JURY TRIALS IN CRIMINAL PROSECUTIONS:
"FREEDOM LIVES"1

The flame in the lamp of freedom has been burning brighter since the Supreme Court's decision in Baldwin v. New York.2 Although the Constitution guaranteed the right to a trial by jury "[i]n all criminal . . . prosecutions," in reality, not every accused has been afforded this right. Instead, the courts have made an unattested distinction, whereby the trial by jury guarantee is applicable only to those accused of "serious" crimes. Through the courts' interpretation, those charged with "petty" offenses are excluded. However, what constituted a petty offense has never been precisely defined. In Baldwin v. New York, the Supreme Court has made a clarification. In doing so, the Court expanded the right to a trial by jury to all those accused of "petty" offenses, where the penalty may be more than six months imprisonment.

Understanding the Baldwin decision, with all its futuristic implications, is facilitated by a brief examination and analysis of the historical path which the concept of judgment by one's peers has traversed.

The right to a jury trial may be traced to the Magna Charta.3 The preservation of this right was of major importance to the English. In 1689, the people secured express protection for this right in their Declaration and Bill of Rights.4 Years later, after commenting on the tyranny in France and Turkey where imprisonment was at the will and pleasure of the monarchs, Blackstone, the noted English jurist, wrote that

the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion.5

The English colonists who migrated to America included many hypersensitive civil libertarians who were jealously protective of the right to trial by jury. Tampering by the Crown was not tolerated. The

1 "[N]o tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the Constitution: it is the lamp that shows that freedom lives." P. Devlin, Trial by Jury 164 (1956).
3 See 4 W. Blackstone, Commentaries on the Laws of England 277-78 (Cooley ed. 1899); see also Callan v. Wilson, 127 U.S. 540, 552 (1888) ("the Magna Charta of King John, art. 46, . . . declares that no freeman shall be taken, imprisoned, or condemned, 'but by lawful judgment of his peers, or by the law of the land'.")
5 W. Blackstone, supra note 3, at 349-50.
First Congress of the American Colonies in declaring "the most essential rights and liberties of the colonists"\(^6\) included the right to trial by jury, noting that "trial by jury is the inherent and invaluable right of every British subject in these colonies."\(^7\) In response to trial before judges wholly dependent on the King and to trials in the mother country for alleged offenses executed in the colonies, the First Continental Congress declared "[t]hat 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."\(^8\) Less than two years later, the colonists, in the Declaration of Independence, again voiced their disapproval of the King's role in their judiciary. Specifically, they objected to judges who were dependent on the King by the tenure of their office and for the payment of their salaries. More importantly, however, the colonists complained of the King's attempt to deprive them of the benefits of trial by jury.

Manifestation of their concern for the right to trial by jury was its inclusion in our Constitution when the thirteen colonies formed the United States.\(^9\) However, the colonists, with a memory of oppression and repression under the King, were not fully satisfied with the protection afforded them by the Constitution. Thus, a Bill of Rights was added and the right to a trial by jury was again incorporated.\(^10\)

While trial by jury is ancient, equally ancient is the summary proceeding. Throughout British and American history, the summary proceeding has been employed to limit trial by jury in criminal cases. Both in England and in the colonies, petty offenses were decided summarily, and therefore have ever since been exempt from the sixth amendment provision for jury trials. Today, as a result, not everyone charged with a crime is entitled to a jury trial. There is a dichotomy between "se-

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\(^7\) Id.
\(^8\) Id. at 288.
\(^9\) U.S. CONST. art. 3, § 2 states that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be held in the State where the said Crimes shall have been committed."
\(^10\) U.S. CONST. amend. VI provides that "[i]n 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."

Even with the Bill of Rights included there was a struggle to ratify the new Constitution. Of crucial importance in the debate, was the protection of the individual's rights, and often mentioned was the right to trial by jury. "The friends and adversaries of the plan of the Convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: The former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." The Federalist No. 83, at 521 (B. Wright ed. 1961) (A. Hamilton). With such guarantees, the Constitution was ratified.
rious" crimes tried with juries and "petty" crimes tried without juries. Persuasive, and thus far successful, arguments for denial of jury trials in petty offense cases are based on the historical acceptance of summary proceedings.

