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Constitutional Law/Criminal Procedure - Changes in the Supreme Court's View of Trial by Jury - Burch v. Louisiana

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CONSTITUTIONAL LAW/CRIMINAL PROCEDURE—Changes in the Supreme Court's View of Trial by Jury. Burch v. Louisiana, 441 U.S. 130 (1979).

In May 1977, Wrestle, Inc. and Daniel W. Burch, president of the corporation, were arrested in New Orleans and each charged with two counts of the crime of obscenity for displaying "hard core sexual conduct."[1] A jury found both defendants guilty, but a poll of the jury revealed that while the vote against Wrestle, Inc. had been unanimous, the vote against Burch was five to one.[2] The verdicts were proper under Louisiana law,[3] and no issue regarding them was raised in the trial court. After the trial but prior to argument on appeal the United States Supreme Court issued its opinion in *Ballew v. Georgia* in which it unanimously agreed that a five member jury violates the right to jury trial guaranteed by the Constitution.[4] On appeal to the Louisiana Supreme Court Burch's attorney argued that *Ballew* meant that Louisiana's constitutional provision allowing a five vote conviction was contrary to the federal Constitution.[5] The court rejected this contention and concluded that there was no reason to rule against the presumed federal constitutionality of the state's constitution.[6]

The Supreme Court of the United States disagreed. In a majority opinion for the Court, Justice Rehnquist reviewed and summed up prior right-to-jury-trial cases: "We have thus held that the Constitution permits juries of less than 12 members, but that it requires at least six. And we

1. LA. REV. STAT. ANN. § 14:106 (West); State v. Wrestle, Inc., 360 So.2d 831, 833 (La. 1978). The display was by means of coin operated projectors which allowed viewing of films on a small screen on the wall of a booth.
2. Burch v. Louisiana, 441 U.S. 130, 132 (1979).
3. Art. 1, § 17 of the Louisiana Constitution provides in part: "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." Burch received two consecutive seven month sentences which were suspended in lieu of two years inactive probation for each sentence on condition that he pay $1000 to the judicial expense fund. Wrestle, Inc. was fined $600 on each count. State v. Wrestle, Inc., *supra* note 1.
4. Ballew v. Georgia, 435 U.S. 223 (1978). The Court struck down Georgia's law allowing unanimous five person verdicts but did not agree on an opinion. For Georgia law see: GA. CONST. art. VI, § 16, ¶ (1945), codified as GA. CODE ANN. § 2-5101; now art. VI, § 15, ¶ 1 (Const. 1976), codified as GA. CODE ANN. § 2-4401 (1977).
5. The Louisiana Supreme Court allowed the argument as "error patent on the face of the proceedings." State v. Wrestle, *supra* note 1, at 837.
6. *Id.* at 838.

have approved the use of certain nonunanimous verdicts in cases involving 12-person juries.[7] Turning to the case before the Court, the Justice noted that it:

> lies at the intersection of our decisions concerning jury size and unanimity. As in *Ballew*, we do not pretend the ability to discern *a priori* a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. But having already departed from the strictly historical requirements of jury trial, it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved.[8]

The line drawn overruled the Louisiana Supreme Court because for "much the same reasons that led us in *Ballew*" to decide that five member juries threaten "the fairness of the proceeding and the proper role of the jury" the present conviction "presents a similar threat to preservation of the substance of the jury trial guarantees. . . ."[9] On this basis the Court reversed the conviction of Burch and affirmed that of Wrestle, Inc.[10]

The opinion was brief (9 pages) and lacked an analysis of the issue before the Court. No rationale was given for the decision other than the brief reference to *Ballew*, and it is not helpful. The survey of prior cases had described *Ballew* as having decided that a jury of five in a nonpetty trial raises "sufficiently substantial doubts as to the fairness of the proceeding and proper functioning of the jury to warrant drawing the line at six."[11] Thus, the

7. Burch v. Louisiana, *supra* note 2, at 137, citations omitted.
8. *Id.*
9. *Id.* at 138. Justice Stevens concurred because he agreed with the Court's resolution of the question "whether conviction by a nonunanimous six-person jury of a nonpetty offense violates the Sixth and Fourteenth Amendments." *Id.* at 139-40. Justice Brennan, joined by Justices Stewart and Marshall, agreed that the conviction must be reversed "as a violation of his right to jury trial guaranteed by the Sixth and Fourteenth Amendments." *Id.* at 140. These Justices dissented in part because they would have reversed both convictions on the grounds that the obscenity statute was unconstitutional.
10. *Id.* at 139. On remand the Supreme Court of Louisiana affirmed the conviction of Wrestle, Inc. and reversed and remanded that of Burch. State v. Wrestle, Inc., 371 So.2d 1165, 1166 (1979).
11. *Id.* at 137.

terms of *Ballew* were simply repeated in *Burch* without explanation. In addition, although the Court in *Ballew* had unanimously agreed as to the result, the opinion in the case represented the views of only two justices[12] and stated that it relied on "the principles ennunciated in *Williams v. Florida*."[13] Finally, although the sixth and fourteenth amendments to the Constitution were mentioned in *Burch*, they were not discussed; nor was the Court's holding stated in terms of them.[14] Since *Duncan v. Louisiana*[15] had held that the sixth amendment's right to jury trial is "fundamental" and applicable to the states, the absence of discussion is particularly noticeable.

