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The Right to Trial by Jury in State Court Prosecutions

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Duncan was charged with simple battery which, under Louisiana law,[1] was a misdemeanor having a maximum punishment of two years imprisonment and a $300 fine. Timely request for a trial by jury was made, but because Louisiana law[2] provided for jury trials only in cases in which capital punishment, life imprisonment, or imprisonment at hard labor may be imposed, the request was denied. Duncan was convicted of the charge. He was sentenced to serve sixty days in prison and was fined $150. In his appeal to the United States Supreme Court[3] Duncan maintained that he had been denied his right to trial by jury[4] as guaranteed by the fourteenth amendment to the United States Constitution.[5] *Held*, *reversed*: The right to trial by jury is a right fundamental to the American scheme of justice and is guaranteed by the fourteenth amendment in all state criminal prosecutions which would come within the sixth amendment's guarantee of a jury trial were they tried in a federal court. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

I. Development of the Fourteenth Amendment and the Right to Trial by Jury in the States

The Fourteenth Amendment and the Bill of Rights. From the earliest cases involving the interpretation of the fourteenth amendment to the United States Constitution, the Supreme Court has maintained that the amendment was not intended to incorporate the entire Bill of Rights.[6] In *Twining v. New Jersey*[7] the Court stated that although the personal rights contained in the Bill of Rights may be safeguarded against state action, "it is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law . . . ."[8] Subsequent to *Twining*, the Court began to rec-

[1] La. Rev. Stat. § 14:35 (1950).

[2] La. Const. art. I, § 9; art. XII, § 41; La. Code Crim. Proc. Ann. art. 779 (1966).

[3] Appellant's appeal to the United States Supreme Court was pursuant to 28 U.S.C. § 1257 (1964); the Court noted probable jurisdiction in 389 U.S. 809 (1962).

[4] "The trial of all crimes, except in cases of impeachment, shall be by jury . . . ." U.S. Const. art. III, § 2. "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.

[5] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[6] Evidence supporting the concept that Congress intended the incorporation of at least the first eight amendments was presented in the appendix to Justice Black's dissent in Adamson v. California, 332 U.S. 46, 68 (1947). An extensive rebuttal to Justice Black's opinion may be found in Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding*, 2 Stan. L. Rev. 5 (1949). *See generally* Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 Harv. L. Rev. 746 (1965); Note, *Constitutional Law—Was It Intended That the Fourteenth Amendment Incorporate the Bill of Rights?*, 42 N.C.L. Rev. 925 (1964).

[7] 211 U.S. 78 (1908).

[8] The Court's conception of fourteenth amendment due process of law as it existed at that time had been clearly defined in the earlier case of Hurtado v. California, 110 U.S. 516, 535 (1884), as

> that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.

ognize specific rights as protected against state infringement.[9] Relying on "natural law" principles, the Court in *Palko v. Connecticut*[10] noted that certain rights were "implicit in the concept of ordered liberty" and should therefore be absorbed into the concept of due process of law.[11] This natural law theory was affirmed ten years later in *Adamson v. California*,[12] although in that case the Court held that the particular Bill of Rights provision in question was not within the meaning of due process.[13]

Since *Adamson*, however, cases concerning the fourteenth amendment have evidenced a trend away from the natural law theory and toward a doctrine of "selective incorporation." During this period, the Court has held that the fourteenth amendment guarantees against state infringement, the prohibition of cruel and unusual punishment,[14] the rights to be free from unreasonable searches and seizures and to have illegally seized evidence excluded from criminal trials,[15] the right to be free from compelled self-incrimination,[16] the rights to counsel,[17] and to a speedy[18] and public[19] trial, the right to confront opposing witnesses,[20] and the right to compulsory process for obtaining witnesses.[21] As a result of the selective incorporation doctrine the Court has concerned itself not only with whether the state court's proceedings meet the demands of fundamental fairness which due process embodies, but also whether the proceedings meet the standards of the particular Bill of Rights provision as it has been interpreted by the Court. Thus under the selective incorporation doctrine as currently applied by the Court, federal standards are imposed in state as well as federal courts.[22]

