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## BALLEW v. GEORGIA: A MOVE TOWARD NEO-INCORPORATIONISM?

When the Supreme Court held the sixth amendment guarantee of a jury trial<sup>1</sup> applicable to the states through the due process clause of the fourteenth amendment,<sup>2</sup> the Court did not decide whether state jury procedures must conform to federal practice.<sup>3</sup> As a result, the states made juries available to defendants accused of serious crimes, but continued to interpret jury practice according to state constitutions and statutes.<sup>4</sup> In *Williams v. Florida*,<sup>5</sup> the Supreme Court upheld the use of a six member jury in a state criminal proceeding.<sup>6</sup> The Supreme Court, reasoning that a six member jury is as capable of performing a jury's functions as a jury of twelve,<sup>7</sup> held that a jury of six complies with the sixth amendment guaran-

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<sup>1</sup> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI.

<sup>2</sup> *Duncan v. Louisiana*, 391 U.S. 145 (1968). *Duncan* held that the right to a jury trial attaches when a defendant is accused of serious crimes. *Id.* at 154. Under *Duncan*, a crime that carried a maximum penalty of two years imprisonment was considered a serious crime. *Id.* at 161-62. Since *Duncan*, the Supreme Court has extended the right to a jury trial to any defendant accused of a crime that carries a maximum penalty exceeding six months imprisonment. *Baldwin v. New York*, 399 U.S. 66, 69 (1970).

<sup>3</sup> Prior to *Duncan*, the sixth amendment right to a jury trial was not applicable to the states. Therefore, defendants acquired jury rights in state criminal proceedings solely through state constitutions and statutes. *See, e.g., Maxwell v. Dow*, 176 U.S. 581, 604-05 (1900) (provision in state constitution for eight member juries in trials for noncapital offenses upheld). In extending the right to a jury trial to state criminal proceedings, the *Duncan* Court examined only a defendant's right to a jury trial, and did not impose a size requirement on state court juries. 391 U.S. at 158 n.30.

<sup>4</sup> *See, e.g., Hearn v. State*, 223 So. 2d 738, 739 (Fla. 1969), *cert. denied*, 399 U.S. 929 (1970) (six member jury constitutional; sixth amendment guarantees jury trial only and not specific number of jurors).

<sup>5</sup> 399 U.S. 78 (1970).

<sup>6</sup> *Id.* at 103. In reaching its decision, the *Williams* Court reasoned that the requirement that a jury be composed of twelve persons was an historical accident. *Id.* at 87-90. Jury size stabilized at 12 with the recognitions under Henry II. The recognitions were groups formed by the courts to examine the facts of a case and report their verdict to the court. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 295, 295 (1892). Various rationales have been suggested for a twelve member jury. The number always has had religious significance (12 apostles, 12 tribes of Israel), and the English measurement system is based on 12 (12 inches in a foot, 12 items in a dozen). White, *Origin And Development Of Trial By Jury*, 29 TENN. L. REV. 8, 15-17 (1961). One commentator has suggested that a jury of 12 has astrological significance. *See Wiehl, The Six Man Jury*, 4 GONZ. L. REV. 35, 38 (1968) (12 signs in the Zodiac) [hereinafter cited as *Wiehl*].

After finding that a jury of twelve was an historical accident, the *Williams* Court concluded that the Constitution does not require that juries be composed of twelve members. 399 U.S. at 99. *But see The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 165-66 (1970) (lack of debate by Framers, Congress and states in adopting sixth amendment suggests intent to retain common law jury of 12).

<sup>7</sup> 399 U.S. at 100. The *Williams* Court reasoned that the jury's purpose is the prevention of government oppression. This purpose can be achieved only when the jury is large enough to promote group deliberation without external influence and to provide the possibility of obtaining a representative cross-section of the community. *Id.* In examining the constitu-

tee.<sup>8</sup> The constitutionality of using juries with less than six members remained in doubt until *Ballew v. Georgia*.<sup>9</sup>

In *Ballew*, the Supreme Court found that the reduction of a jury to five members impairs a jury's ability to fulfill its constitutional purpose and thus held the use of five member juries in state criminal proceedings unconstitutional.<sup>10</sup> *Ballew* was charged with a misdemeanor for violating Georgia's obscenity statute.<sup>11</sup> After the trial court denied *Ballew's* motion to impanel a jury of twelve,<sup>12</sup> *Ballew* was convicted by a jury of five.<sup>13</sup> On

tional sufficiency of six member juries, the *Williams* Court rejected the argument that a reduction in jury size decreases the protection against government oppression by increasing the prosecution's advantage over the defendant. *Id.* at 101-02. The Court agreed that a twelve member jury is more likely than a six member jury to contain one juror sympathetic to the defendant, thereby causing a hung jury rather than a conviction. However, the Court reasoned that a twelve member jury is also more likely to contain one juror sympathetic to the prosecutor, thereby causing a hung jury rather than an acquittal. *Id.* at 101. Furthermore, although a hung jury may be advantageous to the defendant, the Court did not believe that a reduction in jury size to six perceptibly decreases the likelihood of a hung jury. *Id.* at 101 & n.47.