Although these omissions are significant, more disturbing is that they suggest that an issue regarding a right protected by the Constitution can be settled by the Court doing little more than exercising its judgment and drawing a line without reference to principles and application of them to the issue. The omissions were not accidental. They are consisted with a significant shift in the Court's approach to the right to jury trial which has occurred over the last decade. As indicated in the portions of the opinion quoted above, the shift has been from a historical view of

12. The opinion in the case by Justice Blackmun was concurred in only by Justice Stevens. It held that "the 5-member jury does not satisfy the jury trial guarantee of the Sixth Amendment, as applied to the States through the Fourteenth . . . ." Ballew v. Georgia, *supra* note 4, at 228. The holding was agreed with by Justice Brennan who was joined by Justices Stewart and Marshall. *Id.* at 246. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, specifically refused to join the opinion because it "assumes full incorporation of the Sixth Amendment, by the Fourteenth Amendment" contrary to their views. *Id.* They also expressed "reservations as to the wisdom" of the opinion's "heavy reliance on numerology." *Id.* Justice White concurred in the judgment on the limited ground that a jury fewer than six persons did not satisfy the fair cross-section requirement of the sixth and fourteenth amendments. *Id.* at 245. Thus, while the entire Court agreed in the judgment and a majority agreed as to the holding, the opinion itself represented the views of only two Justices.

13. Ballew v. Georgia, *supra* note 4, at 224.

14. Although the concurring opinions clearly stated the Court's conclusion in terms of the sixth and fourteenth amendments, the majority opinion did not. The opinion mentioned the amendments three times, but each time for a specific purpose: first to note that certiorari was granted to consider whether Louisiana law violated the right to trial by jury guaranteed by the amendments, Burch v. Louisiana, *supra* note 2, at 131-32; second, to state that the issue was argued before the Louisiana Supreme Court, *Id.* at 133; and, third, to state the holding of *Duncan v. Louisiana*, *Id.* at 134. The two amendments were also mentioned in footnotes describing concurring opinions.

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

the right, to one in which the "function" of the jury and the "substance" of the right are the focus of discussion. The purpose of this note is to examine and critique that shift and, in doing so, provide an explanation of the omissions and the brevity of the *Burch* opinion. Since the history of cases to be discussed ranges from *Duncan*, decided in 1968 while Chief Justice Warren was still in office, to *Burch*, decided under Chief Justice Burger, a result of the discussion will be to show how the present Court has substantially altered one area of Constitutional law.

I. THE RIGHT TO JURY TRIAL PRIOR TO *Duncan*

The United States Constitution contains two provisions regarding the right to jury trial in criminal trials. Article 3, Section 2, clause 3 provides that: "The trial of all crimes, except in cases of impeachment, shall be by jury . . .." The sixth amendment provides that: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . .."[16]

The earliest cases interpreting these provisions were concerned with when and where the right obtained and not the particulars of the right.[17] When the issues of unanimity and size were finally brought to the Court, it had little trouble disposing of them. The question whether the right included a requirement of a unanimous verdict was first raised in a civil case in 1897.[18] The Utah territorial legislature had enacted a statute which allowed nine members of a civil jury to render a verdict. Finding that the U.S. Constitution applied to the territory, the Court first determined that the defendant had a seventh amendment right to trial by jury and then stated that "unanimity was one of the peculiar and essential features of trial by jury at the

16. In addition, the seventh amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."
17. Callen v. Wilson, 127 U.S. 540 (1888) (right to jury trial applies in the District of Columbia); Missouri v. Lewis, 101 U.S. 22 (1879) (dictum that a state may give no right to a jury trial and not offend the equal protection clause of the fourteenth amendment); Walker v. Sauvinet, 92 U.S. 90 (1875) (seventh amendment applies only in federal courts); *see also* Ex Parte Milligan, 71 U.S. (4 Wall) 2 (1866).
18. Am. Publishing Co. v. Fisher, 166 U.S. 464 (1897).

common law. No authorities are needed to sustain this proposition."[19] When the issue of jury size arose a year later,[20] only a slightly longer discussion was needed to decide that "the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons."[21]

The brevity with which the Court disposed of the issues in these cases reflects the obvious nature the right was thought to have. The requirements of a jury of twelve and unanimity of verdict had been well established in England, followed in the colonies, and adopted by the federal and state courts.[22] As with other Constitutional provisions, the Court viewed the sixth and seventh amendments as preserving the rights which had been present at common law. Questions could be quickly settled by referring to no lesser authority than Blackstone.[23]

This approach continued and by 1930, when the issue of whether a twelve member jury could be waived was brought to the Court, the meaning of the phrase "trial by jury" seemed so well settled that the Court could declare that its meaning was:

> A trial by jury as understood and applied at common law and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question. Those elements were: (1) That the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in

19. *Id.* at 468.
20. Thompson v. Utah, 170 U.S. 343 (1898).
21. *Id.* at 349-50. *Cf.* the Court's comment concerning unanimity at 355. In Maxwell v. Dow, 176 U.S. 581 (1900) the requirement was held not to apply to the states. *See* the Court's comment on unanimity and twelve member juries at 586. *Accord,* Rassmussen v. United States, 197 U.S. 516 (1905).
22. *See* Williams v. Florida, 399 U.S. 78, 117 (1970) (concurring opinion).
23. "But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion." 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349-50, quoted in Duncan v. Louisiana, *supra* note 15, at 151-52.

respect of the facts; and (3) that the verdict should be unanimous.[24]