The Fourteenth Amendment and the Right to Trial by Jury. The relation of the right to trial by jury and the concept of due process of law has been considered by the Court on several occasions. In *Maxwell v. Dow*[23] the Court faced the question of whether the sixth amendment requires a jury of twelve persons in state court prosecutions. The Court noted that although a twelve-man jury is required in the federal courts by virtue of the sixth amendment,[24] the right to trial by jury "has never been affirmed to be a requisite of due process of law."[25] The Court further stated that the

[9] Everson v. Board of Education, 330 U.S. 1 (1947) (establishment of religion); DeJonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Hamilton v. Board of Regents of University of California, 293 U.S. 245 (1934) (freedom of religion); Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech).

[10] 302 U.S. 319 (1937).

[11] *Id.* at 325.

[12] 332 U.S. 46 (1947).

[13] The Court in *Adamson* held that "the due process clause does not protect, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment." *Id.* at 54.

[14] Robinson v. California, 370 U.S. 660 (1962).

[15] Mapp v. Ohio, 367 U.S. 643 (1961).

[16] Malloy v. Hogan, 378 U.S. 1 (1964) (overruled Adamson v. California, 332 U.S. 46 (1947)).

[17] Gideon v. Wainwright, 372 U.S. 335 (1963), *noted in* 18 Sw. L.J. 284 (1964).

[18] Klopfer v. North Carolina, 386 U.S. 213 (1967).

[19] *In re* Oliver, 333 U.S. 257 (1948).

[20] Pointer v. Texas, 380 U.S. 400 (1965), *noted in* 19 Sw. L.J. 632 (1965).

[21] Washington v. Texas, 388 U.S. 14 (1967).

[22] Malloy v. Hogan, 378 U.S. 1 (1964).

[23] 176 U.S. 581 (1900).

[24] Thompson v. Utah, 170 U.S. 343 (1898).

[25] Maxwell v. Dow, 176 U.S. 581, 603 (1900).

right to a jury trial is "a case of self-protection, and the people can be trusted to look out and care for themselves."[26]

Although the case of *Snyder v. Massachusetts*[27] did not squarely involve the question of the right to trial by jury, the Court stated that such a right was not of the very essence of a scheme of ordered liberty and should not be "ranked as fundamental."[28] Similar dicta contained in *Palko v. Connecticut*[29] indicated not only that the right to trial by jury was not essential, but also that the states could abolish it altogether. In recent years, however, the Court has shown an increasing tendency to recognize the right to trial by jury as fundamental and essential.[30] This fact, in conjunction with the Court's ever changing standards of due process of law,[31] set the stage for the reconsideration of the right to a jury trial in *Duncan v. Louisiana.*

II. Duncan v. Louisiana—A New Fundamental Right

Speaking for the majority in *Duncan*, Justice White stated that the Court now considers the right to trial by jury in serious criminal cases "fundamental to the American scheme of justice."[32] The Court at first attempted to reconcile this holding with its prior decisions in *Maxwell, Palko*, and *Snyder*[33] by stating that in these earlier cases the Court merely examined whether a "civilized system" could be imagined which did not guarantee the right in question. In *Duncan*, however, the Court inquired as to whether the right was essential to the Anglo-American regime of ordered liberty. While the validity of this distinction is questionable in light of the Court's own words in the earlier decisions,[34] the effect of this apparent weakness in the Court's opinion was nullified when Justice White, apparently changing his mind in mid-opinion, unequivocably rejected the contrary dicta of *Palko* and *Snyder*. Reasoning that the right to trial by jury was intended to provide protection against oppression by the government, the Court concluded "that in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a funda-

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[26] *Id.* at 605.

[27] 291 U.S. 97 (1934).

[28] *Id.* at 105.

[29] 302 U.S. 319, 324 (1937).