The British, by 1776, made great use of summary proceedings. English courts tried without juries a variety of offenses.\textsuperscript{11} Penalties for these offenses were not always light. Heavy fines, imprisonment, hard labor and corporal punishment were meted out depending on the quality of the offense.\textsuperscript{12} However, Blackstone felt compelled to comment on the rise of English summary proceedings. He warned that summary proceedings had "of late been so far extended, as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases."\textsuperscript{13}

The colonies, like their mother country, resorted to summary proceedings for certain minor offenses. To illustrate, in Massachusetts the magistrates were empowered to punish by whipping, the stocks, the dunking stool, and fine and imprisonment by summary proceedings.\textsuperscript{14} Some colonies were stricter than Massachusetts, others easier. Nonetheless, summary proceedings were utilized in one fashion or another in all thirteen colonies.\textsuperscript{15}

In the contemporary jurisprudential scheme, the denial of jury trials in certain criminal cases is based upon the use of summary proceedings for petty offenses. "Certain it is that the framers did not mean to provide for jury trial in criminal cases under the new government beyond the established practice in their various states. The exclusion of 'petty offense' had been, as we have seen, the accepted doctrine of the colonies and thereafter in the states..."\textsuperscript{16} The makers of the Constitution took all this history and practice for granted and the traditional distinction between the common-law petty offense and the constitutionally required jury trial has often been recognized by the Supreme Court.\textsuperscript{17}

\textsuperscript{11} "Violations of the laws relating to liquor, trade and manufacture, labor, smuggling, traffic on the highway, the Sabbath, cheats, gambling, swearing, small thefts, assaults, offenses to property, servants and seamen, and disorderly conduct were largely in the justices' hands." Frankfurter & Corcoran, \textit{Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury}, 39 \textit{Harv. L. Rev.} 917, 928 (1926).

\textsuperscript{12} \textit{Id.} at 930-34.

\textsuperscript{13} W. Blackstone, \textit{supra} note 3, at 277-78.

\textsuperscript{14} Frankfurter & Corcoran, \textit{supra} note 11, at 988-92.

\textsuperscript{15} \textit{Id.} at 942-65.

\textsuperscript{16} \textit{Id.} at 969.

\textsuperscript{17} See District of Columbia v. Clawans, 300 U.S. 617 (1937); District of Columbia v. Colts, 282 U.S. 63 (1930); Schick v. United States, 195 U.S. 65 (1904); Natal v. Louisiana, 139 U.S. 621 (1891); Callan v. Wilson, 127 U.S. 540, 552 (1888) ("there are certain minor
In *Callan v. Wilson* the defendant was charged with conspiracy and his request for a jury trial was denied. The magistrate found him guilty and he was fined twenty-five dollars; failure to pay would result in his imprisonment for thirty days. The Supreme Court reversed his conviction on the ground that he was entitled to a jury trial. The Court felt that the nature of the offense at common law removed it from the petty category. Conspiracy was "of a grave character, affecting the public at large," and therefore a person charged with having committed it was entitled to a jury trial. "Without further reference to the authorities, and conceding that there is a class of petty or minor offenses, not usually embraced in public criminal statutes, and not of the class or grade triable at common law with a jury...we are of the opinion that the offense with which the appellant is charged does not belong to that class." Justice Harlan, a champion of the jury system, perceived that there were "offenses called petty offenses, which according to the common law, may be proceeded against summarily." He went on to note, however, that, except in those instances deemed petty, the accused in a criminal proceeding has the right to trial by jury. In deciding whether the accused is entitled to a jury the Court felt that the determining factor was the nature of the offense committed. Even at this early point the right was not confined merely to felonies, but was to be construed in light of the common law. Therefore, the Court resolved that it must embrace not only felonies punishable by confinement in the penitentiary, but also some classes of misdemeanors, the punishment of which "may involve the deprivation of the liberty of the citizen."

A few years later, in *Natal v. Louisiana*, the Supreme Court again employed the nature of the offense as the determining factor with respect to the jury trial right. Contrary to a New Orleans city ordinance, Natal maintained a market within "six squares" of a public market.

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18 127 U.S. 540 (1888).
19 Id. at 555.
21 127 U.S. at 557.
22 Id. at 549.
23 189 U.S. 621 (1891).
The Supreme Court, affirming his conviction, observed that "[a] breach of such an ordinance is one of those petty offenses against municipal regulations of police, which in Louisiana, as elsewhere, may be punished by summary proceedings, before a magistrate without trial by jury."\(^{24}\) Similarly in *District of Columbia v. Colts*,\(^{25}\) the Supreme Court relied upon the character of the offense as the determinant. The defendant was charged with reckless driving and found guilty without the benefit of a jury trial. The Court found that this was an offense *malum in se* and indictable at common law. Because it was of such a serious character, it was a crime within the constitutional protection.\(^{26}\)

*Schick v. United States*\(^{27}\) added a second criterion in determining defendants' rights to a jury trial. The Court felt that in addition to the nature of the offense, the amount of punishment would decide whether a crime were serious or petty. Schick was prosecuted for violating the Oleomargarine Act, which carried with it "a penalty of fifty dollars for each such offense." The defendant waived a jury trial and agreed to submit the issue to the Court. The Court, deciding that Schick could waive his right to a jury trial, decided that this was but a petty offense and, hence, there was no constitutional requirement of a jury trial. The Court concluded that "the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors."\(^{28}\) However, the opinion affirms the recognition of petty offenses, which did not come under the constitutional guarantee of jury trial.

