BYU Law Review

Volume 1976 | Issue 2 Article 9

5-1-1976

Constitutional Law-Criminal Procedure-Criminal Contempt-The Right to Trial by Jury - Muniz v. Hoffman

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Constitutional Law—CRIMINAL PROCEDURE—CRIMINAL CONTEMPT—THE RIGHT TO TRIAL BY JURY—*Muniz v. Hoffman*, 422 U.S. 454 (1975).

Early in 1970, Local 21 of the San Francisco Typographical Union began picketing the publishing plant of a local newspaper. The newspaper responded by filing an unfair labor practice charge with the National Labor Relations Board (NLRB).[1] Pursuant to section 10(l) of the National Labor Relations Act, the regional director of the NLRB secured a temporary injunction prohibiting continued picketing while the NLRB's decision was pending. Local 70 and its president, Muniz, were subsequently charged with both civil and criminal contempt for joining Local 21 in its activities prohibited by the injunction. The district court denied the defendants' request for a jury trial, placed Muniz on probation for 1 year and fined Local 70 $10,000. The United States Court of Appeals for the Ninth Circuit affirmed.[2]

On writ of certiorari to the United States Supreme Court, Muniz and Local 70 argued that the district court's decision unconstitutionally deprived them of the right to trial by jury guaranteed by article II, section 2(3)[3] and the Sixth Amendment.[4] Petitioners pointed out that 18 U.S.C. section 1(3) implies that offenses punished by a fine over $500 are serious,[5] and since the right to trial by jury attaches whenever the crime is serious, the petitioners claimed they were entitled to a jury.[6] Petitioners also claimed a statutory right to trial by jury under 18 U.S.C. section 3692, which provides for a jury "in any case involving or growing out of a labor dispute."[7]

In affirming the lower court's decision, the Supreme Court

1. Labor-Management Relations Act of 1947, 29 U.S.C. § 160(1) (1970).

2. Hoffman v. Teamsters Local 70, 492 F.2d 929 (9th Cir. 1974).

3. U.S. CONST. art. III, § 2(3) provides, in pertinent part: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."

4. U.S. CONST. amend. VI provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

5. 18 U.S.C. § 1(3) (1970) reads as follows: "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

6. Muniz v. Hoffman, 422 U.S. 454, 476 (1975).

7. 18 U.S.C. § 3692 (1970) reads, in pertinent part:

> In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.

held that despite the broad language of section 3692, the legislative history indicated that the intended scope of the statute was limited to cases arising under the Norris-LaGuardia Act.[8] The Court also concluded that where the punishment imposed for criminal contempt is limited to a fine, the definition of petty and serious offenses contained in section 1(3) does not control the constitutional right to trial by jury.[9] Other than a brief description of the Court's treatment of the first issue, this case note will consider only the latter aspect of the Court's decision and its effect on the yet unresolved conflict between the judiciary's summary contempt powers and the defendant's right to trial by jury.

I. BACKGROUND

A. *The Right to Trial by Jury*

Trial by jury originated in the English common law where it was considered a matter of right in both civil and criminal proceedings.[10] This right, however, was restricted to cases involving "serious" offenses; so called "petty" offenses were summarily[11] punished.[12] These English practices became part of the common

8. 29 U.S.C. §§ 101-15 (1970).

9. 422 U.S. 454, 476-77 (1975).

10. In the 18th century, Blackstone wrote of the English jury trial practice:

> Our law has, therefore, wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. 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 of *oyer* and *terminer* 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. But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion.

4 W. BLACKSTON, COMMENTARIES 349-50 (Wendell ed. 1854).

11. "The term used in connection with legal proceedings means a short, concise, and immediate proceeding . . . and trial of a 'summary' character is a trial without a jury." BLACK'S LAW DICTIONARY 1604 (4th ed. rev. 1968).

12. This fact was acknowledged by the Supreme Court in District of Columbia v. Clawans, 300 U.S. 617, 624 (1937):

> At the time of the adoption of the Constitution there were numerous offenses, commonly described as "petty," which were tried summarily without a jury, by justices of the peace in England, and by police magistrates or corresponding judicial officers in the Colonies, and punished by commitment to jail, a workhouse, or a house of correction.

law of the American Colonies[13] and subsequently were incorporated in the United States Constitution and the Bill of Rights.[14] Article III, section 2(3) of the Constitution and the Sixth Amendment provide for a jury in the trial of all crimes;[15] the Seventh Amendment extends this right to all "suits at common law, where the value in controversy shall exceed twenty dollars."[16] In light of this common law background, it was long held that the constitutional guarantee of trial by jury extended no further than the guarantee under the common law of 1789.[17] More recent constitutional interpretations, however, have expanded the common law definition of "serious" crimes to include all criminal offenses where the defendant may be incarcerated for over 6 months.[18] The

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Contra, Comment, *Aggregating Multiple Contempts of Court: The Supreme Court Takes Another Step to Insure a Jury Trial*, 20 S.D.L. REV. 438 (1975). The author suggests that England utilized summary proceedings for direct criminal contempts but juries for indirect criminal contempts. Another commentator claims that "until 1720 there is no instance in the common-law precedents of punishment otherwise than after trial in the ordinary course and not by summary process." Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1046 (1924).

