The Petty Offense Exception and the Right to a Jury Trial

Robert P. Connolly
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INTRODUCTION

On May 24, 1979, the Governor of New York proposed a bill designed to restructure the classification of misdemeanors in New York. This plan requires that defendants accused of any of four misdemeanors in New York City—petit larceny, theft of services, criminal possession of stolen property, and criminal mischief—shall be tried summarily by a judge in the Criminal Court when the maximum value of the property stolen or destroyed does not exceed $150. Presently, all persons accused of these crimes in New York State are entitled to trial by jury. The bill, however, calls for the creation of four new "lesser included offenses" for each of these crimes to be included in a new "B" class of misdemeanors. The rationale of the proposed


3. The Penal Law provides that a person is guilty of theft of services when he knowingly uses or attempts to use a stolen credit card to obtain services, and, when he attempts to use another's labor or facilities for his own benefit. It also specifically proscribes various actions such as theft of restaurant, hotel, railroad, subway, taxi, gas, electric, and telephone services. N.Y. Penal Law § 165.15 (McKinney 1975).

4. "A person is guilty of criminal possession of stolen property in the third degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede recovery by an owner thereof." N.Y. Penal Law § 165.40 (McKinney 1975).

5. "A person is guilty of criminal mischief in the fourth degree when, having no right to do so nor any reasonable ground to believe that he has such right, he: 1. Intentionally damages property of another person; or 2. Recklessly damages property of another person in an amount exceeding two hundred fifty dollars." N.Y. Penal Law § 145.00 (McKinney 1975).

6. The Criminal Procedure Law presently provides that "in the New York city criminal court the trial of . . . a misdemeanor for which the authorized term of imprisonment is not more than six months must be a single judge trial." N.Y. Crim. Proc. Law § 340.40(2) (McKinney 1971).

7. Governor's Bill, supra note 1, §§ 10-17; see Governor's Memorandum, supra note 1, at 1-2. The four new misdemeanors will be designated petit larceny in the second degree, theft of services in the second degree, criminal possession of stolen property in the fourth degree, and criminal mischief in the fifth degree. Id.

8. The phrase "lesser included offense" is commonly used in criminal law to denominate any crime "composed of some, but not all, of the elements of a greater crime, and which does not have any element not included in the greater offense." State v. Stewart, 292 So. 2d 677, 679 (La. 1974) (citation omitted); N.Y. Crim. Proc. Law § 1.20(37) (McKinney 1971). See also Black's Law Dictionary 812 (5th ed. 1979).

9. In the New York Penal Law, misdemeanors are presently classified into three classes, "A", "B" and "Unclassified." N.Y. Penal Law § 55.05(2) (McKinney 1973). Under the proposed legislation, the present "B" class will be unchanged, except that it will be renamed "C". Governor's Bill, supra note 1, § 1. The four new misdemeanors will make up the new class "B", with a maximum prison sentence of six months. Id., § 4. Class "A" will change only to the extent that the new class "B" crimes will be removed from the present definition of the class "A" crimes.
legislation is that the creation of new "lesser included offenses," punishable by no more than six months in prison,\(^\text{10}\) permits the state to deny the right to trial by jury to those persons charged with these four misdemeanors.\(^\text{11}\)

Throughout history, legislatures have grappled with the question of whether particular crimes should be tried by a jury or a judge.\(^\text{12}\) Unfortunately, this choice is often influenced by recognition of the burden on chronically backlogged and ill-funded criminal justice systems caused by expensive and time-consuming jury trials.\(^\text{13}\) The proposed legislation, however, raises the novel issue of whether a state can attempt to alleviate this serious congestion by basing the right to a jury trial on a mere adjustment of the penalties authorized for particular crimes.

This Note contends that the proposed legislation is unconstitutional. The history of the legislative prerogative to try crimes summarily is discussed in Part I, which includes an examination of the policy considerations that affect any decision to deny a jury trial. In Part II the constitutional limitations on this prerogative are analyzed, as well as the current status of the petty offense doctrine formulated by the Supreme Court. Finally, the petty offense formula is applied in Part III to the four misdemeanors selected for reclassification. The Note concludes that the right to a jury trial cannot be removed from these crimes by merely lowering the maximum property value and reducing the maximum penalty.

I. The Legislative Decision

A. History

In the twelfth century, trial by jury in criminal cases was a fundamental right at English common law.\(^\text{14}\) Parliament initially guaranteed this right to of petit larceny, theft of services, criminal possession of stolen property in the third degree and criminal mischief in the fourth degree.

\(^{10}\) The reduction in the property value ceiling is the apparent justification for the lenient prison sentence of six months rather than one year. These four misdemeanors are "relatively minor, non-violent offenses for which a lengthy period of imprisonment is not warranted." Governor's Memorandum, supra note 1, at 2.

\(^{11}\) "The United States Supreme Court has held that a jury trial is not constitutionally mandated for an offense punishable by no more than six months in jail." Id. (citation omitted). Although the Governor cites the case of Baldwin v. New York, 399 U.S. 66 (1970), for this proposition, a careful reading of that case leads to the somewhat different conclusion that notwithstanding the nature of the offense, a prison term in excess of six months necessitates that the defendant be tried by a jury. See notes 94-104 infra and accompanying text. The Baldwin decision was a plurality opinion, with two justices concurring, two justices concurring in the judgment, and three dissenting.

\(^{12}\) A second historic issue is the degree of penalty that should be prescribed for a particular crime. Penalties are generally established in accordance with one of the following theories of punishment: (1) prevention, (2) restraint, (3) rehabilitation, (4) deterrence, (5) education, and (6) retribution. See generally United States v. Brown, 381 U.S. 437, 456-62 (1965); Williams v. New York, 337 U.S. 241, 247-52 (1949); J. Hall, General Principles of Criminal Law 296-324 (2d ed. 1960); W. LaFave & A. Scott, Handbook on Criminal Law, 21-24 (1972).


\(^{14}\) For a comprehensive review of the history of trial by jury in criminal cases, see P. Devlin,
all criminal defendants. By the sixteenth century, however, Parliament had passed so many penal statutes that the consequent high volume of criminal prosecutions burdened England's criminal courts and threatened the effective administration of justice. To relieve the congestion, Parliament created a class of minor offenses to be tried without a jury. Eventually, this class grew to include more serious offenses to the extent that ninety-five percent of all criminal cases in England are now dealt with summarily.

In America, the colonists condemned England's infringements of the right to a jury trial in the Declaration of Independence, yet, all of the colonies resorted to the summary disposition of some crimes. None of the colonies, however, denied the right to a jury trial to the extent that prevailed in England at that time. An examination of the colonial laws of New York indicates that the legislature decided as early as 1732 to expedite criminal cases and reduce court costs by providing for the summary disposition of a variety of minor offenses. New York State has often attempted to ease the stress on its criminal courts by providing for summary disposition of some crimes. In particular, the focus of these efforts has been New York City's criminal courts.