<sup>8</sup> *Id.* at 102-03. The Court relied on six articles in deciding that there would be no discernable difference in the verdicts reached by six and twelve member juries. *Id.* at 101 & n.48, citing Cronin, *Six Member Juries in District Courts*, 2 BOSTON B.J. No. 4, 27 (1958); Phillips, *A Jury Of Six In All Cases*, 30 CONN. B.J. 354 (1956) (reduction to six in all trials except capital crimes would save time and expense and reduce court congestion); Tamm, *The Five Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L. J. 120 (1962) (proposed five member jury would decrease trial time, administrative time and costs while retaining the advantages of the jury system); Wiehl, *supra* note 6, at 40-41 (jury of six would perform as well as 12 member jury and would provide representative cross-section of the community while being less costly and time consuming); *New Jersey Experiments with Six-Man Jury*, 9 BULL. SEC. JUD. AD. A.B.A. (May 1966); *Six-Member Juries Tried in Massachusetts District Court*, 42 J. AM JUD. SOC. 136 (1958) (attorneys and court clerk perceived no difference in verdicts, and a reduction in costs and backlog after using six member juries for one and a half years).

In examining the ability of six member juries to provide a representative cross-section of the community, the *Williams* Court further reasoned that there would be little practical difference between the cross-section provided by six and twelve member juries. 399 U.S. at 102. The Court reasoned that if the jury rolls do not exclude particular classes, six member juries would meet the cross-section requirement. *Id.*, citing *Carter v. Jury Comm'n*, 396 U.S. 320, 329-30 (1970).

<sup>9</sup> 435 U.S. 223 (1978). The *Williams* Court reserved ruling on whether a jury smaller than six could satisfy the jury requirement of the sixth amendment. 399 U.S. at 91 n.28.

<sup>10</sup> 435 U.S. at 239.

<sup>11</sup> *Id.* at 225. *Ballew* was the manager of an adult movie theater which presented the film "Behind the Green Door." *Id.* at 224. Georgia's applicable obscenity statute provided: "A person commits the offense of distributing obscene materials when he . . . exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof. . . ." GA. CODE ANN. § 26-2101(a) (1977).

<sup>12</sup> 435 U.S. at 227.

<sup>13</sup> *Id.* Since the maximum penalty for a misdemeanor exceeded six months imprisonment, the right to jury attached. See *Baldwin v. New York*, 399 U.S. 66, 73-74 (1970). *Ballew* was tried in a county court which used five member juries for all misdemeanor trials pursuant to statutory authority. 435 U.S. at 226; see 1890-91 Ga. Laws 937-38. The number of jurors required by statute subsequently was change to six. See 1976 Ga. Laws, Vol. 2, No. 1003, at 3019. In addition, the Georgia Constitution in effect at the time *Ballew* was tried provided

appeal, Ballew questioned the constitutionality of a five member jury,<sup>14</sup> but the Georgia Court of Appeals affirmed his conviction,<sup>15</sup> relying on a Georgia Supreme Court decision upholding the use of five member juries.<sup>16</sup>

Because *Williams* approved the use of six member juries in state criminal proceedings,<sup>17</sup> the issue in *Ballew* concerned the constitutional effect of a reduction in jury size by one member.<sup>18</sup> Although the Court did not reach a majority decision in *Ballew*, the Justices agreed that a jury of five is constitutionally insufficient.<sup>19</sup> Justice Blackmun, writing the plurality opinion,<sup>20</sup> based his conclusion on several empirical jury studies that indicated that a reduction in jury size from twelve to six members impairs the jury's deliberative process.<sup>21</sup> Justice Blackmun, however, did not scrutinize the methodologies of the studies which supported his position,<sup>22</sup> nor did he explicitly recognize that the conclusions of such studies question the validity of *Williams*.<sup>23</sup>

The studies relied upon by Justice Blackmun indicate that juries smaller than twelve<sup>24</sup> are less likely to foster group deliberation than twelve

that "[t]he right of trial by jury, except where otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial or traverse jury, except in the supreme court." GA. CONST. of 1945 art. 6, § 16, ¶ 1. Despite the 1976 statutory change requiring a minimum of six jurors, the state constitution adopted in 1976 retained the same jury provision. GA. CONST. art. 6, § 15, ¶ 1.

<sup>14</sup> *Ballew v. State*, 138 Ga. App. 530, 535, 227 S.E.2d 65, 69 (1976).

<sup>15</sup> *Id.* at 536, 227 S.E.2d at 69.

<sup>16</sup> *See Sanders v. State*, 234 Ga. 586, 216 S.E.2d 838 (1975), *cert. denied*, 424 U.S. 931 (1976).

<sup>17</sup> 399 U.S. at 103; *see text accompanying notes 5-8 supra*.

<sup>18</sup> 435 U.S. at 230-31.

<sup>19</sup> Justice Brennan, joined by Justices Stewart and Marshall, agreed that a five member jury is not allowed by the sixth and fourteenth amendments, but would have held Georgia's obscenity statute unconstitutional. *Id.* at 246. Justice White asserted that a five member jury is unconstitutional due to its inability to represent a cross-section of the community. *Id.* at 245. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, recognized that a minimum jury size must be established and stated that a trial by a jury of five was potentially unfair to the accused. Justice Powell also argued that state and federal jury practice are not required to be identical; therefore, the approval of six member juries in state criminal proceedings does not imply approval of a similar federal jury size. *Id.* at 245-46.

<sup>20</sup> Only Justice Stevens joined Justice Blackmun's plurality opinion. *Id.* at 224.

<sup>21</sup> *Id.* at 232-38. Justice Blackmun cited *Williams* as precedent for the use of empirical studies as a basis for a constitutional decision. *Id.* Justice Powell, however, in his concurring opinion, criticized Justice Blackmun's reliance on such studies since their validity was not subjected to the "traditional testing mechanisms of the adversary process." *Id.* at 246.

