

Baldwin Vs. New York

Baldwin Vs. New York

SooperKanoon Citation : sooperkanoon.com/102715

Court : US Supreme Court

Decided On : 1970

Appeal No. : 399 U.S. 117

Appellant : Baldwin

Respondent : New York

Judgement :

BALDWIN v. NEW YORK - 399 U.S. 117 (1970)

U.S. Supreme Court BALDWIN v. NEW YORK , 399 U.S. 117 (1970)

399 U.S. 117

Robert BALDWIN, Appellant,

v.

State of NEW YORK.

Johnny WILLIAMS, Petitioner,

v.

State of FLORIDA.

Nos. 188, 927.

Supreme Court of the United States

June 22, 1970

Mr. Justice HARLAN, dissenting in No. 188, and concurring in the result in No. 927.

In *Duncan v. Louisiana*, [391 U.S. 145](#) (1968), the Court held, over my dissent, joined by Mr. Justice Stewart, that a state criminal defendant is entitled to a jury trial in any case which, if brought in a federal court, would require a jury under the Sixth Amendment. Today the Court concludes, in No. 188, *Baldwin v. New York*, [399 U.S. 66](#), that New York cannot constitutionally provide that misdemeanors carrying sentences up to one year shall be tried in New York City without a jury. [[Footnote 1](#)] At

Page 399 U.S. 117 , 118

the same time the Court holds in No. 927, *Williams v. Florida*, [399 U.S. 78](#), that Florida's six-member-jury statute satisfies the Sixth Amendment as carried to the States by the *Duncan* holding. [[Footnote 2](#)] The necessary consequence of this decision is that 12-member juries are not constitutionally required in federal criminal trials either.

The historical argument by which the Court undertakes to justify its view that the Sixth Amendment does not require 12-member juries is, in my opinion, much too thin to mask the true thrust of this decision. The decision evinces, I think, a recognition that the 'incorporationist' view of the Due Process Clause of the Fourteenth Amendment, which underlay *Duncan* and is now carried forward into *Baldwin*, must be tempered to allow the States more elbow room in ordering their own criminal systems. With that much I agree. But to accomplish this by diluting constitutional protections within the federal system itself is something to which I cannot possibly subscribe. Tempering the rigor of *Duncan* should be done forthrightly, by facing up to the fact that at least in this area the 'incorporation' doctrine does not fit well with our federal structure, and by the same token that *Duncan* was wrongly decided.

I would sustain both the Florida and New York statutes on the constitutional premises discussed in my dissenting opinion in *Duncan*, 391 U.S., at 161, 88 S.Ct. at 1453-1454 et seq. In taking that course in *Baldwin*, I cannot, in a matter that goes to the very pulse of sound constitutional adjudication, consider myself constricted by stare decisis. 3

Page 399 U.S. 117 , 119

Accordingly, I dissent in No. 188 and, as to the jury issue, concur in the result in No. 927. Given *Malloy v. Hogan*, [378 U.S. 1](#) (1964), I join that part of the Court's opinion in No. 927 relating to the Florida 'alibi' procedure.

I

As a predicate for my conclusions, it is useful to map the circuitous route that has been taken in order to reach the results. In both cases, more patently in *Williams* than in *Baldwin*, the history of jury trial practice in both the state and federal systems has been indiscriminately jumbled together as opposed to the point of departure having been taken from the language in which the federal guarantee is expressed and the historical precedent that brings it to life. The consequence of this inverted approach to interpreting the Sixth Amendment results, fortuitously,⁴ in *Baldwin* in a Sixth Amendment rule that would be reached under the correct approach, given the 'incorporationist' philosophy of *Duncan*, but, unhappily, imposes it on the one jurisdiction in the country that has seen fit to do otherwise; and in *Williams* results in a Sixth Amendment rule that could only be reached by standing the constitutional dialectic on its head.

A

To the extent that the prevailing opinion premises its conclusions in the *Baldwin* case on federal precedent and the common-law practice, I agree that the federal right to

Page 399 U.S. 117 , 120

jury trial attaches where an offense is punishable by as much as six months' imprisonment. I think this follows both from the breadth of the language of the Sixth Amendment, which provides for a jury in 'all criminal prosecutions,' and the evidence of historical practice. In this regard I believe that contemporary usage in the States is of little, if any, significance. [[Footnote 5](#)] For if exceptions are to be created out of the allembicing language of the Sixth Amendment they should only be those that are anchored in history.

It is to the distinction between 'petty' and 'serious' offenses, rooted in the common law, that this Court has looked to ascertain the metes and bounds of the federal right guaranteed by the Sixth Amendment. See *District of Columbia v. Clawans*, [300 U.S. 617](#) (1937); *Schick v. United States*, [195 U.S. 65](#) (1904); *Callan v. Wilson*, [127 U.S. 540, 552](#) , 1304-1305 (1888). Since the conventional, if not immutable practice at common law appears to have been to provide juries for offenses punishable by fines of more than 100 or sentences to hard labor of more than six months in prison, see Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv.L.Rev. 917 (1926),⁶ I think it

Page 399 U.S. 117 , 121

appropriate to draw the line at six months in federal cases,⁷ although, for reasons to follow, I would not encumber the States by this requirement. 8

Page 399 U.S. 117 , 122

B

In *Williams* the Court strangely does an about-face. Rather than bind the States by the hitherto undeviating and unquestioned federal practice of 12-member juries, the Court holds, based on a poll of state practice, that a six-man jury satisfies the guarantee of a trial by jury in a federal criminal system and consequently carries over to the States. This is a constitutional renvoi. With all respect, I consider that before today it would have been unthinkable to suggest that the Sixth Amendment's right to a trial by jury is satisfied by a jury of six, or less, as is left open by the Court's opinion in *Williams*, or by less than a unanimous verdict, a

question also reserved in today's decision.

1. The Court, in stripping off the livery of history from the jury trial, relies on a two-step analysis. With arduous effort the Court first liberates itself from the 'intent of the Framers' and 'the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution.' 399 U. S. at 92-93, 90 S.Ct. at 1902. Unburdened by

Page 399 U.S. 117 , 123

the yoke of history the Court then concludes that the policy protected by the jury guarantee does not require its perpetuation in common-law form.