The special consideration given to the criminal courts in New York City has always involved the balancing of the practical reality of court congestion

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16. Id. at 924-27.
17. Id. at 922-34.
19. Among the grievances set forth by the colonists in the Declaration of Independence was that the King was "depriving us in many cases of the benefits of Trial by Jury." The Declaration of Independence. It is clear that the right to trial by jury was greatly cherished by the English colonists. The Federalist No. 83 (A. Hamilton) 557-60 (Ford ed. 1898).
20. See Frankfurter & Corcoran, supra note 15, at 934-68.
21. Id. at 944-49, 983-88; see, e.g., Law of Oct. 14, 1732, ch. 590, 1720-1737 N.Y. Colonial Laws 766-68 (expired 1735), revived, Law of Nov. 10, 1736, ch. 635, 1720-1737 N.Y. Colonial Laws 920 (expired 1744). In fact, two of the crimes that the Governor proposes to treat summarily, petit larceny and malicious mischief, were tried without juries in colonial New York. Frankfurter & Corcoran, supra note 15, at 983, 986-87. As will be demonstrated in Part II, infra, however, the colonial practice in New York does not define the constitutional right to trial by jury enjoyed by a criminal defendant today. Rather, the history of this right "is illumined by specific instances and not definitively limited by them. It belittles the Constitution to crystallize it by the caprice of some statute which expressed the limit of punishment meted out in 1789 through summary procedure." Frankfurter & Corcoran, supra note 15, at 981.
and increased delays caused by jury trials with the fundamental function that the jury serves in our criminal justice system. Proponents of bench trials argue that the time required by jury trials causes excessive delays and undue depletion of the criminal court's limited resources. The Association of the Bar of the City of New York studied the criminal court system in New York City and concluded that bench trials can be completed in a few hours, but that jury trials take at least several days.

An enormous number of criminal cases are handled by the courts in densely populated urban areas such as New York City. In 1978, for example, of the 229,525 criminal arrests in New York City, "about 80,000 cases were 'disposed of' in the Criminal Court in Manhattan" alone. Massive caseloads and the realities of limited resources have caused many observers to believe that only through compromise can the criminal justice system achieve the most effective administration. Because the system cannot provide a jury trial for every defendant, they believe that bench trials are the provident alternative.

To require jury trials despite the inability of the system to supply them, places undue pressure on prosecutors, who are obligated to provide speedy trials to accept plea bargaining when confronted with a demand for a jury trial. Judge Irving Lang of the Criminal Court has argued that the accept-

23. See note 13 supra and accompanying text.
26. Id. at 1.
27. Morgenthau, supra note 24, at 1, col. 4.
28. Although the number of criminal cases that must be dealt with by the criminal courts has been constantly growing, the resources made available to the criminal courts have decreased. For example, "[I]n 1970, there were eighty-seven judges sitting in [New York] Criminal Court; today there are seventy-five." Morgenthau, supra note 24, at 2, col. 3.
29. Report of the Bar, supra note 24, at 1; see Lang, supra note 24, at 1, col. 2-4, 2, col. 3-4.
30. Lang, supra note 24, at 2, col. 3-5; Morgenthau, supra note 24 at 1, col. 2-4, 2, col. 3-4; Report of the Bar, supra note 24 at 1. Nevertheless, despite the large number of criminal cases handled by the New York City Criminal Courts, there are few trials, bench or jury. In 1977, for instance, there were only 49 jury trials and 101 bench trials in New York County. Lang, supra note 24, at 2, col. 5. Moreover, although 113,118 cases in New York City Criminal Court in 1977 resulted in an acquittal or conviction after trial or a guilty plea, there were only 893 trials, bench or jury. Office of Court Administration—New York City Courts, Criminal Court of the City of New York Filings, Dispositions and Sentences by Charge Citywide Totals January - June 1977 at 99 (Dec. 1978) [hereinafter cited as Court Statistics January - June 1977]; Office of Court Administration—New York City Courts, Criminal Court of the City of New York Filings, Dispositions and Sentences by Charge Citywide Totals July - December 1977 at 99 (May 1979) [hereinafter cited as Court Statistics July - December 1977].
32. Lang, supra note 24, at 2, col. 3. In 1977, for example, there were 60,202 guilty pleas to
tance of a lesser plea by the district attorney should be governed by the particular circumstances of the case rather than the incapacity of the court system to provide a jury trial. Moreover, Robert Morganthau, the District Attorney of New York County, suggests that the excessive amount of plea bargaining has a deleterious effect on the criminal justice system because the number of trials in general, by jury or judge, declines.

Trials are preferred in our criminal justice system because plea bargains are made in private, thereby shielding the participants from public accountability. Also, anticipation of the vigorous scrutiny imposed during a trial encourages conscientious police work. Without such scrutiny, abuses are more likely to occur. In sum, Morganthau concludes that, "[i]f the choice for the people in [New York City] were between having jury trials and having trials before judges without juries, I would . . . urge the former. But that is not the choice. The choice is between trials before judges and virtually no trials at all."

Nevertheless, opponents of any increase in the use of summary disposition argue that the functions of the jury trial make it essential to the just resolution of a criminal case. The jury's most prominent functions are: (1) to prevent governmental oppression by acting as a buffer between the accused and the state; (2) to insulate the defendant from an "eccentric or biased" judge, or an

misdemeanor charges, but only 660 trials of misdemeanor cases in New York City. Court Statistics January - June 1977, supra note 30, at 99; Court Statistics July - December 1977, supra note 30, at 99.

33. Lang, supra note 24, at 2, col. 3. Factors that should control the prosecutor's sentence bargaining decision are: (1) the nature of the crime, (2) the defendant's record, and (3) his place in the community. Id. See generally J. Bond, Plea Bargaining and Guilty Pleas, 252-69 (1975); Heumann, A Note on Plea Bargaining and Case Pressure, 9 Law & Soc'y Rev. 515 (1975); Wheatley, Plea Bargaining—A Case for its Continuance, 59 Mass. L.Q. 31 (1974); Note, Criminal Law: Plea Bargaining—Legitimizing the Agreement Process, 27 Okla. L. Rev. 487 (1974).

34. Morganthau, supra note 24, at 2, col. 3-4.

35. Id.

36. "Trials test everyone; without them people have a tendency to become sloppy. Young prosecutors and Legal Aid lawyers cannot learn their trade in relatively simple cases. Police officers feel less need to investigate and write careful reports. Judges are rarely called upon to decide issues of law." Id.