13. *See* United States v. Barnett, 376 U.S. 681, 701-24 (1964) (considering the contempt proceedings of each colony).

14. Incorporation was implied by the Court. This position, however, has had its critics both on and off the bench. *See* notes 88-99 and accompanying text *infra*; note 12 *supra*.

15. *See* notes 3, 4 *supra*.

16. U.S. CONST. amend. VII.

17. The purpose of art. III, § 2 was to

> preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future . . . but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as a right.

Ex parte Quirin, 317 U.S. 1, 39 (1942). This position is also supported by Gompers v. United States, 233 U.S. 604, 610 (1914), wherein the Court said:

> But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right.

18. *See* Duncan v. Louisiana, 391 U.S. 145, 161-62 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966). In *Cheff*, the Court said:

> [I]n the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further than sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or a waiver thereof.

Id. at 380.

right to trial by jury has also been extended to civil cases involving mixed questions of law and equity.[19]

B. Contempt Proceedings

Contempt of court can be defined as any act or omission that disrupts or obstructs the judicial process.[20] An act of contempt can be classified as either civil—initiated by a private party, or criminal—initiated by the court,[21] and as direct or indirect, depending on whether it occurred within or without the courtroom.[22]

At common law, the power to summarily punish for contempt was deemed an inherent and necessary power of courts to preserve the orderly administration of justice.[23] This summary power was preserved in the federal judicial system as created by the Judiciary Act of 1789.[24] Unrestrained by the buffering influence of a jury, however, the broad language of the act soon led to abuses. A notorious example of such abuse was Judge Peck's summary imposition of criminal contempt sanctions on a disinterested third party for out of court criticism of his decision in a case pending on appeal. This abuse led to congressional impeachment proceedings against Judge Peck.[25]

The day following the Peck proceedings, Congress began

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19. *E.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1958).

20. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 185-86 (1971).

21. Keller, *Civil and Criminal Contempt*, 43 N.D.L. REV. 244, 244-45 (1967) (examining the procedural and substantive differences between civil and criminal contempt).

It has sometimes been said that a person incarcerated for civil contempt carries the keys to the jail since he will be released upon compliance with the relevant court orders. United States v. Barnett, 376 U.S. 681, 754 (1964) (Goldberg, J., dissenting).

The Ninth Circuit defined criminal contempt as conduct against the authority and dignity of the court, an act which requires the "vindication of the court's authority and the punishment of a public wrong." *In re* Osborne, 344 F.2d 611, 616 (9th Cir. 1965).

22. Direct contempt is contumacious behavior that transpires under the court's own eye and within its hearing. *Ex parte* Terry, 128 U.S. 289, 308-09 (1888). "Indirect contempt is contumacious behavior occurring beyond the eye or hearing of the court and for knowledge of which the court must depend upon the testimony of third parties or the confession of the contemnor." United States v. Marshall, 451 F.2d 372, 373 (9th Cir. 1971).

23. *See* Robertson v. State, 20 Ala. App. 514, 104 So. 561, 565 (1924). In 1859, the Supreme Court of Mississippi declared that:

> A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it.

Watson v. Williams, 36 Miss. 331, 341 (1858).

24. Ch. 20, § 17, 1 Stat. 83.

25. For a full transcript of the proceedings before the House and the Senate see A. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833). A brief account is found in Nye v. United States, 313 U.S. 33, 45 (1941).

work on the Judiciary Act of March 2, 1831. This legislation limited the federal courts' summary contempt powers to acts occurring within the courtroom (direct contempts), but the right to trial by jury was not extended to any contempt proceedings.[26] Since the lower federal courts derive their existence and jurisdiction from congressional action,[27] there is no doubt that Congress retained the authority to restrict what some have argued is the "inherent" authority of the federal courts to deal with acts of contempt.[28]

C. *The Right to Trial by Jury in Criminal Contempt Proceeding*

Since at common law neither criminal nor civil contempt was considered a crime, much less a serious crime, the right to trial by jury was not applicable. Largely as a result of continuing judicial abuse[29] and congressional inaction, the Supreme Court in 1964 began to impose additional restraints on the judiciary's exer-

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26. Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487. The Act prohibited summary proceedings for contempt except where such contempt occurred in the presence of the court or near enough to obstruct justice. The present statute, 18 U.S.C. § 401 (1970), enacted in 1948, incorporates the provisions of the 1831 act and limits the power of summary punishment to three situations: (1) misbehavior of any person in the court's presence or so near as to obstruct justice; (2) misbehavior of any of the court's officers in their official capacity; and (3) disobedience or resistance to the court's lawful writ, process or order.

