DUNCAN v. LOUISIANA

SUPREME COURT OF THE UNITED STATES
391 U.S. 145
May 20, 1968
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OPINION: Mr. Justice WHITE…Appellant, Gary Duncan, was convicted of simple battery in the Twenty-fifth Judicial District Court of Louisiana. **Under Louisiana law simple battery is a misdemeanor, punishable by a maximum of two years' imprisonment and a $300 fine.** Appellant sought trial by jury, but because the Louisiana Constitution grants jury trials only in cases in which **capital punishment or imprisonment at hard labor** may be imposed, the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $150. Appellant sought review in the Supreme Court of Louisiana, asserting that the denial of jury trial violated rights guaranteed to him by the United States Constitution. The Supreme Court [of Louisiana]…denied appellant a writ of certiorari… Appellant sought review in this Court, alleging that the Sixth and Fourteenth Amendments to the

United States Constitution secure the right to jury trial in state criminal prosecutions where a sentence as long as **two years** may be imposed…

Appellant was 19 years of age when tried. While driving on Highway 23 in Plaquemines Parish on October 18, 1966, he saw two younger cousins engaged in a conversation by the side of the road with four white boys. Knowing his cousins, Negroes who had recently transferred to a formerly all-white high school, had reported the occurrence of racial incidents at the school, Duncan stopped the car, got out, and approached the six boys. At trial the white boys and a white onlooker testified, as did appellant and his cousins. The testimony was in dispute on many points, but the witnesses agreed that appellant and the white boys spoke to each other, that appellant encouraged his cousins to break off the encounter and enter his car, and that appellant was about to enter the car himself for the purpose of driving away with his cousins. The whites testified that just before getting in the car appellant slapped Herman Landry, one of the white boys, on the elbow. The Negroes testified that appellant had not slapped Landry, but had merely touched him. The trial judge concluded that the State had proved beyond a reasonable doubt that Duncan had committed simple battery, and found him guilty.

The Fourteenth Amendment denies the States the power to 'deprive any person of life, liberty, or property, without due process of law.' In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State; the rights of speech, press, and religion covered by the First Amendment; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses.

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"…The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. **Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, 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.** Since we consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused.

The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. In the 18th century Blackstone could write:

> 'Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown…The founders of the English law have, with excellent forecast, contrived that…the truth of every accusation…should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion.'

Jury trial came to America with English colonists, and received strong support from them. Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765—resolutions deemed by their authors to state 'the most essential rights and liberties of the colonists'—was the declaration: 'That trial by jury is the inherent and invaluable right of every British subject in these colonies.'

The First Continental Congress, in the resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries and to trials in England for alleged crimes committed in the colonies; the Congress therefore declared:

> 'That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.'

The Declaration of Independence stated solemn objections to the King's making 'judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries,' to his 'depriving us in many cases, of the benefits of Trial by Jury,' and to his

'transporting us beyond Seas to be tried for pretended offenses.' The Constitution itself, in Art. III, §2, commanded:

> '**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.'

Objections to the Constitution because of the absence of a bill of rights were met by the immediate submission and adoption of the Bill of Rights. Included was the Sixth Amendment which, among other things, provided:

> 'In all criminal prosecutions, 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.'

The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases…

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon **community participation** in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, **and must therefore be respected by the States**…

We are aware of the long debate, especially in this century, among those who write about the administration of justice, as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings. Although the debate has been intense, with powerful voices on either side, most of the controversy has centered on the jury in civil cases. Indeed, some of the severest critics of civil juries acknowledge that the arguments for criminal juries are much stronger. In addition, at the heart of the dispute have been express or implicit assertions that

juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice. Yet, the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

The State of Louisiana urges that holding that the Fourteenth Amendment assures a right to jury trial will cast doubt on the integrity of every trial conducted without a jury. Plainly, this is not the import of our holding. Our conclusion is 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. We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial. However, the fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court. Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely.

Louisiana's final contention is that even if it must grant jury trials in serious criminal cases, the conviction before us is valid and constitutional because here the petitioner was tried for simple battery and was sentenced to only 60 days in the parish prison. We are not persuaded. It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses. *Cheff v. Schnackenberg*. But the **penalty authorized** for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. *District of Columbia v. Clawans*. The penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments' of the crime in question…In the case before us the Legislature of Louisiana has made simple battery a criminal offense punishable by imprisonment for up to two years and a fine. The question, then, is whether a crime carrying such a penalty is an offense which Louisiana may insist on trying without a jury.

