JURY SYSTEMS 26, 30 (Neil Vidmar ed. 2000) (noting that Australia, Canada, New Zealand, Ireland, and Russia all use twelve-person juries, and unanimity is the norm).

¹⁰² See generally Nancy Jean King, *The American Criminal Jury*, in WORLD JURY SYSTEMS 99 (Neil Vidmar ed. 2000).

¹⁰³ 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND *155a.

¹⁰⁴ SUSAN FORD WILTSHIRE, GREECE, ROME, AND THE BILL OF RIGHTS 162 (1992).

¹⁰⁵ Jack Pope, *The Jury*, 39 TEX. L. REV. 426, 437 (1961).

¹⁰⁶ Saks, *supra* note 12, at 41.

¹⁰⁷ MICHAEL J. SAKS, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE (1977); M.J. Saks & M.W. Marti, A Meta-Analysis of the Effects of Jury Size, 21 L. & HUMAN BEHAVIOR, 451-467 (1997).

¹⁰⁸ Cf. RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 69 (2003).

¹⁰⁹ *Are Six Heads as Good as Twelve?*, AM. PSYCH. ASS’N (May 28, 2004) <https://bit.ly/2XiPTL3>.

¹¹⁰ Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, in THE JURY SYSTEM: CONTEMPORARY SCHOLARSHIP 401 (Valerie P. Hans ed. 2006).

other's reasoning.¹¹¹ The settings for the studies were diverse: they included worker's comp panels, disciplinary boards, courtrooms and structured lab environments, civil and criminal cases, students, children, and real jurors.¹¹² The authors of the meta-analysis also noted that, "For many kinds of decision tasks, the larger the decision-making group, the better the decision will be."¹¹³

Large juries are also better at avoiding racial bias. This is likely because larger juries are more diverse. Halving the size of a jury also halves the odds for minority representation on the panel.¹¹⁴ This, in turn, sabotages the ability of juries to adjudicate fairly. Individuals recall more information about "in-group" members—those who share socially defining traits—than "out-group" members.¹¹⁵ These differences in memories tend to support stereotype-based biases.¹¹⁶ So jurors belonging to different groups will recall information differently. The upshot is that a diverse jury, which is more likely when it is larger, can pool their collective memory and prevent stereotyping.¹¹⁷ One does not even need studies to prove the superiority of large juries. Logic alone suffices. The Condorcet Jury Theorem shows how.¹¹⁸ Suppose a group of people are trying to answer a yes or no factual question—such as whether the accused is guilty of a crime. The theory holds that the larger the group, the higher the odds that a majority will produce the correct answer. The gameshow *Who Wants to Be a Millionaire* is a good example. Phoning a friend for help on the show will give the correct answer 65 percent of the time, asking the audience will yield the correct answer 91 percent of the time.¹¹⁹ It is the wisdom of crowds in action.

An important caveat: the Theorem requires that each individual in the group has at least a 50 percent chance of being right—better than a coin flip. If group members have no idea what they are talking about, a large group will only produce white noise. So, is it safe to assume jurors will be right 50 percent of the time? Absolutely. A baked-in assumption about the justice system is that juries are intelligent.

Countless military cases have held that jurors are presumed to follow complex, ungainly instructions.¹²⁰ The Supreme Court too has admitted, "A crucial assumption underlying [the] system is that juries will follow the instructions given them by the trial judge."¹²¹ What is more, military jurors are not drawn at random but are handpicked for "age, education, training, experience, length of service, and judicial temperament."¹²² So one would expect them to do better than a coin flip.¹²³

¹¹¹ *Id.* at 408.

¹¹² *Id.* at 403.

¹¹³ *Id.* at 408.

¹¹⁴ *Id.* at 407.

¹¹⁵ Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1291–92 (2000).

¹¹⁶ *Id.* at 1292.

¹¹⁷ *Id.*

¹¹⁸ See, e.g., CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE* 9 (2009).

¹¹⁹ Edward Skidelsky, *Always Ask the Audience*, TELEGRAPH (June 28, 2004), <https://bit.ly/33iotsw>.

¹²⁰ E.g., *United States v. Nash*, 71 M.J. 83, 89 (C.A.A.F. 2012); *United States v. Washington*, 57 M.J. 394, 403 (C.A.A.F. 2002); *United States v. Holt*, 33 M.J. 400, 408 (C.A.A.F. 1991).

¹²¹ *Parker v. Randolph*, 442 U.S. 62, 73 (1979).

¹²² 10 U.S.C. § 825(e)(2).

¹²³ Additionally, if one believed that the average military juror was *less* reliable than a coin flip, the solution would be to scrap the jury system altogether, not maintain small, fractured juries.

It would be disingenuous to hold that jurors invariably follow their instructions on one hand, but assume jurors are ignorant for the purposes of analyzing jury decision making. Given that we can safely assume each military juror is better than a coin flip, the Condorcet Jury Theorem demonstrates that increasing the size of the jury will improve its accuracy.

Any downsides of larger or unanimous juries are negligible. Doubling the size of a jury from six to twelve members increases the length of deliberation by a mere seventeen minutes.¹²⁴ In a 1972 case holding that juries did not need to be unanimous, the Supreme Court cited studies showing juries will hang 5.6 percent of the time when they must be unanimous, and 3.0 percent of the time when not.¹²⁵ And the Court's figure may well be excessive, as more recent research tells us that real juries hang less often.¹²⁶ One study estimated that requiring unanimous verdicts in the military would only add 10 to 15 mistrials out of 3,000 courts-martial¹²⁷—which means only 0.3 percent of trials would be affected.

Back when the military was court-martialing hundreds of thousands of people per year,¹²⁸ even tiny changes could have huge consequences. But that is no longer the system we have. In September 2018, the entire Marine Corps had eleven courts-martial.¹²⁹ The entire Navy had fourteen.¹³⁰ In a noncombat setting with so few cases, the chief concern should be accuracy, not haste.

The structure of modern military justice makes it unlikely that a marginal increase in acquittals or mistrials would erode discipline. When a servicemember commits a minor crime, the commander has swifter administrative measures to address misconduct.¹³¹ When a servicemember is suspected of a serious crime that justifies a court-martial, the practice for many years has been to confine or separate the offender from their unit.¹³² By the time the court-martial issues its verdict, the lapse in time is so great it is unlikely to have any appreciable impact on deterrence.¹³³

On top of that, there is every reason to believe that jury reforms would have little impact on discipline. A survey of convening authorities found that four-fifths believed that moving to random selection for jurors—instead of having

¹²⁴ Saks & Weighner Marti, *supra* note 110, at 407.

¹²⁵ Johnson v. Louisiana, 406 U.S. 356, 374 n.12 (1972). That means one additional hung jury every twenty-five cases.

¹²⁶ Saks & Weighner Marti, *supra* note 110, at 411 (stating real juries only hang 1.1 percent of the time); ABRAMSON, *supra* note 83, at xvi (stating a 2.6 percent hung jury rate for federal courts); Valerie P. Hans et al., *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, in THE JURY SYSTEM: CONTEMPORARY SCHOLARSHIP 42 (Valerie P. Hans ed. 2006) (similar).

¹²⁷ Anderson & Hunsucker, *supra* note 33, at 60.

