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Right to Trial by Jury: New Guidelines for State Criminal Trial Juries

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may have been influenced by the particular taxpayer involved in the suit. South Central Bell, as well as the other large corporations, will have the resources to challenge the taxes and will not be deterred from doing so as a result of this decision. For this reason, the court may have weighed more heavily those policy factors in favor of awarding attorney's fees to the Collector. However, the potential impact of this decision is yet to be seen; in those cases involving substantial sums paid under protest, the award of attorney's fees alone could be staggering.[40] In such situations, the amount awarded in attorney's fees may seem unwarranted, and the supreme court may be forced to question whether the practice of imposing attorney's fees on the losing litigant in protest suits provides the "adequate remedy" required by the Louisiana constitution.

Allen P. Jones

RIGHT TO TRIAL BY JURY: NEW GUIDELINES FOR STATE CRIMINAL TRIAL JURIES

In the past ten years, a series of United States Supreme Court decisions has reshaped the state criminal trial jury by abandoning the traditional common law formula requiring twelve-member juries and unanimous verdicts. In place of that formula, the Court has imposed new guidelines based upon a functional model of the jury, a theoretical construct embodying jury size and unanimity requirements consistent with the function of the jury in contemporary society. In its two most recent decisions concerning jury size and unanimity requirements, *Ballew v. Georgia*[1] and *Burch v. Louisiana*,[2] the Court has further defined the perimeters within which states may organize their criminal trial juries. In *Ballew*, the Court held that in a state criminal trial involving a noncapital offense, the sixth and fourteenth amendments[3] require that the jury consist of no

40. Currently, several pipeline companies plan to challenge the First Use Tax, LA. R.S. 47:1301-07 (Supp. 1978), by paying under protest, unless the tax is declared unconstitutional before the first payment is due. It is estimated that the potential liability of these companies under this tax is over 100 million dollars annually. If the companies lose the protest suit, the award of attorney's fees will be ten percent of that amount.

1. 435 U.S. 223 (1978).
2. 99 S. Ct. 1623 (1979).
3. U.S. CONST. amend. VI provides:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and

fewer than six members. More recently, in *Burch*, the Court held that conviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty offense violates the right of the accused to trial by jury. These cases indicate that the abandonment of the traditional common law model of the jury has introduced into this area of the law a struggle, prevalent in other areas of due process litigation, between the desire for certainty, based upon objective criteria, and the impulse toward subjective analysis, based upon "judicial hunch."

Although institutions analogous to the jury may be traced to ancient Greece, the jury form with which we are most familiar developed in England following the Norman Conquest.[4] Commentators have traditionally viewed the great purposes which gave rise to the common law jury as being political in nature. In *Democracy in America*, de Tocqueville concluded that "[t]he jury is preeminently a political institution; it must be regarded as one form of the sovereignty of the people . . . ."[5] Blackstone observed that trial by jury "preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens."[6] Thus, the evolution of the jury evidenced the desire to safeguard individual liberties against intrusion by the government and other powerful forces.

While admirers of the jury point to the political advantages of mass participation in the judicial process, others argue that these advantages are realized at the cost of efficient decision-making.[7] Criticism is generally aimed at the inadequate performance of juries as fact-finders and at the economic inefficiency of utilizing juries as a means of judicial determination.[8] It is maintained that a judge or

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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.

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held that the right to trial by jury in criminal cases is a fundamental right applicable to the states by virtue of the fourteenth amendment. See text at notes 16-18, *infra*.

4. M. BLOOMSTEIN, VERDICT: THE JURY SYSTEM 2-20 (1968).

5. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 288 (H. Reeve trans. 1899).

6. W. BLACKSTONE, COMMENTARIES ON THE LAW 690 (Gavit ed. 1941).

7. *See* Steuer, *The Case Against the Jury*, 47 N.Y. ST. B.J. 101, 103 (1975).