[30] Irvin v. Dowd, 366 U.S. 717 (1961); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

[31] Edwards, *Due Process of Law in Criminal Cases*, 57 J. Crim. L.C. & P.S. 130, 131 (1966).

[32] Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[33] *See* text accompanying notes 23-29 *supra.*

[34] The Court has, in the past, referred to "those principles of liberty and justice *which lie at the base of all our civil and political institutions.*" Hurtado v. California, 110 U.S. 516, 535 (1884) (emphasis added). Even more notable were the words in *Snyder* and *Palko* where the Court based its decisions on the "principles of justice *so rooted in the traditions and conscience of our people* as to be ranked as fundamental." *E.g.*, Palko v. Connecticut, 302 U.S. 319, 325 (1937) (emphasis added); *see* text accompanying notes 26-28 *supra.* The Court in *In re* Gault, 387 U.S. 1 (1967), in its discussion of the American system of justice omitted any mention of trial by jury as an essential right. In light of *Gault* and the wording used by the Court in *Hurtado, Snyder*, and *Palko*, one might fairly question whether the Court was, as Justice White stated, only considering "imaginary and theoretical schemes" of justice and not the American system. Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968).

mental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."[35]

Having concluded that the right to trial by jury in criminal cases is fundamental to the American scheme of justice and is therefore protected from infringement by the states, the Court examined the notable exception to this right. The Court has long recognized that there is no right to trial by jury in prosecutions of petty offenses.[36] However, faced with the absence of definitive constitutional standards[37] as to what constitutes a serious offense, the Court has turned to the maximum penalty that may be imposed as an objective criterion of seriousness.[38] In the federal courts Congress has provided that no crime carrying a maximum penalty of imprisonment for six months or less is a serious offense.[39] In *Duncan*, however, the Court declined to specify a clear delineation between petty and serious offenses. It merely stated that the possible two-year sentence under the Louisiana simple battery statute was of sufficient length to guarantee Duncan the right to a jury trial.

III. DUNCAN IN PERSPECTIVE

In previous cases involving the doctrine of selective incorporation the Court has generally applied the same interpretation of the constitutional right in both the state and federal courts.[40] The Court in *Duncan* indicated just such a policy when Justice White stated that the right to trial by jury must be guaranteed in all criminal cases "which—*were they to be*

[35] Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968).

[36] Cheff v. Schnackenberg, 384 U.S. 373 (1966); District of Columbia v. Clawans, 300 U.S. 617 (1937); Callan v. Wilson, 127 U.S. 540 (1888).

[37] Compare the exact standards for the right to trial by jury in civil cases provided in the seventh amendment: "In suits at common law, where the value shall exceed twenty dollars, the right to trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

[38] District of Columbia v. Clawans, 300 U.S. 617 (1937); Schick v. United States, 195 U.S. 65 (1904). In Bloom v. Illinois, 391 U.S. 194 (1968), a companion case to *Duncan*, the Court held that the Constitution guarantees a right to trial by jury in trials of serious criminal contempt. As in *Duncan*, the Court in *Bloom* looked to the penalty involved to determine the seriousness of the offense. *Bloom* is notable not only in that it makes a jury trial available to a defendant accused of a serious contempt, but also because the Court looked to the penalty actually imposed when no maximum penalty was prescribed by law. *Bloom*, however, like *Duncan* involved a two-year sentence so that the Court shed no new light on the difference between petty and serious offenses.

[39] 18 U.S.C. § 1 (1964). In Callan v. Wilson, 127 U.S. 540, 554 (1888), the Court said that "Congress has the right to provide for the trial . . . by a court without a jury, of such offenses as were, by the laws and usages in force at the time of the adoption of the Constitution, triable without a jury . . . ." Although petty offenses were tried summarily both in England and in the American colonies, there was never a clear standard for determining the criteria of serious offenses. The choice of six months' imprisonment as a division between petty and serious offenses was an attempt by Congress to codify the most common historical standard. Of this historical approach to the question, one source notes that "history presents a body of experience expressive of the judgment of its time, but does not save Congress nor the Supreme Court from the necessity for judgment in giving past history present application." Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917, 982 (1926).