¹²⁸ Randy James, *A Brief History of the Court-Martial*, TIME (Nov. 18, 2009) <https://bit.ly/2PFEyal>.

¹²⁹ STAFF JUDGE ADVOCATE TO THE COMMANDANT, MARINE CORPS GENERAL AND SPECIAL COURT-MARTIAL DISPOSITIONS: SEPTEMBER 2018 (2018), <https://bit.ly/2DsP5My>.

¹³⁰ OFFICE OF THE NAVY CHIEF OF INFORMATION, SPECIAL AND GENERAL COURTS-MARTIAL RESULTS FOR SEPTEMBER 2018 (2019), <https://bit.ly/3k2D0i9>.

¹³¹ *E.g.*, 10 U.S.C. § 185; DEP'T OF THE ARMY REGULATION 600-37 UNFAVORABLE INFORMATION (setting the process for placing official reprimands in a soldier's records).

¹³² Murl A. Larkin, *Should the Military Less-than-Unanimous Verdict of Guilt Be Retained?*, 22 HASTINGS L.J. 237, 255 (1971) (“In today's highly complex military society, however, when a commander finds it necessary to resort to a general or special court-martial, he will often separate the offender from his fellow servicemen by confinement.”).

¹³³ *Id.* (noting that by the time a sentence is imposed, “the mobility of personnel and the lapse of time often preclude the order from having any appreciable ‘disciplinary’ value”).

the convening authority select—would not affect discipline.¹³⁴ Juror selection is arguably a more jarring change to how courts-martial are structured than size or decision rule, yet commanders themselves were fine with it.

III. COURTS UNDERPLAYING EVIDENCE ABOUT JURIES

Courts once thought highly of twelve-member panels. In 1881, the Supreme Court wrote, “It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.”¹³⁵ A few years earlier, the Court had stated that a criminal defendant could not be tried by a jury of less than twelve.¹³⁶ A few years later, the Court invalidated a Utah territorial conviction because it was made by an eight-person jury.¹³⁷

For years, the Court repeatedly held that the Sixth Amendment guaranteed not only a right to a jury, but to a jury of twelve.¹³⁸ In 1968, a Louisiana law was struck down in *Duncan v. Louisiana* that permitted judges alone to try the offense of battery carrying a maximum sentence of two years.¹³⁹ There were plenty of other instances of courts standing up for juries.¹⁴⁰ In the 1950s, the Sixth Circuit was thunderous in defense of unanimous verdicts. It said that the unanimity requirement was “inextricably interwoven with the required measure of proof,” and that anything less would “destroy this test of proof.”¹⁴¹ As a result, a defendant lacked the power to waive the right to a unanimous verdict.¹⁴²

But the love affair with juries did not last. The Eleventh Circuit decided that, upon second thought, defendants could waive the right to a unanimous verdict.¹⁴³ Only two years after *Duncan v. Louisiana*, the Supreme Court was confronted with whether a criminal defendant could be tried by only six jurors in *Williams v. Florida*.¹⁴⁴ It did an about-face. Little empirical evidence at the time indicated that the size made a difference, and the Court doubted whether size had any impact on reliability.¹⁴⁵ After reviewing the purposes of trial by jury, the Court concluded, “we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when

¹³⁴ COMPTROLLER GEN. OF THE U.S., FPCD-76-48, MILITARY JURY SYSTEM NEEDS SAFEGUARDS FOUND IN CIVILIAN FEDERAL COURTS 37 (1977).

¹³⁵ R.R. Co. v. Stout, 84 U.S. 657, 664 (1873).

¹³⁶ Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) (citing *Cancemi v. The People*, 18 N.Y. 128 (N.Y. 1858)).

¹³⁷ *Thompson v. Utah*, 170 U.S. 343, 349 (1898).

¹³⁸ *Patton v. United States*, 281 U.S. 276, 289 (1930); *Rasmussen v. United States*, 197 U.S. 516, 528 (1905) (voiding an Alaska statute that permitted six-person juries as “repugnant to the Constitution”); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900) (“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.”); *Capital Traction Co. v. Hof*, 174 U.S. 1, 13–14 (1899) (matter-of-factly stating that the right of “trial by jury” means a jury of twelve).

¹³⁹ *Duncan v. Louisiana*, 391 U.S. 145 (1968).

¹⁴⁰ *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899); *Am. Pub. Co. v. Fisher*, 166 U.S. 464, 468 (1897); *Springville v. Thomas*, 166 U.S. 707, 708 (1897); *Clark v. Container Corp. of Am., Inc.*, 589 So. 2d 184, 188 (Ala. 1991); *George v. People*, 167 Ill. 447, 457, 47 N.E. 741, 744 (1897); *Brown v. State*, 42 A. 811, 814 (N.J. 1899); *McRae v. Grand Rapids, L. & D. R. Co.*, 93 Mich. 399, 406 (1892); *Power v. Williams*, 205 N.W. 9, 12 (N.D. 1925).

¹⁴¹ *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953).

¹⁴² *Id.*

¹⁴³ *Sanchez v. United States*, 782 F.2d 928, 934 (11th Cir. 1986).

¹⁴⁴ *Williams v. Florida*, 399 U.S. 78, 100 (1970).

¹⁴⁵ *Id.* at 100–01.

it numbers 12.”¹⁴⁶ The size of twelve was dismissed as nothing more than a “historical accident” and not necessary to due process.¹⁴⁷ The Court soon permitted sub-twelve juries for civil cases as well.¹⁴⁸ And so a century of precedent was erased.

Williams, however, was predicated on faulty assumptions about group decision making. In addition to incorrectly stating that size did not matter, it also postulated that there was no difference between a vote of 8 to 4 and a vote of 4 to 2 because the proportion is the same.¹⁴⁹ This claim was “contradicted by all of the studies on which the Court relied for support of its proposition.”¹⁵⁰ In truth, there is a great difference between a vote of 10 to 2 and a vote of 5 to 1. Indeed, research tells us a dissenter is far more likely to stand their ground if they have but a single ally, even if the proportion of the vote is identical.¹⁵¹ The very scholars that the Court relied upon in *Williams* said the Court had gotten their research wrong.¹⁵²

Newly empowered to shrink juries, states were all too happy to sell their constitutional birthright for a mess of pottage. They hacked jury sizes down to the bone,¹⁵³ for every juror cut meant a few more precious dollars saved.¹⁵⁴ Many more ditched the traditional unanimity requirement.¹⁵⁵ Georgia took it the farthest, allowing defendants to be tried by a jury of five.¹⁵⁶

It was a bridge too far. Armed with richer empirical data to draw upon, the Court first drew a line in the sand in *Ballew v. Georgia*. The evidence showed that the smaller juries were less likely to foster deliberation, overcome biases, and self-criticize, all of which led to inaccurate verdicts.¹⁵⁷ Smaller juries also disproportionately hurt the defense and reduced the odds of minority representation.¹⁵⁸ Based on the new evidence, the *Ballew* Court held that five was too small but allowed six-person jurors to continue.¹⁵⁹ Separately, the Court struck down a Louisiana law that allowed for non-unanimous verdicts among six-person juries in *Burch v. Louisiana*. Relying on similar data, the *Burch* Court required six-person juries to be unanimous.¹⁶⁰

Naturally, military defense attorneys read these opinions and hastily challenged the emaciated juries permitted by the Uniform Code of Military Justice. It did not end well for them.

