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Richard A. Weinberg

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THE RIGHT TO A JURY TRIAL IN OBSCENITY PROSECUTIONS: A SIXTH AMENDMENT ANALYSIS FOR A FIRST AMENDMENT PROBLEM

INTRODUCTION

In prosecutions pursuant to municipal ordinances prohibiting distribution or display of obscene material,¹ a question arises as to whether the defendant has a constitutional right to a trial by jury.² Some states provide for a jury trial for all or most municipal offenses;³

1. *E.g.*, Arcadia, Cal., Ordinance 1690 (Nov. 20, 1979) (amending Arcadia, Cal., Mun. Code § 6439); Vernon, Conn., Ordinance 89 (Jan. 1, 1975); Hollywood, Fla., Ordinance 0-77-72 (Oct. 19, 1977); Hollywood, Fla., Ordinance 0-77-71 (Oct. 5, 1977); Chicago, Ill., Mun. Code § 192-10.1 (adopted June 24, 1960); Hoffman Estates, Ill., Ordinance 699-1975 (Mar. 6, 1975) (amending Hoffman, Ill., Mun. Code ch. 7); Bowling Green, Ky., Ordinance 77-34 (June 21, 1977) (amending Bowling Green, Ky., Code of Ords. by adding §§ 9-100 to -110); Philadelphia, Pa., Bill No. 699 (Oct. 7, 1977) (amending Philadelphia, Pa., Code tit. 10 by adding ch.10-1100); Irving, Tex., Ordinance 2923 (Jan. 6, 1977) (amending Irving, Tex., Code of Civ. & Crim. Ords. by adding § 44); Fairfax County, Va., Code § 5-1-23 (adopted Feb. 9, 1976); Weston, Wis., Mun. Code § 4.105 (adopted May 5, 1978). Whether municipalities can prohibit the distribution or display of obscene material may depend on whether a state statute preempts the ordinance. *Whitney v. Municipal Court*, 58 Cal. 2d 907, 909, 377 P.2d 80, 81-82, 27 Cal. Rptr. 16, 17-18 (1962) (en banc); *see Bundo v. Liquor Control Comm'n*, 92 Mich. App. 20, 25, 283 N.W.2d 860, 863 (1979). In addition to considering the express language of the statute, *Whitney v. Municipal Court*, 58 Cal. 2d 907, 909, 377 P.2d 80, 82, 27 Cal. Rptr. 16, 18 (1962) (en banc); *Bundo v. Liquor Control Comm'n*, 92 Mich. App. 20, 25-26, 283 N.W.2d 860, 863 (1979), courts will also consider legislative history in determining whether municipal legislation is preempted. *Whitney v. Municipal Court*, 58 Cal. 2d 907, 909, 377 P.2d 80, 82, 27 Cal. Rptr. 16, 18 (1962) (en banc); *Olson v. City of West Fargo*, 305 N.W.2d 821, 831 (N.D. 1981).

2. *Compare Holderfield v. City of Birmingham*, 380 So. 2d 990, 993 (Ala. Crim. App. 1979) (jury trial not constitutionally required in the first instance), *cert. denied*, 449 U.S. 888 (1980), *with City of Kansas City v. Darby*, 544 S.W.2d 529, 532 (Mo. 1976) (en banc) (jury trial constitutionally required in the first instance), *appeal dismissed and cert. denied*, 431 U.S. 935 (1977). One of the purposes of the sixth amendment is to protect defendants from the "corrupt or overzealous prosecutor and . . . the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Juries also provide for (1) "resolution of factual issues by group deliberation rather than by the decision of a single judge," Note, *The Petty Offense Exception and the Right to a Jury Trial*, 48 *Fordham L. Rev.* 205, 210 (1979) [hereinafter cited as *Petty Offense*]; *see Sparf v. United States*, 156 U.S. 51, 99-106 (1895), and (2) community involvement in the judicial process so as to create both community responsibility and public confidence in the system. *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting); *Petty Offense, supra*, at 210-11.

3. Mont. Code Ann. § 95.2004(a) (Supp. 1977); N.Y. Crim. Proc. Law § 340.40(2) (McKinney 1971). Minnesota case law requires a jury trial for all obscenity prosecutions. *City of Duluth v. Sarette*, 283 N.W.2d 533, 538 (Minn. 1979)(en banc).

in other states, however, municipal offenses are not tried to juries.⁴ A few states use a two-tier system in which the initial trial is by the court,⁵ but on appeal the defendant is entitled to a jury trial *de novo*.⁶ Although the Supreme Court has determined that a two-tier system does not by itself unconstitutionally burden a defendant's right to a jury trial,⁷ it has declined to hear the question of whether this system is constitutional in the context of an obscenity prosecution.⁸

The sixth amendment⁹ guarantees a defendant a trial by jury for non-petty, or serious, offenses¹⁰—a characterization that customarily

4. *State v. Webb*, 335 So. 2d 826, 828 (Fla. 1976); *Boyd v. County of Dade*, 123 So. 2d 323, 328 (Fla. 1960); Fla. R. Crim. P. 3.251; see N.J. Ct. R. 7:4. New Jersey municipal courts have jurisdiction of "all complaints charging offenses within its trial jurisdiction and all indictable offenses triable by it upon the defendant's waiver of indictment and trial by jury." *Id.* 7:4-1. All crimes in New Jersey are prosecuted by indictment unless indictment is waived by the defendant. *Id.* 3:7-2. Crimes in New Jersey are defined as offenses that carry authorized sentences in excess of six months. N.J. Stat. Ann. § 2C:1-4(a) (West 1980). Thus, prosecutions for violations of municipal ordinances are not tried to a jury if the authorized sentence is six months or less.

5. Alabama does not provide a jury trial in municipal courts. Ala. Code § 12-14-6 (1975). In Pennsylvania, a defendant charged with a violation of a municipal ordinance that punishes a crime as a summary offense is not entitled to a jury trial initially. Pa. R. Crim. P. 63(b). In Virginia, the accused has the right to a jury trial in a court of record on a plea of not guilty, Va. Sup. Ct. R. 3A:19(a), but municipal courts are not courts of record. Va. Code § 16.1-69.5(a), (e) (1975). Municipal courts have exclusive jurisdiction of prosecutions for violations of municipal ordinances within the geographic boundaries of the municipality. *Id.* § 16.1-124(1). Washington provides a jury trial in its municipal courts when the defendant could lose his driver's license if convicted or for prosecutions of "other gross misdemeanors." Wash. Rev. Code Ann. § 3.50.280 (Supp. 1981). Gross misdemeanors are offenses punishable by sentences of more than ninety days but not more than one year. *Id.* § 9A.04.040(2) (1977).

6. Alabama allows appeals from municipal court convictions, Ala. Code § 12-14-70(c) (Supp. 1979), providing for a jury trial *de novo*, *id.* § 12-11-30(3) (1975), in misdemeanor cases, *id.* § 15-14-30, which are punishable by a fine of up to \$500 and a sentence of up to six months. *Id.* § 15-18-3. Pennsylvania provides a jury trial *de novo* in the Philadelphia court system. Pa. R. Crim. P. 6006(a)(1), (2). Virginia grants a right of appeal from a court not of record, Va. Code § 16.1-132 (1975), and provides for a jury trial *de novo*. *Id.* § 16.1-136. The judgments of the municipal courts in Washington are subject to review in the superior court *de novo* with a jury. Wash. Rev. Code Ann. §§ 3.50.370, .410 (Supp. 1980).

