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Constitutional Law: Extension of Right to Jury Trial in State Crimimal Prosecution

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Case Comment

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Defendant was charged with simple battery, a misdemeanor punishable by a maximum penalty of two years' imprisonment and a $300 fine.[1] Following denial of his request for a trial by jury,[2] he was convicted and sentenced to serve 60 days in jail and fined $150. The Supreme Court of Louisiana denied certiorari.[3] The United States Supreme Court reversed,[4] *holding* that the "due process" clause of the fourteenth amendment guarantees a right to jury trial in all criminal cases which would come within the sixth amendment guarantee[5] if tried before a federal court. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

Article III, section two[6] and the sixth amendment of the Constitution ostensibly require that the right to trial by jury be afforded those persons accused of crimes. Prior to *Duncan*, all rights guaranteed to the criminally accused by the sixth amendment, except for the right to trial by jury,[7] had been extended to the states through the fourteenth amendment.[8] The right to

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1. LA. REV. STAT. § 14:35 (1950).

2. Jury trial was denied pursuant to LA. CONST. art. VII, § 41, which grants the right to a jury trial only in cases involving the possibility of capital punishment or imprisonment at hard labor.

3. 250 La. 253, 195 So. 2d 142 (1967).

4. Jurisdiction in the Supreme Court was based on 28 U.S.C. § 1257(2) (1966), which provides that the Supreme Court may review the decision of the highest state court in which a decision could be had, if the case involves a challenge to the validity of a state constitutional provision or statute on the ground of its repugnancy to the United States Constitution, and if the state court has upheld its validity.

5. U.S. CONST. amend. VI provides: "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 . . . ."

6. U.S. CONST. art. III, § 2 states: "The trial of all crimes, except in cases of impeachment, shall be by jury . . . ."

7. "It steadily has been ruled that the commandments of the Sixth and Seventh Amendments, which require jury trial in criminal and certain civil cases, are not picked up by the due process clause of the Fourteenth so as to become limitations on the States." Fay v. New York, 332 U.S. 261, 288 (1947), *citing* Palko v. Connecticut, 302 U.S. 319, 324 (1937), and cases cited therein. *Accord*, *Ex parte* Whistler, 65 F. Supp. 40 (E.D. Wis. 1945), where the court said that article III, § 2 applies only to the federal courts.

8. Washington v. Texas, 388 U.S. 14 (1967) (compulsory process for obtaining witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of

jury trial as set forth in article III, section two had not only been limited to the federal courts, but also had been consistently interpreted as only being guaranteed to the extent that it was recognized at common law.[9] Since it was the practice at common law to try petty offenses in summary proceedings,[10] a large number of offenses were excluded from the scope of the terms "crimes"[11] and "criminal prosecutions"[12] as used in the Constitution.[13] Thus petty offenders were denied the right to jury trials in the federal courts.[14] The fifth and sixth amendments, while guaranteeing the preservation of certain traditions of trials by jury which article III, section two fails to mention,[15] do not enlarge the right to jury trial as established by that article.[16]

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opposing witnesses); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in criminal prosecutions); *In re* Oliver, 333 U.S. 257 (1948) (public trial).

9. District of Columbia v. Colts, 282 U.S. 63 (1930); Patton v. United States, 281 U.S. 276 (1930); Callan v. Wilson, 127 U.S. 540 (1888).

10. District of Columbia v. Clawans, 300 U.S. 617 (1937); District of Columbia v. Colts, 282 U.S. 63 (1930); Patton v. United States, 281 U.S. 276 (1930); Callan v. Wilson, 127 U.S. 540 (1888). *But see* J. Fox, HISTORY OF CONTEMPT OF COURT 203-09 (1927).

