Six-Person Nonunanimous Verdicts: Further Cutbacks on the Right to Jury Trial?

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SIX-PERSON NONUNANIMOUS VERDICTS: FURTHER CUTBACKS ON THE RIGHT TO JURY TRIAL?

The Supreme Court has granted certiorari to Burch v. Louisiana. This case will enable the Court to further develop the essential characteristics of the sixth amendment right to jury trial. This Note examines the issues the Supreme Court will be addressing in Burch.

The right to jury trial has been acclaimed "fundamental to the American scheme of justice," "essential for preventing miscarriages of justice," and necessary "to prevent oppression by the Government." Divergent opinions exist concerning the scope of this constitutional protection. The cases decided prior to 1970 reflect the judicial assumption that the right to jury trial has always included the guarantee of a unanimous verdict rendered by twelve impartial lay persons; however, the right to trial by jury has been

2. The full text of the sixth amendment reads as follows:

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

   U.S. CONST. amend. VI.

   This Note addresses only those issues pertaining to the sixth amendment right to jury trial in criminal cases, although many of the issues discussed and the sources cited are relevant to the seventh amendment right to jury trial in civil cases as well. For the leading case on the current status of size requirements for juries in civil cases, see Colgrove v. Battin, 413 U.S. 149 (1973).

4. Id. at 155.
5. Id. at 155 (footnote omitted).
6. See, e.g., Andres v. United States, 333 U.S. 740 (1948); Patton v. United States, 281 U.S. 276 (1930); Rasmussen v. United States, 197 U.S. 516 (1905); Maxwell v. Dow, 176 U.S. 581 (1900); Thompson v. Utah, 170 U.S. 343 (1898). The right to jury trial did not always include the right to an impartially chosen jury from a representative cross section of the community, without regard to race or sex; however, this matter is not discussed in this Note. Strauder v. West Virginia, 100 U.S. 303 (1880), struck down state jury selection regulations that explicitly discriminated on the basis of race. The Court later held unconstitutional jury selection systems where a racially discriminatory pattern of administration was shown, although the law itself
significantly redefined in a series of recent Supreme Court decisions. These cases question whether reductions in jury size or majority rather than unanimous verdicts violate the sixth and fourteenth amendments. To date, the Supreme Court has held that criminal convictions resulting from both nonunanimous twelve-person juries and six-person unanimous juries are constitutional, whereas verdicts rendered by unanimous five-person juries are unconstitutional. The extent to which further deviations from the traditional unanimous twelve-person model will be sanctioned is unresolved.

In *Burch v. Louisiana*, the Court will consider the constitutionality of a provision in the Louisiana Constitution which per-

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10. In *Duncan v. Louisiana*, 391 U.S. 145 (1967), the Court extended the sixth amendment's provision for jury trial to the states via the fourteenth amendment's due process clause. The fourteenth amendment provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

> U.S. CONST. amend. XIV, § 1.


15. *La. Const.* art. 1, § 17, provides:

> Section 17. 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 the right to full voir dire
mits a criminal conviction by a verdict rendered by five votes of a six-person jury. This five-out-of-six jury system presents a composite of the two previously sanctioned "jury enfeebling measures": the nonunanimous twelve-person model and the unanimous six-member system. Thus, to assess the constitutionality of a criminal conviction based on five votes of a six-person jury, it is necessary to explore the theories advanced by the Court in sanctioning unanimous six-person panels and nonunanimous twelve-person verdicts and to harmonize these rationales with the Court's recent decision invalidating a five-person jury system.

Although the Supreme Court has sanctioned nonunanimous verdicts by twelve-person juries and unanimous six-person verdicts, the Louisiana arrangement is constitutionally offensive in light of underlying theories the Court advanced in those decisions. The defects of a five-person unanimous panel cannot be cured by adding another person to the jury without a means of insuring that the contributions of the additional member will be reflected in the final verdict that emerges from the deliberative process.

Although this argument assumes the soundness of the "jury-enfeebling" cases, this Note additionally suggests that serious questions have been raised concerning the validity of the factual premises relied on by the Court in sanctioning substantial deviations

16. The phrase is Professor Zeisel's and refers to any deviation from the 12-member unanimous jury. See Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710, 723 (1971).
from the traditional unanimous twelve-person model. Therefore, reliance on the precedential value of these decisions may be misplaced. Although it is unlikely that these cases will be reversed in the foreseeable future, there is some indication that the Court in Burch will not approve further limitations on the right to jury trial, and will resist suggestions that deviations from presently permitted jury systems follow logically from the earlier opinions.

HISTORICAL MEANING OF THE RIGHT TO JURY TRIAL

The sixth amendment to the United States Constitution affords all criminal defendants “the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.” Until recently, the Supreme Court had not explicitly determined the characteristics of a jury necessary to satisfy sixth amendment requirements. Rather, early decisions of the Court were based on the unquestioned assumption that certain attributes are constitutionally mandated. Seemingly unchallengeable was the notion that the sixth amendment guarantees that a criminal conviction can result only from the unanimous agreement of a twelve-member jury. Speaking for the Court in Thompson v. Utah, Justice Harlan observed: “[T]he 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

22. Given the difficulty of reconciling Ballew with prior cases dealing with “jury enfeebling measures,” this is one possible interpretation of the holding that unanimous five-person jury verdicts are unconstitutional. See text accompanying notes 69-82 infra.
24. See notes 25-34 infra and accompanying text.
25. Speaking for the Court in Patton v. United States, 281 U.S. 276, 288 (1930), Justice Sutherland observed that it is “not open to question” whether the phrase “trial by jury” in the sixth amendment embraces a unanimous verdict rendered by a 12-person jury. In the majority opinion in Andres v. United States, 333 U.S. 740 (1948), Justice Reed stated that “[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply.” Id. at 748 (footnote omitted). In Maxwell v. Dow, 176 U.S. 581, 609 (1900), Justice Harlan noted in dissent: [W]e have held that the jury here referred to was a common law jury consisting of neither more or less than twelve persons, whose unanimous verdict was necessary to acquit or convict the accused; that a jury of less number was not admissible . . . in any court organized under the authority of the United States. Id. at 609 (Harlan, J., dissenting) (citations omitted). See also cases cited note 6 supra.
26. 170 U.S. 343 (1898).
verdict of such a jury."27

There is a noticeable lack of early cases challenging the view that the sixth amendment mandates a verdict rendered by a unanimous twelve-member body: Such juries must have been considered axiomatic to any definition of the sixth amendment protection. Until very recently, the Supreme Court had never directly considered whether a twelve-person unanimous verdict was constitutionally compelled or merely a historical remnant devoid of legal significance. However, because the Court had been called upon to decide this issue indirectly, it is apparent that the Court assumed that these features are necessary components of a jury. Those cases which arose before the sixth amendment right to jury trial was applied to the states,28 and which considered whether a criminal proceeding is governed by state laws at variance with the twelve-person unanimity requirement or by federal law, never questioned the premise that the sixth amendment requires twelve-person unanimous verdicts. Rather, it was implicitly understood by both parties that the federal twelve-person unanimous model is mandated by the sixth amendment.29 The Court sanctioned eight-member juries where it concluded the sixth amendment was not determinative,30 yet held unconstitutional six-31 and eight-person32 juries where it found the sixth amendment did apply. In addition, nonunanimous verdicts were held unconstitutional where the federal constitutional standard governed.33 The notion that the sixth amendment guarantees a unanimous verdict of a twelve-member body was so deeply ingrained in constitutional history that the Supreme Court even grappled with the constitutionality of allowing a criminal defendant to waive this protection.34