II. THE RIGHT TO JURY TRIAL IN DUNCAN V. LOUISIANA

The *Duncan* Court did not see itself as changing the right to jury trial but expanding it. The days when the Court had consistently refused to extend provisions of the Bill of Rights to the states had long since passed, and the incorporationist approach (applying provisions of the amendments to the states through the due process clause of the fourteenth amendment) had become well established.[25] The approach was not without its opponents and was vigorously debated and criticized in *Duncan* as well as other opinions.[26]

Gary Duncan had been convicted of simple battery under a Louisiana law which provided a maximum penalty of two years imprisonment.[27] Under the Louisiana Constitution non-capital crimes carrying penalties of imprisonment without hard labor were to be tried by a judge without a jury.[28] The issue before the United States Supreme Court was whether or not the sixth and fourteenth amendments secured the right to jury trial in state criminal prosecutions.[29] After briefly reviewing other portions of the Bill of Rights which had been held to apply to the states and the relevant fifth and sixth amendment standards for review, the Court held that "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."[30]

24. Patton v. United States, 281 U.S. 276, 288 (1930) (dictum).
25. *See e.g.*, Adamson v. California, 332 U.S. 46, 68 (1947) (dissenting opinion), *and see* the history of the fourteenth amendment provided in the opinion's Appendix A at 92.
26. *See e.g.*, Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (concurring opinion).
27. LA. REV. STAT. ANN. § 14:35 (West 1950).
28. LA. CONST. art. VII, § 41 (1948). The provision has since been amended.
29. Duncan v. Louisiana, *supra* note 15, at 147. Cf. *Duncan's* companion case, Bloom v. Illinois, 391 U.S. 194 (1968).
30. *Id.* at 149. The holding was agreed upon by seven Justices. They, however, disagreed upon the theory by which the sixth amendment was to be applied to the states. Four held the selective incorporation doctrine expressed by Justice White in the plurality opinion. Justice Black, joined by Justice Douglas, agreed that the sixth amendment had indeed been incorporated

Although unanimity and jury size were not directly at issue in *Duncan*, they were central to the argument before the Court and engendered considerable controversy within it. Louisiana had expressed concern that an adverse decision would mean that it and other states would need to comply with these federal requirements. Indeed, given a Court dominated by the incorporationist approach, there was no reason to think that this would not be the case. Only a few years earlier the Court had made clear that it rejected "the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights' . . .."[31]

The Court did not rule directly on the question, but responded in a footnote that "it seems very unlikely to us that our decision today will require widespread changes in state criminal processes."[32] Two reasons were given for the statement. They were that sixth amendment decisions "are always subject to reconsideration" and that the impact of the *Duncan* decision would be minimal because only four states allowed juries of fewer than twelve to sit without a defendant's consent and only two states allowed less-than-unanimous convictions for crimes with penalties of imprisonment greater than one year.[33] While not stating that unanimous verdicts and twelve member juries are required of the states, these comments indicate that such, indeed, was to be the effect of the holding unless matters underwent "reconsideration."

At least some Justices were ready to do just that. Evidence of the depth of the controversy on the Court and the importance of the footnote can be found in Justice

by the fourteenth, but made clear that this was so because the entire Bill of Rights had been made applicable by the passage of the fourteenth amendment. *Id.* at 162, 166. Justice Fortas concurred, but did so on the basis that the due process clause requires the right to jury trial because the right is fundamental. Bloom v. Illinois, *supra* note 29, at 211-12. That the sixth amendment guaranteed the right in federal cases was, for him, not conclusive, but a "powerful reason" for determining that the right was fundamental. *Id.* at 212.

31. Malloy v. Hogan, 378 U.S. 1, 10-11 (1964), quoting from Ohio ex rel. Eaton v. Price, 364 U.S. 263, 275 (1960) (dissenting opinion).
32. Duncan v. Louisiana, *supra* note 15, at 158 n. 30.
33. *Id.*

Fortas's concurring opinion and Justice Harlan's dissent. Justice Fortas disapproved of the footnote. He disagreed with its "implication" that requiring the states to accord the right to a jury trial meant "importing" the "ancillary rules" which accompany the right.[34] Specifically he stated:

> Neither logic nor history nor the intent of the draftsmen of the Fourteenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that this Court's decisions have applied.[35]

Justice Harlan was even more direct in his criticism. His dissenting opinion was primarily devoted to attacking the incorporationist approach and defending "fundamental fairness" as the standard by which due process limitations on the states are to be determined.[36] On the *Duncan* issue he reproached the majority because "It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored."[37]

Thus, *Duncan*, when read in light of incorporationist theory and the statements of those Justices who disagreed with its holding, seems to have been a case in which those on the Court thought that they were not only deciding that states must provide a jury in criminal trials whenever the sixth amendment requires, but also deciding that a Constitutional jury must consist of twelve members who must render a unanimous verdict.

III. THE RIGHT TO JURY TRIAL AFTER DUNCAN

A. *Williams v. Florida*

Despite the views of the members of the Court at the time of *Duncan*, when the issue of twelve member juries was

34. Bloom v. Illinois, *supra* note 29, at 213 (concurring opinion).
35. *Id.*
36. Duncan v. Louisiana, *supra* note 15, at 179-80.
37. *Id.* at 181. Both Justice Harlan's and Justice Fortas's views followed from the "fundamental fairness" approach they shared in common. Under it the specific practice was examined to see whether it was necessary to protect

brought to it two years later in *Williams v. Florida*[38] reconsideration became reality. The case presented the Court with a challenge to the constitutionality of a Florida statute allowing six member juries. As the subsequent reliance of *Burch* on *Ballew* and *Ballew* on *Williams* has made clear, the "principles" of *Williams* are important. They, however, are not a set of standards to be applied to an issue, but the method used by Justice White to reach the result.

