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SIXTH AMENDMENT—THE REQUIRED NUMBER OF JURORS

Ballew v. Georgia, 435 U.S. 223 (1978).

In *Ballew v. Georgia,*[1] the Supreme Court held that a state criminal trial by a jury of only five persons deprived the accused of the right to trial by jury guaranteed by the sixth and fourteenth amendments. The Court found no overriding state interest sufficient to offset the threat to constitutional guarantees that would result from a reduction in jury size from six to five. *Ballew* thus establishes that a constitutionally adequate state criminal trial jury can be composed of no fewer than six members.

I

In 1974, Claude Ballew, manager of the Paris Art Adult Theater in Atlanta, Georgia, was arrested and charged in a two-count misdemeanor accusation with violating Georgia's obscenity statute[2] by showing the film "Behind the Green Door" on two separate occasions.[3] Ballew was tried in the Criminal Court of Fulton County.[4] After a jury of five members had been selected and sworn,[5] Ballew moved to impanel a jury of twelve persons. He contended that in an obscenity trial, a jury of five was constitutionally inadequate to assess the contemporary standards of the community, and that the sixth and fourteenth amendments to the United States Constitution[6] required a jury of at least six members in criminal trials. The motion was overruled and the trial proceeded before the five member jury which returned a verdict of guilty on each count.[7] After the court denied an amended motion for a new trial,[8] Ballew appealed to the Court of

[1] 435 U.S. 223 (1978). Justice Blackmun wrote the opinion for the Court. Justice Stevens filed a concurring statement. Justice White concurred in the judgment. Justice Powell filed an opinion concurring in the judgment in which he was joined by Chief Justice Burger and Justice Rehnquist. Justice Brennan, Justice Stewart and Justice Marshall concurred in the holding but disagreed that the petitioner should be subjected to a new trial.

[2] Ballew was charged with "distributing obscene materials in violation of Georgia Code Section 26-2101 in that the said accused did, knowing the obscene nature thereof, exhibit a motion picture film entitled 'Behind the Green Door' that contained obscene and indecent scenes . . . ." 435 U.S. at 225.

[3] The two count misdemeanor charge was the result of two showings of different prints of the film.

[4] On January 2, 1977, the Criminal Court of Fulton County was merged with the Civil Court of Fulton County and is now known as the State Court of Fulton County. 1976 Ga. Laws, vol. 2, No. 1004, p. 3023.

[5] The Criminal Court of Fulton County tried misdemeanor cases before juries of five persons persuant to GA. CONST. art. 6, § 16, ¶ 1, codified as GA. CODE § 2.5101 (1973), and to 1890-1891 Ga. Laws, vol. 2, No. 278, pp. 937-38, and 1935 Ga. Laws, No. 38, p. 498. 1890-1891 Ga. Laws, pp. 937-38, states in part:

> The proceedings [in the Criminal Court of Atlanta] after information or accusation, shall conform to the rules governing like proceedings in the Superior Courts, except that the jury in said Court, shall consist of five, to be stricken alternately by the defendant and State from a panel of twelve.

Effective March 24, 1976, the number of jurors in the Criminal Court of Fulton County was changed from five to six. 1976 Ga. Laws, vol. 2, No. 1003, p. 3019.

Regardless of its size, a Georgia jury in a criminal trial must reach a unanimous verdict in order to convict. *See* Ball v. State, 9 Ga. App. 162, 70 S.E. 888, 889 (1911).

[6] U.S. CONST. amend. VI states that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

The provisions of the sixth amendment as to trial by jury have been made applicable to the states through the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145 (1968).

U.S. CONST. amend. XIV states, in pertinent part:

> "nor shall any state deprive any person of life, liberty or property without due process of law."

U.S. CONST. art. III, § 2, cl. 3 provides that:

> The trial of all crimes, except in cases of Impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such Place or Places as the Congress may by Law have directed.

[7] Ballew was sentenced to one year imprisonment on each count and fined $1,000 on each count, the sentences to run concurrently and to be suspended on payment of the fines. 435 U.S. at 227.

[8] In his amended motion for a new trial, Ballew argued that the films were illegally seized under a defective warrant; that the obscenity statute violated the first, fourth, fifth, sixth and fourteenth amendments of the United States Constitution; that the double conviction

Appeals of the State of Georgia[9] where he challenged his conviction on the grounds, *inter alia,* that the use of the five member jury deprived him of his sixth and fourteenth amendment right to a jury trial.

The court of appeals[10] rejected the contention that the five member jury was constitutionally insufficient.[11] The court noted that the United States Supreme Court had not fixed a minimum number of jurors necessary for a constitutionally sufficient jury, but had only ruled that a six member jury was adequate and above the minimum.[12] The appellate court relied on *Sanders v. State*[13] in which it had been said that, absent a holding by the United States Supreme Court that a five member jury was constitutionally inadequate, it would approve the five person jury prescribed by the Georgia Constitution. The court also relied on *McIntyre v. State*[14] which, without elaboration, found that the Georgia statutes pertaining to jury operation were constitutional. The Supreme Court of Georgia denied certiorari.