11. U.S. CONST. art. III, § 2.

12. U.S. CONST. amend. VI.

13. The authors of the Constitution did not mention the "petty crimes" exclusion in article III because it was too obvious to merit their attention. Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 969-70 (1926). In Schick v. United States, 195 U.S. 65 (1904), the Court concluded that the use of the word "crimes" in article III evidenced the intent of the drafters to exclude from the constitutional guarantee of a jury the trial of petty criminal offenses, *citing* 4 BLACKSTONE'S COMMENTARIES (1756). *Contra*, Kaye, *Petty Offenders Have No Peers*, 26 U. CHI. L. REV. 245 (1959). Kaye believes the words "crimes" and "criminals" as used in the Constitution do not refer solely to major transgressions. He notes that if the English practice were truly followed it would lead to a more restrictive result than that adopted by Frankfurter and Corcoran, since the English tried all misdemeanors summarily.

14. Petty crimes and offenses include soliciting prostitution, Bailey v. United States, 98 F.2d 306, 69 App. D.C. 25 (1938); engaging in the business of selling second-hand property without a license, District of Columbia v. Clawans, 300 U.S. 617 (1937); and reckless driving, District of Columbia v. Colts, 282 U.S. 63 (1930).

15. The sixth amendment has been held to require a 12-man jury, Thompson v. Utah, 170 U.S. 343, 349 (1898), and a unanimous verdict, Andres v. United States, 333 U.S. 740 (1948).

16. *Ex parte* Quirin, 317 U.S. 1, 39 (1942); Schick v. United States, 195 U.S. 65, 78 (1904); Callan v. Wilson, 127 U.S. 540, 549 (1888). Amendment VI uses the term "all criminal prosecutions," as opposed to article III, § 2 which speaks of "trial of all crimes." This was not,

The "petty crimes" exclusion has created a perplexing definitional problem.[17] The Supreme Court has stated that the severity of the penalty[18] and the nature of the crime[19] are the elements to be considered in determining whether an offense should be classified as "petty" or "serious,"[20] but no case has clearly delineated the scope of those phrases.

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however, intended to enlarge the scope of the right to a jury trial. Concern over the scope of the jury trial provisions in article III was not a motivating factor for the inclusion of the Federal Bill of Rights. Instead, it was meant to dispel public fears regarding rights not enumerated in article III. Frankfurter & Corcoran, *supra* note 13, at 970 n.248.

17. *See* Frankfurter & Corcoran, *supra* note 13, at 980-81 (1926):

> Broadly speaking, acts were dealt with summarily which did not offend too deeply the moral purposes of the community, which were not too close to society's danger, and were stigmatized by punishment relatively light. These general tendencies, both in England and in the colonies, represent the history absorbed by the Constitution . . . [Judgment is required, not mechanical tests]. We cannot exclude recognition of a scale of moral values according to which some offenses are heinous and some are not. Nor can we escape differentiation between severity of sentences and relative lightness . . . The history of the common law does not solve the problem of judgment which it raises in demonstrating that the guaranty of a jury did not cover offenses which, because of their quality and their consequences, had a relatively minor place in the register of misconduct.

The New York courts have held that trial by jury is not required in misdemeanor cases—the decision as to the nature of the offense being made by reference to the common law. People *ex rel.* Frank v. McCann, 253 N.Y. 221, 170 N.E. 898 (1930).

18. United States v. Barnett, 376 U.S. 681 (1964); District of Columbia v. Clawans, 300 U.S. 617, 627 (1937).

19. In Green v. United States, 356 U.S. 165 (1958), the Court broadly asserted that criminal contempt proceedings do not constitutionally require jury trial, thus implying that the nature of the crime is determinative, regardless of the seriousness of the violation or the severity of the penalty. In Callan v. Wilson, 127 U.S. 540 (1888), the Court held that conspiracy is not a petty crime.