27. Under the Judiciary Act of 1789, the federal courts "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . ."

The Supreme Court said in *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 511 (1873) that:

> These courts [district and circuit] were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The Act of 1831 [now 18 U.S.C. § 401 (1970)] is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted.

28. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510-11 (1873). *See generally* J. Fox, The History of Contempt of Court (1927).

29. The Court has recognized the unique potential for judicial abuse in summarily punishing criminal contempts. *See, e.g.*, Taylor v. Hayes, 418 U.S. 488 (1974); Offutt v. United States, 348 U.S. 11 (1954); Cooke v. United States, 267 U.S. 517 (1925); *Ex parte* Terry, 128 U.S. 289 (1888). In Bloom v. Illinois, 391 U.S. 194 (1968), the Court stated:

> [A] compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. . . .
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> . . . [T]here has been a recurring necessity to set aside punishments for criminal contempt as either unauthorized by statute or too harsh.

Id. at 202, 206.

cise of contempt powers. In *United States v. Barnett*,[30] the Court refused to declare criminal contempt to be a crime. Therefore, whether or not the contempt itself was serious, there was no right to trial by jury.[31] The Court added, however, that if the punishment for the contempt were sufficiently serious there might be a right to trial by jury.[32] Two years later, in *Cheff v. Schnackenberg*,[33] the Court was asked to indicate what punishment was sufficiently serious to trigger this right. Although not formally adopting 18 U.S.C. section 1(3) (defining petty offenses) as the standard, the Court referred to it and held that sentences for criminal contempt exceeding 6 months imprisonment "may not be imposed by federal courts absent a jury trial or waiver thereof."[34] Interestingly, the Court used a standard based on the difference between serious and petty crimes even though it had not yet declared criminal contempt to be a crime. This discrepancy was resolved in *Bloom v. Illinois*[35] when the Court declared criminal contempt to be a "crime in every fundamental respect,"[36] thus meriting a jury trial under the Sixth Amendment when the contempt is serious.[37] Without expressly referring to section 1(3), the Court held that in the absence of a jury or a waiver thereof, it is unconstitutional to impose a sentence of 2 years imprisonment in an indirect criminal contempt proceeding.[38] In *Duncan v. Louisiana*,[39] decided the same day as *Bloom*, the Court used the standard established by section 1(3) to determine whether a crime was serious, thereby entitling the defendant to a trial by jury. Again, however, the Court refused to expressly adopt the statute's standard.[40] Finally, in *Codispoti v. Pennsylvania*,[41] the Court, without actually mentioning section 1(3), adopted its 6 months imprisonment standard in criminal contempt proceedings arising in state courts.

30. 376 U.S. 681 (1964).

31. Fifty cases from 1812 to 1964 are cited in support of summary disposition of contempts without reference to any distiction based on the seriousness of the offense. *Id.* at 694 & n.12.

32. *Id.* at 695 n.12.

33. 384 U.S. 373 (1966).

34. *Id.* at 380.

35. 391 U.S. 194 (1968).

36. *Id.* at 201.

37. *Id.* at 202.

38. Although the case dealt with indirect contempt, in dicta the Court suggested that the right to a jury trial might extend to direct contempts as well. *Id.* at 209-10.

39. 391 U.S. 145 (1968).

40. *Id.* at 161.

41. 418 U.S. 506, 512 (1974).

In its search for a standard to determine when the right to trial by jury attaches in both criminal and criminal contempt proceedings, the Court has often referred to section 1(3), but has never expressly adopted it as the standard. Furthermore, the Court has never addressed the question of how large a fine must be to trigger the right to a jury trial in criminal contempt proceedings. Therefore, it is not surprising that when faced with requests for a jury trial in criminal contempt proceedings, lower court decisions have varied greatly. Some courts have relied on the standard of section 1(3) and have held that a criminal contempt punished by a fine over $500 was serious, requiring a trial by jury.[42] Other courts have refused to follow the statute, reasoning that the Supreme Court has not discussed fines and that they were therefore free to make their own determination of the seriousness of the contempt.[43] Thus, when the Court considered *Muniz*, the only point of agreement among the courts was that trial by jury was required where the contemnor was sentenced to more than 6 months incarceration.