In his petition for certiorari to the United States Supreme Court, Ballew again challenged the constitutionality of the five person jury[15] and the Court granted certiorari.[16] The Supreme Court reversed and remanded on the ground that Ballew's trial before a jury of only five persons had deprived him of his right to trial by jury guaranteed by the sixth and fourteenth amendments.[17]

Two prior decisions established the foundation for *Ballew.* In *Duncan v. Louisiana,*[18] the Court held that the due process clause of the fourteenth amendment incorporated[19] the sixth amendment's right to trial by jury and made it applicable against the states. The Court's interpretation of the purpose of the sixth amendment was adopted in subsequent cases which defined the constitutionally required features of jury trial. Two years after *Duncan,* and eight years before *Ballew,* the Court held, in *Williams v. Florida,*[20] that a six member jury was constitutionally sufficient to meet the requirements of trial by jury in state criminal cases. In reaching its conclusion, the *Williams* Court first described the way in which a jury must function to fulfill its purpose. Then, applying this functional analysis,[21] it defined the features of a jury required by the Constitution as those necessary for the jury to serve its purpose. This analysis enabled the Court to construct the test of constitutionally sufficient jury size which it applied in *Williams* and again in *Ballew.*

In *Ballew,* the Court was confronted with an issue that it had avoided in *Williams*: whether a further reduction in the size of state criminal trial juries was constitutionally permissible or whether such a reduction would impair the functioning of the jury to a significant degree.[22] Writing for the Court, Justice Blackmun[23] reiterated that the purpose of a jury trial was to provide a safeguard against governmental oppression by permitting the "participation of the community in determinations of guilt and by the application of the common sense of laymen . . . ."[24] The Court then adopted the *Williams* test and stated that the Constitution compelled a jury of sufficient size "to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community."[25]

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had placed him in double jeopardy; that the evidence was insufficient to support the verdicts; that the trial court erroneously excluded testimony of a defense expert witness; and that the court's instructions on scienter improperly shifted the burden of proof to the defense. 435 U.S. at 227 n.6.

[9] Ballew v. State, 138 Ga. App. 530, 227 S.E.2d 65 (1976).

[10] *Id.* at 535-36, 227 S.E.2d at 69 (1976).

[11] The court of appeals also rejected petitioner's other contentions. It reviewed the film and found it to be "hard core pornography" and "obscene as a matter of constitutional law and fact"; it found that the evidence was sufficient; that the jury instructions correctly explained the standard of scienter; and that there was no error in the issuance of the warrants or in the two separate convictions. *Id.* at 533-34, 227 S.E.2d at 67-69.

[12] Williams v. Florida, 399 U.S. 78 (1970).

[13] 234 Ga. 586, 216 S.E.2d 838 (1975), *cert. denied,* 424 U.S. 931.

[14] 190 Ga. 872, 11 S.E.2d 5 (1940).

[15] He also challenged the constitutional sufficiency of the jury instructions on scienter and obscenity *vel non.*

[16] 429 U.S. 1071 (1977).

[17] Since the Court held that the five member jury did not satisfy the jury trial guarantee of the sixth amendment as applied to the states through the fourteenth amendment, it did not reach the other issues. Justices Brennan, Stewart and Marshall, while concurring in the majority opinion, disagreed that Ballew could be subjected to a new trial on the grounds that the Georgia obscenity statute was overbroad and therefore facially unconstitutional. 435 U.S. 228, 246 (1978).

[18] 391 U.S. 145 (1968).

[19] The concept of incorporation is discussed in Section II *infra.*

[20] 399 U.S. 78 (1970).

[21] Functional analysis is discussed in Section II *infra.*

[22] 435 U.S. at 231.

[23] *See* note 1 *supra.*

[24] 435 U.S. at 229.

[25] *Id.* at 230 (citing Williams v. Fla., 379 U.S. 78, 100.

The Court acknowledged that in finding six member juries constitutionally sufficient in *Williams*, it had presumed that reduction in jury size would not impair jury function or effect the accuracy or consistency of jury verdicts. It then devoted a substantial portion of its opinion to an analysis of a body of data developed since *Williams*[26] which casts doubt on the accuracy, reliability and consistency of results achieved by smaller juries. Based on this analysis the Court concluded that a *further* reduction in jury size would impair, to a constitutional degree, the functioning of the jury.

The empirical data on which the *Ballew* Court relied indicated that "smaller juries are less likely to foster effective group deliberation ... [which leads at some point] to inaccurate fact finding and incorrect application of the common sense of the community ...."[27] The data showed a significant correlation between decrease in group size and decrease in ability to make the critical contributions necessary for problem solving.[28] "[M]emory is important for accurate jury deliberations"[29] and fewer jury members meant less input about pieces of evidence or argument.[30] The studies also indicated that group size correlated positively with the ability to overcome individual biases and reach objective results which accurately applied the common sense of the community to the facts of a case. Moreover, the variation in verdicts reached by smaller juries was likely to be detrimental to the defense[31] because six member panels were less than half as likely as twelve member panels to result in hung juries. Significantly fewer minority viewpoints would be represented on six member juries and the likelihood of a minority opinion being shared by two jurors, thereby increasing the chance that the minority would adhere to its position and cause a hung jury, decreased almost 70% on a six member jury.[32] The Court agreed that smaller juries were also less likely to represent minority groups, thereby reducing meaningful community participation.[33] Retreating from its position in *Williams* that six person juries adequately represented a cross-section of the community, the Court now found that the chance for representation diminished with a decrease in size from twelve to six and concluded that further reduction in size would make it even more difficult to achieve representation.

The Court cited articles critical of the research methodology of studies which had concluded that there was only an insignificant difference in the verdicts reached by juries of six and twelve.[34] It also reasoned that even if different sized juries disagreed in only a small percentage of cases, that percentage would translate into a large number of cases nationwide. Furthermore, disagreement on verdicts is more frequent in close cases, the very cases in which it is of the utmost importance to have a properly functioning jury to insure accurate factfinding.[35]

The Court acknowledged that the recent studies raised "substantial doubt about the reliability and appropriate representation of panels smaller than six."[36] It held that any further reduction in jury size that "promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance."[37] The Court recognized that the data did not distinguish between the performance of six and five member juries.[38] Nevertheless, the Court created just such a distinction. While it held that five member juries in state criminal trials were constitutionally insufficient, it *explicitly reaffirmed* the previous holding in *Williams* that six member juries were adequate and avoided reassessing that holding in light of the data relied on in *Ballew*.[39]

The Court dismissed the contention of the State that *Johnson v. Louisiana*[40] had approved a five person jury. It responded that *Johnson* had merely considered the narrow question of whether requiring only nine members out of a twelve member jury to agree in order to convict in a felony case was a denial of equal protection when unanimity was required of five member panels used in misdemeanor trials. The Court had found that the classification was not invidious and not a violation

