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Kentucky Law Journal

Volume 59 | Issue 4 Article 11

1971

Constitutional Law--Defendant's Right to a Jury Trial--Is Six Enough?

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Recommended Citation

Stevens, William L. (1971) "Constitutional Law--Defendant's Right to a Jury Trial--Is Six Enough?," *Kentucky Law Journal*: Vol. 59 : Iss. 4 , Article 11.
Available at: https://uknowledge.uky.edu/klj/vol59/iss4/11

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The Court saw a situation in which the strict interpretation of the statute of limitations was causing harsh consequences, decided not to wait for legislative action to change the wording of the statute, and acted on its own authority to give the patient an effective means of obtaining relief. Hopefully this will bring about the enactment of legislation which will change the wording of the present statute and incorporate the discovery rule into its actual language.

Michael W. Hawkins

CONSTITUTIONAL LAW—DEFENDANT'S RIGHT TO A JURY TRIAL—IS SIX ENOUGH?—In *Williams v. Florida*, the United States Supreme Court held that a twelve-man jury is not a necessary part of "trial by jury" and that a six-man panel does not violate a defendant's sixth amendment rights as applied to the states through the fourteenth amendment.[1] The reasons put forth by the Court for overturning a constitutional mandate which has existed since at least 1898[2] are not only inadequate, but are not in fact the basis for the decision. An examination of the Court's rationale reveals that no basis *for* change was found; only an absence of evidence strong enough to prevent the removal of the constitutional requirement. The choice the Court posed for itself was *not* between a twelve-man jury and a smaller panel, but rather was a choice between continued recognition of a constitutional right and harmonious development of a judicially

[1] 90 S. Ct. 1893 (1970). Williams, charged with robbery, filed a pretrial motion in a Florida state court to impanel a twelve-man jury rather than the six-man jury as provided by Florida law in all criminal cases except those designated as capital. "Twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other criminal cases." FLA. STAT. ANN. § 913.10(1) (1967). Petitioner claimed that the statute violated his sixth amendment right to a jury trial. The motion was denied and petitioner was convicted as charged and given a sentence of life imprisonment. The Florida District Court of Appeals affirmed the judgment. Certiorari was granted on petitioner's subsequent appeal to the United States Supreme Court which affirmed. 90 S. Ct. 1893, 1907 (1970). Petitioner filed a second pretrial motion seeking to be excused from FLA. R. CRIM. P. 1.200 which required, among other things, a defendant, on written demand of the prosecuting attorney, to give advance notice if he planned to claim an alibi, and to furnish the prosecuting attorney with information such as the names and addresses of witnesses he intends to call. Williams contended that these requirements violated his constitutional rights under the fifth and fourteenth amendments not to be compelled to testify against himself. This motion was denied by the Florida court and affirmed on the appeal to the United States Supreme Court. 90 S. Ct. 1893, 1898 (1970). The Court found that the notice-of-alibi rule required nothing additional of the defendant nor bound him to pretrial acts. The only effect was to force him to make decisions about his defense at an earlier date but he still retained the right to change that defense. *Id.*

[2] *See* note 4, *infra*, and accompanying text.

created canon of constitutional construction. The *raison d'etre* of the decision was the conflict between these concepts but, contrary to Justice Harlan's thesis,[3] the compelling reasons why the Court chose as it did will be found apart from these two factors. The development of this thesis requires dissection of the opinion in *Williams* in three main parts: first, a discussion of the problem which prompted the decision; second, an examination of the majority opinion to illustrate exactly what was and was not shown; and third, a suggestion as to one of the real reasons for the decision. When combined these three inquiries raise the haunting question which makes *Williams* worthy of comment: was the issue of the existence of constitutional strictures on jury size resolved by jurisprudentially sound methods?

The development of the twelve-man jury panel to its eventual conflict with the incorporation doctrine began with *Thompson v. Utah.*[4] The historical belief that the sixth amendment required, at least in federal courts, a twelve-man jury in criminal cases was based on the decision in *Thompson.* There two defendants were charged with grand larceny and were tried in federal court while Utah was still a territory. After a verdict of guilty, defendants successfully applied for a new trial. Prior to the date of the new trial, Utah was admitted as a state and the second trial was conducted in state court with only eight jurors as provided by the Utah constitution. Defendants were convicted and subsequently prosecuted their appeal to the United States Supreme Court.[5] The Supreme Court overturned the state conviction on the basis that the Utah law was *ex post facto* in its application to felonies committed prior to the time Utah became a state because the United States Constitution, through the sixth amendment, required that the jury, in federal court, consist of twelve men.[6] It was this constitutional holding which would eventually come into conflict with the Court's incorporation scheme, but this could not happen until the jury, with its complex of facets (twelve-man panel, unanimity, etc.), was itself incorporated into the fourteenth amendment. However, *Thompson* was accepted as law with little

