DUNCAN V. LOUISIANA:

THE RIGHT TO TRIAL BY JURY

A Thesis

Presented to

the Faculty of the Division of Social Sciences

The Kansas State Teachers College of Emporia

In Partial Fulfillment

of the Requirements for the Degree

Master of Arts

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by

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August 1969

Approved for the Major Department

Approved for the Graduate Council

ACKNOWLEDGMENTS

I give my sincere appreciation to Dr. Joe A. Fisher who has been so helpful in his assistance in writing this paper.

A special appreciation is extended to United States Supreme Court Associate Justice John M. Harlan who furnished the briefs on Duncan v. Louisiana, without which this thesis could not have been written. Acknowledgment and appreciation are also expressed to Marie Russell and other personnel at the Kansas State Law Library for use of their services.

A final thought must go to my husband for being so understanding while this paper was in progress.

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CHAPTER I

INTRODUCTION

Of all legal institutions the trial by jury is most familiar to citizens of the United States. The student of elementary history remembers the colonial objection to admiralty courts operating without juries at the time of the Revolution. State constitutions and state cases testify to the value of jury trials. Even contemporary sources such as television support the jury as a traditional characteristic of criminal processes in the United States. However, although popular and valued, the exact scope and extent of trial by jury has been largely uncertain. Practices relative to jury trial have varied with time and among the states. Until 1968 this variability was left unchallenged.

Until Duncan v. Louisiana[1] the Supreme Court of the United States had never reviewed a case where a complete denial of jury trial was the question. The Duncan case originated in the Twenty-fifth Judicial District Court of Louisiana. Appellant Gary Duncan was charged with simple battery, a misdemeanor punishable by two years' imprisonment and a $300 fine under Louisiana Law.[2] He asked for a jury trial, but

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[1] 391 U.S. 145 (1968).

[2] La. Rev. Stat. 14: 35 (1950).

because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed,[3] the trial judge denied the request. Duncan was convicted and sentenced to serve 60 days in the parish prison, and pay a fine of $150.[4] Duncan appealed to the Louisiana Supreme Court on the ground that he was denied his constitutional right to jury trial. The Supreme Court of Louisiana, finding "no error of law in the ruling complained of," denied him a writ of certiorari.[5] Duncan appealed to the United States Supreme Court on the grounds that the Sixth and Fourteenth Amendments guaranteed a jury trial when a sentence as long as two years could be imposed.[6] The United States Supreme Court noted probable jurisdiction,[7] and on May 20, 1968, the Supreme Court reversed the judgment of the Louisiana Supreme Court.[8] In the eight to two decision Justice White spoke for the majority, Justices Black and Douglas concurred, Justice Fortas concurred separately, and Justices Harlan and Stewart dissented.

Duncan v. Louisiana marked another major step by the Supreme Court in applying the specific provisions of the Bill of Rights to the states. Because it was the first case in which the Court had reviewed a situation where a complete denial of jury trial was the question, many

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[3]La. Const., Art. VIII Sec. 41.

[4]An additional twenty days in the event fine and costs were not paid. See infra, Chapter II.

[5]195 So. 2d 142 (1967).

[6]Duncan v. Louisiana, "Appendix to Briefs," 3. Hereafter cited as "Appendix."

[7]389 U.S. 809 (1967).

[8]See supra, note 1.

historical and legal issues arose from the decision. In analyzing Duncan v. Louisiana these major issues were reviewed: the historical status of jury trial; the relationship of jury trial to due process; and the relationship of the states to the federal government in application of a guarantee to the states.

Trial by jury began in England, but neither its appearance nor application were instantaneous. The development of the jury was a slow and painful process occurring over several centuries. The jury trial as a mode of procedure in criminal prosecutions grew out of events in both English and American history. When the colonists came to the New World, they adopted and adapted the jury trial to their situation. In America the trial by jury became one of the most important rights cherished by the colonists. At the time of the Revolution the denial of jury trial was one of the specific grievances issued against George III. After the Revolution the right to trial by jury was eventually embodied in the United States Constitution in two separate places. The delegates to the Constitutional Convention represented the viewpoints of many local areas on criminal procedure. How these delegates viewed jury trial and what debates took place over jury trial are vital elements in the history of jury trial. Generally, the degree of acceptance or rejection represented at the Convention carried over into the succeeding state constitutions.

During the first half of the 19th century, the history of trial by jury was blurred to a certain extent. For the most part, the states

administered their own brand of justice, because the Supreme Court had not yet begun to control state action in the areas of civil liberty. Only one Supreme Court case,[9] and few relevant state cases[10] concerning jury trial were made during the period prior to the Fourteenth Amendment.

Upon adoption of the Fourteenth Amendment the entire relationship between the states and the federal government changed, because the Amendment embodied a potential control over the jurisprudence of the states in questions of denial of due process of law. However, just what change would occur, and how the Amendment was to be used against the states, were not agreed upon. Areas traditionally under state control now came into question. Specifically, questions began to arise as to whether the right to a jury trial was included in the Fourteenth Amendment's due process clause. The Court had the opportunity to rule on this question in several instances.[11]

In the debate over the use and extent of the Fourteenth Amendment, the entire system of federalism came under the scrutiny, and often the criticism, of the judicial branch. How far could the states go before the federal government, the Supreme Court specifically, could

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[9] Barron v. Baltimore, 7 Peters 243 (1833).

[10] See infra, Chapter III, notes 75-85.

[11] Maxwell v. Dow, 176 U.S. 581 (1900). Other cases contained important dicta which denied the inclusion of jury trial in the 14th Amendment: Snyder v. Massachusetts, 291 U.S. 97 (1934), Brown v. Mississippi, 297 U.S. 278 (1936), Palko v. Connecticut, 302 U.S. 319 (1937), Stein v. N.Y., 346 U.S. 156 (1953).

intervene and restrict state action under the Fourteenth Amendment? The general test which evolved was to determine if the state had violated a fundamental element of due process. But, what was fundamental? Various answers to the question were suggested, ranging in degree from demanding only fairness and allowing a wide area of experimentation by the states, to requiring the total inclusion of the guarantees of the first eight amendments in the Fourteenth Amendment and, therefore, protecting those guarantees against state action. Immediately after the adoption of the Amendment the Supreme Court, in a series of decisions, developed the theory that jury trial was not fundamental, and therefore, not guaranteed in state courts.[12] Until the Duncan decision the states operated under that theory.

Beginning in 1960 the Supreme Court increasingly began to find guarantees of the Bill of Rights applicable to the states. Along with these recent decisions, the Court, in Duncan v. Louisiana, decided to include jury trial as a fundamental element of due process protected by the Fourteenth Amendment. What had changed to make the Supreme Court reverse its original opinions on jury trial? Part of the answer to that question is to be found in examining recent cases decided prior to Duncan v. Louisiana. The application of jury trial in the Sixth Amendment, as with all cases making such applications, brought forth debate on federalism. In the case of each guarantee of the Bill of Rights, the protection was one which, originally, only the federal

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[12] Ibid.

government had to afford an individual. But after one hundred and seventy-nine years since the adoption of the Constitution, the states now had to comply with the jury trial provision of the Sixth Amendment. How diverse had state procedures on jury trial become during that time, and what affect would the Duncan decision have on that diversity? Some changes have already taken place in the last year and other reforms may be under way.

It is not the purpose of this thesis to argue the advantages and disadvantages of a jury trial, except as those arguments relate directly to issues contained in the Duncan decision. Rather, the emphasis will be on the criminal jury trial as exemplified in Duncan v. Louisiana.

CHAPTER II

DUNCAN V. LOUISIANA:

THE ORIGIN AND THE DECISION

Gary Duncan, appellant, was a Negro citizen of the United States, and a resident of Plaquemines Parish, Louisiana. On December 5, 1966, Duncan was charged with simple battery in a bill of information filed in the Twenty-Fifth Judicial District Court of Louisiana.[1] In Louisiana, simple battery was a crime punishable by a term of two years imprisonment and a fine of $300.[2] Because simple battery was not punishable by "imprisonment at hard labor," the crime was categorized as a "misdemeanor" at state law.[3] Article 779 of the Code of Criminal Procedure of Louisiana denied the right to trial by jury in misdemeanor cases.

On January 25, 1967, prior to trial in the state court, Duncan filed a "Demand for Trial by Jury," in which he contended that the right to trial by jury on the charge against him was secured by the Sixth and

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[1] Duncan v. Louisiana, "Appendix to the Briefs," 1. Appendix contains transcript of testimony before 25th Judicial District Court and other documents filed in proceedings. Hereafter cited as "Appendix."

[2] La. Rev. Stat. 14:35 (1950).

[3] Ibid., 14:2.

Fourteenth Amendments to the United States Constitution.[4] The demand was rejected by the trial judge on the authority of Article 779 of the Louisiana Code of Criminal Procedure.[5] Duncan was then tried before a judge, without a jury.

The charge against Duncan was based on an incident involving his two young cousins, who had recently transferred to the formerly all-white Boothville-Venice School under the provisions of a federal court order.[6] After the transfer, these boys were assaulted, threatened, and otherwise harassed by the white students in the school.[7] On October 18, 1966, Duncan was driving home past the Boothville-Venice School and observed his two cousins confronted by four white boys on the highway.[8] He stopped his car, told the Negro boys to get into his car and drove them away.[9] At the trial the white boys and white onlooker some distance away testified that after the Negro boys went to Duncan's car, Duncan slapped one of the white boys on the arm.[10]

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[4] "Appendix," 4.

[5] Ibid., 5-6, 18-19.

[6] United States v. Plaquemines Parish School Board, 11 Race Rel. L. Rep. 1764 (E.D. La., Aug. 26, 1966) as cited in Duncan v. Louisiana, "Brief for Appellant", 4.

[7] "Appendix," 22,24,32,52.

[8] Ibid., 28.

[9] Ibid., 31, 59, 64.

[10] Ibid., 21, 31, 44, 49.

Duncan and his two cousins each testified that Duncan had not slapped the boy, but had merely touched him on the elbow, as a manner of expression, while telling him that it would be best if he went home.[11]

The basic argument used by Richard B. Sobol, Duncan's attorney, in the trial was that the incident between Duncan and Herman Landry, plaintiff, had been prefaced by a tense, highly explosive atmosphere at the school and in the county, and that the two cousins were being threatened when Duncan stopped. The two cousins had been attacked earlier that day at school as they followed the federal order to integrate the formerly all-white school. The court objected to questioning based upon this line of reasoning from Sobol and insisted that all the court wanted to know was what went on on the side of the road, not at school that day.[12] The court, as was evidenced in its final argument, did not take into consideration the atmosphere of the incident. In sentencing Duncan this may have been a factor in placing the penalty at only 60 days when there existed a two year potential penalty. In view of the atmosphere in the county, the conflicting, and inconclusive, evidence in the trial, it would have appeared a jury would have been a more fair arbiter. Later, on appeal to the United States Supreme Court, Sobol's arguments shifted from the atmosphere of the incident to a more concrete denial of the constitutionality of the

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[11] Ibid., 53-54, 60, 64.

[12] Ibid., 38.

Louisiana statute which denied Duncan a jury trial when a two year penalty could have been imposed.

The entire character of the trial, as evidenced by the transcript, was highly informal. On several occasions the witnesses had to be reminded not to talk to each other[13] and during the trial the judge could not remember the name of Duncan's counsel.[14] The testimony of Duncan and his two cousins was identical, that the act was a "touch", which Duncan justified as "just out of expression."[15] The three white boys involved testified the act was a "slap."[16] Thus, the testimony of the boys was inconclusive. The Court's decision rested on the testimony of a forty-two year old man, P. E. Lathum, who had witnessed the incident from a distance and had called the police. This witness testified that Duncan hit the white boy. The Court, in rendering the verdict against Gary Duncan, made the following comments:

> . . . Every touching or holding, however trifle of another person, or his clothes, an angry resentual, rude or insolent or hostile manner shall be battery, as defined in the Code under the Revised Statute Title 14, Section 33.

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[13] Ibid., 30, 47.

[14] Ibid., 19, 20, 21.

[15] Ibid., 65.

[16] Ibid., 21, 31, 44.

> The Court taking into consideration Mr. Lathum's testimony, a man who was not even in the discussion, and the testimony of the victim himself, Mr. Landry, that this blow was sufficient to sting him, I think the State for those reasons has proved to me beyond a reasonable doubt that the defendant is guilty of simple battery.[17]

Thus, the Court, on the basis of one witness standing some distance from the scene and the testimony of the plaintiff, found Gary Duncan guilty of simple battery, an offense for which, by Louisiana law, he could have received a two-year prison sentence and a $300 fine.

On February 6, 1967, Duncan filed in the Supreme Court of Louisiana an application for a writ of certiorari to review the judgment below, and specifically the ruling of the court on appellant's demand for trial by jury.[18] In the application two questions were presented: (1) does the denial of a jury trial for a crime punishable by two years in prison contravene petitioner's right under the Sixth and Fourteenth Amendments to the Constitution of the United States; and (2) in the particular circumstances of this case, does the denial of a jury trial contravene petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States?[19] The application emphasized that the trial court erred in denying Duncan's demand for a trial by jury.[20]

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[17] Ibid., 72-73.

[18] Ibid., 9-13.

[19] Ibid., 10-11.

[20] Ibid., 11.

The application argued that the particular circumstances of the arrest and of the trial constituted a clear denial of a trial by jury under the Sixth and Fourteenth Amendments. The atmosphere was "racially tense" on October 18, 1966, when Duncan's two cousins missed the schoolbus and were walking home.[21] Duncan stopped to take his cousins home. One of the white boys said, "You must think you're tough," and the battery took place. The testimony unjustly rested on the word of a man who was some distance away. The District Court resolved the conflicting testimony in favor of the State and found that Duncan had struck Landry with "force or violence" within the meaning of L.S.A. - R.S. 14:33. The application reiterated,

> It is manifest that the circumstances attendant to the arrest of petitioner on the charge of battery were racially oriented. These same racial overtones were expressed at the trial; petitioner presented only Negro witnesses in aid of his defense while the prosecution's witnesses were all white. Certainly in this atmosphere, only a jury composed of a fair representation of the community could impartially assess the evidence and render a just verdict.[22]

The petition recognized that simple battery was punishable by two years imprisonment in Louisiana and the Sixth and Fourteenth Amendments granted a jury trial on such a charge.[23] Citing Cheff v. Schnackenberg,[24] where

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[21] Ibid.

[22] Ibid., 12.

[23] Ibid.

[24] 384 U.S. 373 (1966).

the Court held that in contempt proceedings a penalty longer than six months warranted a jury trial, the petition argued that since contempt proceedings had historically involved lesser procedural safeguards to the accused than other criminal proceedings, the Cheff rule would prescribe a minimum standard applicable in criminal proceedings.

The application concluded that the Sixth Amendment applied to the states by virtue of the Fourteenth Amendment, and cited Gideon v. Wainwright,[25] applying the right to counsel to the states, and Pointer v. Texas,[26] applying the right to confrontation and cross-examination of witnesses to the states. Furthermore, Article 779 of the Louisiana Code of Criminal Procedure was "unconstitutional on its face."[27] Because Duncan was deprived of trial by jury, petitioner was convicted in violation of due process of law secured by the Fourteenth Amendment.

On February 20, 1967, the Supreme Court of Louisiana denied appellant's application for a writ of certiorari. The Memorandum Decision stated in full: "No error of law in the ruling complained of."[28] On May 12, 1967, Duncan sent a notice of appeal to the United States Supreme Court, alleging that the Sixth and Fourteenth Amendments secured

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[25] 372 U.S. 353 (1963).

[26] 380 U.S. 400 (1965).

[27] "Appendix", 13.

[28] 250 La. 253 (1967).

the right to a trial by jury in a state criminal prosecution for "simple battery," where a two year prison term could be imposed.[29] The docket time was set in the United States Supreme Court on July 24, 1967,[30] and the Supreme Court ruled on the case in May, 1968.

In a jurisdictional statement to the Supreme Court appellant pressed two arguments. First, the Supreme Court's earlier refusal to apply the Sixth Amendment jury trial guarantee to the states was based on an interpretation of the Fourteenth Amendment that had long been abandoned. The argument contended that the first case of Maxwell v. Dow,[31] although deciding that a jury of twelve was not required in state courts, was issued at a time when the Court believed none of the protections of the Bill of Rights applied to the states.[32] Since that time almost all of the guarantees of the Sixth Amendment had been applied to the states.[33] Furthermore, the language in recent cases suggested that all the rest of the Sixth Amendment was applicable to the states.[34] The second argument held that the right to trial by jury in criminal cases

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[29] "Appendix", 16.

[30] Ibid., 17.

[31] 176 U.S. 581 (1900).

[32] Duncan v. Louisiana, "Jurisdictional Statement", 6-8.

[33] Ibid., 7.

[34] Ibid.

was basic to an Anglo-American concept of due process of law.[35] The jurisdictional statement briefly traced the history of jury trial to illustrate the fundamental nature of the procedure. The statement concluded on the argument that trial by jury secured the individual against arbitrary official conduct. Duncan asserted that he acted peacefully to protect the Negro boys from violent interference with their rights and that the prosecution against him was part of the general official effort to discourage the exercise of rights under the federal court order to desegregate schools in Plaquemines Parish.[36]

The arguments in this first jurisdictional statement for Duncan remain basically the same with a few minor changes, in the "Brief for Appellant" presented to the Supreme Court. One argument was extended beyond the jurisdictional statement: The "Brief for Appellant" argued that due process of law required trial by jury in criminal cases.[37] The Appellant discussed this contention at length. The "Brief" stated that a jury not only secured the individual against arbitrary official conduct, but also served to ameliorate harsh or technical application of law.[38] The determination of guilt or innocence by a trier other than

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[35] Ibid., 9-16.

[36] Ibid., 16.

[37] Duncan v. Louisiana, "Brief for Appellant", 21-32.

[38] Ibid., 24.

the judge was often a necessary condition of a fair and rationally conducted trial.[39] Under this argument, the Appellant contended that the denial of trial by jury lessened the state's burden of proof. The implication was that had Duncan had a jury, the evidence presented, as conflicting as it was, would not have been enough to convict him. The argument stated that the determination of guilt or innocence by a body other than the trial judge was a necessary adjunct of the constitutional exclusionary rule. Due process of law prohibits the introduction of evidence that is obtained in violation of the rights of the accused under the Fourth, Fifth or Sixth Amendments. These exclusionary rules apply without regard to the reliability of the evidence in question. A judge could be swayed by valid, but inadmissible, evidence concerning the accused. In other words, because the judge in Duncan's trial determined both the exclusion or inclusion of evidence and the guilt or innocence of the accused, the former could have fatally affected the latter. The argument ended with the claim that to allow the judge to decide both questions of law and questions of fact would result in hopeless mingling of the two.[40] It should be noted that this extensive treatment of the nature of a jury over the judge comprised a very small portion of the argument by the Supreme Court in its final decision in the Duncan case.[41]

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[39] Ibid., 26.

[40] Ibid., 32.

[41] See Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

The "Brief for Appellee" based the majority of its argument on the traditional objections to finding jury trial in the due process clause. However, the "Brief" placed special emphasis on the argument that even if the Sixth Amendment jury trial provision were applied to the states, Duncan's sixty day sentence would not qualify him for a jury trial.[42] The Appellee's argument rested on the historical exclusion of petty offenses from the jury trial requirement. Petty offenses were defined as those whose imposed penalty did not exceed six months imprisonment.[43] The Appellee took issue with Appellant's argument that Duncan would have constitutionally received a jury trial had he been in a federal court. The Appellee contended that since the Fourteenth Amendment did not incorporate the Bill of Rights, that is, make all of its provisions directly applicable to the states, a right secured by the Bill of Rights was binding on the states only if it was indispensable to liberty and justice.[44] This issue of the Fourteenth Amendment and the Bill of Rights becomes one of the important issues dealt with by the Court in the Duncan decision. The "Brief" went on to argue that historically trial by jury was not recognized at common law either by the framers of the Constitution or by Louisiana as an essential

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[42] Duncan v. Louisiana, "Brief for Appellee", 7-36.

[43] Cheff v. Schakenberg, 384 U.S. 373 (1966) cited in ibid., 7.

[44] Ibid., 36.

element of a fair trial.[45] The Appellee emphasized that if the Court made a direct application of the Sixth Amendment jury trial right, then the states would be required to grant juries composed of twelve men, no less, and to allow only verdicts which were unanimous. This argument rested on the fact that the federal courts were required to have only twelve-man juries and unanimous verdicts. The argument closed with the thesis that even though jury trial may have merit, it was not indispensable to a fair trial.[46]

Justice White, who delivered the opinion for the Court, held that the Fourteenth Amendment guaranteed a right of jury trial in all criminal cases which—"were they to be tried in a federal court"—would come within the jury trial guarantee of the Sixth Amendment.[47] The decision pointed out that the Fourteenth Amendment had recently applied many of the provisions of the Bill of Rights to the states through the due process clause. The Court described recent cases as part of a "new approach" to the application of rights to the states because they found the rights fundamental not on the basis of an idealized system, but on the basis of an "Anglo-American scheme of ordered liberty."[48] The Court traced the history of trial by jury from the Magna Carta to the adoption of the Constitution. The decision showed that state constitutions, both

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[45] Ibid., 81-100.

[46] Ibid., 116-126.

[47] Duncan v. Louisiana, 391 U.S. 145, 149.