Neither argument is, in my view, an acceptable reason for disregarding history and numerous pronouncements of this Court that have made 'the easy assumption' that the Sixth Amendment's jury was one composed of 12 individuals. Even assuming ambiguity as to the intent of the Framers,⁹ it is common sense and not merely the

Page 399 U.S. 117 , 124

blessing of the Framers that explains this Court's frequent reminders that: 'The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.' *Smith v. Alabama*, [124 U.S. 465, 478](#), 569 (1888). This proposition was again put forward by Mr. Justice Gray speaking for the Court in *United States v. Wong Kim Ark*, [169 U.S. 649](#) (1898), where the Court was called upon to define the term 'citizen' as used in the Constitution. 'The Constitution nowhere defines the meaning of these words (the Citizenship Clause) In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution.' 169 U.S., at 654. History continues to be a wellspring of constitutional interpretation. Indeed, history was even invoked by the Court in such decisions as *Townsend v. Sain*, [372 U.S. 293](#) (1963), and *Fay v. Noia*, [372 U.S. 391](#) (1963), where it purported to interpret the constitutional provision for habeas corpus

according to the 'historic conception of the writ' and took note that the guarantee was one rooted in common law and should be so interpreted. [[Footnote 10](#)] Cf. *United States v. Brown*, [381 U.S. 437, 458](#) , 1720 (1965). In accordance with these precepts, sound constitutional interpretation requires, in my view, fixing the federal jury as it was known to the common law.

It is, of course, true that history should not imprison those broad guarantees of the Constitution whose proper scope is to be determined in a given instance by a blend

Page 399 U.S. 117 , 125

of historical understanding and the adaptation of purpose to contemporary circumstances. Cf. *Katz v. United States*, [389 U.S. 347](#) , 19 L. Ed.2d 576 (1967); *Estes v. Texas*, [381 U.S. 532](#) , 595-596, 1666 (1965) (concurring opinion); *Olmstead v. United States*, [277 U.S. 438, 471](#) , 570 (1928) (Brandeis, J., dissenting); *United States v. Lovett*, [328 U.S. 303, 318](#) , 1080 (1946) (Frankfurter, J., concurring).¹¹ B. Cardozo, *The Nature of the Judicial Process* (1921). This is not, however, a circumstance of giving a term 'a meaning not necessarily envisioned ... so as to adapt (it) to circumstances ... un contemplated.' See my opinion concurring in the result in *Welsh v. United States*, [398 U.S. 333, 344](#) , 1798 (1970). The right to a trial by jury, however, has no enduring meaning apart from historical form.

The second aspect of the Court's argument is that the number '12' is a historical accident-even though one that has recurred without interruption since the 14th century (see 399 U.S., at 89)-and is in no way essential to the 'purpose of the jury trial' which is to 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' 399 U.S. at 100. Thus history, the Court suggests, is no guide to the meaning of those rights whose form bears no relation to the policy they reflect. In this context the 12-member feature of the classical common-law jury is apparently regarded by the Court as mere adornment.

This second justification for cutting the umbilical cord that ties the form of the jury to the past is itself, as

Page 399 U.S. 117 , 126

I see it, the most compelling reason for maintaining that guarantee in its common-law form. For if 12 jurors are not essential, why are six? What if New York, now compelled by virtue of *Baldwin* to provide juries for the trial of misdemeanors, concludes that three jurors are adequate 'interposition between the accused and his accuser of the common-sense judgment of a group of laymen,' and constitute adequate 'community participation and (provide) shared responsibility which results from that group's determination of guilt or innocence'? The Court's elaboration of what is required provides no standard and vexes the meaning of the right to a jury trial in federal courts, as well as state courts, by uncertainty. Can it be doubted that a unanimous jury of 12 provides a greater safeguard than a majority vote of six? The uncertainty that will henceforth plague the meaning of trial by jury is itself a further sufficient reason for not hoisting the anchor to history.

2. The circumvention of history is compounded by the cavalier disregard of numerous pronouncements of this Court that reflect the understanding of the jury as one of 12 members and have fixed expectations accordingly. Thus in *Thompson v. Utah* a unanimous Court answered in the affirmative the question whether the Sixth Amendment jury 'is a jury constituted, as it was at common law, of twelve persons, neither more nor less.' [170 U.S. 343, 349](#) , 622 (1898),¹² and it appears that before *Duncan* no Justice of this Court has seen fit to question this holding, one that has often been reiterated. See *Patton v. United States*, [281 U.S. 276, 288](#) , 254 (1930), where

Page 399 U.S. 117 , 127

the Court reaffirmed earlier pronouncements and stated that the Sixth Amendment jury is characterized by three essential features: '(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them in respect of

the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.' See also *Maxwell v. Dow*, [176 U.S. 581, 586](#) , 450 (1900); *Rassmussen v. United States*, [197 U.S. 516, 527](#) , 518 (1905); *Andres v. United States*, [333 U.S. 740, 748](#) , 884 (1948) (unanimity).¹³ As Mr. Justice Frankfurter stated in *Gore v. United States*, [357 U.S. 386, 392](#) , 1284 (1958), in applying a constitutional provision 'rooted in history ... a long course of adjudication in this Court carries impressive authority.'

The principle of state decisis is multifaceted. It is a solid foundation for our legal system; yet care must be taken not to use it to create an unmovable structure. It provides the stability and predictability required for the ordering of human affairs over the course of time and a basis of 'public faith in the judiciary as a source of impersonal and reasoned judgments.' *Moragne v. States Marine Lines*, [398 U.S. 375, 403](#)

Page 399 U.S. 117 , 128

(1970). See also *Helvering v. Hallock*, [309 U.S. 106](#) (1940); *Boys Markets v. Retail Clerks*, [398 U.S. 235](#) (1970); *Hertz v. Woodman*, [218 U.S. 205, 212](#) , 622 (1910); *Burnet v. Coronado Oil & Gas Co.*, [285 U.S. 393, 405](#) - 406, 446-447 (1932) (Brandeis, J., dissenting). Woodenly applied, however, it builds a stockade of precedent that confines the law by rules, ill-conceived when promulgated, or if sound in origin, unadaptable to present circumstances. No precedent is sacrosanct and one should not hesitate to vote to overturn this Court's previous holdings-old or recent-or reconsidered settled dicta where the principles announced prove either practically (e.g., *Moragne v. States Marine Lines*, *supra*; *Boys Markets v. Retail Clerks*, *supra*), or jurisprudentially (e.g., *Desist v. United States*, [394 U.S. 244, 256](#) , 1037 (1969) (dissenting opinion)) unworkable, or no longer suited to contemporary life (e.g., *Katz v. United States*, [389 U.S. 347, 360](#) , 516 (1967) (concurring opinion)). See also *Welsh v. United States*, [398 U.S. 333](#) (1970); *Chimel v. California*, [395 U.S. 752](#) (1969); *Marchetti v. United States*, [390 U.S. 39](#) (1968); *Estes v. Texas*, 381 U.S., at 595-596, 1666d 543 (concurring opinion); *Warden, Md. Penitentiary v. Hayden*, [387 U.S. 294](#) (1967); *Swift & Co. v. Wickham*, [382 U.S. 111](#) (1965); *James v. United States*, [366 U.S. 213, 241](#) ,