II. Muniz v. Hoffman

In *Muniz v. Hoffman*, the Court confronted the same question that has divided the lower courts. That is, how large must a fine for criminal contempt be for the offense to be considered serious with the attendant right to a trial by jury? As a corollary to that issue, *Muniz* also presented the question of whether section 1(3) should control the classification of criminal contempts as petty or serious.

Before reaching these issues, the Court considered the petitioners' claim to a statutory right to trial by jury under 18 U.S.C. section 3692.[44] Despite its broad language guaranteeing the right to trial by jury "in any case involving or growing out of a labor dispute," the Court noted that the statute was intended to be a

42. *E.g.*, Mitchell v. Fiore, 470 F.2d 1149, 1153 (3d Cir. 1972); United States v. R.L. Polk & Co., 438 F.2d 377 (6th Cir. 1971); County of McClean v. Kickapoo Creek, Inc., 51 Ill. 2d 353, 282 N.E.2d 720 (1972). *See also* United States v. Merrick, 459 F.2d 644 (4th Cir. 1972) (18 U.S.C. § 1(3) quoted as the legislative definition of the maximum penalty that may be considered petty); Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 275 N.C. 503, 169 S.E.2d 867 (1969) (referring to the threshold established by 18 U.S.C. § 1(3)).

43. *E.g.*, Clark v. Boyton, 362 F.2d 992, 999 & n.17 (5th Cir. 1966); Seven Rivers Farm, Inc. v. Reynolds, 84 N.M. 789, 508 P.2d 1276 (1973); *In re* Jersey City Educ. Ass'n, 115 N.J. Super. 42, 278 A.2d 206 (Super. Ct. 1971); Rankin v. Shanker, 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.S.2d 625 (1968).

44. The pertinent part of § 3692 is quoted at note 7 *supra*.

mere recodification of section 11 of the Norris-LaGuardia Act.[45] Since *Muniz* arose under the Taft-Hartley Act[46] and was not covered by the Norris-LaGuardia jury trial provisions, the Court concluded that section 3692 did not apply.[47] Justices Stewart, Marshall, Powell, and Douglas dissented on the ground that the plain meaning of section 3692 should govern its interpretation, not prior interpretations of section 11 of the Norris-LaGuardia Act.[48]

The Court then considered the union's second claim,[49] that the imposition of a $10,000 fine rendered the contempt a serious offense under the standard of section 1(3) and that, consequently, its demand for a trial by jury under article III, section 2 and the Sixth Amendment had been erroneously denied. This claim presented the Court with an issue of first impression; that is, whether a right to trial by jury exists when a criminal contempt is punished by a fine unaccompanied by incarceration.[50] The majority rejected the proposition that all criminal contempts are serious per se. Rather, it concluded that in light of the fundamental differences between fines and imprisonment, the seriousness of a contempt in which a fine alone was imposed must be evaluated on a case by case basis. Futhermore, the standard of section 1(3) was held not to control the petty/serious determination required by the common law gloss on the Constitution.[51] Having rejected this standard, however, the Court failed to provide another objective standard upon which to base the petty/serious determination. Rather, noting that the union collected dues from 13,000 members, the Court held that "the fine of $10,000 imposed on Local 70 in this case was [not] a deprivation of such magnitude that a jury should have been interposed to guard against bias or mistake."[52]

45. 422 U.S. 454, 462-63, 467-69 (1975).

46. 29 U.S.C. §§ 141-97 (1970).

47. 422 U.S. at 467, 474 (1975).

48. *Id.* at 478 (Douglas, J., dissenting), 484 (Stewart, J., dissenting).

49. Muniz did not join with the union in asserting this claim because he was merely placed on probation for 1 year. In Frank v. United States, 395 U.S. 147 (1969), the Supreme Court rejected the claim that a sentence of 3 years probation was serious and therefore merited a trial by jury. Referring to the statute defining petty and serious offenses, 18 U.S.C. § 1(3), the Court pointed out that the statute only mentions penal sanctions and monetary fines, making no reference to probationary penalties. Since the Court refused to grant a jury trial on the basis of the 3-year probationary penalty in *Frank*, silence on this matter in *Muniz* is understandable. *See* Muniz v. Hoffman, 422 U.S. 454, 476 (1975); 69 MICH.L. REV. 1549, 1562-63 (1971).

50. 422 U.S. at 476.

51. *See id.* at 476-77.