[48] Ibid., 150 n. 14.

at the time of the adoption of the Constitution and today, guaranteed jury trial in one form or another. Prior cases containing opinion that a jury trial was not fundamental were only dicta; the Duncan decision simply rejected prior dicta.[49] While jury trial protected criminal defendents from oppression by the government, the Court did not emphasize the nature of jury trial as fundamental to fairness. In fact, for the most part, the Court ignored the fairness issue which was dealt with so heavily in the "Brief for Appellant". Two explanations could justify the Supreme Court's approach, an approach which varied with the arguments presented by the "Brief for Appellant." Even though the racial tension and conflicting testimony could have affected the outcome of Duncan's trial, no definite proof of such an affect existed. In the final analysis, there was the testimony of one seemingly impartial witness to prove Duncan guilty. Secondly, the arguments upholding the jury as superior to the judge in fostering fairness could not have been unquestionably validated. Moreover, the Court's application of the Sixth Amendment's jury trial provision directly provided for the protection against the unfairness which may have entered into Duncan's original trial. Under this approach there was no need for an actual discussion of the issue of fairness by the Court. In one sense the Court could reach the same end, i.e. fairness, by using other arguments and avoiding a discussion of the racial tension or conflicting testimony. The Court

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[49] Ibid., 155.

preferred to rest its argument on the historical and contemporary basis for trial by jury, and the great length of the potential prison term which Duncan could have received, as the two grounds for including the Sixth Amendment's jury trial provision in the due process clause of the Fourteenth Amendment. In discussing Duncan's prison term, the Court set the test at the potential penalty, rather than the imposed penalty as it had done in the past, as a basis for granting a jury trial. The Court refused to draw an "exact line" between petty and serious offenses, for the Court did not think it was necessary.[50] The decision remarked that the Duncan case would cause few changes in the states, but added that its prior decisions on the Sixth Amendment were always open to reconsideration.[51]

Justice Black, joined by Justice Douglas, concurred with the majority decision. Black's concurring opinion, however, emphasized that the Fourteenth Amendment was intended to incorporate all the Bill of Rights, according to the framers of the Amendment.[52] However, since a majority of the Court had never accepted this total incorporation theory, Black was willing to accept, reluctantly, the selective incorporation process, whereby some of the guarantees of the Bill of Rights had been found in the Fourteenth Amendment's due process clause, as in the Duncan decision. Black rejected the fundamental fairness doctrine presented in

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[50] Ibid., 161.

[51] Ibid., 150-162.

[52] Ibid., 163-164.

Harlan's dissenting opinion. Harlan contended that only if those rights were fundamental to fairness could they be included in the due process clause of the Fourteenth Amendment, and the fact that a certain guarantee was also in the Bill of Rights was merely "accidental."[53] Black believed the fundamental fairness doctrine gave too much power for the Court arbitrarily to choose which guarantees were included in the due process clause and which were not. The fundamental fairness test did not even accept the selection of some of the guarantees of the Bill of Rights because they were in the Bill of Rights.

It is difficult to distinguish between the fundamental fairness doctrine and the selective incorporation doctrine without examination of Harlan's dissent. This difficulty arises from the fact that if a certain guarantee in the Bill of Rights is included in the due process clause of the Fourteenth Amendment, it is a process of "selective" incorporation of the guarantee, whether it is included on the basis of fundamental fairness or not. However, the context of Harlan's objection in his dissent was not so much the process of including guarantees in the due process clause, but the idea that in recent decisions that inclusion has resulted in all the federal rules accompanying the right being applied to the states as necessary parts of the particular guarantee. Harlan objected to the inclusion of jury trial just because the Court had found

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[53] Ibid., 177.

the procedure to be "old" or used in the federal courts.[54] Harlan did not consider jury trial the only fair means of trying issues of fact.

In a separate concurring opinion, Justice Fortas voiced a similar objection to the implication in the majority decision that the application of the Sixth Amendment jury trial right should require the imposition of federal standards of a unanimous verdict and a jury of twelve on the states.[55] Fortas, however, found jury trial fundamental to due process. Whereas both Harlan and Fortas objected to the Duncan decision and other recent decisions which had imposed federal standards of a right on the states, Justice Black did not believe such applications of the Bill of Rights interferred with the concept of federalism. Black contended that a state had no constitutional right under the "guise of federalism" to abridge or experiment with rights that had been found fundamental in federal courts.[56] On the contrary, Black felt his doctrine was more fair than allowing the judges to determine on a case-by-case basis which rights were "in" and which were "out."

The conflicting nature of testimony at the original trial, the tense, racial atmosphere in Plaquemines Parish, and the fact that Gary

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[54] Ibid., 172.

[55] Ibid., 213.

[56] Ibid., 170.

Duncan was a Negro accused by a white seemed to indicate the necessity of a jury trial to insure fairness.[57] But the reason to grant Duncan's appeal was not the racial overtones of the incidents, but Article 779 of the Louisiana Code of Criminal Procedure and Louisiana Revised Statutes 14:2 making simple battery a misdemeanor punishable by up to two years imprisonment. The Supreme Court specifically stated that where two years imprisonment was the penalty, the crime was clearly out of the petty class. However, Duncan v. Louisiana involved more than the issue of petty offenses and the right to trial by jury. The decision involved the status of trial by jury, the use of the Fourteenth Amendment, and the relationship between the federal government and the states.

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[57]It is doubtful, however, that a jury would have been any more fair under the circumstances. A selection of jurors in such a climate very easily could have resulted in a prejudiced verdict. See Charles Morgan Jr., "Segregated Justice," Southern Justice, ed. Leon Friedman (New York: Random House, 1965), 163.

CHAPTER III

JURY TRIAL: FROM ITS ORIGIN TO THE ADOPTION OF THE FOURTEENTH AMENDMENT

The seeds of a jury trial date back to Roman law, the "inquisitio," a method used to determine the rights of the king. Because of the system of feudalism, law was local and varied, causing many disputes where the lands of two lords touched. Thus, Frankish rulers began to use this Roman inquest to determine rights in a disputed area. They periodically summoned certain individuals from a community and demanded information on fiscal and administrative matters. This institution survived in the provinces conquered by the Normans, who brought it to England. Although there is some disagreement,[1] most historians agree that the English jury did not originate in Anglo-Saxon law or procedure.[2] However, most historians[3] also concede that a jury was not fully developed until the

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[1]Hannis Taylor, The Origin and Growth of the English Constitution (London: Houghton Mifflin and Co., 1899), 204.

[2]Lewis Mayers, The American Legal System (New York: Harper and Brothers, 1955), 165; William S. Holdsworth, A History of English Law (London: Methven and Co., Ltd., 1903), 313.

[3]See H.S. Hanbury, English Courts of Law (2d ed., London: Oxford University Press, 1953), 34.; Holdsworth, A History of English Law, I, 314.; James C. Holt, Magna Carta (Cambridge: University Press, 1965), 10. Goldwin A. Smith, A Constitutional and Legal History of England (New York: Charles Scribner's Sons, 1955), 98. Mayers, American System, 166.

reign of Henry II of England, who began to use the jury specifically to try suspected criminals for the Crown.[4]

During the 11th and 12th centuries the English central government was sufficiently strong for royal justice to supercede local customs. The local use of the royal jury resulted from the activities of the sheriff, the king's representative in the local area. Originally jurors were selected as witnesses who would testify on the knowledge they might have concerning the defendent involved.[5] They were supposed to inform themselves and, under oath, give this information to the court to support the guilt or innocence of the accused. No evidence other than the reports of these "jurors" was admitted in the court, and their testimony served as a method of proving guilt. Proof by jury, however, was one of the newer forms of proof that had evolved in England. Slowly the jury began to overtake the older forms of proof such as trial by battle, compurgation and ordeal, so that after 1166 these older forms were the exception.[6] Gradually witnesses were called from outside the vicinage to assist the jury, consequently lessening the need for jurors to be informed before the trial.[7] Jurors were selected until at least twelve were found who could come to a definite conclusion in favor of the accused or the Crown.[8] Until the 14th century, however, their verdict

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[4]Smith, History of England, 96.

[5]Holdsworth, A History of English Law, 317.

[6]Smith, History of England, 98.

[7]Mayers, American System, 166.

[8]Taylor, Origin and Growth, 331.

did not have to be unanimous.[9] By the 16th century jurors rendered verdicts exclusively upon the basis of evidence presented to them.[10] The jury had gradually become judges of the facts rather than witnesses.

During the development of trial by jury from the 12th to 14th century, another event occurred which enhanced the use of jury trials — the Magna Carta signed in 1215. Historic interpretations of the Magna Carta have hailed the crucial chapter 39 as a legislative declaration of the rule of law and due process, without which, according to the Fifth and Fourteenth Amendments to the United States Constitution, no one can be deprived of "life, liberty or property without due process of law."[11] Ironically, however, the charter was misinterpreted. Chapter 39 read as follows:

> NO freeman shall be taken or imprisoned or disseised of any freehold, or liberties, or free customs, or outlawed, or baniahed, or in any other way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.[12]

The term "due process of law" was not part of the charter, but was used

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[9]Smith, History of England, 101. "To require that twelve men should be unanimous was simply to fix the amount of evidence which the law deemed to be conclusive of a matter in dispute," since these jurors were in fact only witnesses. William Forsyth, History of Trial by Jury (Toronto: R. Carswell, 1876), 198.

[10]Mayers, American System, 116.

[11]Hanbury, English Courts, 50.

[12]William F. Swindler, Magna Carta: Legend and Legacy (Indianapolis: The Bobbs-Merrill Company, Inc., 1965), 316-317.

for the first time in a statute in 1354.[13] The term "due process of law," which meant procedure by original writ or by indicting jury, was construed to exclude procedure before the King's Council or by special commissions, and to limit intrusions into the sphere of action of the common law courts.[14] Also, in 1354 the term "no free man" was misinterpreted to mean "no man of whatever estate or condition he may be."[15] The term "legal judgment of peers" did not refer to trial by jury for commoners, but to the trial of a peer by the body of his peers for treason or felony. The order of "peerage" was the class of nobles and lords that composed the heart of the feudal structure in England.[16] Some scholars doubt that the words judicium parium, trial by one's peers, could ever have been applied to the verdict of a jury.[17] The jurors were merely witnesses to facts and their sworn testimony could not have been called a judicium; judicium referred to the decision of a judge.[18] "Law of the land" meant the procedures accepted as the law in England at that time. In other words, free men were guaranteed a trial

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[13]28 Edward III, Cap. 3 Statutes of Realm I, 345 as cited in Holt, Magna Carta, 9.

[14]Ibid.; see also, Samuel W. McCart, Trial by Jury (New York: Chilton Books, 1964), 5-7; Swindler, Magna Carta, 316-321.

[15]28 Edward III, Cap. 3 Statutes of Realm I, 345 as cited in Holt, Magna Carta, 9.

[16]Hanbury, English Courts, 50-51.

[17]Forsyth, Trial by Jury, 92.

[18]Ibid.

by peers or other accepted modes of procedure.[19]

These interpretations actually reversed the original intention of the charter. In the first place, a trial by jury as we know it today was not in existence in 1215; trial by jury at that time was imposed from above, not sought as a protection by the accused. The overall objective of the Magna Carta was to require the king to observe what the nobles regarded as his feudal obligations.[20] Nevertheless, it was left to the common Englishman to change the meanings of these terms to suit his needs. The term "due process" was, thus, equated to "law of the land" to give the commoners the rights originally intended for the nobles. As these terms were extended, however, no set definition was ever made. In these extensions the term "due process" was kept in accord with new social and political conditions.[21] The importance of this was that as the conditions in England changed, jury trial was not always considered a necessary part of due process and the use of juries was not uniform at all times and in all places. The charter itself supports the idea that a "legal judgment of peers" was only one of the procedures guaranteed the freeman. The charter states "or by the law of the land." Some sources quote the charter as connecting the two terms with and, making "law of the land" synonymous to "lawful

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[19]Robert von Moschziaker, Trial by Jury. (Philadelphia: Geo. T. Bisel Co., 1922), 265.

[20]Milton Viorst, The Great Documents of Western Civilization (New York: Bantam Books, Inc., 1965), 108.

[21]Holt, Magna Carta, 12.

judgment of peers."[22] However, most historians agree that the correct translation was or.[23] Thus, even though Englishmen in later years extended the rights of the charter to include other classes outside the nobility, the term "due process" intentionally had no precise definition and, secondly, the term contained more than one form of procedure as due process of law.[24]

Thus, when the Supreme Court refers to the Magna Carta in Duncan v. Louisiana, jury trial is noted in existence in England for several centuries and to have "carried impressive credentials traced by many to Magna Carta."[25] The Court admits that "historians no longer accept this pedigree."[26] Blackstone is of the older opinion that the Magna Carta intended a trial by jury for all Englishmen. On the other hand, as the Court has pointed out, historians hold that the original charter did not include such a right and, more important, the term "due process" had to be re-defined on the basis of conditions in England after the charter, since the Charter only referred to a feudal privilege.[27]

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[22]Rodney L. Mott, Due Process of Law (Indianapolis: Bobbs-Merrill Co., 1926), 370-371.

[23]David Fellman, The Defendant's Rights (New York: Rinehart and Co., Inc., 1958), 64; Swindler, Magna Carta, 316-317; Ralph Arnold, A Social History of England (New York: Barnes and Noble, Inc., 1967), 340.

[24]Mott, Due Process, 140.

[25]4 W. Blackstone, Commentaries on the Laws of England 349, Cooley ed. 1899, as quoted in 391 U.S. 145, 151 n. 16.

[26]391 U.S. 145, 151 n. 16.

[27]Mott, Due Process, 123.

The Great Charter did not guarantee 'trial by jury' to anyone."[28] The weight of this evidence, however, is not meant to discredit a trial by jury or the later belief by the colonists that this was one of the procedures of high value. The purpose is to illustrate that "law of the land" (i.e. due process) included various forms of procedure in English law, as this was the original intention of the framers of the Magna Carta itself. Jury trial was one of those procedures.

Naturally, as the English colonies were established in America, much of English custom was transplanted. The English law was originally intended to follow the colonists to the New World. The first Virginia charter provided that inhabitants of the colony "shall HAVE and enjoy all Liberties . . . as if they had been abiding and born . . . within this our Realm of England."[29] This first Virginia charter also provided for jury trials with 12 jurors in all felony cases.[30] The colonists, however, did not adopt the English law wholesale. The colonists were not learned in the law, and were definitely not sympathetic to it. The English law they had known was most often unjust and often cruel.[31] As

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[28]Hannis Taylor, Due Process of Law and the Equal Protection of the Laws (Chicago: Callagan and Co., 1917), 6.

[29]Francis N. Thorpe (ed.), The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America (Washington: Government Printing Office, 1909), V, 3783, 3788. Hereafter referred to as State Constitution.

[30]Hugh F. Rankin, Criminal Trial Proceedings in the General Court of Colonial Virginia (Charlottesville: University Press of Virginia, 1965), 2.

[31]Francis H. Heller, The Sixth Amendment, A Study in Constitutional Development (Lawrence: University of Kansas Press, 1951), 13.

a result, there was "a period of rude untechnical popular rule,"[32] and a marked hostility toward the legal profession. The colonists experimented, adopted and adapted the English law to suit their particular situation.[33] In addition to this adaption and selection of certain aspects of English law, the colonies themselves developed peculiar systems within their area, often consciously departing from many of the essential principles of English common law.[34] Because the colonies were remote from one another and different in character and purpose, pronounced differences existed in the application of jury trial to various types of cases by the end of the colonial period.[35] For example, in colonial Massachusetts the status of jury trial was questioned and for one year was the subject of a special study, and "it appears that juries were for a time abolished."[36] In New York, the Carolinas, Virginia and Connecticut, the use of juries in trials became so informal that they often resembled simple arbitrations.[37] Even though the original charter

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[32]Paul S. Reinsch, "English Common Law in the Early American Colonies," Select Essays in Anglo-American Legal History, Number 11 (Boston: Little, Brown and Co., 1907), 367-70.

[33]Van Ness v. Packard, 2 Pet. 137, 143 (1829); McCart, Trial by Jury, 13.

[34]Reinsch, "English Common Law," 415.

[35]Charles W. Joiner, Civil Justice and the Jury (New Jersey: Prentice-Hall, Inc., 1962), 173.

[36]Reinsch, "English Common Law," 378.

[37]Heller, Sixth Amendment, 16.

of Virginia called for juries of 12, by 1630 trials were held with juries from 13 to 14 members.[38]

Early in the eighteenth century the colonists adopted the institution of public prosecutor from the European continent. A greater need soon developed to protect the individual from this trained professional. Added to this development were the lack of lawyers and great distances between cities, all tending to increase the support for the jury as a protection for the individual. As a later result, the Northwest Ordinance of 1787 provided in Article II that "The inhabitants of said territory shall always be entitled to the benefits of the writ of habeas corpus and trial by jury."[39]

As jury trial varied in scope and application, so did the meaning of due process vary. Thus, the colonists looked upon the term "due process" as one with a wide, varied, and indefinite content:

> At no time was there any serious attempt to define it . . . . It seems certain that . . . a jury trial where one was appropriate was considered as the minimum of due process in criminal cases. (Emphasis added)[40]

The term "due process" had such an unsettled meaning that it would not be defined so as to "limit its application to the single protection

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[38]William Hening (comp.), The Statutes at Large . . . of Virginia (Richmond: Samuel Pleasants, 1809) I, 67-69, as cited in ibid., 19.

[39]Thorpe, State Constitutions, I, 957.

[40]Mott, Due Process, 123.

involved in a jury trial . . . . Due process of law had a wider connotation than a single form of trial."[41] Depending on the degree of fairness in each state so varied the extent of protection afforded the accused. Jury trials were not afforded on a uniform basis throughout the colonies, except that "petty offenses" were exempt from the privilege of a jury.[42] Frankfurter and Corcoran's study, however, reveals that the exclusion of petty offenses was far from definite. The study makes three basic conclusions about trials without a jury or summary trials.[43] First, there was a definite withdrawal from specifying jury trials for certain offenses. Second, there was no unifying consideration as to the type of criminal offense subjected to summary trial, nor any uniformity in the number of magistrates before whom the various offenses were tried. Third, there was no uniformity governing appeals to courts with juries. Offenses that could be tried by a magistrate without a jury differed from colony to colony in kind and amount of penalty which could be imposed: "The number of offenses . . . which did not have to be tried by a jury varied in the colonies from 60 to 180."[44] Although most of the crimes considered "petty" at the common law were minor, some violations

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[41] Ibid., 140.

[42] Felix Frankfurter and Thomas G. Corcoran, "Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury," Harvard Law Review, XXXIX (1926), 922-925; Hanbury, English Courts, 123; Joiner, Civil Justice, 178-179.

[43] Summary proceeding: "Any proceeding by which a controversy is settled, case disposed of, or trial conducted, in a prompt and simple manner, without the aid of a jury, without presentment or indictment, or in other respects out of the regular course of the common law." Henry Campbell Black, Black's Law Dictionary, (4th ed. St. Paul, Minnesota: West Publishing Company, 1957), 1369.

[44] "Note," Georgia Law Journal, XVIII (1930), 374,376.

bordered closely on serious offenses,[45] and some offenses triable without a jury had punishments up to one year in prison.[46]

After the colonies became independent states, trial by jury was embodied in their several constitutions. Under the Articles of Confederation, the states were free from central control and, therefore, their varied colonial practices relative to jury trial continued. To prevent local customs from being offended, only the most general statement with regard to jury trial could be included in the Constitution framed in Philadelphia.[47] Actually there was little debate on including a general provision protecting jury trial in criminal cases in the Constitution. The three major plans presented to the Convention included references to jury trial in criminal procedure.[48] The Committee on Detail embodied these proposals into Article XI, Section 4, of the first draft and reported it on Monday, August 6, 1787:

> The Trial of all Criminal offenses (except in cases of impeachments) shall be in the State where they shall be committed; and shall be by Jury.[49]

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[45]Frankfurter and Corcoran, "Petty Offenses," Harvard Law Review, XXXIX, 927.

[46]Ibid., 932-33.

[47]Max Farrand, The Records of the Federal Convention 1787 (New Haven: Yale University Press, 1937), III, 616, 626, 600; II, 571, 601; Caleb P. Patterson, "Jury System," Southwest Political and Social Science Quarterly, IV, 221, as cited in Jury System, ed. Julia Johnson (Vol. V, No. 6, The Reference Shelf, New York: H.W. Wilson Co., 1928).

[48]Farrand, Records, III, 616, 626, 600.

[49]James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America, ed. Gaillard Hunt and James Brown Scott (New York: Oxford University Press, 1920), 344.

On Tuesday, August 28 this section was amended as follows:

> The trial of all crimes (except in cases of impeachment) shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, then the trial shall be at such a place or places as the Legislature may direct.[50]

There was no real debate on this amendment — its purpose was to provide for trial by jury offenses committed out of any state. Those delegates who were dissatisfied with the section objected to the absence of a provision for civil jury trials.[51] Roger Sherman felt the state declarations were sufficient on this point,[52] but moved that a Bill of Rights be drawn up. The motion was defeated. Section 4, as amended, was sent to the Committee on Style, which incorporated it into the Article III, Section 2, Clause 3 of the Constitution.[53] Elbridge Gerry was still not satisfied and moved to annex to the end, "And a trial by jury shall be preserved as usual in civil cases." Nathaniel Gorham

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[50] Ibid., 477. This change from "criminal offenses" to "crimes" was later explained by the Supreme Court:

> If the language had remained 'criminal offenses,' it might have been contended that it meant all offenses of a criminal nature, petty as well as serious, but when the change was made from 'criminal offenses' to 'crimes,' and made in the light of popular understanding of the meaning of the word 'crimes,' . . . it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses. Schick v. U.S., 195 U.S. 65, 70 (1904).