37. Id. at 2, col. 4; see note 29 supra and accompanying text.


39. Prevention of oppression is the longest recognized, and perhaps the most important, function of the jury. Duncan v. Louisiana, 391 U.S. 145, 155 (1968). As Blackstone observed in the 18th century, "our law has therefore wisely placed this . . . barrier, of . . . a trial by jury, between the liberties of the people, and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices . . . occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure." 4 W. Blackstone, Commentaries *349. An examination of history reveals that when the jury system falls or is abolished, criminal prosecution becomes an effective mechanism for those in political power to eliminate opposition. See, e.g., P. Devlin, supra note 14, at 164. An extreme illustration of the
"overzealous or corrupt" prosecutor;\textsuperscript{40} (3) to provide for resolution of factual issues by group deliberation rather than by the decision of a single judge;\textsuperscript{41} (4) to dispense with a relevant rule of law that either does not fit the case or is too harsh under the particular circumstances;\textsuperscript{42} and (5) to allow popular participa-

danger that potentially exists is the situation in Iran following the overthrow of the Shah. Hundreds of persons who opposed the Ayatollah Khomeini's government have been summarily tried and executed. N.Y. Times, Feb. 21, 1979, \$ A at 1, col. 4; \textit{id.}, March 8, 1979, \$ A at 1, col. 2; \textit{id.}, March 15, 1979, \$ A at 1, col. 1. Conversely, a pertinent example of how the jury system, when intact, can protect the criminal defendant against governmental oppression occurred in this country in the early years of the labor movement. The prosecution of labor leaders by the government was stifled by the refusal of juries to reach guilty verdicts under the conspiracy laws. \textit{See generally} M. Turner, The Early American Labor Conspiracy Cases (1967); Attorney for the Damned 267-326 (A. Weinberg ed. 1957).

Nevertheless, Justice Harlan argued that the need for the jury to prevent oppression by the state no longer exists in this country because our laws are enacted and administered through the democratic process. Duncan v. Louisiana, 391 U.S. 145, 188 (1968) (Harlan, J., dissenting). \textit{See generally} Sunderland, \textit{The Inefficiency of the American Jury}, 13 Mich. L. Rev. 302, 305 (1914).

40. Duncan v. Louisiana, 391 U.S. 145, 156 (1968); see Taylor v. Louisiana, 419 U.S. 522, 530 (1975). In the United States today, judges and prosecutors are either elected by the people directly or appointed by elected officials. Duncan v. Louisiana, 391 U.S. 145, 188 (1968) (Harlan, J., dissenting). Consequently, high standards of integrity and performance are the rule and not the exception. Broeder, \textit{supra} note 24, at 420; Haines, \textit{General Observations on The Effects of Personal, Political, and Economic Influences in the Decisions of Judges}, 17 Ill. L. Rev. 96 (1922). Because of the frailty of human nature, however, it may be necessary, on occasion, for a jury to shield a criminal defendant from an infirmity of either judge or prosecutor. In fact, a nationwide empirical study of trial by jury revealed that, based on a sample of 3,376 trials, judges convict defendants in 16\% more cases than do juries. H. Kalven & H. Zeisel, The American Jury 58-59 (1966).

41. Sparf & Hansen v. United States, 156 U.S. 51, 99-106 (1895); Broeder, \textit{supra} note 24, at 389. Clinical psychological research has indicated that the group decision making process characteristic of jury deliberation is a method of reaching factual conclusions that is superior to the resolution of factual issues by a single person. As opposed to a single judge who makes decisions in the isolation of whatever biases, eccentricities and assumptions he may have, the jury reaches a verdict by engaging in open discussion that is bound to expose any personal misconceptions or prejudices. R. Simon, \textit{The Jury System in America} 146-47 (1975); see Barlund, \textit{A Comparative Study of Individual, Majority and Group Judgment}, 58 J. Abnormal & Soc. Psych. 55 (1959); Taylor & Faust, \textit{Twenty Questions: Efficiency in Problem Solving As a Function of Size of Group}, 44 J. Exp. Psych. 360 (1952); Winick, \textit{The Psychology of the Courtroom}, in Psychology of Crime and Criminal Justice 68 (H. Toch ed. 1979).

42. Duncan v. Louisiana, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting); see Broeder, \textit{supra} note 24, at 411; Curtis, \textit{The Trial Judge and the Jury}, 5 Vand. L. Rev. 150, 157 (1952); Kadish & Kadish, \textit{The Institutionalization of Conflict—Jury Acquittals}, in Law, Justice, and the Individual in Society 308 (J. Tapp & F. Levine ed. 1977). For a discussion of the jury's role in tort cases that can be analogized to criminal cases, see Wyzanski, \textit{A Trial Judge's Freedom and Responsibility}, 65 Harv. L. Rev. 1281, 1285-86, 1290 (1952). Although a jury theoretically does not have the legal right to disregard the law, and should be so instructed, the jury undeniably has the power to do so. Duncan v. Louisiana, 391 U.S. 145, 187 \& nn.30 \& 31 (1968) (Harlan, J., dissenting). Of course, the jury's power to dispense with the relevant rule of law can be a double-edged sword. Not only is it possible for a legally guilty but morally innocent defendant to be set free, but also, local prejudice of the jury can result in the conviction of innocent persons. For example, southern juries had a propensity to free whites accused of lynching black persons. Broeder, \textit{supra} note 24, at 412.
tion in the judicial process that fosters community responsibility and public confidence in the judicial process.\textsuperscript{43} Therefore, the opponents argue, the jury's role is too vital to the criminal justice process to be sacrificed for the sake of economic considerations or judicial expediency.\textsuperscript{44} Recognizing that the backlog in criminal courts must be alleviated, they conclude that it can be accomplished through other, less harmful, means.\textsuperscript{45}

Until 1968, it was solely within the province of state governments to decide whether to increase the use of summary disposition in the administration of penal statutes.\textsuperscript{46} This prerogative was limited, however, in Duncan v. Louisiana,\textsuperscript{47} in which the Supreme Court held that a state's policy considerations are subject to constitutional restraint. Accordingly, any decision to deny a jury trial to persons accused of a particular offense is subject to certain constitutional requirements regardless of the policy considerations of economy and congestion.\textsuperscript{48}

II. CONSTITUTIONAL PARAMETERS OF THE PETTY OFFENSE EXCEPTION

The United States Constitution can be read as a guarantee that all criminal defendants have the right to trial by jury.\textsuperscript{49} That guarantee, however, has

\textsuperscript{43} Duncan v. Louisiana, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting). It has always been part of the political philosophy of this country to maximize popular participation in governmental processes. Note, The Changing Role of the Jury in the Nineteenth Century, 74 Yale L.J. 170, 172 (1964). By acquainting the average citizen with the judicial process, jury duty can foster a citizen's sense of community interest and responsibility. Broeder, supra note 24, at 417. Moreover, it has been suggested that one explanation for the high degree of public confidence enjoyed by the judicial process, compared with other branches of government, stems from the integral role played by the public when they serve as jurors. Janata, supra note 38, at 598.

\textsuperscript{44} McQuillan, supra note 38, at 4, col. 6; see Janata, supra note 38; Karcher, supra note 38. But see Broeder, supra note 24; Harley, supra note 24.