52. *Id.* at 477.

Justice Douglas argued in dissent that the plain meaning of the Sixth Amendment requires a jury trial upon demand in all criminal proceedings.[53] He further argued that even assuming that the petty/serious dichotomy was appropriately applied in *Muniz*,[54] "it is impossible fairly to characterize either the offense or its penalty as 'petty.' "[55]

III. ANALYSIS

A. *Consequences of* Muniz

The Court's refusal to adopt the objective standard of section 1(3) in applying the petty/serious standard of the Sixth Amendment creates more confusion in an already uncertain area of the law. By the time *Muniz* reached the Supreme Court, it was clear that the seriousness of criminal contempts, now deemed crimes by virtue of *Bloom*, was to be measured by the penalty actually imposed.[56] It was not clear, however, what standard would be used to distinguish between petty and serious criminal contempts.[57]

In the past, the Court understandably has been influenced by section 1(3) since that section seemed well suited as a standard for classifying petty and serious crimes. Unfortunately, the Court has used this statute inconsistently. At times, it has referred to and relied on the statute without expressly adopting its terms; other times, the Court has ignored the statute.[58] For example, in *Duncan* the Court referred to section 1(3) and relied on its standard[59] but refused to specifically adopt it, stating, "we need not,

53. *Id.* at 479-80. In an earlier case Justice Douglas expressed a similar view. Noting that Congress has not attempted to isolate petty contempts, he contended that it is improper for the Court to do so. Cheff v. Schnackenberg, 384 U.S. 373, 392 (1966) (Douglas, J., dissenting).

54. Justice Douglas has argued that the Court should not apply a petty/serious test in the absence of legislation isolating petty from serious criminal contempts. *See* Cheff v. Schnackenberg, 384 U.S. 373, 393 (1966) (dissenting opinion).

55. 422 U.S. at 480.

56. Bloom v. Illinois, 391 U.S. 194, 201, 211 (1968).

57. *See* notes 42, 43 and accompanying text *supra*.

58. *Compare* Frank v. United States, 395 U.S. 147 (1969) *and* Duncan v. Louisiana, 391 U.S. 145 (1968) *with* Bloom v. Illinois, 391 U.S. 194 (1968) *and* Codispoti v. Pennsylvania, 418 U.S. 506 (1974).

59. The Court's language, however, encompasses more than the standard of 18 U.S.C. § 1(3):

> In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to receive a jury trial, we are counseled by District of Columbia v. Clawans, 300 U.S. 617, to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal

however, settle in this case the exact location of the line between petty offenses and crimes."[60] Yet the opinion in *Bloom v. Illinois*, written by the same author as *Duncan*, failed even to refer to the statute.[61] Finally, in *Muniz*, the Court refused to rely on the statute.[62]

The Court's rejection of the objective standard of section 1(3) is understandable given the legislative history of the statute. Early versions and congressional records suggest that the statute was intended to unclog criminal calendars by eliminating the need for a grand jury indictment for petty offenses.[63] Furthermore, the House proceedings reveal no expectation that the petty/serious standard established therein would control the right to trial by jury.[64] This history, together with the fact that section 1(3) existed in one form or another for over 35 years[65] without even being referred to as a factor in determining the right to a jury trial in criminal contempt or criminal cases,[66] makes it clear that Congress never intended it to be used for this purpose.[67]

Rejection of the statute has two important consequences. First, the rejection demonstrates that the Court's characterization of an offense as serious if the punishment exceeds 6 months incarceration is the result of judicial alteration of the common law.[68] Second, when only a fine is imposed for contempt, there is no objective standard for determining whether the offense is petty or serious. This leaves the constitutional right of trial by jury to the discretion of judges subject only to appellate court review. Each case will require unique analysis of its facts and merits.[69]

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system, petty offenses are defined as those punishable by no more than six months imprisonment and a $500 fine.

391 U.S. at 161. This statement suggests that societal attitudes toward criminal contempt may influence judicial assessment of seriousness. Although the Court stated that legislative enactments especially reflect societal attitudes, other expressions of public sentiment might similarly influence the judges. *See also* Note, *Criminal Contempt and Trial by Jury*, 8 WM. & MARY L. REV. 76, 90-100 (1966).

60. 391 U.S. at 161.

61. 391 U.S. 194 (1968).

62. 422 U.S. 454 (1975).

63. *See* Act of Dec. 16, 1930, ch. 15, 46 Stat. 1029-30; 72 CONG. REC. 9991-94 (1930).

64. *See* 72 CONG. REC. 9991-94 (1930).

65. *See* note 63 *supra*.