[51] Ibid., 556-557.

[52] Ibid.

[53] Ibid., 572.

replied that the constitutional provisions on jury trial were so different in different states that such a clause was difficult.[54] Thus, the debate on the jury provision in Article III was ended at the Convention.

Article III, Section 2, Clause 3 guaranteed an individual trial by jury in federal courts only and was not applicable to the states. The debate which occured on Article III was caused by the differences of opinion among the delegates as to how a jury trial provision should be stated. Each state had certain ideas on the protection of trial by jury. As the delegates returned to their respective states they were met with much more debate than they had had at the Convention. The states wanted more specific requirements on jury trial, especially a vicinage requirement. The delegates from the Convention were faced with the task of explaining the general nature of Article III to the state conventions. James Madison explained the provision as he spoke before the Virginia Convention in June, 1788:

> The trial by jury is held as sacred in England as in America. There are deviations of it in England: yet greater deviations have happened here since we established our independence, than have taken place there for a long time, though it be left to the legislative discretion. It is a misfortune in any case that this trial should be departed from, yet in some cases it is necessary. It must be, therefore, left to the discretion of the legislature to modify it according to circumstances.[55]

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[54] Ibid.

[55] James Madison in the Virginia Convention, June 20, 1788 from Robertson, Debates of the Convention of Virginia, 1788 (2 ed. 1805), 377-382 as quoted in Farrand, Records, III, 332.

Richard D. Spaight met similar questions at the North Carolina Convention in July, 1788:

> It was impossible to make any one uniform regulation for all the states, or that would include all cases where it would be necessary. It was impossible, by one expression, to embrace the whole. It was therefore left to the legislature to say in what cases it should be used . . . . [56]

James Wilson answered similar questions for a meeting of citizens in Philadelphia when he said "The cases open to a jury differed in the different states; it was therefore impracticable on that ground, to have made a general rule."[57] James McHenry expressed the reluctance to limit the trial by jury and was persuaded that "Congress might hereafter make provision more suitable to each respective State . . . . "[58] Maclaine in the North Carolina Convention explained that the Article III jury trial provision was debated but not changed because it was felt that "the rule could not have been drawn more narrowly without changing the rule of some states."[59] The delegates could not agree on what form a more specific jury trial provision should take.

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[56]Richard D. Spaight in the North Carolina Convention, July 28, 1788 from Jonathan Elliot, ed., The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Philadelphia: J. B. Lippincott Company, 1836), IV, 119-120.

[57]James Wilson, "Address to a Meeting of the Citizens of Philadelphia," October 6, 1787, from P. L. Ford, Pamphlets on the Constitution, 157-159 as quoted in Farrand, Records, IV, 101.

[58]James McHenry Before the Maryland House of Delegates, November 29, 1787 as quoted in Farrand, Records, III, 150.

[59]Maclaine in North Carolina Convention, from Elliot, State Conventions, IV, 175.

The states were still not satisfied with the jury trial provision of Article III and preferred the addition of amendments protecting the rights of the individual against federal encroachment. At the time of the ratifying conventions, many of the states concerned with this matter began to urge amendments to the document to facilitate its passage. Among other rights demanded, seven states asked for jury trial in civil cases, five for jury trial of the vicinage, and four for a speedy and public trial to be added in the form of amendments.[60] James Madison accepted and formulated these demands into several propositions, three referring to criminal rights. The strongest proposal provided that ". . . No State shall violate . . . trial by jury in criminal cases."[61] This proposal was eliminated by the Senate but there is no record of the debate.[62] As the Supreme Court in Duncan points out: "This is relatively clear indication that the framers of the Sixth Amendment did not intend

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[60]Edward Dumbauld, The Bill of Rights and What It Means Today (Norman: University of Oklahoma, 1957), 33.

[61]Francis N. Thorpe, The Constitutional History of the United States (Chicago: Callaghan and Co., 1901), II, 245. This Article 14 was to be inserted into the body of the Constitution in Article I, Section 10 which imposed restrictions on the states. Not until some time later did Madison yield to the insistence that the amendments be appended to the Constitution.

[62]Senator Maclay of Pennsylvania, principal source of Senate debate, was absent the week of September 2 and, therefore, the debate on jury trial provision is not known. Heller, Sixth Amendment, 31.

its jury trial requirement to bind the States."[63] The House accepted most of the Senate's amendments, but the Conference Committee added an "impartial jury of the State and district wherein the crime shall have been committed . . . ." A letter from Madison to Edmund Pendleton identified the jury trial provision as the principle stumbling block. "The truth is that in most of the States the practice is different, and hence the irreconciliable difference of ideas on the subject."[64] In framing the Sixth Amendment the delegates had to provide maximum protection against the federal government and frame a jury trial provision which would be agreeable to all the varying practices in the states. The Sixth Amendment was thus proposed to, and ratified by, the states, minus Madison's prohibition against the states, and with the Conference Committee's addition concerning the nature and selection of the jury:

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

Obviously the states were concerned with protecting their own special laws and practices on jury trials, but, also, with protecting the

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[63] 391 U.S. 145, 153 (1968).

[64] James Madison, Writings, V, 424, ed. Gaillard Hunt (New York: Putnam's and Sons 1900-1910) as quoted in Heller, Sixth Amendment, 33.

individual against arbitrary action from the federal government. Ratification of the Constitution as amended indicated the general acceptance of the principles therein. But what bearing did the new provisions have on the States? Article III, Section 2, Clause 3 and the Sixth Amendment were guarantees for the individual against the federal government and did not restrict the states.[65] Although the "supreme law of the land" clause in the Constitution prohibited conflict of state laws with the Constitution, this was only a general negative restriction. Article III and the Sixth Amendment were specific positive restrictions against the federal government. For the period before the adoption of the Fourteenth Amendment, no case arose involving a conflict of state jury trial laws with the Constitution. Thus, according to the courts, the states had complied with the Constitution.

Although all the states did not have bills of rights,[66] the constitutions of all states had provisions protecting jury trial or the "law of the land," and sometimes both. The term "law of the land," when first used in the Magna Carta, probably meant the established law

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[65]McCart, Trial by Jury, 12; William O. Douglas, We the Judges. (New York: Doubleday and Co., Inc., 1956), 390; William Anderson The Nation and the States, Rivals or Partners? (Minneapolis: University of Minnesota Press, 1955), 88; Dumbauld, Bill of Rights, 132; William J. Brennan, Jr., "The Bill of Rights and the States," in The Great Rights, ed. Edmond Cahn (New York: The Macmillan Co., 1963), 79-80; Morris I. Bloomstein, Verdict: The Jury System (New York: Dodd, Mead and Co., 1968), 26-27; Moschzisker, Trial by Jury, 267; Francis X. Busch, Law and Tactics in Jury Trials (Indianapolis: Bobbs-Merrill Co., Inc., 1949), 22-23.

[66]Dumbauld, Bill of Rights, 41.

of the kingdom, in opposition to the civil or Roman law. By 1789 it was generally regarded as meaning general public laws binding on all members of the community. It meant due process of law warranted by the state constitution, by the common law adopted by the constitution, or by statutes passed in pursuance of the constitution.[67] These state provisions provided that liberty or property would not be interferred with except by the "laws of the state"—Connecticut—, or by the "law of the land"—Maryland and North Carolina—, or the "law of the land or the judgment of his peers"—Pennsylvania, Virginia, Vermont, South Carolina, Massachusetts, and New Hampshire.[68] Twenty-three of thirty-six state constitutions written prior to the Fourteenth Amendment provided separate protections for jury trial as "inviolate."[69] Other states provided for protection of impartial juries—Louisiana, Oregon, Texas—or a "jury of the vicinage"—Maine—or that trial by jury shall remain as "heretofore"—Delaware.[70] Of these first constitutions only Nebraska made any limitations on jury trial to allow the legislature to decrease juries

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[67]Black, Dictionary, 1032.

[68]Thorpe, State Constitutions, 569, 1687, 1821, 2455, 3277; Taylor, Due Process, 13-14.

[69]Thorpe, State Constitutions, 98, 269, 391, 538, 665, 785, 981, 1124, 1180, 1274, 1931, 1992, 2034, 2163, 2349, 2402, 2653, 2910, 3224, 3427, 4077.

[70]Ibid., 1442, 2999, 3548, 1647, 569.

to less than 12 in inferior courts.[71] The term "law of the land," or "due process," referred to the procedure in criminal cases, that is, the legislator had to use those methods of procedure which were known to be the "law of the land."[72] Due process of law had no significant substantive meaning until after 1850.[73]

The Supreme Court did not restrict the states in matters involving jury trial and due process before the Fourteenth Amendment. Although this was a period of nationalism in American history, it was also a period of sectionalism and states' rights when the Supreme Court had not exercised its full power in restricting state action in the area of civil liberties. The states could administer civil liberties as they wanted. Left to their own devices, the states' administration of criminal processes was subject to the discrimination which was taking place in most of the states against the Negro slave—he was denied the right to trial by jury as he was all other civil rights.[74] Article 107 of the Constitution of Louisiana of 1845, which guaranteed a speedy public trial

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[71] Ibid., 2349.

[72] Edward S. Corwin, "The Doctrine of Due Process of Law Before the Civil War," Harvard Law Review, XXIV (1911), 366, 373.

[73] See Wynehamer v. New York, 13 N.Y. 378 (1856); Dred Scott v. Sandford, 19 How. 393 (1857); Hepburn v. Griswold, 8 Wall. 603 (1870).

[74] United States v. Scott, Fed. Cas. No. 16, 240 b (1851); State v. Moss, 47 N.S. 66 (1854); Dowell v. Boyd, 11 Miss 592 (1844).

by an impartial jury of the vicinage, was deemed not applicable to slaves.[75] Fugitive slaves were returned to service without provision for trial by jury.[76] Earlier cases showed more freedom in granting rights to the Negro, but the later cases cited above illustrate the increasing pressure the white men felt from slave revolts and the abolitionist movement. For example, earlier a Louisiana case declared that slaves charged with capital crimes were entitled to an impartial jury,[77] and in Kentucky, a statute by which persons of color were compelled to leave the state without trial by jury was declared unconstitutional.[78] Nevertheless, as the Civil War drew closer, the discrimination against the Negro grew increasingly more obvious, especially as the abolitionists began to capitalize on the state of the Negro slave. These inequalities eventually resulted in the framing of the Fourteenth Amendment to protect the freed slave from arbitrary state action.

State cases confirmed the belief that Article 3, Section 2, Clause 3, and the Sixth Amendment applied to the federal government only,[79] and

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[75] State v. Dick, 4 La. Ann. 182 (1849).

[76] In re Sims, 61 Mass. 285 (1851).

[77] State v. George, 8 Rob. 535 (1844).

[78] Doram v. Commonwealth, 31 Ky. 331 (1833).

[79] Territory v. Hattick, 2 Mart. 88 (1811); Jackson v. Wood, 2 Cow. 819 (1824); Murphy v. People 2 Cow. 815 (1824).

that states could restrict the use of trial by jury.[80] State use of jury trial was decided on the basis of common law. State cases unanimously agreed that the constitutional requirements of jury trial, that the right "shall remain inviolate," did not confer the right where it did not exist before the adoption of the state constitution.[81] A case in New York held that the Constitution of 1846 did not limit or restrict the authority of the legislature to legislate in respect to the right of trial by jury, except only that the particular right was guaranteed.[82] Indiana allowed the legislature to prescribe trial by jury in cases where the state constitution did not guarantee a jury.[83] The application of jury trial was based on the accepted common law on jury trial at the adoption of the constitution. Several general principles may be drawn from state decisions on the common law of jury trials. The federal courts followed the same basic principles of common law on the jury as did the state. The Supreme Court has decided on several occasions that the right to trial by jury guaranteed in the federal courts by the Constitution

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[80] Maurin v. Martinez, 5 Mart. 432 (1818).

[81] Tims v. State, 26 Ala. 165 (1855); Ross v. Irving, 14 Ill. 171 (1852); Isom v. Mississippi Cent. R. Co., 36 Miss. 300 (1858).

[82] Walker v. People, 32 N.Y. 147 (1865).

[83] Lake Erie, W. & St. L. R. Co. v. Health, 9 Ind. 558 (1857).

referred to a jury as it was known in common law at the adoption of the Constitution, that is a jury of twelve,[84] issuing a unanimous verdict,[85] and excluding the right of trial by jury in petty offenses.[86] These requirements unquestionably were the common law on jury trials. First, there were certain types of courts which did not generally give jury trials, and these courts were to continue trying criminals without juries.[87] New offenses created by statute since the adoption of the Constitution were left to the legislature to determine the granting of the jury trial right.[88] Offenses which existed at the time of adoption of each constitution were granted jury trials on the basis of their status at the time.[89] As previously discussed, "petty" offenses were not

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[84] Thompson v. Utah, 170 U.S. 343 (1898); Patton v. U.S., 281 U.S. 276 (1930).

[85] Thompson v. Utah, 170 U.S. 343; Patton v. U.S., 281 U.S. 276; Singer v. U.S., 380 U.S. 24 (1965); Andres v. U.S., 333 U.S. 740 (1948).

[86] Callan v. Wilson, 127 U.S. 540 (1888); Schick v. U.S., 195 U.S. 65 (1904); District of Columbia v. Colts, 282 U.S. 63 (1930); District of Columbia v. Clawans, 300 U.S. 617 (1937); Cheff v. Schnackenberg, 384 U.S. 373 (1966). This common law accepted and applied in the federal courts should not be confused with the issue of diversity cases at common law. For this problem see Swift v. Tyson, 16 Pet. 1 (1842) and Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[87] Thompson v. Floyd, 47 N. C. 313 (1855); Commissioners v. Seabrook, 2 Strob. 563 (1848).

[88] Tims v. State, 26 Ala. 165 (1855).

[89] Caldwell v. Commonwealth, 2 Ky. 129 (1802); Carson v. Commonwealth, 8 Ky 290 (1818); State v. Paul, 5 R.I. 185 (1858).

granted jury trials.[90] Some cases designated only capital or infamous crimes as deserving of jury trial.[91] Juries at common law always consisted of 12 men,[92] no more,[93] no less.[94] The verdict of the jury had to be unanimous.[95] Except with regard to the Negro, the state courts evidently supported the jury trial provisions of the state constitutions and the basic common law requirements of a jury.

The states continued to administer trial by jury as they saw fit without federal interference. The landmark case before the adoption of the Amendment to deny federal authority over the states in civil liberties, specifically the application of the Bill of Rights to the states, was Barron v. Baltimore.[96] The Barron case was the first case to present the question of the application of a provision of the Bill of Rights to a state. The City of Baltimore made street improvements which

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[90] See notes 42-46 supra.

[91] People v. Fisher, 11 How. Prac. 554 (1855); Murphy v. People, 2 Cow. 815 (1824).

[92] Brown v. State, 8 Blackf. 561 (1847); Clark v. City of Utica, 18 Barb 451 (1854); Lamb v. Lane, 4 Ohio St. 167 (1854); May v. Milwaukee & M.R. Co., 3 Wis. 219 (1854).

[93] Whitehurst v. Davis, 3 N.C. 113 (1800).

[94] Denman v. Baldwin, 3 N.J. Law 945 (1812).

[95] State v. Moss, 47 N.C. 66 (1854).

[96] 7 Peters 243 (1833).

destroyed the commercial use of a wharf. Barron alleged that this action upon the part of the city was a violation of the clause in the Fifth Amendment that forbade taking private property for public use without just compensation. His contention was that this Amendment, being a guarantee of individual liberty, ought to restrain the states as well as the national government. Chief Justice Marshall decided that the Bill of Rights did not operate against state power, only federal power. Marshall continued,

> The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.[97]

Some claim the specific intention of the framers of the Fourteenth Amendment was to reverse the constitutional rule that the Barron case had announced.[98] In theory the Fourteenth Amendment destroyed this freedom of the states to administer justice without review from the federal government.

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[97] 7 Peters 243, 247.

[98] Justice Black, in dissent in Adamson v. California 332 U.S. 46, 68 (1947).

CHAPTER IV

ADOPTION OF THE FOURTEENTH AMENDMENT

After the Barron decision the states had the Supreme Court's sanction for a thesis they had long held, that the Bill of Rights did not apply to the states. But this lack of constitutional authority was short-lived as the Fourteenth Amendment was soon added to the Constitution. By this Amendment the states were forbidden to abridge the "privileges and immunities" of citizens, deprive a person of "life, liberty, or property, without due process of law," or deny any person the "equal protection of the laws." The important unanswered question was how would the Supreme Court interpret these phrases and the intention of the framers of the Amendment? In theory the Fourteenth Amendment contained a new authority for the federal government to control the states although the mere addition of authority might not immediately effect any change.

One of the theories in answer to this question comes from Justice Black who concurred in Duncan v. Louisiana. Black's contention was that one of the chief purposes of the first section (the three phrases quoted above) of the Amendment was specifically intended "to make the Bill of Rights . . . applicable to the States."[1] This total incorporation theory

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[1] Adamson v. California, 332 U.S. 46, 71 (1947).

would, thus, make the Sixth Amendment, along with the other seven, binding upon the states after 1868. In this way, Black believed, the framers of the Fourteenth Amendment intended to reverse the constitutional rule of Barron v. Baltimore. In Duncan v. Louisiana Black referred to his study of the adoption of the Fourteenth Amendment, which he had expressed in full in the earlier case of Adamson v. California. Black's view of total incorporation is far from accepted, and has never been approved by a majority of the Supreme Court. Therefore, to discover the intention of the first section of the Fourteenth Amendment, one must look to the process of adoption in 1866. The only three sources to have discussed the adoption of the first section fully are Justice Black, Charles Fairman and William Crosskey. The debate between Fairman and Crosskey is far more comprehensive than any of the United States Supreme Court cases on this point and must be examined.

The genesis of the Fourteenth Amendment began with the Civil Rights Bill of 1866 which was an attempt by the Radicals to extend federal guarantees over Negro civil rights. Many conservatives pointed out that placing private rights under federal jurisdiction might be considered a violation of the rights of the states because the control of private rights had always been reserved to the states, and the express or implied powers of Congress obviously did not include such a power. Senator Trumbull and other Radicals defended the guarantee of the Civil Rights Bill as constitutional under the Thirteenth Amendment. Although some Congressmen still objected and President Johnson vetoed the bill, Congress passed the bill into law over his veto. Meanwhile the Joint Committee on

Reconstruction was studying the entire problem of Reconstruction and, after some opposition from the Senate, reported on April 30, 1866, what was to become the Fourteenth Amendment.[2]

It is at this point that the studies of Black, Fairman, and Crosskey begin. All three studies revolve around the two major exponents of the proposed amendment, Representative John A. Bingham of Ohio and Senator Jacob Howard of Michigan. All three sources agree that Bingham was the author of the crucial first section of the amendment. Here, however, the works begin to diverge. Justice Black explained that Bingham upheld the amendment as a grant of power to Congress to

> punish officials of States for violation of . . . the oaths enjoined upon them by their Constitution . . . . What more could have been added to that instrument to secure the enforcement of these provisions of the bill of rights in every State, other than the additional grant of power which we ask this day?[3]

Black further described the intention of Bingham and other congressmen to support the Amendment to make the Bill of Rights applicable to the states. In other words, Black contended that Bingham wanted the Amendment passed to make the Bill of Rights applicable to the states, for without such an amendment the Civil Rights Bill had no constitutional basis. Senator Howard introduced the Amendment into the Senate and explained the first section as a general prohibition upon all the states to prevent

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[2]Alfred H. Kelly and Winfred A. Harbison, The American Constitution, Its Origins and Development (New York: W.W. Norton & Company, 1963), 458-461.

[3]Cong. Globe, 39th Cong., 1st Sess. (1865) 1089, as quoted by Justice Black in Adamson v. California, 332 U.S. 46, 96-97.

abridgment of the privileges and immunities of the citizens of the United States.

> To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right of an accused person . . . to be tried by an impartial jury of the vicinage.[4]

Justice Black held that newspapers of the day reported the Amendment embodied the Civil Rights Bill and gave Congress the power to define and secure the privileges of citizens of the United States. In 1871 Bingham further expressed his belief that "these eight articles . . . never were limitations upon the power of the States, until made so by the fourteenth amendment."[5] Black ended his study by citing several Supreme Court cases which to him indicated a belief that the Fourteenth Amendment was an application of the Bill of Rights to the States.[6]

In reply to Black's theory in Adamson, Charles Fairman, of Stanford University, wrote an article containing his views of the actions of the 39th Congress.[7] Fairman admitted that Representative Bingham

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[4]Cong. Globe, 39th Cong., 1st Sess. (1865), 2765 as quoted in Adamson v. California, 332 U.S. 46, 105-106.

[5]Cong. Globe, 42nd Cong., 1st Sess. (1871) App. 81, 83-85 as quoted in Adamson v. California, 332 U.S. 46, 115.

