fixing of jury size at 12 was "a historical accident" that, although firmly established when the Sixth Amendment was proposed and ratified, was not required as an attribute of the jury system, either as a matter of common-law background [63] or by any ascertainment of the intent of the framers.[64] Being bound neither by history nor framers' intent, the Court thought the "relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial." The size of the jury, the Court continued, bore no discernable relationship to the purposes of jury trial—the prevention of oppression and the reliability of factfinding. Furthermore, there was little reason to believe that any great advantage accrued to the defendant by having a jury composed of 12 rather than six, which was the number at issue in the case, or that the larger number appreciably increased the variety of viewpoints on the jury. A jury should be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility that a cross-section of the community will be represented on it, but the Court did not speculate whether there was a minimum permissible size and it recognized the propriety of conditioning jury size on the seriousness of the offense.[65]

When the unanimity rule was reconsidered, the division of the Justices was such that different results were reached for state and federal courts.[66] Applying the same type of analysis as that used in *Williams*, four Justices acknowledged that unanimity was a common-law rule but observed for the reasons reviewed in *Williams* that it

---

[63] The development of 12 as the jury size is traced in *Williams*, 399 U.S. at 86–92.

[64] 399 U.S. at 92–99. Although the historical materials were scanty, the Court thought it more likely than not that the framers of the Bill of Rights did not intend to incorporate into the word "jury" all its common-law attributes. This conclusion was drawn from the extended dispute between House and Senate over inclusion of a "vicinage" requirement in the clause, which was a common law attribute, and the elimination of language attaching to jury trials their "accustomed requisites." *But see* id. at 123 n.9 (Justice Harlan).

[65] 399 U.S. at 99–103. In Ballew v. Georgia, 435 U.S. 223 (1978), the Court unanimously, but with varying expressions of opinion, held that conviction by a unanimous five-person jury in a trial for a nonpetty offense deprived an accused of his right to trial by jury. Although readily admitting that the line between six and five members is not easy to justify, the Justices believed that reducing a jury to five persons in nonpetty cases raised substantial doubts as to the fairness of the proceeding and proper functioning of the jury to warrant drawing the line at six.

[66] Apodaca v. Oregon, 406 U.S. 404 (1972), involved a trial held after decision in Duncan v. Louisiana, 391 U.S. 145 (1968), and thus concerned whether the Sixth Amendment itself required jury unanimity, while Johnson v. Louisiana, 406 U.S. 356 (1972), involved a pre-*Duncan* trial and thus raised the question whether due process required jury unanimity. *Johnson* held, five-to-four, that the due process requirement of proof of guilt beyond a reasonable doubt was not violated by a conviction on a nine-to-three jury vote in a case in which punishment was necessarily at hard labor.