66. It was first used for this purpose in Cheff v. Schnackenberg, 384 U.S. 373 (1966).

67. The $500 maximum provision of 18 U.S.C. § 1(3) has remained unaltered in the course of subsequent recodifications. Failure to adjust the amount in light of inflation casts further doubt on the theory that the statute was intended to categorize crimes as petty or serious with jury trial consequences.

68. *See* notes 12, 17 *supra*.

69. One might ordinarily think that only criminal contempt cases involving fines *over*

Indeed, until the Supreme Court reviews a case, the trial judge will not know with certainty whether he should have impaneled a jury.

B. Evidence of the Contemnor's Financial Status in Determining His Right to a Jury Trial

1. In general

Although the Court is unwilling to apply the precise provisions of the statute, it considers the actual penalty imposed to be important in assessing the seriousness of the criminal contempt.[70] In *Muniz*, the Court considered not only the size of the fine actually imposed, but also the union's ability to pay the fine.[71] Consideration of this factor is unusual. In the civil setting, evidence of a defendant's financial condition is generally considered irrelevant[72] and unfairly prejudicial,[73] except on the issue of punitive damages.[74] Similarly, except for its potential use in sentencing,[75] the question of a defendant's wealth would rarely arise in a criminal trial.[76] Its use in a criminal contempt proceeding, while analogous to the punitive damages context and punitive phase of a criminal trial, is not wholly the same. But since fines for criminal contempt, like punitive damages and criminal punishment, are arguably aimed at deterrence, it seems appropriate to consider financial condition.[77]

The issue in *Muniz*, however, was not the size of the fine necessary to insure sufficient deterrence, but the size of the fine that would warrant a jury trial.[78] When the deterrence considera-

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$500 would require review regarding seriousness. This may not be so, however, since in certain circumstances even a fine under $500 may be held to be serious. Another unanswered question is how the Court will look on imprisonment terms under 6 months accompanied by fines of varying sizes.

70. Bloom v. Illinois, 391 U.S. 194, 211 (1968).

71. 422 U.S. at 476-77.

72. "The existence or non-existence of the defendant's wealth or financial support is wholly irrelevant when it comes to compensatory damages." D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 218 (1973); *see* FED. R. EVID. 401, 402.

73. *See* FED. R. EVID. 403.

74. *See, e.g.*, Bowers v. Carolina Pub. Serv. Co., 148 S.C. 161, 165, 145 S.E. 790, 791 (1928); Marriott v. Williams, 152 Cal. 705, 710, 93 P. 875, 878 (1908).

75. *See* FED. R. CRIM. P. 32(c); *cf.* United States v. Dockery, 447 F.2d 1178 (D.C. Cir.), *cert. denied*, 404 U.S. 950 (1971).

76. *See* FED. R. EVID. 401, 402.

77. *See also* note 21 *supra*.

78. 422 U.S. at 476.

The holding of *Muniz* was limited to its facts: a $10,000 fine imposed on an unincor-

tion is absent, the relevance of a defendant's wealth seems to disappear. If it is accepted that the wealth factor is not applicable to individuals in the jury trial determination, there is no reason that can justify the use of a different standard for associations and corporations since they too are constitutionally guaranteed the right to trial by jury.[79] On the other hand, if, as the Court implied in *Muniz*, a defendant's wealth is considered in the determination of its right to a trial by jury, there is arguably a violation of the defendant's right to equal protection under the laws.

2. Equal protection

Under equal protection case law the Court applies a strict scrutiny test to discriminatory legislation that either is based on suspect classifications or burdens fundamental rights.[80] In the absence of a compelling state interest, which has rarely been found by the Court, such legislation is invalidated under the equal protection clause of the Fourteenth Amendment.[81]

Recent case law has dealt with the question of whether wealth is a suspect classification. In *Harper v. Virginia Board of Elections*,[82] the Court stated that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."[83] Although the Court invalidated the legislation under the strict scrutiny test since it burdened a fundamental interest—voting—the Court appears to have been influenced by the use of wealth as a classification.[84] In *San Antonio Independent School District v. Rodriguez*,[85] however, the Supreme Court did not treat wealth as a suspect classification since there had been no discrimination against a definable category of persons result-

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porated labor union collecting dues from 13,000 members. In rejecting the plea to apply 18 U.S.C. § 1(3) the Court stated that:

> It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual, but it is not tenable to argue that the possibility of a $501 fine would be considered a serious risk to a large corporation or labor union.

422 U.S. at 477. Given the narrow holding of *Muniz*, there is a possibility that the over $500 fine standard may still be viable for measuring the seriousness of traditional crimes (in contrast to criminal contempts).