1067 (1961) (Separate opinion of Harlan, J.). Indeed, it is these considerations that move me to depart today from the framework of Duncan. It is, in part, the disregard of stare decisis in circumstances where it should apply, to which the Court is, of necessity, driven in Williams by the 'incorporation' doctrine, that leads me to decline to follow Duncan. Surely if the principle of stare decisis means anything in the law, it means that precedent should not be jettisoned when the rule of yesterday remains viable, creates no injustice, and can reasonably be said to be no less sound than the rule sponsored by those who seek

Page 399 U.S. 117 , 129

change, let alone incapable of being demonstrated wrong. The decision in Williams, however, casts aside workability and relevance and substitutes uncertainty. The only reason I can discern for today's decision that discards numerous judicial pronouncements and historical precedent that sound constitutional interpretation would look to as controlling, is the Court's disquietude with the tension between the jurisprudential consequences wrought by 'incorporation' in Duncan and Baldwin and the counter-pulls of the situation in Williams which present the prospect of invalidating the common practice in the States of providing less than a 12- member jury for the trial of misdemeanor cases.

II

These decisions demonstrate that the difference between a 'due process' approach, that considers each particular case on its own bottom to see whether the right alleged is one 'implicit in the concept of ordered liberty,' see *Palko v. Connecticut*, [302 U.S. 319, 325](#) , 152 (1937), and 'selective incorporation' is not an abstract one whereby different verbal formulae achieve the same results. The internal logic of the selective incorporation doctrine cannot be respected if the Court is both committed to interpreting faithfully the meaning of the federal Bill of Rights and recognizing the governmental diversity that exists in this country. The 'backlash' in Williams exposes the malaise, for there the Court dilutes a federal guarantee in order to reconcile the logic of 'incorporation,' the 'jot-for-jot and case-for- case' application of the federal right to the States, with the reality of federalism.

Can one doubt that had Congress tried to undermine the common-law right to trial by jury before *Duncan* came on the books the history today recited would have barred such action? Can we

Page 399 U.S. 117 , 130

expect repeat performances when this Court is called upon to give definition and meaning to other federal guarantees that have been 'incorporated'?

In *Ker v. California*, [374 U.S. 23](#) (1963), I noted in an opinion concurring in the result that: 'The rule (of 'incorporation') is unwise because the States, with their differing law enforcement problems, should not be put in a constitutional strait jacket And if the Court is prepared to relax (federal) standards in order to avoid unduly fettering the States, this would be in derogation of law enforcement standards in the federal system' *Id.*, at 45-46, 83 S.Ct. at 1646. Only last Term in *Chimel v. California*, *supra*, I again expressed my misgivings that 'incorporation' would neutralize the potency of guarantees in federal courts in order to accommodate the diversity of our federal system. I reiterate what I said in dissent in *Duncan*, [391 U.S. 145](#) , at 175-176, at 1463: '(N)either history, nor sense, supports using the Fourteenth Amendment to put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law.' Since we now witness the first major attempt to wriggle free of that 'straitjacket,' it is appropriate, I think, to step back and view in perspective how far the incorporation doctrine has taken us, and to put the spotlight on a constitutional revolution that has inevitably become obscured by the process of case-by- case adjudication.

A

The recent history of constitutional adjudication in state criminal cases is the ascendancy of the doctrine of ad hoc ('selective') incorporation, an approach that absorbs one-by-one individual guarantees of the federal Bill of Rights into the Due Process Clause of the Fourteenth Amendment, and holds them applicable to the States with all the subtleties and refinements born of history

and embodied in case experience developed in the context of federal adjudication. Thus, with few exceptions the Court has 'incorporated,' each time over my protest,¹⁴ almost all the criminal protections found within the first eight Amendments to the Constitution, and made them 'jot-for-jot and case-for-case' applicable to the States.

The process began with *Mapp v. Ohio*, [367 U.S. 643](#) , 6 L. Ed.2d 1081 (1961), where the Court applied to the States the so-called exclusionary rule, rendering inadmissible at trial evidence seized in violation of the Fourth Amendment, and thereby overruling pro tanto *Wolf v. Colorado*, [338 U.S. 25](#) (1949). See my dissenting opinion, 367 U.S., at 672, 81 S.Ct. at 1700-1701. The particular course embarked upon in *Mapp* was blindly followed to its end in *Ker v. California*, [374 U.S. 23](#) (1963), where the Court made federal standards of probable cause for search and seizure applicable to the States, thereby overruling the remainder of *Wolf*. See my opinion concurring in the result, 374 U.S., at 44, 83 S.Ct. at 1635. Thereafter followed *Malloy v. Hogan*, [378 U.S. 1](#) (1964), and *Griffin v. California*, [380 U.S. 609](#) , 14 L. Ed.2d 106 (1965), overruling *Twining v. New Jersey*, [211 U.S. 78](#) (1908), and *Adamson v. California*, [332 U.S. 46](#) (1947), and incorporating the

Fifth Amendment privilege against self-incrimination by holding that 'the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.' 378 U.S., at 11. See my dissenting opinion in *Malloy*, 378 U.S., at 14, 84 S.Ct. at 1497, and my concurring opinion in *Griffin*, 380 U.S., at 615, 85 S.Ct. at 1233. The year of *Griffin* also brought forth *Pointer v. Texas*, [380 U.S. 400](#) (1965), overruling *Snyder v. Massachusetts*, [291 U.S. 97](#) (1934), and *Stein v. New York*, [346 U.S. 156, 194](#) , 1097 (1953), by holding that the Sixth Amendment's Confrontation Clause applied equally to the States and Federal Government. See my opinion concurring in the result, 380 U.S., at 408, 85 S.Ct. at 1070. In 1967 incorporation swept in the 'speedy trial' guarantee of the Sixth

Amendment. *Klopfer v. North Carolina*, [386 U.S. 213](#) (1967), and in 1968 *Duncan v. Louisiana*, *supra*, rendered the Sixth Amendment jury trial a right secured by the Fourteenth Amendment Due Process Clause. Only last Term the Court overruled *Palko v. Connecticut*, *supra*, and held that the 'double jeopardy' protection of the Fifth Amendment was incorporated into the Fourteenth, and hence also carried to the States. *Benton v. Maryland*, [395 U.S. 784](#) (1969); see my opinion concurring in the result in *Klopfer*, 386 U.S., at 226, 87 S.Ct. at 995; my dissenting opinion in *Duncan*, 391 U.S., at 171, 88 S.Ct. at 1458; my dissenting opinion in *Benton*, 395 U.S., at 801, and my separate opinion in *North Carolina v. Pearce*, [395 U.S. 711, 744](#) , 2085d 656 (1969).¹⁵ In combination these cases have in effect restructured the Constitution in the field of state criminal law enforcement.