\textsuperscript{45} Judge McQuillan suggests that "dedication, hard work, planning and resources are the means for dealing effectively and rationally with calendar delays." McQuillan, supra note 38, at 4, col. 6. Additional resources might best be allocated to the New York City Criminal Court for the appointment of more judges, the hiring of additional administrative and clerical personnel, and the renovation of the physical plant. In his plan to reduce the current delays in New York's civil courts, Chief Judge Lawrence Cooke recognized that "the processing of criminal cases presents a brighter, yet still not satisfactory, picture." Text of Chief Judge's Plan, N.Y.L.J., Nov. 1, 1979, at 2, col. 4. Judge Cooke's plan is not meant to conflict with efforts to reduce delays in the criminal courts. Id.


\textsuperscript{47} 391 U.S. 145 (1968).

\textsuperscript{48} The right to trial by jury was the last right enumerated in the sixth amendment to be held applicable to the states by incorporation into the fourteenth amendment. See Washington v. Texas, 388 U.S. 14 (1967) (compulsory process to obtain witnesses in defendant's favor); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation with opposing witnesses); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); In re Oliver, 333 U.S. 257 (1948) (public trial).

\textsuperscript{49} The Constitution 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." U.S. Const. art. III, § 2. The sixth amendment 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." U.S. Const. amend. VI.
always been subject to certain limitations. For example, the Supreme Court declined to apply the jury trial guarantee to the states until 1968, when it determined that the jury trial right was incorporated into the due process clause of the fourteenth amendment. All states adopted jury trial guarantees in their own constitutions, but the definition of the parameters of those rights had been purely a matter of state law.

One of the most significant limitations on the jury trial right is the petty offense exception, used by the Supreme Court to limit the constitutional guarantee of a jury trial to "serious" crimes. In America, the petty offense exception has existed since colonial times when judges and magistrates were permitted to try petty crimes summarily. By 1789, the procedure had been firmly established, and because the Supreme Court interpreted the Constitution "in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution," it incorporated the petty offense doctrine as an exception to the sixth amendment guarantee.

50. In cases prior to Duncan v. Louisiana, 391 U.S. 145 (1968), the Court refused to incorporate the right to trial by jury into the fourteenth amendment. See Palko v. Connecticut, 302 U.S. 319 (1937) (double jeopardy prohibition of fifth amendment held not applicable to states); Snyder v. Massachusetts, 291 U.S. 97 (1934) (felony defendant not entitled under fourteenth amendment to attend jury's view of crime scene); Maxwell v. Dow, 176 U.S. 581 (1900) (no provision of the Bill of Rights is applicable to the states through the fourteenth amendment).


52. Duncan v. Louisiana, 391 U.S. 145, 154-55 (1968); see Maxwell v. Dow, 176 U.S. 581 (1900). State courts had often upheld convictions for three months or more over objections to the denial of a jury trial. See, e.g., Bray v. State, 140 Ala. 172, 177 So. 250 (1904); State v. Parker, 87 Fla. 181, 100 So. 260 (1924); State v. Anderson, 165 Minn. 150, 206 N.W. 51 (1925).


54. See notes 19-22 supra and accompanying text.

55. Frankfurter & Corcoran, supra note 15, at 936.


Once the Court adopted the petty offense exception the class of offenses that would be subject to that exception remained to be defined. Such an endeavor inevitably required that a fine line be drawn through the broad range of human conduct regulated by criminal law. As a result, the Court has vacillated in its effort to establish the analytic framework needed to define the petty offense class, and has set forth four types of crimes that are serious: crimes that were indictable at common law, crimes that involve moral turpitude, crimes that are *mala in se*, and crimes for which the maximum penalty exceeds six months in prison.

The earliest distinction between petty and serious offenses focused solely upon the nature of the crime, and the Court examined the colonial common law as a guide. Colonial treatment of petty offenses was not a mechanical classification of particular offenses. Rather, colonial decisions were the result of careful analysis that in large measure reflected the public opinion that the quality and consequences of the crime were serious enough to warrant a jury trial.

Accordingly, in *Callan v. Wilson*, the Court's analysis addressed the inherent nature of the defendant's criminal conduct. A thorough examination of common law authority indicated that conspiracy constituted a crime of grave and serious character that could not be classified as petty. In making this determination, the Court recognized that an important indicator of the serious nature of conspiracy was that it was indictable at common law.

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62. See id.
63. 127 U.S. 540 (1888). Callan was convicted in the police court of the District of Columbia for conspiring, through an illegal boycott, to injure several other members of a musical association to which he belonged. He argued that the police court's denial of his demand for a jury trial and his subsequent summary trial by that court violated the due process clause of the fifth amendment and the right to trial by jury in criminal cases secured by the Constitution in Art. III, § 2 and the sixth amendment. 127 U.S. at 547. Shortly after *Callan*, in Natal v. Louisiana, 139 U.S. 621 (1891), the Court held for the first time that a particular offense was petty in nature. Natal violated a municipal ordinance that prohibited keeping a private market within six blocks of any public market in the city. The Court held that a breach of a municipal ordinance is a petty offense that may constitutionally be tried summarily by a magistrate. *Id.* at 624.
64. 127 U.S. at 555-57.
65. *Id.* The Court observed that, historically, society views a crime that involves the concerted action of two or more people as more serious than the same crime performed by one individual. *Id.* at 555-56.
66. *Id.* at 555. The Court has often considered whether an offense was indictable at common law to determine whether its nature is serious. District of Columbia v. Clawans, 300 U.S. 617, 625 (1937); District of Columbia v. Colts, 282 U.S. 63, 73 (1930). See also Cheff v. Schnakenberg,
The Court set forth a second criterion for defining the nature of an offense in *Schick v. United States*. In *Schick*, a retail butter dealer was convicted of buying oleomargarine that had not been stamped in compliance with the Oleomargarine Act of 1886. In holding that this crime was a petty offense that did not require trial by jury, the Court decided that this crime was "not one necessarily involving any moral delinquency." By looking at the level of moral offensiveness of the crime as an indicator of its seriousness, the Court's analysis was consistent with the colonial policy, documented by Frankfurter and Corcoran, to dispose of crimes summarily that "did not offend too deeply the moral purposes of the community."

A third indicator of a crime's nature was provided by the Court in *District of Columbia v. Colts*. After the Court stated that reckless driving of an automobile so as to endanger property and individuals was a crime indictable at common law and was so morally offensive as "to shock the general moral sense," it found that the character of the crime was *malum in se* and not merely *malum prohibitum*, and therefore, inherently evil at common law. Thus, by its nature, reckless driving was a serious offense and not within the petty class.