8. *See, e.g.*, J. FRANK, COURTS ON TRIAL (1949) (generally critical of the performance of juries as fact-finders); M. GLEISSER, JURIES AND JUSTICE (1968) (uses case histories to indicate the shortcomings of jury decisionmaking); G. TULLOCK, THE LOGIC OF THE LAW 76-104 (1971) (criticism from the viewpoint of economic theory).

panel of judges, "as a result of training, discipline, recurrent experience, and superior intelligence," would be better able to analyze the facts and understand the law "than laymen, selected from a wide range of intelligence levels, who have no particular experience with matters of this sort, and who have no durable official responsibility."[9] Additionally, critics assert that the jury system is too expensive and that a jury often will not follow the law, either because the jury does not like the law or does not understand it, the result being an unequal administration of justice.[10]

In light of these and similar criticisms, the question arose as to whether states may substitute, in criminal actions, a trial before a judge or panel of judges in place of a trial by jury. Louisiana, because of its unique civil law background, provided the United States Supreme Court with a chance to address this threshold question. Colonial Louisiana derived its judicial system from France and Spain,[11] neither of which had developed the jury as a mode of judicial determination. As a result, prior to becoming a possession of the United States in 1803, Louisiana did not try criminal defendants by lay jury.[12] Livingston, the redactor of a proposed penal code for the state, advocated that trial by jury should "be the mode of trial in *all* criminal prosecutions"[13]; contrary to his suggestion, constitutional and statutory law in Louisiana did not provide for jury trials in misdemeanor[14] cases until 1968.[15] In that year the Supreme Court

9. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 8 (1966).

10. *Id.*

11. *See* 1 W. HOLDSWORTH, A. HISTORY OF ENGLIGH LAW 314-17 (5th ed. 1931); Inbau, *The Concept of Fair Hearing in Anglo-American Law*, 31 TUL. L. REV. 67 (1956). Professor Inbau has theorized that the absence of jury trials in continental Europe may be attributable to the lack of strong centralized governments. As a result, civil and canon lawyers influenced the method of dispensing justice in a direction other than trial by jury.

12. For a detailed discussion of the judicial process in colonial Louisiana, *see* Dart, *The Place of the Civil Law in Louisiana*, 4 TUL. L. REV. 163, 174 (1930).

13. E. LIVINGSTON, REPORT ON A PENAL CODE OF THE STATE OF LOUISIANA 121 (1822), in 1 THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 15-16 (1968) (emphasis added).

14. LA. R.S. 14:2 (1950) provides: "'Felony' is any crime for which an offender may be sentenced to death or imprisonment at hard labor. . . . 'Misdemeanor' is any crime other than a felony."

15. 1968 La. Acts, No. 635, *amending* LA. CODE CRIM. P. art. 779. Prior to 1968, "[a] defendant charged with a misdemeanor . . . [was] tried by the court without a jury." LA. CODE CRIM. P. art. 779 (as it appeared prior to 1968 La. Acts, No. 635). Constitutions prior to 1974 similarly contained no provisions for jury trials in misdemeanor cases. LA. CONST. of 1921, art. I, § 9 & art. VII, § 41; LA. CONST. of 1913, arts. 9, 116 & 140; LA. CONST. of 1898, arts. 9 & 116; LA. CONST. of 1879, art. 7; LA. CONST. of 1868, tit. I, art. 6 & tit. IV, art. 87; LA. CONST. of 1864, tit. VII, art. 105 & tit. V, art. 82; LA. CONST. of 1852, tit. VI, arts. 103, 124 & tit. IV, art. 78; LA. CONST. of 1845, tit. VI, arts. 107 & 128; LA. CONST. of 1812, art. VI, §18.

held in *Duncan v. Louisiana*[16] that "trial by jury in criminal cases is fundamental to the American scheme of justice," and, as a result, the fourteenth amendment guarantees a "right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."[17] By making the sixth amendment applicable to the states via the fourteenth amendment, the Court compelled Louisiana to provide jury trials in all criminal cases involving a fine in excess of five hundred dollars or imprisonment for more than six months.[18]