It therefore is clear that in the earlier cases, the constitutional

27. Id. at 355.
28. The sixth amendment right to jury trial was held applicable to the states through the fourteenth amendment in Duncan v. Louisiana, 391 U.S. 145 (1968). See notes 37-47 infra and accompanying text.
34. See Patton v. United States, 281 U.S. 276 (1930). The Court upheld the constitutionality of an 11-member jury where a criminal defendant in federal court waived his right to a verdict rendered by 12 jurors when one juror became ill during the trial. Id. at 299.
concept of trial by jury paralleled the essential features of a jury trial at common law as described by Blackstone in the eighteenth century: "[T]he truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous sufferage of twelve of [defendant's] equals and neighbors, indifferently chosen, and superior to all suspicion." Although the law appeared to be settled on this point, the Supreme Court opened the floodgates to a stream of challenges questioning the constitutional necessity of the twelve-person unanimous model once the protections of the sixth amendment were extended to state criminal proceedings by the due process clause of the fourteenth amendment.

CURRENT STATUS OF SIXTH AMENDMENT RIGHT TO JURY TRIAL

General Applicability to the States

In the seminal case of Duncan v. Louisiana, the Supreme Court announced that the sixth amendment right to jury trial extends to state criminal proceedings. The full ramifications of the Duncan decision were not immediately discernible, since Duncan held only that a state violates the fourteenth amendment guarantee of due process of law if it denies a criminal defendant a jury trial when the crime charged is of a serious nature. The seven Justices concurring in the decision advanced various rationales for the holding, but the Court left unsettled the question whether state jury trials must be identical to federal jury trials in all respects, or

36. See note 28 supra.
38. Id. at 149.
39. Id. at 156. In Baldwin v. New York, 399 U.S. 66 (1970), the Court held that a state must provide a trial by jury for any offense with a possible penalty in excess of six months, regardless of whether the state labels the offense petty or nonpetty. Id. at 69.
40. Justice White, in the majority opinion joined by Chief Justice Warren and Justices Brennan and Marshall, intimated that the same standard should be applied in federal and state proceedings. Duncan v. Louisiana, 391 U.S. at 158. Justice Black, in an opinion joined by Justice Douglas, argued that the fourteenth amendment makes all of the Bill of Rights provisions fully applicable to the states. Id. at 163-71 (Black, J., concurring). Justice Fortas concurred in the Court's opinion, but saw no reason to conclude that the features of the federal jury trial should automatically be applied to the states. Bloom v. Illinois, 391 U.S. 194, 213 (1968) (Fortas, J., concurring). Bloom was a companion case to Duncan v. Louisiana, 391 U.S. 145 (1968), and Justice Fortas' concurring opinion in Bloom was also applicable to Duncan.
41. In Duncan Justice Black expressed the view that the requirements should be identical. See note 40 supra.
whether states may formulate their own standards for jury trials within broad limits. Thus Duncan did not resolve the constitutional status of state statutes which permitted verdicts in criminal cases either by nonunanimous twelve-member juries or by unanimous juries of fewer than twelve members.

Based on the pre-Duncan decisions previously discussed, it appeared unquestionable that the sixth amendment, as applied to federal criminal proceedings, included the right to a unanimous twelve-member panel. Thus, it seemed that the extent to which the sixth amendment was incorporated in the due process clause of the fourteenth amendment would be determinative of the constitutionality of various state jury systems. If Duncan were interpreted as requiring only a vague, undefined right to jury trial for a defendant in a state proceeding, without reference to the specific federal requirement, then the Court's prior interpretations of the sixth amendment would be of limited assistance in determining the constitutionality of various features of the jury in the context of the alternative state systems. Instead, a case-by-case analysis would be necessary to ascertain whether the particular jury feature at issue is fundamental to a fair trial and therefore incorporated into the due process clause, irrespective of its relation to the sixth amendment. If, however, the sixth amendment applied "jot for jot" to the states, substantial authority suggested that state criminal convictions could result only from the unanimous verdict of a twelve-member jury.

As the Court confronted these issues in subsequent cases, a majority concluded that the sixth amendment applies uniformly to federal and state court jury trials. However, the historically rooted unanimous twelve-person panel was abruptly deleted from the Court's formulation of the sixth amendment protection. Justice

42. This is the view expressed by Justice Fortas in Duncan and Bloom. See note 40 supra.
43. See notes 24-34 supra and accompanying text.
44. See Bloom v. Illinois, 391 U.S. 194, 213-14 (1968) (Fortas, J., concurring) (concurring also in Duncan).
45. See id. at 214-15 (Fortas, J., concurring) (concurring also in Duncan).
46. "Jot for jot" is the commonly used shorthand expression of the view that every feature of the federal protection applies in exactly the same manner to the states once the protection is incorporated into the fourteenth amendment. See Duncan v. Louisiana, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting), where Justice Harlan characterizes the total incorporation view as the "jot for jot" approach. For explanation of the total incorporation or "jot for jot" approach, see id. at 162-71 (Black, J., concurring).
47. See notes 24-34 supra and accompanying text.
White’s majority opinion in *Williams v. Florida*\(^49\) held unanimous verdicts rendered by six-member juries constitutional; his opinions for the Court in the companion cases of *Johnson v. Louisiana*\(^50\) and *Apodaca v. Oregon*\(^51\) upheld the constitutionality of nonunanimous twelve-member juries. In holding these alternative jury systems constitutional, the Court relegated to dicta a century of authority to the contrary.\(^52\)

**Reductions in Jury Size**

In *Williams v. Florida*,\(^53\) the Court, by a seven-to-one vote, upheld the constitutionality of a Florida statute permitting six-person unanimous juries to render verdicts in criminal proceedings.\(^54\) A majority of the Court adopted the view that the sixth amendment right to jury trial is fully incorporated into the due process clause of the fourteenth amendment; therefore, the same standard applies in the state and federal proceedings. The Court found, however, that the standard relating to the number of jurors was undefined.\(^55\) Determining that the Framers’ intent regarding the twelve-member panel is unclear,\(^56\) and that the number twelve is without meaningful historical significance,\(^57\) the Court concluded that this “accidental feature” of the jury has not been “immutable codified into our Constitution”,\(^58\) rather it is constitutionally compelled only if necessary to insure the proper functioning of the jury.\(^59\) To determine if twelve jurors are constitutionally compelled, the Court focused on the relationship between the twelve-person panel and the purposes to be served by the jury:

> [T]he 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 de-

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\(^{49}\) 399 U.S. 78 (1970).

\(^{50}\) 406 U.S. 356 (1972).

\(^{51}\) 406 U.S. 404 (1972) (plurality opinion).

\(^{52}\) See notes 24-34 supra and accompanying text.