Since *Colts*, the Court has not set any additional criteria to determine the nature of a petty offense. Rather, the Court has emphasized that the severity of the penalty authorized for a crime can be determinative of the requirement for a jury trial. Although it has stated that the nature of the offense is relevant to the inquiry, the Court also decided that the penalty alone was...
sufficiently serious to warrant a jury trial no matter how petty in nature the crime.\textsuperscript{76}

The penalty prescribed for a crime has long been recognized as an important indicator of a crime's status as petty or serious.\textsuperscript{77} This reasoning is historically rooted in another colonial practice, discussed by Frankfurter and Corcoran, of dealing summarily with crimes that were punishable with relatively light penalties.\textsuperscript{78}

In order to assess whether a particular penalty by itself is sufficiently harsh to require trial by jury, the Court developed objective standards based upon "the laws and practices of the community taken as a gauge of its social and ethical judgments."\textsuperscript{79} The Court looked at both contemporary penal sanctions and the common law that prevailed when the Constitution was adopted to establish a current rule that any crime that carries a maximum prison term of more than six months is serious.\textsuperscript{80} The Court reasoned that at common law the summary punishment of petty offenses by imprisonment for up to six months was not uncommon,\textsuperscript{81} and that the current practice in the federal court system is to limit the penalty for petty offenses to a six-month prison term and a $500 fine.\textsuperscript{82} Moreover, as recently as 1970, in \textit{Baldwin v. New York},\textsuperscript{83} the Court observed that states other than New York uniformly refuse to deny the right to a jury trial when the penalty for a crime exceeds six months.\textsuperscript{84}

One of the first cases to emphasize the nature of the prescribed penalty in applying the petty offense exception was \textit{Cheff v. Schnackenberg}.\textsuperscript{85} Cheff was convicted of criminal contempt for failing to comply with a cease and desist order issued by the Federal Trade Commission.\textsuperscript{86} The Supreme Court affirmed the conviction, concluding that Cheff was not entitled to a jury trial when charged with criminal contempt for two reasons. The crime was deemed petty in nature, and Cheff's sentence was six months imprisonment.

\textsuperscript{76} Codispoti v. Pennsylvania, 418 U.S. 506, 511-13 (1974); Baldwin v. New York, 399 U.S. 66, 72-73 (1970); Duncan v. Louisiana, 391 U.S. 145, 161-62 (1968). In District of Columbia v. Clawans, 300 U.S. 617 (1937), the Court analyzed the nature of the punishment in order to hold that the right to a jury trial did not attach, but only after it determined that the "offense of which the petitioner was convicted [was], by its nature," petty. \textit{Id.} at 624-25. The Supreme Court has never held, however, that a crime that is serious in nature can be classified as petty if it does not carry a serious punishment.

\textsuperscript{77} \textit{E.g.}, Schick v. United States, 195 U.S. 65, 68 (1904).

\textsuperscript{78} Frankfurter & Corcoran, \textit{supra} note 15, at 934-65.

\textsuperscript{79} District of Columbia v. Clawans, 300 U.S. 617, 628 (1937).


\textsuperscript{81} \textit{See} District of Columbia v. Clawans, 300 U.S. 617, 626-27 (1937).


\textsuperscript{83} 399 U.S. 66 (1970).

\textsuperscript{84} \textit{Id.} at 72-74.

\textsuperscript{85} 384 U.S. 373 (1966).

\textsuperscript{86} \textit{Id.} at 375.
If the sentence were for a term of more than six months, however, Cheff would have had an absolute right to a jury trial, notwithstanding the petty nature of criminal contempt.\textsuperscript{87}

In contempt cases, the Court has uniformly continued the six-month rule.\textsuperscript{88} In the recent case of \textit{Codispoti v. Pennsylvania},\textsuperscript{89} the six-month limitation was characterized as "a fixed dividing line between petty and serious offenses."\textsuperscript{90} Although Justice White implied that a prison term of less than six months is sufficient by itself to place a crime in the petty class even if the nature of the offense is otherwise serious, he noted that such a characterization was not necessarily the opinion of the Court. He conceded that "at the very least, the sixth amendment requires a jury trial in all criminal prosecutions where the term of imprisonment authorized by statute exceeds six months."\textsuperscript{91}

Justice White's concession in \textit{Codispoti} was based upon the two non-contempt cases in which the Supreme Court applied the six-month rule to determine the applicability of the petty offense exception. The first of these cases was \textit{Duncan v. Louisiana},\textsuperscript{92} in which the Court held "that a crime punishable by two years in prison is . . . a serious crime and not a petty offense."\textsuperscript{93}

The \textit{Duncan} Court reached this conclusion after it made a detailed examination of the history of the jury trial in criminal cases. Citing \textit{Cheff}, the Court determined that "[c]rimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses."\textsuperscript{94} The Court did not ignore the importance of the nature of the offense to the application of the petty offense doctrine.\textsuperscript{95} It merely stated that the nature of the offense as serious or petty was not relevant in \textit{Duncan} when the penalty attached to the crime was a possible two year prison sentence.\textsuperscript{96}

Although the \textit{Duncan} Court cited the six-month limitation prescribed in federal contempt cases, it did not set that limit for the states' criminal justice systems.\textsuperscript{97} That question first arose in \textit{Baldwin v. New York}\textsuperscript{98} after the New York Court of Appeals determined that the state's traditional view of the serious-petty distinction was the same as its felony-misdemeanor distinction, even though the maximum punishment for misdemeanors was one year.\textsuperscript{99}

At issue in \textit{Baldwin} was section 40 of the New York City Criminal Court Act which then prohibited jury trials in New York City criminal courts when

\textsuperscript{87} Id. at 380.
\textsuperscript{89} 418 U.S. 506 (1974).
\textsuperscript{90} Id. at 512.
\textsuperscript{91} Id. at 512 n.4.
\textsuperscript{92} 391 U.S. 145 (1968).
\textsuperscript{93} Id. at 162.
\textsuperscript{94} Id. at 159 (emphasis added).
\textsuperscript{95} Id. at 159-60.
\textsuperscript{96} Id. at 161-62.
\textsuperscript{97} Id.
\textsuperscript{98} 399 U.S. 66 (1970).
\textsuperscript{99} Id. at 69-70.
the defendant was charged with a crime carrying a penalty of one year in prison or less.\textsuperscript{100} New York defended this statute on the grounds that its purpose was to increase efficiency and reduce costs in the New York City criminal court system.\textsuperscript{101}