We think not. **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 jury trial provisions.** There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications. These same considerations compel the same result under the Fourteenth Amendment. **Of course the boundaries of the petty offense category have always been ill-defined…**In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must

either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little.

In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans* to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine. In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail. Moreover, in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term, although there appear to have been exceptions to this rule. **We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense. Consequently, appellant was entitled to a jury trial and it was error to deny it…**

CONCURRENCE: Mr. Justice BLACK/DOUGLAS…[Not Provided.]

DISSENT: Mr. Justice HARLAN/STEWART…The question…is whether the State of Louisiana, which provides trial by jury for all felonies, is prohibited by the Constitution from trying charges of simple battery to the court alone. In my view, the answer to that question, mandated alike by our constitutional history and by the longer history of trial by jury, is clearly 'no.'

The States have always borne primary responsibility for operating the machinery of criminal justice within their borders, and adapting it to their particular circumstances. In exercising this responsibility, each State is compelled to conform its procedures to the requirements of the Federal Constitution. 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.

The Court's approach to this case is an uneasy and illogical compromise among the views of various Justices on how the Due Process Clause should be interpreted. The Court does not say that those who framed the Fourteenth Amendment intended to make the Sixth Amendment applicable to the States. And the Court concedes that it finds nothing unfair about the procedure by which the present appellant was tried. Nevertheless, the Court reverses his conviction: it holds, for some reason not apparent to me, that the Due Process Clause incorporates the particular clause of the Sixth Amendment that requires trial by jury in federal criminal cases…

I have raised my voice many times before against the Court's continuing undiscriminating insistence upon fastening on the States federal notions of criminal justice, and I must do so again in this instance. With all respect, the Court's approach and its reading of history are altogether topsy-turvy.

Although we see the "incorporation doctrine" many times (the idea that the 14th Amendment "incorporates" many aspects of the Bill of Rights and, therefore, applies to state and local government as well as federal government), this is a good (but lengthy) discussion of same from the other perspective.

I believe I am correct in saying that every member of the Court for at least the last 135 years has agreed that our Founders did not consider the requirements of the Bill of Rights so fundamental that they should operate directly against the States. They were wont to believe rather that the security of liberty in America rested primarily upon the dispersion of governmental power across a federal system. The Bill of Rights was considered unnecessary by some but insisted upon by others in order to curb the possibility of abuse of power by the strong central government they were creating.

The Civil War Amendments dramatically altered the relation of the Federal Government to the States. The first section of the Fourteenth Amendment imposes highly significant restrictions on state action. But the restrictions are couched in very broad and general terms: citizenship; privileges and immunities; due process of law; equal protection of the laws. Consequently, for 100 years this Court has been engaged in the difficult process Professor Jaffe has well called 'the search for intermediate premises.' The question has been, **Where does the Court properly look to find the specific rules that define and give content to such terms as 'life, liberty, or property' and 'due process of law'?**

A few members of the Court have taken the position that the intention of those who drafted the first section of the Fourteenth Amendment was simply, and exclusively, to make the provisions of the first eight Amendments applicable to state action. This view has never been accepted by this Court. In my view, often expressed elsewhere, the first section of the Fourteenth Amendment was meant neither to incorporate, nor to be limited to, the specific guarantees of the first eight Amendments. The overwhelming historical evidence marshalled by Professor Fairman demonstrates, to me conclusively, that the Congressmen and state legislators who wrote, debated, and ratified the Fourteenth Amendment did not think they were 'incorporating' the Bill of Rights and the very breadth and generality of the Amendment's provisions suggest that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of 'liberty' and 'due process of law' but that the increasing experience and evolving conscience of the American people would add new 'intermediate premises.' **In short, neither history, nor sense, supports using the Fourteenth Amendment to put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law.**

Although I therefore fundamentally disagree with the total incorporation view of the Fourteenth Amendment, it seems to me that such a position does at least have the virtue, lacking in the Court's selective incorporation approach, of internal consistency: we look to the Bill of Rights, word for word, clause for clause, precedent for precedent because, it is said, the men who wrote

the Amendment wanted it that way. For those who do not accept this 'history,' a different source of 'intermediate premises' must be found. The Bill of Rights is not necessarily irrelevant to the search for guidance in interpreting the Fourteenth Amendment, but the reason for and the nature of its relevance must be articulated.