Though the *Duncan* Court clearly required states to provide jury trials in all nonpetty cases, it did not specify whether states would also be forced to satisfy the common law standard of twelve-member juries. Justice Harlan, dissenting in *Duncan*, raised this question and significantly foreshadowed the Court's ultimate decision on the subject when he noted that "the rule, imposed long ago in the federal courts, that 'jury' means 'jury of exactly twelve,' is not fundamental to anything: there is no significance except to mystics in the number 12."[19]

Agreeing with Justice Harlan's conclusion, the Court held, in the 1970 case of *Williams v. Florida*,[20] that a criminal trial before a six-member jury does not violate the defendant's sixth or fourteenth amendment rights. Finding that the twelve-member requirement was "a historical accident," the Court concluded that the framers did not explicitly intend to codify, as a constitutional requirement, that feature of the common law jury. The result reached by the Court was based upon its determination that a twelve-member jury is not essential to the sixth amendment's purpose of interposing between the defendant and the prosecution the common sense judgment of defendant's peers.[21]

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16. 391 U.S. 145 (1968).

17. *Id.* at 149.

18. *See* LA. CODE CRIM. P. art. 779, *as amended by* 1968 La. Acts, No. 635.

19. 391 U.S. at 182 (Harlan, J., dissenting). Justice Harlan objected to what he perceived as a total incorporation of the sixth amendment into the fourteenth. Among other things, he feared that a total incorporation would impose an unduly strict uniformity upon the various states and might lead to an eventual lessening of the federal standards under the sixth amendment. *See also* Williams v. Florida, 399 U.S. 78, 138 (1970) (Harlan, J., concurring).

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

21. *Id.* at 92-99. Several commentators believed that the number of jurors at common law came to be fixed at twelve for mystical or superstitious reasons. Note G. Duncombe's explanation:

> [T]his number is no less esteemed by our own law than by holy writ. If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number twelve to try us in our temporal. The

Though, in *Williams*, the Court allowed state deviation from the common law jury size requirement, it did not address the issue of whether the sixth and fourteenth amendments embodied the common law requirement of unanimous verdicts.[22] Criticism of the unanimity requirement centered primarily upon the number of hung juries and the resulting necessity for retrials. As Professor Slovenko of Tulane University noted: "Expediency and analogy are against the common law practice of requiring unanimous verdicts. It is difficult for twelve men to agree on any question, particularly if they come from diversified elements of the population."[23] In its 1972 *Johnson v. Louisiana*[24] decision, the Court decided that a nonunanimous jury verdict (a nine of twelve vote majority) does not offend the defendant's right to due process or equal protection. The case, however, did not rest on sixth amendment grounds since the *Johnson* trial was held prior to *Duncan* and the Court had already decided that the *Duncan* incorporation of the sixth into the fourteenth amendment would not be given retroactive application.[25] In *Apodaca v. Oregon*,[26] the Court held that a nonunanimous verdict (a ten of twelve vote majority), in a case involving a noncapital offense, does not violate the sixth and fourteenth amendments. As in *Williams*, the *Apodaca* Court refused to be swayed solely by the traditional jury requirements in its determination; the Court found that the fourteenth amendment does not incorporate the sixth amendment requisite of unanimity. The Court focused upon the function served by the jury in contemporary society[27] and the ability of nonunanimous juries to perform this function. Upon completion of this inquiry, the Court could "perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one."[28]

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tribes of Israel were twelve, the partriarchs were twelve, and Solomon's officers were twelve.

1 G. DUNCOMBE, TRIALS PER PAIS 92-93 (8th ed. 1766), *quoted in* J. PROFFATT, TRIAL BY JURY 112 n.4 (1877). Lord Coke observed that the "number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc." E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 155a (1st Am. ed. 1812).

22. "We intimate no view whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial." 399 U.S. at 100 n.46.

23. Slovenko, *Control Over the Jury Verdict in Louisiana Criminal Law*, 20 LA. L. REV. 657, 681 (1960).

24. 406 U.S. 356 (1972).