<sup>22</sup> *See text accompanying notes 42-47 infra*.

<sup>23</sup> *See text accompanying notes 76-79 infra*.

<sup>24</sup> Since most of the jury studies were undertaken to test the validity of *Williams*, they generally compare juries of six and twelve. *See, e.g., Lempert, Uncovering "Non-discernable" Differences: Empirical Research And The Jury-Size Cases*, 73 MICH. L. REV. 643 (1975) [hereinafter cited as Lempert]; Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971) [hereinafter cited as Zeisel]; Note, *Six-Member And Twelve-Member Juries: An Empirical Study Of Trial Results*, 6 U. MICH. J. L. REF. 671 (1973) [hereinafter cited as *Trial Results*]; Note, *An Empirical Study Of Six- And Twelve-Member Jury Decision-Making Processes*, 6 U. MICH. J. L. REF. 712 (1973) [hereinafter cited as *Decision Process*]; Note, *The Effect Of Jury Size on the Probability of*

member juries.<sup>25</sup> In smaller juries, individual jurors make fewer critical contributions,<sup>26</sup> and individual prejudices are more difficult to overcome.<sup>27</sup> Justice Blackmun also cited studies showing that the use of smaller juries increases the risk of convicting innocent defendants<sup>28</sup> and results in a wider range of verdicts.<sup>29</sup> Therefore, Justice Blackmun believed that the verdicts rendered by smaller juries are less accurate and consistent than verdicts rendered by twelve member juries.<sup>30</sup> In addition, Justice Blackmun examined a five member jury's ability to comply with the cross-section requirement.<sup>31</sup> The low probability of minority representation on six member juries<sup>32</sup> convinced him that a reduction to five would further decrease the opportunity for minority participation.<sup>33</sup> Finally, Justice Blackmun reasoned that because of an expected decrease in the number of hung juries<sup>34</sup> and in minority representation,<sup>35</sup> a reduction from six to five gives the prosecution an overall advantage without offering any counterbalancing

*Conviction: An Evaluation of Williams v. Florida*, 22 CASE W. RES. L. REV. 529 (1971). *But see, e.g.*, H. KALVIN & H. ZEISEL, *THE AMERICAN JURY* (Phoenix ed. 1971) (comparing verdicts reached by 12 member juries with verdict judge would have rendered) [hereinafter cited as KALVIN & ZEISEL]; Nagel & Neef, *Deductive Modeling To Determine An Optimum Jury Size And Fraction Required To Convict*, 1975 WASH. U.L.Q. 933 (attempt to ascertain optimum jury size through probability theory) [hereinafter cited as Nagel & Neef].

<sup>25</sup> 435 U.S. at 232-34; *see* Thomas & Fink, *Effects of Group Size*, 60 PSYCH. BULL. 371, 373 (1963) (comparison of various size groups showed positive correlation between size, group performance and productivity).

<sup>26</sup> 435 U.S. at 233; *see* Faust, *Group Versus Individual Problem-Solving*, 59 J. ABNORMAL & SOC. PSYCH. 68, 71 (1959) (larger group is more likely than smaller group to remember details such as evidence and jury instructions).

<sup>27</sup> 435 U.S. at 233; *see* Barnlund, *A Comparative Study of Individual, Majority and Group Judgment*, 58 J. ABNORMAL & SOC. PSYCH. 55, 59 (1959) (in larger groups, individual prejudices are more often counterbalanced by viewpoints of other group members).

<sup>28</sup> 435 U.S. at 234; *see* Nagel & Neef, *supra* note 24, at 960 (probability of convicting innocent defendant increases seven per cent when jury size decreases from twelve to six).

<sup>29</sup> 435 U.S. at 235; *see* Lempert, *supra* note 24, at 679-80 (jury of 12 more likely to reach consistent compromises in resolving multiple counts or levels of offense than jury of six).

<sup>30</sup> 435 U.S. at 234-35. Justice Blackmun also cited a mock trial experiment which indicated a 14% decrease in correct verdicts when jury size decreased from twelve to six. *Id.*; *see* M. SAKS, *JURY VERDICTS*, 86-87 (1977) [hereinafter cited as SAKS, VERDICTS].

<sup>31</sup> 435 U.S. at 236-37, 241-42; *see* note 7 *supra*.

<sup>32</sup> A minority comprising 10% of a community would be unrepresented on 28.2% of randomly selected twelve member juries and 53.1% of randomly selected six member juries. 435 U.S. at 236; Lempert, *supra* note 24, at 669.

<sup>33</sup> 435 U.S. at 236-37; *see* text accompanying notes 50-59 *infra*.

<sup>34</sup> 435 U.S. at 236; *see* Zeisel, *supra* note 24, at 720 (percent of hung juries decrease from 5% to 2.4% with reduction in jury size from twelve to six). A defendant benefits from a hung jury because he remains unconvicted pending another trial, is in a better position to plea bargain because the weaknesses of a case have been exposed, and the prosecution's evidence against him has been fully disclosed. Lempert, *supra* note 24, at 667.