[3] *See* note 70, *infra,* and accompanying text.
[4] 170 U.S. 343 (1898).
[5] *Id.* at 344-45.
[6] *Id.* at 355. There the Court stated:

> In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the Territory became a State, *because,* in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offence, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.

discussion.[7] Indeed, the idea that twelve men were required in federal criminal trials was so accepted that the rule was incorporated into the rules of federal court procedure in criminal cases.[8]

States, on the other hand, were allowed to fix the number of jurors in criminal cases as they saw fit, with only minor consideration of possible violations of constitutional rights.[9] This divergence of procedure as to the required number of jurors produced no conflict with the incorporation doctrine until 1968 in the case of *Duncan* v. *Louisiana*,[10] where the Court held "trial by jury in criminal cases [to be] fundamental to the American scheme of justice" and that the fourteenth amendment guaranteed a jury trial to a defendant in state court where the sixth amendment would so require if he were in federal court.[11]

By this incorporation of the sixth amendment right to a jury trial into the fourteenth, the Court created inconsistencies which inevitably led to *Williams*. These inconsistencies centered around the required number of jurors. Following *Duncan*, the law required jury trials in both federal and state courts under certain conditions. These conditions were identical in both state and federal courts;[12] however, a defendant in state court might face a jury of any number so long as it could fairly be called a jury.[13] This disparity of procedure, which had been permissible before *Duncan*, now produced a state of affairs contrary to the usual result of "incorporation" of constitutional rights into the fourteenth amendment.[14]

Previously, all such decisions had held that each federal right so incorporated was "applicable to the States with all the subtleties and refinements born of *history* and embodied in case experience developed in the context of federal adjudication."[15] While this statement of the policy may be a bit strong, it is nonetheless indicative of the completeness of such absorptions. In fact, the Court had previously stated that "[o]nce it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice' . . . the

[7] Williams v. Florida, 90 S. Ct. 1893, 1901 nn.29-31 (1970).

[8] FED. R. CRIM. P. 23. *See* Williams v. Florida, 90 S. Ct. 1920 n.13 (Harlan, J., dissenting).

[9] Maxwell v. Dow, 176 U.S. 581, 603-04 (1900). For a listing of the various state laws and their differences see the appendix to Mr. Justice Harlan's dissent. Williams v. Florida, 90 S. Ct. at 1926-28.

[10] 391 U.S. 145 (1968).

[11] *Id.* at 149.

[12] *Id.*

[13] *See* appendix, *supra* note 9.

[14] *See* Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Ker v. California, 374 U.S. 23 (1963).

[15] Williams v. Florida, 90 S. Ct. 1893, 1922 (Harlan, J., dissenting).

same constitutional standards apply against both the State and Federal Government."[16]

In *Williams* the Court was squarely faced with the conflict between a constitutional right and the incorporation procedure, and if the policy of complete absorption as stated above was to continue, the Court would have to make some decision about the required number of jurors. Either the states would be required to provide juries of twelve in all cases where the federal courts would so require or juries of twelve would not be required in either state or federal courts.[17] The latter choice would require the Court to find that a jury of twelve was not constitutionally required in federal court by the sixth amendment, and thus overrule *Thompson.*[18] In *Williams* the Court chose to dilute the constitutional standard of *Thompson* in favor of retaining intact the incorporation scheme.[19] The decision was reached on the basis of ambiguous historical facts and the absence of empirical data to refute the justices' personal determination of human behavior. Confirmation of this hypothesis will be discovered through an examination of the reasoning utilized in the majority opinion.

In reaching the decision that the twelve-man panel was not an essential feature of trial by jury, the analysis of the majority in *Williams* was based on a three step approach: first, a discussion of the historical development of the jury and the twelve-man panel coupled with a review of the judicial precedent behind the requirement; second, consideration of the adoption of the sixth amendment to determine whether the Framers of the Constitution had intended to include the twelve-man panel in the jury requirement; and third, an analysis of the jury's function as relates to its size.

First considering the historical development of the jury to determine its relationship to the twelve-man feature,[20] the court gave brief consideration to various historical treatises[21] and came to the conclusion that the jury of twelve men appeared "to have been an historical accident, unrelated to the great purposes which gave rise to the jury in the first place."[22] The Court's conclusion that the choice

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[16] Benton v. Maryland, 395 U.S. 784, 795 (1965). *See* Williams v. Florida, 90 S. Ct. 1914 (Marshall, J., dissenting).