[6]See Walker v. Sauvinet, 92 U.S. 90, 92 (1875) (dissenting opinion); O'Neil v. Vermont, 144 U.S. 323, 337 (1892) (dissenting opinion) as cited by Justice Black, dissenting opinion, Adamson v. California, 332 U.S. 46, 96-123 (1947).

[7]Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," Stanford Law Review, II (1949), 5.

viewed section 1 as giving power to Congress to make the states obey the Bill of Rights. But Fairman contended that Bingham had misread Barron, that the Bill of Rights were, in Bingham's words, "enjoined" upon state officials and that the Amendment was just added power to Congress to enforce the rights. Fairman then became confusing as he mixed the privileges and immunities clause and the equal protection clause, a clause Black did not deal with. All the members of Congress did not understand Bingham, as illustrated by the fact that shortly before the vote was taken on the Amendment, one Representative insisted he still did not know what the effect the privileges and immunities clause would be. Fairman added an evaluation of the ratification of the amendment in the state legislatures and concluded that had they understood they were fastening the Bill of Rights to themselves, they would have made their own laws and constitutions conform to federal standards. Specifically on this point, Fairman examines the state provisions on jury trial and finds that many states had constitutions or laws inconsistent with the Bill of Rights. Fairman concluded that a failure to notice this inconsistency showed that many legislatures did not realize the 14th Amendment was meant to incorporate the Bill of Rights. Thus, this failure by contemporaries to refer to the incorporation doctrine showed that no incorporation was intended.[8]

Professor William W. Crosskey, of the University of Chicago Law School, wrote a lengthy reply in 1954 to Fairman's views of the

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[8] Ibid., 34, 66-70, 80.

Fourteenth Amendment in Congress.[9] Crosskey stated that Bingham and Howard understood the privileges and immunities clause of Article IV, Sec. 2 of the original Constitution, as if it read: "The citizens of each state shall be entitled to all privileges and immunities of citizens of the United States in the several states." (emphasis in the original).[10] This was the "common faith" of the Republican Party to which they belonged.[11] Even though "of the United States" did not appear in the original Constitution in the privileges and immunities clause of Article IV, Sec. 2 (which Bingham calls the interstate privileges and immunities clause), Crosskey said Bingham read the clause that way, as if it had an ellipsis in it, to understand the privileges and immunities guarantee. Bingham and other representatives viewed this interstate privileges and immunities clause as protecting a citizen against his own state's legislation, Crosskey contended, although the clause had generally been interpreted only to prevent discrimination against interstate travelers. Crosskey explained Bingham's conflict with the Barron decision by pointing out that Bingham and others felt this decision wrong and politically motivated to protect slavery. Crosskey showed that Bingham thought the interstate privileges and immunities clause already included the Bill of

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[9]William W. Crosskey, "Charles Fairman, 'Legislative History,' and the Constitutional Limitations on State Authority," University of Chicago Law Review, XXII (1954), 1.

[10]Ibid., 12.

[11]Ibid., 11 and 26.

Rights, and the Fourteenth Amendment was only to give Congress the power to enforce those privileges and immunities. Crosskey discussed the equal protection clause, as did Fairman, but this was only secondary. He also mentioned newspaper articles, but felt they were of little consequence. However, he agreed with Fairman that some people were unaware of Bingham's intent to incorporate the Bill of Rights into the Fourteenth Amendment.[12]

Comparing the views of these three major works with the debates in the Congressional Globe of the 39th Congress, parts of each interpretation are found to be accurate. Justice Black's coverage is the lightest of the three. Nevertheless, several of his basic contentions appear to be correct. Bingham did intend the Amendment as a grant of power to Congress to enforce certain rights.[13] Fairman was in error when he claimed that Bingham was confused on the interpretation of Barron v. Baltimore. One representative took the position that the Bill of Rights already applied to the states, and Bingham answered in the negative, citing the Barron decision to the House as a denial of federal authority to enforce the Bill of Rights.[14] Thus, he concluded that the Fourteenth Amendment was necessary for enforcement. Apparently, Fairman misinterpreted Bingham's emphasis on enforcement by Congress, as a belief by Bingham that the Bill of Rights already applied to the states but had not been so

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[12] Ibid., 113-119.

[13] Cong. Globe, 39th Cong., 1st Sess. (1865) 1089.

[14] Cong. Globe, 39th Cong., 1st Sess. (1865) 1090.

enforced. After Bingham had cited the Barron decision he followed with the following question and reply:

> Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced.[15]

A more appropriate conclusion would be that Bingham did not believe that the Barron decision was proper and that the Fourteenth Amendment would help Congress enforce rights which should rightfully, despite a Supreme Court decision, be protected against state violation.[16] When Bingham stated that the "eight articles" were "never" limitations upon the states until the adoption of the Fourteenth Amendment, he could have meant that in practical terms, without enforcement power, the rights had never been protected against the states.[17] Crosskey's contention that Bingham's theories were the "common faith" of the party was not an entirely accurate statement. No other member of Congress spoke of an alleged ellipsis in the interstate privileges and immunities clause and one author explains that "of the United States" could have meant merely "whose" privileges

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[15] Ibid.

[16] Bingham interpreted Barron as denying Congress the power to enforce the Bill of Rights because these rights were interpreted as protections against the federal government only. Ibid., 1090. Whether he felt the rights were applicable to the states is impossible to determine from his statements in Congress before 1871.

[17] One author explains this apparent contradiction of this statement in 1871 with 1866 statements by saying that Bingham presented his original draft under the mistaken belief that the Bill of Rights was already binding and revised the wording when (by 1871) he learned it must be made binding on them. Irving Brant, The Bill of Rights, Its Origin and Meaning, (Indianapolis: The Bobbs-Merrill Co., Inc., 1965), 333.

would be protected, and not limited to the nature of the privilege covered by the clause.[18]

Although Bingham's incorporation might have been debatable, since he did not actually speak of incorporation until after the Amendment was adopted, Senator Howard's introductory speech to the Senate was unmistakable. He simply added the first eight amendments to the privileges and immunities in the first section of the Fourteenth Amendment.[19] In Howard's list of privileges and immunities he included the right to be tried by an impartial jury of the vicinage.[20] This, however, was not the first time that a jury trial was held to be a guaranteed right by a member of Congress. In 1861, Bingham himself had denounced a fugitive slave law amendment as unconstitutional because it let a commissioner, not a jury, decide whether a Negro was a fugitive slave.[21] During the debates on the readmission of certain Southern States in 1868, a Democrat protested that one of the new state constitutions infringed the right of trial by jury.[22] Senator Fowler suggested in 1870 that the right to trial by jury was a

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[18]Alfred Avins, "Incorporation of the Bill of Rights," Harvard Journal on Legislation, VI (1968), 1, 15.

[19]See supra, note 4.

[20]Cong. Globe, 39th Cong., 1st Sess. (1866), 2765.

[21]Ibid., 36th Cong., 2d Sess. (1861), App. 83, in Avins, "Incorporation," Harvard Journal on Legislation, VI, 23.

[22]Ibid., 40th Cong., 2d (1868), 2448.

privilege of citizenship.[23] In Bingham's speech in 1871, he pointed out that before the Fourteenth Amendment a state could deny any citizen the right of trial by jury, and it was done, but after the Amendment, Congress had the power to enforce this right upon the states.[24] The most convincing evidence of incorporation is found in a speech by Representative William Lawrence from Ohio. Lawrence argued in 1871 that when land was taken for the purpose of building schools, it was unconstitutional to have the value determined by a commissioner. The value must be determined by a jury.

> . . . Doubts have been entertained on this subject prior to the adoption of the fourteenth article of amendments to the Constitution, and there was [sic] authorities to show that a jury trial was not a matter of right. . . . But since the adoption of the fourteenth article, it may well be maintained that a common-law jury trial is secured.[25]

Thus, the debates in Congress, both during and after the adoption of the Fourteenth Amendment, contain considerable evidence for the incorporation theory among legislators. These legislators especially included trial by jury as a privilege which was necessary to due process.

Black, Fairman and Crosskey all agreed that the idea of

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[23] Ibid., 41st Cong., 2d Sess. (1870), 515.

[24] Ibid., 42nd Cong., 1st Sess. (1871), App. 84-5.

[25] Ibid., 41st Cong., 3rd Sess. (1871) 1245.

incorporation was not published widely in the newspapers and the first section to the Amendment did not attract much public interest.[26] The first section, naturally, did not get much publicity. To the people its intention was partially to give Congress power to enforce the interstate privileges and immunities clause which was already in the original Constitution. Furthermore, Sections 2 and 3 were of more importance to the public as they dealt with the more specific vital issues of representation and status of former confederate leaders. They were the parts which interested the public. The average citizen, reporter, and sometimes judge, was not likely to go to the Congressional Globe and read through the volumes of debate on the Amendment to determine exactly what the framers intended. He was satisfied with what the Amendment said and what he read in the newspapers and other common media. Neither Black nor Crosskey has denied Fairman's evidence that, with the exception of Massachusetts, none of the state ratifying legislatures referred to incorporation.[27] Fairman's evidence, however, is negative, for proving the public and the states did not know of incorporation does not prove incorporation was not intended. On the other hand, how should the courts interpret the states' silence on the incorporation doctrine in their ratifying conventions? Such silence could be interpreted as either passive acceptance or as nonacceptance since the states may not have

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[26]Black, Adamson v. California, 332 U.S. 46, 110; Fairman, "Fourteenth Amendment," Stanford Law Review, II, 66-80; Crosskey, " 'Legislative History,' " University of Chicago Law Review, XXII, 113-119.

[27]See Fairman, "Fourteenth Amendment," Stanford Law Review, II, 80-125.

recognized that such a doctrine existed.[28] The same problem arises when one examines the first relevant case, decided within months of the adoption of the Amendment. In Twitchell v. Pennsylvania, decided in the December term of 1868, Chief Justice Chase spoke for a unanimous court when he said,

> The scope of application of [the Fifth and Sixth] amendments are no longer subjects of discussion here. . . . The views [of Barron v. Baltimore] . . . apply to the Sixth as fully as to any other amendments.[29]

Whether this case is a significant test on incorporation is open to question. It may represent a denial of the incorporation doctrine; however, this is mere speculation because the reports of the case do not indicate that any reference was made to the new Amendment. Nevertheless, even if the Court had not read the debates or known of the incorporation theory, the decision did illustrate the current opinion on the Bill of Rights and their application to the states. This opinion stemmed from the Barron decision, the landmark discussion on the applicability of the Bill of Rights to the states.

The first cases involving the interpretation of the Fourteenth Amendment were the Slaughter-House Cases.[30] The cases arose under a

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[28] See Maxwell v. Dow, 176 U.S. 581, 602 (1900). In this case the Court said that it must look to the ratifying intentions, as well as Congress, because an amendment had no effect until states ratified it and it should be given no broader construction than the states intended.

[29] 7 Wall 321, 325, 327 (1868).

[30] 16 Wall. 36 (1873).

measure enacted in 1869 by the legislature of Louisiana. The act regulated the business of slaughtering livestock in New Orleans. It required that such activities for the city and for a vast area surrounding it should be restricted to a small section below the city of New Orleans, and provided that the slaughtering should be done by one corporation.[31] The effect was virtually a monopoly grant of the business. Several butchers in the city brought suit to prevent the enforcement of the act. The Supreme Court of Louisiana held the act valid. The cases were appealed to the United States Supreme Court. The butchers charged that the statute was a violation of all three clauses of Section One of the Fourteenth Amendment.[32] If Justice Miller decided in favor of the butchers, he would thereby bring all civil rights under control of the federal government in the privileges and immunities clause. Justice Miller asked whether the Fourteenth Amendment was intended "to transfer the security and protection of all the civil rights . . . from the States to the federal government . . ." or "to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states . . ."?[33] In answering in the negative he drew a careful distinction between state and national citizenship, placing

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[31]Kelly and Harbison, American Constitution, 503-504.

[32]The butchers also contended it was a violation of the Thirteenth Amendment, but their main argument was the privileges and immunities clause of the Fourteenth.

[33]16 Wall. 36, 77.

most civil rights under the state. The Fourteenth Amendment only protected against state violations those rights which owed their existence to the federal government.[34] To interpret the amendment otherwise would be "so great a departure from the structure and spirit of our institutions" that it would "degrade the State governments by subjecting them to the control of Congress."[35] He concluded by saying,

> We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislature of the States which ratified them.[36]

The Court decided that a citizen derived most civil rights from state citizenship and, therefore, those rights were not protected by the Fourteenth Amendment against state action. Basically, the rights of the citizens in his state were protected by the same authority as they had been before the adoption of the Fourteenth Amendment. There had been little, if any, change. This extremely narrow interpretation of the Fourteenth Amendment was due to the conservatism of the judges and the belief that the immediate purpose of the Amendment was the protection of the Negro.[37]

In effect, the Slaughter-House Cases brought constitutional history back to Barron v. Baltimore. Ironically, the decision which the framers

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[34] Ibid., 79.

[35] Ibid., 78.

[36] Ibid.

[37] Kelly and Harbison, American Constitution, 505.

of the Fourteenth Amendment intended to reverse, was pronounced against their own amendment. In 1873 application of the Bill of Rights to the states, for all practical purposes, was still prohibited by the Barron decision of 1833. Through 1908 the legacy of the Slaughter-House Cases affected constitutional decisional law. In case after case, the Supreme Court held that the guarantees of the federal Bill of Rights in regard to the states were not among "the privileges and immunities of citizens of the United States."[38]

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[38]See Hurtado v. California, 110 U.S. 516 (1884); Maxwell v. Dow, 176 U.S. 581 (1900); Twining v. New Jersey, 211 U.S. 78 (1908).

CHAPTER V

THE FOURTEENTH AMENDMENT, THE SUPREME COURT AND THE STATES

After the Slaughter-House Cases the Supreme Court continued to give the Fourteenth Amendment a narrow interpretation. However, the states were soon to be restricted by a test which had been set up in Murray's Lessee v. Hoboken Land & Improvement Co. in 1856.[1] The Supreme Court held in this case that in America due process was a limitation on the legislature as well as on the executive and the judiciary. Congress was brought within the scope of the due process clause, and a standard for determining whether legislative action constituted due process was stated. The adoption of the Fourteenth Amendment meant that state legislatures were placed in a similar position. Although the first cases on the Fourteenth Amendment, the Slaughter-House Cases, based their argument on the privileges and immunities clause, in later cases the courts turned naturally to the due process clause.

In the Murray case the validity of an act of Congress giving a summary remedy by a distress warrant against the property of an official defaulter was at issue. The Court decided that the warrant was legal process, but was it due process? It was understood that Congress could not

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[1] 18 How. 272 (1856).

make any process due process by its will. The Court set out a two-part test to determine what process was "due process." First, "we must examine the constitution itself, to see whether this process be in conflict with any of its provisions." Secondly, is the process in accord with

> those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[2]

If a procedure or law met with these two tests, then due process had been afforded. In Walker v. Sauvinet the Court came to the conclusion that if it was the law of the land, then it was due process. As described earlier, law of the land meant the general public laws binding on all the community.

In 1875 a case came to the Supreme Court involving a Louisiana procedure which allowed, in damage suits, the judge to decide a case alone if the jury could not agree or failed to reach a verdict.[3] The Court ruled that trial by jury in suits at common law in a state court was not a privilege and immunity of national citizenship protected by the Fourteenth Amendment, and that due process did not mean that all state trials had to be by jury.[4] Due process was met if

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[2]Ibid., 276.

[3]Walker v. Sauvinet, 92 U.S. 90 (1875); Fellman, Defendant's Rights, 87.

[4]Ibid., 92-93.

> the trial is had according to the settled course of judicial proceedings. Due process of law is process according to the law of the land. This process in the state is regulated by the law of the state.[5]

A similar decision was reached in Missouri v. Lewis:

> The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding.[6]

Thus, the Court's decisions continued to limit the power of the Fourteenth Amendment over the states. Slowly the "settled usage" doctrine became the leading guideline for due process. Of course, the states had to meet both parts of the test, i.e., their laws and procedures could not conflict with any provisions of the Constitution.

The due process clause received its first thorough examination in Hurtado v. California.[7] This case involved the validity of a section of the Constitution of California, providing for prosecution by information in the place of the common law method of indictment by a grand jury in cases of infamous crime. The plaintiff contended that under the due process clause of the Fourteenth Amendment, he was entitled in a felony case to a grand jury indictment before trial. The Court denied the contention. Referring to Murray, the Court extended the two part test

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[5] Ibid.

[6] 101 U.S. 22, 31 (1879).

[7] 110 U.S. 516 (1884).

set forth in that case. The Court could not accept the idea that "nothing else can be due process of law," that only the "settled usages" could be the law. More important the decision stated that the due process clauses of the Fifth and Fourteenth Amendments had identical content. Furthermore, the due process clause of the Fifth Amendment did not include grand jury, because to interpret that clause in such a way would make the Constitution redundant, as grand jury was provided for in separate and distinct guarantee outside the due process clause.[8] If a grand jury had been intended, the framers of the Fourteenth Amendment would have embodied an express declaration for it. Due process of law referred to the law of the land in each state, enforced by the power of each state within the limits of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ."[9] The Court concluded.

> It follows that any legal proceedings enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law. . . .[10]

Three important rulings came out of the Hurtado decision. In upholding the test in Murray, the Court expanded the test to include new

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[8] Ibid., 534-535.

[9] Ibid., 535.

[10] Ibid., 538.

procedures not known to common law. In other words, due process was met by passing a three-part test: one, to not be in conflict with specific provisions of the Constitution; two, to be acceptable to settled usages and modes; but also, three, to not violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." This phrase was the second important ruling in the case, because it was to limit the states, not only in violations of the Constitution or settled usages, but in "fundamental principles" in addition to the Constitution and settled usages. That this was the exact intention of the phrase becomes clear when one looks at the third ruling: The due process clause of the Fifth Amendment did not include the other guarantees listed in the Bill of Rights, for to do so would make the Constitution redundant. Therefore, the Fourteenth Amendment's due process clause did not include those rights either, for the same reason. Thus, the Court denounced the incorporation of the Bill of Rights into the due process clause of the Fourteenth Amendment, and set the test of due process as "fundamental principles of liberty and justice."

The landmark case dealing with jury trial was Maxwell v. Dow, involving constitutional provisions of Utah providing for accusation by information rather than a grand jury, and a trial jury of eight instead of twelve men.[11] Maxwell was prosecuted under an information, tried and convicted of robbery by a jury of eight. He claimed that such a procedure abridged his privileges and immunities and deprived him of due process of law. The Court dismissed the first complaint by saying that

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[11]176 U.S. 581 (1900).

> the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government.[12]

he privileges and immunities clause was, therefore, held not to require ither indictment or twelve-men jury in state trials. The remaining uestion was whether twelve jurors were essential to due process of law. elying heavily on Hurtado, the Court answered in the negative, as it quated grand jury with the number fixed by common law for a petit jury

> Trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the Hurtado case is trial by jury mentioned as a necessary part of such process. . . . The State has full control over its procedure in its courts . . . subject only to the qualification that such a procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.[13]

he test was now clear. A state could determine criminal procedure as ong as such procedure did not violate fundamental rights, or conflict ith specific and applicable provisions of the Constitution. Since jury rial was deemed not a fundamental right, and the jury trial provisions of he Constitution applied only against the federal government (Walker and urtado), the states were free to use jury trial as they saw fit. In ederal courts the juries had to be composed of twelve men and give a nanimous verdict,[14] but in state courts juries could be composed of less

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[12] Ibid., 598.

[13] Ibid., 603-605.

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

than twelve men and issue less than unanimous verdicts.[15]

In Twining v. New Jersey,[16] the plaintiff had been convicted of knowingly exhibiting to a state bank examiner a false paper, with the intent to deceive him as to the condition of a trust company of which he was a director.[17] At the trial the defendant called no witnesses and did not testify. The judge instructed the jury that the defendant's failure to testify would not infer guilt, but that the jury had a right to consider the fact that he did not do so when a direct accusation was made against him. Twining claimed this violated his privileges and immunities and due process of law. The Court rejected the contention that the right against self-incrimination was a privilege of national citizenship on the basis of the Slaughter-House and Hurtado cases. The Court admitted that some of the provisions of the Bill of Rights might be part of due process of law but,

> . . . if this is so, 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. [The basic requirements of due process are only reasonable notice and a fair opportunity to be heard.][18]

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[15] Maxwell v. Dow, 176 U.S. 581 (1900) on less than twelve; Jordon v. Massachusetts, 225 U.S. 167 (1912) on unanimous verdicts. See also, Hawaii v. Mankiki, 190 U.S. 197 (1903) and West v. Louisiana, 194 U.S. 258 (1903) on Sixth Amendment.

[16] 211 U.S. 78 (1908).

[17] Fellman, Defendant's Rights, 165.

[18] 211 U.S. 78, 99, 112.