In its decisions prior to 1930,\(^{29}\) the Supreme Court was without statutory guidelines as to what constituted a "petty" offense and what constituted a "serious" offense. The boundaries between "petty" and "serious" were ill-defined and subject to change. However, in December 1930, Congress passed a law which defined "petty." A petty offense, by and large, was one where possible imprisonment was for a period of no longer than six months.\(^{30}\)

\(^{24}\) *Id.* at 624.

\(^{25}\) *282* U.S. *65* (1930).

\(^{26}\) The Court concluded that "whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense." *Id.* at 73.

\(^{27}\) *195* U.S. *65* (1904).

\(^{28}\) *Id.* at 68.


\(^{30}\) Law of Dec. 16, 1930, ch. 15, 46 Stat. 1029, provided "[t]hat all offenses not involving moral turpitude, the penalty for which does not exceed confinement in a common jail
The Supreme Court, in *District of Columbia v. Clawans*, expressed its tacit approval of this limit set by Congress. The defendant was charged with selling secondhand personal property without a license, an offense punishable by a fine of not more than $300 or imprisonment of not more than ninety days. Clawans was denied a jury trial and found guilty by the trial court. The Supreme Court, considering both the offense and the punishment, felt that this was a petty offense, triable by a magistrate alone. The Court clearly imported that not every criminal proceeding must be accompanied by a jury. In determining if a jury trial is to be afforded, the Court felt that the severity of the possible maximum penalty in addition to the moral quality of the act should be considered. Since under the common law sentences of more than ninety days, some as high as six months, were meted out as punishment for petty offenses without jury trials, the Court felt that a ninety-day sentence was permissible. The Court observed, perhaps prospectively, that "a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribed, in some cases which were triable without a jury when the Constitution was adopted."

For many years the constitutional right to a jury trial was applicable only in the federal courts. It is only recently that this right has been extended to include the state judiciary. Previously, the first ten amendments were applicable only within the federal system. With the enactment of the fourteenth amendment, the argument was made that the Bill of Rights applied to the states as well, through the due process clause. The amendment specifies that no state could "deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In 1873, the Supreme Court rejected this argument, and held that the Bill of Rights was not incorporated into the fourteenth amendment. While some members, past and present, have argued that the

18 U.S.C. § 1(3) (1964). Presently, the same limit is upheld in federal cases.
first ten amendments should be included entirely, the Supreme Court has selectively extended the Bill of Rights' applicability. Today, most of the guarantees of the Bill of Rights are applicable to the states by virtue of the fourteenth amendment. If the right is one of those "fundamental principles of liberty and justice, which lie at the base of all our civil or political institutions,"\(^{38}\) or "basic in our system of jurisprudence,"\(^{39}\) or "essential to a fair trial"\(^{40}\) the Court has deemed it incorporated under the due process clause and thus applicable to the states.

In *Duncan v. Louisiana*,\(^ {41}\) the Court decided that the right to jury trials was applicable to the states. Duncan, accused of simple battery, requested a trial by jury which was denied. Duncan was found guilty by the magistrate and sentenced to serve sixty days and to pay a $150 fine. On appeal to the Supreme Court, Duncan asserted that he was deprived of a right guaranteed by the United States Constitution. It was his contention that the sixth amendment right to a trial by jury was applicable to the states through the due process clause of the fourteenth amendment. The Court, agreeing, reversed his conviction. The Court felt that a jury was "essential to a fair trial" even if the defendant was charged with a misdemeanor because the possible maximum sentence was two years.

This decision represented a significant departure by the Court from its prior position. In *Palko v. Connecticut*,\(^ {42}\) the Court had held that the fourteenth amendment did not protect from state action all that, which if done by the federal government, would be violative of the Bill of Rights. The Court said, with marked insensitivity,

> the right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.\(^ {43}\)

Earlier cases had produced a similar response from the Court.\(^ {44}\)

Prior to *Duncan*, the Supreme Court had adhered to the belief that the states were free to regulate their own court procedure, and

\(^{38}\) Herbert v. Louisiana, 272 U.S. 312, 316 (1926).

\(^{39}\) *In re Oliver*, 333 U.S. 257, 273 (1948).


\(^{41}\) 391 U.S. 145 (1968).

\(^{42}\) 302 U.S. 319 (1937).