\(^{54}\) Section 913.10 of Florida’s criminal procedure code provides as follows: “Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases.” FLA. STAT. ANN. § 913.10 (West 1973).

\(^{55}\) 399 U.S. at 86-87.

\(^{56}\) Id. at 92-99. The Court characterized “the intent of the Framers” as an “elusive quarry.” Id. at 92.

\(^{57}\) Id. at 87-90.

\(^{58}\) Id. at 90, 100.

\(^{59}\) Id. at 99-100.
termination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community.\footnote{Id. at 100.}

The Court found "no discernible difference"\footnote{Id. at 101.} between six- and twelve-person juries that jeopardizes this function of the jury. It is significant that the validity of the Court's reasoning is contingent on an empirically verifiable assumption—that the two differently-sized groups are functionally equivalent—rather than on historical or theoretical grounds.

Eight years after Williams the Court rejected any further reduction in jury size in Ballew v. Georgia.\footnote{435 U.S. 223 (1978).} In the intervening period between the two cases, reams of social science data had been compiled comparing and contrasting various attributes of six- and twelve-person juries.\footnote{See generally id. at 231 n.10, 233 nn.11 & 12, and studies cited therein.} Announcing the judgment in Ballew, Justice Blackmun reviewed many of the findings of this empirical research. These included the following: (1) There is a positive relationship between group size and group productivity and performance; therefore, as jury size decreases, it is less likely that effective group deliberations will occur;\footnote{Id. at 232-33.} (2) a decrease in group size reduces the reliability, accuracy, and consistency of jury decisions;\footnote{Id. at 234-35.} (3) the chances for a hung jury decline as the number of jurors decreases;\footnote{Id. at 236.} and (4) the chances for minority representation decline absolutely and proportionately as jury size declines.\footnote{Id. at 236-37.}

This social science data demonstrates the dubious validity of the Court's original assertion that juries of various sizes are functionally equivalent. In light of this data, Justice Blackmun concluded: "[A]ny further reduction that prompts inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance."\footnote{Id. at 239.} Although the empirical data relied on by Justice Blackmun indicates that far greater disparities exist between twelve- and six-person juries than
the Williams decision assumed, the Court managed to reaffirm the constitutional validity of the six-member panel approved in Williams as it rejected the five-member panel in Ballew. This prompted criticisms such as the following:

Such a statement [that twelve- and six-person juries are functionally equivalent whereas six- and five-person juries are not] implies that the jump from 12 to six has a zero effect on the verdicts, but the step from six to five would have an effect. Nowhere in nature or in society do we know of an organism or an institution displaying such strange behavior. The expectation, therefore, is that the jump from 12 to six will make a difference . . .

The Court’s analysis in Ballew fails to distinguish logically between six- and five-member juries. It simply does not provide a basis for prohibiting five- while sanctioning six-member juries. In fact, the Court stated: “We readily admit that we do not pretend to discern a clear line between six members and five.”

Although much can be said for the Court’s candor, criticism like that above requires judicial attention. Given data equally critical of both jury models, the Court’s invalidation of the jury system in Ballew is inconsistent with its affirmation of the model in Williams. Ballew prohibited further reduction in jury size, but ignored overwhelming evidence that the initial decision permitting six-person juries was based on a shaky factual premise: that twelve- and six-person juries were functionally equivalent.

Certainly, the data utilized by Justice Blackmun in Ballew raises serious doubts about the Williams conclusion, since Williams was premised on the lack of evidence suggesting meaningful distinctions between six- and twelve-person juries. However, instead of reevaluating Williams in light of this evidence, the Court hinted at a broader justification for reductions in jury size. In Ballew examination of the functional differences between various-sized juries was only the first step in the Court’s analysis. Conceding that a reduction in jury size could have adverse consequences, the Ballew opinion suggests this inhibition on the jury

69. See generally notes 160 & 165 infra and studies cited therein.
70. 435 U.S. at 239.
71. Id.
73. 435 U.S. at 239.
function might yet be constitutional if supported by a valid state interest.\footnote{435 U.S. at 243.} In \textit{Ballew} this interest was the economic benefit derived from savings in the daily allowances paid to jurors.\footnote{Id. at 244.} The Court determined that no substantial savings result when the number of jurors is reduced from six to five,\footnote{Id. at 243-44.} but suggested that there is a significant savings when the change is from twelve to six.\footnote{Id. at 244.}

If \textit{Ballew} stands for the proposition that a balancing test is necessary to judge the constitutionality of six-member juries, then at first glance the \textit{Williams} decision appears reconcilable with \textit{Ballew}. The monetary savings involved when the jury size is reduced from twelve to six is certainly more apparent than when the change is from six to five,\footnote{Id. at 244.} although recent evidence suggests that the savings is insubstantial in both cases.\footnote{Id.} However, any rationale for a reduction in jury size which relies on the economic benefit to be derived\footnote{Id.} only undercuts the Court's decision in \textit{Ballew}.

The implication inherent in this justification is that if the initial proposal had been a reduction from twelve to five jurors, it would have been permissible, since the savings which result from reducing the jury by seven jurors is greater than the savings which result from reducing the jury by six. Thus the Court in \textit{Ballew} did not explore the full ramifications of its reasoning. In fact, the Court overlooked the apparent implications of its analysis by using six instead of twelve as the starting point for measuring potential savings which would result from juror reduction. However, it is illogical for the Court to base its analysis on the savings involved when changing from six to five jurors, since the core question involves the permissibility of deviations from the historical twelve-member model. By choosing to use six rather than twelve as the basis for comparison, the Court, in effect, assumed the functional equivalence of twelve- and six-member juries, although it was not willing

\footnote{The Court estimated "that a reduction from 12 jurors to 6 throughout the federal system could save at least $4 million annually." \textit{Id.} at n.39 (citing Zeisel, supra note 72, at 13). However, Zeisel challenges the significance of this amount since it represents only two percent of the total federal judicial budget and only slightly more than the thousandth part of one percent of the total federal budget. Zeisel, supra note 72, at 13. \textit{See also} Pabst, \textit{Statistical Studies of the Costs of Six-Man Versus Twelve-Man Juries}, 14 WM. & MARY L. REV. 326 (1972).}

\footnote{See \textit{Ballew} v. Georgia, 435 U.S. at 244.}
to unequivocally maintain this position due to the post-Williams evidence suggesting the opposite conclusion. At any rate, under the Court's analysis, there is no reason why an initial change from twelve to five jurors should not be sanctioned, and therefore a logical basis for distinguishing Williams from Ballew is still lacking.

**Unanimity in Jury Verdict**

In the companion cases of Johnson v. Louisiana and Apodaca v. Oregon, the Supreme Court upheld the constitutionality of criminal convictions rendered by nonunanimous jury votes of nine to three and ten to two, respectively.

The requirement of unanimity is arguably more crucial for preserving the traditional common-law conception of jury trial than is the requirement of a twelve-member jury. One commentator compared the effects of reducing the number of jurors with the effects of dispensing with the requirement of unanimity: "[A] majority verdict requirement is far more effective in nullifying the potency of minority viewpoints than is the outright reduction of a jury to a size equivalent to the majority that is allowed to agree on a verdict." This commentator concludes that while reducing the number of jurors is one type of "jury-enfeebling measure," abandoning the requirement of unanimity represents "reduction with a vengeance." It is not surprising, therefore, that the Supreme Court found the issues raised in the nonunanimous verdict cases more divisive than those involved in the six-member panel decision.