[26] 435 U.S. at 231 n.10.
[27] *Id.* at 232.
[28] *Id.* at 233 (citing Faust, *Group Versus Individual Problem Solving*, 59 J. Ab. & Soc. Psych. 68, 71 (1959)).
[29] 435 U.S. at 233.
[30] *Id.* (citing, among others, Saks, *Ignorance of Science Is No Excuse*, 10 Trial 18, 77 (Nov.-Dec. 1974)).
[31] 435 U.S. at 236.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 237.
[35] *Id.* at 239.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] 406 U.S. 356.

of equal protection. However, it did not rule on the constitutionality of the five member jury.[41]

The State argued that because the constitutionality of six member juries assessing felony charges had been affirmed, the use of five member panels for misdemeanors should be adequate. Rejecting this reasoning, the Court answered that neither the purpose nor function of a jury varied with the importance of a crime.[42] Georgia also claimed that the retention of the unanimity requirement should preserve the constitutionality of the five member jury. The Court responded that reaching a unanimous verdict did not insure that the jury had engaged in meaningful deliberation and had correctly recollected the evidence and arguments. Therefore, even a unanimous five person jury would not necessarily serve the defendant's interest in having the commonsense judgement of his peers applied to his case.[43]

The Court also rejected the argument that a five member jury would adequately represent the community if it had been selected without arbitrarily excluding a particular class. Again relying on the data, the Court expressed doubt about the ability of small juries, even if fairly selected, to represent minority groups and opinions as fully or frequently as larger panels, and to apply the commonsense judgement of the community consistently.[44] Finally, the Court dismissed data cited by the State to substantiate the position that a decrease in jury size would not significantly affect jury verdicts. The Court believed that the conclusions of the studies had been misinterpreted by the State and that methodological research problems made the reliability of the studies questionable.[45]

The Court then considered whether any significant state interests existed which would offset the threat to the Constitutional guarantee of trial by jury created by a reduction in jury size from six to five. It found that there were none. Responding to the argument that the state's interest in saving time and money justified smaller juries, the Court relied on a study which demonstrated that impanelling smaller juries did not significantly decrease total trial time.[46] It also emphasized that only minimal financial savings would result from reducing juries from six to five members and concluded that these minimal savings did not justify a further reduction in jury size. Thus, the Court held that trial on criminal charges before a five member jury deprived the petitioner of the right to jury trial guaranteed by the sixth and fourteenth amendments.

Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, in a concurring opinion, agreed that five member juries raised problems of fundamental fairness. Acknowledging that a line between five and six was difficult to justify, Powell took the position that a line had to be drawn somewhere to preserve the substance of jury trial. He also emphasized that full incorporation of the sixth amendment was unwise, that the features of federal and state criminal jury trials need not be identical, and that the guideline should always be whether the state procedure was fundamentally fair. Finally, Powell criticized the majority's reliance on statistical data obtained by studies which he believed had not been scientifically tested within the framework of the adversary system.[47]

II

To understand the reasoning of the Court in holding that five persons do not comprise a constitutionally adequate jury, it is helpful to examine its reasoning in the past in defining other constitutional requirements of trial by jury. In grappling with the interpretation of the sixth amendment and the sixth as incorporated by the fourteenth amendment, the Court has employed two modes of analysis. In early cases, it adopted an historical analysis to ascertain the dimensions and components of trial by jury. This approach required examining the traditional elements of the common law jury, and deciding which of those elements the Framers intended to include in the sixth amendment guarantee. More recently, the Court has employed a functional analysis to determine the components of a constitutional jury trial and has repudiated what it had once presumed to be the dictates of history and tradition. Functional analysis involves defining the purpose of the right to trial by jury, determining how a jury must function to fulfill that purpose, and deciding which substantive and procedural features enable a jury to func-

[41] 435 U.S. at 240.

[42] Only for truly petty offenses is a defendant not entitled to trial by jury. Baldwin v. New York, 399 U.S. 66 (1970).

[43] 435 U.S. at 241.

[44] *Id.* at 241-42.

[45] *Id.* at 242-43

[46] 435 U.S. at 244 n.39 (citing Pabst, *Statistical Studies of the Costs of Six-Man Versus Twelve-Man Juries*, 14 WM. & MARY L. REV. 326 (1972)).

[47] 435 U.S. at 246.

tion as it should. These features then, are required for a consitutionally sufficient trial by jury.

Taking an historical approach, the Court had found it easy to conclude that the sixth amendment mandated a common law jury of twelve members in federal criminal trials. In *Thompson v. Utah*,[48] the Court traced the existence of the twelve member jury to the Magna Carta and the English common law[49] and reasoned that the sixth amendment required a jury constituted as it was at common law. The Court noted:

> It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument . . . .[50]

In *Maxwell v. Dow*[51] the Court found "no doubt" that a commonlaw jury composed of twelve persons was prescribed by the sixth amendment.[52] Again, in *Rasmussen v. United States*,[53] Justice Harlan wrote that the constitutional requirement of trial by jury meant "by the historical, common-law jury of twelve persons."[54] And, twenty-six years later in *Patton v. United States*,[55] relying on history and tradition, the Court held that a "constitutional jury means twelve men as though that number had been specifically named."[56]

More complex problems arose when the Court applied the sixth amendment to the states through the due process guarantee of the fourteenth amendment. In *Duncan v. Louisiana*,[57] the Court held that the fourteenth amendment's due process guarantee incorporated the sixth amendment's right to trial by jury and made it enforceable against the states. In reaching its conclusion, the *Duncan* Court used both historical and functional analysis. First, it outlined the history of trial by jury in criminal cases and found "impressive support" for considering the right fundamental to our system of justice.[58]

The Court then analyzed the purpose of trial by jury. It concluded that the framers had intended to protect against government oppression and arbitrary action by the judiciary. The option of being judged by peers who would apply the common sense of the community to the facts of the case provided "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge."[59] Given this purpose, the Court had no difficulty finding again that the general grant of jury trial for serious offenses[60] was a fundamental right which must be respected by the states. It held, therefore, that the fourteenth amendment guaranteed the right to a jury trial in all criminal cases which, if tried in federal court, would come within the sixth amendment guarantee.[61]

Duncan is important for several reasons. First, in each subsequent case in this area, the Court has adopted *Duncan's* definition of the purpose of jury trial.[62] Second, in concurring and dissenting opin-

[48] 170 U.S. 343 (1898).