Page 399 U.S. 117 , 133

There is no need to travel again over terrain trod in earlier opinions in which I have endeavored to lay bare the historical and logical infirmities of this 'incorporationist' approach. On that score I am content to rest on what I said in dissent in *Duncan*, [391 U.S. 145](#) , at 171, at 1460. I continue to consider the principles therein expressed as the sound basis for approaching the adjudication of state cases of the kind now before us. It is my firm conviction that 'incorporation' distorts the 'essentially federal nature of our national government,' *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, [398 U.S. 281, 285](#) , at 1742 (1970), one of whose basic virtues is to leave ample room for governmental and social experimentation in a society as diverse as ours, and which also reflects the view of the Framers that 'the security of liberty in America rested primarily upon the dispersion of governmental power across a federal system,' 391 U.S., at 173, 88 S.Ct. at 1461. The Fourteenth Amendment tempered this basic philosophy but did not unstitch the basic federalist pattern woven into our constitutional fabric. The structure of our Government still embodies a philosophy that presupposes the diversity that engendered the federalist system.

That these doctrines are not only alive in rhetoric but vital in the world of practical affairs is evidenced by contemporary debate concerning the desirability of returning to 'local' government the administration of many programs and functions

that have in late years increasingly been centralized in the hands of the National Government.

Page 399 U.S. 117 , 134

B

But the best evidence of the vitality of federalism is today's decision in *Williams*. The merits or demerits of the jury system can, of course, be debated and those States that have diluted the common-law requirements evince a conclusion that the protection as known at common law is not necessary for a fair trial, or is only such marginal assurance of a fair trial that the inconvenience of assembling 12 individuals outweighs other gains in the administration of justice achieved by using only six individuals (or none at all as was the case in New York City).

The prevailing opinion rejects in *Baldwin* what would be the consistent approach, requiring affirmance, simply because New York City is the single jurisdiction in the Nation that sees fit to try misdemeanants without a jury. In doing so it, in effect, holds that 'due process' is more offended by a trial without a jury for an offense punishable by no more than a year in prison than it is by a trial with a jury of six or less for offenses punishable by life imprisonment. This ignores both the basic fairness of the New York procedure and the peculiar local considerations that have led the New York Legislature to conclude that trial by jury is more apt to retard than further justice for criminal defendants in New York City.

I, for one, find nothing unfair in the New York system which provides the city defendant with an option, in lieu of a jury, of a bench trial before three judges, N.Y.C.Crim.Ct.Act 40. Moreover, I think it counterproductive of fairness in criminal trials to hold by way of incorporation that juries are required of States in these days when congested calendars and attendant delays make what many students of criminal justice

Page 399 U.S. 117 , 135

feel is one of the most significant contributions to injustice and hardship to criminal defendants.

The statistics cited by the New York Court of Appeals and amplified in the briefs are revealing and trenchant evidence of the crisis that presently bedevils the administration of criminal justice in New York City. New York's population density, a factor which is, as noted by the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 5, 28 (1967), directly associated with crime, is twice that of Buffalo, the second largest city in the State. Statistics supplied by the Office of the State Administrator of the Judicial Conference of the State of New York show that: 'From July, 1966 through December, 1968 the New York City Criminal Court disposed of 321, 368 nontraffic misdemeanor cases; whereas in the next largest city, Buffalo, the City Court disposed of 8,189 nontraffic misdemeanor cases.' 24 N.Y.2d 207, 218, 299 N.Y.S.2d 424, 432, 247 N.E.2d 260, 266 (1969). Thus, New York City's misdemeanor caseload is 39 times that of Buffalo's although its population is only 17 times greater. After today each of such defendants in New York is entitled to a trial by some kind of a jury. It can hardly be gainsaid that a jury requirement with the attendant time for selection of jurors and deliberation, even if not invoked by all defendants, will increase delays in calendars, depriving all defendants of a prompt trial. Impressive evidence suggests that this requirement could conceivably increase delays in New York City courts by as much as a factor of eight. A study done of the administration of the Municipal Court in Minneapolis shows that the requirement of a trial by jury in cases of intoxicated driving increased court delays there from three to 24 months. Note, *Right to a Jury Trial for Persons Accused of an Ordinance Violation*, 47 Minn.L.Rev. 93 (1962).

Page 399 U.S. 117 , 136

Notwithstanding this critical situation the Court concludes that the Constitution requires a procedure fraught with delay even though the American Bar Association Project on Standards for Criminal Justice, *Trial By Jury*, has recognized the New York City three-judge procedure as a possible compromise measure where jury trials are not permitted or waived, and the further fact that one-half the defendants

tried for misdemeanors in New York City are acquitted. [[Footnote 16](#)]

III

Today's decisions demonstrate a constitutional schizophrenia born of the need to cope with national diversity under the constraints of the incorporation doctrine. In *Baldwin* the prevailing opinion overrides the consideration of local needs, but in *Williams* the Court seeks out a minimum standard to avoid causing disruption in numerous instances even though, a priori, incorporation would surely require a jury of 12. The six-man, six-month rule of today's decisions simply reflects the lowest common denominator in the scope and function of the right to trial by jury in this country, but the circumstance that every jurisdiction except New York City has a trial by a jury for offenses punishable by six months in prison obscures the variety of opinion that actually exists as to the proper place for the jury in the administration of justice. More discriminating analysis indicates that four States besides Florida authorize a jury of less than 12 to try felony

Page 399 U.S. 117 , 137

offenses¹⁷ and three States authorize a nonunanimous verdict¹⁸ in felony cases, and at least two other States provide a trial without jury in the first instance for certain offenses punishable by more than one year with a right to de novo trial on appeal. [[Footnote 19](#)] Eight States provide for juries ranging from five to 12 to try crimes punishable by one year in prison, and one State has provided for a verdict by nine in a jury of 12.²⁰ Five States first provide a bench trial for misdemeanors from which the defendant can seek a trial de novo by jury, ²¹ a procedure that this Court, in a federal trial, has deemed incompatible with the Sixth Amendment for putting the accused to the burden of two trials if he wishes a jury verdict. See *Callan v. Wilson*, [127 U.S. 540](#) (1888).²²

These varying provisions, reflecting as they do differing estimates of the importance of the jury in securing a fair trial and the feasibility of administering such a procedure given the local circumstances, and the extensive study and debate about the merits and demerits of the jury system, demonstrate that the

relevance and proper role of trial by jury in the administration of criminal justice is yet far from sure.