[17] There was the third option of allowing the diversity to exist but this apparently was not considered. *See* note 72 *infra,* and accompanying text.

[18] *See* Williams v. Florida, 90 S. Ct. at 1919-21 (Harlan, J., dissenting).

[19] "Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment which would forever dictate the precise number which can constitute a jury." *Id.* at 1907 (majority opinion).

[20] *Id.* at 1899.

[21] *Id.* at 1899-1900 nn.19-25.

[22] *Id.* at 1900.

of twelve jurors as the appropriate number was accidental is in all probability a valid one. The authorities cited by the Court reach or tend to lead to that conclusion.[23] Likewise other writers have reached a similar conclusion upon an independent review of the history of the development of the jury.[24] Even Justice Harlan, in dissent, was unable to present any authority to show that there was some reason, apart from chance, for the selection of twelve as the appropriate number.[25] He did, however, question the second part of the Court's conclusion that the number twelve is unrelated to the purposes which gave rise to the jury. Accepting the majority's statement of the purposes of a jury,[26] Harlan concluded that although the settlement on this number was accidental, it is an accident which has occurred continuously since the fourteenth century, which indicates a reflection of the policies *behind* the jury in the *form* of the jury.[27] Indeed he feels that "[t]he right to a trial by jury . . . has no enduring meaning apart from historical form."[28]

The important aspect of the use of history in this case, however, is not its accuracy but rather the actual purpose it served. In prior decisions, history had been used for the breaking of long lines of precedent, but always the Court was able to find in the history the "fact" or "truth" which *called for* the change of position.[29] The history relied upon was often suspect,[30] but this was not the case in *Williams;* rather the history used may be accepted as valid. Yet nowhere in the history did the Court find a reason *for* removing the

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[23] *See* note 21 *supra.*

[24] *See, e.g.,* Clark, *The American Jury: A Justification,* 1 VALPARAISO U.L. REV. 1 (1966); Wiehl, *The Six-man Jury,* 4 GONZAGA L. REV. 35 (1968).

[25] 90 S. Ct. at 1919 (Harlan, J., dissenting). For an indication of his willingness to challenge the validity of the majority's facts, *see* Hadley v. Junior College District, 397 U.S. 50 (1970) (dissent); Reynolds v. Sims, 377 U.S. 533 (1964) (dissent); Wesberry v. Sanders, 376 U.S. 1 (1964) (dissent).

[26] *See* note 55 *infra,* and accompanying text.

[27] 90 S. Ct. at 1919 (Harlan, J., dissenting).

[28] *Id.* It must be kept in mind that Justice Harlan is speaking of federal juries.

[29] "Historical adjudication . . . supplies an apparent rationale for politically inspired activism that can be indulged in the name of constitutional continuity." Kelly, *Clio and the Court: An Illicit Love Affair,* 1965 SUP. CT. REV. 119, 131 (1965). Kelly views the Court as employing four distinct types of history or historical research: first, history as the study of precedent; second, history as the circumstances surrounding the precedent; third, creation of history by judicial fiat; and fourth, history as an extended essay of the "law-office" type (using only that which is favorable). *Id.* at 121-22. The *Williams* opinion utilized all four types.

[30] *Id.* at 132. Kelly is quite critical of much of the Court's use of history, especially the historical essay from its inception in *Dred Scott v. Sanford,* 19 How. 393 (1857) and the Income Tax Cases, *Pollack v. Farmers Loan & Trust Co.,* 157 U.S. 429 (1895), 158 U.S. 601 (1895). Kelly, *supra* note 29, at 125-26. See the apportionment cases cited *supra* note 25. He compares this use of history as being similar to the distortions of some Marxist writers. Kelly, *supra* note 29, at 157.

constitutional requirement, instead it found no historical reason *preventing* the removal.[31] In evaluating the Court's decision the history relied upon must be considered at most neutral, and thus eleminated as a basis for the holding. In addition, other commentators have felt that while history is important for revealing the function which the jury *has* served, any appraisal must be based on "contemporary attitudes, needs and values."[32] In view of the position of the jury as arbitrator in disputes arising from contemporary circumstances, the reluctance to rely upon an historical basis for the number of jurors seems appropriate.[33]