25. *See* DeStefano v. Woods, 392 U.S. 631 (1968).

26. 406 U.S. 404 (1972).

27. *Id.* at 410.

28. *Id.* at 411. The Court's language may indicate that the nine to three verdict which was upheld in *Johnson* would not meet constitutional requirements now that the sixth amendment has been incorporated into the fourteenth.

In the *Williams-Johnson-Apodaca* trilogy of cases, the Supreme Court permitted individual states to modify, through the manipulation of size and unanimity requirements, the traditional form of the jury. However, in its most recent decisions in this area, the Court has rejected further modifications of state criminal trial juries. In *Ballew v. Georgia*,[29] the defendant challenged his conviction by a five-member state trial jury. Although the Court in *Williams* had determined that a six-member jury, in a case involving a noncapital offense, was of sufficient size to meet sixth amendment requirements, it reserved the question of whether smaller juries might also meet this standard.[30] Faced with this exact issue in *Ballew*, the Court expressed doubt as to the validity of a five-member jury under the standards enunciated in *Williams*.[31] Justice Blackmun, writing for the Court, placed great emphasis upon recent empirical studies of juries.[32] While conceding that these studies could not identify the precise number of jurors needed to form a properly functioning jury, he noted that they do "raise significant questions about the wisdom and constitutionality of a reduction below six."[33] The Court found that progressively smaller juries are less likely to foster effective group deliberation[34] and that the studies raise doubts about the consistency and accuracy of the results achieved by smaller panels.[35] The opinion further indicated concern that such a reduction in the size of the jury increases the likelihood that juries will contain no minority representatives.[36] Based upon the above possibilities, the Court concluded that a state criminal trial jury of fewer than six members would threaten sixth and fourteenth amendment interests.[37]

The unanimity question resurfaced in *Burch v. Louisiana*,[38] wherein the Court was called upon to decide the constitutionality of Louisiana's statutory and constitutional provisions permitting nonunanimous verdicts (a five of six vote majority) in state criminal

29. 435 U.S. 223 (1978).

30. In a footnote to its *Williams* opinion, the Court stated: "We have no occasion in this case to determine what minimum number can still constitute a 'jury,' but we do not doubt that six is above that minimum." 399 U.S. at 91 n.28.

31. 435 U.S. at 232.

32. M. SAKS, JURY VERDICTS (1977); Friedman, *Trial by Jury: Criteria for Convictions, Jury Size and Type I and Type II Errors*, AM. STATISTICIAN April 1972, at 21; Nagel & Neef, *Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict*, 1975 WASH. U. L.Q. 933.

33. 435 U.S. at 232.

34. *Id.*

35. *Id.* at 234.

36. *Id.* at 237.

37. *Id.* at 243-44.

38. 99 S. Ct. 1623 (1979)

trials for nonpetty offenses.[39] Louisiana had relied upon the Court's prior decisions permitting six-member juries in noncapital cases[40] and allowing nonunanimous verdicts in cases involving twelve-member juries.[41]

As one writer pointed out: "If 75 percent concurrence (9/12) was enough for a verdict as determined in *Johnson v. Louisiana* then requiring 83 percent concurrence (5/6) ought to be within the permissible limits of *Johnson*."[42] In *Burch*, the Court did not concern itself with the percentage of concurring votes, but rather with the threat to those constitutional principles that led to the establishment of a size threshold of six members.[43] After noting that only two of the twenty-five states utilizing six-member juries also allowed less-than-unanimous verdicts,[44] the Court held that when a state has chosen to reduce the size of its juries to the minimum constitutional number of jurors, nonunanimous jury verdicts are prohibited. In so holding, the Court was influenced by the "threat to preservation of the substance of the jury trial guarantee" that was perceived by the *Ballew* Court.[45]

In this series of post-*Duncan* decisions, the Supreme Court has set forth general guidelines within which states may organize their

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39. LA. CONST. art I, § 17, provides:

> A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury.