7. *Ludwig v. Massachusetts*, 427 U.S. 618, 630 (1976).

8. *Howell v. City of Birmingham*, 383 So. 2d 567 (Ala. Crim. App.), *cert. denied*, 449 U.S. 937 (1980). The Court was presented with the question "[w]hether, in obscenity cases, a trial by jury is required in the first instance on the issue of contemporary community standards." Petition for Certiorari at i, *Howell v. City of Birmingham*, 449 U.S. 937 (1980). Three justices dissented, voting to grant certiorari and reverse the conviction. 449 U.S. at 937.

9. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."). The right to trial by jury in federal court guaranteed by the sixth amendment is applicable to the states through the fourteenth amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

10. See *Scott v. Illinois*, 440 U.S. 367, 371 (1979); *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968); *District of Columbia v. Clawans*, 300 U.S. 617, 630 (1937); *Callan v. Wilson*, 127 U.S. 540, 555 (1888) (dictum).

requires an authorized sentence in excess of six months.¹¹ Many municipal obscenity ordinances authorize only fines or sentences too short to qualify obscenity as non-petty on the basis of length of sentence alone.¹² Thus, under the interpretation of the sixth amendment that focuses on length of sentence, a jury trial is not guaranteed in all obscenity cases.

11. *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974); *Baldwin v. New York*, 399 U.S. 66, 69 (1970). The seriousness of the penalty is an element to be considered "in determining whether a statutory offense, in other respects trivial and not a crime at common law, must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial." *District of Columbia v. Clawans*, 300 U.S. 617, 625 (1937). As early as *Schick v. United States*, 195 U.S. 65 (1904), the Supreme Court suggested that the authorized penalty was a factor in the petty/non-petty determination. *Id.* at 67-68. The Court has emphasized that the maximum authorized sanction is the most relevant indication of a crime's seriousness. *Baldwin v. New York*, 399 U.S. 66, 68 (1970); *Frank v. United States*, 395 U.S. 147, 148 (1969).

12. *E.g.*, *Arcadia, Cal.*, Ordinance 1690, § 2 (Nov. 20, 1979) (amending *Arcadia, Cal.*, Mun. Code § 6439) (six months and \$500 fine); *Vernon, Conn.*, Ordinance 89, § 3 (Jan. 1, 1975) (thirty days and \$100 fine); *Hollywood, Fla.*, Ordinance 0-77-72, § 1 (Oct. 19, 1975) (ninety days and \$500 fine); *Chicago, Ill.*, Mun. Code § 192-10.2 (adopted Dec. 28, 1956) (six months and \$200 fine); *Hoffman Estates, Ill.*, Ordinance 699-1975, § 1 (March 6, 1975) (amending *Hoffman Estates, Ill.*, Mun. Code by adding ch. 7, art. 11) (\$500 fine); *Bowling Green, Ky.*, Ordinance 77-34(4) (June 21, 1977) (amending *Bowling Green, Ky.*, Code of Ords. by adding § 9-110) (six months and \$500 fine); *Philadelphia, Pa.*, Bill No. 699 (Oct. 7, 1977) (amending *Philadelphia, Pa.*, Code tit. 10 by adding ch. 10-1100) (ninety days and \$300 fine); *Irving, Tex.*, Ordinance 2923, § 2 (Jan. 6, 1977) (\$200 fine); *Weston, Wis.*, Mun. Code § 4.105(4) (adopted May 8, 1978) (sixty days and \$1500 fine). *Contra Fairfax County, Va.*, Code § 5-1-23(g)(1) (adopted Feb. 9, 1976) (twelve months and \$1000 fine). Many state statutes, on the other hand, authorize sentences longer than six months for the display, distribution or other promotion of obscene material. *Cal. Penal Code* § 311.2 (West Supp. 1982) (prohibiting preparation or importation of obscene material); *id.* § 311.9 (most violations of § 311.2 punishable by sentences up to one year); *Fla. Stat. Ann.* § 775.082(4)(a) (West 1976) (misdemeanor of first degree, possible one-year imprisonment); *id.* § 847.011(1)(a) (misdemeanor of first degree); *Ill. Ann. Stat. ch. 38, § 11-20(d)* (Smith-Hurd 1979) (Class A misdemeanor); *id.* § 1005-8-3(a)(1) (Smith-Hurd Supp. 1981-1982) (Class A misdemeanor, possible sentence less than one year); *Ky. Rev. Stat.* § 531.020(2) (1975) (distribution of more than one unit of material a Class A misdemeanor); *id.* § 532.090 (Class A misdemeanor, sentence up to one year); *N.Y. Penal Law* § 70.15(1) (McKinney 1980) (class A misdemeanor punishable by imprisonment of up to one year); *id.* § 235.05 (class A misdemeanor); *Tex. Penal Code Ann.* § 12.34 (Vernon 1974) (felony of third degree punishable by not more than ten years, not less than two years); *id.* § 43.23(b) (Vernon Supp. 1982) (felony of third degree); *Wis. Stat. Ann.* § 939.50(3)(d) (West Supp. 1981-1982) (\$10,000 or five years imprisonment or both for a class D felony); *id.* § 944.21 (class D felony); *see N.J. Stat. Ann.* § 2C:34-2(b) (West Supp. 1980) ("any person charged pursuant to this section shall have the right to a trial by jury"). A state obscenity statute may preempt municipal prohibition of obscenity. *See supra* note 1.

Length of sentence, however, is not the only factor relevant to a classification of an offense as non-petty; courts have also considered whether the crime is morally offensive. Whether obscenity is sufficiently offensive to qualify as a non-petty crime, however, has not been considered. Instead, obscenity defendants have been granted or denied jury trials under a first amendment analysis alone.¹³

Freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom."¹⁴ Obscenity is not part of that matrix.¹⁵ Because there is nevertheless a fine line between protected and unprotected speech,¹⁶ and because the erroneous removal of that protection hinders the free exchange of ideas,¹⁷ the Supreme Court requires procedural safeguards of the highest order in cases involving first amendment rights.¹⁸ Courts in obscenity cases are not in agreement, however, as to whether the Constitution guarantees an obscenity defendant the right to a jury trial,¹⁹ or if a jury is guaranteed, whether it should be accorded in the first instance in two-tier

13. *Holderfield v. City of Birmingham*, 380 So. 2d 990, 991-93 (Ala. Crim. App. 1979), *cert. denied*, 449 U.S. 888 (1980); *City of Duluth v. Sarette*, 283 N.W.2d 533, 537 (Minn. 1979) (en banc); *City of Kansas City v. Darby*, 544 S.W.2d 529, 531-32 (Mo. 1976) (en banc), *appeal dismissed and cert. denied*, 431 U.S. 935 (1977).

14. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *accord* *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958); *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring); *Near v. Minnesota*, 283 U.S. 697, 713 (1931); J. Nowak, R. Rotunda, J. Young, *Handbook on Constitutional Law* 719 (1978) [hereinafter cited as J. Nowak]; B. Schwartz, *Constitutional Law: A Textbook* § 8.1, at 311 (2d ed. 1979); *see* Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963). "Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society." *Id.* at 878-79.

15. *Miller v. California*, 413 U.S. 15, 23 (1973); *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972) (per curiam); *United States v. Reidel*, 402 U.S. 351, 354 (1971); *Roth v. United States*, 354 U.S. 476, 485 (1957); *City of Kansas City v. Darby*, 544 S.W.2d 529, 532 (Mo. 1976) (en banc), *appeal dismissed and cert. denied*, 431 U.S. 935 (1977).

16. *Blount v. Rizzi*, 400 U.S. 410, 417 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961); *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *see* *Hamburg, Utah Law Voided by Federal Court*, N.Y.L.J., Mar. 11, 1982, at 1, col. 1, at 2, col. 3.

17. *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring); *see* *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958).

18. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-17 & n.12 (1980) (per curiam); *McKinney v. Alabama*, 424 U.S. 669, 673-74 (1976); *Blount v. Rizzi*, 400 U.S. 410, 416-17 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961); *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *Roth v. United States*, 354 U.S. 476, 488 (1957); *accord* *Hanby v. State*, 479 P.2d 486, 490-91 (Alaska 1970); *see* *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *Smith v. California*, 361 U.S. 147, 155 (1959).

states.²⁰ This Note contends that obscenity offenses are non-petty per se and thus under the sixth amendment must be tried to a jury regardless of the penalty authorized. This Note further contends that because prosecuting obscenity in the two-tier system abridges first amendment rights, a jury must be available in the first instance.

I. THE FIRST AMENDMENT APPROACH

A. *Municipal Ordinance Enforcement*

Whether a violation of a municipal ordinance authorizing a sentence of six months or less will be tried to a jury may be dictated by the state legislature. For example, New York State provides for a jury trial in local criminal courts outside New York City for misdemeanors²¹—all offenses punishable by sentences of more than fifteen days but not more than one year.²² New York City criminal courts provide a jury only when the defendant faces a possible sentence in excess of six months.²³ Montana provides for a jury trial in all prosecutions of municipal offenses.²⁴

In contrast, some states' municipal criminal justice systems do not provide for a jury. Florida's rules of criminal procedure require a jury trial for all criminal prosecutions.²⁵ The Florida Supreme Court, however, held that prosecutions of municipal offenses do not warrant jury trials because such violations were tried without jurors prior to the adoption of Florida's constitution.²⁶ Obtaining the same result more directly, New Jersey court rules do not provide for trial by jury in municipal courts.²⁷

19. *Compare* Holderfield v. City of Birmingham, 380 So. 2d 990, 993 (Ala. Crim. App. 1979) (jury not constitutionally required), *cert. denied*, 449 U.S. 888 (1980), *and* City of Duluth v. Sarette, 283 N.W.2d 533, 538 (Minn. 1979) (en banc) (same), *with* City of Kansas City v. Darby, 544 S.W.2d 529, 532 (Mo. 1976) (en banc) (jury constitutionally required), *appeal dismissed and cert. denied*, 431 U.S. 935 (1977).

20. *Compare* Holderfield v. City of Birmingham, 380 So. 2d 990, 991, 993 (Ala. Crim. App. 1979) (jury not constitutionally required in the first instance), *cert. denied*, 449 U.S. 888 (1980), *with* City of Kansas City v. Darby, 544 S.W.2d 529, 532 (Mo. 1976) (en banc) (jury constitutionally required in the first instance), *appeal dismissed and cert. denied*, 431 U.S. 935 (1977).

21. N.Y. Crim. Proc. Law § 340.40(2) (McKinney 1971).

22. N.Y. Penal Law § 70.15(1) (McKinney Supp. 1981-1982). Offenses punishable by sentences of fifteen days or less are classified as violations. *Id.* § 70.15(4) (McKinney 1975).

23. N.Y. Crim. Proc. Law § 340.40(2) (McKinney 1971).

24. Mont. Code Ann. § 95-2004(a) (Supp. 1977). In Minnesota, a jury trial is judicially required in all obscenity prosecutions. *City of Duluth v. Sarette*, 283 N.W.2d 533, 538 (Minn. 1979).

25. Fla. R. Crim. P. 3.251.

26. *State v. Webb*, 335 So. 2d 826, 828-29 (Fla. 1976); *Boyd v. County of Dade*, 123 So. 2d 323, 328 (Fla. 1960). A defendant would be entitled to a jury trial if the municipal offense also constituted a crime under state law. *Powers v. State*, 370 So. 2d 854, 855 (Fla. Dist. Ct. App. 1979); *see supra* note 1.

27. *See supra* note 4.

Other states, however, balance the benefits of a jury trial against administrative convenience.²⁸ These states provide for a jury trial only on appeal, after the defendant has been convicted of a municipal offense at a bench trial.²⁹ The constitutionality of such a two-tier system was challenged in *Ludwig v. Massachusetts*.³⁰ Ludwig was charged with negligently operating a motor vehicle, and under Massachusetts's two-tier system,³¹ was tried first by the court. He challenged the two-tier system as unconstitutionally burdening his sixth amendment right to a speedy jury trial.³² The Supreme Court recognized that the burdens inherent in the two-tier system include "(1) . . . the financial cost of an additional trial; (2) . . . a potentially harsher sentence if [the defendant] seeks a trial *de novo* in the second tier; and (3) . . . the increased psychological and physical hardships of two trials."³³ In a five-four decision, the Court held that these burdens did not unconstitutionally deprive the defendant of his right to a jury trial.³⁴ The Court reasoned that the increased financial, psychological and physical hardships of two trials were alleviated by the defendant's option under the Massachusetts system to waive a full trial in the first instance.³⁵ In addition, the Court found that because an imposition of a harsher sentence on appeal is only unconstitutional when

28. Municipalities will probably be unsuccessful in arguing that administrative convenience is a sufficient reason to deny jury trials in municipal courts. The Supreme Court dismissed that argument in *Baldwin v. New York*, 399 U.S. 66, 73-74 & n.22 (1970).

29. See *supra* notes 5-6 and accompanying text.

30. 427 U.S. 618 (1976).

31. Massachusetts now affords a jury trial at the first level in prosecutions of municipal offenses. Mass. Ann. Laws ch. 218, §§ 26, 26A (Michie/Law. Co-op. Supp. 1981).

32. 427 U.S. at 623.

33. *Id.* at 626.

34. *Id.* at 630.