\(^{43}\) Id. at 323.

since the right to a jury trial was not so fundamental, it was, therefore, not constitutionally protected. The Duncan Court, in overturning what seemed to be precedent, employed two arguments. First, it claimed that the language in earlier cases, indicating that jury trials were not mandated, was mere dicta. They were, therefore, not overturning precedent, but only rejecting dicta. A second reason given, which represented a significant departure from the previous thinking, was that a new standard was necessary to safeguard what constituted a fundamental principle of justice. The Court felt that this right to judgment by one's peers was deeply rooted in that concept of ordered liberty which forms the cornerstone of a free society.45

The Court in Duncan decided that the offense was not petty because it was punishable by a maximum sentence of two years. Aside from stating that a possible penalty of two years was too much, no other guideline was given.46 The Court, however, was careful to point out that in the federal system, a petty offense is punishable by no more than six months in prison and/or a $500 fine. Turning to the state system, the Court noted that there were only two jurisdictions, excluding Louisiana, in which a jury trial is denied for crimes punishable by imprisonment for more than six months.47 It is apparent that the Court, without directly deciding the line of demarcation for jury trials in state proceedings, hinted strongly that six months might become the cutoff. The Court declared that “[b]ecause 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.”48

In Bloom v. Illinois49 and Dyke v. Taylor Implement Co.,50 decided after Duncan but during the same session, the Court dealt with the right to jury trials in criminal contempt cases. Bloom was convicted of criminal contempt and sentenced to twenty-four months imprisonment. His request for a jury trial was refused. In view of

46 The Duncan Court dutifully manifested an extraordinary aggregate of judicial restraint, phlegmatically observing that “we need not . . . settle in this case the exact location of the line between petty offenses and serious crimes.” Id. at 161. Presumably, the Court was fearful that any opportunistic activism on its part might rob some future tribunal of its historic moment.
47 Id. at 161 n.33. The city of New York and the state of New Jersey were the two aberrant jurisdictions.
48 Id. at 149.
Duncan, the Court reexamined the rule that criminal contempt may be constitutionally tried without a jury. The Court felt that the best evidence as to the seriousness of the offense, when the legislature has not set a maximum penalty, is the penalty actually imposed. With Duncan in mind, the Court held that since Bloom was sentenced to two years, he was entitled to a jury trial. In the Dyke case, the defendant, without a jury trial, was found guilty of contempt, and given the maximum sentence, ten days in jail and a $50 fine. The Court in upholding the conviction, stated that this was a petty offense. "It is clear that a six month sentence is short enough to be petty" the Court concluded. The Supreme Court, in Frank v. United States, affirmed a conviction for criminal contempt without a jury trial where the defendant was placed on probation for three years. The Court held contempt proceedings equivalent to a procedure to prosecute a petty offense, which, accordingly, does not always require a jury trial. It would be safe to conclude that, in the field of criminal contempt, a right to a jury trial exists if by statute the punishment is more than six months or if the actual sentence imposed is more than six months.

In light of the Supreme Court's previous decisions, it should have been no surprise when, in Baldwin v. New York, the Court applied the federal standard for petty offenses to the states. Recently, federal courts had applied federal standards to the states in other areas involving judicial rights. The Fifth Circuit had determined that states must provide counsel for indigent defendants in criminal cases to the same extent as the federal government must. Going one step further, after the Duncan decision, that same court held that the constitutional right to counsel extended to state misdemeanor cases. In addition, when this case was adjudicated, New York City was the only jurisdiction in the country where jury trials were denied to a person accused of a crime punishable by a year's imprisonment.

In Baldwin v. New York, the Supreme Court reversed the New York Court of Appeals and overturned the appellant's conviction.

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51 See United States v. Barnett, 376 U.S. 681 (1964), holding that there was no constitutional right to a trial by jury. But cf. Cheff v. Schnackenberg, 384 U.S. 373 (1966), wherein the Court, although it held that the defendant sentenced to a term of six months imprisonment was not entitled to a jury trial, adopted the federal "petty" offense standard whereby those sentenced to terms in excess of six months were entitled to trial by jury in cases of contempt.


55 McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965).

56 Goslin v. Thomas, 400 F.2d 594 (5th Cir. 1968).

Baldwin was arrested and charged with jostling, a class A misdemeanor, punishable by up to one year's imprisonment. His pretrial motion for a jury trial was denied, based on the New York City Criminal Court Act, which provides that all trials in the criminal court are to be held without juries. Found guilty, Baldwin was given the maximum sentence of one year. The New York Court of Appeals upheld Baldwin's conviction, and rejected his argument that section forty was unconstitutional. The Court also rejected Baldwin's contention that the Criminal Court Act violates the fourteenth amendment's equal

58 N.Y. PENAL LAW § 165.25 (McKinney 1967): A person is guilty of jostling when, in a public place, he intentionally and unnecessarily: 1. Places his hand in the proximity of a person's pocket or handbag; or 2. Jostles or crowds another person at a time when a third person's hand is in the proximity of such person's pocket or handbag.

Jostling is an attempt to curb pickpocketing.

59 N.Y.C. CRIM. CT. ACT § 40 (McKinney supp. 1969): All trials in the court shall be without a jury. All trials in the court shall be held before a single judge: provided, however, that where the defendant has been charged with a misdemeanor . . . [he] shall be advised that he has the right to a trial in a part of court held by a panel of three judges thereof . . .