[40] Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964). One noted judge, critical of this practice, has commented that the "real bite" of the selective incorporation process is that "once a particular provision of the Bill of Rights makes the grade for 'absorption,' it comes over to the states with all the overlays the Court has developed in applying it to the federal government . . . ." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 933 (1965). On the other hand, the Court defends this policy on the basis that to allow the federal standards to be "watered down" would be to allow the states "greater latitude than the Federal Government to abridge concededly fundamental liberties protected by the Constitution." Pointer v. Texas, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring).

tried in a federal court—would come within the Sixth Amendment's guarantee.'"[41] From this statement it may be inferred that any crime having a maximum penalty of imprisonment for more than six months should be regarded as serious.[42] The Court went on to state, however, that it would not settle the exact division between petty and serious offenses. Nor did the Court further define the limits of the sixth amendment as applied in the federal courts.[43]

In a concurring opinion Justice Black restated the reasoning which he so clearly espoused in his dissent to *Adamson v. California*.[44] He also refuted a number of arguments against his "total incorporation" doctrine and noted that the selective incorporation process has already operated to incorporate most of the provisions of the Bill of Rights. Justice Harlan, on the other hand, dissented to the Court's opinion with reasoning equally as familiar[45] as that of Justice Black. In addition to echoing his well known objections to the incorporation process, Justice Harlan stated that, even accepting this process, the right to trial by jury is not fundamental to procedural fairness. He further stated that there is no reason "why this court should reverse the conviction of the appellant, absent any suggestion that his particular trial was in fact unfair, or compel the State of Louisiana to afford jury trial in an as yet unbounded category of cases that can, without unfairness, be tried to a court."[46]

IV. Conclusion

While the decision in *Duncan* is commendable in that it protects a fundamental right, several questions remain unanswered. The immediate issue[47] which the Court must decide is whether the interpretation of the

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[41] Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (emphasis added).

[42] Since Congress has provided a statutory division between petty and serious crimes, the Court has been relieved of the burden of determining this division. While the Court must now decide the question with respect to the state courts, it would appear that it would require a severe departure from the historical approach taken by both Congress and the Court, *see* note 39 *supra*, if the division between petty and serious offenses is to be other than six months' imprisonment.

[43] Not discussed by the Court are the federal requirements that the jury be composed of twelve persons, Thompson v. Utah, 170 U.S. 343 (1898); that it be impartial and drawn from a cross section of the community, Smith v. Texas, 311 U.S. 128 (1940); and that it not be instructed by the judge to reach a specific verdict, Starr v. United States, 153 U.S. 614 (1894).

[44] 332 U.S. 46, 68 (1947).

[45] *See* Klopfer v. California, 386 U.S. 213, 226 (1967) (concurring opinion); Griffin v. California, 380 U.S. 609, 615 (1965) (concurring opinion); Pointer v. Texas, 380 U.S. 400, 408 (1965) (concurring opinion); Malloy v. Hogan, 378 U.S. 1, 14 (1964) (dissenting opinion); Kerr v. California, 374 U.S. 23, 44 (1963) (concurring opinion); Mapp v. Ohio, 367 U.S. 643, 672 (1961) (dissenting opinion).

[46] Duncan v. Louisiana, 391 U.S. 145, 190 (1968).