The New York Court of Appeals interpreted \textit{Duncan} as permitting a determination that all misdemeanors are petty in nature if the punishment for those crimes does not exceed two years. It concluded that for offenses punishable by less than two years in prison, the \textit{Duncan} Court left to the lower courts the task of determining whether a crime should be "characterized" as petty or serious.\textsuperscript{102} The Supreme Court reversed, however, and held that any crime with an authorized punishment in excess of six months cannot be petty.\textsuperscript{103}

\begin{itemize}
  \item \textsuperscript{100} The New York City Criminal Court Act provided that: "All trials in the court shall be held before a single judge; provided, however, that where defendant has been charged with a misdemeanor . . . [t]he defendant shall be advised that he has the right to a trial in a part of the court held by a panel of three of the judges thereof . . . ." Law of April 27, 1967, ch. 680, \S\ 132, 1967 N.Y. Laws 1578-79, \textit{repealed}, Law of June 25, 1971, ch. 893, \S\ 2, 1971 N.Y. Laws 2164. For the current version of this statute see note 6 \textit{supra}. All misdemeanors committed in the city of New York, except libel, are to be tried in the New York City Criminal Court. N.Y. Crim. Ct. Act. \S\ 31 (McKinney 1963). The penalty for misdemeanors in New York State may not exceed one year. N.Y. Penal Law \S\ 70.15 (McKinney 1975).
  \item \textsuperscript{103} Baldwin v. New York, 399 U.S. 66 (1970). The Court expressly did not reach the petitioner's contention that \S\ 40 also violated the equal protection clause of the fourteenth amendment. Petitioner challenged \S\ 40 on these grounds because it only applied to criminal trials in New York City and persons accused of the same crimes outside New York City were entitled to jury trials by virtue of another statute. \textit{Id.} at 71 n.17; \textit{see} Uniform Dist. Ct. Act, ch. 274, \S\ 243, 1939 N.Y. Laws 63, \textit{repealed}, Law of July 2, 1971, ch. 1097, \S\ 115, 1971 N.Y. Laws 2756; Uniform City Ct. Act, ch. 497, \S\ 211, 1964 N.Y. Laws 1444, \textit{repealed}, Law of July 2, 1971, ch. 1097, \S\ 105, 1971 N.Y. Laws 2755 (requirement of six person jury trials for all criminal cases tried outside New York City). Although the statutes challenged in \textit{Baldwin} have been repealed, New York retained the geographic distinction between criminal trials in New York City and the rest of the state. N.Y. Crim. Proc. Law \S\ 340.40(2) (McKinney 1971).

If the \textit{Baldwin} Court had reached the petitioner's equal protection argument, however, it might have found the New York law violative of the equal protection clause. The Court's interpretation of the equal protection clause has been subject to considerable revision. In \textit{Salsburg v. Maryland}, 346 U.S. 545 (1954), for example, the Court upheld a Maryland statute that permitted illegally obtained evidence to be admissible only in the prosecution of gambling misdemeanors committed in one particular county of the state. The Court reasoned that Maryland's efforts to deal with the high level of illegal gambling in that single county provided a rational basis for the statute, and that such a geographic distinction was within the wide discretion afforded a state in prescribing rules of practice. \textit{Id.} at 549-50. The Court upheld a Missouri rule of appellate procedure in \textit{Missouri v. Lewis}, 101 U.S. 22 (1879) which allowed direct appeals of criminal convictions to the Supreme Court of Missouri from every circuit court of the state except from those in five specific counties. Although the case did not involve the right to trial by jury, the Court employed the sixth amendment guarantee of trial by jury to illustrate its reasoning when it stated that "there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it
The Court also questioned the New York analogy between the serious-petty and felony-misdemeanor distinctions. It refused to accept that analogy because "some misdemeanors are also 'serious' offenses."\(^{104}\) As in Duncan, the Court recognized that the nature of the offense is an important consideration when defining a petty offense,\(^{102}\) but it also determined that the penalty authorized was, by itself, sufficient to impose the right to a jury trial.\(^{106}\)

The Baldwin Court also chose to clarify the Duncan rule by setting a maximum six-month limit on the sentence that can be authorized for an otherwise petty offense without allowing a jury trial. This maximum was expressly defined as applicable only if the nature of the crime is such that the severity of the penalty alone is the object of the serious-petty inquiry.\(^{107}\)

Only when the distinction between application of the petty offense exception to penalties severe by themselves and to crimes without such penalties is recognized, can the Supreme Court decisions be reconciled. The fixed dividing line referred to by Justice White in Codispoti v. Pennsylvania\(^{108}\) can only be applied when the nature of the offense is petty, such as in cases of criminal contempt.\(^{109}\)

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\(^{104}\) 399 U.S. at 70.

\(^{105}\) Id. at 69-70. "Decisions of this Court have looked to both the nature of the offense itself, as well as the maximum potential sentence, in determining whether a particular offense was so serious as to require a jury trial." Id. at 69 n.6 (citations omitted).

\(^{106}\) Id. at 73-74.

\(^{107}\) "This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." Id. at 72-73 (emphasis added).


Therefore, before the New York legislature can constitutionally deny jury trials by removing serious penalties, it must be sure that the misdemeanors in question are petty in nature. An examination of the crimes selected for reclassification, however, indicates that although the proposed legislation is an attempt to alleviate the burden on the New York City courts, these four misdemeanors are by their nature serious crimes.

III. APPLICATION OF CONSTITUTIONAL ANALYSIS

Notwithstanding the proposal to create a new class of misdemeanors, petit larceny, theft of services, possession of stolen property, and criminal mischief are serious crimes. Application of the analysis developed by the Supreme Court in the petty offense area indicates that it is unconstitutional to deny the right to trial by jury to persons accused of these crimes that are both mala in se and morally offensive in nature.

A. Moral Offensiveness

Although the morals of our society constantly change and are sometimes difficult to assess, courts must often determine whether a crime involves moral turpitude. It is generally accepted that moral turpitude is present if a
crime involves dishonesty, baseness, vileness, or depravity, or if it involves conduct contrary to accepted social standards. No definition, however, can provide a foolproof mechanical method for differentiating crimes that are morally offensive from those that are not. Rather, the determination is made by carefully weighing the inherent nature of the criminal transgression against the mores of society.

Petit larceny, theft of services, and possession of stolen property are all theft-related crimes that involve moral turpitude. Petit larceny has consistently been characterized as morally offensive. Theft of services was not recognized at common law as larceny because no personal property was involved, however, legislatures eventually included theft of services as one of the theft offenses codified in their penal statutes. Similarly, possession of

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116. See United States v. Esperdy, 187 F. Supp. 753 (S.D.N.Y. 1960), aff'd, 285 F.2d 341 (2d Cir.), cert. denied, 366 U.S. 905 (1961); United States v. Zimmerman, 71 F. Supp. 534 (E.D. Pa. 1947). In Esperdy, the court concluded that a conviction for bribery involved moral turpitude, and thus, was grounds for the deportation of an alien. Disregarding the circumstances surrounding the particular conduct of the alien and the state's characterization of the offense, the court examined the inherent nature of bribery and concluded that it is the act of "corruptly influencing one in the discharge of his duties, responsibilities, or loyalties, moral and even contractual." 187 F. Supp. at 756.

117. In the New York Penal Law, all three of these crimes are codified under Title J, which is entitled "Offenses Involving Theft." N.Y. Penal Law §§ 155.00-165.65 (McKinney 1975 & Supp. 1979-1980).