35. *Id.* at 626-30. The financial cost of an additional trial was not considered overly burdensome because the defendant was not required to submit to a full trial in the first tier. *Id.* at 626. He could admit sufficient findings of fact and permit the court to hear enough evidence to find probable cause to believe the defendant's guilt and enter judgment accordingly. *Id.* at 621, 626. If the defendant had elected to allow the court to proceed in this manner, he still would have had the right to a jury trial *de novo*. *Id.* at 626. The dissent strongly criticized the majority's reasoning: "[I]f we presume that the defendant is innocent until proved guilty, we must also assume that the innocent defendant would deny or contradict the evidence offered by the prosecutor. The choice between admitting the truth and also the prima facie sufficiency of evidence the defendant considers false or misleading, on the one hand, or insisting on a full nonjury trial on the other, is not an insignificant price to pay for the exercise of a constitutional right." *Id.* at 636. (Stevens, J., dissenting). The Court also examined the possibility of increased psychological and physical hardships of two trials. *Id.* at 628-29. There was no indication in the record as to whether the two-tier system delayed final adjudication. *Id.* at 629. The Court, therefore, refused to label these hardships as unconstitutionally burdening a defendant's right to a speedy jury trial. *Id.*

vindictive,³⁶ the mere possibility of a harsher sanction at the second trial did not make the two-tier system unconstitutional per se.³⁷

The *Ludwig* Court's hardship analysis, however, must be limited to the facts and circumstances of that case.³⁸ Other states may not allow a defendant to avoid a full bench trial. In addition, the *Ludwig* decision implicated only the sixth amendment.³⁹ Because the defendant was charged with negligently operating a motor vehicle,⁴⁰ no first amendment issue was present. Had *Ludwig* been an obscenity case, the inherent danger of suppressing speech between the two trials would have existed,⁴¹ and the Supreme Court would have been sensitive to whether the procedural protections afforded were of the highest order.⁴²

B. *The Role of the First Amendment in Obscenity Prosecutions*

Under the obscenity test articulated by the Supreme Court in *Miller v. California*,⁴³ material cannot be deemed obscene unless the average person, applying contemporary community standards, would find it patently offensive and appealing to prurient interests.⁴⁴ The Court

36. *Id.* at 627 (citing *Colten v. Kentucky*, 407 U.S. 104, 116 (1972); *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969)).

37. 427 U.S. at 627.

38. The Missouri Supreme Court held that *Ludwig* was not controlling in an obscenity case. *City of Kansas City v. Darby*, 544 S.W.2d 529, 531 (Mo. 1976) (en banc), *appeal dismissed and cert. denied*, 431 U.S. 935 (1977).

39. 427 U.S. at 623, 628-29.

40. *Id.* at 622-23.

41. See *supra* notes 14-17 and accompanying text.

42. See *supra* note 18 and accompanying text.

43. 413 U.S. 15, 24 (1973) ("(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" (citations omitted)). A jury is best equipped to determine contemporary community standards. *Id.* at 26. Because the value of a work, taken as a whole, is not determined in light of contemporary community standards, *Smith v. United States*, 431 U.S. 291, 301 (1977); see F. Schauer, *The Law of Obscenity* 123-24 (1976), this Note does not discuss the third component of the *Miller* test.

44. See *Smith v. United States*, 431 U.S. 291, 299-301, 308 (1977) (interpreting *Miller v. California*, 413 U.S. 15 (1973), as requiring that appeal to prurient interests, as well as patent offensiveness, be measured in light of contemporary community standards); Note, "*Contemporary Community Standards*" in *Obscenity Prosecutions—Smith v. United States*, 30 *Baylor L. Rev.* 317, 320-22 (1978) [hereinafter cited as *Contemporary Community Standards*]. When a jury is present it determines if material is obscene. *E.g.*, *Bohin v. State*, 156 Ga. App. 206, 208, 274 S.E.2d 592, 594 (1980), *cert. denied*, No. 37006 (Jan. 16, 1981); *State v. Luck*, 353 So. 2d 225, 229 (La. 1977); *Carlock v. State*, 609 S.W.2d 787, 788 (Tex. Crim. App. 1980); *Berg*

commented that only hard-core pornography would be labeled obscene under this test.⁴⁵ Although the classification of material as hard-core pornography would not seem to be a sensitive determination, obscenity regulations must embody stringent procedural safeguards as a "special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks."⁴⁶ Consistent with this policy, *Miller* called for continued reliance "on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide."⁴⁷

The *Miller* Court's call for reliance on the jury has been variously interpreted by the states. In *City of Kansas City v. Darby*,⁴⁸ the Missouri Supreme Court held that the two-tier system as applied to obscenity prosecutions is unconstitutional.⁴⁹ The court interpreted *Miller* as requiring a jury because jurors are best suited to determine contemporary community standards,⁵⁰ and thus held that if a jury is delayed until a later proceeding, the defendant's first amendment rights would be unlawfully restricted.⁵¹ Although the Alabama Court of Criminal Appeals, in *Holderfield v. City of Birmingham*,⁵² agreed that jurors are uniquely qualified to make obscenity determinations, it refused to hold that a jury trial was constitutionally mandated.⁵³ Because provision for a jury trial was thus discretionary with

v. State, 599 S.W.2d 802, 804-05, 808 (Tex. Crim. App. 1980); see *City of Duluth v. Sarette*, 283 N.W.2d 533, 537-38 (Minn. 1979) (en banc); *City of Kansas City v. Darby*, 544 S.W.2d 529, 532 (Mo. 1976) (en banc), *appeal dismissed and cert. denied*, 431 U.S. 935 (1977); *McNary v. Carlton*, 527 S.W.2d 343, 347-48 (Mo. 1975) (en banc). By making patent offensiveness and appeal to prurient interests questions of fact, the Court has appeared to shift to the juries much of the responsibility for determining what is obscene. Note, *Jenkins v. Georgia, and Hamling v. United States: Testing the Miller Obscenity Test*, 7 Colum. Hum. Rts. L. Rev. 349, 353 (1975) [hereinafter cited as *Testing the Miller Test*].

45. 413 U.S. at 27.

46. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); see *supra* note 18 and accompanying text. The chilling effect, *Jenkins v. Georgia*, 418 U.S. 153, 162-63 (1974) (Brennan, J., concurring) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 100-01 (1973) (Brennan, J., dissenting)); F. Schauer, *supra* note 43, at 199-200; *Testing the Miller Test*, *supra* note 44, at 360-61, may be the reason for the Court's requiring stringent protections in obscenity proceedings. See *Smith v. California*, 361 U.S. 147, 150-51 (1959) ("[there exist] legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.").

47. *Miller v. California*, 413 U.S. 15, 26 (1973).

48. 544 S.W.2d 529 (Mo. 1976) (en banc), *appeal dismissed and cert. denied*, 431 U.S. 935 (1977).

49. *Id.* at 532.

50. *Id.* at 530 (citing *McNary v. Carlton*, 527 S.W.2d 343 (Mo. 1975) (en banc)).

51. *Id.* at 532.

52. 380 So. 2d 990 (Ala. Crim. App. 1979), *cert. denied*, 449 U.S. 888 (1980).