The Twining decision reaffirmed Hurtado and warned that no change in ancient procedure could be made which disregarded fundamental principles.[19]

The Hurtado decision continued to foreshadow the decisions of the Supreme Court for many years. Each case after Hurtado had to reconcile the doctrine that the due process clause of the Fifth and Fourteenth Amendments could not have included the specific guarantees found in the other parts of the Bill of Rights. The Powell case in 1932 climaxed the problem.[20] Nine Negro youths were indicted for the rape of two white girls. They were tried by a jury six days after the day upon which they were arrested, amidst an atmosphere of tense, hostile public sentiment. They were not represented by counsel and not asked if they wanted one. The jury returned a verdict of guilty and recommended the death penalty. The state supreme court affirmed the decision. How could the Court circumvent the Hurtado doctrine? The problem was simplified by the fact that recently some exceptions had been found to the Hurtado decision in the First Amendment freedoms.[21] The Powell case in 1932 obviously represented unfairness, but the Court had to decide whether to follow the Hurtado doctrine or more recent decisions, i.e. Gitlow v. New York. Solving the dilemma, although only temporarily, the

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[19] Ibid., 83.

[20] Powell v. Alabama, 287 U.S. 45 (1932).

[21] Gitlow v. N.Y., 268 U.S. 652 (1925); Near v. Minnesota, 283 U.S. 697 (1931). It should be noted that Gitlow did not use "incorporationist" language. It simply said that the freedoms of the First Amendment were protected against state impairment because they were "fundamental."

Court defined the problem as one of determining under the circumstances of that particular case whether the denial of counsel constituted a denial of due process.[22] The Court answered in the affirmative. Although subsequent cases were to erroneously state so, the Powell case did not apply the Sixth Amendment's right to counsel in the Fourteenth Amendment to the states. That question was again covered in Betts v. Brady,[23] where the Court followed the pattern of Powell and decided on the special circumstances of the case and avoided applying the right to counsel to the states. The Supreme Court, therefore, had still not overturned the Hurtado doctrine.

In 1934 the Court, in Snyder v. Massachusetts, declared a state could abolish trial by jury altogether.[24] A state could regulate its own procedures,

> unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.[25]

Again the Court affirmed the basic Hurtado doctrine. It was not until 1937 that the Court freed itself of that part of the Hurtado doctrine which denied rights in the Bill of Rights could be included in the due process clause of the Fourteenth Amendment.[26] Palko was found guilty of

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[22] 287 U.S. 45, 71.

[23] 316 U.S. 455 (1942).

[24] 291 U.S. 97 (1934).

[25] Ibid., 105.

[26] Palko v. Connecticut, 302 U.S. 319 (1937).

second degree murder and sentenced to life imprisonment. The state appealed his case and a new trial was ordered on the basis of an error found to the prejudice of the state. He was tried again, convicted of first degree murder, and sentenced to death. He appealed this procedure under the Fourteenth Amendment, claiming double jeopardy. The Court denied this contention but proclaimed that the due process clause of the Fourteenth Amendment "absorbed" only those provisions of the Bill of Rights which were "of the very essence of a scheme of ordered liberty."[27] For the first time the Court had seriously altered the rule set down in Hurtado v. California. Now certain rights in the Bill of Rights, in addition to the First Amendment freedoms, could be found in the due process clause of the Fourteenth Amendment if they met the "ordered liberty" test. The Court in Palko went on to say,

> The right of trial by jury may have value and importance. Even so [it is] not of the very essence of a scheme of ordered liberty.[28]

Therefore, in Palko the court rejected the total incorporation theory, but substituted a selective process, or "absorption" process, by which certain guarantees in the Bill of Rights could be used to afford protection against state action.

Adamson v. California involved provisions of the California state constitution which permitted comment on the refusal of a defendant to

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[27] Ibid., 325. The term "incorporated" is not used.

[28] Ibid.

testify in his own defense. The Court stated firmly that the Fifth Amendment was not applicable against the states.[29] In the five-four decision the Court denied the idea of total incorporation. However, for the first time, with Justice Black leading the dissent, the total incorporation theory lacked only one vote of being the law of the land. For the first time since the adoption of the Amendment, a thorough examination of the debates in Congress was presented. Justice Black's study of the debates, however, was not successful in convincing the majority. The theory of total incorporation has still never commanded a majority on the Court. Rather the Court has preferred to follow the selective process set down by the Palko decision. Justice Black criticized this approach in determining what rights were included in the due process clause of the Fourteenth Amendment.

> This decision [Adamson] reasserts a constitutional theory . . . that this Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.'[30]

He called this "substituting natural law concepts for the Bill of Rights."[31] Black's description of court decisions was fairly accurate. From the Hurtado decision in 1884 through Adamson to Mapp v. Ohio in 1961,[32]

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[29] 332 U.S. 46 (1947).

[30] Ibid., 69.

[31] Ibid., 90.

[32] But see Mapp v. Ohio, 367 U.S. 643 (1961).

e Court has continued this process of selection, demanding only neral standards of due process, fairness, and ordered liberty from the ates.

Although Justice Black continued to advocate incorporation, ere was no reason for the Court to incorporate or apply the Bill of ghts to achieve justice in state criminal processes. On the contrary, corporation of the Bill of Rights would have tended to limit the urt's authority over the states in the area of civil liberties. By mply defining "due Process" the Court has maintained a more flexible thod of regulating state criminal processes. Furthermore, by refusing set specific standards for the states to follow, the Court has given eater consideration for the differences which exist between the states d allowed a certain measure of freedom for experimentation.

Consistent with the general standards set up in the preceding ses, the Supreme Court ruled on state criminal cases involving jury ials. Those standards demanded that a state procedure must not conflict th the Constitution, must not run contrary to settled modes and ages, or must not violate "fundamental principles of justice and berty." In the criminal cases of the states the Supreme Court began interpret these three standards as specifically demanding fairness. e process had to be fair process, regardless of what specific procedure e states used.

In 1915 a factory manager was convicted in Georgia of the murder a girl from Georgia. The man was a Jew from New York and considered

a "foreigner."[33] Appeal was made to have the trial removed to another court, but the appeal was denied. The Supreme Court upheld the lower court's decision, saying that the federal government could not exercise a general review over state proceedings, but could only see that the fundamental rights of the accused were not violated.[34] Holmes dissented to no avail. Eight years later Holmes had the chance to overrule the Frank decision. In Moore v. Dempsey[35] five Negroes had been convicted of murder in an Arkansas court and sentenced to death. In a petition for habeas corpus before a federal district court the following facts were alleged: that the principal witnesses had been tortured; that only white people were admitted to the grand and petit juries; that a threatening mob had surrounded the courthouse; that the defense didn't dare request a delay in the trial, challenge jurymen, or ask for a change of venue or separate trials; that no witnesses were called in defense; that the whole trial lasted about forty-five minutes.[36] The accused was tried and convicted in an atmosphere of a race riot and terror as the "counsel, jury and judge were swept to the fatal end by an irresistible wave of public opinion."[37] The Court demanded a new trial because the trial

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[33]C. Herman Pritchett, The American Constitution, (New York: McGraw-Hill Book Company, 1968), 643.

[34]Frank v. Mangum, 237 U.S. 309, 334 (1915).

[35]261 U.S. 86 (1923).

[36]Fellman, Defendant's Rights, 61.

[37]261 U.S. 86, 91.

flagrantly lacked the necessary element of fairness. A similar decision was reached in Tumey v. Ohio, where the Court found that a fair trial had been denied because the judge had a pecuniary interest in finding the defendant guilty.[38] In 1936 the Court overturned a state trial involving a physically coerced confession.

> Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. . . .[39]

The Court's decisions continued to emphasize the element of fairness in state trials rather than specific application of a right. A more difficult question arose in 1941 when the question of psychological rather than physically coerced confessions came to the Court.[40] The Court refused to overturn the lower court's decision on the ground that prolonged questioning alone made a resulting confession the product of coercion and hence inadmissible on due-process grounds.

> As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.[41]

The Court showed continued reluctance to impose certain standards on the

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[38] 273 U.S. 510 (1927).

[39] Brown v. Mississippi, 297 U.S. 278, 285-286 (1936).

[40] Lisenba v. California, 314 U.S. 219 (1941).

[41] Ibid., 236.

states when it decided to allow the state to leave the question as to whether or not a confession was coerced to the jury.

> The Fourteenth Amendment does not forbid jury trial of the issue. The states are free to allocate functions as between judge and jury as they see fit.[42]

In 1947 the Court was called upon to test the constitutionality of New York's "blue ribbon" juries, whereby the selection rested upon the intelligence of the prospective jurors as revealed by a questionnaire sent to them.[43] The Court upheld this practice, stating that the states were free to alter or abolish trial by jury as they saw fit because,

> The function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ.[44]

Consistent with these Supreme Court rulings on criminal prosecutions in the state, some states began to change their constitutional provisions on jury trial. After the Supreme Court had reiterated in case after case that the Bill of Rights, specifically the Sixth Amendment, did not apply to the states through the Fourteenth Amendment, some states

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[42] Stein v. New York, 346 U.S. 156, 179 (1953).

[43] Bernard Schwartz, A Commentary on the Constitution of the United States, Part III: Rights of the Person, Vol. I: Sanctity, Privacy and Expression (New York: The Macmillan Company, 1968), 106.

[44] Fay v. New York, 332 U.S. 261, 294 (1947).

appeared to change their views on the right of jury trial. It will be recalled that the common law required a jury consisting of twelve men, a unanimous verdict, and a jury in all classes of offenses not designated as petty.[45] The common law requirements, of course, were not part of the written jury trial provisions in the Constitution. But the Supreme Court interpreted the jury trial provisions of the Constitution stating that

> . . . A trial by jury as understood and applied at common law . . . included all the essential elements as they were recognized in this country and England when the Constitution was adopted . . . that the jury should consist of twelve men, neither more nor less, and that the verdict should be unanimous.[46]

Through Court interpretation the common law requirements of a trial by jury in a sense became part of the Constitutional jury trial provisions. Since the Constitutional provisions on jury trial applied only to the federal courts, these constitutional requirements of 12-men and unanimity of verdict were required only in the federal courts. These constitutional requirements should be distinguished from federal rules which may be defined as certain procedures found to be efficient in the federal court system, but not necessarily mandatory to maintain the substance of a constitutional right.[47] Unless these requirements were

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[45] See, supra, Chapter II.

[46] Patton v. U.S., 281 U.S. 276, 288 (1930).

[47] The difference is important because when a guarantee embodied in a constitutional provision is applied to the states through the Fourteenth Amendment, those parts of the guarantee which are considered constitutional requirements, that is necessary to the substance of the guarantee, are then required of the states. On the other hand, federal rules are usually not carried over to the states because the Court assumes the states may develop equally efficient means of enforcing or applying a guarantee. See Wolf v. Colorado, 338 U.S. 25 (1949) and see, infra, Chapter VI.

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fulfilled, the right of trial by jury had been violated. But the Constitutional provisions on jury trial did not apply to the states, according to the doctrines of Hurtado and Twining. Reasonably, then, this doctrine could be applied to the common law requirements of a jury as well.

Although early state constitutions applied no written restrictions on the common law jury, constitutions immediately after the adoption of the Fourteenth Amendment did. The Constitution of Montana in 1889 provided that jury trial would remain inviolate except in misdemeanors where a jury could be composed of six men and reach a verdict by 2/3 vote.[48] Courts not of record could use juries with fewer than 12 members according to the Constitutions of 1899 in both North and South Dakota.[49] The original Constitution of the state of Utah in 1895 provided for twelve-man juries in capital cases, eight in general jurisdiction, and four in inferior courts.[50] State cases in Utah upheld the right of the state to allow for less than twelve-man juries.[51] These early constitutions

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[48]Thorpe, State Constitutions, 2303. "Misdemeanor" is a term which refers to offenses lower than felonies and generally those punishable by fine or imprisonment otherwise than in a penitentiary. Black, Dictionary, 1150.

[49]Ibid., 2855, 3370.

[50]Ibid., 3703.

[51]State v. Imlay, 22 Utah 156 (1900); State v. Bates, 14 Utah 293 (1896).

supported the doctrine that trial by jury was a procedure which could be altered by the state.[52]

More than the other states, Louisiana's history directly affected the status of jury trial in that state. From 1712 to 1769, the law of France applied to the then French colony of Louisiana. Shortly after the French ceded Louisiana to Spain, French law was replaced with Spanish law. Under neither legal system was a jury trial afforded.[53] No significant limitations on the right of jury trial appeared in Louisiana until the Constitutions of 1879[54] and 1898.[55] It would have seemed in 1879 and 1898 that such changes would be found constitutional due to the prevailing opinion in the Supreme Court concerning state jury trials. Other states, for example, Florida, used juries of less than twelve in

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[52]For more recent changes in state constitutions regarding jury trial see infra, Chapter VII.

[53]McCart, Trial by Jury, 14.

[54]Louisiana Constitution of 1879 Art. VII:

". . . in all cases where the penalty is not necessarily imprisonment at hard labor or death, the General Assembly may provide for the trial thereof by a jury, less than twelve in number. . . ."

[55]Louisiana Constitution of 1898 Art. IX:

". . . cases in which the penalty is not necessarily imprisonment at hard labor, or death, shall be tried by the court . . . or by a jury less than twelve. . . ."

Louisiana Constitution of 1898 Art. CXVI:

"All cases . . . not at hard labor shall . . . be tried without jury." It is upon this provision that the Duncan case rests.

capital cases,[56] or in courts not of record.[57]

The Supreme Court has consistently held that the Fourteenth Amendment did not bring to citizens all the guarantees of the Bill of Rights against arbitrary state action. Until 1937 the decisions of the Court upheld the view that the due process clauses in the Constitution could not include other specific guarantees in the Bill of Rights, for to do so would make the Constitution redundant. It was not until Palko v. Connecticut that the Court overturned the Hurtado doctrine to allow some of the protections in the Bill of Rights to apply against the states if they were "of the very essence of a scheme of ordered liberty." During this period after the adoption of the Fourteenth Amendment, due process was met in a state trial if the procedure used did not violate some specific provision of the Constitution, did not violate the settled modes and usages of the state, and did not violate the "fundamental principles of liberty and justice." Even after the Palko decision when the Court began to apply to the states some of the guarantees of the Bill of Rights deemed fundamental, these tests of due process remained the same. The Court demanded only general standards of the states. The Court developed the rule that a state criminal trial had to be basically fair, regardless of the settled modes and usages of the state. Early in

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[56] Shannon v. State, 89 Fla. 64, (1925); Cotton v. State, 85 Fla. 197 (1926).

[57] Peper v. Holtcamp, 235 Mo. 232 (1911); Lakes v. Goodloe, 195 Ky. 240 (1922).

the cases, after the adoption of the Fourteenth Amendment, jury trial was not included in those "fundamental principles of liberty and justice" which the state could not violate. In Maxwell v. Dow the Court affirmed that jury trial was not fundamental in state courts not only because the jury trial provisions of the Constitution did not apply to the states, but also because the jury was not the only fair procedure to determine issues of guilt or innocence. The states were in control of all criminal processes so long as such procedures guaranteed due process of law. The states could alter or abolish jury trial. Although none of the states abolished jury trial, several states altered the established common law, that is the accepted constitutional requirements in federal courts. State constitutions and cases began to uphold juries composed of less than twelve men and verdicts which were not unanimous. The Maxwell case determined that a state could use juries of less than twelve men, and Jordon v. Massachusetts allowed less than unanimous verdicts.[58] The Court was of the opinion that allowing the states to alter these aspects of jury trial did not substantially alter the right. Thus, the procedures set up in the constitutions of Louisiana were not questioned. Whether the Court would continue to allow the states to differ from the constitutional requirements on jury trial remained to be seen.

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[58] Thompson v. Utah, 170 U.S. 343.

CHAPTER VI

"THE NEW APPROACH"

AND DUNCAN V. LOUISIANA

In attempting to place Duncan v. Louisiana in the history of the Fourteenth Amendment, the Court claimed that the Duncan decision was merely another case similar to other recent cases applying provisions of the first eight amendments to the states, and that those recent cases represented a "new approach" to the incorporation debate.[1] Is there a new approach? Has the Court departed from the selective process of Palko and Adamson? To answer these questions first one must understand what the Court considered the "new approach." The Court explained its theory in this way:

> Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. [Cites Palko v. Connecticut.] The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is

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[1] Duncan v. Louisiana, 391 U.S. 145, 149 n. 14.

> fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. It is this sort of inquiry that can justify the conclusions of Mapp v. Ohio . . . Griffin v. California . . . and . . . Robinson v. California. Of each of these determinations that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.[2]

Thus, the "new approach" began with Mapp v. Ohio, when the Court's decisions rested on an Anglo-American regime of ordered liberty rather than an idealized system of justice. The Court in Duncan contended that recent cases included rights regardless of their necessity to fairness in any other system. If this "new approach" actually existed, the resulting court decisions could have gone in three directions: no change in standards demanded of the states, less strict standards of the states, or more strict standards of the states.

In the first place, the phrasing of the new test was strikingly similar to past tests. The only way to view the results of this "new approach," to assess its existence, is to look at the decisions referred to by the Court and other related decisions. Four main areas have gained special attention by the Court in the last eight years, searches and seizures, self-incrimination, the right to counsel, and cruel and unusual punishment. Mapp v. Ohio,[3] Robinson v. California,[4] and Griffin v. California,[5] as well as other cases, fall within these areas.

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[2] Ibid.

[3] 367 U.S. 643 (1961).

[4] 370 U.S. 660 (1962).

[5] 380 U.S. 609 (1965).

The approach to Mapp v. Ohio began in 1949 in Wolf v. Colorado.[6] This case involved an abortionist who had been convicted on the basis of records seized in an unauthorized search of his office. Justice Frankfurter, writing the Court's opinion, concluded that freedom from unreasonable search and seizure was an essential element in the concept of "ordered liberty," and so entitled the citizen to the Fourteenth Amendment's protection against state action.[7] The security against arbitrary intrusion by the police was the "core" of the Fourth Amendment protection which was basic to a free society and thus enforceable against the states through the due process clause.[8]

The important question in Wolf, however, was whether the federal exclusionary rule would apply to the states, whether evidence seized in an illegal search would be admitted in court. Justice Frankfurter described the barring from a federal prosecution of illegally obtained evidence as "a matter of judicial implication."[9] But the question remained, if the exclusionary rule were deemed necessary to the constitutional right in federal prosecutions, why did not the states have to follow such a rule on the Amendment? Frankfurter answered this by

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[6] 338 U.S. 25 (1949).

[7] 338 U.S. 25, 27-28.

[8] Ibid., 27.

[9] Ibid., 28.

ying that only the "core of the Fourth Amendment" was extended to the ates.[10] The remedy for such an infringement of the right was excluded om this "core," since it could not be "derived from the explicit quirements of the Fourth Amendment."[11]

The majority opinion in Wolf noted that states which had not opted the exclusionary rule did provide other remedies, both by atute and common law. It was not up to the Court to dogmatically clude varying solutions, especially since "a State's reliance upon her methods, if consistently enforced, would be equally effective."[12] e Court appears to have been giving the states experimental freedom thin the federal system. At one point the opinion suggested that an ficer might be resisted, or sued for damages, or even prosecuted for pression, or suffer removal or other discipline from superiors.[13] ankfurter concluded that there were more compelling reasons to exclude idence at the federal level which did not exist at the local level.

> The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote

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[10] Ibid.

[11] Ibid., 28 n. 2.

[12] Ibid., 31.

[13] Ibid., n. 2. Citing People v. Defore, 242 N.Y. 13 (1926).

> authority persuasively exerted throughout the country.[14]

The Wolf decision reflected the traditional reluctance to impose certain procedures on the states. But the decision was careful to point out that the enforcement of a right was basic to its existence. Wolf left open the possibility that imposition of a more effective remedy was within the power of the Court, yet it avoided an appraisal of the constitutional necessity of imposing it.

Many parallels can be drawn between the exclusionary rule in Wolf and the Sixth Amendment jury trial requirements in Duncan. The Court in Duncan did not discuss the possibility of the federal, constitutional twelve-man, unanimity, and petty offense requirements applying to the states. The Court stated

> We hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.[15]

On another occasion the Court allowed that its decisions on the Sixth Amendment "are always subject to reconsideration."[16] The Court did not feel that many of the states would require changes, in any case. Thus, the Court may have been allowing those states who differed

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[14] Ibid., 32-33.

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

[16] Ibid., 158-159 n. 30.

seriously, to the point of denying the right of jury trial, time to change their laws.

This is a reasonable assumption because the requirements of twelve-man juries and unanimous verdicts were not judicially created rules as was the exclusion rule in Wolf. These two were the common law requirements of a jury at the time of the adoption of the Constitution. The Court interpreted the jury trial provisions of the Sixth Amendment as a common law jury composed of twelve men and issuing unanimous verdicts. (Thompson v. Utah). These requirements have never been demanded in state trials because the Sixth Amendment, the jury trial provision specifically, has never been applied to the states.

On the other hand, the Court may have felt, as it did in Wolf on the exclusionary rule, that the right to twelve men and a unanimous verdict in federal courts was not basic to the right of jury trial, and allowed the states to experiment with jury trial as long as the basic right was not infringed.[17]

The Wolf rule, however, proved to be difficult to apply. The Court had applied the Fourth Amendment, but had not provided the states with a specific means of enforcement. Three cases illustrated the problem. In 1952 police forceably entered a man's home and pumped his stomach to obtain two capsules the police believed to contain a narcotic. The morphine capsules were the chief evidence on which the man was

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[17]See infra, Chapter VII.

onvicted. The case reached the Supreme Court in Rochin v. California.[18] ustice Frankfurter for a unanimous court invalidated the conviction. The olf rule would have allowed the evidence, but the Court would not accept onduct which "shocks the conscience."[19] The Fourth Amendment and the olf rule were ignored in the decision.