¹⁴⁶ *Id.* at 100.

¹⁴⁷ *Id.* at 102.

¹⁴⁸ *Colgrove v. Battin*, 413 U.S. 149, 149 (1973).

¹⁴⁹ *Williams*, 399 U.S. at 101 n.49.

¹⁵⁰ Saks & Weighner Marti, *supra* note 110, at 409.

¹⁵¹ *Id.*

¹⁵² Aliza B. Kaplan & Amy Saack, *Overturing Apodaca v. Oregon Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 ORE. L. REV. 1, 11 (2016).

¹⁵³ JAMES P. LEVINE, JURIES AND POLITICS 29 (1992).

¹⁵⁴ *Burch v. Louisiana*, 441 U.S. 130, 139 (noting that the state justified weakening juries to save time and money). Cost savings are an ever-favorite argument of those seeking to limit popular participation in the justice system.

¹⁵⁵ LEVINE, *supra* note 153, at 29.

¹⁵⁶ *Ballew v. Georgia*, 435 U.S. 223, 224 (1978). Some states have, to this day, defended indispensable nature of a twelve-person jury. *See e.g.*, *Kakos v. Butler*, 63 N.E.3d 901, 911 (2016).

¹⁵⁷ *Ballew*, 435 U.S. at 232–34.

¹⁵⁸ *Id.* at 236–37.

¹⁵⁹ *Id.* at 239.

¹⁶⁰ *Burch*, 441 U.S. at 138.

The first case was *United States v. Wolff*.¹⁶¹ In it, the defendant argued that because courts-martial could be different sizes depending on how many members were struck, and smaller juries achieve less-accurate results, different defendants were getting different levels of justice.¹⁶² He relied on *Ballew* and the empirical evidence contained therein.¹⁶³ The court dismissed this out of hand, saying—without evidence in support—that those studies did not apply to the military because civilian juries are selected differently.¹⁶⁴ *Wolff* contrasted how civilian jurors are randomly selected from a cross-section of the community on the one hand, with how military jurors are handpicked based on who is “best qualified” on the other.¹⁶⁵ Notably absent was any explanation for why this would affect group decision-making in any way. After discounting the available empirical evidence to the contrary, it declared, “[t]here is no showing that a five-member court-martial does not render the same quality of justice as does a larger court.”¹⁶⁶

After *Wolff*, military courts tended to dismiss similar jury challenges quickly and with little analysis. *United States v. Guilford*¹⁶⁷ was the next case that gave the issue any extended discussion. In it, the defendant once again cited *Ballew* and *Burch*.¹⁶⁸ *Guilford*’s attempt to distinguish precedent was even less spirited than *Wolff*. There, the court claimed that the Supreme Court cases did not apply since the court-martial had seven members not six and reiterated that studies about civilians did not apply to the military.¹⁶⁹

From there on out, military courts routinely dismissed challenges to jury rules without analysis.¹⁷⁰ At the Supreme Court, Justice William Brennan asked to review non-unanimity requirements in the military in 1984, but it did not go anywhere.¹⁷¹ Vote counts were not recorded, but since four votes are required to hear a case, we can surmise it was fewer than four.¹⁷²

These rulings are odd in light of the Supreme Court’s own writings on military juries. In *United States ex rel. Toth v. Quarles*,¹⁷³ the Court said “right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists” to serve as jurors. They bring a “variety of different experiences, feelings, intuitions and habits” and have “manfully stood up in defense of liberty.”¹⁷⁴

¹⁶¹ *United States v. Wolff*, 5 M.J. 923, 923 (N.C.M.R. 1978).

¹⁶² *Id.* at 924.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 925.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *United States v. Guilford*, M.J. 598, 598 (A.C.M.R. 1979).

¹⁶⁸ *Id.* at 601.

¹⁶⁹ *Id.*

¹⁷⁰ *United States v. Brown*, 13 M.J. 381 (C.A.A.F. 1982); *United States v. Spear*, No. ACM 38537, 2015 CCA LEXIS 310, at *8-9 (A.F. Ct. Crim. App. July 30, 2015); *United States v. Wilt*, No. NMCCA 201300274, 2015 CCA LEXIS 57, at *24-25 (N-M. Ct. Crim. App. Feb. 19, 2015); *United States v. Edwards*, NMCM 93 00935, 1995 CCA LEXIS 412, at *7 (N-M. Ct. Crim. App. Dec. 14, 1995); *United States v. Viola*, 26 M.J. 822, 830, (A.C.M.R. 1988); *United States v. Rojas*, 15 M.J. 902, 919, (N-M. 1983); *United States v. Seivers*, 9 M.J. 612, 615 (A.C.M.R. 1980); *United States v. Yoakum*, 8 M.J. 763, 768 (A.C.M.R. 1980).

¹⁷¹ Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 21–22 (1998).

¹⁷² *Id.* at 22 n.101.

¹⁷³ *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955).

¹⁷⁴ *Id.*

The status quo of allowing small, variable juries leads to strange results. If a conviction requires two-thirds, and the panel has five members, four must vote in favor of conviction for the government to prevail. Thus, the defense only needs to get two members to vote not guilty to win. But if the panel has six members, still only four votes are required to convict. So now, the defense must secure three votes for a finding of not guilty. Additionally, if a jury has seven members with a two-thirds rule, the government needs five votes to convict. If the defense peremptorily strikes one, the government only needs four to convict, as the struck jurors will not be replaced in military courts.¹⁷⁵ This forces defense attorneys to make a Hobson's choice between striking a potentially unfriendly juror and lowering the government's threshold to convict.

IV. ARGUMENTS AGAINST LARGER, UNANIMOUS JURIES ARE UNPERSUASIVE

The core of the argument against reforming juries is that empirical research is wholly inapplicable to the military because it was conducted on civilians.¹⁷⁶ In this view, servicemembers are almost a different species, psychologically speaking. While facially plausible, this argument does not hold up well under scrutiny.

For starters, as Army Captain Scott A. Hancock has pointed out,¹⁷⁷ the logic does not make sense on its own terms. If military jurors are truly superior to civilian jurors, as implied, why allow non-unanimity? If military jurors are as sublime as courts make them out to be, should not a single dissenter be enough to prevent a conviction? After all, if military jurors are more astute than civilians, a military juror's dissenting view should be entitled to just as much, if not more, weight.

As explained further below, evidence shows: (1) servicemembers behave much like anyone else on a psychological level, particularly when one considers that the military is a remarkably diverse organization, both in terms of who joins and roles performed, (2) cognitive biases have plagued the military as long as warfare has existed, (3) any expertise military jurors bring to the table does not prevent cognitive bias, (4) racial bias affects even those who are not mean-spirited, (5) the military has blurred the distinction between martial and civil over the decades, and (6) historical justifications for small, fractured juries no longer apply.

¹⁷⁵ *United States v. Kelly*, 76 M.J. 793, 796 (A. Ct. Crim. App. 2017). The reason struck jurors are not replaced is because in the military, peremptory strikes are not used to purge potential jurors; rather, strikes remove jurors who are already seated. See Gregory B. Coe, "Something Old, Something New, Something Borrowed, Something Blue": *Recent Developments in Pretrial and Trial Procedure*, 1998 ARMY LAW. 44, 70 (1998).