Apart from the approach taken by the absolute incorporationists, I can see only one method of analysis that has any internal logic. That is to start with the words 'liberty' and 'due process of law' and attempt to define them in a way that accords with American traditions and our system of government. This approach, involving a much more discriminating process of adjudication than does 'incorporation,' is, albeit difficult, the one that was followed throughout the 19th and most of the present century. It entails a 'gradual process of judicial inclusion and exclusion,' seeking, with due recognition of constitutional tolerance for state experimentation and disparity, to ascertain those 'immutable principles…of justice which inhere in the very idea of free government which no member of the Union may disregard.' Due process was not restricted to rules fixed in the past, for that 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.' Nor did it impose nationwide uniformity in details, for 'the Fourteenth 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.'**

Through this gradual process, this Court sought to define 'liberty' by isolating freedoms that Americans of the past and of the present considered more important than any suggested countervailing public objective. The Court also, by interpretation of the phrase 'due process of law,' enforced the Constitution's guarantee that no State may imprison an individual except by fair and impartial procedures.

The relationship of the Bill of Rights to this 'gradual process' seems to me to be twofold. In the first place it has long been clear that the Due Process Clause imposes some restrictions on state action that parallel Bill of Rights restrictions on federal action. Second, and more important than this accidental overlap, is the fact that the Bill of Rights is evidence, at various points, of the content Americans find in the term 'liberty' and of American standards of fundamental fairness.

An example, both of the phenomenon of parallelism and the use of the first eight Amendments as evidence of a historic commitment, is found in the partial definition of 'liberty' offered by Mr. Justice Holmes, dissenting in *Gitlow v. New York*: 'The general principle of free speech…must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.'

As another example, Mr. Justice Frankfurter, speaking for the Court in *Wolf v. Colorado* recognized that: "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the

concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

The Court has also found among the procedural requirements of 'due process of law' certain rules paralleling requirements of the first eight Amendments. For example, in *Powell v. Alabama*, the Court ruled that a State could not deny counsel to an accused in a capital case:

> "The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'…is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the Federal Constitution."

Later, the right to counsel was extended to all felony cases. The Court has also ruled, for example, that 'due process' means a speedy process, so that liberty will not be long restricted prior to an adjudication, and evidence of fact will not become stale; that in a system committed to the resolution of issues of fact by adversary proceedings the right to confront opposing witnesses must be guaranteed; and that if issues of fact are tried to a jury, fairness demands a jury impartially selected. That these requirements are fundamental to procedural fairness hardly needs redemonstration.

In all of these instances, the right guaranteed against the States by the Fourteenth Amendment was one that had also been guaranteed against the Federal Government by one of the first eight Amendments. The logically critical thing, however, was not that the rights had been found in the Bill of Rights, but that they were deemed, in the context of American legal history, to be fundamental. This was perhaps best explained by Mr. Justice Cardozo, speaking for a Court that included Chief Justice Hughes and Justices Brandeis and Stone, in *Palko v. Connecticut*[1]:

> 'If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.'

Referring to *Powell v. Alabama*, Mr. Justice Cardozo continued:

> 'The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.'

Mr. Justice Cardozo then went on to explain that the Fourteenth Amendment did not impose on each State every rule of procedure that some other State, or the federal courts, thought desirable, but <u>only those rules critical to liberty</u>…

[1] *Palko v. Connecticut* was overruled in 1969 by *Benton v. Maryland*. See Session #41.

Today's Court still remains unwilling to accept the total incorporationists' view of the history of the Fourteenth Amendment. This, if accepted, would afford a cogent reason for applying the Sixth Amendment to the States. The Court is also, apparently, unwilling to face the task of determining whether denial of trial by jury in the situation before us, or in other situations, is fundamentally unfair. Consequently, the Court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is 'in' rather than 'out.'

The Court has justified neither its starting place nor its conclusion. If the problem is to discover and articulate the rules of fundamental fairness in criminal proceedings, there is no reason to assume that the whole body of rules developed in this Court constituting Sixth Amendment jury trial must be regarded as a unit. The requirement of trial by jury in federal criminal cases has given rise to numerous subsidiary questions respecting the exact scope and content of the right. It surely cannot be that every answer the Court has given, or will give, to such a question is attributable to the Founders; or even that every rule announced carries equal conviction of this Court; still less can it be that every such subprinciple is equally fundamental to ordered liberty.

Examples abound. I should suppose it obviously fundamental to fairness that a 'jury' means an 'impartial jury.' I should think it equally obvious that the rule, imposed long ago in the federal courts, that 'jury' means 'jury of exactly twelve,' is not fundamental to anything: there is no significance except to mystics in the number 12. Again, trial by jury has been held to require a unanimous verdict of jurors in the federal courts, although unanimity has not been found essential to liberty in Britain, where the requirement has been abandoned.