79. *See* Ross v. Bernhard, 396 U.S. 531 (1970).

80. Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection*, 1976 B.Y.U.L. REV. 89.

81. *Id.* at 94, 103-04.

82. 383 U.S. 663 (1966).

83. *Id.* at 668 (citations omitted).

84. *Id.* at 670.

85. 411 U.S. 1 (1973).

ing in the absolute deprivation of the alleged right.[86] The Court also rejected the claim that since the legislation burdened a fundamental right—public education—the strict scrutiny test should be applied. According to the Court, the right to a public education did not qualify as a fundamental right since it was not protected by the Constitution expressly or by reasonable implication.[87]

Using wealth as a factor to determine the right to a jury trial raises equal protection issues similar to those raised in *Harper* and *Rodriguez*. Concededly, this discrimination is judicial, not legislative; but this distinction is unimportant for purposes of appraising the wisdom of the Court's position. This position, were it legislatively based, would be subject to strict judicial scrutiny. The right to trial by jury is a fundamental right even by the *Rodriguez* standard since it is expressly protected by the Constitution. Such a fundamental right, when burdened by a classification based on wealth, as in *Harper*, is even more certain to be protected by the equal protection clause. Furthermore, discrimination on the basis of wealth in this setting arguably meets the *Rodriguez* requirements for a suspect classification. Whereas im *Rodriguez* the class subject to discrimination involved a mixture of poor and non-poor within geographic districts, the judicial discrimination in *Muniz* was directed only against those with greater financial resources. In addition, the plaintiffs in *Rodriquez* were not absolutely deprived of the right to a public education; in *Muniz*, a wealthy defendant was deprived absolutely of the right to trial by jury. It seems inconsistent for the Court to burden the fundamental interest of trial by jury by discriminating on the basis of wealth when the Court routinely strikes down legislation having the same effect.

C. Abandonment of the Petty/Serious Distinction

Questions have been raised about the wisdom of limiting the guarantees of the Sixth Amendment to serious offenses. Justices Black and Douglas have consistently argued that the plain language of the Sixth Amendment affords the right to trial by jury to "all" crimes regardless of their seriousness.[88] Since the Consti-

86. *Id.* at 25.

87. *Id.* at 35.

88. *See, e.g.*, Frank v. United States, 395 U.S. 147, 159-60 (1969) (Black, J., dissenting); Cheff v. Schnackenberg, 384 U.S. 373, 391 (1966) (Douglas, J., dissenting); United States v. Barnett, 376 U.S. 681, 724 (1964) (Black, J., dissenting); Green v. United States, 356 U.S. 165, 193 (1958) (Black, J., dissenting).

tution itself does not distinguish between petty and serious offenses, they argue, the Court should not create a distinction.[89] This proposition is supported by the Seventh Amendment, which guarantees a trial by jury in suits at common law where the value in controversy exceeds $20. It is improbable that the framers intended litigants to be protected in cases involving such a trifling amount, yet not be protected where the risk is imprisonment or a fine much greater than $20.[90]

A similar position has been adopted in at least two states. California, for instance, constitutionally guarantees a jury trial for any person charged with a public offense.[91] Similarly, the Supreme Court of Alaska interpreted the Alaska Constitution, the relevant language of which is virtually identical to the Sixth Amendment,[92] as extending the right to a jury trial to all criminal defendants who wish one.[93] The court indicated that there is no good reason to draw a line between petty and serious offenses. It rejected policy arguments based on overburdening the judicial system as inapplicable when discussing the extent of constitutional protections, and rejected the common law history as stifling "a progressive development of our legal institutions."[94] The wisdom of rejecting the petty/serious dichotomy is suggested by these and other arguments made by Justices Black and Douglas.[95]

In the alternative, Justice Douglas has argued that all criminal contempts should be treated as serious given the serious nature of some criminal contempts and the severe fines imposed on others.[96] According to Justice Douglas, any offense that carries with it the social stigma of being a crime merits a jury;[97] he points

89. In place of the common law petty/serious distinction, Justices Black and Douglas proposed a violation/crime test. According to this proposal, criminal defendants would have a right to trial by jury whereas those charged with a mere violation, like a traffic violation which carries with it no criminal stigma, would not. *See* Baldwin v. New York, 399 U.S. 66, 76 & n.2 (1970); Cheff v. Schnackenberg, 384 U.S. 373, 390-1 (1966).

90. *See* District of Columbia v. Clawans, 300 U.S. 617, 633-34 (1937) (McReynolds & Butler, JJ., dissenting).