This vague decision brought continued problems. In Irvine v. alifornia[20] the police had planted a microphone in a man's room to btain evidence to convict him of illegal bookmaking. In the decision ive separate opinions emerged: four justices were of the opinion that olf governed the decision and Rochin did not because no physical rutality was involved; one justice rejected Rochin entirely; two justices dhered to both Wolf and Rochin, but felt Rochin applied to the facts at and; Black adhered to his decision in Adamson v. California; Douglas till felt the Wolf decision in error.[21] The result of the Irvine case as that when no physical brutality was involved, illegally seized vidence could be admitted in court.

The third case involving the Wolf rule on evidence was Breithaupt . Abram.[22] The police, in this case, directed a doctor to secure a

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[18] 342 U.S. 165 (1952).

[19] Ibid., 172-173.

[20] 347 U.S. 128 (1954).

[21] Pritchett, American Constitution, 610.

[22] 352 U.S. 432 (1957).

sample of an unconscious man's blood to determine whether he was intoxicated. The sample was positive and was used to convict the man. This case involved the exclusion rule and the Fifth Amendment's privilege against self-incrimination. The Court upheld the blood tests as "routine in our everyday life," and therefore, they did not violate the prisoner's Fifth Amendment privilege against self-incrimination.[23] The Court accepted the use of a hypodermic needle and the use of evidence obtained in such a manner because it did not shock the conscience as opposed to the "brutal" method of pumping the stomach used in Rochin. Thus, the distinguishing test between acceptable methods and unacceptable ones was the element of physical brutality, which was not present in the Breithaupt case.

All three cases represent the problems that the Wolf ruling had caused in finding an effective means of enforcing the Fourth Amendment. The ruling had allowed some states to obtain evidence in illegal seizures, as these states were protected from federal interference. The logical outcome of the dilemma came with Mapp v. Ohio. Police officers suspected that a certain criminal was hiding in Miss Mapp's apartment. The police forcibly entered the home and found obscene material in a trunk. During the subsequent proceedings the officers could not produce the warrant itself, thus introducing the question of whether the search was legal. But because there was no brutal force used against Miss Mapp in obtaining the

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[23] Ibid., 436.

Material (as in Rochin) the Ohio court followed the Wolf rule and admitted the evidence in court. She was convicted and appealed to the Supreme Court. The Supreme Court overruled the Wolf case stating that all evidence obtained by searches and seizures in violation of the Constitution was inadmissible in a state court.[24] The Court decided that the exclusion of evidence seized illegally was basic to the Fourth Amendment right, and without such a rule the Fourth Amendment had no real meaning. Thus, when the states had failed to guarantee the true meaning of the Fourth Amendment, they no longer were allowed to experiment in finding other "remedies" to enforce the amendment.

Although the subject of state versus federal rules on jury trial is the topic for a later chapter, several comments on federal requirements on jury trial illustrate an interesting comparison to the Wolf-Mapp situation. The requirement that trial jruies must number twelve in federal courts appears to have little substantive basis, and therefore, was not intended to be, and probably will not be applied to the states. As Harlan, dissenting, pointed out in Duncan, there is little significance "except to mystics in the number 12."[25] On the other hand, the requirement of unanimity may be a substantive incident of a jury trial. The main argument for unanimity is that it makes the prosecution prove guilt beyond a doubt. Those who oppose unanimity argue that

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[24] 367 U.S. 643 (1961).

[25] 391 U.S. 145, 182.

majority rule should be the prevailing determination. The Duncan decision, as the Wolf decision, could be followed by a state case where unanimity was denied and fatally affected the results of the trial. Several states do not require unanimity in cases where the federal courts do.[26]

Two years later in Ker v. California, the Supreme Court added strength to the Mapp decision when it interpreted the decision as follows:

> . . . The Fourth Amendment 'is enforceable against them [the states] by the same sanction of exclusion as is used against the Federal Government,' by the application of the same constitutional standard prohibiting 'unreasonable searches and seizures.'[27]

The result was that, following Mapp and Ker, the guarantees of the Fourteenth Amendment were then considered coextensive with those of the Fourth.[28] There was no longer any established line of demarcation between the constitutional principles governing the standards for state searches and seizures, and those controlling federal activity of that kind.[29] As Harlan, concurring, stated, "Henceforth state searches and seizures are to be judged by the same constitutional standards as apply

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[26]See infra, Chapter VII.

[27]374 U.S. 23, 30-31 (1963).

[28]Justice Brennan, dissenting, ibid., 64.

[29]Justice Harlan, concurring, ibid., 44-45.

in the federal system."[30]

The trend from Mapp to Ker was to require more rigid standards of the states. The Court was showing an increasing tendency to look at state trials from the viewpoint of federal courts and their requirements. In the case of Mapp v. Ohio, the federal intrusion seemed warranted. The states had been given a chance in Wolf and then did not follow with effective enforcement of the Fourth Amendment. The conclusion was that to enforce the Fourth Amendment in the United States the exclusionary rule was necessary. On the other hand, the Mapp decision opened many questions relating to federal laws on searches and seizures and just how far a state had to obey them. These questions were quite similar to the questions from the Duncan decision relating to federal requirements of twelve-man juries, unanimous verdicts and petty offenses. There is no reason that federal and state requirements have to be the same regarding any constitutional guarantee, including the right to trial by jury. The two components in the federal system could quite easily establish varying standards to the same constitutional guarantee. In some cases the state could establish much stricter standards than the federal government.

The second area of Supreme Court decisions was related to self-incrimination, a guarantee intermingled in some instances with the search and seizure area. For a considerable amount of time the states had been allowed to comment upon a defendant's failure to take the witness stand, as in Twining and Adamson. These decisions were overruled, however, in

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[30] Ibid., 45.

Malloy v. Hogan.[31] A man refused to answer question concerning charges of gambling activities and was jailed for contempt. The Supreme Court reversed the lower court and applied the Fifth Amendment's privilege against self-incrimination to the states. In making the application the Court also reasoned:

> It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.[32]

Harlan dissented in opposition to the application of certain guarantees from the first eight amendments to the states, "freighted with their entire accompanying body of federal doctrine."[33]

The Malloy ruling was applied in Griffin v. California.[34] In this case a California law allowed both judge and prosecutor to comment on the accused's failure to testify. Harlan concurred, but said the decision was just another example of "the creeping paralysis with which this Court's recent adoption of the 'incorporation' doctrine is infecting the operation of the federal system."[35] He viewed incorporation as an inflexible method of guaranteeing due process in state trials. The

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[31] 378 U.S. 1 (1964).

[32] Ibid., 11.

[33] Ibid., 19.

[34] 380 U.S. 609 (1965).

[35] Ibid., 616.

general conclusion reached in Griffin was that a defendant's control over his own defense was disrupted when his failure to testify was subject to comment by either a federal or state prosecutor. There could be a number of legitimate reasons for a defendant's failure to testify, other than a reason which infers guilt. If a defendant did not have adequate knowledge on a particular subject to speak, in doing so he might, unknowingly, incriminate himself.

The third area of special concern, but not as publicized as other areas, involved the Eighth Amendment's cruel and unusual punishment clause. The landmark case concerned a California law making it an offense to possess or use narcotics while in the state.[36] The law did not require any proof that the addict had bought or used any, or had any in his possession. The Court decided that the statute to punish addiction, as it were, inflicted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The cruel and unusual punishment resulted not from the degree of punishment (90 days), but from convicting the addict of a crime. The Court equated punishing addiction to punishing insanity. As the decision pointed out, "even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[37] Although punishing one for a disease is not universally denoted a crime, punishing the insane for a crime, because they could not help their actions, is not legally or socially accepted. Addiction

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

[37] Ibid., 667.

is becoming increasingly labeled as a disease and not a crime. The Robinson case has come the closest of the three named cases[38] in representing the "new approach." Treating addiction as a sickness rather than a crime is a development in the Anglo-American "scheme of ordered liberty," but not necessarily in other nations or idealized systems of justice. The result of using the test, in this case, was tighter control of the states.

The fourth group of decisions involved the right to counsel in the Sixth Amendment. The approach to the current case on the right of counsel, Gideon v. Wainwright,[39] came in Powell v. Alabama and Betts v. Brady. As previously discussed, the Powell decision stated that in the special circumstances of that particular case counsel should have been afforded.[40] In the Betts decision[41] the Court again examined the special circumstances of the case, but came to the conclusion that in this case counsel was not fundamental to due process. Finally, in Gideon, the Court declared that to deny a defendant counsel because he was too poor to hire one, would deny him a fair trial and due process under the Sixth and Fourteenth Amendments. To deny counsel on the ground that a defendant could not afford one, implied that only the rich would receive a fair

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[38] See supra, n. 2 and accompanying text.

[39] 372 U.S. 335 (1963).

[40] See supra, Chapter IV, notes 20-23 and accompanying text.

[41] 316 U.S. 455 (1942).

trial, as those who could not meet the sum would be denied an adequate defense. Quoting Powell v. Alabama, the Court stated:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he be not guilty, he faces the danger of conviction because he knows not how to establish his innocence.[42]

In Gideon the Court viewed lawyers in criminal prosecutions as luxuries, "used by everyone from government agencies to criminals."[43] Finally, the Court pointed out that the right to counsel might not be deemed fundamental and essential to a fair trial in some countries, but it was in the United States. This statement is an exact copy of what the Court in Duncan called the "new approach," that is, a right might not be fundamental in some systems but is "fundamental in the context of the criminal processes maintained by the American States."[44] That is, whatever the majority of states deem the proper approach is fundamental.

Duncan v. Louisiana is intricately woven into this "new approach."

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[42] 287 U.S. 45, 68-69.

[43] 372 U.S. 335, 344.

[44] Duncan v. Louisiana, 391 U.S. 145, 150 n. 14.

The Court made a careful study of the history of jury trial from England to the United States.[45] Every constitution of the original states guaranteed jury trial in one form or another.[46] The laws of every contemporary state guaranteed a right to jury trial in serious criminal cases; no state had dispensed with it.[47] The Court recognized that prior dicta contained opinion contrary to the Duncan holding, but the Court did not consider this prior dicta particularly important. The Court specifically dismissed Maxwell v. Dow, Snyder v. Massachusetts, and Palko v. Connecticut.

> None of these cases, however, dealt with a state which had purported to dispense entirely with a jury trial in serious criminal cases. In neither Palko nor Snyder was jury trial actually at issue, although both cases contain important dicta asserting that the right to jury trial is not essential to ordered liberty and may be dispensed with by the States regardless of the Sixth and Fourteenth Amendments. In Malloy v. Hogan . . . the Court rejected Palko's discussion of the self-incrimination clause. Respectfully, we reject the prior dicta regarding jury trial in criminal cases.[48]

The Court justified this rejection on two grounds. First, since the earlier cases were dicta and did not actually deal specifically with a denial of jury trial, the Duncan decision was not overturning a previous

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[45] Ibid., 151-154.

[46] Ibid., 154.

[47] Ibid., 155.

[48] Ibid., 154-155.

case, but only rejecting dicta. But had a complete denial of jury trial reached the Court earlier, would the Court have found jury trial fundamental and required? The answer turns on the approximate date the case would have come to the Court. As late as 1953 the Court upheld in Stein v. New York the traditional view that jury trial was not fundamental.[49] However, after 1953 a shift appeared in some Court decisions. In U.S. ex rel. Toth v. Quarles the Court labeled jury trial

> so important to liberty of the individual that it appears in two parts of the Constitution. . . . This right of trial by jury ranks very high in our catalogue of constitutional safeguards.[50]

In Reid v. Covert, involving the trial of civilians attached to military personnel, the Court said even further,

> In the view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial by a civilian judge and an independent jury picked from the common citizenry are not fundamental rights. (emphasis added)[51]

This dicta was an important change in that the Court had never referred to jury trial as "fundamental" in any previous dicta.

Two cases may have in essence been a confirmation of the right to trial by jury before the Duncan decision. In Irwin v. Dowd, involving the impartiality of a jury sitting in a highly publicized trial, the Court proclaimed jury trial "priceless,"

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[49] See supra, n. 39 and accompanying text.

[50] 350 U.S. 11, 16 (1955).

[51] 354 U.S. 1, 9-10 (1957).

> . . . although this Court has said that the 14th Amendment does not demand the use of jury trials in a state's criminal procedure, every state has constitutionality provided trial by jury. . . . In the ultimate analysis, only the jury can strip a man of his liberty or his life. (emphasis added)[52]

Although this was dicta, not involving the direct issue in the case, the Court said that only a jury could deprive a man of life or liberty. The reasoning was that "every state" had provided for trial by jury, that is, in the Anglo-American system the jury was fundamental. This was the "new approach" to which the Duncan Court referred.

In 1966 the Court went even further in its dicta when it stated

> The command of the Sixth Amendment . . . that 'the accused shall enjoy, the right to a . . . trial by an impartial jury . . .' is made applicable to the states through the Due Process Clause of the Fourteenth Amendment.[53]

Both of the preceding cases involved the question of jury trial impartiality and not a complete loss of jury trial. However, their significance is notable when the overwhelming dicta on jury trials covering almost one hundred years contrary to these decisions is considered. These cases are evidence that the Court has been moving toward the Duncan decision for the past decade.

Second, the Court rationalized its rejection of prior dicta on jury trials because the past cases rested on an old test, and the new test that has evolved in recent years looked at a right in a different light. As the Court in Duncan stated,

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[52]366 U.S. 717, 721-722 (1962).

[53]Parker v. Gladden, 385 U.S. 363, 364 (1966).

> A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system. . . . Every state . . . uses the jury extensively.[54]

This application of jury trial, consistent with the "new approach," admitted that other forms of procedure might be equally as fair as a jury in determining guilt, but, most important, it was the jury alone which was fundamental in the "Anglo-American regime of ordered liberty."

Duncan v. Louisiana was the seventh in a series of cases applying the guarantees of the Sixth Amendment to the states. All but one of the other six cases had been decided since 1963. The first case, In re Oliver in 1948,[55] involved the "public trial" guarantee in the Sixth Amendment. The case concerned the "one-man grand jury" system of Michigan. The case arose when a judge, sitting as a grand jury, determined that one of the witnesses was not telling the truth. With no break in the proceedings, in the secrecy of the grand jury, the judge charged the witness with contempt, convicted and sentenced him to sixty days in jail. The witness was denied the right to counsel and to be confronted with the witnesses against him. The Court decided that a trial held in secrecy denied fundamental fairness of due process which required "a charge fairly made and fairly tried in a public tribunal."[56]

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[54] 391 U.S. 145, 150 n. 14.

[55] 333 U.S. 257 (1948).

[56] Ibid., 278.

The Court stated:

> In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.[57]

The Court did not specifically "apply" the public trial guarantee of the Sixth Amendment, although subsequent cases held this case accomplished that end.

Gideon v. Wainwright was the second of the Sixth Amendment cases to specifically apply a guarantee through the Fourteenth Amendment to the states.[58] Following Gideon the Court declared in Pointer v. Texas that confrontation of witnesses and cross-examination was a "fundamental right essential to a fair trial," and made these protections obligatory on the states through the Fourteenth Amendment.[59] The case resulted when the transcript of testimony given by a witness at the preliminary hearing was introduced at the trial because the witness had left the state and was unavailable to testify. The Court expressed the opinion that

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[57] Ibid., 273.

[58] Irwin v. Dowd was the first case, see supra, n. 52 and accompanying text.

[59] 380 U.S. 400 (1965).

> The right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. (emphasis added)[60]

Again the Court emphasized the right as fundamental in the United States.

In both Pointer and Gideon the Court deemed the rights in question "fundamental to a fair trial," which the Court in Duncan did not directly do. In both Gideon and Pointer, however, the Court expressly held that the rights in the Sixth Amendment were made obligatory on the states by the Fourteenth Amendment. Justice Harlan, concurring in Pointer, rejected the Court's test of applying the Sixth Amendment guarantee, but found the right to a public trial "implicit in the concept of ordered liberty" as reflected in the due process clause of the Fourteenth Amendment, independent of the Sixth.[61] Justice Harlan held to the Palko test of ordered liberty based on fundamental fairness, rather than the application of parts of the Bill of Rights in a selective process, or Justice Black's total incorporation.[62]

In Klopfer v. North Carolina the Court held that the right to a speedy trial provision of the Sixth Amendment was applicable against the states.[63] A university professor's 1964 trial for a sit-in trespass had

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[60] Ibid., 405.

[61] Ibid., 408.

[62] Justice Harlan, dissenting, Duncan v. Louisiana, 391 U.S. 145, 171.

[63] 386 U.S. 213 (1967).

resulted in a hung jury. Over a year later the prosecutor secured a special order, stating he did not intend to prosecute the case further at that time, but with leave to reinstate the indictment.[64] Thus the defendant was in constant fear that the trial might be renewed at some later time. The Court explained that the pendancy of the indictment might subject him to public scorn and deprive him of employment and almost certainly force curtailment of his speech, associations and participations in unpopular causes.[65] This violated the accused's right to a speedy trial guaranteed by the Sixth and Fourteenth Amendments.

The Court made similar statements in Washington v. Texas where the Court stated:

> The right of the accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than other Sixth Amendment rights that we have previously held applicable to the states. At one time, it was thought that the Sixth Amendment had no application to state criminal proceedings. That view no longer prevails, and in recent years we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law.[66]

The language in this 1967 case strongly suggested that the Court considered all Sixth Amendment rights applicable in state proceedings. Washington represented a significant prelude to Duncan v. Louisiana. The

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[64] Pritchett, American Constitution, 639.

[65] 386 U.S. 213, 224.

[66] 388 U.S. 14, 18 (1967).

Court in Duncan concluded that

> in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.[67]

The Supreme Court in recent years had sharply departed from the Palko test of "ordered liberty." This can be seen not so much in the phrasings of the various tests but the manner in which the Court reached its conclusions in applying a guarantee to the states, and also in the increasing control the recent decisions have brought over state criminal proceedings. In review, the Mapp decision was a necessary remedy for the failure of the states to enforce the Fourth Amendment, thus the federal exclusionary rule was applied to the states. In Malloy v. Hogan the Court recognized the inconsistency in having two different standards determine state and federal prosecution on the exact same issue of self-incrimination. In Gideon and Pointer the Court carefully pointed out that the rights in question were fundamental to the American system, although not necessarily to every system. The majority in Washington v. Texas recognized the recent trend of testing state criminal trials in light of the Sixth Amendment. Thus, the Duncan decision was not a radical change in the test used in similar cases on the Sixth Amendment. On the contrary, the dicta in Toth v. Quarles, Reid v. Covert, and especially Parker v. Gladden and Irwin v. Dowd, heralded a new status for jury trial and the Sixth Amendment. Although only dicta in Parker v.

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[67] 391 U.S. 145, 157-158.

Gladden jury trial became "fundamental" and applicable to the states through the Due Process Clause of the Fourteenth Amendment" before the Duncan decision had made the formal application of the jury trial provision of the Sixth Amendment to the states.

In a sense the "new approach", as the Duncan Court defined it, was actually an extension of the Palko test of ordered liberty. In the previous tests the guiding factor was supposedly an ideal system of justice. The guidelines for that system ultimately came from the prevailing modes and procedures in the United States. Therefore, looking at the "Anglo-American system", as in Duncan, was not new in itself. On the other hand, as discussed in relation to the Robinson case, this Duncan test may allow for application of new ideas which develop in the American legal system. In the final analysis, what was really new in this so-called "new approach" was the Court's increasing reliance on the federal Bill of Rights as guidelines for testing state criminal trials, in addition to a new emphasis on the practices upheld in a majority of the states in determining what was fundamental.

Justice Harlan strongly dissented from this "new approach" of the Court in Duncan and other recent cases.

> The Due Process Clause of the Fourteenth Amendment requires that those procedures be fundamentally fair in all respects. It does not, in my view, impose or encourage nationwide uniformity for its own sake; it does not command adherence to forms that happen to be old; and it does not impose on the states the rules that may be in force in the federal courts except where such rules are also found to be essential to basic fairness.[68]

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[68] Duncan v. Louisiana, 391 U.S. 145, 172.

This was only one example of Harlan's dissent to the application of Bill of Rights' guarantees to the states.[69] Harlan's objection rested on a "fundamental fairness" doctrine. Justice Harlan's view of due process stemmed from the Twining decision. There due process was an evolving concept and therefore involved the gradual inclusion and exclusion of those principles which were deemed fundamental to due process. The test of including those principles in due process was fairness. Thus, Harlan contended, if due process required only fairness, then "the inquiry in each case must be whether a state trial process was a fair one."[70]

Harlan's major criticism of the majority's decision was lack of any real consideration of the jury as necessary to fairness. The Court did not evaluate, as pointed out, the procedure by which Duncan was tried in the original trial. This lack of consideration for fairness sets the Duncan decision apart from even the cases on the Sixth Amendment, Gideon v. Wainwright or Pointer v. Texas, where a consideration of fairness was at least a part of the analysis. Harlan saw the approach of the majority as a compromise on the ease of the incorporationist doctrine without its internal logic.[71] He described the decision as an unwillingness on the

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[69]See opinions in Mapp v. Ohio (dissenting); Ker v. California (concurring); Malloy v. Hogan (dissenting); Pointer v. Texas (concurring); Griffin v. California (concurring); Klopfer v. North Carolina (concurring).