Having found no historical reason for retaining this "accidental" feature of the jury, the majority then turned to determining whether the twelve-man jury "has been immutably codified into our Constitution."[34] The Court was immediately faced with two obstacles, the first of which was *Thompson* and the line of cases following it.[35] *Thompson* was disposed of by arguing that the holding that a twelve-man panel was constitutionally required in federal court was unnecessary for the decision in that case[36] The majority reasoned that the application of the *ex post facto* ruling could have equally rested on the basis of rights previously allowed *Thompson* rather than on a direct conflict between state law and constitutional rights.[37] This argument seems particularly weak when compared to the stated holding in *Thompson* that the application of state law was *ex post facto because the United States Constitution gave* defendants in federal courts the right to a jury of twelve.[38] Unsatisfied, the Court further attacked the *Thompson* Court's reasoning that the jury as known at common law had been completely incorporated by the Constitution.[39] The majority found that:

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[31] To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment . . . would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions. 90 S. Ct. 1907.

[32] Clark, *supra* note 24, at 1-2. *See also* Kelly, *supra* note 29 at 156-57.

[33] This reluctance applies equally to arguments for decreasing the number of jurors as well as for retaining the twelve-man panel requirement.

[34] 90 S. Ct. 1900 (1970).

[35] Patton v. United States, 281 U.S. 276 (1930); Rassmussen v. United States, 197 U.S. 516 (1905); Maxwell v. Dow, 176 U.S. 581 (1900).

[36] 90 S. Ct. at 1900. See note 55 *infra* and accompanying text.

[37] *Id.*

[38] *See* note 6 *supra. Accord,* Williams v. Florida, 90 S. Ct. 1920 n.12 (Harlan, J., dissenting).

[39] 90 S. Ct. at 1901. It should be noted that the Court specifically reserved judgment on what effect the seventh amendment might have on the size of a jury. *Id.* at 1901 n.30. Neither did the Court consider the constitutional necessity for unanimity under the sixth amendment. *Id.* at 1906 n.46.

> [N]oticeably absent [in the *Thompson* opinion] was any discussion of the essential step in the argument; namely, that every feature of the jury as it existed at common law—whether incidental or essential to that institution—was necessarily included in the Constitution wherever that document referred to a 'jury.'[40]

The cases following *Thompson* were disposed of in *Williams* by declaring that they were often merely dicta and if not, then ill-considered opinions.[41]

With *Thompson* abandoned, the majority was itself forced to the "essential step" of determining whether it was "the intent of the Framers" to include the twelve-man panel in the sixth amendment.[42] In trying to determine exactly what the intent of the Framers was, the Court relied upon the discussions and maneuvering in the adoption of the vicinage requirements.[43] The amendment as originally introduced by Madison called for juries in criminal cases drawn from the "vicinage,"[44] unanimity, challenge, and "other accustomed requisites."[45] The syllogistic approach of the *Williams* majority was based on three theories: first, that vicinage was as much a part of the common law jury structure as the twelve-man panel yet simple reference to trial by jury did not lead the Framers to the belief that the term included vicinage; second, the Framers successfully prevented the coupling of the jury trial to the accustomed requisites in the Constitution; and third, the legislative activity of that time took particular pains to include specific provisions invoking desired aspects of the common law, yet did not include a requirement of twelve jurors.[46] With these theories as parameters the failure of the amendment to pass as written, the absence of vicinage as known at common law, and the complete deletion of the unanimity requirement and "other accustomed requisites" clause led the majority in *Williams* to conclude that Congress did *not* intend to include the twelve-man panel requirement within the right to trial by jury in the sixth amendment.[47]

While their authenticity is probably unquestionable, the facts marshalled by the Court are subject to varying interpretations. Indeed the absence of explicit reference by the Framers to the twelve-man

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[40] *Id.* at 1901.
[41] *Id. But see id.* at 1920-21 (Harlan, J., dissenting).
[42] *Id.* at 1902 (majority opinion).
[43] *Id.*
[44] Vicinage, used in connection with jury, means a panel drawn from the neighborhood or community. *Id.* at 1902 n.35.
[45] *Id.* at 1902-03 [quoted from 1 ANNALS OF CONG. 452 (1789)].
[46] *Id.* at 1904.
[47] *Id.* at 1903-05.

panel, upon which the majority so heavily relied, may just as logically be turned against the Court's decision. If in fact the Framers were so conscious of the need for including specific attributes which might be separated from the common law concept of the jury as the majority claims, then not only the failure to include but the failure to even consider[48] the twelve-man panel would seem to indicate the assumption that this factor was so attached to the concept of trial by jury that any discussion would have been superfluous.[49] The Court acknowledged such a possibility but pointed to the diversity of jury systems within the colonies which differed from the common law twelve-man panel.[50] In the final analysis the conclusion was that the Framers probably gave little thought to the question, and ". . . there is absolutely no indication in 'the intent of the Framers' of an *explicit* decision to equate the constitutional and common law characteristics of the jury."[51]