[49] "The law of England hath afforded the best method of trial, that is possible, . . . namely, by a jury of twelve men all concurring in the same judgment" *Id.* at 350 (quoting 1 HALE'S P.C. 33).

[50] 170 U.S. at 350.

[51] 176 U.S. 581 (1900).

[52] *Id.* at 586. *Maxwell* held that the sixth amendment guarantees were not limits on the powers of the states and that the right to a trial by a jury of twelve as required by the sixth amendment was not a privilege and immunity protected by the fourteenth amendment.

> The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and remedies. Great diversities may exist in two states separated only by an imaginery line. On one side of this line there may be a right to a trial by jury, and on the other side no such right.

Id. at 599.

> It appears to us that . . . whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors. . . . [is] eminently proper to be determined by the citizens of each State for themselves. and does not come within the clause of the amendment . . . . It is emphatically the case of the people by their own organic law, providing for their own affairs, and we are of the opinion they are much better judges of what they ought to have in these respects than anyone else can be.

Id. at 604.

Maxwell was repudiated in Duncan v. Louisiana, 391 U.S. 145 (1968), which held the sixth amendment right to trial by jury applicable to the states through the due process clause of the fourteenth amendment.

[53] 197 U.S. 516 (1905).

[54] *Id.* at 529 (Harlan, J., concurring).

[55] 281 U.S. 276 (1930).

[56] *Id.* at 292.

[57] 391 U.S. 145 (1968).

[58] *Id.* at 153.

[59] *Id.* at 156.

[60] The Court found that a crime carrying a possible maximum penalty of two years was a serious crime subjecting the trial to the sixth amendment guarantees.

[61] In Baldwin v. New York, 399 U.S. 66 (1970), the Court held that the fourteenth amendment right to trial by jury attaches where the sentence could exceed six months imprisonment. Since both the federal system and the vast majority of the states allowed jury trial for crimes punishable by imprisonment for longer than six months, the Court was willing to adopt this "near uniform judgment of the nation" as the objective criterion for defining serious crimes. The Court rejected the argument that a distinction could be made between felony and misdemeanor trials.

[62] *See, e.g.*, notes 74-90 and accompanying text *infra*

ions, the Justices argued the merits of selective incorporation and Federalism and assumed positions which have been represented reasonably consistently in cases specifying requirements of a constitutionally adequate state criminal jury trial.[63]

Selective incorporation is the absorbtion into the fourteenth amendment of selected Bill of Rights provisions which the Court finds are mandated by the guarantee of due process of law. These provisions, once incorporated in the fourteenth amendment, are then enforceable against the states. The incorporated guarantees are often those which the Court determines are implicit in the concept of ordered liberty or fundamental to our system of justice.[64] Several positions on selective incorporation were articulated in *Duncan*. Some Justices asserted that a Bill of Rights guarantee, once absorbed into the fourteenth amendment, imposed identical standards on the state and federal government so that the same features were required to protect individual rights against state as against federal encroachment. This position was represented by Justices Black and Douglas in a concurring opinion in *Duncan*.[65] They agreed with the majority that the fourteenth amendment absorbed the sixth amendment guarantee of trial by jury. Furthermore, they contended, state courts should apply the same standards for the Bill of Rights as are applied in federal courts. Rejecting the argument that this would interfere with state experimentation with criminal justice systems, they reasoned that the states should not be allowed to experiment with protections afforded by the Bill of Rights.[66]

A second position was that a Bill of Rights guarantee, once incorporated, might have different meanings and requirements as applied to the state and federal government; that the substance of a particular guarantee could be made applicable to the states without imposing all of the requirements applicable within the federal system. This position was articulated by Justice Fortas, who concurred in the holding in *Duncan*, but who objected to the implication of the majority opinion that incorporating the sixth amendment required that all of the ancillary rules which the Court had developed incidental to the right to trial by jury must automatically be applied to the states.[67] Arguing against "slavish adherence" to the incorporation theory[68] Fortas asserted that even if the right to jury trial was fundamental and applicable against the states, the particulars accorded that right need not be uniform. In keeping with the principles of federalism, states should be given maximum latitude to experiment with variations that would not impair the purpose of jury trial. Fortas claimed that the substance of the sixth amendment guarantee could be absorbed by the fourteenth amendment without all of its "bag and baggage, however securely affixed they may be by law and precedent to federal proceedings."[69]

A third position was articulated by Justices who opposed incorporation altogether. These Justices argued that the Court should consider each case in light of whether the state procedure involved was fundamentally fair and thus complied with the fourteenth amendment due process guarantees. This position was advocated by Justice Harlan in his dissent in *Duncan*.[70] Harlan argued that due process did not require imposing federal rules on the states except when essential to fundamental fairness. Because he did not believe that trial by jury was the only fair means of resolving issues of fact, he would have had the Court consider, in each case, whether the state trial process was a fair one. Harlan's objection to incorporating the sixth amendment was that it would require imposing on the states only one means of trying criminal cases, thus putting the states in a federal constitutional "straightjacket."[71] This, Harlan argued, was inconsistent with the principles of federalism, which command that the states be permitted to control the "machinery of criminal justice within their borders";[72] and have maximum room to experiment

(discussing Williams v. Florida, 399 U.S. 78 (1970)), and notes 91–98 and accompanying text *infra* (discussing Apodaca v. Oregon, 406 U.S. 404 (1972)).