One further example is directly relevant here. The co-existence of a requirement of jury trial in federal criminal cases and a historic and universally recognized exception for 'petty crimes' has compelled this Court, on occasion, to decide whether a particular crime is petty, or is included within the guarantee. Individual cases have been decided without great conviction and without reference to a guiding principle. The Court today holds, for no discernible reason, that if and when the line is drawn its exact location will be a matter of such fundamental importance that it will be uniformly imposed on the States. This Court is compelled to decide such obscure borderline questions in the course of administering federal law. **This does not mean that its decisions are demonstrably sounder than those that would be reached by state courts and legislatures, let alone that they are of such importance that fairness demands their imposition throughout the Nation.** Even if I could agree that the question before us is whether Sixth Amendment jury trial is totally 'in' or totally 'out,' I can find in the Court's opinion no real reasons for concluding that it should be 'in.' The basis for differentiating among clauses in the Bill of Rights cannot be that only some clauses are in the Bill of Rights, or that only some are old and much praised, or that only some have played an important role in the development of federal law. These things are true of all. The Court says that some clauses are more 'fundamental' than others, but it turns out to be using this word in a sense that would have astonished Mr. Justice Cardozo and which, in addition, is of no help. The word does not mean 'analytically critical to procedural fairness' for no real analysis of the role of the jury in making procedures fair is even

attempted. Instead, the word turns out to mean 'old,' 'much praised,' and 'found in the Bill of Rights.' The definition of 'fundamental' thus turns out to be **circular**.

Since, as I see it, the Court has not even come to grips with the issues in this case, it is necessary to start from the beginning. When a criminal defendant contends that his state conviction lacked 'due process of law,' the question before this Court, in my view, is whether he was denied any element of fundamental **procedural fairness**. Believing, as I do, that due process is an evolving concept and that old principles are subject to re-evaluation in light of later experience, I think it appropriate to deal on its merits with the question whether Louisiana denied appellant due process of law when it tried him for simple assault without a jury.

The obvious starting place is the fact that this Court has, in the past, held that trial by jury is not a requisite of criminal due process. In the leading case, *Maxwell v. Dow*, Mr. Justice Peckham wrote as follows for the Court: 'Trial by jury has never been affirmed to be a necessary requisite of due process of law…The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either…The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections.'

In *Territory of Hawaii v. Mankichi*, the question was whether the Territory of Hawaii could continue its preannexation procedure of permitting conviction by non-unanimous juries. The Congressional Resolution of Annexation had provided that municipal legislation of Hawaii that was not contrary to the United States Constitution could remain in force. The Court interpreted the resolution to mean only that those requirements of the Constitution that were 'fundamental' would be binding in the Territory. After concluding that a municipal statute allowing a conviction of treason on circumstantial evidence would violate a 'fundamental' guarantee of the Constitution, the Court continued: 'We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case (Sixth Amendment jury trial and grand jury indictment) are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their wellbeing.'

…Although it is of course open to this Court to re-examine these decisions, I can see no reason why they should now be overturned. It can hardly be said that time has altered the question, or brought significant new evidence to bear upon it. The virtues and defects of the jury system have been hotly debated for a long time, and are hotly debated today, without significant change in the lines of argument.

The argument that jury trial is not a requisite of due process is quite simple. The central proposition of *Palko*, a proposition to which I would adhere, is that 'due process of law' requires only that criminal trials be fundamentally fair. As stated above, apart from the theory that it was

historically intended as a mere shorthand for the Bill of Rights, I do not see what else 'due process of law' can intelligibly be thought to mean. If due process of law requires only fundamental fairness, then the inquiry in each case must be whether a state trial process was a fair one. The Court has held, properly I think, that in an adversary process it is a requisite of fairness, for which there is no adequate substitute, that a criminal defendant be afforded a right to counsel and to cross-examine opposing witnesses. But 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.

The jury is of course not without virtues. It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law. It eases the burden on judges by enabling them to share a part of their sometimes awesome responsibility. A jury may, at times, afford a higher justice by refusing to enforce harsh laws (although it necessarily does so haphazardly, raising the questions whether arbitrary enforcement of harsh laws is better than total enforcement, and whether the jury system is to be defended on the ground that jurors sometimes disobey their oaths). And the jury may, or may not, contribute desirably to the willingness of the general public to accept criminal judgments as just.