It should be obvious that the history used by the Court in its judicial and constitutional analysis suffers from the same weaknesses as that used in the historical analysis. While the facts that are presented are probably accurate, all of the facts simply are not available and those available are ambiguous.[52] Yet *Thompson* was refuted because the Court could not find the *explicit*[53] intent to require twelve jurors but neither was the majority able to find any intent not to require such juries. In the end the Court was forced to acknowledge that history provides no comfort to either position.[54]

Failing to find codification in the Constitution, and disposing of *Thompson's* precedent, the Court turned to its final consideration: whether a twelve-man jury is indispensable to the essential *function* of a jury system. In *Duncan* the purpose of a jury had been found to be prevention of oppression by the government.[55] In *Williams* this purpose led the Court to the determination that:

> [T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility which results from that group's determination of guilt or innocence. *The performance of this role is not a*

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48 *Id.* at 1902-04 nn.35-42.
49 *Id.* at 1918 n.9 (Harlan, J., dissenting).
50 *Id.* at 1904-05 n.45 (majority opinion).
51 *Id.* at 1905.
52 *Id.* at 1902-03 nn.33-39.
53 *See* note 51 *supra*, and accompanying text.
54 *Id.*
55 Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

function of the particular number of the body which makes up the jury.[56] (Emphasis added.)

A check of the authorities cited by the Court finds no study which directly and explicitly gives empirical evidence showing that jury verdicts will *not* vary according to the size of the panel.[57] While some of the authorities conclude that there *should* be no difference in the deliberative processes in six and twelve-man juries, this does not mean that *in fact* there would be no difference.[58] Conversely, there seems to be no factual study explicitly indicating that there would be a change in verdicts resulting from a variation in panel size.[59]

Regardless of this absence of evidence, and contrary to the finding of the Court, there must be at least *some* relationship between function and number or else just one juror would be a sufficient buffer between the accused and his accuser. If one man were sufficient then it would seem that the presence of the judge would eliminate the concept of a jury in its function as a buffer. It would follow then that the number of people chosen bears *some* relation to the function of the jury. It was to these ideas that Justice Harlan was responding when he asked what number of jurors would be too few.[60] The majority's answer was only that if there was a minimum, six was above it, but the opinion gave no guidelines for determining the matter.[61]

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[56] 90 S. Ct. 1893, 1906 (1970).

[57] *Id.* at 1906-07 nn.48-49. The studies in n.48 deal primarily with the time saving features of the smaller jury.

[58] The studies seem to indicate that the minority on a jury would be influenced, following the first ballot, by the proportional size of the majority. From this basis the Court reasoned that as the jury decreased in size the number of jurors the defendant would have to persuade to his side would decrease. Therefore the defendant should not be complaining. *Id.* at 1906-07 n.49. These facts can be viewed in another light. Assume a given number of jurors have been persuaded and that they will be swayed by the proportional division against them. Assume four is the minimum number needed to prevent an opposing verdict with a twelve-man jury and that only two are needed with a six-man panel. If the number of jurors actually persuaded is three it is obvious that the *verdict will vary with the size of the jury.*

[59] *See* Erlanger, *Jury Research in America,* 4 LAW & SOCIETY 345 (1970) for a listing and discussion of most of the empirical studies of the jury. Throughout this paper changes in verdicts as a result of changes in size are used to show a relationship between function and number. The equating of function to verdicts seems natural, for although the jury may have other "functions" (citizen participation, etc.) they have no meaning apart from the process of rendering verdicts.

[60] 90 S. Ct. at 1919 (Harlan, J., dissenting).

[61] *Id.* at 1901 n.28 (majority opinion). If there is a minimum why does it exist? If there is a number beyond which any decrease destroys the jury it must be because there is some relationship between function and number. It would follow then that if the Court really means that there is *no* relationship between function and number then no number would be too small, even zero. *But see* Baldwin v. New York, 90 S. Ct. 1886 (1970) requiring a jury rather than a three judge panel.