[47] In DeStefano v. Woods, 392 U.S. 631 (1968), the Court held that the decisions in *Duncan* and *Bloom* would not be applied retroactively. The Court considered three factors in reaching its decision: "(a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards." Stoval v. Denno, 388 U.S. 293, 297 (1967). For cases in which the Court has set different standards to be considered in determining the retroactive application of a decision *see* Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. Shott, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965). In *DeStefano* the Court noted that the retroactive application of *Duncan* would require the retrial of all persons convicted by a procedure not in accordance with the Court's interpretation of the sixth amendment. While the Court concluded that the "values implemented by the right to trial by jury" would not be significantly furthered by a retroactive application of *Duncan*, the reasoning behind

sixth amendment presently applied in the federal courts[48] will also be applied to the states.[49] Such an application would require many changes in state court procedure.[50] The question may well be asked what effect these changes would have on the administration of justice at the state level.[51] It has been noted that jurisdictions that have previously expanded the right to trial by jury have caused local courts to become hopelessly clogged.[52] Louisiana has taken immediate legislative steps to avoid just such a result.[53]

A further repercussion of an application of the federal standards to the state courts would be the inability of the states to "experiment" with the jury procedure in an effort to find a just, yet efficient, judicial system. In this regard, however, a strong argument is made by many authorities that, despite the importance of efficient judicial administration, limiting trial by jury in favor of trial by judge is not a just means of obtaining such efficiency.[54] It might well be asked whether the best aid to judicial administrative problems consistent with the Court's concept of fundamental justice as expressed in *Duncan* might not be to guarantee the right to trial by jury, in accordance with the federal standards, in state criminal trials where a maximum penalty of one year imprisonment may be imposed. It could then be left to the legislature and courts of each state, where local needs and philosophies can best be balanced, to determine the jury trial rights in the prosecution of offenses which involve a less serious penalty.

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this conclusion is not clearly explained. DeStefano v. Wood, *supra* at 634. Notable also is the Court's failure to distinguish *Duncan* and *Bloom* from those cases which have been held to apply retroactively. *See* Jackson v. Denno, 378 U.S. 368 (1964), *noted in* 18 Sw. L.J. 729 (1964); Gideon v. Wainwright, 372 U.S. 335 (1964); Griffin v. Illinois, 351 U.S. 12 (1956).

[48] *See* note 43 *supra*.

[49] A strong indication that the federal standards will be applied to the states may be found in the fact that the Court did not deny Louisiana's assertion that the states will be obliged to comply with the past interpretations of the sixth amendment. In response to the contention that such a policy would require widespread changes in state criminal processes the Court merely noted that its decisions interpreting the sixth amendment are always open to reconsideration. Duncan v. Louisiana, 391 U.S. 145, 158 n.30 (1968). In a concurring opinion to Bloom v. Illinois, 391 U.S. 194, 214 (1968), Mr. Justice Fortas argued that unless the Court "slavishly adheres to the incorporation theory, body and substance" there is no reason why not only the sixth amendment, but also its "bag and baggage" must be imposed upon the states.

[50] The State of New York previously distinguished between petty and serious offenses by whether the prosecution had to be initiated by indictment. A recent decision from that state has held that, in light of *Duncan*, the seriousness of an offense must be based on the maximum penalty involved and that the "indictment criterion" is no longer applicable. The court went on to hold that a misdemeanor punishable by one year imprisonment was a serious offense by contemporary standards and "existing laws and practices in the nation." People v. Bowman, 3 CRIM. L. REP. 2496 (N.Y. County Crim. Ct. Sept. 10, 1968). *See generally* Hood, *Recent Developments: Trial by Jury*, 20 ALA. L. REV. 76 (1967).

[51] For a discussion of the need for more efficient judicial administration *see* Kennedy, *Crime in the Cities: Improving the Administration of Criminal Justice*, 58 J. CRIM. L.C. & P.S. 142 (1967).

[52] Before the decision in State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959), expanding the right to jury trials in Minnesota courts, the Minneapolis Municipal Court was three months behind its calendar; after the decision it fell to two years behind the calendar. Note, *Right to Jury Trial for Persons Accused of an Ordinance Violation*, 47 MINN. L. REV. 93, 105 (1962).

[53] For a general description of the steps taken by the Louisiana legislature to avoid a flood of jury trial cases *see* Times-Picayune (New Orleans), July 11, 1968, § 1, at 14, col. 1.

[54] *See generally* Powell, *Jury Trial of Crimes*, 23 WASH. & LEE L. REV. 1 (1966).