91. CAL. CONST. art. I, § 7.

92. ALAS. CONST. art. I, § 11 provides that:

> In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record.

93. Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970).

94. *Id.* at 396.

95. *See* notes 53, 88 *supra*.

96. *See* Cheff v. Schnackenberg, 384 U.S. 373, 384-86 & nn.2-3 (1966) (Douglas, J., dissenting).

97. *See* note 89 *supra*.

out that criminal contemnors are treated for all intents and purposes as ordinary criminals. Furthermore, the maximum potential sentence, not the sentence actually imposed, should be the relevent factor in determining how society looks at an offense. Although no maximum sentence is imposed by law in cases of criminal contempt, it is clear from the severity of sentences that can be and have been imposed that society views the offense as serious.[98] Justice Douglas does not deny that some criminal contempts might be petty, but contends that "[u]ntil the time when petty criminal contempts are properly defined and isolated from other species of contempts . . . punishment for all manner of criminal contempts can constitutionally be imposed only after a trial by jury."[99]

Both Justice Douglas' initial and alternative positions lead to the same result—the extension of the right to trial by jury to all criminal contempt proceedings. Although this extension eliminates the need to make the petty/serious detemination on a case by case basis, it also completely divests judges of summary contempt powers that arguably are needed to control the administration of justice.

D. Legislative Solution to the Petty/Serious Dichotomy

The ramifications of abandoning the petty/serious distinction, especially with respect to judges' control of the administration of justice, would be significant. The Court has recently suggested that congressional action[100] might solve the dilemma caused by the conflict between the judiciary's need to maintain order in the court and the need to determine which criminal defendants are entitled to a trial by jury.[101] Under this legislative approach, courts would not make subjective determinations on an ad hoc basis, but could work with an objective standard by which the offense punishable by fine would be classified as petty or serious according to whether its maximum penalty exceeded the legislatively established threshold. Two obstacles must be

98. Cheff v. Schnackenberg, 384 U.S. 373, 384-86 & nn.2-3 (1966) (Douglas, J., dissenting).

99. *Id.* at 393.

100. Some have suggested that the legislature, not the judiciary, should institute appropriate reforms in this area of the law. *See* Patterson, *Criminal Contempt: A Proposal for Reform Providing "The Least Possible Power Adequate to the End Proposed,"* 17 S.D.L. REV. 41, 64 (1972).

101. *See* Bloom v. Illinois, 391 U.S. 194, 211 (1968). *See also* Muniz v. Hoffman, 422 U.S. 454, 476 (1975).

overcome before this approach becomes viable. First, Congress must legislate a maximum penalty for criminal contempt.[102] Second, Congress must enact a statute establishing a threshold between petty and serious crimes.[103] If Congress were to enact such legislation, or clearly manifest intent that 18 U.S.C. section 1(3) be used for such purpose,[104] the process by which the right to a jury trial in federal criminal contempt cases is to be determined would be clear.

Without basing the petty/serious criteria on constitutional grounds, however, the Court would still have to decide requests for a jury trial in criminal contempt cases arising in state courts on a case by case basis. Although it is true that the right to trial by jury has been extended to state proceedings by virtue of the Fourteenth Amendment,[105] any federal statute attempting to control the right to trial by jury in state proceedings would likely be held invalid as a congressional exercise beyond its power.

Given their disadvantages, the solutions considered above are not entirely satisfactory. One approach not yet fully explored appears to be the most efficient: the establishment by the Supreme Court of objective criteria with which to make the petty/serious determination deemed inherent in the Sixth Amendment.[106] This solution would sufficiently clarify this disconcerting area of the law so as to avoid the case by case analysis presently required. In addition, the Court would no longer need to consider the financial circumstances of the contemnor, a consideration that appears to deny equal protection of the laws as guaranteed by the Constitution. Furthermore, interpreting the Sixth Amendment right by objective judicial creiteria would guarantee the right to trial by jury in state, as well as federal, proceedings by virtue of the Fourteenth Amendment.[107]

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102. Cheff v. Schnackenberg, 384 U.S. 373, 391 (1966) (Douglas, J., dissenting).

103. *See generally* Kuhns, *Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury*, 73 MICH. L. REV. 483, 494 (1975). The author proposes that all criminal contempts be treated for all purposes as ordinary criminal prosecutions and indicates needed legislative reforms.

104. In *Muniz* the majority declared that "criminal contempt, in and of itself without regard for the punishment imposed, is not a serious offense absent legislative declaration to the contrary . . . ." 422 U.S. at 476.

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

106. *See* notes 10-17 and accompanying text *supra*.

107. *See generally* Duncan v. Louisiana, 391 U.S. 145 (1968).