The opinion was set within the framework of *Duncan* and its application of the sixth amendment to the states through the fourteenth. Section II, in which the issue of jury size was first discussed, began by stating both the holding of *Duncan* and the ultimate holding of *Williams* in terms of the amendments.[39] The opinion also concluded by repeating that "petitioner's Sixth Amendment rights, as applied to the States through the Fourteenth Amendment were not violated by" the six member jury.[40]

Within this framework of incorporationist language lay the method. It consisted, first, of a lengthy and extensively footnoted discussion of the development of the right to trial by jury and the drafting of the sixth amendment. On the basis of his examination of history, Justice White concluded that the number twelve appeared to be "a historical accident, unrelated to the great purposes which gave rise to the jury in the first place."[41] He next asked whether this accidental feature "has been immutably codified into our Constitution."[42] Finding from his account of the adoption of the sixth amendment[43] that "there is absolutely no indication . . . of an explicit decision to equate the constitutional and common-law characteristics of the jury," he turned to "other than purely historical considerations to determine

"liberty" under the due process clause of the fourteenth amendment. They arrived at opposite sides in *Duncan* because Justice Fortas concluded that a jury trial was required, while Justice Harlan, along with Justice Stewart who joined him, concluded that it was not.

38. Williams v. Florida, *supra* note 22.
39. *Id.* at 86.
40. *Id.* at 103.
41. *Id.* at 89-90.
42. *Id.* at 90.
43. *Compare*, Kershen, Vicinage, 29 OKLA. L. REV. 801, 817-28 (1976).

which features of the jury system, as it existed at common law, were preserved in the Constitution."[44]

The second part of the method was the discussion of "other" considerations. The test Justice White established was that of determining whether the feature of jury trial under consideration performs some function in meeting the purposes of trial by jury,[45] in particular preventing "oppression by the Government."[46]

> Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.[47]

The Justice immediately noted that the jury's "performance of this role is not a function of the particular number" of the jury.[48] He then went on to discuss several other matters which might require a jury composed of a particular number. The jury should "probably" be large enough "to promote group deliberation" and "provide a fair possibility for obtaining a representative cross-section of the community."[49] These considerations were dismissed with the comment that "we find little reason to think" that they are "in any meaningful sense less likely to be achieved" with six rather than twelve member juries.[50] "And certainly, the reliability of the jury as a factfinder hardly seems to be a function of its size."[51] The next question discussed was whether or not a twelve member jury gave the defendant

44. Williams v. Florida, *supra* note 22, at 99.
45. *Id.* at 99-100.
46. *Id.* at 100. The purpose is taken from Duncan v. Louisiana, *supra* note 15, at 155-56.
47. *Id.* As explained in *Duncan* the right to jury trial was included in the Constitution because those who wrote the amendment "knew from history and experience that it was necessary to protect against unfounded criminal charges . . . ." In particular, they feared "judges too responsive to the voice of higher authority," "biased or eccentric" judges, and "the corrupt or overzealous prosecutor." Duncan v. Louisiana, *supra* note 15, at 156.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 100-101.

greater chances of acquittal. This concern was met with the observation that "what few experiments have occurred—usually in the civil area—indicate that there is no discernable difference between the results reached by the two different-sized juries."[52] Finally, Justice White stated that while "in theory the number of viewpoints represented on a randomly selected jury" ought to be greater with a twelve member jury, "in practice the difference . . . seems likely to be negligible."[53]

Having thus raised, defined, and disposed of the purposes and functions of jury trial, the Justice concluded that "the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics'."[54]

B. Cases after Williams

The method used by Justice White in *Williams* has been followed, with some variation, in subsequent jury trial cases. When the issue of unanimity of juries in state criminal trials was brought to the Court in *Apodaca v. Oregon*,[55] Justice White again wrote the opinion.[56] Again he referred to *Duncan* and the sixth and fourteenth amendments to state the claim on which certiorari was granted, but he immediately turned to a discussion of *Williams*.[57] Comparing the

52. *Id.* at 101. Six sources are cited in support of the statement in n. 48.
53. *Id.* at 102.
54. *Id.*
55. Apodaca v. Oregon, 406 U.S. 404 (1972) (plurality opinion). The outcome is peculiar. The opinion represents the views of Justices White (its author), Blackmun, Rehnquist, and Chief Justice Burger. While agreeing that the sixth amendment applies uniformly to federal and state courts, they find that unanimity is not required. Justices Marshall, Brennan, and Douglas in separate dissenting opinions would also have applied the sixth amendment to the states but dissented because they believed unanimity to be required by the sixth amendment. Justice Stewart found unanimity to be required but based his conclusion on the fourteenth amendment. Justice Powell agreed that unanimity was required, but only of the federal government. Thus, while seven Justices held the view that the sixth amendment applies to state and federal governments equally, and five agreed that the Constitution requires unanimous verdicts, the Court held that unanimous verdicts are *not* required in state criminal trials.
56. Justice White also wrote the opinion in *Apodaca's* companion case, Johnson v. Louisiana, *supra* note 26. Since the trial in *Johnson* occurred prior to *Duncan* and *Duncan* was held not to apply retroactively, DeStefano v. Woods, Sheriff, 392 U.S. 631 (1968), *Johnson* is not a sixth amendment case and is not discussed in this note.
57. Apocada v. Oregon, *supra* note 55, at 406.