<sup>35</sup> 435 U.S. at 236; *see* note 32 *supra*. Often an unconvinced juror will join the majority in voting for acquittal or conviction unless he is supported by another juror who shares his viewpoint. Furthermore, hung juries are usually caused by only one or two hold out jurors. Therefore, as jury size is reduced, the likelihood of a jury containing two jurors who express minority opinions is also reduced, thus decreasing the number of hung juries. 435 U.S. at 356; *see* Lempert, *supra* note 24, at 673-77.

safeguards for the defendant.<sup>36</sup> Justice Blackmun cited the results of the empirical studies to support his conclusion that a reduction in jury size to five members is unconstitutional under the sixth and fourteenth amendments because such a reduction impairs, to a constitutionally significant degree, a jury's ability to function.<sup>37</sup>

Not all jury studies, however, support Justice Blackmun's conclusion that jury deliberation and accuracy are adversely affected by a size reduction. Two mock trial experiments<sup>38</sup> and a study comparing actual trial verdicts<sup>39</sup> concluded that there are no significant differences between verdicts, deliberation times, and deliberative processes of juries of twelve and six.<sup>40</sup> Rejecting such conclusions, Justice Blackmun criticized the methodologies employed in these studies.<sup>41</sup>

While Justice Blackmun criticized the methodologies of studies that undermined his position,<sup>42</sup> he cited without scrutiny the conclusions of other studies to assert that a reduction in jury size affects a small percentage of verdicts.<sup>43</sup> By not considering the inherent difficulty in assessing the effect of a size reduction on jury behavior,<sup>44</sup> Justice Blackmun failed to

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<sup>36</sup> 435 U.S. at 236.

<sup>37</sup> *Id.* at 239.

<sup>38</sup> Davis, Kerr, Atken, Holt & Meek, *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-thirds Majority Rules*, 32 J. PERSONALITY & SOC. PSYCH. 1 (1975) [hereinafter cited as Davis]; *Decision Process*, *supra* note 24, at 712.

<sup>39</sup> *Trial Results*, *supra* note 24, at 671.

<sup>40</sup> Davis, *supra* note 38, at 7; *Decision Process*, *supra* note 24, at 716-18; *Trial Results*, *supra* note 24, at 710.

<sup>41</sup> 435 U.S. at 237-39, 242-43, citing Diamond, *A Jury Experiment Reanalyzed*, 7 U. MICH. J. L. REF. 520 (1974) [hereinafter cited as Diamond]; Zeisel & Diamond, "Convincing Empirical Evidence" on the Six Member Jury, 41 U. CHI. L. REV. 281 (1974) [hereinafter cited as Zeisel & Diamond]. The facts presented in both mock trial experiments were so heavily biased in favor of one party that all juries, regardless of size, reached the same verdict. 435 U.S. at 243; see Diamond, *supra* at 521-22; Zeisel & Diamond, *supra* at 287. In one experiment, only three out of sixteen jury panels reached verdicts through deliberation. The examination of the deliberative processes of only three panels cannot support any inferences regarding the general behavior of juries because the sample is too small. Zeisel & Diamond, *supra* at 287-88. Other methodological problems result because the juries in the mock trials were composed of students. Davis, *supra* note 38, at 5; *Decision Process*, *supra* note 24, at 721. Students are less likely to spend as much time deliberating than actual jurors, because students are aware of their participation in an experiment and must return to other classes. Diamond, *supra* at 522-23.

Another study compared actual jury results in civil cases before and after jury size was reduced from twelve to six. See *Trial Results*, *supra* note 24, at 657. Although the study concluded that there was no significant difference in the damages awarded by six and twelve member juries, critics have argued that such a conclusion was unsupported by the study's data. See Zeisel & Diamond, *supra* at 288-90. In addition, because the study dealt only with civil cases, its applicability to criminal juries is questionable. *Id.*

<sup>42</sup> See note 41 *supra*.

<sup>43</sup> 435 U.S. at 234-35, citing SAKS, VERDICTS, *supra* note 30, at 86-87; Lempert, *supra* note 24, at 648-53. In citing the Saks experiment, Justice Blackmun did not examine the methodology employed as he did when he rejected the conclusions of other mock trial experiments. Compare 435 U.S. at 234-35 with *id.* at 242-43.

<sup>44</sup> Researchers generally agree that a size reduction affects only a small percent of jury

recognize the weaknesses of the studies supporting his position.<sup>45</sup> Researchers have concluded from such studies that group deliberation is adversely affected as size is reduced. However, the magnitude of the adverse effect resulting from a reduction in jury size to either six or five has not been measured.<sup>46</sup> Nevertheless, Justice Blackmun considered the conclusions of such research an adequate indication that a reduction in jury size from twelve to six adversely affects the reliability of jury verdicts by impairing the jury's deliberative process. He then concluded that a reduction to a five member jury would have a constitutional effect on a jury's reliability.<sup>47</sup>

Even if five member juries were sufficiently large to promote group deliberation,<sup>48</sup> juries also must provide the possibility of obtaining a representative cross-section of the community.<sup>49</sup> In testing the ability of a five member jury to comply with the cross-section requirement, Justice Blackmun was concerned that juries smaller than six could not adequately represent the community.<sup>50</sup> The small mathematical probability of minority<sup>51</sup>

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verdicts. See, e.g., Lempert, *supra* note 24, at 648-53. For this reason, Lempert questioned the ability of any experiment to reflect differences caused only by size. *Id.* at 653.

<sup>45</sup> Researchers utilize four major methods of studying the effect of size on jury behavior: mock trials, comparisons of trial results conducted before different sized juries, mathematical models and group decision making experiments. In mock trial experiments, different sized panels are presented with a fact situation, and the panels deliberate and return their verdicts. See, e.g., SAKS, VERDICTS, *supra* note 30, at 86-97; Davis, *supra* note 38, at 7; *Decision Process*, *supra* note 24, at 716-18. Because such experiments are dissimilar from actual trials in the manner of presentation and the motivation of the jurors, the study of size and its effect on jury behavior is difficult. Zeisel & Diamond, *supra* note 41, at 287-88.