It can hardly be gainsaid, however, that the principal original virtue of the jury trial—the limitations a jury imposes on a tyrannous judiciary—has largely disappeared. We no longer live in a medieval or colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat. They are elected by the people or appointed by the people's elected officials, and are responsible not to a distant monarch alone but to reviewing courts, including this one.

The jury system can also be said to have some inherent defects, which are multiplied by the emergence of the criminal law from the relative simplicity that existed when the jury system was devised. It is a cumbersome process, not only imposing great cost in time and money on both the State and the jurors themselves, but also contributing to delay in the machinery of justice. Untrained jurors are presumably less adept at reaching accurate conclusions of fact than judges, particularly if the issues are many or complex. And it is argued by some that trial by jury, far from increasing public respect for law, impairs it: the average man, it is said, reacts favorably neither to the notion that matters he knows to be complex are being decided by other average men, nor to the way the jury system distorts the process of adjudication.

That trial by jury is not the only fair way of adjudicating criminal guilt is well attested by the fact that it is not the prevailing way, either in England or in this country. For England, one expert makes the following estimates. Parliament generally provides that new statutory offenses, unless they are of 'considerable gravity' shall be tried to judges; consequently, summary offenses now outnumber offenses for which jury trial is afforded by more than six to one. Then, within the latter category, 84% of all cases are in fact tried to the court. Over all, 'the ratio of defendants actually tried by jury becomes in some years little more than 1 per cent.'

In the United States, where it has not been as generally assumed that jury waiver is permissible, the statistics are only slightly less revealing. Two experts have estimated that, of all prosecutions for crimes triable to a jury, 75% are settled by guilty plea and 40% of the remainder are tried to the court. In one State, Maryland, which has always provided for waiver, the rate of court trial appears in some years to have reached 90%. The Court recognizes the force of these statistics in

stating, 'We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.'

I agree. I therefore see no reason why this Court should reverse the conviction of appellant, absent any suggestion that his particular trial was in fact unfair, or compel the State of Louisiana to afford jury trial in an as yet unbounded category of cases that can, without unfairness, be tried to a court.

Indeed, even if I were persuaded that trial by jury is a fundamental right in some criminal cases, I could see nothing fundamental in the rule, not yet formulated by the Court, that places the prosecution of appellant for simple battery within the category of 'jury crimes' rather than 'petty crimes.'…

In Massachusetts, crimes punishable by whipping (up to 10 strokes), the stocks (up to three hours), the ducking stool, and fines and imprisonment were triable to magistrates. The decision of a magistrate could, in theory, be appealed to a jury, but a stiff recognizance made exercise of this right quite rare. New York was somewhat harsher. For example, 'anyone adjudged by two magistrates to be an idle, disorderly or vagrant person might be transported whence he came, and on reappearance be whipped from constable to constable with thirty-one lashes by each.' Anyone committing a criminal offense 'under the degree of Grand Larceny' and unable to furnish bail within 48 hours could be summarily tried by three justices. With local variations, examples could be multiplied.

The point is not that many offenses that English-speaking communities have, at one time or another, regarded as triable without a jury are more serious, and carry more serious penalties, than the one involved here. The point is rather that until today few people would have thought the exact location of the line mattered very much. There is no obvious reason why a jury trial is a requisite of fundamental fairness when the charge is robbery, and not a requisite of fairness when the same defendant, for the same actions, is charged with assault and petty theft. The reason for the historic exception for relatively minor crimes is the obvious one: the burden of jury trial was thought to outweigh its marginal advantages. Exactly why the States should not be allowed to make continuing adjustments, based on the state of their criminal dockets and the difficulty of summoning jurors, simply escapes me.

In sum, there is a wide range of views on the desirability of trial by jury, and on the ways to make it most effective when it is used; there is also considerable variation from State to State in local conditions such as the size of the criminal caseload, the ease or difficulty of summoning jurors, and other trial conditions bearing on fairness. We have before us, therefore, an almost perfect example of a situation in which the celebrated dictum of Mr. Justice Brandeis should be invoked. It is, he said, 'one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory…' *New State Ice Co. v. Liebmann* (dissenting opinion).

This Court, other courts, and the political process are available to correct any experiments in criminal procedure that prove fundamentally unfair to defendants. That is not what is being done

today: instead, and quite without reason, the Court has chosen to impose upon every State one means of trying criminal cases; it is a good means, but it is not the only fair means, and it is not demonstrably better than the alternatives States might devise.

I would affirm the judgment of the Supreme Court of Louisiana.