53. *Id.* at 993.

the state, a jury was not required in the first instance.⁵⁴ The Minnesota Supreme Court's constitutional analysis in *City of Duluth v. Sarette*⁵⁵ led to the same conclusion, but the court nevertheless required a jury trial for all obscenity prosecutions because "a jury can best reflect contemporary community standards."⁵⁶

Supreme Court decisions subsequent to *Miller* implicitly assumed that a jury would be present to determine whether material is obscene. For example, the Court has held that expert testimony on the nature of the material is not constitutionally required:⁵⁷ Jurors do not need expert assistance because "[s]uch testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand."⁵⁸ In addition, jurors cannot be bound by a legislative attempt to define obscenity. The Supreme Court has determined that a codification of community standards is merely informative and cannot supplant the jury's role of defining obscenity.⁵⁹ Furthermore, once the standards are defined, the jury must decide, in its traditional role as fact finder, whether the material appeals to prurient interests and is patently offensive to the average member of the community.⁶⁰

The Supreme Court's emphasis on the jury system in obscenity cases may be attributable to a belief that "[t]he jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person."⁶¹ A judge, however, does not constitute a cross-section of the community, and his views are inherently more one-sided than a jury's. Thus, as the finder of fact, he "is placed in the unenviable position of determining contemporary community standards . . . from his contacts with [the community],"⁶² necessarily fewer than those of a jury.

54. *Id.* at 991, 993.

55. 283 N.W.2d 533 (Minn. 1979)(en banc). Minnesota provides for a jury trial only if there is a possibility of incarceration. Minn. Stat. Ann. § 487.25(6) (West Supp. 1982). The municipal ordinance in *Sarette* authorized a fine as the only possible sanction. 283 N.W.2d at 535.

56. 283 N.W.2d at 538.

57. *Hamling v. United States*, 418 U.S. 87, 100 (1974); *Kaplan v. California*, 413 U.S. 115, 121 (1973); see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973).

58. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6 (1973).

59. *Smith v. United States*, 431 U.S. 291, 302, 308 (1977). A state legislature may specify the geographic boundaries of the relevant community, *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974), but need not. *Hamling v. United States*, 418 U.S. 87, 104-05 (1974).

60. See *supra* note 44.

61. *McKinney v. Alabama*, 424 U.S. 669, 688 (1976) (Brennan, J., concurring) (quoting *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 448 (1957) (Brennan, J., dissenting)); accord *Holderfield v. City of Birmingham*, 380 So. 2d 990, 993 (Ala. Crim. App. 1979), cert. denied, 449 U.S. 888 (1980); *City of Duluth v. Sarette*, 283 N.W.2d 533, 538 (Minn. 1979) (en banc); *McNary v. Carlton*, 527 S.W.2d 343, 347-48 (Mo. 1975) (en banc); see *City of Kansas City v. Darby*, 544 S.W.2d 529, 530 (Mo. 1976) (en banc), appeal dismissed and cert. denied, 431 U.S. 935 (1977).

Given the inherent deficiency of a judge's view of contemporary community standards, it is appropriate policy to provide for a jury trial in all obscenity prosecutions. In *City of Kansas City v. Darby*,⁶³ however, the Missouri Supreme Court did not rely on policy. In holding that the first amendment requires a jury trial in prosecutions for violations of municipal obscenity ordinances,⁶⁴ the court relied on a prior Missouri decision that required a jury determination in a civil proceeding to enjoin the distribution of obscene material.⁶⁵ Although the result in *Darby* seems correct based on policy considerations, that court's determination that a jury was constitutionally required is somewhat flawed.

In *Alexander v. Virginia*,⁶⁶ the Supreme Court held that a jury trial is not constitutionally required in a state civil obscenity proceeding.⁶⁷ The Court based its decision on the fact that the seventh amendment right to a jury trial was not applicable to the states.⁶⁸ The first amendment right of free speech, however, is applicable to the states.⁶⁹ Accordingly, if a jury trial for an obscenity prosecution were required by the first amendment alone, the Court in *Alexander* would arguably have been obliged to reach a different conclusion. First amendment protections,⁷⁰ however, often need to be implemented through other constitutional provisions.⁷¹ The first amendment's guarantee of free speech can only be accorded a jury trial through the sixth amendment. Although the first amendment, therefore, does not

62. *City of Duluth v. Sarette*, 283 N.W.2d 533, 538 (Minn. 1979) (en banc).

63. 544 S.W.2d 529 (Mo. 1976) (en banc), *appeal dismissed and cert. denied*, 431 U.S. 935 (1977).

64. *Id.* at 532.

65. *Id.* at 530 (citing *McNary v. Carlton*, 527 S.W.2d 343, 344, 347-48 (Mo. 1975) (en banc)).

66. 413 U.S. 836 (1973) (per curiam).

67. *Id.* at 836.

68. *Id.* (citing *Melancon v. McKeithen*, 345 F. Supp. 1025, 1027, 1035-45, 1048 (E.D. La.) (non-applicability of seventh amendment to the states), *aff'd sub nom. Mayes v. Ellis*, 409 U.S. 943 (1972)). It is settled law that the seventh amendment does not apply to the states. *E.g.*, *O'Connor v. State*, 507 F. Supp. 546, 548 (D. Nev. 1981); *Iacaponi v. New Amsterdam Casualty Co.*, 258 F. Supp. 880, 884 (W.D. Pa. 1966), *aff'd per curiam*, 379 F.2d 311 (3rd Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968); *United States ex rel. Morgan v. Wolfe*, 232 F. Supp. 85, 97 (S.D.N.Y. 1964); *J. Nowak, supra* note 14, at 415.

69. *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *L. Tribe, American Constitutional Law* § 11-2, at 567 (1978).

70. U.S. Const. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

71. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 102 S. Ct. 752, 764 (1982). Although a claimant may have a first amendment constitutional right, he cannot litigate a violation of that right solely

by itself require a jury trial, it recommends as a matter of policy that one be provided. The two-tier system, attempting to balance administrative convenience and a defendant's jury trial right, allows a judge to restrict the free exchange of ideas between a defendant's trial and appeal.⁷² Furthermore, a defendant faced with the burdens attending a second trial⁷³ may, as a practical matter, not wish to avail himself of the jury trial, accepting the lower court's sanction. A two-tier system thus prevents the full implementation of the policy that a jury trial be provided in first amendment cases.⁷⁴ The larger question still remains, however, whether the Constitution guarantees a jury trial in obscenity prosecutions at all.

II. THE SIXTH AMENDMENT APPROACH

A. *The Non-Petty Standard*

The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."⁷⁵ A literal reading of the amendment would obviate the determination of whether a crime is petty or non-petty, but the Supreme Court, in *Duncan v. Louisiana*,⁷⁶ held that the right to a jury trial only attaches to non-petty offenses.⁷⁷ Because the offense in *Duncan* was obviously non-petty,⁷⁸ however, the Court did not determine where the fine line between petty and non-petty offenses must be drawn,⁷⁹ and expressed an awareness of the difficult question that a closer case would present.⁸⁰

because it has been encroached. *Id.* at 765. To have standing, he must either isolate a personal injury, *id.*, or rely on an injury to others. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981). Even if article III standing is established, first amendment rights cannot be enforced against state action unless the balancing test of the due process clause of the fourteenth amendment is satisfied. *See id.* at 71.

72. *City of Kansas City v. Darby*, 544 S.W.2d 529, 532 (Mo. 1976) (en banc), *appeal dismissed and cert. denied*, 431 U.S. 935 (1977).

73. *See supra* notes 32-33 and accompanying text.