Comparisons of actual trial verdicts have been attempted. See, e.g., *Trial Results*, *supra* note 24, at 671. The validity of such studies is hampered by the difficulty of obtaining comparable data. Community attitudes, court procedures and inflation may contribute to any verdict difference as well as the size reduction. Nagel & Neef, *supra* note 24, at 936. Furthermore, such studies, which compare jury behavior in civil trials, have questionable relevance to criminal juries. See Lempert, *supra* note 24, at 290.

Because of the difficulty in isolating size as a factor in jury deliberation and verdicts, Nagel and Neef constructed a mathematical model to clarify the relationship between jury size, the probability of convicting innocent defendants and the probability of acquitting guilty defendants. Nagel & Neef, *supra* note 24, at 938. Although they concluded that the probability of convicting the innocent defendant increases as jury size decreases, they made no assertions regarding the magnitude of the increase. *Id.* at 975. Rather, the magnitude depends on the assumption of the number of truly guilty defendants. If most defendants are in fact guilty, a size reduction would have little effect on the accuracy of verdicts. *Id.* at 963.

Finally, psychological studies of group deliberation and problem-solving have been examined for their relevance to the jury size question. Such studies show that larger groups are superior to smaller groups in both quality and productivity. Thomas & Fink, *supra* note 25, at 373. However, since these studies did not examine juries, groups of twelve were not compared with groups of five or six. Nor were the decisions faced by such groups comparable to the decisions faced by a jury. Lempert, *supra* note 24, at 667, 686.

<sup>46</sup> One commentator concluded that it is impossible to infer from empirical studies the extent of any advantage to the defendant of a jury of twelve over a jury of six. See Lempert, *supra* note 24, at 689.

<sup>47</sup> 435 U.S. at 239.

<sup>48</sup> See text accompanying notes 24-47 *supra*.

<sup>49</sup> 435 U.S. at 230; see note 7 *supra*.

<sup>50</sup> 435 U.S. at 237.

representation on a six member jury<sup>52</sup> convinced Justice Blackmun that a reduction in jury size to five would impair to a constitutional degree the opportunity for minority participation on a jury.<sup>53</sup> However, the mathematical probability of minority representation on a jury of any size has little relationship to either the cross-section requirement as interpreted by the Supreme Court<sup>54</sup> or to the likelihood of minority representation on an actual jury.<sup>55</sup> Justice Blackmun's analysis of the cross-section requirement, which concentrates on the effect of a size reduction on minorities represented on each jury rather than on minority participation in the entire jury system, could be interpreted as requiring actual minority representation on each jury.<sup>56</sup> Constitutional rights and practical difficulties, however, make such an interpretation improbable.<sup>57</sup>

The practical effect of challenges during jury selection proceedings<sup>58</sup> on

<sup>51</sup> Justice Blackmun used the term "minority" to refer to viewpoints as well as racial groups. See 435 U.S. at 242.

<sup>52</sup> See note 32 *supra*.

<sup>53</sup> 435 U.S. at 236-37, 241-42.

<sup>54</sup> See note 57 *infra*.

<sup>55</sup> See text accompanying notes 58-61 *infra*.

<sup>56</sup> Justice Blackmun cited *Smith v. Texas*, 311 U.S. 128, 136 (1940), for the proposition that juries must be truly representative of the community to comply with the Constitution. 435 U.S. at 237, 243. He then questioned a five member jury's ability to meet such a requirement. *Id. Smith*, however, concerned the participation of all members of the community in the jury process. See 311 U.S. at 129. Therefore, the argument could be made that Justice Blackmun is trying to extend the *Smith* holding to include the requirement of cross-representation on each jury.

<sup>57</sup> The cross-section requirement has two constitutional sources: the right to jury provision of the sixth amendment and the equal protection clause of the fourteenth amendment. See U.S. CONST. amends. VI, XIV, § 1. The Supreme Court has interpreted the equal protection clause to forbid the states from excluding protected classes from the jury selection process. See, e.g., *Fay v. New York*, 332 U.S. 261, 284-85 (1947). When the Supreme Court applied the sixth amendment right to a jury trial to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968), the affirmative duty to provide a cross-representative jury venire, previously required only in federal courts, also became applicable to the states. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). Individual trial juries, however, have never been required to represent a cross-section of the community. E.g., *Virginia v. Rives*, 100 U.S. 313, 322-23 (1880). The Supreme Court has specifically ruled that a defendant has no right to actual minority representation on his jury. E.g., *Peters v. Kiff*, 407 U.S. 493 (1972).

In addition, the number of protected classes entitled to participate in the jury process has been greatly expanded in recent years. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975) (women); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican-Americans); *United States v. Butera*, 420 F.2d 564 (1st Cir. 1970) (young adults); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967) (day laborers). Such an expansion limits the practical ability of each jury to contain either a representative of each class or proportional cross-representation of the community. Even if juries were forced to contain an economic or racial cross-section of the community, there would be no way to insure that such juries would also contain a cross-section of ideologies. See *LaRue, A Jury Of One's Peers*, 33 WASH. & LEE L. REV. 841, 873-75 (1976). Therefore, the cross-section requirement is satisfied when the jury venire properly represents the community. *Taylor v. Louisiana*, 419 U.S. at 538.