60 State v. Baldwin, 24 N.Y.2d 207, 247 N.E.2d 260, 299 N.Y.S.2d 424 (1969). Hogan v. Rosenberg, 24 N.Y.2d 207, 247 N.E.2d 260, 299 N.Y.S.2d 424 (1969), decided on the same day as Baldwin, determined that the New York City Criminal Court was without the authority to impose a four year reformatory sentence, the maximum penalty provided for by the state's Young Adult Procedure. See N.Y. PENAL LAW § 75 (McKinney 1967). The issue arose when a Criminal Court Judge granted the defendant's motion for a jury trial. The defendant, a young adult, was charged with two class A misdemeanors. Judge Rosenberg, granting the motion for a jury trial, had reasoned that the possible one year sentence attendant to the misdemeanor charge was sufficient in itself to render the charge "serious" and entitled the defendant to a jury trial, without considering the implications involved in the reformatory sentence permissible under the Young Adult Procedure. New York District Attorney Hogan brought an Article 78 proceeding against the Judge, seeking to prohibit the enforcement of his order. Special Term, however, agreed that a jury trial was necessary but premised this decision on the fact that a defendant was subject to a possible four year reformatory sentence. That court, moreover, found section 40 of the Criminal Court Act unconstitutional to the extent that it denied jury trials to young adults who might be subject to reformatory sentences under section 75. Hogan v. Rosenberg, 58 Misc. 2d 585, 296 N.Y.S.2d 584 (Sup. Ct. N.Y. County 1968).

The Court of Appeals reversed, holding that a jury trial was not required where the possible imprisonment was for one year. The court agreed, however, that under the Duncan decision, a sentence greater than one year would classify a crime as serious and, hence, entitle the defendant to a jury. The court upheld the constitutionality of section 40, however, preferring to find that the Criminal Court lacked jurisdiction to impose an Article 75 reformatory sentence of greater than one year without a jury trial. Of course, Baldwin has since modified this—six months is now the maximum permissible sentence without a jury.

Cf. In re D, 27 N.Y.2d 90, 261 N.E.2d 627, 313 N.Y.S.2d 704 (1970), wherein the Court held that, in juvenile proceedings at least, trial by jury is neither constitutionally mandated nor desirable. Of greater interest, however, was the dissent written by Chief Judge Fuld. Relying on the recent Baldwin decision, Judge Fuld found "... it difficult to escape the conclusion, first, that a child charged with juvenile delinquency is entitled to a trial by jury if the period for which he may be confined or incarcerated exceeds six months . . . ." 27 N.Y.2d at 98, 261 N.E.2d at 632, 313 N.Y.S.2d at 711.
protection clause, insofar as defendants charged with the same crime, outside of New York City, were afforded jury trials. The major concern of the New York Court of Appeals was the overcrowded criminal courts in the city. In contrast to Buffalo, the second largest city in the state, New York City's caseload is thirty-nine times greater. Further evidence of the burdensome caseload is the ratio of cases to judges — in Buffalo it is six and one-half to one, in New York City thirty-nine to one. The Court felt that the chaotic calendar conditions and delay in the courts because of the volume of cases justified its decision.

However, the Supreme Court of the United States could not agree. The Court found both of Baldwin's contentions valid. Previously, the Duncan Court had decreed that defendants accused of serious crimes were afforded the right to trial by jury. In Baldwin, the Court was forced to determine "the line between 'petty' and 'serious' for purposes of the sixth amendment right to jury trials." Prior cases have shown that the most important criterion in deciding whether an offense is serious or petty is the severity of the maximum authorized penalty. A six month sentence was deemed short enough to include the offense in the petty category. However, a possible two year sentence was "serious" enough to require a jury trial for the accused. The question in this case is whether the possibility of a one year sentence is enough in itself to require the opportunity for a jury trial." The Court, answering this in the affirmative, concluded "that no offense can be deemed 'petty' for the purposes of the right to trial by jury where imprisonment for more than six months is authorized."

The Court rejected the state of New York's contention that the line between serious and petty should coincide with the line between felony and misdemeanor. Granting that a felony conviction is more serious than a misdemeanor conviction, the Court felt that this in no way defeated the appellant's argument that some misdemeanors are also "serious" offenses. Refusing to adopt the felony-"serious," misdemeanor-"petty" classification, the Court adopted the uniform standard present in the country. Relying on Duncan, the Court stated that "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" may be determined by "the existing laws and practices
The Court found that New York City was alone in the entire nation in denying jury trials to the accused where conviction meant a possible prison term of more than six months. The "near uniform judgment of the Nation" furnished the Court with an objective point at which to draw the line between serious and petty offenses. The Court, having viewed the consequences of any criminal conviction, felt that "where the accused cannot possibly face more than six months imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits which result from speedy and inexpensive non-jury adjudications." However, the Court could not conclude "that these administrative conveniences, in light of the practices which now exist in every one of the fifty states as well as in the federal courts, can similarly justify denying an accused the important right to trial by jury where the possible penalty exceeds six months imprisonment." The Court was not unanimous in the *Baldwin* decision, however. Mr. Justice Black, with whom Mr. Justice Douglas joined, concurred in the opinion, agreeing that the appellant was entitled to a trial by jury. However, they contended that a jury trial should be afforded to every accused in a criminal trial. Chief Justice Burger dissented, concluding that the constitutional right to a jury trial should apply only to the federal judiciary and not the states. "The Founding Fathers therefore cast the constitutional provisions we deal with here as limitations on federal power, not the power of the States." Furthermore, the Chief Justice felt that what may be serious in one setting — "stealing a horse in Cody, Wyoming" — may be less serious elsewhere. Reject-
ing the "constant pressure to conform to some uniform pattern," the Chief Justice voted to uphold the New York City trial scheme at issue.