74. *City of Kansas City v. Darby*, 544 S.W.2d 529, 532 (Mo. 1976) (en banc), *appeal dismissed and cert. denied*, 431 U.S. 935 (1977). *Contra Holderfield v. City of Birmingham*, 380 So. 2d 990, 991, 993 (Ala. Crim. App. 1979), *cert. denied*, 449 U.S. 888 (1980).

75. U.S. Const. amend. VI.

76. 391 U.S. 145 (1968).

77. *Id.* at 159-60. This has traditionally been the rule. *Scott v. Illinois*, 440 U.S. 367, 371 (1979); *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970); *District of Columbia v. Clawans*, 300 U.S. 617, 628-30 (1937); *Callan v. Wilson*, 127 U.S. 540, 555 (1888).

78. 391 U.S. at 162 (two-year sentence authorized).

79. *Id.* at 161.

80. *See id.* at 160. "Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitu-

In *Baldwin v. New York*,⁸¹ the Court refined the petty/non-petty distinction. Baldwin challenged the constitutionality of New York's denial of a jury trial in crimes involving a maximum sentence not in excess of one year.⁸² The Court noted that every other jurisdiction in the country provided for a jury when the possible sentence exceeded six months.⁸³ Finding this unanimity persuasive, the Court held that crimes carrying possible sentences in excess of six months are certainly serious.⁸⁴

The *Baldwin* Court refused to hold, however, that all offenses carrying possible sentences of six months or less are necessarily petty.⁸⁵ Indeed, before classifying a crime as petty, a court must look "to both the nature of the offense itself . . . as well as the maximum potential sentence . . . in determining whether a particular offense [is] so serious as to require a jury trial."⁸⁶ *Baldwin* is thus consistent with the statement in *Duncan v. Louisiana*⁸⁷ that "[c]rimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses."⁸⁸ Both *Duncan* and *Baldwin*, therefore, recognized that a crime may be non-petty by its nature, regardless of the authorized sanction.⁸⁹ Thus, if the possible term of imprisonment is not in excess of six months, it is necessary to examine the nature of the offense before classifying it as petty.⁹⁰

tional 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." *Id.* Recognizing this obligation, the Court held that a possible sentence of two years is sufficiently serious to classify a crime as non-petty. *Id.* at 161-62.

81. 399 U.S. 66 (1970).

82. *Id.* at 67, 69.

83. *Id.* at 71-72. The Court also noted that "with a few exceptions, crimes triable without a jury . . . since the late 18th century were . . . generally punishable by no more than a six-month prison term." *Id.* at 71 (footnote omitted). See generally Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917 (1926) (discussing the existence and use of the six-month rule at common law).

84. 399 U.S. at 69.

85. *Id.* at 69 n.6. The concurring opinion, written by Justice Black, adhered to an absolutist position, requiring a jury trial in all criminal prosecutions. *Id.* at 74-76 (Black and Douglas, JJ., concurring in judgment).

86. *Id.* at 69 n.6 (citations omitted).

87. 391 U.S. 145 (1968).

88. *Id.* at 159 (emphasis added).

89. *Baldwin v. New York*, 399 U.S. 66, 68, 69 n.6 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 156, 159 (1968); *accord Ludwig v. Massachusetts*, 427 U.S. 618, 624-25 (1976); *Taylor v. Hayes*, 418 U.S. 488, 496 (1974); *Frank v. United States*, 395 U.S. 147, 148-50 (1969); *Bloom v. Illinois*, 391 U.S. 194, 196-97 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373, 378-80 (1966).

90. *Baldwin v. New York*, 399 U.S. 66, 69 n.6 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968); *Schick v. United States*, 195 U.S. 65, 68 (1904). Traditionally,

In what might be interpreted as a rejection of this approach, the Court in *Codispoti v. Pennsylvania*⁹¹ stated that a fixed line existed between petty and non-petty offenses: All crimes carrying sentences of six months or less are petty; all carrying sentences of more than six months are serious.⁹² Any extrapolation from *Codispoti* of a fixed line in the petty/non-petty determination for all cases, however, would be erroneous.⁹³ The defendant in *Codispoti* was charged with criminal contempt.⁹⁴ Criminal contempt is a sui generis crime;⁹⁵ its punishment is not intended to deter morally offensive conduct but to protect the dignity of the court.⁹⁶ The Court has consistently recognized that criminal contempt is petty by its nature and can only be classified non-petty by the penalty involved.⁹⁷

the Supreme Court has determined whether crimes are non-petty per se by examining them in light of at least one of the following three factors: (1) whether the crime was indictable at common law; (2) whether the crime was malum in se; and (3) whether the crime involved moral turpitude. *Petty Offense*, supra note 2, at 213; e.g., *District of Columbia v. Clawans*, 300 U.S. 617, 624-25 (1937) (morally inoffensive, not indictable at common law); *District of Columbia v. Colts*, 282 U.S. 63, 73-74 (1930) (malum in se, indictable at common law); *Schick v. United States*, 195 U.S. 65, 67-68 (1904) (not morally delinquent); *Callan v. Wilson*, 127 U.S. 540, 557 (1888) (indictable at common law). State and federal courts regularly follow this approach. E.g., *United States v. Craner*, 652 F.2d 23, 26 (9th Cir. 1981); *United States v. Sanchez-Meza*, 547 F.2d 461, 463-65 (9th Cir. 1976); *United States v. Woods*, 450 F. Supp. 1335, 1343-44 (D. Md. 1978); *Brady v. Blair*, 427 F. Supp. 5, 9-10 (S.D. Ohio 1976); *Baker v. City of Fairbanks*, 471 P.2d 386, 393-94 (Alaska 1970); *Bruce v. State*, 126 Ariz. 271, 273, 614 P.2d 813, 815 (1980) (en banc); *People v. Oppenheimer*, 42 Cal. App. 3d Supp. 4, 11, 116 Cal. Rptr. 795, 800 (1974); *State v. Wikle*, 291 N.W.2d 792, 794 (S.D. 1980).

91. 418 U.S. 506 (1974).

92. *Id.* at 512.

93. The Court improperly cited *Baldwin v. New York*, 399 U.S. 66, 69 (1970), and *Frank v. United States*, 395 U.S. 147, 149-50 (1969), for the fixed-line proposition. 418 U.S. at 512. *Frank* implicitly recognized that the authorized sentence is not the only factor to be considered in the petty/non-petty determination. 395 U.S. at 148. *Baldwin* explicitly recognized the Court's tradition of examining the nature of an offense as well as the maximum potential sentence before classifying it as petty or serious. 399 U.S. at 69 n.6. Furthermore, *Codispoti* recognized that a majority of the Court has never held that sentences of six months or less are necessarily petty. 418 U.S. at 512 n.4.

94. 418 U.S. at 509.

95. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966); *Myers v. United States*, 264 U.S. 95, 103 (1924).

96. W. LaFave & A. Scott, *Handbook on Criminal Law* § 7, at 39 (1972); see *Myers v. United States*, 264 U.S. 95, 103 (1924); *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 327 (1904). The conduct that results in criminal contempt can also be prosecuted as an additional offense. W. LaFave & A. Scott, supra, § 7, at 43.