Page 399 U.S. 117 , 138

'Incorporation' in *Duncan* closed the door on debate,²³ irrespective of local circumstances, such as the backlogs in urban courts like those of New York City, and has, without justification, clouded with uncertainty the constitutionality of these differing state modes of proceeding, see Appendix, pending approval by this Court; it now promises to dilute in other ways the settled meaning of the federal right to a trial by jury. Flexibility for experimentation in the administration of justice should be returned to the States here and in other areas that now have been swept into the rigid mold of 'incorporation.' I agree with THE CHIEF JUSTICE: 'That the 'near-uniform judgment of the Nation' is otherwise than the judgment in some of its parts affords no basis ... to read into the Constitution something not found there.' Opinion of THE CHIEF JUSTICE in *Baldwin*, 389 U.S., at 77.

It is time, I submit, for this Court to face up to the reality implicit in today's holdings and reconsider the 'incorporation' doctrine before its leveling tendencies further retard development in the field of criminal procedure by stifling flexibility in the States and by discarding the possibility of federal leadership by example.

APPENDIX TO OPINION OF HARLAN, J.

A. Nonunanimous Verdict For Felony-Type Offenses

1. Louisiana: La.Crim.Proc., Code Art. 782. (Verdict of nine out of 12 in cases necessarily punished by hard labor.)
2. Oregon: Constitution, Art. I, 11; Ore.Rev.Stat. 136.330, 136. 610 (1967) (five out of six sufficient for verdict in a circuit court except in capital cases).

Page 399 U.S. 117 , 139

3. Texas: Tex.Code Crim.Proc., Art. 36.29 (1966) (permitting verdict by less than 12 when juror is incapacitated).

B. Non-Jury Trial In Cases Punishable By More Than One Year's Imprisonment With De Novo Review

1. Maryland: Constitution, Declaration of Rights, Arts. 5, 21; Md.Ann. Code, Art. 51, 18, Art. 52, 13 (1968), Art. 66 1/2, 48, 74, 75, 216, 325 (1967), 327 (Supp.1969); Md.Rules Proc. 743, 758. (Trial by jury appears not to be afforded in motor vehicle cases in the first instance even though some motor vehicle offenses carry a penalty of up to five years' imprisonment.)

2. North Carolina: Constitution, Art. I, 13; State v. Sherron, 4 N. C.App. 386, 166 S.E.2d 836 (1969); N.C. Gen.Stat. 7A-272(a), 7A-196(b), 14-3 (1969). (District courts have jurisdiction to try, without a jury, all offenses below the grade of felony. Such offenses are denominated petty misdemeanors and the maximum sentence which may be imposed is a fine or two years' imprisonment.)

3. Pennsylvania: Constitution, Sched. Art. 5, 16(r)(iii) (offenses tried in the municipal division of the court of common pleas carrying penalties up to two years' imprisonment and indictable offenses under the motor vehicle laws for which punishment does not exceed three years' imprisonment).

C. 6-Man Jury For Misdemeanors

1. Alaska: Constitution, Art. I, 11; Alaska Stat. 11.75.030 (1962), 22.15.060, 22.15.150 (1967). (Jury of six in district magistrate's courts, which have jurisdiction of misdemeanors, punishable by up to one year's imprisonment.)

2. Georgia: Constitution, Art. I, 2-105, Art. VI, 2-5101; Ga.Code Ann. 27-2506 (Supp.1968); Ga.

Page 399 U.S. 117 , 140

Laws 1890-1891, pp. 935, 939, 942. (In county criminal courts, which have jurisdiction of misdemeanors-cases in which the maximum sentence imposable is

a fine of up to \$1000 or imprisonment for a term of up to 12 months or both-a defendant may demand a jury trial. Depending upon the county, however, a jury ranges in size from five to 12 persons. The Criminal Court of Atlanta, for example, tries misdemeanors with juries of five. In Hall County the same crimes are tried by juries of 12.)

3. Iowa: Constitution, Art. 1, 9; Iowa Code 602.15, 602.25, 602. 39, 687.7 (1966). (Jury of six in municipal courts, which have jurisdiction of misdemeanors, carrying a maximum fine of \$500 or imprisonment for one year or both.)

4. Kentucky: Constitution, 7, 11, 248; Ky.Rev.Stat. 25.010, 25. 014, 26.400, 29.015 (1963). (Misdemeanors, carrying a maximum penalty of \$ 500 or 12 months' imprisonment, are tried in inferior courts by a jury of six. Circuit courts, where a 12-member jury is used, have concurrent jurisdiction.)

5. Mississippi: Constitution, Art. 3, 31, Art. 6, 171; Miss.Code Ann. 1831, 1836, 1839 (1956). (Jurisdiction of crimes punishable in the county jail may be tried in the justice of the peace courts by a six-man jury. Many such crimes have a one-year maximum term. Circuit courts have concurrent jurisdiction. Such crimes include, e.g., offenses involving corruption in elections (Miss.Code Ann. 2031, 2032), escape or aiding escape of prisoners (2133, 2134, 2135, 2141), public officers' interest in contracts (2301, 2302), and trade marks (2390, 2391).)

6. Oklahoma: Constitution, Art. 2, 19, 20; Okla.Stat.Ann. Tit. 11 , 958.3 958.6 (Supp.1969-1970), Tit. 21, 10 (1958). (In misdemeanor cases-those in which a sentence of up to one year's imprisonment may

Page 399 U.S. 117 , 141

be imposed-in courts of record, a defendant may demand a jury of 12; nine members of the jury may render a verdict. For violations of city ordinances tried in courts not of record, the defendant may demand six jurors, five of whom may render a verdict.)