In Johnson and Apodaca, the Court discussed both historical and functional justifications for the requirement of unanimity. In Johnson the Court discussed whether In re Winship, which held that due process mandates that criminal convictions be imposed

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82. See notes 160 & 165 infra and studies cited therein.
84. 406 U.S. 404 (1972) (plurality opinion). Throughout the following discussion, the companion cases of Johnson v. Louisiana, 406 U.S. 356 (1972), and Apodaca v. Oregon, 406 U.S. 404 (1972) (plurality opinion), are treated as one decision, except where noted. However, citations to the pertinent portions of these opinions will generally be to the Johnson opinion only, since Justices Douglas, Brennan, Marshall, Blackmun, and Powell wrote opinions which were applicable to both cases, but which were attached to the Johnson decision.
86. Id. at 723.
87. Id. at 722.
only upon proof beyond a reasonable doubt, requires unanimity in criminal trials. The Court rejected the argument that a unanimous verdict is inherent in the proof beyond a reasonable doubt standard. In *Apodaca*, the majority refused to accept the view that the sixth amendment, applied to the states through the fourteenth amendment, requires a unanimous verdict.

As in *Williams*, an overwhelming majority of the Court accepted the "full incorporation" view of the right to jury trial and concluded that federal and state standards must be synonymous. A majority also found that the sixth amendment requires a unanimous verdict in criminal proceedings. Therefore, because there was majority support for the propositions that the sixth amendment requires a unanimous jury to convict a criminal defendant, and that the sixth amendment applies fully to state criminal proceedings, the *Johnson* and *Apodaca* Courts' sanctioning of the nonunanimous jury verdict is anomalous. The result is explainable, however, by the unusual alignment of viewpoints comprising the majority decision.

Seven Justices concluded that the sixth amendment applies uniformly to both state and federal proceedings. However, four of these Justices maintained that the sixth amendment does not mandate a unanimous verdict; three concluded that the sixth amendment requires unanimous verdicts in state as well as federal criminal proceedings. An eighth Justice, Justice Stewart, concluded

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89. Id. at 364.
92. Id. (White, J., joined by Burger, C.J., Blackmun and Rehnquist, JJ.); *Johnson v. Louisiana*, 406 U.S. at 400 (Marshall, J., dissenting) (dissenting also in *Apodaca*); id. at 395 (Brennan, J., dissenting) (dissenting also in *Apodaca*). In all, the Justices adhering to this viewpoint are Chief Justice Burger and Justices Douglas, Brennan, White, Marshall, Blackmun, and Rehnquist.
93. *Apodaca v. Oregon*, 406 U.S. at 414 (Stewart, J., dissenting); *Johnson v. Louisiana*, 406 U.S. at 400 (Marshall, J., dissenting) (dissenting also in *Apodaca*); id. at 397 (Stewart, J., dissenting); id. at 395 (Brennan, J., dissenting) (dissenting also in *Apodaca*); id. at 382-83, 391-92 (Douglas, J., dissenting) (dissenting also in *Apodaca*); id. at 371 (Powell, J., concurring) (concurring also in *Apodaca*). The five Justices adhering to this viewpoint are Justices Douglas, Brennan, Stewart, Marshall, and Powell.
95. *Johnson v. Louisiana*, 406 U.S. at 400 (Marshall, J., dissenting) (dissenting also in *Apodaca*); id. at 495 (Brennan, J., dissenting) (dissenting also in *Apodaca*); id. at 382-83 (Douglas, J., dissenting) (dissenting also in *Apodaca*).
that the fourteenth amendment alone requires unanimity. The ninth member of the Court, Justice Powell, agreed that the sixth amendment requires unanimity in federal trials, but did not find this feature of the sixth amendment applicable to state criminal proceedings. Therefore, a majority resulted, albeit for different reasons, that upheld the constitutionality of nine- and ten-out-of-twelve verdicts in state criminal proceedings.

Speaking for the Court in both Johnson and Apodaca, Justice White subordinated the historical importance of unanimity to the modern purposes served by the jury: "[A]s in Williams, our inability to divine the 'intent of the Framers' . . . requires that in determining what is meant by a jury we must turn to other than purely historical considerations." Thus, the Court embarked on a functional analysis of the relationship between the unanimity requirement and the modern purposes served by the jury.

The Court asserted that jury unanimity is not inherent in the proof beyond a reasonable doubt standard applied in all criminal cases, concluding that "as to the nine jurors who voted to convict, the State satisfied its burden of proving guilt beyond any reasonable doubt." Further, the Court found no reason to assume that the majority jurors had not carefully considered the arguments of the minority before reaching a verdict. Based on the assumption that any verdict rendered is the product of a meaningful deliberative process whereby a large majority of the jurors have become convinced of the defendant's guilt, Justice White found "no basis for denigrating the vote of so large a majority of the jury or for refusing to accept their decision."

In his dissent, Justice Douglas argued that permitting nonunanimity diminishes the reliability of the jury by extracting "from the jury room [an] automatic check against hasty factfinding by relieving jurors of the duty to hear out fully the dissenters." The other dissenters, Justices Brennan and Stewart, contended that, absent a requirement of unanimity, "consideration of minority views may become nothing more than a matter of majority

96. Id. at 397-99 (Stewart, J., dissenting).
97. Id. at 369-80 (Powell J., concurring) (concurring also in Apodaca).
98. Apodaca v. Oregon, 406 U.S. at 410 (plurality opinion).
100. Id. at 361-62.
101. Id. at 361.
102. Id. at 389 (Douglas, J., dissenting) (dissenting also in Apodaca).
thereby jeopardizing effective vindication of the fourteenth amendment's guarantee of "universal participation of the citizenry in the administration of criminal justice." Speaking for the plurality, Justice White refused to give credence to these contentions and on the basis of available evidence noted that the Court perceived "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to 2 or 11 to one."

As in Williams, Justice White apparently based the Court's decisions in Johnson and Apodaca on the lack of substantiated evidence demonstrating significant operational differences between unanimous and nonunanimous juries. This provoked a deluge of empirical research, much of it casting doubt on the Court's underlying premise. The validity of the Court's rationale for approving nonunanimous jury verdicts is, therefore, unclear.

Five-out-of-Six Jury Verdicts

The jury system under review in Burch v. Louisiana combines nonunanimity and reduced panel size. Petitioner Burch was convicted of violating an obscenity statute, a nonpetty offense, by a jury vote of five to one. Article 1, section 17, of the Louisiana Constitution provides for six jurors, only five of whom must concur to reach a verdict, in all cases "in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months."

Petitioner challenged the constitutionality of his conviction by a five-out-of-six verdict after the Supreme Court held unanimous five-member panels unconstitutional in Ballew v. Georgia. He argued that the Court's earlier decisions in Williams—sanctioning the six-member jury—and Ballew—holding the five-member jury unconstitutional—necessitates maintenance of the unanimity requirement.