LA. CODE CRIM. P. art. 779 (as it appeared prior to 1979 La. Acts. No. 56) stated:

> A defendant charged with a misdemeanor in which the punishment may be a fine in excess of five hundred dollars or imprisonment for more than six months shall be tried by a jury of six jurors, five of whom must concur to render a verdict.
>
> The defendant charged with any other misdemeanor shall be tried by the court without a jury.

40. Williams v. Florida, 399 U.S. 78 (1970).

41. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

42. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 56 n.300 (1974) (citation omitted).

43. 99 S. Ct. at 1628. See text at note 37, *supra*.

44. 99 S. Ct. at 1628 n.12.

45. *Id.* at 1628.

criminal juries. A state may reduce the size of its juries, in non-capital cases, to six members,[46] but juries composed of fewer than six members are prohibited by the sixth and fourteenth amendments.[47] Nonunanimous verdicts are permitted in cases involving twelve-member juries.[48] If, however, the state has chosen to reduce the size of its juries to six members, the Constitution prohibits less-than-unanimous verdicts.[49] These decisions leave at least one question unanswered in the area of jury size and unanimity requirements: the constitutionality of nonunanimous verdicts rendered by juries composed of more than six yet fewer than twelve members.[50] The Louisiana legislature, in response to the *Burch* decision, amended article 779 of the Code of Criminal Procedure to provide for unanimous verdicts in misdemeanor cases involving six-member juries.[51] If the imposition of a unanimity requirement leads to a significant increase in the number of mistrials due to hung juries, proposals might be made to increase the size of juries in misdemeanor cases in order to reinstate a nonunanimous verdict scheme. In its 1950 Projet of a Constitution for the State of Louisiana, the Louisiana State Law Institute proposed that quasi-felonies be tried by eight-member juries, with six members concurring in

46. Williams v. Florida, 399 U.S. 78 (1970).

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

48. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

49. Burch v. Louisiana, 99 S. Ct. 1623 (1979).

50. *Id.* at 1628 n.11.

51. 1979 La. Acts, No. 56. It should be noted that article I, section 17 of the Louisiana constitution, see note 39, *supra*, has not been amended and still requires a concurrence of only five of the six jurors to reach a verdict. Subsequent to the *Burch* decision, the Louisiana Supreme Court, in *State v. Jackson*, 370 So. 2d 570 (La. 1979), granted the state's request for a special jury instruction to the effect that all six of the jurors must concur in a verdict. In *State v. Claiborne*, 370 So. 2d 1257 (La. 1979), the state applied for supervisory writs upon learning that the trial judge intended to instruct the trial jury that, in accordance with the *Burch* decision, there must be a unanimous verdict to convict but that only five of the six jurors need concur in order to acquit the defendant. The Louisiana Supreme Court accepted the state's argument that, since neither the *Burch* decision nor the state constitution distinguishes between verdicts to convict and verdicts to acquit, the imposition of a unanimity requirement on one should also be applied to the other. In all deference to the court, it should be noted that the *Burch* decision addressed only the qusestion of whether the sixth and fourteenth amendment rights of an accused are violated when he is *convicted* by a less-than-unanimous six-member jury. It is difficult to interpret the *Burch* decision as saying that the constitutional rights of an accused are violated when he is *acquitted* by a less-than-unanimous jury. It is submitted that the constitutional guarantee of an acquittal upon the concurrence of five of six jurors, as found in article I, section 17 of the Louisiana constitution, was not invalidated by the *Burch* decision and should still be given effect. Any change in legislative intent should be reflected through an amendment to the constitutional provision in question.

any verdict rendered.[52] The suggestion was opposed by the smaller parishes, which were apprehensive of the additional costs and inconvenience of securing eight-member juries for these lesser crimes.[53] Faced with the possibility of a larger number of mistrials, these smaller parishes might find a scheme utilizing eight-member juries and nonuanimous verdicts to be less costly than the current six-member, unanimous verdict jury scheme.