<sup>58</sup> Once presented with a jury venire, the prosecution and defense are each entitled to challenge prospective jurors for cause if a juror shows actual prejudice or an interest in the trial's outcome. Each side also is entitled to a specific number of peremptory challenges where



actual minority representation was not considered by Justice Blackmun.<sup>59</sup> Challenges, designed to give effect to the sixth amendment guarantee of an impartial jury,<sup>60</sup> may limit actual minority representation on a jury.<sup>61</sup> Thus, although Justice Blackmun's opinion could be read as support for critics of the challenge system,<sup>62</sup> his purpose in citing the mathematical probability of minority representation was not criticism of jury selection procedures. Rather, his use of statistical probability was an attempt to support empirically his belief that a jury of five is too small to reflect community values.<sup>63</sup>

Although Justice Blackmun's reference to the mathematical probability of minority representation does illustrate that a jury of six is less likely to reflect community values than a larger jury,<sup>64</sup> Blackmun's reliance on mathematical probability is not entirely justified.<sup>65</sup> Nevertheless, recognizing that a jury of six cannot represent the essence of the community as well as a jury of twelve, Justice Blackmun concluded that a reduction of jury size to five members decreases to a constitutionally significant degree a jury's ability to constitute a cross-section of the community.<sup>66</sup> Therefore, in *Ballew*, the use of five member juries was held unconstitutional because a five member group is not large enough to foster group deliberation or to represent the community.<sup>67</sup>

Despite the concurring Justices' reservations concerning Justice Blackmun's heavy reliance on empirical data,<sup>68</sup> Blackmun expressed his belief that such studies provide the "only basis" for deciding whether a five member panel can fulfill a jury's purpose and functions.<sup>69</sup> Although Justice Blackmun cited the studies as an indication that a five member jury is not constitutionally capable of fostering group deliberation or properly representing the community,<sup>70</sup> the studies could have been cited to support the conclusion that a jury of five is as capable as a jury of six. Jury studies have attempted to compare the functioning and accuracy of juries of

bias need not be proven. See J. VAN DYKE, *JURY SELECTION PROCEDURES* 139-40, 143-45 (1977) [hereinafter cited as VAN DYKE].

<sup>59</sup> 435 U.S. at 236-37, 241-42.

<sup>60</sup> See, e.g., *Swain v. Alabama*, 380 U.S. 202, 219 (1965). The *Swain* Court reasoned that the purpose of peremptory challenges is the elimination of extremes of partiality, thereby insuring that a case is decided solely on the merits. *Id.*

<sup>61</sup> See VAN DYKE, *supra* note 58, at 139.

<sup>62</sup> Some commentators have argued that the use of peremptory challenges should be restricted or curtailed because they tend to decrease minority representation on trial juries. See, e.g., VAN DYKE, *supra* note 58, at 222.

<sup>63</sup> 435 U.S. at 242.

<sup>64</sup> *Id.* at 236-37.

<sup>65</sup> See text accompanying notes 54-57 *supra*.

<sup>66</sup> 435 U.S. at 237. In a concurring opinion, Justice White concluded, without reference to empirical data, that a jury smaller than six cannot represent the sense of the community. *Id.* at 245 (White, J., concurring).

<sup>67</sup> *Id.* at 239; see note 7 *supra*; text accompanying notes 25, 50-53 *supra*.

<sup>68</sup> See notes 19 & 21 *supra*.

<sup>69</sup> *Id.* at 231 n.10.

<sup>70</sup> *Id.* at 239.

twelve with juries of six,<sup>71</sup> but the results are inconclusive. If a difference exists between the verdicts reached by different sized juries, its extent and effect have not been measured. Since researchers have not examined five member juries,<sup>72</sup> any difference between six and five member juries in deliberation or accuracy is largely a matter of conjecture.<sup>73</sup> Thus, despite Justice Blackmun's claim that his decision was based on empirical research, his interpretation of the studies suggests that his conclusion, like those of the concurring Justices, was based on judicial hunch. Yet, unlike the other Justices, Blackmun felt compelled to support his hunch with empirical data.<sup>74</sup>

The impetus for citing empirical data was undoubtedly the *Williams* decision. The *Williams* Court has been criticized repeatedly for failing to draw on empirical data for its conclusion that a jury of six can perform the jury's functions as well as a jury of twelve.<sup>75</sup> By citing research on jury size, Justice Blackmun attempted to give scientific support for his opinion and, thus, to avoid the criticism leveled at *Williams*.

Despite Justice Blackmun's apparent desire to support his opinion with empirical evidence, his use of such data indicates his unwillingness to rely fully on the conclusions of such studies. Justice Blackmun interpreted the jury studies he cited as suggesting that a jury size reduction to six impairs a jury's ability to deliberate and to represent the community.<sup>76</sup> Rather than concluding that six member juries do not comply with the sixth amendment guarantee of a trial by jury, however, Justice Blackmun specifically reaffirmed *Williams*<sup>77</sup> and stated that a reduction in jury size to five members is unconstitutional.<sup>78</sup> Furthermore, he gave no explicit reason for his inconsistent use of the studies. If he believed that the studies, in fact, show an impairment of jury functions as a result of the reduction to six, a reassessment of *Williams* would have been in order.<sup>79</sup> The reaffirmation of the *Williams* decision despite the citation of studies criticizing the wisdom of that decision suggests the presence of other factors which override the potential adverse affects of the six member jury. The basis of *Williams* may have been the belief that the use of six member juries would save money and court time, thus reducing delay caused by crowded court dock-

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<sup>71</sup> See note 24 *supra*.