The Court went on to consider other arguments against decreasing the size of the jury panel such as: the danger of tampering, the greater difficulty of finding the one juror to "hang" the jury, and the decreased possibility of obtaining a representative cross-section of the community. In each instance, however, the Court found no significant difference due to a decrease from twelve-man to six-man juries.[62] Repeating the practices of the Court's historical analysis, the holding that the number of jurors bore no relationship to their function was in reality based upon the *absence* of evidence showing that there was any connection.[63] Once again, as in its prior reasoning, the Court found no reason for eliminating the constitutional guarantee, but rather found no reason against eliminating it.[64] To summarize, the Court found no basis, in history or in fact, to prevent holding that the twelve-man jury was not constitutionally required; but likewise, the majority found nothing (at least stated nothing) to support reversal of the construction of a constitutional mandate that had stood since 1898. In the final analysis, all that can be said for the majority's rationale is that it provides no basis either one way or the other for the holding. In no case did the majority find any connection between the number of jurors and these bases of authority of such significance as to require a nullification of the Florida law in this instance.[65]

The importance of this decision is greater than perhaps appears on first reading because more than just a refusal to nullify Florida law was involved. Neither was this merely a case of refusing to apply federal constitutional standards to state action. That was already required by *Duncan*.[66] The constitutional provision being discussed was not the fourteenth amendment but the *sixth*, which applies directly to the *federal courts*. The result of this decision is not just that Florida courts do not have to provide twelve-man panels but also that federal courts are no longer constitutionally required to provide such juries.[67] What had previously been regarded as a constitutional

[62] The Court dismissed these possibilities as meaningless especially if unanimity is required. Williams v. Florida, 90 S. Ct. 1893, 1906 (1970). The majority also felt that any disability to a defendant would weigh equally upon the prosecution. There was no indication whether it was assumed that the prosecution deserved an equal chance to tamper with the jury. *Id. See also* Note, *Trial by Jury in Criminal Cases*, 69 COLUM. L. REV. 420, 425 (1969).

[63] *Supra* note 57, and accompanying text.

[64] 90 S. Ct. at 1906-07. "In short, neither currently available evidence nor theory suggests that the twelve-man jury is *necessarily* more advantageous to the defendant than a jury composed of fewer members." (Emphasis added.) This seems to be a rather curious choice of wording for a constitutional finding of fact.

[65] *Id.* at 1907.

[66] *See* note 11 *supra*, and accompanying text.

[67] *See* note 19 *supra*.

requirement was reduced to the level of court procedure.[68] It is submitted that the Court's decision to do so was in fact not based on the reasoning of the majority opinion but rather, that the decision merely reflects the justices' *personal determination* that the twelve-man panel should not be constitutionally required.[69] Because of this dilution some effort must be made to determine upon exactly what reasoning the Court based its decision.

Any discussion of what factors actually were the bases for the decision must remain conjectural, but Justice Harlan raises some possibilities in his dissent. It is his thesis that the basis of the decision lies in an attempt to reconcile conflicts arising under the "selective incorporation" doctrine.[70] As discussed previously, whenever the Court has incorporated a federal constitutional right into the fourteenth amendment it has required complete conformity by the state to the federal law.[71] Justice Harlan sees the Court faced with a divergence between state and federal law in an area which had been incorporated by *Duncan*, but it was a divergence which contained a great deal of equity for the state's position. Rather than allow the divergence and introduce conflict into the selective incorporation doctrine, the majority chose to dilute a federal constitutional right so that uniformity could be achieved.[72]

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68 90 S. Ct. at 1907.

69 While this statement will obviously apply to some extent to almost every opinion, in decisions such as *Williams*, where no other basis is given, this personal determination seems to be the *only* factor. If the Court did in fact make its decision upon this basis it is ironic that selective incorporation, which was conceived to remove such personal or conscience considerations from the judicial process, *see generally* 90 S. Ct. at 1909 (Black, J., dissenting), should result in this decision.

70 90 S. Ct. at 1921 (Harlan, J., dissenting). "The only reason I can discern for today's decision . . . is the Court's disquietude with the tension between the jurisprudential consequences wrought by 'incorporation' . . . and the counter-pulls of the situation presented in Williams. . . ." *Id.*

71 *See* note 16 *supra*, and accompanying text.