history of jury unanimity with the history of the twelve member jury, the Justice found there to be no clear indication of intent[58] and, so, moved to "other than purely historical considerations."[59] The inquiry, he stated, "must focus upon the function served by the jury in contemporary society."[60] The purpose of preventing oppression by imposing "the common sense judgment of a group of laymen" was again given, and again the conclusion followed that "A requirement of unanimity . . . does not materially contribute to the exercise of this commonsense judgment."[61]

Only slight variations in the approach appeared in Justice Brennan's majority opinion in *Colgrove v. Battin.*[62] It began by examining the history of the adoption of the seventh amendment, and, because the Justice found the amendment's purpose to have been "preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents,"[63] he concluded that, quoting *Williams*, "history reveals no intention on the part of the Framers 'to equate the constitutional and common-law characteristics of the jury'."[64] The Justice then discussed whether or not a jury of twelve is part "of the substance of the common-law right of trial by jury."[65] Since the purpose of jury trial was "to prevent government oppression" in criminal cases and to "assure a fair and equitable resolution of factual issues" in both criminal and civil cases, he said, "the question comes down to whether jury performance is a function of jury size."[66] Noting that *Williams* had rejected this idea and that "nothing has been suggested to lead us to alter that conclusion," Justice Brennan concluded that "it cannot be said that twelve members is a substantive aspect of the right of trial by jury."[67] Finally, the Justice turned to "the question whether a jury of six

58. *Id.* at 408-10.
59. *Id.* at 410.
60. *Id.*
61. *Id.*
62. Colgrove v. Battin, 413 U.S. 149 (1973).
63. *Id.* at 155.
64. *Id.* at 156, Williams v. Florida, *supra* note 22, at 99.
65. *Id.* at 157.
66. *Id.*
67. *Id.*

satisfies the Seventh Amendment guarantee of 'trial by jury'."[68] He noted that the conclusion of *Williams* that there was "no discernible difference"[69] between the two sizes of juries had inspired a number of studies of jury decision making. Acknowledging them by means of a long footnote, the Justice stated that none of them "persuades us to depart from the conclusion reached in *Williams*,"[70] and concluded that a jury of six satisfies the seventh amendment's guarantee.[71]

In *Ballew v. Georgia*[72] the issue presented to the Court was the constitutionality of five member juries in state criminal trials. The Court in *Williams* had expressly reserved this issue.[73] The opinion in *Ballew* by Justice Blackmun began with the statement that it followed the "principles ennunciated in *Williams v. Florida.*"[74] The issue of the case,[75] the argument at trial,[76] the argument on state appeal,[77] and the case's holding[78] were set forth in terms of the sixth and fourteenth amendments. *Duncan* was described as having held that the right to jury trial was "fundamental" and as applying the sixth amendment to the states.[79] But the opinion's discussion was of *Williams*. The purpose of the jury in preventing oppression was repeated, as were the needs that the jury should be of sufficient size to promote group deliberation, provide reliability of verdicts, and provide a representative cross-section.[80]

To find whether a five member jury met these requirements, Justice Blackmun turned to studies of jury and small group deliberation processes. Both *Williams* and *Colgrove* had referred to such studies, but they were discussed for the

68. *Id.* at 158.
69. *Id.*, Williams v. Florida, *supra* note 22, at 101.
70. *Id.* at 159. The studies are listed in n. 15.
71. *Id.* at 160.
72. Ballew v. Georgia, *supra* note 4, at 224.
73. *Id.* at 230, Williams v. Florida, *supra* note 22, at 91 n. 28.
74. *Id.* at 224.
75. *Id.*
76. *Id.* at 226, 227.
77. *Id.*
78. *Id.* at 228.
79. *Id.* at 229, *see also* at 224 n. 1.
80. *Id.* at 230.

first time in *Ballew*. "They raise," the Justice stated, "significant questions about the wisdom and constitutionality of a reduction below six."[81] In discussing the studies he presented five points. First, "progressively smaller juries are less likely to foster effective group deliberation."[82] Second, the data "raise doubts about the accuracy achieved by smaller and smaller panels."[83] Third, in criminal cases the variance in jury verdicts between smaller and larger juries "amounts to an imbalance to the detriment of . . . the defense."[84] Fourth, as juries decrease in size there are problems with "the representation of minority groups in the community."[85] And, fifth, methodological problems which tend "to mask differences in the operation of smaller and larger juries" have been found in the research.[86] The outcome was that:

> While we adhere to, and reaffirm our holding of Williams v. Florida, these studies . . . lead us to conclude that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members. We readily admit that we do not pretend to discern a clear line between six members and five. But the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six.[87]

IV. ANALYSIS OF THE COURT'S APPROACH

A. *The Development from Duncan to Burch*

In *Duncan* the United States Supreme Court extended the sixth amendment's right to jury trial to the states through the fourteenth amendment. Given the facts before the Court, the holding was only that states are constitutionally required to *provide* a jury trial. However, given the incorporationist views of the *Duncan* majority, the historical content the right was thought to have, the

81. *Id.* at 232.
82. *Id.*
83. *Id.* at 234.
84. *Id.* at 236.
85. *Id.*
86. *Id.* at 237.
87. *Id.* at 239.