7. Oregon: Constitution, Art. I, 11; Constitution of 1857, Art. VII , 12; Ore.Rev.Stat. 5.110 (1965), 46.040, 46.175, 46.180 (1967). (Jury of six in county courts, which have jurisdiction of all crimes except those carrying the death penalty or life imprisonment. Jury of six in district courts, which have jurisdiction of all misdemeanors, punishable by one year's imprisonment.)

8. Virginia: Constitution, Art. I, 8; Va.Code Ann. 16.1-123, 16. 1-124, 16.1-126, 16.1-129, 16.1-132, 16.1-136 18.1-6 (1960), 18.1-9 (Supp. 1968), 19.1-206 (1960). (In courts not of record, which have jurisdiction of misdemeanors, punishable by up to one year's imprisonment, charges are tried without a jury. The defendant may appeal as of right to the circuit court, where he receives a trial de novo. All trials in the circuit court of offenses not felonious, whether in the first instance or on appeal, are with five jurors.)

D. Non-Jury Trial For Misdemeanors Subject to De Novo Review

1. Arkansas: Constitution, Art. 2, 10; Ark.Stat.Ann. 22-709, 22- 737, 26-301 (1962), 41-106, 43-1901, 43-1902, 44-115, 44-116, 44-509 (1964); see generally Greenebaum, Arkansas' Judiciary: Its History and Structure, 18 Ark.L.Rev. 152 (1964). (No jury provided in municipal courts, which have jurisdiction of misdemeanors carrying a maximum penalty of one year's imprisonment. Upon conviction, the defendant may appeal to the circuit court where he is entitled to a trial de novo before a common-law jury.)

Page 399 U.S. 117 , 142

2. Maine: Constitution, Art. I, 6, 7; Me.Rev.Stat.Ann., Tit. 4, 152 (Supp.1970), Tit. 15, 1, 451 (1965); Me.Rules Crim.Proc. 23(b), 31(a); Sprague v. Androscoggin County, 104 Me. 352, 71 A. 1090 (1908); letter dated Dec. 17, 1968, from Maine Attorney General's office to New York County District Attorney's office. (Maine district courts try misdemeanors- crimes punishable by a sentence of up to one year-without a jury. A defendant may appeal his conviction to the Superior Court, however, where he is entitled to a common-law jury.)

3. New Hampshire: Constitution, pt. 1, Arts. 15, 16, pt. 2, Art. 77; N.H.Rev.Stat. Ann. 599:1 (Supp.1969), 502-A:11, 502-A:12, 502:18 (1968); State v. Despres, 107 N.H. 297, 220 A.2d 758 (1966). (District and municipal courts try, without a jury, misdemeanors carrying a maximum term of imprisonment of one year. The defendant in these courts has an absolute right of appeal to the Superior Court where he may demand a jury of 12 in his trial de novo.)

4. Rhode Island: Constitution, Art. 1, 10, 15; R.I.Gen.Laws Ann. 12-3-1, 12-17-1, 12-22-1, 12-22-9 (1956); State v. Nolan, 15 R.I. 529, 10 A. 481 (1887). (There are no juries in the district courts, which have jurisdiction of misdemeanors-crimes punishable by a fine of up to \$500 or imprisonment for up to one year or both. A defendant may appeal his conviction to the Superior Court where he is entitled to a trial de novo before a jury of 12.)

5. Virginia: Constitution, Art. I, 8; Va.Code Ann. 16.1-123, 16. 1-124, 16.1-126, 16.1-129, 16.1-132, 16.1-136, 18.1-6 (1960), 18.1-9 (Supp. 1968). (In courts not of record, which have jurisdiction of misdemeanors, punishable by up to one year's imprisonment, charges are

Page 399 U.S. 117 , 143

tried without a jury. The defendant may appeal as of right to the circuit court, where he receives a trial de novo with five jurors.)

Mr. Justice STEWART, dissenting in No. 188, and concurring in the result in No. 927.

I substantially agree with the separate opinion Mr. Justice HARLAN has filed in these cases-an opinion that fully demonstrates some of the basic errors in a mechanistic 'incorporation' approach to the Fourteenth Amendment. I cannot subscribe to his opinion in its entirety, however, if only for the reason that it relies in part upon certain dissenting and concurring opinions in previous cases in which I did not join.

The 'incorporation' theory postulates the Bill of Rights as the substantive metes and bounds of the Fourteenth Amendment. I think this theory is incorrect as a matter of constitutional history, and that as a matter of constitutional law it is both stultifying and unsound. It is, at best, a theory that can lead the Court only to a Fourteenth Amendment dead end. And, at worst, the spell of the theory's logic compels the Court either to impose intolerable restrictions upon the constitutional sovereignty of the individual States in the administration of their own criminal law, or else intolerably to relax the explicit restrictions that the Framers actually did put upon the Federal Government in the administration of criminal justice. All this, and much more, is elaborated in Mr. Justice HARLAN'S separate opinion, and I would affirm the judgments in both No. 188 and No. 927 for substantially the reasons he states. 1

Page 399 U.S. 117 , 144

The architect of the contemporary 'incorporation' approach to the Fourteenth Amendment is, of course, Mr. Justice BLACK. See *Adamson v. California*, [332 U.S. 46, 68](#) , 1683 (dissenting opinion).² And the separate opinion my Brother BLACK has filed today in No. 927 could serve as Exhibit A to illustrate the extraordinary habits of thought into which some of us have fallen in conditioned reflex to that erroneous constitutional doctrine. 'Incorporation' has become so Pavlovian that my Brother BLACK barely mentions the Fourteenth Amendment in the course of an 11-page opinion dealing with the procedural rule the State of Florida has adopted for cases tried in Florida courts under Florida's criminal laws. [[Footnote 3](#)] His opinion relies instead upon the 'plan and obvious meaning' of the 'specific words' of the Fifth Amendment and other 'provisions of the Bill of Rights' which, together with 'the history surrounding

Page 399 U.S. 117 , 145

the adoption of those provisions,' make clear that '(t)he Framers ... designed' those rights 'to shield the defendant against state power.'

Though I admire the rhetoric, I submit with all deference that those statements are, to quote their author, 'plainly and simply wrong as a matter of fact and law. ...' If the Constitution forbids the Florida alibi-defense procedure, it is because of the Fourteenth Amendment, and not because of either the 'specific words' of the Bill of Rights or 'the history surrounding' their adoption. For as every schoolboy knows, the Framers 'designed' the Bill of Rights not against 'state power,' but against the power of the Federal Government. [[Footnote 4](#)]

Surely Mr. Justice HARLAN is right when he says it is time for the Court to face up to reality. Footnotes

[Footnote 1](#) Outside of New York City, such cases are triable before six-member juries.