[70]Duncan v. Louisiana, 391 U.S. 145, 187.

[71]Ibid., 181.

part of the Court to determine whether denial of trial by jury in the Duncan situation, or in any other situation, was fundamentally unfair. Since the Court failed to accomplish this task, Harlan started "from the beginning."[72] Based on his view of due process, his first question was whether Louisiana had denied Duncan due process by trying him for simple battery without a jury. His answer was no. Although the right to counsel was properly part of a fair trial, "it simply has not been demonstrated, nor, I think, can it be demonstrated, that trial by jury is the only fair means of resolving issues of fact."[73] In the first place, the original virtue of the jury, the limitations a jury imposed on a tyrannous judiciary, had disappeared. Judges were elected, not appointed by a "distant monarch."[74] Harlan pointed out that the jury was cumbersome, costly, slow, and untrained.[75]

Harlan conceded that even if he could be convinced that trial by jury was a fundamental right in some cases, he could find nothing to include the crime of simple battery in the category of serious crimes. The basic criticism here is the great weight that the Court placed on potential penalty, rather than the nature of the crime or the imposed penalty (60 days), which clearly placed Duncan's offense in the "petty" class. Harlan cited instances where crimes with greater penalties had

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[72] Ibid., 183.

[73] Ibid., 187.

[74] Ibid., 188.

[75] Ibid., 188-189.

been tried without a jury during the colonial period. He emphasized that there was no obvious reason why a jury trial was fundamental to fairness in robbery and not in petit theft.[76]

Harlan's criticisms of the majority decision are based on several tenets. The Court slighted but did not totally avoid the issue of fairness. In the traditional sense, that is, in terms of the Palko ordered liberty test, the Court did avoid a consideration of the events of Duncan's original trial, such as the conflicting testimony, the fact he was a Negro, and the racial atmosphere which accompanied the trial. However, under the new test that the Court sets up in the Duncan decision, denying a jury trial for an offense carrying a two year penalty was, in the Court's opinion, a denial of fairness in the Anglo-American system. Whereas more serious penalties may have been imposed in the colonial period without affording a jury trial, such extreme punishments demanded jury trial in the American legal system today. Again, this can be compared to the Robinson decision where the arrest and conviction of an addict were deemed contrary to the prevailing thought in the United States. In the final analysis, the "new approach" formulates a test that will grow with the changing conceptions of fairness in the United States. This test is very close to the fundamental fairness test of Harlan, with the exceptions that this test might, as it has in recent cases, result in identical federal-state standards and that the guiding factor is not an idealized system, as it seems to be in Harlan's test, but the process in

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[76] Ibid., 192.

the majority of states.

Other reasons for the Court's avoidance of the fairness issue involved the nature of Duncan's original trial. There was no specific event or element in the original trial which made it unfair. The fact that the testimony conflicted did not resolve the conflict in Duncan's favor. The only way the Court could have examined the element of unfairness at the original trial was to point to racial tension which existed in the county at the time. There was no evidence to prove that discrimination occurred against Gary Duncan, even though all the witnesses against him were white. However, and it is certain this was one of the objects the Court believed important, there was a reasonable doubt that the evidence, consisting of the testimony of one man in reality was sufficient to convict Duncan fairly. The Court made implication to this in its concluding remarks.

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or over zealous prosecutor and against the complaint, biased or eccentric judge.[77]

Although the Court emphasized the two year penalty which Duncan faced as the determining factor, the Court decision did not ignore the other attributes of a jury. The jury was guaranteed criminal defendants "in order to prevent oppression by the Government."[78] The majority

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[77] Ibid., 156.

[78] 391 U.S. 145, 155.

opinion illustrated the possibility of unfounded criminal charges or a judge who was too responsible to the dictates of higher authority. Indirectly the Court seemed to be considering the possible prejudice of the judge in Duncan's original trial. The jury protected a defendant from the "complaint, biased, or eccentric judge."[79] The jury was found to be more sympathetic than the judge. But the Court did not end its argument on this basis. The Court found the jury trial provisions in the federal and state constitutions testified to the reluctance of the American people to trust a man's life, liberty or property to one judge. Thus, the Court returned to the new approach of viewing fundamental principles not from an ideal system, but the system actually established in the states. "The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement" qualified for protection under the due process clause of the Fourteenth Amendment.[80] The decision recognized the weaknesses of the jury system, but added that recent studies had found the jury more lenient than the judge in cases where they differed.[81] According to the decision, then, jury trial was fundamental to due process, not because a defendant may never be as fairly treated by a judge as a jury, or that every trial

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[79] Ibid., 156.

[80] Ibid.

[81] Kalven and Zeisel, The American Jury, 4 n. 23, as cited in ibid., 157.

before a judge was unfair, but that the jury guarded against unfairness in many cases and in "most places more trials for serious crimes are to juries than to a court alone."[82] Overall, the Court refused to say that the jury procedure was necessary to a fair trial, but the fact that most of the states and defendants showed a preference for the jury made it fundamental to due process in the Fourteenth Amendment. The Duncan decision can be contrasted to the Gideon case where the Court specifically stated that counsel was "fundamental to a fair trial" and that most defendants could not present their own case. Nevertheless, the Gideon case illustrated the "new approach" also, but gave a more careful consideration to fairness than Duncan. The consideration of "fairness" in the Duncan decision took on a new light than in previous decisions.

In looking at the Anglo-American system, the decision naturally studied the laws and practices of the states. This may be a guideline to be followed in future cases in the Court. Rather than idealistically consider the nature of a particular right, the Duncan decision may be heralding a new emphasis on state provisions as a determining factor in what rights are to be considered fundamental. Harlan does not reject the Bill of Rights as totally irrelevant in interpreting the due process clause of the Fourteenth Amendment. On the contrary, in Duncan he stated

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[82] Ibid., 158.

the Bill of Rights was evidence of "American standards of fundamental fairness."[83] What Harlan objected to was the idea that all phases of any given guarantee were necessarily fundamental.

Justice Fortas concurred in the Duncan decision but also took issue with the implication in the majority's opinion that all the rules incidental to the right of jury trial in federal courts be imported to the states. As Harlan pointed out earlier, Fortas saw no reason to assume that

> Our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. To take this course . . . would inflict a serious blow upon the principle of federalism.[84]

Fortas and Harlan expressed a widely held opposition to these recent Supreme Court decisions which have imposed specific standards on the states in criminal trials.

Justice Black, however, expressed the belief in his concurring opinion in Duncan that applying the Bill of Rights to the states according to the same standards that protected those rights against the federal government, did not interfere with the "concept of federalism."[85] He could not accept the idea that under the "guise of federalism" the states could experiment with the protections afforded citizens by the Bill of Rights. He pointed out in a similar opinion in Pointer v. Texas:

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[83] Duncan v. Louisiana, 391 U.S. 145, 177.

[84] Ibid., 213.

[85] Duncan v. Louisiana, 391 U.S. 145, 170.

> . . . to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. In my view this promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism.[86]

Black's thesis was that his concept of total incorporation, or the majority's concept of selective incorporation, was actually more in the interest of the states and federalism than the fundamental fairness doctrine of Justice Harlan. He explained that Harlan's doctrine restricted the states to practices which a majority of the Court was willing to accept on a "case-by-case" basis.[87] Black described his doctrine as a fight against the expansion of the Court's authority over the states "through the use of a broad, general interpretation of due process that permits judges to strike down state laws they do not like."[88]

In a sense, Justice Black's doctrine is a more restrictive doctrine than Justice Harlan. Under Black's theory the Fourteenth Amendment would incorporate the Bill of Rights and not allow judges to decide at any one time what they thought was fundamentally fair. Nevertheless, under Black's theory the states in some instances would have to comply with what have been deemed constitutional and therefore, federal standards which might not be any better than the ones the states have

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[86] 380 U.S. 400 as quoted in Ibid.

[87] Duncan v. Louisiana, 391 U.S. 145, 171.

[88] Ibid.

developed. For example, requiring that juries must be composed of 12 men is not infinitely better than a jury of 10 or 14. Yet if the Sixth Amendment's jury trial provision were applied to the states under Black's theory then the states would have to follow such constitutional requirements. However, if a certain federal rule were deemed a constitutional requirement, as the exclusionary rule implicit in the Fourth Amendment, then it would be illogical to allow the states to violate it by using some other process, as Black points out. Probably here lies the answer to why the Court has never fully accepted Black's theory: some federal rules can not be justified as a necessary part of a constitutional provision. Thus, the Court has preferred to interpret the guarantees of the Bill of Rights on an individual basis to allow the Court to state which are, and are not, fundamental elements of a guarantee.

In light of the "new approach", what affect will the Duncan decision have on the states? The issue of federalism debated by Justices Harlan and Black is central to the answer of this question.

CHAPTER VII

DUNCAN V. LOUISIANA AND THE STATES

The dissenting opinion of Justice Harlan and the concurring opinion of Justice Fortas raised an important question about the Duncan decision: What affect would the decision have on state jury procedures? Specifically, what issues did the Court decision discuss involving the relationship of the states and federal criminal processes? The states had been allowed to determine jury procedures for one hundred years after the adoption of the Fourteenth Amendment. Moreover, until before the decision jury trial was not considered a fundamental element of criminal procedure. Even the most recent statements on jury trial had been dicta in cases involving other issues. Under these conditions little uniformity of state and federal jury trials was achieved. However, before Duncan, the Court had always held that this diversity did not adversely affect state criminal trials. Now that the Sixth Amendment jury trial had been applied to the states, the state judicial systems had to conform to the Amendment. But what requirements does the Sixth Amendment jury trial provision include? The Court dealt incidently with these issues in Duncan v. Louisiana.

The State of Louisiana contended in arguments before the Supreme Court reviewing the Duncan case that even if the state must grant jury

trials in serious criminal cases, the conviction of Gary Duncan was valid because he was tried for simple battery and was sentenced to only 60 days in the parish prison.[1] The Court denied this contention and began reviewing the guidelines in granting jury trials.

The Court recognized a commonly held belief that not all crimes were subject to jury trial at the time of adoption of the Constitution.

> So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's trial provisions. There is not substantial evidence that the Framers intended to depart from this established common-law practice . . . . These same considerations compel the same result under the Fourteenth Amendment.[2]

Thus, according to the Sixth and Fourteenth Amendments, jury trials were not granted to those accused of petty offenses. The exclusion of petty crimes from the jury trial guarantees has been justified in the interests of increased efficiency of law enforcement and judicial administration and in the view that the penalties on petty crimes are not serious enough to justify a jury trial. However, it is interesting to consider that if the Court in Duncan has found jury trial fundamental to due process, then it is fundamental in all offenses, and to exclude the petty offender is to deny him due process of law. The definition of "petty offense" however, is far from clear and has given the Court some serious difficulty on several occasions.

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[1] Duncan v. Louisiana, 391 U.S. 145, 159.

[2] Ibid., 160. See also, supra, Chapter III note 50.

As it will be recalled,[3] during the colonial period petty offenses were exempt from the privilege of a jury. Jury trials were also withheld from specific offenses and there was no unifying consideration as to the type of criminal offense subjected to summary trial,[4] no uniformity in the number of magistrates before whom the various offenses were tried, and no uniformity governing appeals to courts with juries.[5] Thus, the Court on several occasions found it difficult to define "petty offense." Callan v. Wilson[6] was the first case in which the Court stated that petty offenses could be tried without a jury. The case involved the crime of conspiracy, and the court emphasized the nature of the crime rather than the possible penalty as the determining factor in granting jury trials. The fine was only $25, but the Court decided that conspiracy was serious by its nature and, therefore, entitled to a trial by jury. In 1904, however, the Court added that in addition to the nature of the offense, the amount of punishment prescribed also determined whether a crime was petty or not.[7] In District of Columbia v. Colts the defendant violated a local police regulation requiring a license to operate a business. The maximum possible

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[3]See supra, Chapter III, notes 42-46, and accompanying text.

[4]Ibid., n. 43.

[5]Frankfurter and Corcoran,"Petty Offenses," Harvard Law Review, XXXIX, 922-25.

[6]127 U.S. 540 (1888).

[7]Schick v. U.S., 195 U.S. 65 (1904).

penalty was $300 and ninety days in prison, but he was sentenced to pay $300 or go to jail for sixty days. The Court held this was petty based on the potential penalty and the nature of the offense.[8] In 1966 the Court determined that a six month prison term was within the legislative definition[9] of petty and therefore did not require a trial by jury.[10] In Duncan the Court referred to this statutory interpretation of petty in the federal courts.[11] A case tried one month after Duncan referred to the federal legislative definition of petty as the determining factor.[12] In light of these recent cases which have emphasized the six month line, it would appear that this is the definition of petty that the Court prefers. In a sense the amount of punishment could be a gauge as to the community's view as to the serious of the crime,[13] and therefore, a crime with a lengthy penalty would not be a petty offense. On the other hand, an offense carrying a small penalty does not always indicate the offense is petty. A crime may be serious if a stigma attaches to it, or if extra-

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[8] 282 U.S. 63 (1930).

[9] 18 U.S.C. Sec. 1 defines a petty offense as one in which the punishment does not exceed six months imprisonment and a $500 fine.

[10] Cheff v. Schnackenberg, 384 U.S. 373 (1966).

[11] Duncan v. Louisiana, 391 U.S. 145, 161.

[12] Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

[13] District of Columbia v. Clawans, 300 U.S. 617, 628.

legal consequences stem from it, for example, drunken driving.[14] Nevertheless, the Court refused to settle the exact location of the line between petty and serious offenses. Furthermore, at one point the Court indicated that a one year prison term might also signify the dividing line.[15] This vagueness on the part of the Court could have been intentional in order to allow the states some measure of freedom in classifying petty crimes.

The state of Louisiana presented two arguments against the imposition of jury trial in Duncan's case. First, the penalty actually imposed on Duncan was only sixty days. Louisiana cited the Cheff case where the penalty imposed was the determining factor. The Court answered this contention by stating that Cheff did "not reach the situation where a legislative judgment as to the seriousness of the crime was imbedded in the statute in the form of an express authorization to impose a heavy penalty for the crime in question."[16] The Court explained that Cheff concerned criminal contempt which involved a wide range of conduct, some not requiring jury trial. In addition, criminal contempt was unique in that legislative bodies often authorized punishment without stating the extent of the penalty which could be imposed. Under the

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[14]Elaine J. Pollock, "Due Process and Jury Trials in State Courts," Arizona Law Review, X (1968), 499.

[15]Duncan v. Louisiana, 391 U.S. 145, 161.

[16]Duncan v. Louisiana, 391 U.S. 145, 162 n. 35.

statute in Cheff, the penalty was not set. Therefore, the Court concluded it was not applicable to the Duncan case. Although the Court has, on other occasions, used imposed penalty as the determining factor, the two year potential penalty on the offense of simple battery clearly classified the crime as serious and worthy of a jury trial. The fact that Duncan's sentence happened to be sixty days was incidental because others tried under the same statute could have easily received six months or the full two-year penalty.

The second argument by Louisiana was that simple battery was not a serious crime by nature. The simple battery in question was either a "slap" or a "touch" on the elbow.[17] Louisiana contended that this was simple, not aggravated, battery. Historically, justices of the peace in England did not use juries and they had jurisdiction over assault and battery.[18] The "Brief for Appellee" questioned In re Robinson, used by Appellant, as proof that a jury trial was required in cases of battery.[19] In this case the defendants were charged with assault and battery by "beating, wounding, and ill treating" the victim, an aggravated degree of battery, and therefore, not applicable to the case of Gary Duncan.[20] The Court did not take issue on this point with Louisiana; rather the emphasis was placed on the potential penalty that Duncan could have faced.

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[17] Duncan v. Louisiana, 391 U.S. 145, 147.

[18] Holdsworth, A History of English Law, II, 364.

[19] 20 D.C. 570 (Sup. Ct. D.C. 1892) as cited in Duncan v. Louisiana, "Brief for Appellee," 13.

[20] Ibid.

In this case the length of the penalty so clearly denoted the offense as serious, that the court did not find it necessary to consider the nature of the act as a factor in granting a jury trial.[21]

Although Duncan involved a two-year penalty, the Court had shown a preference for the six month line, as it pointed out that New York, New Jersey and Louisiana did not afford jury trials for offenses with more than six months penalty.[22] New York state provided a jury within New York City only for offenses bearing a maximum sentence greater than one year.[23] Two New York cases subsequent to the Duncan decision show a division of opinion on whether the six month line is part of the requirement placed upon the state. In People v. Morganbesser[24] the state supreme court, the court of original jurisdiction, decided that the New York statute was valid and no jury trial was required. In the second case, People v. "Bowdoin,"[25] the New York County Criminal Court decided that a one year punishment without a jury trial did not violate the Duncan decision. In New Jersey all disorderly person offenses, carrying

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[21]Aggravated battery, carrying a potential penalty of 10 years imprisonment, is not considered a jury trial crime in Louisiana. La. Rev. Stat. 14: 34.1.

[22]Duncan v. Louisiana, 391 U.S. 145, 163 n. 33.

[23]N.Y.C. Crim. Ct. Act. Sec. 40 (1966); People v. Sanabria, 249 N.Y.S. 2d 66 (1964).

[24]293 N.Y. S2d 397 (Sup. Ct. 1968).

[25]57 Misc. 2d 536, N.Y.C. Crim. Ct. (1968).

a maximum penalty of one year in jail or $1,000 fine, or both, were tried without a jury at the time of the Duncan decision.[26] In State v. Maier the New Jersey Supreme Court decided that because the offense was simple assault and battery, comparable to disorderly conduct, that it could be tried without a jury.[27]

Louisiana granted jury trials only in cases in which capital punishment or imprisonment at hard labor could be imposed.[28] In lieu of the federal standards on jury trials being applied to these states as a result of the Duncan decision, there were two possible ways for these states to adjust to the situation: (1) provide for jury trials for all offenses whose maximum possible sentence exceeded the federal six month's limit, or (2) lower the maximum possible misdemeanor sentences to meet the federal limit, so that those offenses could continue to be tried by a judge alone.[29] The Louisiana legislature has combined the two solutions by lowering the maximum possible sentence of nineteen offenses to meet the federal petty offense limit;[30] and misdemeanors whose

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[26]N.J. Stat. 2a: 169-4.

[27]13 N.J. 235 (1953).

[28]See supra, n. 16.

[29]Judith M. Arnette, "Jury Trial in Louisiana—Implications of Duncan," Louisiana Law Review, XXXIX (1968), 126-127.

[30]La. Acts 1968, No. 647 as cited in Ibid.

punishment continued to exceed the federal limit were to be tried by a five-man jury.[31] In June, 1968, the New Jersey legislature amended their disorderly person statute so that it was a petty offense subject to imprisonment for not more than six months.[32]

No specific changes have been made in New York, other than the two mentioned cases, regarding the Duncan decision. The attorney general of the state of New York, however, filed a brief as amicus curiae when the Supreme Court accepted the Duncan appeal.[33] In this brief New York argued that the federal statute providing for a six month line in petty offenses had never been held to be constitutionally mandated. The brief argued that the line was an arbitrary line drawn by Congress for describing a class of misdemeanors rather than an attempt to define the maximum constitutional limitation of sentence for offenses tried without a jury. The legislative history of 18 U.S.C. Section 1 suggested that Congress was of the view that offenses punishable by imprisonment of anything less than one year could be constitutionally tried in the federal courts without a jury and settled upon six months in order to fall well within constitutional requirements.[34] The brief cited the study of Frankfurter

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[31] La Code Crim. P. Art. 779 as cited in ibid.

[32] Assembly Bill No. 847 as cited in Ann Fraser Bours, "The Jury as the underwriter of the Presumption of Innocence in State Criminal Cases—A Role Made Possible by Duncan v. Louisiana," Boston University Law Review XLIX (1969) 148-149.

[33] "Brief of the State of New York as Amicus Curiae," Duncan v. Louisiana.

[34] See 72 Cong. Rec. 9992 (1930) as cited in ibid., 6.

and Corcoran which showed that some offenses at common law were petty even though they carried one year prison penalties.[35] The approach of the New York courts was to require jury trials only in serious, not petty, offenses, and to distinguish between the two classes of cases according to whether or not a particular crime was an indictable offense at common law. The brief concluded that since New York only dispensed with jury trials in misdemeanor offenses that were not indictable offenses at common law, the New York practice conformed with the federal standard relating to the nature of the crime charged and was consistent with the Sixth Amendment.[36]

The brief from New York was expressing the views of all the states on the determining of petty offenses. Unlike the federal courts, which had an express statutory provision on what was a petty offense, the states from the time of the adoption of their constitutions had determined petty offenses on the basis of common law. This common law referred to the common law at the adoption of the state constitution so that crimes not triable by jury at common law, and offenses of comparable character, were classified as "petty." "Offenses of comparable character" were those offenses that by their nature were similar to offenses existent at the adoption of the state constitution. On the theory of their being offenses comparable to crimes existing in colonial times, many minor offenses unknown to the common law have been held triable by a court without a

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[35] Ibid.

[36] Ibid., 5.

jury, for example, illegal sale of oleomargarine,[37] violations of game laws,[38] illegal transportation and sale of intoxicating liquors,[39] and violation of motor vehicle laws.[40] In some of the states the courts have recently been inquiring into the severity of the possible penalty and the moral quality (involving contemporary considerations) of the act, as well as whether the offense was one which required a jury at common law.[41] Nevertheless, the state test has remained basically a determination on the basis of the common law at the adoption of its constitution.