¹⁷⁶ *United States v. Wolff*, 5 M.J. 923, 925 (1978); *United States v. Guilford*, 8 M.J. 598, 601 (1979). This is in keeping with the general trend of courts undervaluing social scientific evidence. As one commentator wrote, "The reaction of courts to social science evidence is frequently an uneasy one." Richard O. Lempert, *Social Science in Court: On 'Eyewitness Experts' and Other Issues*, 10 L. & HUMAN BEHAVIOR 167, 167 (1986).

¹⁷⁷ Scott A. Hancock, *The Constitution and the Criminally Accused Soldier: Is the Door Opening or Closing?*, 1987 ARMY LAW. 28, 33 (1987).

A. *Research Does Not Show Servicemembers Are Psychologically Unique*

Professor Michael Saks, the jury expert from the Supreme Court cases of *Ballew* and *Burch*, opined that “the same principles [of group decision-making] would apply to the military as to civilian decision makers,” and “in other areas of research, only negligible or no differences have been found between civilian and military populations.”¹⁷⁸ When confronted with this reality, in a separate case, the Solicitor General of the United States brushed it aside without challenging its truth.¹⁷⁹

Opinion polling suggests that members of the military hold different views from the general public, but not radically so.¹⁸⁰ Studies looking at the effect of military service on political beliefs have said “gross comparisons between those serving and those not serving point toward modest effects at best” and “the simple distinction between service and nonservice was too crude a cutting tool and [it was] necessary to make finer distinction.”¹⁸¹

Research on the impact of military service on socioeconomic attainment has found positive, negative, and neutral associations with earnings and status depending on the veterans’ characteristics and era of service.¹⁸² In other words, there are no clear categorical rules of how servicemembers behave and service affects everyone differently.

The simplest explanation for all this is that the military is not monolithic. On the contrary, it is diverse. There are roughly 1.3 million active-duty servicemembers, and about 800,000 in the Reserves and National Guard.¹⁸³ The racial demographics of the military roughly mirror society at large,¹⁸⁴ and it is growing ever more diverse.¹⁸⁵ Though a long way from reaching gender parity, it is moving in that direction now that women are one-sixth of the force.¹⁸⁶ Compare that to the 1970s—which is when *Ballew* and *Burch* were decided—when only one-twentieth of servicemembers were women.¹⁸⁷

More than demographics, the breadth of what servicemembers actually do is immense. When we think of the military, we think of combat arms—branches like infantry, artillery, or jet pilots. But most soldiers perform combat support roles—like cooking, logistics, and so forth, even in a combat theater.¹⁸⁸ The Army alone has hundreds of professions, from interpreter to water treatment specialist to nutrition care specialist to counterintelligence agent.¹⁸⁹ All might

¹⁷⁸ Anderson & Hunsucker, *supra* note 33, at 59.

¹⁷⁹ *Id.*

¹⁸⁰ Leo Shane III, *Support for Trump is Fading Among Active-Duty Troops, New Poll Shows*, MIL. TIMES (Oct. 15, 2018), <https://bit.ly/3gluuZl>.

¹⁸¹ M. Kent Jennings & Gregory B. Markus, *The Effect of Military Service on Political Attitudes: A Panel Study*, 71 AM. POL. SCI. REV. 131, 146 (1977).

¹⁸² Alair MacLean, *The Privileges of Rank: The Peacetime Draft and Later-life Attainment*, 34 ARMED FORCES SOC. 682, 682 (2008).

¹⁸³ Kim Parker, Anthony Cilluffo & Renee Stepler, *6 Facts About the U.S. Military and Its Changing Demographics*, PEW RES. CEN. (Apr. 13, 2017), <https://pewrsr.ch/30koo5R>.

¹⁸⁴ *Id.*

¹⁸⁵ Amanda Barroso, *The Changing Profile of the U.S. Military: Smaller in Size, More Diverse, More Women in Leadership*, PEW RES. CENTER (Sept. 10, 2019), <https://pewrsr.ch/2DaFSJc>.

¹⁸⁶ George M. Reynolds & Amanda Shendruk, *Demographics of the U.S. Military*, COUNCIL ON FOREIGN RELATIONS (Apr. 24, 2018), <https://on.cfr.org/3gxsc8>.

¹⁸⁷ Barroso, *supra* note 185.

¹⁸⁸ JOHN J. McGRATH, THE OTHER END OF THE SPEAR: THE TOOTH-TO-TAIL RATIO (T3R), in MODERN MILITARY OPERATIONS 50 (2007).

¹⁸⁹ Rod Powers, *Complete List of Army Enlisted MOS: Army Military Occupational Specialties* (June 18, 2019), <https://bit.ly/3hR2yNk>.

have received similar training upon entry to the military, but the day-to-day job and life for a Green Beret is going to be very different from, say, a military air traffic controller.

There is even less reason to believe that *officers* are distinct psychological animals from all civilians. This is a particularly important question for purposes of military juries. Any officer is entitled to serve on a court-martial, but enlisted jurors can only serve if an enlisted defendant requests it, and even then, enlisted need comprise no more than one-third of the body.¹⁹⁰ The vast majority of them have either a college or advanced degree.¹⁹¹ This means that officers had four-plus years in a civilian institution (excepting the small share who attended service academies).¹⁹² Unlike enlisted servicemembers, officers are generally allowed to live off base, giving them a deeper connection to the civilian world.¹⁹³ They are permitted to live off-post because “their duties require a more independent lifestyle.”¹⁹⁴

In the romanticized version, the military may be purely martial in character. But this is not correct. By the time of the 1970s, half of enlisted servicemembers performed technical jobs (like mechanic) and another third performed service-related jobs (like food service).¹⁹⁵ And “[s]ociologists have noted the gradual convergence of military and civilian social structures due to technology and the bureaucratization of military functions.”¹⁹⁶ The old notion that the military is a separate society is no longer accurate. Today, “the military functions much like a large civilian corporation, with officers playing the role of managers and enlisted personnel playing the role of employees.”¹⁹⁷ Even the Court of Military Appeals has recognized this reality. Persons in the military “are neither puppets nor robots . . . they are human beings endowed with legal and personal rights.”¹⁹⁸

The above-cited research on jury performance involved studies that looked at tens-of-thousands of people in many different types of deliberative settings.¹⁹⁹ Nearly all of the studies reached the same conclusions: large, unanimous juries perform better. Such consistent evidence should not be brushed aside simply because it focused on civilians, given that no evidence exists military juries would not see the same sorts of improvements from larger, unanimous juries.

¹⁹⁰ 10 U.S.C. § 825.

¹⁹¹ Parker et al., *supra* note 183.

¹⁹² For example, West Point has an enrollment of about 4,000. *A Brief History of West Point*, U.S. MIL. ACADEMY (last visited Sept. 5, 2019) <https://bit.ly/2PFDVHq>. There are about 80,000 officers in the Army. Erin Duffin, *Total Military Personnel of the U.S. Army for Fiscal Years 2018 to 2020, by Rank*, STATISTA (Apr. 29, 2019), <https://bit.ly/3i21CG6>.