97. E.g., *Muniz v. Hoffman*, 422 U.S. 454, 476 (1975); *Taylor v. Hayes*, 418 U.S. 488, 496 (1974); see *Frank v. United States*, 395 U.S. 147, 149-50 (1969); *Bloom v. Illinois*, 391 U.S. 194, 198 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373, 378-80 (1966). In most crimes, the authorized sentence is the most relevant consideration. *Duncan v. Louisiana*, 391 U.S. 145, 159, 162 & n.35 (1968). Legislatures, however,

Classifying contempt as a crime petty by its nature is consistent with the Court's recognition that a class of crimes may exist that are non-petty per se because they are morally offensive, regardless of how insignificant the authorized sanction.⁹⁸ In contrast to an objective six-month standard, an evaluation of the moral offensiveness of a crime involves the use of subjective criteria. In the late nineteenth century, the Supreme Court looked to whether the offense was indictable at common law.⁹⁹ Before the states began to adopt penal codes,¹⁰⁰ a crime was indictable at common law if the act was deemed "injurious to public morals."¹⁰¹ Distribution or display of obscene material was considered such a crime.¹⁰² That they were indictable at common law, however, may be insufficient to qualify crimes as non-petty because what was considered morally offensive at common law might not be considered inherently evil today.¹⁰³

Recognizing that society's moral standards may change, the Court has turned to the additional criteria of whether the offense was ma-

often call for prosecutions of criminal contempt without authorizing specific sentences. *Id.* at 162 n.35; *e.g.*, 18 U.S.C. § 401 (1976); N.Y. Jud. Law § 750(A)(2), (3), (4) (McKinney 1975); *id.* § 751(1) (McKinney Supp. 1981-1982); 42 Pa. Cons. Stat. Ann. §§ 4131-4132 (Purdon 1981); Va. Code § 18.2-456 (1975). When no specific sentence is authorized, the penalty actually imposed is the criterion to be used in determining whether a contempt is petty or non-petty. *Duncan v. Louisiana*, 391 U.S. 145, 162 n.35 (1968); *cf.* 18 U.S.C. § 402 (1976) (sentence of six months authorized for criminal contempt committed outside presence of court).

98. See *supra* notes 85-90 and accompanying text.

99. *Callan v. Wilson*, 127 U.S. 540, 555-57 (1888); see *Petty Offense*, *supra* note 2, at 213. In later cases, whether the crime was indictable at common law continued to be a consideration in the petty/non-petty determination. *E.g.*, *District of Columbia v. Clawans*, 300 U.S. 617, 625 (1937); *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930).

100. *W. LaFave & A. Scott*, *supra* note 96, § 9, at 60.

101. *Winters v. New York*, 333 U.S. 507, 515 (1948); accord 1 J. Bishop, *Bishop on Criminal Law* § 500 (9th ed. 1923); Clark & Marshall, *A Treatise on the Law of Crimes* § 11.09 (M. Wingersky 6th ed. 1958) [hereinafter cited as Clark & Marshall]; 1 F. Wharton, *Wharton's Criminal Law* § 16, at 21 (12th ed. 1932); *cf.* *W. LaFave & A. Scott*, *supra* note 96, § 6, at 29 n.25 (common-law crimes inherently evil). For a summary of the history of obscenity crimes from common law to its early infancy as a statutory offense, see *Smith v. California*, 361 U.S. 147, 163 n.1 (1959) (Frankfurter, J., concurring).

102. *Smith v. California*, 361 U.S. 147, 163 n.1 (1959) (Frankfurter, J., concurring); *Winters v. New York*, 333 U.S. 507, 515 (1948); *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91, 101 (Pa. 1815); 1 J. Bishop, *supra* note 101, § 500; Clark & Marshall, *supra* note 101, § 11.10, at 692.

103. *United States v. Woods*, 450 F. Supp. 1335, 1342 (D. Md. 1978) ("[t]he Court must look to the 'principles' of the common law to determine if a particular offense is one which would fall into the class of cases properly labeled . . . as 'so serious' that it is 'comparable to a common law crime.' "); see *District of Columbia v. Clawans*, 300 U.S. 617, 625 (1937) (recognizing that a crime not indictable at common law might be considered serious today).

lum in se or involved moral turpitude.¹⁰⁴ Offenses that are so labeled violate the accepted mores of the community.¹⁰⁵ Moreover, defendants convicted of crimes malum in se, or involving moral turpitude, may face severe collateral consequences. In fact, a conviction of a crime involving moral turpitude may result in (1) deportation;¹⁰⁶ (2) revocation of a business license;¹⁰⁷ (3) denial of the right to practice a profession;¹⁰⁸ (4) termination of a public employee's pension plan;¹⁰⁹ and (5) impeachment as a witness.¹¹⁰ That such severe consequences can attach regardless of the sentence indicates that the community finds the offense morally repugnant.¹¹¹

104. *District of Columbia v. Clawans*, 300 U.S. 617, 625 (1937) (morally inoffensive); *District of Columbia v. Colts*, 282 U.S. 63, 73-74 (1930) (malum in se, depraved); *Schick v. United States*, 195 U.S. 65, 67 (1904) (not morally delinquent); *Petty Offense*, *supra* note 2, at 214.

105. "Malum in se" has been used to describe crimes that are "naturally evil as adjudged by the sense of a civilized community." *State v. Horton*, 139 N.C. 588, 592, 51 S.E. 945, 946 (1905). It has also been stated that a crime that requires criminal intent as an element for conviction is malum in se. *W. LaFave & A. Scott*, *supra* note 96, § 6, at 29. Because an obscenity ordinance without a scienter requirement has been found unconstitutional, *Smith v. California*, 361 U.S. 147, 150, 154-55 (1959), obscenity offenses may be malum in se. Crimes involving moral turpitude are those that involve dishonesty, *In re Pontarelli*, 393 Ill. 310, 314-15, 66 N.E.2d 83, 85 (1946) (draft evasion); *Commonwealth v. Smith*, 240 Pa. Super. 212, 216, 361 A.2d 862, 865 (1976) (burglary, larceny and receiving stolen property), *rev'd on other grounds*, 477 Pa. 424, 383 A.2d 1280 (1978), baseness, vileness or conduct contrary to accepted social standards. *Jordan v. DeGeorge*, 341 U.S. 223, 226 (1951). Because "[t]he distinction between crimes which do, and crimes which do not, involve moral turpitude is much the same as the distinction between crimes *mala in se* and crimes *mala prohibita*, . . . courts often define one phrase in terms of its counterpart." *W. LaFave & A. Scott*, *supra* note 96, § 6, at 31.

106. *Costello v. Immigration & Naturalization Serv.*, 376 U.S. 120, 121 (1964); *Jordan v. DeGeorge*, 341 U.S. 223, 225 (1951); 8 U.S.C. § 1251(a)(4) (1976).

107. *E.g.*, *In re Madden*, 184 A.2d 204, 205 (D.C. 1962) (bail bondsman); *In re Schmidt & Sons, Inc.*, 79 N.J. 344, 355, 399 A.2d 637, 643 (1979) (wholesale liquor seller).