20. The petty crimes exclusion is rationalized on the theory that the penalties resulting from convictions for petty offenses are not sufficiently serious to justify jury trials in light of the increased efficiency of law enforcement and judicial administration that would be fostered by the denial of the right. Waiver of the right to jury trial, by the exercise of a free and intelligent choice and with the approval of the court and the government, also contributes to greater judicial efficiency by reducing the number of jury proceedings. 391 U.S. at 160; *see* Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); FED. R. CRIM. P. 23(a). The accused cannot compel a trial before a judge alone. Singer v. United States, 380 U.S. 24 (1965), held that to compel an accused to submit to a jury trial is not a violation of his rights to a fair trial and due process. What constitutes waiver depends on the facts of each case. In Patton v. United States, 281 U.S. 276 (1930), the Court held that the defendant's acquiescence in an eleven man jury constituted a waiver of the entire jury. Regarding frequency of waiver of jury trial and its relation to geographic region and type of crime, *see* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 24-32 (1966).

In holding that the Constitution was violated when Duncan's request for a jury trial was refused, the Court admitted it favored jury trial over other fair methods of criminal adjudication.[21] The *Duncan* opinion outlined what the Court considered to be the development of a new approach to the problem of incorporation of Bill of Rights guarantees into the fourteenth amendment. In the past, incorporation had been based on the importance of the particular procedural safeguard in a theoretical and ideal system of justice. The right to a trial by jury was not felt to be one of those guarantees essential in a "scheme of ordered liberty."[22] Recent cases, however, have proceeded on the assumption that the importance of a procedural safeguard should be judged by reference to its role in the Anglo-American system of justice.[23] The *Duncan* Court stressed the importance of the jury in criminal law, stating that the framework and procedures of the criminal process in every state developed in connection with and in reliance upon the right to jury trial.[24] Thus, the Court decided that the right to trial by jury in criminal cases is "fundamental in the context of the criminal processes maintained by the American States."[25] In so doing, it apparently created and applied a new standard of incorporation.

Yet the Court refused to impeach the constitutionality of waiver of jury trial[26] on the theory that an accused person who prefers a bench trial will be as fairly treated by a judge as by a jury because the mere guarantee of a right to jury trial will make judicial or prosecutorial unfairness less likely.[27] In addition, the Court recognized that considerations of speed and efficiency entered into its approval of waiver of jury trial, as well as prosecutions of petty crimes without a right to jury trial.[28]

The Court took into consideration the effect of its holding and concluded that widespread changes in state criminal procedures would not be required even though prior constructions of the sixth amendment right to jury trial would be extended to the states.[29] Thus, the *Duncan* holding may not represent as great an extension of the right to jury trial as it appears on

21. 391 U.S. at 150 n.14.
22. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
23. 391 U.S. at 149 n.14.
24. *Id.* at 150 n.14.
25. *Id.*
26. *Id.* at 158. *See* note 20 *supra.*
27. 391 U.S. at 158.
28. *See* note 20 *supra.*
29. 391 U.S. at 158 n.30.

the surface. In Minnesota, for example, there is already a constitutional provision guaranteeing the right to jury trial to the criminally accused.[30] This provision has been construed to extend to all criminal prosecutions under state statutes, but not to those involving municipal police regulations or ordinances, the latter being considered "petty."[31] This interpretation is at least as broad a guarantee as exists under the *Duncan* rule. The Court could find only two instances other than the Louisiana scheme in which states deny jury trial for crimes punishable by imprisonment for more than six months. In New Jersey, disorderly conduct carries a one-year maximum sentence, but the accused has no right to jury trial.[32] New York allows jury trials in New York City only for offenses punishable by more than one year's imprisonment.[33]

The *Duncan* Court placed unprecedented emphasis on the seriousness of the potential sentence in determining whether a particular offense falls within the "petty crimes" exclusion.[34] If the sentence is severe enough, that fact alone will subject the trial to the jury requirement.[35] The Court viewed the possible sentence as a gauge of the social and ethical judgments of the locality.[36] Thus, the two year sentence which could have been imposed on Duncan made his crime serious enough to entitle him to a trial by jury.