¹⁹³ Rod Powers, *Living On or Off Base For Single Military: The Barracks or Apartment Living?*, BALANCE CAREERS (July 18, 2019), <https://bit.ly/3185mid>.

¹⁹⁴ KEITH E. BONN, *ARMY OFFICER’S GUIDE 94* (50TH ED. 2005).

¹⁹⁵ Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1402 (1973).

¹⁹⁶ *Id.*

¹⁹⁷ Karen A. Ruzic, *Military Justice and the Supreme Court’s Outdated Standard of Deference: Weiss v. United States*, 70 CHI.-KENT. L. REV. 265, 265 (1994). See also Elizabeth Lutes Hillman, *The “Good Soldier” Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 893 (1999) (“The technologically advanced, professional standing armed forces are not so ‘separate’ a society as perhaps they once were.”).

¹⁹⁸ *United States v. Milldebrandt*, 25 C.M.R. 139, 143 (C.M.A. 1958).

¹⁹⁹ Saks & Weighner Marti, *supra* note 110, at 401.

B. *Evidence Suggests Servicemembers Are Susceptible to the Same Cognitive Biases as Everyone Else*

The history of warfare is rife with flawed decision making. This fact shows that servicemembers are human, not a different genus. In the Civil War, both Union and Confederate commanders made unforced errors.²⁰⁰ Commanders during World War I fundamentally erred by adopting offensive strategies in a battle space that heavily favored defensive tactics.²⁰¹ The British were able to exploit the cognitive biases of Axis leaders to great effect in World War II.²⁰² Groupthink is a well-known cognitive bias where a team fails to critically assess itself, allowing bad ideas and false assumptions to flourish unchecked. It is seen as the root of many military disasters, including Pearl Harbor, the Bay of Pigs, and escalation of the Vietnam War.²⁰³ A 1973 study found that overconfidence bias—which makes people more sure of their decisions than they should be—is prevalent in the military.²⁰⁴ The presence of unjustified confidence is even more pronounced on hard questions.²⁰⁵

In 2009, a Navy submarine and amphibious ship crashed into each other in Bahrain.²⁰⁶ Navy officials displayed retrievability bias and hindsight bias by illogically assuming that ship crashes were more likely going forward—that is to say, a recent vivid example of a shipwreck gave the false impression that shipwrecks were becoming more common.²⁰⁷

As summarized above, research indicates that larger, unanimous juries help counteract these natural impulses.²⁰⁸ Longer deliberation helps expose bad ideas and discover good ones.²⁰⁹ More people—and more diversity—reduce the odds that everyone will be on the same page at the start.²¹⁰ And unanimity requirements guarantee that a devil’s advocate cannot be ignored.²¹¹

²⁰⁰ MICHAEL J. JANSER, COGNITIVE BIASES IN MILITARY DECISION MAKING 9, 10 (2007) <https://bit.ly/3gk9bas> (describing cognitive errors made by General George McClellan and Robert E. Lee).

²⁰¹ JACK SNYDER, THE IDEOLOGY OF THE OFFENSIVE: MILITARY DECISION MAKING AND THE DISASTERS OF 1914, at 9, 15–17 (1984).

²⁰² Blair S. Williams, *Hueristics and Biases in Military Decision Making*, MIL. REV. 40, 43, 48 (Sept.-Oct. 2010), <https://bit.ly/2EL4Z5X>.2010.

²⁰³ Andrew Hill, *Why Groupthink Never Went Away*, FIN. TIMES (May 6, 2018) <https://on.ft.com/3198VVr>

²⁰⁴ JANSER, *supra* note 200, at 3.

²⁰⁵ *Id.*

²⁰⁶ *USS Hartford and USS New Orleans Arrive in Port Bahrain*, U.S. NAVY (Mar. 21, 2009), <https://bit.ly/39O7HCR>.

²⁰⁷ Williams, *supra* note 197, at 42–43. Relatedly, the Israeli Air Force incorrectly believed that pilots responded well to negative criticism after a bad flight because pilots did better the next time. DANIEL KAHNEMAN, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 10 (1982). But the real reason is probably that after a bad flight, the next one would be better because the only direction to go was up. *Id.*

²⁰⁸ E.g., Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 37, 41 (1997).

²⁰⁹ Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, in THE JURY SYSTEM 401 (Valerie P. Hans ed. 2006).

²¹⁰ *Ballew v. Georgia*, 435 U.S. 223, 232–39 (1978).

²¹¹ Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1291–92 (2000).

C. *Racial Bias Affects Most Everyone, Even Those Who Should Be Aware of and Opposed to It*

The history of racial hatred and jury trials is well known.²¹² Modern studies show that the race of a juror does not generally affect how they will vote,²¹³ but that does not mean trials are perfect. Racial bias can infect decision making for all professions of all sorts. Studies that measure implicit racial bias found evidence of unconscious prejudice against African Americans in a wide variety of test subjects. A study found that most peremptory challenges were based on group stereotypes, and judges almost always accept neutral explanations for these.²¹⁴

When participants read a story about a fight, they remembered the characters as more aggressive when they were Black rather than white, and invented false memories of the Black characters acting aggressively.²¹⁵ Subjects in these studies included first-year law students,²¹⁶ police officers and probation officers,²¹⁷ judges,²¹⁸ and, most surprisingly, capital defense attorneys.²¹⁹ Defense attorneys representing Black clients were also more likely to interpret, unintentionally, the evidence available as probative of guilt.²²⁰

Racial injustice haunts the military justice system like any other. A recent study found that Black servicemembers face court-martial actions and nonjudicial punishment at a substantially higher rate.²²¹ Depending on the service, a Black servicemember can be 1.29 to 2.61 times more likely than a white servicemember to face punishment.²²² Because members of the military are screened for prior criminal histories and are guaranteed to have a steady paycheck, it is hard to explain this disparity on non-racial grounds. History also supplies examples of racial injustices.²²³

Military courts have stated, “In our American society, the Armed Services have been a leader in eradicating racial discrimination.”²²⁴ Defense Secretary Mark Esper has said, “Racism is real in America, and we must all do our very best to recognize it, to confront it, and to eradicate it.”²²⁵ We know that enlarging juries would aid in this cause. Larger juries are more likely to have

²¹² *E.g.*, GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* 9 (2012) (example of black jurors being excluded); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 437 (2012) (describing white juries acquitting white defendants who attacked black victims).

²¹³ *Id.* at xi.

²¹⁴ ABRAMSON, *supra* note 83, at xxiv, xxvi.

²¹⁵ Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 *DUKE L.J.* 345, 398–401, 400–02 (2007).

²¹⁶ Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 *DEPAUL L. REV.* 1539, 1544 (2004).

²¹⁷ Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 *W. VA. L. REV.* 307, 331 (2010).

²¹⁸ Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 *NOTRE DAME L. REV.* 1195 (2009).

²¹⁹ Eisenberg & Johnson, *supra* note 216, at 1553.

²²⁰ L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 *YALE L.J.* 2626, 2636 (2013).