118. See Orlando v. Robinson, 262 F.2d 850 (7th Cir.) (petit larceny grounds for deportation of alien), cert. denied, 359 U.S. 980 (1959); Caldwell v. State, 282 Ala. 713, 213 So. 2d 919 (1968) (petit larceny grounds for impeachment of witness' testimony); In re Henry, 15 Idaho 755, 99 P. 1054 (1909) (petit larceny grounds for disbarment of attorney).

119. See Tillery v. State, 44 Ala. App. 369, 209 So. 2d 432 (1968); People v. Ashworth, 220 A.D. 498, 501-02, 222 N.Y.S. 24, 28 (4th Dep't 1927); State v. Guffey, 265 N.C. 331, 144 S.E.2d 14 (1965). See generally Sharp v. Erie R.R., 90 A.D. 502, 85 N.Y.S. 553 (3d Dep't 1904), rev'd on other grounds, 184 N.Y. 100, 76 N.E. 973 (1906). Although courts were willing to include items such as electricity and gas supplied by utilities within the purview of personal property, see, e.g., People v. Menagas, 367 Ill. 330, 11 N.E.2d 403 (1937); People v. Neiss, 92 Misc. 2d 839, 401 N.Y.S.2d 422 (Sup. Ct. 1978), they were not willing to consider other services to be personal property for the purposes of larceny prosecution. See, e.g., Chappell v. United States, 270 F.2d 274 (9th Cir. 1959); People v. Ashworth, 220 A.D. 498, 222 N.Y.S. 24 (4th Dep't 1927). In other contexts, however, they were willing to consider services to be property. See, e.g., In re Ira Haupt & Co., 424 F.2d 722, 724 (2d Cir. 1970) (services rendered by attorneys held to be property for purposes of bankruptcy statute).

stolen property was not included in common law larceny because the defendant does not participate in the actual taking.\textsuperscript{121} In New York, the elements of criminal possession of stolen property are included in the definition of larceny.\textsuperscript{122} Therefore, no matter whether a thief steals personal property, the services of another, or possesses property stolen from another, his conduct is dishonest and morally offensive.

Although a person who commits criminal mischief invades another's property rights, the crime differs from theft-related crimes because he does not take or withhold for his own benefit.\textsuperscript{123} Instead, he intentionally or recklessly destroys the property of another.\textsuperscript{124} The statutory definition of criminal mischief embraces various forms of criminal conduct. It ranges from the vandalization of public property,\textsuperscript{125} to the malicious damage of an automobile,\textsuperscript{126} and from the malicious killing of another person's animals,\textsuperscript{127} to the destruction of gravestones in a cemetery.\textsuperscript{128} Recently, for example, persons suspected of burning crosses on the lawns of black residents have been charged with this crime.\textsuperscript{129}

Intentional criminal mischief consists of base, vile, and depraved conduct that violates the social duties man owes to his fellow man and society.\textsuperscript{130} Although reckless conduct may not be regarded to be as severe as intentional conduct, the Supreme Court held in\textit{District of Columbia v. Colts}\textsuperscript{131} that to act "so recklessly 'as to endanger property and individuals' is [to] act [with] such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense."\textsuperscript{132} Criminal mischief, therefore, is a crime of moral turpitude.

The morally offensive character of petit larceny, theft of services, posses-
tion of stolen property and criminal mischief does not diminish when those crimes are limited to property valued at $150 dollars or less. Conduct in violation of property rights is morally offensive in character irrespective of the value of the property involved. For example, in Orlando v. Robinson, an alien was deported pursuant to the Immigration and Naturalization Act because he was convicted of two crimes involving moral turpitude. One conviction was for the theft of packages that were worth five dollars. Judge Parkinson concluded, however, that although the minimal value of the property "might have been a disappointment to the thief . . . it would not extirpate the element of moral turpitude."

That the degree to which an act offends society's moral standards does not depend on the amount taken or destroyed by the defendant is also evident after an examination of the social stigma that attaches to a person convicted of any crime. Even if the maximum penalty is lowered to six months, a conviction of any of the four crimes proposed to be treated as petty offenses may severely stigmatize the defendant. Indeed, a prison term may prove far less costly than the possible collateral legal and social consequences incurred. A doctor or lawyer who is convicted of petit larceny, theft of


134. 262 F.2d 850 (7th Cir.), cert. denied, 359 U.S. 980 (1959).


136. An alien shall be deported who "at any time after entry is convicted of two crimes involving moral turpitude." Id., § 1251(a)(4).

137. Orlando had also been convicted of contributing to the delinquency of a minor. The only issue before the Seventh Circuit, however, was whether petit larceny was a crime of moral turpitude. 262 F.2d at 851.

138. Id. "Theft has always been held to involve moral turpitude, regardless of the sentence imposed or the amount stolen." Soetarto v. Immigration & Nat. Serv., 516 F.2d 778, 780 (7th Cir. 1975) (citations omitted).

139. See note 110 supra.


141. Courts have discretion to decide whether these consequences are appropriate and may decide not to impose sanctions in a specific case. See In re Fischer, 179 F.2d 361, 370 (7th Cir.
services, possession of stolen property or criminal mischief faces the prospect of losing his professional license, and thereby, his livelihood. An alien convicted of one of these misdemeanors may be subject to deportation, a penalty akin to banishment or exile. Moreover, whenever a person convicted of these crimes testifies at civil or criminal proceedings as either a party or witness, he places his credibility at issue because he was convicted of a crime of moral turpitude. Accordingly, the punitive consequences incurred by a person accused of these four misdemeanors are not limited to the authorized prison term. Although the proposed legislation reduces the maximum prison term to six months, it does not modify the other serious legal and social consequences that stigmatize a person convicted of these crimes.

B. Mala in se or Mala prohibita

Not only are petit larceny, theft of services, possession of stolen property, and criminal mischief considered morally offensive by present day standards, but they were also classified as inherently evil at common law. They are mala in se as opposed to mala prohibita crimes. Mala in se crimes are wrong in themselves or inherently evil. Mala prohibita crimes, however, are wrong only because they are prohibited by statute, not because they are naturally evil.

Although several commentators have questioned the utility of the distinction between mala in se and mala prohibita, it still survives. In fact,
judicial decisions often turn on the application of this distinction. For example, many jurisdictions recognize the crime of unlawful act manslaughter. In the states that recognize this crime, a person who causes the death of another while committing an unlawful act may be prosecuted for manslaughter. If the unlawful act is malum in se, the defendant may be convicted of manslaughter even though the death was coincidental to the illegal act. On the other hand, if the unlawful act is merely malum prohibitum in nature, the prosecution must prove that the death was a foreseeable or natural consequence of the act to obtain a conviction.