The importance of the potential sentence to the definition of "petty crimes" is underscored by the result in the companion case of *Bloom v. Illinois*.[37] In that case the Court revoked the former rule that the Constitution allows all criminal contempt proceedings to be tried without a jury.[38] According to the

30. MINN. CONST. art. I, § 6.

31. State v. Ketterer, 248 Minn. 173, 177, 79 N.W.2d 136, 139 (1956). *But see* State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959). Jury trial is available on appeal to a district court. MINN. STAT. § 484.63 (1967).

32. N.J. STAT. ANN. § 2A: 169-4 (1953), *construed in* State v. Maier, 13 N.J. 235, 99 A.2d 21 (1953).

33. N.Y. PENAL LAW § 10.00(4) (McKinney 1967). *See* People v. Sanabria, 42 Misc. 2d 464, 249 N.Y.S.2d 66 (Sup. Ct. 1964), cited by the Court, 391 U.S. at 161 n.33.

34. 391 U.S. at 159.

35. *Id.*

36. *Id.* at 160.

37. 391 U.S. 194 (1968). Bloom was convicted of criminal contempt for having willfully petitioned to admit to probate a will falsely prepared and executed after the death of the putative testator. He was sentenced to 24 months' imprisonment.

38. The right to jury trial had previously been extended by statute to certain federal criminal contempt prosecutions. Cheff v. Schnacken-

Court, criminal contempt can no longer be viewed as an intrinsically petty offense, since strong consideration must be given to the particular penalty imposed.[39] Whether criminal contempt is deemed a petty offense, triable without a jury, or a serious offense requiring a right to jury trial depends upon the severity of the punishment which may be administered.[40] Because some legislatures have not fixed maximum penalties which can be imposed in criminal contempt cases,[41] the *Bloom* Court held that the penalty actually imposed is the best evidence of the seriousness of the offense.[42] Since the two-year penalty imposed on Bloom made his crime a serious one, his conviction was reversed and he was held entitled to a trial by jury.[43] It should be noted that the Court refused to make an exception to this rule for cases falling within the terms of Rule 42(a) of the Federal Rules of Criminal Procedure.[44] The Court observed that penalties imposed for contemptuous actions in the presence of the forum are usually relatively light, and that imposition of the *Bloom* rule in this context would not be unduly burdensome because such infractions may still be punished summarily.[45]

The objective of the Court in both *Duncan* and *Bloom* appears to have been to safeguard and strengthen the role of the jury in preventing "oppression by the Government."[46] Thus, in granting a constitutional right to jury trial to persons accused of serious criminal contempts, the *Bloom* Court noted that the need to maintain respect for judges and courts is not entitled to more consideration than the interest of the individual in securing the

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berg, 384 U.S. 373 (1966). The same was true in some states. *See, e.g.*, Jones v. Commonwealth, 308 Ky. 233, 213 S.W.2d 983 (1948), *construing* KY. REV. STAT. § 432.260; Marco Industries, Inc. v. United Steel Workers of America, 50 Berks 214 (Pa. Com. Pl. 1958), *construing* PA. STAT. ANN. § 2047 (1962); and State v. Boren, 253 P.2d 939 (Wash. 1953), *construing* REV. CODE WASH. § 9.23.010 (1961).

39. 391 U.S. at 211. See the discussion of prior cases in Comment, 51 MINN. L. REV. 967 (1967).

40. 391 U.S. at 198.

41. *Id.* at 206 n.8.

42. *Id.* at 211.

43. *Id.*

44. Rule 42(a): "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court."

45. 391 U.S. at 210. The *Bloom* rule does not apply to civil contempt cases. If the imprisonment is coercive, and the prisoner has the ability to release himself by complying with the court's order, he has no right to trial by jury. Shillitani v. United States, 384 U.S. 364 (1966).