²²¹ PROTECT OUR DEFENDERS, *RACIAL DISPARITIES IN MILITARY JUSTICE: FINDINGS OF SUBSTANTIAL AND PERSISTENT RACIAL DISPARITIES WITHIN THE UNITED STATES MILITARY JUSTICE SYSTEM* (2017) <https://bit.ly/3gtwlvn>.

²²² *Id.* at i.

²²³ Jeff Schogol, *‘Racism is real in America’—SecDef Esper Condemns the Killing of George Floyd*, *TASK & PURPOSE* (June 3, 2020) <https://bit.ly/3gtwu1S>.

²²⁴ *United States v. Santiago-Davila*, 26 M.J. 380, 390 (C.M.A. 1988).

²²⁵ Schogol, *supra* note 223.

people of color on them. Those jurors, in turn, can help counteract racial stereotypes.

D. The History of Military Juries Shows that Size and Decision Rules Were Created to Solve Problems that Are Far Less Pressing Today

History once provided a strong argument for treating military juries differently. No more. Commentators have noted that the traditional justifications courts assert to treat servicemembers differently have not aged well.²²⁶

In the beginning, military juries were preeminent. On June 28, 1775, a committee including George Washington and Philip Schuyler drafted the Articles of War, and two days later, Congress adopted them.²²⁷ The inaugural Articles of War did not set out specific punishments. For the most part, its authors decided that discretion was the better part of valor. By way of example, Article 8 stated that deserters “shall be punished at the discretion of a general court-martial.” This “discretion” empowered courts-martial to mete out a variety of punishments, including reductions in rank, dismissal from service, docking pay, imprisonment, or whipping.²²⁸ Vague language is used throughout the rest of the Articles, thus placing few limitations on the conduct of courts-martial and the jurors who would run them.²²⁹

Though commanders loomed large over the process, no judge monitored the proceedings. Judicial functions were shared between the prosecutor and the jurors themselves.²³⁰ The president of the court-martial—the senior-most member of the jury—oversaw the trial and the jury ruled on motions and evidentiary objections.²³¹ Jurors took an active role at trial, questioning, recalling, and ordering the appearance of witnesses,²³² and until 1916, testifying.²³³ They were also the ones to decide challenges for cause against panel members.²³⁴

Even after the adoption of the Uniform Code of Military Justice, jurors still played an outsized role compared to their civilian counterparts. The 1951 Manual for Courts-Martial stated that the “president of a special court-martial will rule in open court upon all interlocutory questions other than challenges arising during the trial.”²³⁵ Jurors could even overturn a judge’s ruling on a motion for a finding of not guilty or a finding of the accused’s sanity.²³⁶ Counsel could argue the law directly to juries on these issues.²³⁷ When judges did rule on such a motion, it would be “subject to the objection of any court member,” and jurors

²²⁶ Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 948-50 (2015).

²²⁷ DEP’T OF THE ARMY, *supra* note 6, at 7.

²²⁸ 1775 Articles of War, art. 51.

²²⁹ There are a few exceptions. Officers guilty of “profane cursing or swearing” would be fined four shillings. 1775 Articles of War, art. 3. Soldiers who misbehaved in church would be fined one-sixth of a dollar for the first offense, and fined and jailed for the second. *Id.* at art. 2. Soldiers could suffer death for abandoning their post, revealing the watch-word, or surrendering a post to the enemy. *Id.* at arts. 25, 26, and 31.

²³⁰ DEP’T OF THE ARMY, *supra* note 6, at 89.

²³¹ *Id.*

²³² *Id.*

²³³ CHRIS BRAY, COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND (2016) 242.

²³⁴ *United States v. Carter*, 25 M.J. 471, 475 (C.M.A. 1988).

²³⁵ Manual for Courts-Martial, United States (1951 ed.) § 57c.

²³⁶ *Id.* at § 57d.

²³⁷ See LUTHER C. WEST, THEY CALL IT JUSTICE: COMMAND INFLUENCE AND THE COURT-MARTIAL SYSTEM 2 (1977).

could acquit on purely legal grounds.²³⁸ The president of a court-martial would chide attorneys like a judge might, and in one case, the president of a court-martial told a judge that it was not necessary for him to rule on the motion, to which the judge replied, “Very well.”²³⁹ Later rules to restrict the power of juries were resisted.²⁴⁰ All this was in keeping with a proud American tradition of reposing great confidence in juries.²⁴¹

The 1775 Articles of War set out two types of court-martial: general and regimental.²⁴² The former consisted of at least thirteen commissioned officers, with the president being a field officer.²⁴³ The latter consisted of at least five officers or, if necessary, three.²⁴⁴ The drafters considered the large size important, as general courts-martial could only be shrunk if empanelling a full thirteen would cause “manifest injury to the service.”²⁴⁵ During trial, it was acceptable for the number of jurors to drop below thirteen, but not below five.²⁴⁶ Later amendments would also require convening authorities to explain why they were using fewer than thirteen members.²⁴⁷

It was not until 1920 that the Articles of War dropped the hard suggestion of thirteen jurors. Instead, it simply set a lower limit of five for general courts-martial, three for special courts-martial, and one for a summary court-martial.²⁴⁸ This was continued in the 1948 Elston Act that instituted many reforms to the military justice system,²⁴⁹ the 1949 rough draft of the Uniform Code of Military Justice,²⁵⁰ and finally, the adopted version of the Code.²⁵¹

The Navy followed a similar progression. The earliest rules for the Navy in 1776 stated that a court-martial should consist of three captains, three first lieutenants, and a like number of Marine officers if they were available, with the eldest captain presiding.²⁵² A range of five to thirteen court-martial members was also adopted by the Navy in 1799.²⁵³ More than a century later in 1932, it had this same range and called upon convening authorities to appoint as many members as possible without inflicting “injury to the service.”²⁵⁴ The 1932 version of the Articles for Government of the Navy—known as the Rocks and Shoals—remained in force until the Code replaced it.²⁵⁵

²³⁸ *Id.* at 3.

²³⁹ *Id.* at 84.

²⁴⁰ *United States v. Miller*, 14 M.J. 924, 925 n.1 (A.F.C.M.R. 1982) (ignoring rule that forbid jurors from asking questions directly).

²⁴¹ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 927-28 (1987).

²⁴² 1775 Articles of War, art. 33.

²⁴³ *Id.* On occasion, courts-martial could be *larger* than thirteen. Fourteen officers, for example, tried Major John Andre, the spy who conspired with Benedict Arnold. LOUIS FISHER, *MILITARY TRIBUNALS & PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 12 (2005).

²⁴⁴ 1775 Articles of War, art. 38.

²⁴⁵ 1806 Articles of War, art. 64; 1874 Articles of War, art. 75; 1916 Articles of War, art. 5.

²⁴⁶ WILLIAM WINTHROP, *A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY WITH NOTES* 87 (1895).

²⁴⁷ 1878 Articles of War, art. 17.

²⁴⁸ Articles of War, art. 5 (1920).

²⁴⁹ Act of June 24, 1948, Pub. L. 758, 62 Stat. 628, ch. 625, §§ 204, 205.

²⁵⁰ NATIONAL MILITARY ESTABLISHMENT, *UNIFORM CODE OF MILITARY JUSTICE: TEXT, REFERENCES AND COMMENTARY BASED ON THE REPORT OF THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE TO THE SECRETARY OF DEFENSE* (1949).