Court's rejection of "watered down" versions of constitutional rights, and the debate within the *Duncan* Court, it is clear that the Court meant to extend the full right to the states. Nevertheless, because of the kind of case before the Court subsequent cases have been able to find the phrase "right to jury trial" to be more ambiguous than the *Duncan* Court thought it to be.

While the approach developed in *Williams* and followed in subsequent cases can be viewed as the analysis the Court uses to examine the extent of the right incorporated, the opinions in those cases make it clear that incorporationist theory has little to do with the outcome of the case. Members of the Court continue to disagree about incorporationist theory,[88] but in the context of the right to jury trial the disagreement seems to have more to do with the statement of the holding than the holding itself. Similarly, the recitation of the holding of *Duncan* appears to be little more than ritual since that case now applies only when a defendant has been denied a jury.

Instead, the pattern of steps developed by Justice White in *Williams* constitutes the approach of the Court. The question to be asked is not what history mandates the meaning of the amendment to be, but what preserves the "purpose" or "function" of trial by jury. Determining whether the feature at issue before the Court meets the "purpose" has so far been settled by reference to jury studies. Thus, the question of whether a particular feature of jury trial is included within the sixth amendment's guarantee has been made a "factual"[89] question of whether that feature is necessary to preserve the purpose of trial by jury as defined by the Court.

B. The Decision in Burch

With this shift in mind, the brevity and omissions of the opinion in *Burch* can be readily understood. The pattern

88. *See* notes 9, 12, 14, 30, and 55 *supra*.
89. Although juries may be studied and factual conclusions reached, determining on the basis of such studies that particular features "preserve" designated purposes requires interpretation of the data and judgment as to its import.

of prior decisions was repeated, not by repeating the steps of the method but by a kind of shorthand in which the decisions of prior cases are substituted for the steps. *Duncan*, the sixth and fourteenth amendments, and incorporationist theory did not need to be discussed because they were no longer relevant to the outcome of the case. No reference to principles and discussion based upon them was needed because the determination to be made was a "factual" one. The brief reference to *Ballew* was sufficient because the reference was to the conclusions Justice Blackmun drew from the jury studies he described. Finally, the case was one in which the Court had to draw a line because it had to make the "factual" determination of whether the "purpose" of jury trial was preserved when a jury was allowed to render a five to one verdict.[90]

V. CRITIQUE OF THE COURT'S APPROACH

The approach developed in *Williams* is clearly carried through subsequent cases. It seems equally clear that it is result oriented. Although the Court is the final arbiter of the intent behind Constitutional provisions, the approach it has taken to discover intent contains numerous flaws. Similarly, the use the Court has made of jury studies appears to be not only incorrect in cases prior to *Ballew*, but also motivated by the conclusions to be drawn.

A. Historical Considerations

In *Williams* Justice White concluded that the number twelve was a "historical accident."[91] It was this conclusion, combined with finding no clear intent on the part of the drafters of the sixth amendment, that allowed him to turn to "other than purely historical considerations."[92] While there is no reason to doubt his conclusion, his investigation

90. A more pragmatic, though speculative, way of reading the opinion is as a compromise written to elicit majority agreement. The Court in *Ballew* had been sharply divided even when unanimous as to the result. *See* note 12 *supra*. Not stating the holding in terms of the sixth and fourteenth amendments and not discussing jury studies avoided the controversial parts of the *Ballew* opinion.
91. See the text accompanying note 41 *supra*.
92. See note 44 and the text accompanying notes 41-44 *supra*.

relied on a crucial assumption. It assumed that a rational reason for the origin of the number twelve was the only possible evidence that would support the continued use of that number. Having set out to find such a reason, the investigation had to fail. First, as the Justice himself noted,[93] the number twelve was fixed by the middle of the fourteenth century. There is scant written evidence explaining why anything was done as it was at that time. Furthermore, it is likely that the number was gradually settled upon rather than chosen at one time. The investigation also had to fail because it was looking in the wrong place. "Twelve" carries no special magic. Even if contemporary explanations were available, no more rational reasons would be given for the number than could be given now. There may have been, nonetheless, good and proper reasons for preferring a jury of that size rather than one of a much smaller or larger number. The reasons may have been fear of juror intimidation, or the need for an appropriately small number to allow discussion and decision making; or it may have been the need to have a sufficiently large number to offset the harsh penalties of the time. Whatever the reason, it was not to be found by searching for a justification for the number twelve.[94]

Focusing on the origin of the number twelve also missed what should have been an important consideration in examining the common law right to jury trial. The fact that the number chosen was "accidental" does not mean that its retention by first English and then American courts for six hundred years prior to *Williams* was also accidental. Subsequent history should have been more important than the origin of the number.

Similar considerations apply to the history of the requirement of unanimity in *Apodaca*. Again, the origin of the requirement may be, as Justice White noted, "shrouded

93. Williams v. Florida, *supra* note 22, at 87 n. 18. The Justice quotes from: SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW 75-76 (1922).
94. *Cf.* Sperlich, . . . *And then there were six: the decline of the American jury*, 63 JUDICATURE 262, 266 (1980).

in obscurity,"[95] but the reasons the practice was retained and the purposes it was thought to serve should have been important in determining the constitutional role of unanimity. Such considerations, however, were not part of the opinion.