72 90 S. Ct. at 1921 (Harlan, J., dissenting). "Can one doubt that had Congress tried to undermine the common law right to trial by jury before *Duncan* came on the books the history today recited would have barred such action?" *Id. Contra, id.* at 1909 (Black, J., dissenting). In support of Justice Harlan it can be demonstrated that at least one of the decisions made by the Court was to dilute the constitutional right in favor of the incorporation scheme. This can be done by an examination of the functional result of the Court's action. First, the functional effect of the decision was to allow the Florida jury to remain the same while making it possible to have smaller juries in federal courts. With this effect consider the given factors with which the Court began: 1. a six-man jury in Florida courts, 2. a twelve-man jury in federal courts, 3. a constitutional requirement of 2, 4. a judicial requirement of uniformity between 1 & 2. Of these factors only 3 & 4 can be manipulated by the Court so as to effect 1 & 2, thus any analysis must be concerned with possible arrangements of 3 & 4 in light of the effect they might have on the two jury systems. This effect will depend upon whether the Court retains them in their present form or alters them. There are

(Continued on next page)

As inviting as this conclusion is, it still begs the question of why the majority decided as it did. The conflict between the constitutional right and the incorporation scheme provides not a basis but only a framework for the decision; its sole function served to limit the options given to the justices and the entire discussion to this point has only illuminated the factors which allowed the majority to cast the problem in the mold of this conflict. Nothing as yet has been said which would indicate why the Court, faced with this choice, chose continuation of the incorporation doctrine. It is to this question that attention must now be turned.

In attempting to discover a true rationale for the Court's decision, one possible explanation relates to the inherent value of the incorporation doctrine which would cause a court to value it over a constitutional guarantee. Exactly what the inherent value of the doctrine may be is subject to varying interpretations and its effect upon the Court would probably be difficult to ascertain. At any rate such a thesis would demand a complete treatment of the doctrine in the light of the circumstances of this case which is an undertaking beyond the scope of this comment, as are other possible bases such as the personal desire to see the continuation of a product of one's thoughts or emotional attitudes toward the place of laymen in the private perserve of justice. If these considerations are too illusive or intricate to provide a basis for the opinion (beyond mere speculation) is there any factor which may rationally be put forth as a basis for the decision?

Perhaps such a basis may be found by turning once again to the dissent of Justice Harlan. It is submitted that the most obvious reason for the Court's choice lies in the overcrowded state of court dockets across the nation. The courts of both the state and federal

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four possible combinations which will produce an effect upon 1 & 2. These combinations and their effect are as follows:

A. Keep 3 & 4 unaltered—This will have the functional effect of requiring twelve-man panels in both systems.
B. Keep 3 & alter 4—This will have the functional effect of allowing six-man panels in Florida while retaining the twelve-man jury in federal courts.
C. Alter 3 and retain 4—This will have the functional effect of allowing six-man juries in either system.
D. Alter both 3 & 4—The functional effect of such a decision is beyond determination. This would not seem to be the one sought because such a decision would require an additional prompting factor in view of the role 3 & 4 played in supplying the impetus for the consideration of the case.

It would follow from this analysis that the functional decision of the Court was C. or Justice Harlan's thesis.

systems are extremely overloaded.[73] The backlog of cases is enormous and many commentators place a major portion of the blame upon the jury system.[74] In an attempt to speed up the trial process courts have experimented with the use of smaller juries in civil cases.[75] The results of these studies seem to indicate a possible reduction in the time required for each trial along with a decrease in the expense.[76] The primary focus of the authorities cited by the *Williams* Court seemed to be these studies.[77] As an indication of the impact of these problems (and this case) upon the other courts in the federal system and the speed with which this solution will be adopted, the federal district courts for Kentucky have announced the adoption of six-man juries in civil cases citing the expense, the press of cases, and *Williams* as both the reason and justification for the action.[78]

In summary, this analysis of the Supreme Court's decision in *Williams* ends with the conclusion that the necessities of judicial administration provided the basis of the choice between options limited by a self-imposed regime. As pointed out earlier, the Court's choice was not between a twelve-man panel and a smaller one but between disruption of the incorporation practice and dilution of a constitutional right, and the majority chose to dilute the guarantee because to do so would seem to lead to less congestion in the courts while alteration of the incorporation scheme would further congest the courts. The Court appears to have reasoned: (a) judicial practice in the form of the incorporation doctrine demanded dilution, (b) administration of the litigation process would apparently be facilitated by dilution of the constitutional standard, (c) no reason was found to prevent diluting the standard, *thus* (d) the standard should (could) be diluted. Two things should be obvious: first, that the Court omitted the first two steps of its logic from the opinion, and second, that this logic does not and can not lead to the conclusion that there

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[73] *Id.* at 1924-25 (Harlan, J., dissenting). *See* ZEISEL *et. al.*, DELAY IN THE COURTS [hereinafter ZEISEL] (1959).