²⁵¹ Article 16, Uniform Code of Military Justice [10 U.S.C. § 816] (1950).

²⁵² Rules for the Regulation of the Navy of the United Colonies (1776).

²⁵³ Articles for the Government of the Navy, art 47 (1799).

²⁵⁴ Articles for the Government of the United States Navy, art. 39 (1930).

²⁵⁵ *Rocks and Shoals*, NAVAL HIST. & HERITAGE COMMAND (June 22, 2018), <https://bit.ly/2PifuPZ>.

The size of courts-martial was dropped in the interest of convenience, not justice. Congress was worried that small, detached units might not be able to obtain thirteen officers.²⁵⁶ This was once a valid concern. The military was born of an era where “mails were slow and telegrams unknown.”²⁵⁷ Congress is given the constitutional power to “declare” rather than “make” war because the founders knew it could take too long for Congress to convene, and the president would need to act immediately.²⁵⁸ During the Revolutionary War, it could take Washington several months to get in touch with a state governor.²⁵⁹

That was another world entirely. Apart from technological improvements, the nature of military justice has changed. It is not essential that defendants be tried at the location of the event, even in combat situations. Overseas servicemembers are usually transported to different locations for prosecution.²⁶⁰ In Vietnam, servicemembers were flown to Japan for courts-martial.²⁶¹ The My Lai massacre case was tried in the United States.²⁶²

In addition to geographic isolation, there would have been valid logistical concerns about finding enough officers. Three years after the Treaty of Paris ended the Revolutionary War, the American Army shrank down to fewer than forty officers, so it would have been virtually impossible to assemble the required thirteen officers for a capital case.²⁶³ By 1801, the officer corps had grown to only 248.²⁶⁴

Today, no one can now contend the military lacks the bodies to fill a jury of twelve. There are nearly a quarter-million officers in the military.²⁶⁵ The force has become increasingly top-heavy.²⁶⁶ In the event there was ever a scenario that prevented twelve officers from being collected, the Uniform Code of Military Justice already provides an exception to jury size for “physical conditions or military exigencies.”²⁶⁷

Early courts-martial did not have unanimity requirements. For much of the military’s history, no set percentage was established for a conviction, but it was usually a majority vote.²⁶⁸ At the time of the Civil War, a majority of jurors could vote to impose a noncapital punishment, and two-thirds would suffice for a death sentence.²⁶⁹ In 1874, Congress officially set two-thirds as the percentage necessary for a death sentence, but was silent about the standard for other types

²⁵⁶ *Mendrano v. Smith*, 797 F.2d 1538, 1546 (10th Cir. 1986).

²⁵⁷ WILLIAM ADDLEMAN GANO, *THE HISTORY OF THE UNITED STATES ARMY* 16 (1964).

²⁵⁸ LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 250 (5th ed. 2007).

²⁵⁹ GANO, *supra* note 257, at 32.

²⁶⁰ Sherman, *supra* note 195, at 1401.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980*, 4 (2001).

²⁶⁴ GANO, *supra* note 257, at 108.

²⁶⁵ Gregory C. McCarthy, *Are There Too Many General Officers for Today’s Military?*, 87 *JOINT FORCE QUARTERLY* 76, 78 (2017) <https://bit.ly/3hXR0b2>.

²⁶⁶ *Id.* at 76, 78 (noting, respectively, that the ratio of general officers to active duty troops has more than quadrupled since World War II, and that in the last 30 years, the ratio of 4-star officers to the overall force as increased 65 percent).

²⁶⁷ 10 U.S.C. § 825(c)(4).

²⁶⁸ *Mendrano*, 797 F.2d at 1546.

²⁶⁹ DEP’T OF THE ARMY, *supra* note 6, at 60.

of cases.²⁷⁰ In 1916, Congress codified the longstanding practice of two-thirds for capital cases and a majority vote for all others.²⁷¹

Once again, efficiency, not justice, was the driving force behind these changes. This time, the goal was to reduce the incidence of hung juries.²⁷² Or, at least, that is what courts think. In declaring this as fact, the Tenth Circuit stated that reducing hung juries was the “obvious policy preference” of Congress, but did not cite any evidence of Congress’ intent or evidence or any studies showing what effect, if any, non-unanimous decisions had on hung juries.²⁷³ Had it bothered to look, it might have learned it is rare for one or two holdouts to result in a deadlocked jury.²⁷⁴

Though courts have worked hard to preserve the status quo for jury size and decision rules, it is not clear Congress has given the matter much thought. When the Uniform Code of Military Justice was debated in Congress, there were concerns about juries but on a different topic. The complaint was that convening authorities should not be able to select the jurors, as it gives the impression that the game is rigged.²⁷⁵ If any issue has since dominated discussion of military juries, it has been this.²⁷⁶ There was no debate in Congress over the proper size of military juries or decision rules.

If anything, Congress appears to recognize that larger juries would be good for defendants. During hearings the produced the 1920 version of the Articles of War, the Army General Staff admitted that larger minimum requirements to convict help the accused.²⁷⁷ Case in point, the number of required jurors goes up for more serious crimes,²⁷⁸ and the unanimity requirement only kicks in for capital cases.²⁷⁹ The inference is that defendants facing the most serious charges deserve the most due process in decision rules. In the 2016 Military Justice Act, Congress also upped the conviction threshold for noncapital cases from two-thirds to three-quarters.²⁸⁰

E. Reasons to Uphold the Current System Do Not Tip the Scale

The Army’s Trial Counsel Assistance Program has put out guidance explaining why *Ramos v. Louisiana* does not invalidate existing rules for courts-martial.²⁸¹ The Army’s main point is that the Sixth Amendment has not been interpreted to apply to courts-martial.²⁸² Indeed, a long line of cases backs up this assertion.²⁸³ The Army also stresses that if the Sixth Amendment did apply to the

²⁷⁰ Articles of War, art. 46 (1878).

²⁷¹ Articles of War, art. 43 (1920).

²⁷² *Mendrano*, 797 F.2d at 1546.

²⁷³ *Id.* Note that the court was happy to accept this unsupported supposition to justify a policy, but courts require defendants has to produce unassailable empirical evidence that smaller juries degrade decision-making in the context of the military.

²⁷⁴ Taylor-Thompson, *supra* note 115, at 1317.

²⁷⁵ 96 Cong. Rec. 1350 (Feb. 2, 1950) (statement of Mr. Kefauver).

²⁷⁶ COMPTROLLER GENERAL OF THE UNITED STATES, *MILITARY JURY SYSTEM NEEDS SAFEGUARDS FOUND IN CIVILIAN FEDERAL COURTS* 6 (June 15, 1977) <https://bit.ly/2DeFtpD>.

²⁷⁷ S. REP. NO. 130, 64 at 30 (1916).

²⁷⁸ *See* 10 U.S.C. § 816.

²⁷⁹ 10 U.S.C. § 852(b).

²⁸⁰ Act of Dec. 23, 2016, Pub. Law 114-328, 130 Stat. 2894.

²⁸¹ TCAP Express, *Ramos v. Louisiana—Unanimous Jury Verdicts* (May 5, 2020). The Navy’s Trial Counsel Assistance Program has taken a similar position on non-unanimous juries and the *Ramos* decision.