The discussion of constitutional history was similarly flawed. Determining the intent of a constitutional provision by investigating its history is, of course, proper. However, the nature of the investigation undertaken by Justice White in *Williams* indicates that it was designed to arrive at a particular conclusion. He concluded that "there is absolutely no indication" of "an explicit decision" that the jury intended by the authors of the sixth amendment was to be the common law jury.[96] While there is no reason to doubt this conclusion, the standard of an "explicit decision" was so high that it flawed the inquiry. To search for an explicit decision is to stipulate that intent will be relevant only when the issue before the Court is the same as, or very similar to, one debated by the drafters of the Constitution. If the question is the intent of the drafters, the reasonable place to begin an investigation is with a search to find whether there is *any* indication of intent. Perhaps little evidence can be found or no strong conclusion can be drawn from the evidence, but requiring an "explicit decision" means that in all but the rarest case no intent will be found.

In addition, looking for an explicit decision, not finding one, and then letting the matter rest suggests that not only was there no decision but also no intent. It is not likely that such was the case. If no clear intent can be discovered, it is reasonable to assume that the provision was intended to preserve the right as it was at the time the amendment was adopted. It was this inference that Justice White was attempting to avoid, and the standard of an "explicit decision" seems to have been designed to insure that this alternative was not reached.

95. Apodaca v. Oregon, *supra* note 55, at 407 n. 2.
96. See the text accompanying note 43 *supra*.

The standard was also high enough that it allowed prior cases to be easily dealt with. *Thompson v. Utah*[97] was criticized for not discussing whether "every feature of the jury as it existed at common law . . . was necessarily included in the Constitution."[98] Similarly, statements in all other cases were denounced for relying "solely on the fact that the common-law jury consisted of 12."[99] The demand that these cases provide an explanation served to cover the fact that the statements made in them were made on the basis of the *theory* that the Constitution was intended to preserve the common law jury.[100] Making the criticism allowed the Justice to avoid the need to find fault with that theory.

B. The Move to Alternate Grounds

The shift to alternative considerations and the purpose chosen as the alternative were also designed to reach a result. In *Williams* the move was described as a turn "to other than purely historical considerations to determine" the features of the common law jury that "were preserved in the Constitution."[101] This statement suggested that the alternative inquiry would determine some fact about the past. Yet, the next sentence described the inquiry as determining the function the feature performs in relation to "the purposes of the jury trial."[102] Such inquiry would be into the present performance of juries. There was no logical connection between the two statements. Rather, the transition seems intended to obscure the fact that the common law origin of the feature would play no role in the judgment that the feature did or did not meet the "purpose" of jury trial. The feature discussed could as easily have been one unknown at common law.

The purpose of jury trial selected by Justice White is also problematic. The "safeguard from oppression" standard was taken from *Duncan*, but in that case it was

97. See note 26 *supra* and the accompanying text.
98. Willams v. Florida, *supra* note 22, at 91.
99. *Id.* at 92.
100. See the discussion in Section I of the text.
101. See the text accompanying notes 41-44 and 92 *supra*.
102. See the text accompanying note 45.

described as the intent of the framers.[103] Using it as the standard by which to measure the sixth amendment's jury trial right, was to say that we know the purpose of the provision, but not whether the drafters believed that the juries they used satisfied it. Although it may be that alternatives to twelve member juries and unanimous verdicts can also meet the purpose, it is likely that, having had the purpose in mind, the drafters believed that the common law jury met it.

It was the shift to alternative considerations that allowed the introduction of the idea of "purpose" and the naming of the safeguard function as the purpose. The choice of this standard determined the outcome of the cases. Once selected, it was the fact that the jury was present and not the number of its members or the unanimity of its verdict, that satisfied the purpose by creating a barrier to oppression. Number and verdict could be relevant to how well the jury performed subsidiary functions, as was the case in *Ballew* and presumably *Burch*, but not whether it met the purpose of jury trial. The selection of the "safeguard" purpose meant that very little would be required for a Constitutional jury. Only by referring back to the additional functions mentioned in *Williams* was Justice Blackmun in *Ballew* able to establish the unconstitutionality of five member juries. Alternatives to the "safeguard" purpose were available to Justice White in *Williams*.[104] While a different purpose may or may not have required a twelve member jury, the determination would have been more difficult than with the "safeguard" purpose.

C. *The Use of Jury Studies*

However problematic Justice White's method, it has been the use of jury studies which has led the Court into trouble. In *Williams* Justice White cited six articles to support his statement that there is "no discernible difference between the results reached by the two different sized

103. See note 47 *supra*.

104. A fuller discussion of this point can be found in: Singley, *Ballew v. Georgia: Five is Not Enough for What?*, 52 TEMP. L. Q. 217, 231-34 (1979).

juries."[105] After the decision several articles pointed out serious deficiencies in the studies.[106] They were, nevertheless, cited again in *Colgrove* along with other studies, including those which had been critical of them.[107] *Colgrove's* use of studies was criticized in other articles which, along with some of the earlier articles and later studies, than appeared in *Ballew*.[108] The use made of studies in *Ballew* has been well received.[109] However, many of the studies cited were comparative studies of six and twelve member juries conducted after the *Williams* decision. While they support the Court's decision that five member juries do not operate the same as twelve member juries, they equally support the conclusion that six member juries do not operate the same as twelve member juries. Thus, if their use is valid and they are accepted by the Court, *Williams* and *Colgrove* should be overruled.[110]

It seems likely that the citation of jury studies in *Williams* was done for the purpose of giving credence to the conclusions the Court wished to make. By using them, however, the Court opened itself to criticism by those who work in the area. It also opened itself to arguments in subsequent cases which use other studies as well as criticisms of the studies previously cited. Factual determinations, unlike questions of constitutional interpretation, are not matters the Court can rule on with finality. Nor can it declare which studies are valid and which are not. The use of studies as the basis for decisionmaking requires a Court which is willing to change its decisions to accord with the best possible data. Yet, the Supreme Court is not known as an institution which is willing to overturn recent decisions.