<sup>72</sup> *Id.*

<sup>73</sup> Justice Blackmun reasoned in *Ballew* that the reduction in jury size from six to five seriously impairs the functioning of a jury. 435 U.S. at 239.

<sup>74</sup> None of the concurring Justices cited empirical research to support their conclusions. 435 U.S. at 245-46.

<sup>75</sup> The studies cited in *Williams* were based on opinions rather than empirical data. See, e.g., Saks, *Ignorance Of Science Is No Excuse*, 10 TRIAL, No. 6, at 18 (1974); Zeisel, *The Waning of the American Jury*, 58 A.B.A.J. 367, 368 (1972) [hereinafter cited as *Zeisel-Waning*].

<sup>76</sup> 435 U.S. at 239.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> The issue in *Ballew* was the constitutional sufficiency of the use of five member juries. 435 U.S. at 228. Justice Blackmun, therefore, could have reserved ruling on the continued validity of *Williams*.

ets.<sup>80</sup> Although the *Williams* Court did not explicitly consider the savings resulting from a jury size reduction,<sup>81</sup> in *Ballew*, Justice Blackmun was willing to balance the negative effect of a reduction against the state's interest in the reduction.<sup>82</sup> This willingness suggests that the same considerations may have affected the *Williams* decision.<sup>83</sup>

Both *Ballew* and *Williams* arose because state jury procedures did not conform to federal jury standards.<sup>84</sup> Since the Court had decided previously that the due process clause of the fourteenth amendment incorporates the right to jury provision of the sixth amendment,<sup>85</sup> the issue in *Williams* was the effect of that incorporation.<sup>86</sup> In earlier decisions the Court followed the selective incorporation doctrine, whereby an incorporated provision subjects the states to the procedural standards imposed on the federal government.<sup>87</sup> An alternative to selective incorporation is neo-incorporation. Under neo-incorporation, the states may develop their own procedures to give effect to an incorporated right.<sup>88</sup> In *Williams*, the Supreme Court approved the use of six member juries in state courts by construing the sixth amendment.<sup>89</sup> Although the *Williams* analysis is in keeping with the

<sup>80</sup> See, e.g., Zeisel-Waning, *supra* note 75, at 370; Comment, *Defendant's Right to a Jury Trial—Is Six Enough?*, 59 KY. L. J. 996, 1007-08 (1971).

<sup>81</sup> *Williams v. Florida*, 399 U.S. 78, 100-02.

<sup>82</sup> 435 U.S. at 243-44. Justice Blackmun indicated that he might have allowed a jury reduction to five if Georgia had been able to justify the reduction by showing a significant saving in time or costs. While the use of six member juries could benefit the state by a substantial reduction in daily allowances paid to jurors, savings in court time have not been documented. *Id.*, citing Pabst, *Statistical Studies Of The Costs Of Six-Man Versus Twelve-Man Juries*, 14 WM. & MARY L. REV. 326, 327-28 (1972); Zeisel, *Twelve Is Just*, 10 TRIAL, No. 6, at 13 (1974). From these studies, Justice Blackmun reasoned that minimal savings would result were jury size reduced from six to five. Therefore, Georgia could not justify a reduction and Justice Blackmun found the use of five member juries unconstitutional. 435 U.S. at 244-45.

<sup>83</sup> The underlying rationale of *Williams* also might have been the desire of the Court not to infringe upon the states. See Comment, *Trial By Jury Under the Sixth Amendment—Williams v. Florida*, 399 U.S. 78 (1970), 5 SUFFOLK U. L. REV. 278, 284 (1970). When the Supreme Court decided *Williams*, eight states provided for six member juries in some circumstances. See *Williams v. Florida*, 399 U.S. at 139-41 (Appendix to Opinion of Harlan, J., concurring). By 1977, 32 states had provisions for less than twelve member juries. E.g., CONN. GEN. STAT. ANN. § 54-82 (West Supp. 1978) (jury of 12 for crimes punishable by death or life imprisonment only); FLA. STAT. ANN. § 913.10 (West 1973) (jury of 12 for capital offenses only); IDAHO CODE § 2-105 (Supp. 1978) (jury of 12 unless misdemeanor). See also VAN DYKE, *supra* note 58, at 286-89. The same day the Supreme Court decided *Williams*, the right to a jury trial was extended to any defendant accused of a crime carrying a maximum penalty in excess of six months imprisonment. *Baldwin v. New York*, 399 U.S. 66 (1970). If the potential infringement on the states were a factor in the *Williams* decision, the same considerations supported the reaffirmation of *Williams* by *Ballew*.

<sup>84</sup> In federal courts, juries of twelve are required. FED. R. CRIM. P. 23(b); see note 3 *supra*.

<sup>85</sup> See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>86</sup> *Williams v. Florida*, 399 U.S. 78, 87 (1970).

<sup>87</sup> See, e.g., *Benton v. Maryland*, 395 U.S. 784, 795 (1969); Cord, *Neo-Incorporation: The Burger Court And The Due Process Clause Of The Fourteenth Amendment*, 44 FORDHAM L. REV. 215, 229-32 (1975) [hereinafter cited as Cord].

<sup>88</sup> See, e.g., *Duncan v. Louisiana*, 391 U.S. at 211 (Fortas, J., concurring). See also Cord, *supra* note 87, at 238.