103. Id. at 396 (Brennan, J., dissenting) (dissenting also in Apodaca).
104. Id. at 397 (Stewart, J., dissenting).
105. Apodaca v. Oregon, 406 U.S. at 411 (plurality opinion).
106. See id.
109. 360 So. 2d at 833.
110. LA. CONST. art. 1, § 17. For the full text of this provision, see note 15 supra.
Since only five persons are required for conviction in a five-out-of-six verdict system, petitioner contended that the rationales used to invalidate convictions rendered by five-member juries are equally applicable to his case.\textsuperscript{112} He argued that if six jurors are the minimum number necessary to provide a representative cross section of the community under \textit{Ballew}, allowing a verdict to be rendered by five out of the six does not adequately insure that all six members will meaningfully participate in the deliberative process.\textsuperscript{113} Thus, petitioner maintained that the five-out-of-six verdict system is tantamount to the five-member system invalidated in \textit{Ballew}.

The Supreme Court of Louisiana rejected these contentions, holding that \textit{Ballew} was not dispositive.\textsuperscript{114} The court reviewed the \textit{Williams} decision sanctioning six-member juries in criminal cases and the \textit{Johnson} and \textit{Apodaca} holdings sanctioning nine- and ten-out-of-twelve jury systems. The court reasoned that since nine-twelfths represents seventy-five percent concurrence, whereas five-sixths represents eighty-three percent concurrence, the five-out-of-six verdict system is within the permissible limits of \textit{Johnson}.\textsuperscript{115} Furthermore, the court found no reason to assume that the purposes served by having six jurors instead of five are “necessarily defeated because the six-person jury’s verdict may be rendered by five instead of by six persons.”\textsuperscript{116} Although the Supreme Court of Louisiana characterized the issue as a close one, it concluded that since it is bound by a presumption of federal constitutionality of all provisions of the state constitution, the presumption should prevail in this borderline case.\textsuperscript{117} This set the stage for Supreme Court consideration of the most recent “jury-enfeebling measure.”

\textbf{Burch v. Louisiana: Future Status of Sixth Amendment Right to Jury Trial}

In deciding \textit{Burch} the Supreme Court of the United States should invalidate the five-out-of-six verdict system permitted by

\begin{itemize}
  \item \textsuperscript{113} \textit{Id.} at 2-3.
  \item \textsuperscript{114} State v. Wrestle, Inc., 360 So. 2d at 838.
  \item \textsuperscript{115} \textit{Id.} (quoting Hargrave, \textit{The Declaration of Rights of the Louisiana Constitution of 1974}, 35 \textit{LA. L. REV.} 1, 56 n.300 (1974)).
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{Id.}
\end{itemize}
the Louisiana constitution. There is no reason for the Court to indulge in an unwarranted assumption of constitutionality when scrutinizing this state constitutional provision. The theories advanced by the Court in prior cases do not support the constitutionality of the Louisiana system; furthermore, the Court should be wary of placing any additional enfeebling measures on the right to jury trial.

Permitting further erosion of the essential features of a jury will severely undercut the purposes served by incorporating the various procedural safeguards outlined in the first eight amendments into the due process clause of the fourteenth amendment. Concern for a high degree of fairness prompted the Court to extend the protections of the sixth amendment to the states in Duncan v. Louisiana.118 The Duncan rationale was meant to insure criminal defendants in state proceedings a quality of treatment that "is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States."119 It would make a mockery of this rationale if the original understanding of the rights incorporated by the fourteenth amendment are watered down to such an extent that the application of the federal constitution to state criminal proceedings becomes a meaningless formality. Thus, the Supreme Court should not permit the present sixth amendment definition of a jury to be further broadened to include the five-out-of-six model.

Although the Court has upheld the constitutionality of the unanimous six-person jury120 and the nonunanimous twelve-person jury,121 it does not follow that a nonunanimous six-member panel is permissible. To the contrary, applying the nonunanimity feature to the six-member panel is inconsistent with the theories expounded by the Court in permitting reduced jury size and non-unanimity. The justifications for these deviations from the traditional twelve-member unanimous model are mutually exclusive and fail when asserted together.

The Court's decision concerning size requirements in Williams

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119. Id. at 149 n.14.
predated Johnson and Apodaca,122 the first of the Court’s decisions to deal with the unanimity requirement. Thus the Court’s analysis in Williams was based only on a comparison of six- and twelve-member unanimous panels. Concluding that a reduction in jury size does not alter the essential aspects of the right to jury trial, the Court in Williams stated: “[W]e find little reason to think that these goals [group deliberation and insuring cross-sectional representation] are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained.”123 The Court’s conclusion that the twelve-person requirement lacks historical significance may be equally applicable to a historical analysis of the unanimity requirement.124 However, in sustaining the six-person jury, Williams relied on the functional congruities between the six- and twelve-person models rather than on the lack of historical certainty regarding the intent of the Framers.125 In rejecting the claim that a twelve-person panel is a necessary component of the jury, the Court compared the unanimity and twelve-person requirements: “[T]he former, unlike the latter, may well serve an important role in the jury function, for example, as a device for insuring that the Government bear the heavier burden of proof.”126

Justice White’s suggestion that the requirement of unanimity has greater functional importance than the requirement of twelve jurors is both logically and empirically compelling. Abolishing the unanimity requirement in the six-person context would seriously interfere with those factors that the Court in Williams and Ballew deemed essential to safeguard effective operation of the jury.127

The Court’s primary concern in Ballew was that a change in the number of jurors not affect the group’s method or manner of discussion.128 The Court concluded that a five-member panel is insufficient to insure effective group deliberation, even when the product of the deliberative process must be a unanimous verdict.129 Therefore, sequestering six jurors until unanimous agree-

122. Williams was decided in 1970; Johnson and Apodaca were decided in 1972.
123. 399 U.S. 78, 100 (1970) (emphasis added) (footnote omitted). See text accompanying note 60 supra.
124. See id. at 100 n.46.
125. Id. at 99-102. See text accompanying notes 55-61 supra.
128. Id. at 241.
ment is reached is, thus far, the bare minimum demanded by the Court to insure effective and meaningful group deliberations. Abolishing the unanimity requirement in the six-member context would mean that the lowest acceptable standard is no longer met. This is the necessary conclusion unless one accepts the extraordinarily illogical suggestion that no difference exists in the intensity of the debate that must persuade six out of six rather than five out of six jurors.\textsuperscript{130} This assertion is contrary to normal expectations regarding human behavior. As Justice Douglas pointed out in his dissent in \textit{Johnson}: "[H]uman experience teaches that polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity."\textsuperscript{131} Mandating unanimity to insure full and complete debate has been considered so essential that, prior to the \textit{Johnson} and \textit{Apodaca} decisions, it was persuasively argued, with support from the judiciary, that this right could not even be waived by a criminal defendant.\textsuperscript{132}

Moreover, numerous empirical studies demonstrate the impact that removal of the unanimity requirement has on the jury process. A comparison of mock juries required to act unanimously with those permitted to act by a two-thirds majority vote shows that deliberation times are expedited when unanimity is not required.\textsuperscript{133} These findings suggest that only cursory consideration is given to dissenting views if they are not necessary for the group’s verdict.\textsuperscript{134}