The effect of the decision in Baldwin will be felt immediately. The decision has removed the confusion surrounding the differentiation between petty and serious offenses. The boundaries of the petty offense category are no longer ill-defined or subject to change by jurisdictions. The task of determining what is petty is no longer a matter to be determined by the trial judge. Instead, an objective rather than subjective standard has evolved, removing all uncertainty. It is clear that an accused has the right to a jury trial where the possible penalty exceeds six months.

Immediately after the Baldwin decision the city of New York placed before the Court of Appeals two questions for its consideration; first, was Baldwin to be retroactive, and second, could the jury requirement be avoided by the Court's imposition of sentence of less than six months? The Court held that Baldwin would not be applied retroactively to cases in which the trial was begun prior to the date of decision, June 22, 1970. Moreover, it decided that the Criminal Court of the City of New York could not evade jury trials by imposing sentences of less than six months, if the accused were charged with an offense punishable by more than six months.

Confronted with this decision, the state has only two alternatives. The legislature could lower the maximum sentence for class A misde-

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73 399 U.S. at 76-77.
75 Id. Chief Judge Fuld dissented in Dargan, voicing the opinion that Baldwin had done "... nothing more or less than construe and refine the rule articulated in Duncan v. Louisiana." 27 N.Y.2d at 103, 261 N.E.2d at 635, 313 N.Y.S.2d at 715. He thus postulated that the Baldwin decision should be applicable to all cases tried after the date on which Duncan came down, May 20, 1968. Id.

In United States ex rel. Butler v. Thomas, Civil No. 70-4486 (S.D.N.Y., decided Nov. 30, 1970) (citation is to the slipsheet opinion), Judge John M. Cannella adopted the reasoning of the dissent in Dargan. Granting the petitioner a writ of habeas corpus, the judge ordered that Butler be retried within thirty days or released.

Charged with criminal possession of a dangerous drug, Butler's request for a jury trial was denied; he was subsequently convicted and sentenced to a term of one year in state prison. Referring to the New York Court of Appeals' decision in Dargan Judge Cannella explained that "[t]his court would readily defer to the wisdom of the Court of Appeals were it not for the fact that trial by jury is so crucial an element in our system of justice." Id. at 6. Accordingly the Judge found that "[t]he petitioner's fundamental right to a jury trial has existed since May 20, 1968." Id. at 7.

It would appear, however, that Butler was something of an aberration. At least two of Judge Cannella's colleagues in New York's Southern District have ruled differently, upholding the reasoning of Dargan and construing the Baldwin rule as having prospective applicability only. See United States ex rel. Buonaraba v. Commissioner of Corrections, 315 F. Supp. 556 (S.D.N.Y. 1970); United States ex rel. Farmer v. Kosan, Civil No. 70-2282 (S.D.N.Y., Sept. 4, 1970).
meanors to six months, and thereby sidestep the jury requirement. However, this seems improbable, since few upstate legislators would be inclined to adopt such a measure, solely to accommodate New York City. More likely, permanent provision will be made so that New York City will afford the right to trial by jury for those accused of class A misdemeanors. On July 9, temporary provision for jury trials in New York City was made by the appellate division in amendments to the Rules of the Criminal Court. Although the rules were ordered effective immediately, the first jury trial was not to take place until July 20 in order to allow arrangements to be made. The amended rules provide for trials before a jury of six persons, unless a defendant, in open court, waives this right. However, the questioning of prospective jurors was to be conducted by the presiding judge rather than the parties' attorneys.

The *Baldwin* decision has generated a great many needless anxieties. Critics fear that the criminal courts will be deluged and more delays will result. Certainly, the overcrowded conditions of the New York City detention centers are well appreciated. What effect the *Baldwin* decision will have on this condition remains to be seen. However, there is little doubt that much will be done in an attempt to keep the caseload of jury trials down. It is more than likely that many more cases will be dismissed. Moreover, to encourage defendants to waive jury trials, the prosecution may be willing to accept lesser pleas. Conceding that problems will arise for which solutions will have to be found, it is without a doubt a small price to pay for the protection of the individual's civil liberties.