105. Williams v. Florida, *supra* note 22, at 101. The studies are listed at 101 n. 48.
106. *E.g.*, Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971). The "data" used in *Williams* consisted largely of observations by judges and attorneys and not controlled studies. The conclusion of the article states: "the change in verdicts that might be expected from the reduction of the twelve member jury to six members is by no means negligible." *Id.* at 724.
107. Colgrove v. Battin, *supra* note 62, at 158 n. 13, 15, and 16.
108. Ballew v. Georgia, *supra* note 4, at 231 n. 10.
109. For a favorable analysis of Justice Blackmun's five points see: Sperlich, *Trial by Jury: It May Have a Future*, SUP. CT. L. REV. 191, 209 (1978), and Singly, *supra* note 104, at 249.
110. *Id.* at 218.

Although this suggests there is a basic problem inherent in the Court's use of jury studies or other social science data, a more fundamental concern is the use to which such data should be put. So far the use of jury studies has been to establish that some feature of the jury is or is not necessary to preserve the purpose of jury trial or fill one of the needs associated with the purpose. Justice Blackmun's statements in *Ballew* were of this sort. For example, his concern in discussing whether a five member jury represents a cross section of the community was the minimum number necessary to meet the requirement. However, since both the Court and the jury exist in a pluralistic, democratic society, the concern ought to have been to find the number of jurors which would *maximize* representation while maintaining a workable system. Similarly, if data is to be used to discuss the effectiveness of group deliberation, the reliability of results, and possible biases built in by size, the concern ought to be to find the features of juries which promote their best operation and provide a maximum of fairness in procedure. There is reason why Justice Blackmun did not take this approach. Seeking to maximize the requirements would have led to the conclusion that *Williams* and *Colgrove* had been wrongly decided. Yet, not doing so suggested both minimal concern for the preservation of juries and that the studies were cited primarily because they supported the conclusion to be reached.

Included in the issue of the proper use of social science data is the question of the weight it should be given in judicial decisionmaking. Given that the Court may be called upon to make factual determinations about juries or similar matters, the relevance of carefully researched information is apparent. Strict reliance, however, is questionable. Data collected are necessarily subject to interpretation. As research proceeds, new data may require new conclusions. Disputes about methodology are not uncommon and developments in methodology may cast doubt on the validity of previous research. Yet, the decisions of the Court establish the law and define constitutional rights. One of the functions of a system of law is to provide stability within a society.

Another is to allow citizens to form reasonable expectations about their relations not only with each other but also with their government. *Res judicata* is not a convenient principle to prevent overburdening of courts, but an essential element of a legal system based on precedent. Establishing law on the basis of information which is subject to reevaluation introduces uncertainty. This is particularly true with the use of jury studies since extensive work in the area has occurred only since the decision in *Williams*.

Nor is it clear that constitutional law is an appropriate area for reliance on the results of studies. Part of our understanding of law is that there is an area of rights which are considered so essential to our fulfillment as human beings that they cannot be taken away from us by our government, or even by our individual consent, but only by the most demanding of procedures.[111] Placing our understanding of those rights on information which is subject to change, criticism, and reevaluation meets neither the needs of the society nor our understanding of rights and the importance they have for us as human beings. If this is the case, then the final criticism of the Court's approach is not that its reliance on data is misplaced, but that the question it uses the data to answer is the wrong question to ask. The Constitution's protection of individual rights is reduced to a question of whether features of a system serve the purposes of that system. The purpose identified may be the protection of individuals from governmental oppression, but asking questions about features and functions is different from asking questions about rights. One leads to judgments about the "factual" operation of systems, the other to judgments about human dignity and the kind of society it requires.

VI. CONCLUSION

In regard to the sixth amendment's right to jury trial, the current Supreme Court has largely circumvented the incorporationist approach of the Warren Court in *Duncan*.

111. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

While cases may still be brought to the Court claiming violation of the incorporated provision and the Court's opinion will describe the *Duncan* holding, the decision of the Court will have little to do with either. Although jury studies are likely to be used in argument and considered by the Court in its opinion, it is unclear that they will be controlling. The "safeguard" purpose of juries seems likely to remain the formal standard used by the Court, but the actual decision will depend more upon the Justices' perception of the fairness of the procedure.

While *Ballew* and *Burch* indicate that the Court will not regard all procedures as fair, the "safeguard" approach itself does not suggest what the Court may decide in future cases. Indeed, there is as yet no indication that the "safeguard" approach has any limitations. The application of this minimal standard to other features of trial by jury could bring about other major changes equal to those begun by the Court in *Williams*. While it is unlikely that the present Court will reverse the positions taken in *Williams*, *Apodaca*, and *Colgrove*, changes in the compostion of the Court could lead to reconsideration of these cases.

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