[63] The Court has frequently used the incorporation doctrine to make selected Bill of Rights guarantees applicable to the states. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (applying the fifth amendment right to be free of compelled self-incrimination); Gideon v. Wainright, 372 U.S. 335 (1963) (applying the sixth amendment right to counsel); and Mapp v. Ohio, 367 U.S. 643 (1961) (applying the fourth amendment right to be free from unreasonable searches and seizures and to have illegally seized evidence excluded from criminal trials).

[64] 391 U.S. at 148, 149 & n.14.

[65] *Id.* at 162 (Black and Douglas, JJ., concurring).

[66] *Id.* at 170.

[67] Justice Fortas' concurrence in *Duncan* can be found after Bloom v. Illinois, 391 U.S. 211 (1968).

[68] 391 U.S. at 213.

[69] *Id.* Justice Fortas specifically mentioned that the *Duncan* decision should not be presumed to impose the federal requirements of jury unanimity or jury size on the states since it was possible to conclude that these features of federal jury trials were not fundamental and were not essential to due process of law.

[70] Justice Stewart joined Justice Harlan in dissent.

[71] 391 U.S. at 176.

[72] *Id.* at 172.

as long as they provide machinery which is fundamentally fair.[73]

The Justices maintained these positions on incorporation in *Williams v. Florida*,[74] the case in which the Court laid the foundation for its decision in *Ballew*. In *Williams*, the Court held that a six member jury was constitutionally adequate to meet the requirements of trial by jury in state criminal trials. The majority purportedly relied on *Duncan's* incorporation of the sixth amendment into the fourteenth via the due process clause and then squarely rejected earlier decisions in which it had held that twelve jurors were required for a constitutional trial by jury. Justice White[75] delivered the opinion in which the Court repudiated history and tradition as a mandate for establishing jury size. The Court examined the history of the jury system and asserted that a panel of twelve members was "without significance," the result of "historical accident, unrelated to the great purposes which gave rise to the jury in the first place, an accidental feature"[76] which, despite precedent, ought not to be "immutably codified into our constitution."[77] "To read the Sixth Amendment as forever codifying a feature so incidental to the purpose of the Amendment is to ascribe blind formalism to the Framers for which there is little evidence in the history or language of the Constitution."[78]

The Court asserted that the intent of the Framers supported its position and cast "doubt on the easy assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution."[79] Concluding that the Framers had no explicit intent to equate the constitutional and commonlaw characteristics of the jury, the Court was free to look at other than historical considerations. White's majority opinion clearly reflected the assumption that functional analysis was a more suitable approach to the question of jury size, and that the relevant issue ought to be what size panel was necessary in order for the jury to fulfill its constitutional purpose.

Establishing the foundation for a functional analysis, the *Williams* Court adopted the view expressed in *Duncan* that the purpose of trial by jury was to prevent oppression by the government. The jury achieved its purpose by providing the common-sense judgement of a group of laymen through the "community participation and shared responsibility that results from that group's determination of guilt or innocence."[80] Concluding that performance of this jury function was not contingent on the fact that the jury consisted of twelve members, the Court formulated a test of constitutionally acceptable size—a size which would permit the jury to perform its function. A jury should be large enough to promote "group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community."[81] The Court made casual reference to a few social science "experiments" which ostensibly supported the position that performance of these functions would be unaffected by decreasing jury size from twelve to six. It asserted that there would be no discernible difference in the results reached by six and twelve member panels, that the reliability of verdicts would not be diminished, that a reduction in size would not threaten the exclusion of any class from representation,[82] and that the decrease would favor neither the defense nor the prosecution as there would be no significant difference in the number of "hung juries." Believing that a reduction in jury size would lead to no ill effects, the Court concluded that it was desireable to leave decisions about jury size to state legislatures "unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury."[83]

[73] The Court adopted a functional approach in prohibiting discrimination in the selection of juries. Carter v. Jury Commission, 396 U.S. 320 (1970) and Smith v. Texas, 311 U.S. 128 (1940). The Court reasoned that in order to fulfill its purpose as defined in *Duncan*, the jury must be a body truly representative of the community The principle that to function properly a jury must reasonably reflect a cross section of the community was applied later when the Court assessed whether juries smaller than 12 could function so as to fulfill their constitutional purpose.

[74] 399 U.S. 78 (1970).

[75] Justice Blackmun did not take part in considering this case. Chief Justice Burger, Justice Harlan and Justice Stewart, and Justice Black and Justice Douglas wrote separate concurring opinions. Justice Marshall dissented on the issue of jury size.

[76] 399 U.S. at 89.

[77] *Id.* at 90.

[78] *Id.*

[79] *Id.* at 92.

[80] *Id.* at 100.

[81] *Id.*

[82] The Court reasoned that there was no guarantee that every opinion in the community would be represented even on the 12 member jury, so that as long as a class was not arbitrarily excluded the decrease in jury size should not create concern about representation.

[83] 399 U.S. at 103.