*Baldwin*, on the other hand, might prove to be a blessing in disguise for New York. It will force the legislature to reallocate resources for the benefit of the court system. As a result, the entire judiciary may be revamped. The status of the criminal court as a viable institution should be uplifted. For example, since charges will be necessary for the jury, criminal court judges for the first time may be entitled to law clerks. But of even greater significance, the entire state court system may be unified. Prior to *Baldwin*, the criminal term of the supreme court tried criminal cases with juries, while the criminal court

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77 See, e.g., *Williams v. Florida*, 399 U.S. 78 (1970), wherein the Court held that juries of less than twelve members were valid in criminal trials.
78 This *voir dire* procedure, while followed in the federal courts, is likely to come under challenge when employed in the New York City Criminal Courts. *See* N.Y. Times, July 10, 1970, at 35, col. 1.
80 See, e.g., *id.*
did not. Now, since juries may be required in almost all cases, there is no significant difference between the two. The criminal court should, in fact, be merged into the state supreme court in the first step toward unifying the courts throughout the state. With the anticipated and necessary funds, a rejuvenation of the courts should be forthcoming.

It seems entirely reasonable to predict that in the foreseeable future the Court might extend *Baldwin* and further expand the individual's right to trial by jury. Perhaps a jury trial on demand should be the right of every defendant in all criminal proceedings. Such reasoning would not be entirely without authority. The United States Constitution provides for "the trials of all crimes, except in cases of impeachment," and the sixth amendment guarantees jury trials "in all criminal prosecutions." However self-evident this might appear, the Supreme Court has consistently denied it a literal interpretation. The reasoning is that the founding fathers intended to follow the pattern of differentiation between petty and serious offenses for jury trials. Yet, if they had so intended, why did they not include the words petty or serious, so as to be explicit? In determining subjective intent, it might be useful to look at Holmes' theory of documentary interpretation. It is his contention that an objective standard should be employed in interpreting writings. As he succinctly stated, "we ask not what this man meant, but what these words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used." His advice on statutory interpretation is that "we do not inquire what the legislature meant; we ask only what the statute means." Accordingly, it would be ludicrous to allow a conjectured intent to prevail over vividly unambiguous language. Indeed, that the right has been so long judicially restricted seems nothing less than a constitutional crisis. Although pre-constitutional history demonstrates that summary proceedings were an accepted procedure for judicial determination, there is no evidence that the Constitution was meant to continue the practice. Like slavery and land requirements for voting, limitations on jury trials are without constitutional foundation.

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82 U.S. Const. art. 3, § 2 (emphasis added).
83 U.S. Const. amend. VI (emphasis added).
85 Id. at 204.
86 Id. at 207.
87 Cf. District of Columbia v. Clawans, 300 U.S. 617, 634 (1937) (MacReynolds, J., dissenting): "Constitutional guarantees ought not be subordinated to convenience, nor denied upon questionable precedents or uncertain reasoning."
The chief argument employed by the courts against granting jury trials in all criminal prosecutions is expediency. However, a brief study of jurisdictions which allow jury trials for petty offenses seems to negate this supposition. In California, for example, a jury trial is offered for all offenses, including traffic infractions. Significantly, there is a high waiver rate of jury trials for misdemeanors—in the entire state, only three percent of misdemeanor cases are conducted before juries. For Los Angeles County, the figure rises only to 10 percent. Similarly, in Detroit, relatively few jury trials are demanded for minor offenses. During a typical month, only two to ten juries will be requested according to some judges. Only 2.5 percent of all trials in Detroit's Traffic Court were before a jury. The figure for the misdemeanor division of the court is even less, a scant one-tenth of 1 percent. In New York City, on July 20, the first time juries were utilized in the criminal court in compliance with the Baldwin ruling, only one jury was selected and only one jury trial actually commenced.

Implicit in this argument is the belief that, if petty offenders were given their constitutional right to a jury trial, their constitutional right to a speedy trial might be jeopardized.

"Where the accused cannot possibly face more than six months imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits which result from speedy and inexpensive nonjury adjudications." Baldwin v. New York, 399 U.S. 66, 73 (1970).

"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." Duncan v. Louisiana, 391 U.S. 145, 160 (1968).

"The convenience and benefit to the public resulting from a prompt and inexpensive trial and punishment of violations of petty and trivial police power regulations are more important than the comparatively small prejudice to the individual resulting from his being deprived of the safeguard . . . . of trial by jury . . . ." Katz v. Eldredge, 97 N.J.L. 123, 151, 117 A. 841, 852 (1922).