108. *Jordan v. DeGeorge*, 341 U.S. 223, 227 (1951) (dictum) (attorneys' disbarment); *Golde v. Fox*, 98 Cal. App. 3d 167, 180-89, 159 Cal. Rptr. 864, 871-77 (1979) (real estate license revocation); *People v. Gibbons*, 157 Colo. 357, 360-62, 403 P.2d 434, 435-36 (1965) (en banc) (attorneys' disbarment); *Yurick v. Commonwealth*, 43 Pa. Commw. 248, 249, 402 A.2d 290, 291 (1979) (revocation of license to practice osteopathy).

109. *Gauli v. Board of Trustees*, 143 N.J. Super. 480, 482, 363 A.2d 911, 912 (1976).

110. *Jordan v. DeGeorge*, 341 U.S. 223, 227 (1951) (dictum); *Tucker v. Lower*, 200 Kan. 1, 5-6, 434 P.2d 320, 324 (1967); *Commonwealth v. Smith*, 240 Pa. Super. 212, 216, 361 A.2d 862, 865 (1976), *rev'd on other grounds*, 477 Pa. 424, 383 A.2d 1280 (1978); *Jenkins v. State*, 509 S.W.2d 240, 246 (Tenn. Crim. App. 1974); *see W. LaFave & A. Scott*, *supra* note 96, § 6, at 31.

111. *State v. Woods*, 450 F. Supp. 1335, 1346 (D. Md. 1978); *Brady v. Blair*, 427 F. Supp. 5, 9 (S.D. Ohio 1976); *Baker v. City of Fairbanks*, 471 P.2d 386, 395-96, 401 (Alaska 1970); *People v. Oppenheimer*, 42 Cal. App. 3d Supp. 4, 11, 116 Cal. Rptr.

The authorized sanction, therefore, is not the only criterion to be used in determining whether a defendant must be granted the protection of a jury. Because the length of sentence is only one indication of the ethical judgments of a community, the subjective criteria that indicate a crime's moral offensiveness should not be disregarded. As the Court in *Duncan* noted, when the authorized sentence is six months or less, the offense must otherwise qualify as petty for a jury trial to be constitutionally denied.¹¹²

B. Standards Applied to Obscenity

Given the social and ethical judgments of the courts, obscenity crimes do not qualify as petty. By definition, obscenity crimes are morally offensive. Material cannot be deemed obscene unless the average person, applying contemporary community standards, would find that the material is patently offensive and appeals to prurient interests.¹¹³ Material appeals to prurient interests when it is salacious, lewd, libidinous,¹¹⁴ or tends to corrupt morals by "inciting lascivious thoughts or arousing lustful desire."¹¹⁵ Furthermore, the act of displaying or distributing obscene material has been denounced as sexually immoral, appealing to base human emotions, and a "serious threat to the family, the home and the State."¹¹⁶ In *Miller*, the Court compared obscenity with "rape, murder and a host of other offenses against society and its individual members."¹¹⁷ Given such description of obscenity by courts, the crime is obviously morally

offensive to

795, 800 (1974); *State v. Wikle*, 291 N.W.2d 792, 794 (S.D. 1980). It is interesting to note that Washington recognizes this repugnance and provides a jury trial in the municipal courts for offenses, the conviction of which could result in the defendant's losing his driver's license, and for "other gross misdemeanors." Wash. Rev. Code Ann. § 3.50.280 (Supp. 1981); see *supra* note 5.

112. *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968).

113. See *supra* notes 43-44 and accompanying text.

114. *Walker v. Popenoe*, 149 F.2d 511, 512 (D.C. Cir. 1945); *United States v. Levine*, 83 F.2d 156, 156 (2d Cir. 1936); *United States v. Dennett*, 39 F.2d 564, 568 (2d Cir. 1930); *Khan v. Leo Feist, Inc.*, 70 F. Supp. 450, 458 (S.D.N.Y.), *aff'd*, 165 F.2d 188 (2d Cir. 1947). The Supreme Court has never defined prurient interest, but in *Roth v. United States*, 354 U.S. 476 (1957), cited these and several other earlier cases, see *infra* note 115 and accompanying text, in stating that material must appeal to prurient interests before it is deemed obscene. 354 U.S. at 489 & n.26; *State v. Great Am. Theatre Co.*, 227 Kan. 633, 635-36, 608 P.2d 951, 953 (1980).

115. *Commonwealth v. Isenstadt*, 318 Mass. 543, 550, 62 N.E.2d 840, 844 (1945); accord *State v. Becker*, 364 Mo. 1079, 1084-85, 272 S.W.2d 283, 286 (1954), *overruled on other grounds*, *State v. Vollmar*, 389 S.W.2d 20, 29 (Mo. 1965).

116. *Commercial Pictures Corp. v. Board of Regents*, 305 N.Y. 336, 342, 113 N.E.2d 502, 504 (1953), *rev'd on other grounds per curiam sub nom.* *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587 (1954); accord *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973); *Roth v. United States*, 354 U.S. 476, 485 (1957).

117. *Miller v. California*, 413 U.S. 15, 26 (1973) (footnote omitted).

society.¹¹⁸ Because obscenity crimes involve moral turpitude, severe collateral consequences may redound on the convict.¹¹⁹ Obscenity crimes are thus non-petty per se and require a jury trial of constitutional right.

C. Procedural Protections

Obscenity convictions carry the inherent danger of suppressing the defendant's free speech. Others not party to the prosecution suffer the loss of their right to purchase and view material that may, in fact, be protected by the first amendment. Because the determination of whether material is obscene thus requires stringent procedural protections,¹²⁰ a jury should be available in the first instance. A defendant facing a small fine or a short jail sentence may not wish to incur the financial, physical and psychological stresses as well as the risk of a longer sentence accompanying an additional trial.¹²¹ If the defendant does not appeal, a judge will make the final determination of whether the material is obscene despite his necessarily inferior assessment of the contemporary community standards.¹²² The absence of a jury may result in the abridgement, without adequate procedural protections, of the first amendment rights not only of the defendant, but also of persons unconnected with the prosecution. Such danger requires a jury trial in the first instance.

CONCLUSION

The denial of a jury trial in obscenity prosecutions violates the sixth amendment. Offenses involving the display or distribution of obscene material are non-petty regardless of the authorized sentence. Although the availability of a jury on appeal would satisfy the Supreme Court's sixth amendment concerns, it does not provide the staunch bulwark against the suppression of free speech required by the first amendment. A jury determination is necessary in the first instance to give full protection to the right of free speech, not only of the defendant but also of others not party to the prosecution. Economic and administrative convenience must not be allowed to endanger these fundamental rights.

Richard A. Weinberg

118. See, e.g., Brooklyn Graphic, Feb. 24, 1982, at 3, col. 1 (community reaction to operation of "porno" store); *id.* at col. 3 ("pornographic marketeers . . . have a [deleterious] effect on children and the neighborhoods in general"); Rep. Schumer, Community Report (Feb. 1982) (legislative report to constituents concerning efforts to close pornography store).

119. See *supra* notes 106-111 and accompanying text.

120. See *supra* notes 16-18 and accompanying text.

121. See *supra* notes 32-33 and accompanying text.

122. See *supra* notes 61-62 and accompanying text.