If Louisiana, or any other state, should choose to authorize less-than-unanimous verdicts by juries composed of more than six, yet fewer than twelve members, the Court may once again be called upon to define the perimeters within which states may organize their criminal trial juries. The cases indicate that the constitutionality of a new jury size or unanimity requirement will depend upon the ability of a jury, conforming to the proposed modification, to perform its constitutional function of safeguarding the accused from governmental and judicial abuse.[54]

The latest decisions indicate a lack of consensus among Court members as to what criteria should be used in determining the ability of a jury to perform its functions. Justice Blackmun's opinion in *Ballew* suggests that decisions regarding jury size and unanimity requirements may, in large part, be based upon empirical jury studies.[55] Justice Powell, joined by the Chief Justice and Justice Rehnquist, concurred in the *Ballew* judgment but criticized Justice Blackmun's "reliance on numerology derived from statistical studies."[56] In answering the criticism, Justice Blackmun, in a footnote to his opinion, stated:

> We have considered them [empirical jury studies] carefully because they provide the only basis, besides judicial hunch, for a

52. LOUISIANA STATE LAW INSTITUTE. PROJET OF A CONSTITUTION FOR THE STATE OF LOUISIANA art. VI, § 32 (1950).

53. *See* Bennett, *Louisiana Criminal Procedure—A Critical Appraisal*, 14 LA. L. REV. 11, 26 (1953).

54. In *Williams*, the Court noted that the primary function of the jury "is to prevent oppression by the Government." 399 U.S. at 100. Similarly, the Court in *Duncan* observed that "[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." 391 U.S. at 156.

55. See note 32, *supra*, and accompanying text.

56. 435 U.S. at 246 (Powell, J., concurring). Justice Powell noted:

> Also, I have reservations as to the wisdom—as well as the necessity—of MR. JUSTICE BLACKMUN'S heavy reliance on numerology derived from statistical studies. Moreover, neither the validity nor the methodology employed by the studies cited was subjected to the traditional testing mechanisms of the adversary process. The studies relied on merely represent unexamined findings of persons interested in the jury system.

Id.

> decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment. Without an examination about how juries and small groups actually work, we would not understand the basis for the conclusion of MR. JUSTICE POWELL that "a line has to be drawn somewhere." We also note that THE CHIEF JUSTICE did not shrink from the use of empirical data in *Williams v. Florida*, when the data were used to support the constitutionality of the six-person criminal jury, or in *Colgrove v. Battin*, a decision also joined by MR. JUSTICE REHNQUIST.[57]

In contrast to the *Ballew* decision, Justice Rehnquist's opinion in *Burch* made no reference to empirical data, nor did it indicate why the *Burch* jury was incapable of performing its constitutional function. Instead, the Court seemed to rely upon what Justice Blackmun termed "judicial hunch"[58] in its decisionmaking. The Court reinforced its conclusion by noting that of those states with six-member juries all but two require unanimity.[59] The difference in approach evidenced by the *Burch* and *Ballew* decisions illustrates the tension that exists between the desire for certainty on the one hand and the impulse toward subjective analysis on the other. By abandoning traditional common law jury requirements, the Court has raised a fundamental question in regard to drawing new guidelines for state criminal trial juries. Should modern guidelines be based, at least in part, upon empirical data or should the Court be guided by its visceral reaction to proposed revisions of the trial jury system? Although the accuracy of some empirical studies may be questioned,[60] decisions based largely upon empirical data may provide more certainty and predictability than guidelines based upon "judicial hunch." Just as the *Williams* Court determined that the common law jury size guidelines was "a historical accident,"[61] so might a future Court determine that contemporary jury guidelines based upon "judicial hunch" are nothing more than arbitrarily drawn lines and are thus subject to modification.

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57. 435 U.S. at 232 n.10 (citations omitted).

58. See text at note 57, *supra*.

59. The Court declared:

> We are buttressed in this view by the current jury practices of the several States. It appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two, including Louisiana, also allow nonunanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.

99 S. Ct. at 1628 (footnote omitted).

60. See note 56, *supra*.

61. 399 U.S. at 89.