²⁸² *Id.*

²⁸³ *See Ex parte Quirin*, 317 U.S. 1 (1942); *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012).

military, the court-martial system would have been non-compliant for years, so *Ramos* does not change anything.²⁸⁴ And the Army points to *Weiss v. United States*,²⁸⁵ which set out a test for evaluating due process challenges to courts-martial, in response to substantive due process arguments.

Weiss said that in deciding what process is due, the Court “must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces.”²⁸⁶ The standard to win a military due process challenge is “whether the factors militating in favor of [a new right] are so extraordinarily weighty as to overcome the balance struck by Congress.”²⁸⁷ This standard has been used to deny jury rights in the past.²⁸⁸

Though a high standard, due process demands larger, unanimous juries in the military. The private interest is self-evident: defendants should want juries that entertain minority viewpoints, must reach 100% agreement on guilt, overcome racial prejudices, and represent the diversity of the armed forces. The countervailing government interest is slight: studies predict seventeen additional minutes added to trial, and fifteen additional mistrials for every 3,000 courts-martial.²⁸⁹ There is no additional cost, since jury service is simply something that servicemembers can be tasked with, not something they need to be paid separately for.²⁹⁰ And jury reforms directly contribute to lowering the odds of an erroneous decision, as explained above.

Finally, the Army says that “the issue of whether an Accused has a right to a unanimous jury verdict for serious crimes is not a question for the court system to decide.”²⁹¹ There is some truth to this. Ideally, Congress would act to reform the system, as it has done in the past.²⁹² But military courts have decided many times on their own that change was necessary to ensure a fair trial.²⁹³ This includes rights that relate to juries. In *United States v. Santiago-Davila*, which ended the use of racially biased peremptory strikes in the military, the Court of Military Appeals said, “even if we were not bound by *Batson*, the principle it espouses should be followed in the administration of military justice.”²⁹⁴

²⁸⁴ TCAP Express, *supra*, note 281.

²⁸⁵ 510 U.S. 163 (1994).

²⁸⁶ *Id.* at 177 (quoting *Middendorf v. Henry*, 425 U.S. 25, 43 (1976)).

²⁸⁷ *Id.* at 177–78 (quoting *Middendorf*, 425 U.S. at 44).

²⁸⁸ *United States v. Spear*, No. ACM 38537, 2015 CCA LEXIS 310, at *5-6 (A.F. Ct. Crim. App. July 30, 2015).

²⁸⁹ Anderson & Hunsucker, *supra* note 33, at 60 (citing Larkin, *Should The Military Less-Than-Unanimous Verdict of Guilty Be Retained?*, 22 HASTINGS L.J. 237, 256–57 (1971)).

²⁹⁰ See 10 U.S.C. § 825(e)(2). Even if costs were an issue, parsimony is a strange justification to degrade the quality of the justice system. Particularly in light of the fact that the military, by way of example, spends over \$400 million on bands. Arden Dier, *US Hasn't Shown Military Bands Are Worth the Bill*, NEWSER (Aug. 17, 2017), <https://bit.ly/30IIDud>.

²⁹¹ TCAP Express, *supra* note 281.

²⁹² See, e.g., Act of December 23, *supra* note 280.

²⁹³ See, e.g., *Wade v. Hunter*, 336 U.S. 684, 687–88 (1949) (double jeopardy applies to the military); *United States v. Hershey*, 20 M.J. 433, 435–36 (C.M.A. 1985) (Sixth Amendment right to a public trial applies to the military); *United States v. Gay*, No. CMR 23492, 1984 CMA LEXIS 20813, at *1 (C.M.A. 1984) (finding the military's death penalty procedures insufficiently protective); *United States v. Ezell*, 6 M.J. 307, 310–11 (C.M.A. 1979) (requiring a neutral and detached decision maker to issue search warrants); *United States v. Prater*, 43 C.M.R. 179, 182 (C.M.A. 1971) (applying speedy trial rights to military defendants); *United States v. Kemp*, 32 C.M.R. 89, 97 (C.M.A. 1962) (Fifth Amendment protects servicemembers against self-incrimination); *United States v. Brown*, 28 C.M.R. 48, 54–55 (C.M.A. 1959) (requiring commanders to show probable cause for a search); *United States v. Sutton*, 11 C.M.R. 220, 222 (C.M.A. 1953) (adopting the Confrontation Clause for military practice).

²⁹⁴ 26 M.J. 380, 390 (C.M.A. 1988) (applying the *Batson* rule to courts-martial).

Just so, although *Ramos* may not be binding on courts-martial, its principles should be followed.

V. CONCLUSION

As the United States Supreme Court has often said, the military is different.²⁹⁵ This much is obvious. But the notion that civilian social science research is totally inapplicable to the military plays into the false idea that servicemembers are infallible beings at a time when the average American is more disconnected from the military than ever before and the reality of military life has become “incomprehensible” to many.²⁹⁶

The history of military justice is littered with discarded punishments and procedures that range from bizarre to barbaric. Soldiers were once “earnestly recommended” to diligently attend church services, and if they acted disrespectfully in church, they could be fined one-sixth of a dollar for the first offense, and fined and jailed for the second.²⁹⁷ Those convicted of desertion could be sentenced to wearing a twelve-pound ball and chain around their neck for years, and branded with the letter “D” that was one-and-a-half inches long.²⁹⁸ Times change.²⁹⁹

In the past, the military has been able to improve itself using science. For example, by establishing a scientific triage system to treat the wounded, mortality rates fell from 4.7 percent in World War II to 1 percent in Vietnam.³⁰⁰ Not every legal question lends itself to empirical analysis. Many simply lack any research from which courts can draw conclusions. Other times, the empirical evidence is spotty or contradictory. But on jury size and unanimity, we have a rich body of evidence that all points in the same direction: juries operate better when they are large and when they are unanimous. That translates into fewer guilty defendants going free, fewer innocent defendants going to prison, and less prejudice infecting the military justice system. Those are things everyone should be able to get behind.

²⁹⁵ *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (“The military constitutes a specialized community governed by a separate discipline from that of the civilian.”); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (“the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment”).

²⁹⁶ Adam J. Tiffen, *Here’s What Most People Don’t Understand About the Civilian-Military Divide*, TASK & PURPOSE (June 2, 2014). Less than one percent of Americans have served in the past decade, only seven percent of Americans are veterans, and the share of veterans in Congress has fallen from 77 percent in 1977 to 20 percent today. *Id.*

²⁹⁷ Articles of War, art. 2 (1775).

²⁹⁸ *Items from Lieutenant General Sheridan’s Headquarters*, CHI. TRIBUNE (July 22, 1869), <https://bit.ly/3jYK3Z4>.

²⁹⁹ For example, the Navy recently got rid of its age-old punish of confinement on bread and water. Geoff Ziezulewicz, *Happy holidays, Seaman Timmy! No more confinement on bread and water for you*, NAVY TIMES (Dec. 11, 2018), <https://bit.ly/33jWkrB>.

³⁰⁰ Katharyn Kennedy et al., *Triage: Techniques and Applications in Decisionmaking*, 28 ANNUALS OF EMERGENCY MEDICINE, 136, 137 (1996).