Furthermore, the requirement enunciated in \textit{Williams}, that a verdict be rendered by a jury composed of a representative cross section of the community,\textsuperscript{135} is thwarted if nonunanimity is permitted with six-member juries. \textit{Ballew} concludes that the opportunity for meaningful and appropriate representation of minority viewpoints is decreased below the constitutional minimum when

\begin{footnotesize}
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\item \textsuperscript{130} But see \textit{Apodaca} v. Oregon, 406 U.S. 404 (1972), where the Court perceived "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." \textit{Id.} at 411 (plurality opinion).
\item \textsuperscript{131} 406 U.S. at 389 (Douglas, J., dissenting).
\item \textsuperscript{132} See Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953); Dickinson v. United States, 159 F. 801 (1st Cir. 1908). See also Comment, \textit{Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt}, 21 U. CHI. L. REV. 438 (1954).
\item \textsuperscript{133} Davis, Kerr, Atkin, Holt & Meek, \textit{The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules}, 32 J. PERSONALITY & SOC. PSYCH. 1 (1975).
\item \textsuperscript{134} \textit{Id.} at 12.
\item \textsuperscript{135} \textit{Williams} v. Florida, 399 U.S. 78, 100 (1970). See text accompanying note 60 \textit{supra}.
\end{itemize}
\end{footnotesize}
the jury is composed of only five members. If a five-person unanimous verdict is unconstitutional, it is inconsistent to argue that simply adding one person can satisfy the representative cross-sectional requirement of the fourteenth amendment. If one person does not agree with the group's decision after examining the same evidence and hearing the same testimony as the rest of the jury, then he or she is not represented in the final verdict unless it can be conclusively proven that the extra person's contributions were fully and fairly considered by the other jurors. At the very least, permitting nonunanimity in this context creates uncertainty whether the essential purposes underlying the cross-sectional requirement are being fulfilled in light of the potential impotence of minority viewpoints. Due to the important values protected by the cross-sectional requirement, this uncertainty alone should render the five-out-of-six system invalid.

There is a strong interrelationship between the analytically separable requirements of having a jury composed of a representative cross section of the community and of having the group engage in meaningful and complete deliberation. The complementary nature of these features is most effectively realized when the jury must act unanimously. As Justice Stewart stated in his dissent in Johnson:

[O]nly a unanimous jury . . . selected [by an impartial system which will insure cross-sectional representation] can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear . . . The requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury.

Thus far, this Note has focused on the consequences that may result when the six-member jury is permitted to render a nonunanimous decision. Although abandonment of the unanimity

137. See text accompanying note 134 supra.
138. For discussion of the importance of the cross-sectional requirement, see Smith v. Texas, 311 U.S. 128 (1940).
139. See generally Johnson v. Louisiana, 406 U.S. 356, 397-99 (1972) (Stewart, J., dissenting); id. at 396 (Brennan, J., dissenting) (dissenting also in Apodaca); Williams v. Florida, 399 U.S. 78, 100 (1970). But see Johnson v. Louisiana, 406 U.S. at 378-79 (Powell, J., concurring) (concurring also in Apodaca).
requirement in this context would be detrimental to the essential functions of the jury.\textsuperscript{141} the Supreme Court has sanctioned nonunanimous jury verdicts in other contexts.\textsuperscript{142} It is necessary to demonstrate the inapplicability of the Court's analysis in the nine- and ten-out-of-twelve verdict situations to the five-out-of-six context.

The Court in \textit{Johnson} and \textit{Apodaca} was deeply divided on whether to permit nonunanimous verdicts in any context whatsoever.\textsuperscript{143} Justice Brennan's comment, which summarized the Court's affirmanence of the convictions rendered by nonunanimous twelve-member juries, is significant: "[T]oday's decision . . . [is not inconsistent with a view] that only a unanimous verdict will afford the accused in a state criminal prosecution the jury trial guaranteed him by the Sixth Amendment."\textsuperscript{144} The nature of the \textit{Johnson} and \textit{Apodaca} majority—which resulted from Justice Powell's belief that the sixth amendment, as applied to the states, does not require unanimity\textsuperscript{145} and from Justice Blackmun's tentative concurring opinion\textsuperscript{146}—suggests the tenuous nature of the decisions. Therefore, the Court may well resist any attempt to extend \textit{Johnson} and \textit{Apodaca}.

In his dissent in \textit{Johnson} and \textit{Apodaca}, Justice Marshall summarized his view of the Court's rationale: "The argument seems to be that since, under \textit{Williams}, nine jurors are enough to convict, the three dissenters are mere surplusage."\textsuperscript{147} If this interpretation of the Court's analysis is correct, then the five-out-of-six verdict system should be automatically discarded: Under \textit{Ballew} five jurors are insufficient to convict a criminal defendant, and under \textit{Johnson} and \textit{Apodaca}, given a nonunanimous verdict, dissenters are "mere surplusage"; thus five jurors are too few to convict a criminal defendant in the five-out-of-six situation. Although this approach provides the simplest means to distinguish \textit{Burch} from \textit{Johnson} and

\begin{thebibliography}{99}
\bibitem{141} See text accompanying notes 126-140 \textit{supra}.
\bibitem{142} Apodaca v. Oregon, 406 U.S. 404 (1972) (plurality opinion); Johnson v. Louisiana, 406 U.S. 356 (1972). \textit{See also} text accompanying notes 83-107 \textit{supra}.
\bibitem{143} See note 92-97 \textit{supra} and accompanying text.
\bibitem{144} Johnson v. Louisiana, 406 U.S. 356, 395 (1972) (Brennan, J., dissenting) (dissenting also in \textit{Apodaca}).
\bibitem{145} \textit{Id.} at 369-80 (Powell, J., concurring) (concurring also in \textit{Apodaca}). \textit{See also} text accompanying note 97 \textit{supra}.
\bibitem{146} Johnson v. Louisiana, 406 U.S. 356, 365-66 (1972) (Blackmun, J., concurring) (concurring also in \textit{Apodaca}). \textit{See also} text accompanying note 149 \textit{infra}.
\bibitem{147} Johnson v. Louisiana, 406 U.S. 356, 400-01 (1972) (Marshall, J., dissenting) (dissenting also in \textit{Apodaca}).
\end{thebibliography}
Apodaca, it does not fully respond to the points made by those Justices voting with the Court in Johnson and Apodaca or in the Louisiana Supreme Court's resolution of the issues raised in Burch. Furthermore, if Justice White meant to justify the decision by simply relegating the dissenting jurors to "mere surplusage," this would suggest that an eight-to-four or seven-to-five verdict model would be permissible. If dissenting jurors are merely superfluous, then under Williams all that is needed is six concurring jury members. However, at least one member of the majority, Justice Blackmun, conditioned his concurrence on the fact that "'a substantial majority of the jury' are to be convinced," intimating that the constitutional line should be drawn at nine to three. Therefore, we must assume that the Court will not read the Johnson and Apodaca decisions as demoting the dissenters to "mere surplusage" and invalidate the five-out-of-six verdict system strictly on this basis. Rather, the Court will probably analyze the five-out-of-six system by ascertaining its functional congruities to presently sanctioned jury systems. Even under this analysis, the five-out-of-six model is constitutionally offensive.