Justices Black and Douglas concurred with this portion of the *Williams* opinion.[84] They maintained that the decision posed no conflict with their previous position that specific provisions of the Bill of Rights which had been incorporated by the fourteenth amendment applied to state courts the same standards as applied to federal courts. Rather, prior decisions which had held that the sixth amendment required a jury of twelve members were based on improper constitutional interpretation which was now being reexamined and rejected. Therefore, the *Williams* decision did not dilute the sixth amendment guarantees because the sixth amendment was being reinterpreted. The import of this opinion is that the twelve member jury may be required by federal rules, but is not mandated by the Constitution.[85]

Justice Harlan also concurred in the Court's holding but took the opportunity to attack the incorporation doctrine and reiterate the principles underlying his dissent in *Duncan*.[86] He argued that the Court in *Williams*, by refusing to apply the traditional sixth amendment requirements to state proceedings, had compromised the incorporation doctrine. He considered this an illustration of the problem inherent in incorporation: either states with differing law enforcement problems would find themselves encumbered by requirements developed within the context of the federal system, or the Court would have to relax federal standards. He anticipated that this alternative would dilute Bill of Rights guarantees applicable against the federal government so that the states would have leeway in establishing criminal justice systems suited to their individual needs. Harlan saw *Williams* as the Court's effort to temper its position on incorporation in order to "wriggle free of [the] straightjacket"[87] which restricted state diversity. He viewed it as evidence of the discomfort of the Court with the tension between the "jurisprudential consequences wrought by incorporation ... and the counter-pulls of the situation in *Williams* which presents the prospect of invalidating the common practice in the states of providing less than a 12-member jury for the trials of misdemeanor cases."[88]

He further stated that:

> Today's decisions demonstrate a constitutional schizophrenia born of the need to cope with national diversity under the constraints of the incorporation doctrine .... [I]n *Williams* the Court seeks out a minimum standard to avoid causing disruption in numerous instances even though, *a priori*, incorporation would surely require a jury of 12.[89]

Justice Marshall dissented on the ground that the fourteenth amendment guaranteed to state defendants the same trial by jury as guaranteed to federal defendants by the sixth amendment which the Court had long ago established required a jury of twelve.[90]

The functional analysis employed in *Williams* was adopted in subsequent cases in which the Court held that state criminal trial juries were not required to reach a unanimous verdict in order to convict. In *Apodaca v. Oregon*,[91] a five member majority[92] held that conviction by ten members out of

[84] *Id.* at 106 (Black and Douglas; J.J., concurring in part and dissenting in part).

[85] *Id.* at 107.

[86] *Id.* at 117 (Harlan, J., concurring).

[87] *Id.* at 130.

[88] *Id.* at 129.

[89] *Id.* at 136. Justice Stewart, dissenting, agreed with Harlan, taking issue with the incorporation doctrine which he felt compelled the Court "either to impose intolerable restrictions upon the constitutional sovereignty of the individual states in the administration of their own criminal law or else intolerably to relax the explicit restrictions that the Framers actually did put upon the Federal government in the administration of criminal justice." 399 U.S. at 143 (Stewart, J., concurring).

[90] 399 U.S. at 117 (Marshal, J., dissenting).

Following *Williams*, the Court approved Federal juries of six in civil trials in Colgrove v. Battin, 413 U.S. 149 (1973), holding that a six member jury comported with Seventh Amendment requirements. The case is not relevant to this discussion since it dealt with the seventh rather than the sixth amendment, and the history and purpose of the seventh amendment is substantially different from that of the sixth. However, it is interesting to note that in reaching its conclusion, the Court engaged in a detailed historical analysis and then turned to functional analysis to determine whether jury performance in fulfilling the purpose of trial by jury in civil cases was a function of size. Justice Marshall and Stewart, in dissent, criticized the Court's use of functional analysis and argued "[t]he line must be drawn somewhere, and the difference between drawing it in light of history and drawing it on an ad hoc basis is, ultimately, the difference between interpreting a Constitution and making it up as one goes along." *Id.* at 182 (Marshall, J., dissenting). They were equally critical of the Court's rejection of historical mandate in *Williams*. This perspective, that when arbitrary lines must be drawn by the Court history and tradition may be the best guides, is examined at notes 107-12 and accompanying text *infra*.

[91] 406 U.S. 404 (1972).

[92] Justice White announced the opinion of the Court in which Chief Justice Burger, Justice Blackmun and Justice Rehnquist joined. Justice Powell wrote a separate

twelve in a state criminal trial did not violate the right to trial by jury guaranteed by the sixth amendment as applicable to the states through the fourteenth. After reexamining the history of the sixth amendment the Court concluded that the intent of the framers regarding the requirement of jury unanimity was ambiguous. The Court then utilized a functional analysis and concluded that requiring unanimity did not materially contribute to the ability of the jury to apply the commonsense judgement of the community. Moreover, the Court asserted that the ability of the jury to represent a cross section of the community and "deliberate, free from outside attempts at intimidation"[93] would not be impaired by permitting a verdict of ten to two. Thus, the Court concluded that the functions of the jury would not be disturbed by allowing non-unanimous juries to convict.[94]

Justice Powell's concurrence in *Apodaca* illustrates both the functional approach and the incorporation position advocated by Justice Fortas in *Duncan*.[95] Powell felt that the "safeguarding" function of the jury was adequately preserved by a nine vote majority and found "no reason to believe, on the basis of experience . . . that a unanimous decision of 12 jurors is more likely to serve the high purpose of jury trial . . . ."[96] Moreover, in "defining the elements of the right to jury trial there is no sound basis for interpreting the Fourteenth Amendment to require blind adherence by the States to all the details of the federal Sixth Amendment standards."[97] Therefore, states should be given the freedom to experiment with adjudicatory processes.[98]

III

The decisions of the Court in *Williams* and *Apodaca* generated a substantial body of literature critical of a decrease in jury size from twelve to six. The reliance by the Court on functional analysis seemed to necessitate scientific appraisal of its assumptions about the operational impact of jury size. Numerous studies sought to determine if the ability of a jury to resolve questions of guilt reliably, consistently and accurately was impaired by a decrease in size.[99] Applying the *Williams* test, if the ability of the group to deliberate, to be free from outside intimidation, or to represent a fair cross-section of the community, was negatively affected, then the smaller jury would not fulfill its constitutional purpose as well as the larger jury. Studies demonstrating such impairment would suggest that *Williams* rested on incorrect analysis and its holding would be threatened.