The New York Civil Liberties Union conducted a survey to determine the extent of misdemeanor jury trials in certain cities. The results were as follows: Columbus, Ohio—less than 5 percent; Minneapolis, Minn.—5 percent; Philadelphia, Pa.—1.5 percent; Pittsburgh, Pa.—5 percent; San Diego, Cal.—30 percent where the punishment exceeded six months and 6 percent where less than six months; San Francisco, Cal.—.002 percent; Washington, D.C.—15-20 percent where punishment exceeded six months and 5-10 percent where less than six months. N.Y.C.L.U. LEG. Mxam. No. 20, at 27-28 (Feb. 6, 1969).

CALIF. PENAL CODE, § 689 (West 1956).
Id.
D. McINTYRE, LAW ENFORCEMENT IN THE METROPOLIS 141 (1967).
M. VIRTUE, SURVEY OF METROPOLITAN COURTS—DETROIT AREA 126 (1950). See also H. KALVEN & H. ZEISEL, THE AMERICAN JURY 18 (1966). However, in the final report of the survey, updated statistics in this area were not included. The author does note, though, that jury trials in all courts were on the rise. See, e.g., M. VIRTUE, SURVEY OF METROPOLITAN COURTS FINAL REPORT (1962).
N.Y. Times, July 21, 1970 at 22, col. 1. There were dismissals and guilty pleas for the most part. Commenting on this situation, Criminal Court Judge Lang offered
Based on the available empirical evidence, expediency cannot provide a valid ratiocination for limiting jury trials.\textsuperscript{96} It seems somewhat Orwellian to place the public convenience above the most primitive of all individual rights — the right to exist as a free man.

Considering the consequences of a conviction for a crime (misdemeanor), it would be difficult to deem any offense petty. Thus the majority in \textit{Baldwin}, while declaring six months as the arbitrary line of demarcation between petty and serious, pointed out that “[i]ndeed the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or ‘petty’ matter and may result in quite serious repercussions, affecting his career and his reputation.”\textsuperscript{97} In New York, a person convicted of a misdemeanor can be denied a license for dentistry, pharmacy, optometry and public accountancy.\textsuperscript{98} Numerous occupations in New York require licenses which are granted at the discretion of a commissioner, who may demand “a fit and proper person” as an applicant. Conviction for a misdemeanor has been upheld as grounds for denying a license to one who must be “fit and proper.”\textsuperscript{99} In addition, one convicted of a misdemeanor may be barred from public housing in the city.\textsuperscript{100}

The Court’s estimate was quite accurate as to the serious repercussions which might result from a misdemeanor conviction. It is unfortunate, however, that the Court did not see fit to extend the right to all criminal cases.

Arguing for the right to jury trials in all criminal proceedings were Justices Black and Douglas. Concurring in \textit{Baldwin} they observed that “the Constitution guarantees a right of trial by jury in two separate places, but in neither does it hint of any difference between ‘petty’ offenses and ‘serious’ offenses.”\textsuperscript{101} They further criticized the Court for something of a socratic explanation: “Here we are on this historic day and the more things change, the more they stay the same.”\textsuperscript{Id.}

\textsuperscript{96} Recently at a public hearing conducted by the New York State Assembly Codes and Judiciary Committees, Judge Ryan commented on \textit{Baldwin}. He said that after the decision there was “grave concern that our court would be inundated by jury trials,” but noted that presently “there is no cause for panic at all.” In the two month period following the decision, less than 2 percent of those entitled invoked their right to a jury trial. Numerically, this percentage translates into 42 jury trials out of 2,850 applicable cases. N.Y.L.J., Sept. 22, 1970, at 1, col. 1.

\textsuperscript{96} 399 U.S. at 73.

\textsuperscript{97} Brief for Appellant at 27, Baldwin v. New York, 399 U.S. 66 (1970). In addition, the suspension or revocation of the following licenses may result from a conviction of a “crime”: practitioner of medicine, osteopathy or physiotherapy; professional nurse; barbershop; hairdressing; cosmetology; attorney.

\textsuperscript{98} See id.

\textsuperscript{99} Id. For complete data on the collateral consequences from conviction of a misdemeanor in New York, see id. at App. C.

\textsuperscript{100} Id. 399 U.S. at 74 (concurring opinion).
its long-standing chimerical distinction: "many years ago this Court, without the necessity of an amendment pursuant to Article V, decided that 'all crimes' did not mean 'all crimes,' but meant only 'all serious crimes'." 102 The Justices objected to the mutilation of our written Constitution by the Court "in substituting its own judgment for that embodied in the Constitution." 103 Justices Black and Douglas had previously expressed doubt that a man's imprisonment by the government for any length of time can be considered petty. 104

It should be noted that little, if any, time is lost in giving the petty offender the right to be tried by a jury. Although this right is rarely invoked by the accused, its importance rests as much in its availability as in its use. The right was created to protect individuals against arbitrary law enforcement and prosecution. In a society which condones such chilling instrumentalities as preventive detention and "no-knock" searches, it is of paramount importance that the constitutional guarantee to the right to trial by jury in criminal proceedings be available to all.

102 Id. at 75.
103 Id.