Theft-related crimes have been classified as mala in se since Blackstone formally documented the category. Unlike a violation of the licensing provisions for firearms, which is prohibited only by statute, stealing is wrong because it is inherently bad. Theft of services is treated separately from larceny in the penal code not because the criminal conduct is less wrongful, but because the common law definition of personal property does not encompass services. Similarly, it is as wrong to possess stolen property knowingly as it is to perform the initial theft. Criminal mischief is unlawful conduct that society would not tolerate even in the absence of statutory prohibition.

149. Although this concept is disfavored, it persists in many jurisdictions. W. LaFave & A. Scott, supra note 12, at 30. Courts also employ the distinction between mala in se crimes and those that are mala prohibita to determine whether a particular crime requires an element of intent. Mala in se crimes generally require an element of intent while convictions for mala prohibita crimes may be based on strict liability, requiring no criminal state of mind. See, e.g., Morissette v. United States, 342 U.S. 246, 259 (1952); Duncan v. Commonwealth, 289 Ky. 231, 233-34, 158 S.W.2d 396, 397 (1942); Gardner v. People, 62 N.Y. 295, 304 (1875); State v. Smith, 17 Wash. App. 231, 234, 562 P.2d 659, 661 (1977).
151. Id.
152. "[C]rimes and misdemeanors, that are forbidden by the superior laws, and therefore styled mala in se, such as murder, theft, and perjury; . . . contract no additional turpitude from being declared unlawful by the inferior legislature." 1 W. Blackstone, Commentaries *54.
155. Theft of services, like other theft crimes, is wrongful conduct whether it is prohibited by statute or not. See generally Chappell v. United States, 270 F.2d 274 (9th Cir. 1959); People v. Ashworth, 220 A.D. 498, 222 N.Y.S. 24 (4th Dep't 1927).
157. New York's definition of Criminal Mischief differs from the crime of malicious mischief at common law because in New York the crime is not limited to malicious conduct and contains an element of recklessness. Compare N.Y. Penal Law § 145.00 (McKinney 1975) with W. Clark & W. Marshall, A Treatise on the Law of Crimes § 12.42.-43, at 978-82 (7th ed. 1967). Nevertheless, the Supreme Court held in District of Columbia v. Colts, 282 U.S. 63 (1930), that reckless endangerment of persons and property "is not merely malum prohibitum, but in its very nature is malum in se." Id. at 73.
Moreover, mala in se crimes generally contain an element of mens rea. In order to obtain a conviction for petit larceny, theft of services, possession of stolen property, or criminal mischief, the prosecution must prove beyond a reasonable doubt that the defendant possessed a criminal state of mind. Thus, these four misdemeanors cannot be committed by mere accident or negligence. Rather, the defendant's unlawful taking, possession, or destruction of the property or services of another must be intentional, knowing, or reckless.

Accordingly, it is improper to treat these crimes as petty offenses. They are, by their nature, serious, and the Constitution requires that a right to a jury trial attach to them no matter what the authorized penalty.

C. The Nature of the Penalty

A review of the nation's current practices with respect to penalties for petty offenses reveals little change since Baldwin v. New York. The federal system, for example, still provides that the maximum penalty for petty offenses is six months in prison and a $500 fine. A majority of the states either have not defined a precise upper limit on the penalty allowed for petty offenses or have adopted the six-month/$500 maximum imposed on New York.


160. A criminal mischief conviction cannot stand without proof that the injury to property was intentional or reckless. N.Y. Penal Law § 145.00 (McKinney 1975).

161. 399 U.S. 66, 72 n.18.


York in *Baldwin*.\(^{164}\) Moreover, a number of states have elected to extend the right to trial by jury beyond the minimum constitutional requirements.\(^{165}\) and some provide the option of jury trials to all persons accused of any crime.\(^{166}\)

The Supreme Court has recognized that society's values are subject to change, and therefore, any determination of the severity of a particular penalty may not be permanent.\(^{167}\) No court today is capable of predicting changes in society's values, and there may come a time when the uniform practices of the nation will require that a defendant confronted with the possibility of incarceration, however short the period, be afforded the right to trial by jury.

**CONCLUSION**

Trial by jury in criminal cases is a fundamental right protected by the Constitution that the states may not impair by placing serious crimes in the petty offense class. Accordingly, the New York State legislature cannot by

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Swarners, 510 S.W.2d 156, 157-58 (Tex. Civ. App. 1974); State v. Boggess, 147 W. Va. 98, 101, 126 S.E.2d 26, 28-29 (1962). Indiana, Iowa, Montana, Oregon, Utah and Wyoming guarantee the right to trial by jury in their constitutions, see note 51 *supra*, but have not defined the parameters of that right.


165. Arkansas, Ohio and Oklahoma have extended the right beyond the minimum constitutional requirement. Although the Supreme Court indicated in *Natal* v. Louisiana, 139 U.S. 621 (1891), that a municipal violation is precisely the type of offense for which the Constitution does not guarantee a jury trial, Arkansas permits persons charged with municipal violations the right to a jury trial upon appeal to the circuit court. 44 Ark. Stat. Ann. § 116 (1977). *See also* note 63 *supra*. Ohio and Oklahoma require the jury trial for all crimes except when the penalty involved does not exceed a fine of $100. Ohio Rev. Code Ann. § 2945.17 (1975); Okla. Const. art. II, § 19.

166. Alaska, California, Colorado and Maine have extended the right to provide jury trials for all criminal cases. State v. Browder, 486 P.2d 925, 937-40 (Alaska 1971) (any person accused of a crime for which he may be incarcerated is entitled to a jury trial); Cal. Penal Code § 689 (West 1970) (persons accused of any public offense are entitled to a jury trial); Colo. Rev. Stat. § 16-10-109 (1973) (persons charged with a petty offense are entitled to a six person jury if demannd in writing within ten days of arraignment or entry of plea if twenty-five dollar fee is paid); State v. Sklar, 317 A.2d 160, 165-71 (Me. 1974) (constitutional guarantee of trial by jury extends without qualification to petty offenses).

167. As Justice Stone stated for the Court in District of Columbia v. Clawans, 300 U.S. 617 (1937): "[S]tandards of action and of policy which find expression in the common and statute law may vary from generation to generation. Such change has led to the abandonment of the lash and the stocks, and we may assume, for present purposes, that commonly accepted views of the severity of punishment by imprisonment may become so modified 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 prescribes, in some cases which were triable without a jury when the Constitution was adopted." *Id.* at 627; *see* Schick v. United States, 195 U.S. 65, 67-68 (1904).
reducing the authorized penalty and property value limitation for petit larceny, possession of stolen property, theft of services, and criminal mischief transform those crimes into petty offenses. These reductions cannot obviate the nature of the crimes as morally offensive and *mala in se*, or remove the social stigma that may attach to them upon conviction. If enacted, the proposed amendments will be an unconstitutional infringement upon our right to be tried by a jury of our peers.

Robert P. Connolly