In *Ballew* the Court acknowledged that the recent studies raised substantial doubts about the "wisdom and constitutionality of a reduction [in jury size] below six."[100] But the Court could not identify, within those studies, a finite line below which the number of jurors would not be able to

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opinion concurring in the judgment. Justices Douglas, Brennan, Marshall and Stewart each wrote separate dissenting opinions.

[93] 406 U.S. at 413.

[94] Johnson v. Louisiana, 406 U.S. 356 (1972) was decided by the Court on the same day as *Apodaca*. The issue in *Johnson* was the constitutionality of a conviction by a jury vote of nine to three. Because *Johnson* was tried by the lower court before the Supreme Court reached its decision in *Duncan*, the question was whether the fourteenth amendment due process guarantee required a unanimous verdict, whereas in *Apodaca* the Court was considering whether the sixth amendment as incorporated into the fourteenth required jury unanimity. The Court divided in *Johnson* exactly as it did in *Apodaca*. A five justice majority held that jury unanimity was not required by the due process clause. The majority concluded that neither the accuracy nor integrity of a guilty verdict was undermined by three dissenting votes on a twelve member jury and therefore unanimity was not necessary in order that a trial be fundamentally fair.

One of the significant issues in both *Apodaca* and *Johnson* was how a defendant could be found guilty beyond a reasonable doubt by a jury when two or three jurors remained convinced of his innocence. The issue, however, is not relevant to this discussion.

[95] Justice Powell's opinion appears as his concurrence in Johnson v. Louisiana, 406 U.S. 356, 366 (1972).

[96] *Id.* at 374.

[97] *Id.* at 375.

[98] Justice Douglas, in dissent, also adopted a functional perspective, but argued that a less than unanimous requirement diminished the reliability of a jury verdict and resulted in fewer hung juries thereby favoring the State. The diminution in jury size approved in *Williams*, on the other hand, was neither more nor less advantageous to the state. 406 U.S. 389-90 (Douglas, J., dissenting). Justice Douglas' dissent in *Apodaca* appears in Johnson v. Louisiana, *id.* at 358.

Justices Marshall, Brennan, and Stewart, dissenting in *Johnson* and *Apodaca* also argued that the sixth amendment had identical application against both the state and federal governments. Marshall and Brennan argued that the requirement that juries be drawn from a cross section of the community would be negatively affected by allowing less than unanimous verdicts, since minority views could be ignored. 406 U.S. at 402 (Marshall and Brennan, JJ., dissenting.) Their reasoning is another example of functional analysis. Marshall argued against functional analysis and asserted that history, the appropriate guide, compelled finding that unanimity was an essential feature of a constitutional jury decision. Marshall feared that functional analysis had allowed the majority to strip away many of the characteristic features once guaranteed by jury trial. 406 U.S. at 355 (Marshall and Brennan, J. J., dissenting).

[99] 435 U.S. at 230, 231 n.12.

[100] *Id.* at 232.

function as required by *Williams.*[101] Moreover, the Court recognized that the studies consistently and overwhelmingly found that twelve member juries did a significantly better job of decision making than six member panels, and that six member juries did not perform nearly as adequately in fulfilling the functions specified in *Williams.* Since the data cast equal doubt on the ability of a jury of six and a jury of five to pass the *Williams* test, it is intriguing that the Court relied on the data in *Ballew* to find five member juries inadequate while leaving *Williams,* which held that six member juries were constitutionally adequate, intact.

Apparently, at the time that *Williams* was decided, there was not a sufficiently large body of evidence on the effect of jury size to overcome the presumption that the states should have the power to experiment and decide how large a jury must be to function adequately. The logic of *Ballew,* however, rested on evidence which unquestionably established that, applying the Court's test, five is not large enough, and there is considerable doubt about the wisdom of the Court's refusal to apply the same logic to a reconsideration of *Williams.* The Court's own logic in *Ballew* demonstrated that *Williams* rested on a faulty foundation.

Williams specified that reducing jury size would be unconstitutional if smaller size impaired performance. Because the Court found in *Ballew* that a decrease in size from twelve to six produced more varied verdicts, less accuracy, less reliability, and diminished representativeness, and permitted fewer holders of minority opinions to prevail resulting in fewer hung juries, (in other words, that six and twelve member juries perform quite differently), it could just as well have found that six member juries were as constitutionally inadequate as five member panels. If the proponents of smaller juries in *Williams* had subjected the functioning of the six member jury to their own test to show that change in size would be unlikely to affect the average quality of jury justice, then they clearly would not have prevailed[102] given the data on which the Court relied in *Ballew.* It is interesting that the Court was so uninhibited by its own logic. The six member jury fails the Court's own test by the Court's own reasoning—the correct application of the test would find six as unacceptable as five.

[101] The Court cited Nagel & Neef, *Deductive Modeling to Determine Optimum Jury Size Required to Convict,* 1975 WASH. U.L.Q. 933, for the proposition that optimum jury size was between six and eight but the Court does not purport to rely on this study to draw the line at six.

[102] Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases,* 73 MICH. L. REV. 643, 698 (1975).

There is little left of the Court's opinion in *Williams* after its analysis in *Ballew.* If *Williams* is to stand, the burden should be on the Court to make a meaningful distinction between the performance of six and five member panels and to demonstrate that a jury of six does not threaten the interests that the sixth amendment was designed to protect.

One interpretation of *Ballew* is that it reflects the embarrassment of the Court at having relied on a premise which was so quickly and unequivocally proven false.[103] Perhaps, then, *Ballew* is merely an effort to minimize the damage already done. If so, it is curious that the Court felt compelled to reaffirm *Williams* explicitly when it was only required to decide the narrow issue of the constitutionality of the five member jury, a context in which it was arguably inappropriate to overrule *Williams.* Possibly the Court was trying to buy time and to give itself breathing room before finding another *Williams* on its docket.