[Footnote 2](#) Florida provides for a jury of 12 in capital cases and a six- member jury 'to try all other criminal cases.' Fla.Stat. 913.10(1) (1967), F.S.A.

[Footnote 3](#) As Mr. Justice Frankfurter said, speaking for the Court:

'(S)tare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.' *Helvering v. Hallock*, [309 U.S. 106, 119](#) , 60 S. Ct. 444, 451 (1940).

[Footnote 4](#) While all States except New York provide for jury trials for crimes carrying sentences of six months or more, there is a good deal of diversity as to the number of jurors and the stage at which the right to jury trial attaches.

[Footnote 5](#) After concluding, relying on this Court's prior decisions, that the jury trial required by the Sixth Amendment applies only to 'serious' as opposed to 'petty' offenses, the opinion defines those terms by perfunctory reference to history and a survey of prevailing state rules. See No. 188, 399 U.S. at 71-72, 90 S.Ct. at 1889-1890.

[Footnote 6](#) 'The range and severity of punishment in summary trials has been defined by limiting jurisdiction to the imposition of fines up to a hundred pounds and sentences with hard labor up to six months.' *Id.*, at 934. The practice in the Colonies was not uniform but it is apparent that the line was drawn at six months in most instances. See *District of Columbia v. Clawans*, *supra*, 300 U.S. at 626, 57 S.Ct. at 662 nn. 2, 3.

[Footnote 7](#) While this Court has said that the most significant index to the seriousness of an offense is the degree of penalty that attaches, see *Frank v. United States*, [395 U.S. 147, 148](#), 1504-1505, 23 L. Ed.2d 162 (1969); *District of Columbia v. Clawans*, *supra*, it should be recalled that this is not alone determinative and that the 'apportioned punishment was both a consequence of the minor quality of the misconduct and an index of the community's moral judgment upon it.' *Frankfurter & Corcoran*, *supra*, at 980. In *Clawans* the Court held the severity of punishment was not determinative when the offense by its own nature is not considered grave. 300 U.S., at 625, 57 S.Ct. at 662; see also *Callan v. Wilson*, *supra*, 127 U.S. at 556, 8 S.Ct. at 1307; *Schick v. United States*, *supra*, where this Court noted that the 'nature' of the offense and the severity of punishment are two distinct considerations. Cf. the House debate in 1930 over a bill to provide for a trial before federal magistrates for crimes of a petty nature, 72 Cong.Rec. 9991-9994; see also H.R. Rep. No. 1699, 71st Cong., 2d Sess. (1930) (minority views); Comments, American Bar Association Project on Standards for Criminal Justice, Trial by Jury 21 (Approved Draft 1968); Comment, The Petty Offense Category and Trial by Jury, 40 Yale L.J. 1303 (1931). I would reserve the question as to whether a jury would be required in a federal case for a particular offense not punishable by more than six months in prison.

[Footnote 8](#) Nor do I think it offends the Equal Protection Clause for New York not to provide juries to hear offenses punishable by six months in New York City but to have such a provision for trials elsewhere in the State. In *Salsburg v. Maryland*, [346 U.S. 545](#) (1954), and *Missouri v. Lewis*, [101 U.S. 22](#) (1880), this Court upheld the right of a State to adapt procedures to the differing requirements of territorial subdivisions. In *Salsburg* the Court quoted and reaffirmed the principles set forth in *Missouri*: "(T)here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so." 346 U.S., at 551.

The Court in *Missouri v. Lewis* also stated: 'Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,- trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State government if it could not in its discretion, provide for these various exigencies.' 101 U.S., at 32. See also *Ohio ex rel. Bryant v. Akron Park District*, [281 U.S. 74, 81](#) , 231 (1930); *Ocampo v. United States*, [234 U.S. 91, 98](#) -99, 714-715 (1914).

The disproportionate number of misdemeanor cases that now clog New York City courts, see Part III, *infra*, creates a difference of a magnitude that more than justifies the differences in treatment between city and non- city defendants.

[Footnote 9](#) The Court's conclusions from the historical materials, by its own admission, can hardly be characterized as solid. The entire argument seems to flow from the fact that the Senate Committee substituted the present language of the Sixth Amendment for the more specific House version that incorporated the unanimity requirement and expressly tied the jury to 'other accustomed requisites.'

But the meaning of this change is wholly speculative, for, apart from the 'vicinage' requirement, there is no concrete evidence cited by the Court to show that the Senate opposed the more likely features of the Madison version adopted by the House. In the context of an amendment notable for its sparseness of language, a more likely explanation of the Senate's action is that it was streamlining the Madison version on the assumption that the most prominent features of the jury would be preserved as a matter of course. This interpretation of the events is supported by the fact that the only specifically objectionable feature of the common-law jury-the vicinage requirement-was pre-empted by language providing for a trial by a jury of the district, thus leaving the remaining attributes undefined in face of the distinct expectation that those charged with interpretation would look to the common law. Nor is this explanation rendered less forceful by the fact, noted by the Court, that 'reception' of the commonlaw jury did not unfailingly mean 12 in early colonial times. As the Court itself acknowledges, the States that had constitutions in 1787 provided for juries of 12. The Court's other arguments-(1) that simple reference to a jury in Article III was not necessarily thought to mean to the Framers a common-law jury in light of the need felt to add the Amendments and Madison's more elaborate proposal for the Sixth Amendment; and, (2) that the allusion to 'common law' in the Seventh Amendment suggests that it is not the backdrop for the Sixth Amendment jury-are too remote to require rejoinder.

[Footnote 10](#) While I disagreed with the Court on these occasions, my differences with the majority went to the conclusions that could properly be drawn from the common-law history of the writ and the precedents in this Court, not to the jurisprudential approach that took history as a point of departure.

[Footnote 11](#) 'Broadly speaking, two types of constitutional claims come before this Court. Most constitutional issues derive from the broad standards of fairness written into the Constitution Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from very specific provisions of the Constitution. ... They were defined by history. Their meaning was

so settled by history that definition was superfluous. ...' 328 U.S., at 321, 66 S.Ct. at 1081.

[Footnote 12](#) The significance of this pronouncement cannot be minimized. The holding that retrial by a jury of eight was an ex post facto law is perforce built upon the conclusion that the jury of 12 was a right of substance. If the right were merely a procedure mandated by statute, it would not have required the ex post facto holding.