In some respects this test was not entirely different from the federal tests before an express federal statute set the determination at six months. Before such express determination the federal courts determined petty offenses also on the basis of common law.[42] In District of Columbia v. Clawans the Court said that although the nature of the offense might make it appear to be petty, the severity of the punishment may make the offense "so serious as to be comparable with common law

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[37]Schick v. U.S., 195 U.S. 65 (1904).

[38]State v. Sexton, 121 Tenn. 35 (1908) as cited in Busch, Law and Tactics, 51.

[39]State v. Skipper, 163 La. 18 (1927) as cited in ibid.

[40]Williams v. Pierson, 301 Ky. 302 (1945) as cited in ibid.

[41]In re Bueher, 50 N.J. 501 (1967).

[42]Callan v. Wilson, 127 U.S. 540 (1888).

crimes, and thus to entitle the accused to the benefit of trial by jury. . . ."[43] Since petty crimes in 1789 usually involved penalties of six months, and the federal government found a need for uniformity in federal courts, the six month division was placed in statutory form. Of course, the states continued to determine petty offenses on the basis of common law at the time of the adoption of their particular constitutions.

One source concluded from the Duncan decision that the six-month line requirement in state courts would eventually result in a gradual re-evaluation of the whole class of offenses designated as petty.[44] Although great diversity now exists between the states on penalties imposed for similar crimes,[45] it is doubtful that many more states, other than New York, New Jersey and Louisiana, will voluntarily re-evaluate all offenses they designate as petty, solely on the basis of the Duncan decision. There are several reasons for this conclusion. First, the Court did not specify a need for such a change in express terms. Second, slightly over two-thirds of the state constitutions contain a provision

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[43] District of Columbia v. Clawans, 300 U.S. 617, 625 (1937).

[44] "Constitutional Law: Fourteenth Amendment Entitles Defendants Charged with Serious Crimes in State Courts," Vanderbilt Law Review, XXI (1968), 1099, 1103.

[45] James H. Webb, "Criminal Law and Procedure," Two Centuries Growth of American Law: 1701-1901 (New York: Charles Scribner's Sons, 1901), 379-380.

essentially the same as that in the Sixth Amendment—the accused is entitled to jury trial in all criminal prosecutions.[46] In a few jurisdictions the constitutional right to jury trial is expressly limited to certain offenses, such as those prosecuted for indictment.[47] In most of these states, however, the constitutions have been extended on the right of jury trial beyond that actually stated in the constitution. The great majority of states appear to be in accord with the federal provision on petty offenses.

Justice Black was still not satisfied with using the term "petty" in granting jury trials. In Dyke v. Taylor Implement Manufacturing Company,[48] Black stated that the term "petty" was vague and "until it is given a better definition than the Court gives it today [in Duncan], I do not desire to condemn the right to trial by jury to such an uncertain fate."[49] Black admitted he was "not as sure as the Court seems to be" that the term "petty" should be used to determine jury trial for a criminal defendant. Nevertheless, the Court was unwilling to settle the exact division between petty and serious crimes. To set a fair line would be impossible, because each case has special circumstances which may be more important than the penalty imposed. Again, the Court's approach to this

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[46]Advisory Committee on the Criminal Trial, Standards Relating to Trial by Jury, (American Bar Association Project on Minimum Standards for Criminal Justice, Chicago: American Bar Association, May, 1968), 21.

[47]Alabama Constitution, Art. I, Sec. 6.

[48]391 U.S. 216 (1968). The Court decided that a 10 day jail sentence and $50 fine was petty.

[49]Ibid., 233.

problem may have been a conscious attempt to give a warning to states such as New York and New Jersey to change their laws. As in Wolf v. Colorado, if the states comply with the general spirit of the Sixth Amendment jury trial provision, then the Court will continue to allow the states some freedom in the jury trial area.

Louisiana objected to the Court's inclusion of jury trial in the due process clause because the states would be obligated to comply with all past interpretations of the Sixth Amendment.[50] Specifically, Louisiana objected to applications of the decisions for federal courts which required 12-man juries and unanimous verdicts, and the decision which barred trying of crimes subject to the Sixth Amendment jury trial provision by the procedure of de novo trials.[51] The Court, however, concluded that "it seems very unlikely to us that our decision today will require widespread changes in state criminal processes."[52] Although the Court did not reply at length to Louisiana's contention, the court supported the above conclusion with two statements. First, "our decisions interpreting the Sixth Amendment are always subject to reconsideration."[53] Second, most of the states had provisions equal in breadth to the Sixth

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[50]"Brief for Appellee", 73-81; Duncan v. Louisiana, 391 U.S. 145, 159 n. 30.

[51]Thompson v. Utah, 170 U.S. 343 (1898) (12 man juries and unanimous verdicts in federal courts); Callan v. Wilson, 127 U.S. 540 (1888) (barring de novo trials). For "de novo" see supra, note 66. Twelve-man juries and unanimous verdicts are two distinct requirements. The former stipulates that a jury must be composed of twelve men, no more, no less, in all instances. The latter, requires that the jury must reach a unanimous verdict to convict a defendant.

[52]Duncan v. Louisiana, 391 U.S. 145, 158 n. 30.

[53]Ibid.

Amendment, if that amendment was construed to exclude petty offenses. In illustrating the second contention the decision could find only four states where less than twelve-man juries were used in offenses carrying penalties greater than one year, and only two states, Louisiana and Oregon, where less-than-unanimous juries could convict for offenses carrying penalties greater than one year. The Court seemed to question one type of state procedure.

> However 10 States authorize first-stage trials without juries for crimes carrying lengthy penalties; these States give a convicted defendant the right to a de novo trial before a jury in a different court.[54]

The Court did not directly pass judgment on these de novo trials in the Duncan case. However, in citing some state provisions the majority inferred a partial approval of the one-year maximum penalty in granting jury trials. Since six states differed from the six-month line only slightly, the Court may have been accepting their provisions as constitutional under the Sixth Amendment. On the other hand, New Jersey and Louisiana have interpreted the case to require the federal limit of six months.

If other states must comply, as New Jersey, by granting 12-man, unanimous juries in all cases involving offenses carrying a penalty over six months imprisonment, then many states will have to change their constitutions and laws. Such changes indicate the degree to which the

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[54] Ibid.

state provisions of jury trial differed from the federal provisions prior to the Duncan decision although the Duncan decision does not specifically order such changes.

How varied was a state jury procedure from the federal jury procedure at the time of Duncan v. Louisiana? In federal courts a jury has always been interpreted to mean

> . . . a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted. . . . These elements were: (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 as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.[55]

This view was subsequently upheld in Andres v. U.S.,[56] and Singer v. U.S.[57]

The requirement of a unanimous verdict has been a controversial subject. Those who favored unanimity argued that the accused should be proved guilty beyond a reasonable doubt.[58] It was thought by those who supported it that requiring unanimity demanded more careful consideration of the questions in the case. Some even proved that less than unanimous verdicts worked to the disadvantage of the defendant. Jurisdictions

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[55] Patton v. U.S., 281 U.S. 276, 288 (1930).

[56] 333 U.S. 740 (1948).

[57] 380 U.S. 24 (1965).

[58] Hibbon v. U.S. 204 F. 2d 834, 6th Cir. (1953).

which allowed majority verdicts had 45% fewer hung juries.

> If a 10:2 verdict had been permitted, 34% of the juries would have convicted and 8% would have acquited; if a 9:3 verdict had been permitted, 44% would have convicted and 12% would have acquited; and if an 8:4 verdict had been permitted, 50% would have convicted and 16% would have acquited.[59]

Of the cases in which juries did reach a unanimous verdict, two-thirds were guilty verdicts. One study concluded that unanimity was not of major importance because,

> . . . in the instances where there is an initial majority either for conviction or for acquittal, the jury in roughly nine out of ten cases decides in the direction of the initial majority. Only with extreme infrequency does the minority succeed in persuading the majority to change its mind during deliberation.[60]

Nevertheless, a unanimous verdict may be part of the substantive procedure in a jury trial. It is possible that the reason juries convict in fewer cases than the judge because they must operate as a group and must reach a unanimous verdict, thus demanding a higher threshold of reasonable doubt. Although the Court said the decision would require "widespread changes," the decision inferred that those two states, Louisiana and Oregon, would have to change their laws to comply with the federal rule on unanimous verdicts. Both Oregon and Louisiana allowed less than unanimous verdicts for offenses carrying over one year imprisonment.[61]

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[59]Advisory Committee on the Criminal Trial, 27.

[60]Harry Kalven, Jr., and Hans Zeisel, The American Jury (Boston: Little, Brown and Co., 1966), 448.

[61]Louisiana Const. Art. 7 Sec. 41; Oregon Const. Art. 1 Sec. 11

Oklahoma, Texas, Idaho and Montana do not provide unanimous verdicts for offenses carrying a possible penalty over six months.[62] In a federal court such a procedure would be unconstitutional. But in view of the Court's hesitency on the question of a six-month line, the constitutionality of these provisions is in doubt. The Court further confused the question of whether unanimity will be required in DeStefano v. Woods, where the court interpreted Duncan as having "left open the question of the continued validity of the statement . . . that the Sixth Amendment right to jury trial included a right not to be convicted by less than unanimous verdict."[63]

Maxwell v. Dow held that state juries did not have to be twelve in number. At the time of the Duncan decision there were 22 state constitutions which did not require juries of 12 in certain cases, and about 20 states had enacted statutes to the effect that there would be only six jurors in trials in certain courts.[64] Most of these states met the federal requirement, however, because they either allowed less than 12 jurors only by consent of the accused or both parties, or allowed less than 12 jurors only in cases involving penalties less than six months in length.[65] The Court pointed out that only four states, Florida, Oregon,

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[62]Oklahoma Const. Art 2 Sec. 19; Texas Const. Art 5 Sec. 13; Idaho Const. Art 1 Sec. 7; Montana Const. Art 3 Sec. 23.

[63]392 U.S. 631, 633 (1968).

[64]Advisory Committee on Criminal Jury Trial, 25.

[65]Colorado, Connecticut, Delaware, Kansas, Maryland, Missouri, Nevada, Ohio, Vermont, Wisconsin, Wyoming (consent); Arizona, Michigan, Montana, Nebraska, New Mexico, South Dakota, Tennessee, Washington (less than six months).

Texas and Utah, allowed juries of less than 12 without the defendant's consent or for offenses carrying a punishment over one year. On the other hand, thirteen states do not provide 12-man juries in cases involving offenses with penalties over six months.[66] As with the unanimity requirement, the constitutionality of these provisions may be questioned.

The Court implied a certain doubt as to the acceptability of state procedures which deny jury trial in the first instance but allow a jury trial on appeal to a second court, that is, de novo.[67] This de novo procedure allows an opportunity for a convicted man to appeal to a higher court for a new trial where he would receive a jury. However, not all who appeal receive the de novo, or new, trial. The higher court looks at the evidence, and if that court feels there is doubt as to the conclusion of the lower court on the basis of evidence presented, or if that court feels the presence of doubt is so strong that a jury could possibly reach a contrary verdict, then the higher court will grant a de novo trial with jury. The disadvantages to this procedure are obvious. The ease of appeal varies greatly with the state, court, and particular judge in question. Nevertheless, the states had generally held that in

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[66] Alaska, Florida, Georgia, Iowa, Kentucky, Louisiana, New York, Oklahoma, Oregon, South Carolina, Utah, Virginia, Idaho.

[67] De novo trial-a new trial or retrial had in an appellate court in which the whole case is gone into as if no trial whatever had been had in the court below. Black, Dictionary, 1677. The de novo trial with jury denies a jury in the first trial but offers the opportunity for a second trial with a jury. Only those who are convicted and ask for the second trial receive one. Depending on the particular state's provision or particular court involved, some judges may deny the right to a de novo trial if the reviewing court sees that the judgment below was with the evidence and not against the evidence.

lesser, but not necessarily petty, offenses the constitutional right to jury trial was secured under the de novo procedure if the right of appeal was without "unreasonable restrictions."[68] However, de novo trials were declared unconstitutional in federal courts, because such procedure was considered a denial of the essential right to trial by jury.[69] When discussing state provisions on jury trial the Court in Duncan prefaced its statements on de novo trials with the hesitant "however," indicating that the ten states who offered de novo trials were not protecting the right to jury trial to its fullest extent. These ten states[70] may need to bar the de novo procedure to petty offenses only, or provide jury trials in the first instance where offenses carrying penalties over six months or even one year are involved.

The effect Duncan v. Louisiana will have on the states is still uncertain a year and two months after the decision. To what degree the Court intended the states to change their jury trial standards to comply with the federal standards is not entirely clear from the decision. Some states, New Jersey for example, have indicated that the Duncan decision imposed the federal standard of six months in petty offenses. On the question of unanimity and 12-man juries, the outcome is uncertain. On

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[68] City of Bellingham v. Hite 37 Wash. 2d 652 (1950).

[69] Callan v. Wilson, 127 U.S. 540 (1888).

[70] Alabama, Delaware, Maine, Massachusetts, New Hampshire, North Carolina, Rhode Island, Arkansas, Maryland, Minnesota.

all three issues the Court may decide what they had previously deemed constitutional requirements applicable in the federal courts as merely federal standards or rules now that the Sixth Amendment jury trial provision has been applied to the states. In other words, 12-man juries and unanimous verdicts may not be necessary to maintain the integrity of the jury trial provision of the Sixth Amendment. It is interesting to note that this is the same type of decision made in Wolf v. Colorado concerning the federal exclusion rule, a judicially implied rule not necessary for the enforcement of the Fourth Amendment. The Wolf case was overruled twelve years later in Mapp v. Ohio when the Court decided the exclusion rule was mandatory to maintain the guarantees of the Fourth Amendment. The Duncan decision implied that at least a few changes would take place as a result of the decision, but not too many. In using the "new approach" the Court pointed out that a majority of the states require 12-man juries and unanimous verdicts for serious crimes. Although mentioning some of the states which did not require such standards, the decision did not specifically state those states would have to change. The Court's indication that their interpretations of the Sixth Amendment were "always subject to reconsideration" may be heralding future decisions on the matters of 12-man and unanimity requirements.

CHAPTER VIII

SUMMARY

Before Duncan v. Louisiana, trial by jury was considered a procedural aspect of due process. The origin of the jury was commonly, although erroneously, traced to the Magna Carta in 1215. In this feudal document later generations of Englishmen found the seeds of the jury trial as a procedural safeguard against the arbitrary actions of the Crown, both in England and later in the colonies. When jury trial was brought to the colonies, it reached a dominance it had not had in England and eventually superceded all other modes of trial. The colonists generally held jury trial as an inestimable privilege in legal proceeding. However, the scope and extent of jury trial varied with each colony. The resulting diversity caused considerable debate at the Constitutional Convention, as the delegates tried to attach specific standards to the right of trial by jury.

The framers of the Constitution were only able to include a general guarantee for jury trial, so as not to endanger the varying practices relative to jury trial in the individual states. Nevertheless, all the states' new constitutions protected the right to trial by jury in one form or another. Early in the judicial history of each state, a jury trial was defined as one which met the common law characteristics or requirements of a jury at the adoption of its constitution, that is, a jury composed of exactly twelve men who would issue only unanimous verdicts.

The right to a common law jury was withheld in cases involving "petty offenses." Petty offenses were those minor offenses carrying lesser penalties and excluded from a jury trial in the interest of efficient judicial administration. However, the definition of a "petty offense" was never exact and the exclusion of these offenses from the jury trial procedure varied with each state. The federal courts followed these same common law guarantees relative to a jury. At the close of the nineteenth century, the Supreme Court had several occasions to describe the common law jury as one composed of twelve men issuing unanimous verdicts in federal courts.

In Barron v. Baltimore, 1833, the Supreme Court issued a decision which the states had, in effect, followed since the adoption of the Constitution. That decision stated that the first eight amendments applied only to the federal government and did not protect the individual against state action. Under this license, many states denied the Negro, and others, a good many civil rights guaranteed white men. The Fourteenth Amendment was specifically intended to protect the newly freed slave against arbitrary action by the state. Some contended that the framers of the Fourteenth Amendment intended, through the Amendment, to reverse the doctrine the Barron decision had announced. The main exponent of this total incorporation theory became Justice Hugo Black.

Through study of the debates a certain incorporation of the first eight amendments appears to have been understood by the members of Congress. The state ratifying legislatures, however, did not know of incorporation, but merely ratified the Amendment. Unfortunately, the Fourteenth Amendment was not interpreted by the Supreme Court as having

overturned the Barron decision. On the contrary, in the Slaughter-House Cases the Fourteenth Amendment's privileges and immunities clause was denied as a medium to incorporate the Bill of Rights. Thus, the states were free to continue administration of criminal processes as before the Civil War.

After the Slaughter-House Cases, the due process clause of the Fourteenth Amendment came under judicial view. In Hurtado v. California the Court began to restrict the states to certain "fundamental principles" at the base of "civil and political institutions." Although many members of Congress had thought due process included jury trial, the Court's decisions following Hurtado continued the belief that none of the protections of the Bill of Rights was included in the due process clause for that would have made the Constitution redundant. In 1937 in Palko v. Connecticut, the Court developed an "absorption" process more commonly called selective incorporation. Using this process certain guarantees in the Bill of Rights might be included or "absorbed" into the due process clause of the Fourteenth Amendment if the guarantee were essential to the "concept of ordered liberty." Consistent with this test state trials were judged only by terms of due process, fairness and ordered liberty. If a state trial was fundamentally fair, then the trial met the standards of due process. Of course, as had been the case throughout history, the state's procedures and laws could not violate a specific and applicable provision of the Constitution. Trial by jury was consistently held not to be fundamental to ordered liberty. Under Palko's ordered liberty test,

jury trial was a procedure that a fair and civilized system could exist without. The jury was no more fair than other modes of procedure the states might develop.

Slowly, however, the Court began to develop a "new approach" to the incorporation of specific guarantees of the Bill of Rights in regard to state actions. The majority in the Duncan case identified the test for this new approach as whether a procedure was necessary to an "Anglo-American regime of ordered liberty." The test emphasized the practices in the American states, not an idealized system as in Palko. This new test was one which could grow as the Anglo-American system changed; such was the basis for the decisions in Robinson v. California, Gideon v. Wainwright and others. One resulting affect of using the new test seemed to be an ever-increasing imposition of federal standards on the states, although this may have been merely a coincidence. The imposition of certain standards was most often made to ensure the application of a right. The decisions of the recent cases showed a reluctance to enforce a "watered-down" version a Bill of Rights' guarantee to the states. Nevertheless, the imposition of these standards are justified in the interest of liberty. For example, in Wolf v. Colorado the Court applied the Fourth Amendment right to be free from unreasonable searches and seizures, but refused to include the exclusionary rule, which the decision termed a "judicially implied" rule and not the only means of enforcement. The states could develop their own methods of enforcing the Fourth Amendment. The states, however, failed to follow the implication in Wolf and thus, in Mapp v. Ohio, the exclusionary rule was applied as a

substantive part of the Fourth Amendment right. Justice Black accepted the "new" selective incorporation, as he did not view it as an interference with federalism. He could not agree to state violation of rights which were concededly fundamental in federal courts.

Justice Harlan dissented in the Duncan case on two grounds. One, he could not find jury trial fundamental to due process, and therefore, a substantive right. Two, he espoused a doctrine of fundamental fairness, not selective incorporation. Using the fundamental fairness doctrine, Harlan criticized the majority opinion for ignoring the issue of fairness and the jury. The lack of consideration for fairness, as it had been considered in Gideon, for example, set the Duncan decision in a category by itself. The reason for the absense of opinion on the fairness issue had several causes. Primarily, the emphasis of the Court on the new "Anglo-American" approach allowed the Court to give Duncan a new trial on the sole basis of the denial of jury trial for a serious crime; i.e. carrying a two-year potential penalty. Such a lengthy penalty, without the right to trial by jury, was clearly a violation of the "American scheme of justice," regardless of the nature of the offense or the sixty-day penalty imposed. In the specific case of Duncan's original trial, there was little proof that the trial had been unfair on other grounds, or that discrimination existed against Duncan as a Negro, so that the Louisiana statute was used as the medium for the application of the right to jury trial to the states. It did not matter that Duncan's offense was only simple battery. The potential punishment was the only realistic test of fairness.

Justices Harlan, Stewart and Fortas objected to the implication

in the Duncan decision that all past interpretations of the Sixth Amendment would carry over to the states. The four basic federal requirements governing petty offenses, twelve-man juries, and unanimous verdicts, and barring de novo trials, might now be applied in state courts. Harlan saw this as an unnecessary interference with federalism. Although the Court stated that its interpretations of the Sixth Amendment were always "open to reconsideration," the Court did not squarely face the issue, and concluded that not many state changes would take place anyway. Several states have already initiated legislative changes to comply with the six month (federal) line in classifying petty offenses. Whether the states will change other standards on jury trial to meet the federal requirements is in the future. At least the requirements barring de novo trials and allowing only unanimous verdicts have some possible basis for substantive application to the jury trial right, whereas the twelve-man requirement is less convincing as a substantive requirement.

Thus, Duncan v. Louisiana has elevated jury trial from a status as a procedural safeguard to a substantive right protected against arbitrary state action. In the decision a new test has been recognized and articulated which has altered the course of American constitutional history.

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