The embarrassing position in which the Court found itself in *Ballew* resulted from its attempt to resolve the issue of jury size within the rubric of functional analysis. It may be that it is simply not appropriate to use functional analysis to determine constitutionally acceptable jury size. To say that constitutionally acceptable jury size is the size necessary to fulfill certain functions requires quantifying certain concepts which invariably resist quantification. How *much* representation is enough? How *much* group deliberation is enough? The impulse to rely on social science to provide answers is irresistable—and that, of course, is what the Court has done. But this approach raises more questions than it answers. Social science data and conclusions are subject to frequent change. Is it appropriate for constitutional interpretation to be based on statistical studies, the conclusions of which are certain to change as methodologies are refined and new data is produced? How rapidly ought the law to shift to reflect the new realities social science reveals? If the law is too much a handservant of such data, then it will be in a constant state of flux and create the very uncertainties it is designed to circumvent.[104] The results of relying on data are apparent in *Williams* and *Ballew*: the studies which "supported" the premise of *Williams* that a diminution in jury size would

[103] Discussion with Frank Wiggins, former Associate Professor of Law, Northwestern University School of Law.

[104] Frank Wiggins, former Associate Professor of Law, Northwestern University School of Law.

not impair jury function were substantially discredited in the interim between *Williams* and *Ballew*.

Justice Powell, Chief Justice Burger and Justice Rehnquist, in their joint concurrence in *Ballew*, recognized the problem implicit in relying on social science data and criticized the majority's reliance on "numerology derived from statistical studies."[105] It has been said that constitutional rights should not rest on scientific demonstrations.[106] Even though jury size is more a procedural than a substantive right, the question remains: how should the Court choose a number?

One can argue that history and tradition produce a more certain standard than social science data. Justice Harlan admonished the *Williams* Court for "stripping off the livery of history from the jury trial."[107] He argued that the Court had not produced an acceptable reason for disregarding history, a "wellspring of constitutional interpretation,"[108] and continued:

> The Court's elaboration of what is required [for a constitutionally adequate jury] provides no standard and vexes the meaning of the right to a jury trial in federal courts, as well as state courts, by uncertainty. Can it be doubted that a unanimous jury of 12 provides a greater safeguard than a majority vote of six? The uncertainty that will henceforth plague the meaning of trial by jury is itself a further sufficient reason for not hoisting the anchor to history.[109]

Even if twelve was an arbitrary number, an historical accident, "history ... might have embodied more wisdom than the Court would allow."[110] Since one function of the jury is to represent the community as broadly as possible and since the jury must remain a manageable size, conceivably, after centuries of trial and error, the common law jury came to be fixed at twelve as a number maximizing these two goals.[111]

Nevertheless, since the Court has rejected the mandates of history and tradition as an answer to the question of constitutionally required jury size, and since there is no apparent reason why research data should be the standard for drawing the line at five, is there any justification, except the Justices' own casual explanation that a line must be drawn somewhere, for drawing the line between five and six? One factor which should be reconsidered is the interest of the state. In *Ballew*, the Court determined that states use smaller juries to save time and money. While the time saved was found to be negligible, and the dollars saved by providing a jury of five rather than six were minimal, the Court recognized that the financial benefits of a reduction from twelve to six could be substantial. Perhaps the cost benefits to the state prevail when the reduction is from twelve to six , but not when it is from six to five.

Do *Williams* and *Ballew* reflect the current position of the majority of the Court on selective incorporation? The Court still, apparently, believes that the fourteenth amendment has incorporated the sixth. Thus, it is unlikely that the *Ballew* Court is adopting Harlan's position and rejecting incorporation, although its analysis indicates that five member juries present problems of fundamental fairness and violate the due process guarantee of the fourteenth amendment. The Court is, indeed, giving the states "wriggling room" to the point at which it believes the criminal justice system can no longer be considered fair.

If *Williams* is actually a reinterpretation of the mandates of the sixth amendment, then it is not clear that the majority of the Court has rejected an approach which would bind state courts to the same standards as federal courts. What seems most likely, however, is that the *Ballew* Court has adopted the less intrusive incorporation approach advocated previously by Justice Powell and Justice Fortas. Indeed, this is the position maintained in *Ballew* by Justice Powell, Chief Justice Burger and Justice Rehnquist. They concurred in *Ballew* on the ground that five member juries involve "grave questions of fairness"[112] but emphazised that not every feature of jury trial practice must be the same in federal and state courts in order for the substance of the sixth amendment to be incorporated and made applicable against the states. The Court seems to be saying that, in regard to trial by jury, the Constitution provides certain constraints on state activity, but that states are to be held to less strict judicial oversight than federal courts, in keeping with the principles of federalism. The Con-

[105] 435 U.S. at 246. (Powell, J., Burger, C. J., and Rehnquist, J., concurring).

[106] Lempert, *supra* note 102, at 705.

[107] 399 U.S. at 122 (Harlan, J., concurring).

[108] *Id.* at 124.

[109] *Id.* at 126.

[110] Zeisel, ... *And Then There Were None: The Diminution of the Jury*, 38 U. CHI. L. REV. 710, 712 (1971).

[111] *Id.* at 712.

[112] 435 U.S. at 245 (Powell and Rehnquist, JJ., and Burger, C. J., concurring).

stitution will, apparently, tolerate experimentation down to six, after which a trial is likely to violate the guarantee of fundamental fairness. This explanation provides a rationale which more or less permits *Ballew* and *Williams* to coexist. The problem is, however, that there is still no explanation of why five is more fundamentally unfair than six, and the answer is not to be found in the data which the *Ballew* Court examined so thoroughly.

As yet unanswered is whether a non-unanimous verdict by a jury of six in a state criminal trial is constitutionally acceptable. A majority of the Louisiana Supreme Court recently held that neither *Ballew* nor *Williams* forbids conviction by a five to one majority.[113] A question for the Court in the future is likely to be whether the values which *Ballew* found inadequately served by a five member jury are preserved by the non-unanimous verdict of a six member panel.

[113] State v. Wrestle, 360 So. 2d 831 (La. 1978).