Sanctioning nonunanimity in the six-member panel context involves far greater dangers than permitting nine-out-of-twelve and ten-out-of-twelve jury verdicts. A mere comparison of the seventy-five percent concurrence in the nine-out-of-twelve system and the eighty-three percent concurrence in the five-out-of-six system is misleading. It overlooks a fundamental distinction between the two variations. An eighty-three percent concurrence in the twelve-person jury context represents two dissenting jurors, whereas in the six-member jury context it represents only one. This distinction is crucial because psychological evidence demonstrates conclusively the importance to the proponent of a minority viewpoint.

149. Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring) (concurring also in Apodaca) (quoting id. at 362 (majority opinion)).
150. Id. at 366.
152. When there is only one proponent of a minority viewpoint, group pressures will often result in the dissenting viewholder conforming to the majority view. However, it is generally accepted by social psychologists that a sharp decrease in conformity rates occurs when there are two, rather than one, minority viewholders. See Edmonds, Logical Error as a Function of Group Consensus: An Experimental
of at least one ally when presenting his or her arguments to the majority.\textsuperscript{153} Beginning with the Asch experiments\textsuperscript{154} reported in the 1950's, it has been shown to be unlikely that a sole dissenter will maintain his or her position in the face of a substantial majority opposed to this view.\textsuperscript{155} Even if the minority view proponent internally maintains a contrary view, a grave danger exists that, faced with the majority view, this sole dissenter will change his or her overt opinion to avoid appearing different.\textsuperscript{156} However, the evidence is also clear that when the dissenter has at least one ally, "the conformity rates . . . [fall] off dramatically, even though the subjects [continue] to face absolutely large majorities against them."\textsuperscript{157} Therefore, if the minority view is held by only one out of six jurors, as opposed to two or three out of twelve jurors, there is a severe risk that this viewpoint will not be fully and effectively presented to the majority. The serious consideration that should be given to all viewpoints is likely to be substantially less when an opinion is expressed by only one member of a group than when the same viewpoint is shared by two members of the group, even if the absolute group size is doubled.


\textsuperscript{153} See Lempert, supra note 152, at 673-74.

\textsuperscript{154} Asch, Effects of Group Pressure Upon the Modification and Distortion of Judgments, in GROUP DYNAMICS 189 (3d ed. D. Cartwright & A. Zander 1960), cited in Lempert, supra note 152, at 667 n.71. Lempert describes the initial Asch experiment as follows:

Asch required a subject to state which of three lines matched a criterion line. Subjects responding alone made virtually no errors. However, when naive subjects responded in a group after seven others, each of whom made the same incorrect response, almost one third of the subjects responded incorrectly as well. In these conditions even those giving correct responses evidenced considerable agitation. Post-experiment interviews revealed that many of the conforming subjects had conformed only on the surface; they had continued to believe throughout the experiment that the group was wrong but had changed their answers because they did not want to appear different.

\ldots Asch also found that if he added just one true respondent to the group, the conformity rates of the naive subjects fell off dramatically, even though the subjects continued to face absolutely large majorities against them.

Lempert, supra note 152, at 673-74 (footnotes omitted).

\textsuperscript{155} See note 154 supra. See also Lempert, supra note 152, at 674-78; Saks, supra note 152, at 19.

\textsuperscript{156} See Lempert, supra note 152; Saks, supra note 152.

\textsuperscript{157} Lempert, supra note 152, at 674 (footnote omitted).
In addition, Justice Blackmun noted in Ballew that one of the dangers involved in sanctioning further reductions in the size of the jury is the chance that hung juries will decline, thus creating “an imbalance to the detriment of one side, the defense.”158 In Williams the Court found “no discernible difference”159 between decisions rendered by six- and twelve-person juries. Applying this “no discernible difference” standard, the Court in Ballew was compelled to invalidate a system that had an adverse effect on a criminal defendant’s chance for acquittal. Significantly, the data relied on in Ballew—demonstrating the decreased likelihood of a hung jury which results if the number of jurors is reduced below six—is even more strikingly demonstrative of the danger to the defendant’s chance for a hung jury when unanimity is not required for the six-member panel.160 Therefore, the Court’s rejection in Ballew of any change in the presently sanctioned jury models that works to the detriment of the criminal defendant by decreasing the chances for a hung jury is clearly relevant to the issue before the Court in Burch.

Thus far it has been argued that criminal convictions rendered by five-out-of-six jury votes have important functional consequences which adversely affect the essential purposes of the right to jury trial. It will be necessary to focus on the functional ramifications that occur when the five-out-of-six system is utilized as long as the Court adheres to the reasoning embodied in Williams, Johnson and Apodaca, and Ballew.161

When the Court decided Williams in 1970, it cited various empirical studies purporting to show the functional equivalence of six- and twelve-member panels.162 When the Court decided Johnson and Apodaca in 1972, it noted the lack of empirical data comparing unanimous and nonunanimous juries,163 stating that before the Court would “overturn a considered legislative judgment

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161. See notes 60-72, 99-107 supra and accompanying text.
162. Williams v. Florida, 399 U.S. 78, 101 n.48 (1970). These studies were effectively discredited in Zeisel, supra note 16. For a further discussion of the adequacy of the research the Court has relied on in the jury diminution cases, see Zeisel & Diamond, “Convincing Empirical Evidence” on the Six Member Jury, 41 U. Chi. L. Rev. 281 (1974).
that unanimity is not essential to reasoned jury verdicts, we must have some basis for doing so other than unsupported assumptions." 164 By the time the Court decided Ballew in 1978, considerably more research was available, much of which had been developed in direct response to the assertions in prior cases. These results render doubtful the major premises relied on in Williams and Johnson and Apodaca. 165 Moreover, that Justice Blackmun's opinion in Ballew relied almost exclusively on social science data 166 suggests an increasing acceptance of empirical research by the Court. Thus Ballew contains a major analytical flaw when read in conjunction with Williams and Johnson and Apodaca. Although the evidence cited in Ballew casts serious doubt on the functional abilities of the jury systems sanctioned in the prior decisions, no explanation was offered for the Court's willingness to utilize this data to invalidate the five-person unanimous system, while reaffirming the prior decisions. Commentators have suggested that since the original premises upon which the Court based its decisions have been invalidated, these decisions should be reversed. 167 This criticism is especially applicable to Williams, where the Court explicitly based its decision on the operational importance of the number of jurors. 168 However, the Court has decided to forego the opportunity to reverse these cases, although the data cited in Ballew certainly would have justified a decision to do so. It is evident that a majority of the Court does not consider empirical research the only factor that should be considered in reassessing the validity of either Williams or Johnson and Apodaca, or in evaluating further deviations from the presently sanctioned jury models. Justice Powell's concurrence in Ballew, which was joined by two other Justices, demonstrates that some members of the Court are hesitant to base constitutional decisions on empirical research alone:

I have reservations as to the wisdom—as well as the necessity—of MR. JUSTICE BLACKMUN'S heavy reliance on numerology de-