<sup>89</sup> 399 U.S. at 87-104.

selective incorporation approach,<sup>90</sup> the issue in *Williams* was the constitutionality of state juries containing six members. A narrow reading of both *Ballew* and *Williams*, therefore, would allow six member juries in state criminal trials while maintaining the requirement of twelve member juries in federal criminal trials. The *Ballew* opinion is instructive also because, despite the willingness of the Court to hold five member juries unconstitutional, the Justices could not agree on the rationale for the decision.

The split of the Court in *Ballew* is indicative of the diverging constitutional philosophies of the Justices of the Burger Court.<sup>91</sup> In some decisions, the Burger Court has evinced a tendency to construe Bill of Rights guarantees more narrowly than did the Warren Court.<sup>92</sup> Should such a trend continue, a reduction of federal jury standards may be held constitutional.<sup>93</sup> However, the Burger Court also has shown a willingness to allow states to utilize jury procedures which are not permitted in federal courts.<sup>94</sup> Following this trend, the Court may continue to require twelve

<sup>90</sup> See generally Cord, *supra* note 87, at 229-32.

<sup>91</sup> Of the Justices taking part in *Ballew*, Justices Powell, Rehnquist and Chief Justice Burger clearly indicated their support for separate state and federal jury standards. See 435 U.S. at 245-46 (Powell, J., concurring). Justice Blackmun's willingness to balance sixth amendment rights against possible savings to the states indicates his willingness to approve separate standards. See *id.* at 243-44; note 82 *supra*. Although their concurring opinions in *Ballew* do not clarify their positions, Justices Brennan and Marshall have indicated elsewhere their adoption of the selective incorporation approach. See *Benton v. Maryland*, 395 U.S. 784, 795 (1969); *Cohen v. Hurley*, 366 U.S. 117, 154 (1961) (Brennan, J., dissenting). Although some commentators have asserted that Justice White is a neo-incorporationist, see, e.g., Cord, *supra* note 87, at 238, his opinions in *Williams* and *Ballew* examine sixth amendment jury procedural standards and support a decrease in federal jury size. See 435 U.S. at 245 (White, J., concurring); 399 U.S. at 86. See also *id.* at 118 (Harlan, J., dissenting) (asserting that the *Williams* majority implies a lowering of federal jury standards). Justices Stevens and Stewart have not fully committed themselves to either theory. Compare 435 U.S. at 245 (Stevens, J., concurring) (joining with Justice Blackmun who expressed his willingness to balance state interest) with *Ludwig v. Massachusetts*, 427 U.S. 618, 633-38 (1976) (Stevens, J., dissenting) (federal jury standards applicable to the states); and compare *Williams v. Florida*, 399 U.S. at 143 (Stewart, J., dissenting) (denouncing incorporationism) with *Apodaca v. Oregon*, 406 U.S. 404, 414 (1972) (Stewart, J., dissenting) (right to jury incorporated with federal standards). Thus, the present Supreme Court is divided almost evenly between Justices who would apply federal procedural standards to states whenever a right is incorporated through the fourteenth amendment and those who would allow the states to develop their own procedures to effect such rights. See generally Cord, *supra* note 87, at 229-42.

<sup>92</sup> See Cord, *supra* note 87, at 248 n.232.

<sup>93</sup> Based upon the *Williams* reasoning, the Supreme Court approved the use of six member juries in federal civil cases. *Colegrove v. Battin*, 413 U.S. 149 (1973); see U.S. CONST. amend. VII.

<sup>94</sup> See *Ludwig v. Massachusetts*, 427 U.S. 618 (1976). In *Ludwig*, the Court held state use of a two tiered trial system constitutional. *Id.* at 626-29. Such a procedure is unconstitutional in federal courts. *Id.* at 629-30, citing *Callan v. Wilson*, 127 U.S. 540 (1888). The majority in *Ludwig* justified the more stringent federal standards by interpreting the right to jury provision of Article III, section 2 of the U.S. Constitution to require such a standard. 427 U.S. at 629-30. The dissenting Justices in *Ludwig*, however, argued that *Callan* was based upon the sixth amendment and should have been followed. *Id.* at 634 (Stevens, J., dissenting).

member federal juries.<sup>95</sup> Because a majority of the Justices in *Ballew* was unable to reach a consensus, it is still uncertain which approach to incorporation the Court will adopt.<sup>96</sup> *Ballew v. Georgia*, therefore, simply sets the minimum jury size at six<sup>97</sup> without providing any clear indication of the implication for federal juries. The extent to which state juries must conform to federal practice,<sup>98</sup> a major question posed by *Duncan v. Louisiana*,<sup>99</sup> is still unresolved.

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<sup>95</sup> In order to find that twelve member juries are required in federal criminal trials, the Court would have to distinguish between the civil jury guarantee of the seventh amendment and the criminal jury guarantee of the sixth amendment. When the Supreme Court held the use of six member juries in federal civil courts constitutional, it relied upon the reasoning of *Williams*. See *Colegrove v. Battin*, 413 U.S. 149, 158-60 (1973). The specific studies cited in *Colegrove*, however, were criticized in *Ballew*. See 435 U.S. at 238-39, & nn.31 & 32. Furthermore, based upon the reasoning of *Ludwig*, the argument could be made that Article III, section 2 of the U.S. Constitution imposes more stringent requirements on federal criminal juries than on federal civil juries. See *Ludwig v. Massachusetts*, 427 U.S. at 629-30.

<sup>96</sup> Neither *Ballew* nor *Williams* involved federal juries.

<sup>97</sup> 435 U.S. at 228.

<sup>98</sup> See note 3 *supra*.

<sup>99</sup> 391 U.S. 145 (1968).