46. 391 U.S. at 155.

benefits of procedural safeguards before being subjected to serious criminal punishment.[47]

The results in both *Bloom* and *Duncan* are subject to a number of criticisms. The fact that relatively few states do not already have a guarantee at least as broad as that required by *Duncan* may itself call into question the wisdom of imposing federal standards in state criminal matters relating to trial by jury. It could be argued that such federal intervention and restriction of state autonomy serves no significant purpose at the present time. Those who oppose federal interference with state judicial systems will probably condemn the *Duncan* and *Bloom* decisions on the ground that they open the way for future extension of the right to jury trial by the Supreme Court.

These fears, however, seem unfounded. The Court went to some lengths to acknowledge its recognition of the problems to efficient state judicial administration which would be posed by an across-the-board extension of the right to jury trial. Thus, it seems unlikely that in the future the Court will use its authority in this field to promulgate jury standards which would seriously alter present practices in state judicial systems.

A more valid criticism relates to the Court's failure to delineate clearly the petty-serious dichotomy.[48] Moreover, it can be argued that limitation of the right to jury trial to serious offenses avoids dealing with the crux of the problem of unfairness and governmental oppression in judicial proceedings.[49] For example, there is no constitutional right to trial by jury in cases of violation of municipal ordinances despite the fact that conviction may lead to serious economic penalties.[50]

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47. *Id.* at 208.

48. The Court cited Cheff v. Schnackenberg, 384 U.S. 373 (1966), for the proposition that crimes carrying possible penalties of up to six months do not require a jury trial if they otherwise qualify as petty offenses. 391 U.S. at 159. But the six month limit is not constitutionally required. At common law some crimes triable without a jury were punishable by up to one year's imprisonment. Frankfurter & Corcoran, *supra* note 13, at 932-33.

49. "The law has withdrawn from the universe of jury trials a wide range of matters which, although described as petty, may well involve the most frequent source of contact between the ordinary citizen and the law." H. KALVEN & H. ZEISEL, *supra* note 20, at 16-17.

50. The consequences to the defendant convicted in a municipal ordinance violation proceeding would seem to justify the added cost of a jury trial. The penalties upon conviction may include a fine, imprisonment, and such other consequences as the loss of a license that may be essential to the defendant's livelihood.

Note, *Right to a Jury Trial for Persons Accused of an Ordinance Violation*, 47 MINN. L. REV. 93, 106-07 (1963).

The problem of balancing the merits of jury trial as a safeguard against government oppression, against the burden resulting from imposition of jury trials on state court systems and the restriction of their flexibility, could conceivably have been solved by modification of the jury system and extension of the right to jury trial to more specific offenses. It has been argued that the extension of prior constructions of the sixth amendment[51] to the states may, in this regard, be unwise.[52] It is contended that if limitations must be placed on the right to jury trials in order to achieve efficiency, the petty-serious distinction is a cumbersome and confusing method.[53]

Even granting the validity of this argument, the *Duncan* decision has some merit because it allows the states to innovate and experiment within the petty crimes exclusion.[54] Just as the standards for applicability of the right to trial by jury were broadened in many states before the *Duncan* decision,[55] it is now possible that those standards will be further broadened to apply to certain petty crimes.

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51. Andres v. United States, 333 U.S. 740 (1948); Thompson v. Utah, 170 U.S. 343 (1898).

52. *See* Bloom v. Illinois, 391 U.S. 194, 211 (1968) (concurring opinion).

53. *See* Cheff v. Schnackenberg, 384 U.S. 373, 392 (1966) (dissenting opinion of Douglas, J.). Justice Douglas believes that for the Supreme Court to undertake the task of defining a class of petty contempts would be akin to an attempt to catalogue common law crimes—a power which the federal judiciary does not have. He would require a trial by jury before punishment can be imposed for any criminal contempt, until the time when petty contempts are properly defined and isolated from other species of contempts. He does not think sentence length is the sole determinant of the gravity of the crime.

54. Although the sixth amendment does not guarantee a right to trial by jury in petty offense cases, it does not prohibit it either.

55. 391 U.S. at 158 n.30.