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165. See generally Lempert, supra note 152; Saks, supra note 152; Zeisel, supra note 72; Zeisel, supra note 16; Zeisel & Diamond, supra note 162. See also Ballew v. Georgia, 435 U.S. 223, 231 n.10 (1978).
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.169

Researchers themselves have noted various shortcomings in
the empirical studies in this area. For example, the test situations
are inadequate to compare the operational differences of juries
varied by size and unanimity requirement.170 Necessarily, direct
comparisons must be made under simulated conditions, since no
way exists to control the different types of cases that go to different
types of juries in the courtroom setting.171

Another potential source of confusion arises from the lack of
any reason for assuming that varying features of the jury will make
a difference in every case. This creates the danger that cases in
which differences do occur will go undetected if they comprise
only a small percentage of the total cases.172 Therefore, to get an
accurate portrait of differences that do occur,173 it is necessary to
isolate the types of situations in which the characteristic attitudes
of jurors may make a difference and include only those cases in any
further studies. Although the percentage of cases in which varying
the features will make a difference may appear to be insignificant,
the absolute number of cases affected may be great.174 One re-
searcher's results describe the cases in which differences will occur:

[W]hile the innocent-appearing defendant is unlikely to be con-
victed under any circumstances, the individual who appears to
be nearly guilty or can present only a weak defense runs a much
greater risk of conviction with the more lenient criteria or
smaller jury. The main concern is with the innocent individuals
in this latter category, i.e., those with a record of prior arrests or
with poor legal help who would lose much of the protection of
the 'reasonable doubt' restriction if conviction were made easier.
Therefore, relaxing the jury procedure to permit more actually

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phasis in original) (footnote omitted).
170. See Nagel & Neef, Deductive Modeling to Determine an Optimum Jury
171. See id. at 937-40.
172. See Lempert, supra note 152, at 648-53.
173. Id.
174. In id. at 653, Lempert estimates the proportion of cases in which jury size
has a reasonable probability of affecting jury verdicts at 14.1%.
guilty individuals to be convicted will serve to markedly increase the probability of convicting those who are actually innocent. 175

The types of criminal defendants that will be affected by varying the features of a jury must be kept in mind even if it appears that, in terms of aggregate data comparisons, the percentage of cases affected is minimal. It is also important to note the problems inherent in any type of research that attempts to draw conclusions from aggregate as opposed to selective jury data. 176

Thus, researchers as well as members of the Supreme Court have noted various risks of blind acceptance of social science conclusions. 177 One commentator, in an article aptly entitled "Ignorance of Science is No Excuse," 178 has expressed incredulity at the Court's apparent ignorance of social science techniques. 179 The problems associated with the Court's inability to adequately assess the methodology or probe the validity of the underlying assumptions employed in the various studies have doubtless made the Court skeptical of the results much of this research purports to prove. This is especially true when one considers the avalanche of criticism which the Court generated when it cited and apparently relied on studies later shown to be untenable. 180 Therefore, the Court's reluctance to base its decisions solely on social science research is understandable. However, one researcher has suggested that since history clearly favors, if not mandates, 181 the unanimous twelve-member panel, the Supreme Court has placed on the wrong party the burden of proving that deviations from this model make a difference:

[T]hose who argue that jury size is not defined constitutionally, because size does not affect verdicts and hence has no relationship to sixth and seventh amendment values, should have the burden of empirically proving the lack of relationship. Instead, the uncritical use of significance tests in jury-size research puts a heavy burden of proof on partisans of the status quo. 182

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175. Friedman, Trial by Jury: Criteria for Convictions, Jury Size and Type I and Type II Errors, AM. STATISTICAL, Apr. 1972, at 22-23.
176. See notes 172-173 supra and accompanying text.
177. See generally Lempert, supra note 152; Nagel & Neef, supra note 170. See also note 169 supra and accompanying text.
178. See Saks, supra note 152.
179. Id. at 18-20.
180. See authorities cited note 165 supra.
181. See Lempert, supra note 152, at 660 n.55.
182. Id. at 661-62 (footnotes omitted).
Justice Marshall voiced a similar criticism when he noted that permitting deviations from the traditional common-law jury is necessarily an arbitrary course of action:

[T]here is nothing intrinsically wrong with drawing arbitrary lines . . . , [b]ut in cases where arbitrary lines are necessary, I would have thought it more consonant with our limited role in a constitutional democracy to draw them with reference to the fixed bounds of the Constitution rather than on a wholly ad hoc basis.

. . . . The line must be drawn somewhere, and the difference between drawing it in the light of history and drawing it on an ad hoc basis is, ultimately, the difference between interpreting a constitution and making it up as one goes along.\textsuperscript{183}

Given that the jury had survived, until very recently, in virtually the same form described by Blackstone in the eighteenth century,\textsuperscript{184} the Court should not have assumed that the size and unanimity requirements are merely “accidental features.”\textsuperscript{185} At the very least, the Court should have created a rebuttable presumption regarding the necessity of these features to safeguard the sixth amendment guarantee. In any event, the Court should not sanction further deviations from the traditional jury model absent a clear showing that sixth amendment values are not threatened.

A final point that needs attention is the suggestion made by Justice Blackmun in \textit{Ballew} that, even if a change in the structure of the jury “inhibits the functioning of the jury as an institution to a significant degree,”\textsuperscript{186} the change may nevertheless be justifiable if “any state interest counterbalances and justifies the disruption so as to preserve its constitutionality.”\textsuperscript{187} Since financial benefits result from fewer jurors drawing daily allowances,\textsuperscript{188} savings would not occur in the nonunanimous situation because all the jurors receive the same stipend. The only monetary savings that could conceivably occur would stem either from shorter deliberation periods or reduction in the number of hung juries, which result in the re-

\textsuperscript{184} See note 35 \textit{supra} and accompanying text.
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.} at 244.
trying of cases. However, as has been noted earlier,¹⁸⁹ both these situations endanger important sixth amendment values. Therefore, any potential savings that could result from the five-out-of-six jury verdict model is substantially outweighed by competing considerations which are essential to the proper functioning of the jury.

CONCLUSION

The five-out-of-six jury verdict model should be declared unconstitutional by the Supreme Court in Burch v. Louisiana. In light of the important sixth and fourteenth amendment values at stake, the Court should be extremely wary of sanctioning further deviations from the historically rooted unanimous twelve-person model.

Although the Court was cavalier in asserting that both nonunanimous twelve-person juries and unanimous six-person panels are equivalent to the traditional unanimous twelve-member jury, the Justices were in full agreement in Ballew v. Georgia that a unanimous five-member jury is constitutionally offensive. Significantly, Ballew is the most recent decision concerning “jury enfeebling measures”; it is the only decision in this area in which the Justices were undivided in their holding. Therefore, Ballew may reflect a heightened awareness by the Court of the dangers posed by further relaxations on the constitutional components of the jury. The Court should continue this trend and invalidate the five-out-of-six verdict model to insure that the essential purposes of the sixth amendment right to jury trial are not further infringed.

Dolores Fredrich

¹⁸⁹. See notes 128-34, 158-60 supra and accompanying text.