[74] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 188 (1968) (Harlan, J., dissenting); Phillips, *A Jury of Six in All Cases*, 30 CONN. B.J. 354 (1956); Wiehl, *supra* note 24, Note, *Right to a Jury Trial of Persons Accused of Ordinance Violation*, 47 MINN. L. REV. 93 (1962). *Contra*, Clark, *supra* note 23, at 5-6. *See also* Merrill & Schrage, *Efficient Use of Jurors: A Field Study and Simulation Model of a Court System*, 69 WASH. U.L.Q. 151 (1969).

[75] ZEISEL 277. *See also* Cronin, *Six-Member Juries in District Courts*, 2 BOSTON B.J. 27 (1958).

[76] *Id.*

[77] While some of the studies cited *supra* notes 74-75 are also cited in *Williams*, *supra* note 57, the majority's use of them is as stated, to show the absence of any reason preventing change. The opinion indicates the Court's awareness of the tentativeness of the studies, most of which dealt with civil trials. 90 S. Ct. at 1906.

[78] The Louisville Courier-Journal, Feb. 20, 1971, § B, at 1, col. 6.

is no relationship between the function of juries and the number of jurors (or that verdicts will not change as the size of the jury is decreased) because this is an *assumption* which underlies *all* of the above and which, for all the Court's authorities tell us, may be well-founded or unfounded, *i.e.* the Court doesn't really know. Thus, the majority opinion deals only with the final step in the decision-making process.

In light of the above it would seem that the Court should have weighed the interest of judicial administration against the *unknown* effect on verdicts on reduction of jury size. In the final analysis it is the defendant who will suffer the possible ill-effects of either choice and who is to say that the injustice of possible changes in jury verdicts outweighs the prospect of long delays prior to trial? In this instance the Court assumed the duty and as a part of that duty an obligation to fully and accurately explain the basis of its choice. This obligation was not met.

It is not the purpose of this comment to declare the Court's verdict wrong but only to posit that not only was complete discussion of the real rationale not provided but also that part of it was merely assumed rather than decided.

If the preceding evaluation is correct, the decision takes on the atmosphere of a trick done with mirrors. Putting all talk of constitutional doctrines, legal precedents, etc. aside, the basic decision which faced the Court was whether to allow reduction of the jury panel. This can be translated as whether such a reduction would have an adverse effect upon verdicts.[79] In an attempt to answer this question the Court proceeded upon the logic outlined above, but such questions as relative value between constitutional right and judicial procedure; between administration and jury function; historical demands and verdict stability (which are the questions whose answers produced each step in the logic) cannot be answered until the effect upon verdicts of a change in size is determined. Yet as pointed out, the functional answer to the basic question as provided by the opinion was that there would be no change. Thus, we have a question which is answered by a train of logic which is based on the answer to the question. Can even mirrors produce such a trick?[80]

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[79] Such a translation can be made because regardless of other functions of the jury, they and it can have no meaning apart from the verdicts rendered. Such verdicts are the major, and perhaps only, means of communication for the jury as a group thus any action which will effect the jury must be considered in light of its effect upon verdicts.

[80] Perhaps the most disturbing aspect of this absence of explanation is the uncertainty as concerns possible dilution of other constitutional guarantees in the

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The final conclusion which arises from this quagmire is that perhaps the Court acted unintentionally in omitting public discussion of its decisional process. Perhaps it saw no relevance in discussing the pre-decision logical step of resolving the conflict of *Thompson* and the incorporation doctrine. Perhaps it deemed inconsequential that its decision tacitly held that jury size is irrelevent to the jury's role. The truth of these assumptions would make one pause to contemplate the Court's capacity to act as a safe repository for constitutional rights in this era of problems so complex, so equitably balanced, so shrouded in uncertainty as to produce conflict among all aspects of American life.

Conversely, were the Court cognizant of these decisional facets while avoiding discussing either of them or the motivation of decongesting the courts, then the opinion was less than candid. A full and open discussion, and a clear understanding, of the problem is essential to a constitutional decision. *Williams* evinces a lack of one, if not both, of these factors in allowing six-man juries based on the rationale stated in the Court's opinion.

William L. Stevens

CORPORATIONS—SECURITIES EXCHANGE ACT of 1934 § 16(b)—"SALE" DEFINED.—A corporate insider[1] granted an option on stock which he

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future when the Court is again faced with conflicts within an "incorporated" area. *See* 90 S. Ct. at 1921-22 (Harlan, J., dissenting). *Contra, id.* at 1909 (Black, J., dissenting). Whatever the future may hold, in *Williams* the Court chose *dilution.*

[1] Defendant was an insider by virtue of his ownership of over ten per cent of the outstanding stock of the Cudahy Company. Such insiders are subject to the provisions of section 16(b) of the Securities Exchange Act of 1934, set out below:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be con-

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