[Footnote 13](#) The Federal Rules of Criminal Procedure provide for a jury of 12. Fed.Rule Crim.Proc. 23, and as recently as last year lower federal courts have assumed this Court's commitment to the unanimous verdict of 12. *United States v. Fioravanti*, [412 F.2d 407](#) , 418 (C.A.3d Cir. 1969); *Williams v. United States*, [332 F.2d 36](#) (C.A. 7th Cir. 1964); see also, e.g. , *United States v. Virginia Election Corp.*, [335 F.2d 868](#) , 870 (C.A.4th Cir. 1964); *United States v. Goldberg*, [330 F.2d 30](#) , 42 (C.A.3d Cir. 1964); *Rogers v. United States*, [319 F.2d 5](#) (C.A.7th Cir. 1963); *Fournier v. Gonzalez*, [269 F.2d 26](#) (C.A.1st Cir. 1959); *Billeci v. United States*, 87 U. S.App.D.C. 274, [184 F.2d 394](#) (1950); *Horne v. United States*, [264 F.2d 40](#) (C.A.5th Cir. 1959); *Hibdon v. United States*, [204 F.2d 834](#) (C.A.6th Cir. 1953).

[Footnote 14](#) In addition to separate opinions noted in the text, see, e.g., *Poe v. Ullman*, [367 U.S. 497](#) , 522, at 539-545, 1765 at 1774- 1778 (1961) (dissenting opinion); *Griswold v. Connecticut*, [381 U.S. 479, 499](#) , 1689 (1965) (concurring in the judgment); *Lanza v. New York*, [370 U.S. 139, 147](#) , 1223 (1962) (concurring opinion); *Gideon v. Wainwright*, [372 U.S. 335, 349](#) , 799 (1963) (concurring opinion); *Murphy v. Waterfront Comm'n*, [378 U.S. 52, 80](#) , 1610, 12 L. Ed.2d 678 (1964) (concurring in the judgment); *Barber v. Page*, [390 U.S. 719, 726](#) , 1322 (1968) (concurring opinion); *Berger v. New York*, [388 U.S. 41, 89](#) , 1898 (1967) (dissenting opinion); *Chimel v. California*, *supra*; *Ashe v. Swenson*, [397 U.S. 436, 448](#) , 1196 (1970) (concurring opinion); *Coleman v. Alabama*, [399 U.S. 1, 19](#) , 2008d 387 (1970) (separate opinion); *Bloom v. Illinois*, [391 U.S. 194, 215](#) , 1460,

1477 (1968) (dissenting opinion); *Washington v. Texas*, [388 U.S. 14, 23](#) , 1925 (1967) (concurring in the result); *Dickey v. Florida*, [398 U.S. 30](#) (1970) (concurring opinion).

[Footnote 15](#) The right to counsel appears not to have been explicitly 'incorporated,' although *Gilbert v. California*, [388 U.S. 263](#) (1967), implicitly does so. *Gideon v. Wainwright*, [372 U.S. 335](#) (1963), purported to be a determination that 'fundamental fairness' requires the State to afford trial counsel to the indigent accused. *Id.*, at 343, 83 S.Ct. at 796. Although I have disagreed with particular holdings like *Gilbert v. California*, *supra*, where the Court held that the States must arrange presence of counsel at lineups, see Mr. Justice White's separate opinion in *United States v. Wade*, [388 U.S. 218, 250](#) , 1944d 1149 (1967), which I joined, this is because those decisions incorrectly require, in my view, counsel in circumstances where his presence is not necessary under either the Sixth Amendment or the Due Process Clause. See my separate opinion in *Coleman v. Alabama*, decided today, [399 U.S. 1](#) , at 19, at 2008 (1970).

[Footnote 16](#) The President of the Legal Aid Society in New York City recently reported that 49% of the society's clients who were tried in the New York Criminal Court in 1967 (without a jury) were acquitted; there were 3,023 convictions after trial, 2,678 acquittals after trial. Speech at annual Judicial Conference of the Second Judicial Circuit of the United States, Lake Placid, N.Y., Sept. 14, 1968, reprinted in *N.Y.L.J.*, September 25, 1968, p. 4.

[Footnote 17](#) See the Court's opinion, 399 U.S., at 99 n. 45.

[Footnote 18](#) See Appendix to this opinion.

[Footnote 19](#) See *ibid.*

[Footnote 20](#) See *ibid.*

[Footnote 21](#) See *ibid.*

[Footnote 22](#) 'Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily ... the guarantee of an impartial jury to the accused in a criminal prosecution, conducted ... by ... the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged. ... To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction ... does not satisfy the requirements of the constitution.' [127 U.S. 540](#), at 557, at 1307.

[Footnote 23](#) See e.g., H. Kalven & H. Zeisel, *The American Jury* 5 (1966); Comment, *Should Jury Verdicts Be Unanimous in Criminal Cases?*, 47 *Ore.L. Rev.* 417 (1968).

[[Footnote 1](#)] Like Mr. Justice HARLAN, I join Part I of the Court's opinion in No. 927, relating to the 'alibi' issue.

[[Footnote 2](#)] I have had occasion to state elsewhere my own understanding, for whatever it is worth, of the motivational origins of Fourteenth Amendment 'incorporation':

'Shortly before Justice Jackson came to the Court, some of its then more junior members had embraced the comforting theory that the Fourteenth Amendment's substantive impact upon the states could be exactly measured by the specific restrictions that the first eight Amendments imposed upon the National Government. I call this a 'comforting' theory, because, for critics of the old Court's subjective approach to due process, it was a theory that appeared to give the Fourteenth Amendment objective content and definable scope.' (Footnotes omitted.) P. Stewart, *Robert H. Jackson's Influence on Federal-State Relationships*, in *Mr. Justice Jackson, Four Lectures in His Honor* 57, 76 (1969).

[[Footnote 3](#)] A worthy candidate for nomination as Exhibit B is the separate opinion filed today in *Coleman v. Alabama*, 399 U.S., at 14, by my Brother DOUGLAS. In dealing with the procedure followed by Alabama in the administration of Alabama criminal law, my Brother's opinion advises us that 'it is the Sixth Amendment that controls. ...' And this statement is made in the name of 'strict construction of the Constitution'!

[[Footnote 4](#)] This is not to say that I would agree that the Fifth Amendment or any other provisions of the Bill of Rights would render unconstitutional a federal alibi procedure similar to Florida's. See n. 1, *supra*.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com