A Corporation's Right to a Jury Trial Under the Sixth Amendment

*Alan L. Adlestein**

TABLE OF CONTENTS

* Associate Professor, Widener University School of Law. B.A., Cornell University, 1963; J.D., Harvard University, 1966. The Author thanks Professors Kathleen F. Brickey, Michael J. Cozzillio, Carolyn L. Dessin, G. Randall Lee, and Robert C. Power for their helpful comments on earlier drafts of this Article.

INTRODUCTION

The Supreme Court has considered a corporation's rights in the area of investigative procedure under the Fourth and Fifth Amendments,[1] but there have been no such determinations by the Court in the area of adjudicative procedure under the Fifth or Sixth Amendments.[2] Because of the priority given to white collar crime in recent years by Congress[3] and by the Department of Justice[4]

---

[1] A corporation is not protected by the Fifth Amendment's privilege against compulsory self-incrimination. Wilson v. United States, 221 U.S. 361, 382 (1911); Hale v. Hankel, 201 U.S. 43, 75 (1906). However, a corporation is protected under the Fourth Amendment against unreasonable governmental search and seizure. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (1978); Hale v. Hankel, 201 U.S. 43, 76 (1906).

[2] The Fifth Amendment provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. The Sixth Amendment provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

[3] *See, e.g.*, Hamilton P. Fox, III, *Considerations for Corporate Counsel Faced With a Federal Investigation, in* THE ROLE OF CORPORATE COUNSEL IN LITIGATION, C566 A.L.I.-A.B.A. 171, 173-74 & n.5 (1990); Marvin G. Pickholz et al., *The Increasing Criminalization of Business Conduct: An Overview*, THE BUS. LAW. UPDATE, Jan.-Feb. 1991, at 1, 6-9; Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 235-40 (1993).

[4] Fox, *supra* note 3, at 173 & n.4 ("[A]s a percentage of total federal prosecutions, white collar cases have risen from 8% in 1970, to 20% in 1980, and 24% in 1983 and 1984"); U.S. DEP'T OF JUSTICE, TOWARD A SAFER AMERICA: THE JUSTICE DEPARTMENT'S RECORD OF ACCOMPLISHMENT IN THE FIRST TWO YEARS OF THE BUSH ADMINISTRATION 1 (1991) (stating law enforcement priorities of President and Attorney General include "unrelenting enforcement of federal laws against 'white collar' crime"); BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, WHITE COLLAR CRIMES 1 (1987) (stating that between 1980 and 1985 federal white collar crime convictions rose 18% to 10,733.); FEDERAL BUREAU OF INVESTIGATION, WHITE-COLLAR CRIME: A REPORT TO THE PUBLIC 3 (1990) (stating FBI dedicates more resources to white collar crime than any other criminal program).

(and by some state criminal justice systems as well)[5] and because of the increase of federal prosecutions of corporate defendants,[6] it can reasonably be expected that issues involving a corporation's constitutional trial rights will be more frequently litigated, and perhaps find their way to the Supreme Court. Corporate constitutional trial rights that lower courts have had occasion to consider[7] are the Fifth Amendment rights to indictment by a grand jury[8] and protection against double jeopardy,[9] and the Sixth Amendment

---

5 *See, e.g.*, MICHAEL L. BENSON ET AL., NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, LOCAL PROSECUTORS AND CORPORATE CRIME 1-7 (Jan. 1993). ("Historically, the Federal Government has assumed primary responsibility for controlling corporate crime, but in the past two decades local prosecutors have become increasingly concerned about this problem .... One conclusion [of the study] is that local prosecution of corporate crime is becoming more widespread." *Id.* at 1); Steven D. Brown & Lisa A. Kaner, *Expansion of Corporate Criminal Law in the 1980's—A Growth Industry in the 90's, in* PROBLEM SOLVING FOR CORPORATE COUNSEL at 1, 8-13 (Pennsylvania Bar Institute 1990).

6 In order to meet the needs of the United States Sentencing Commission, the first comprehensive empirical study of criminal prosecutions of organizations in federal courts was undertaken by the Commission staff in 1988. The data from that study is frequently cited and analyzed. *See, e.g.*, Mark A. Cohen, *Corporate Crime and Punishment: A Study of Social Harm and Sentencing Practice in the Federal Courts, 1984-1987*, 26 AM. CRIM. L. REV. 605 (1989); Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 AM. CRIM. L. REV. 513, 520-33, 594-604 (1989). During the four years studied, 1569 organizational defendants (almost exclusively business corporations) were prosecuted in federal court, an average of 400 a year. Parker, *supra*, at 521. (This number represents less than one percent of total federal district court prosecutions of all defendants.) *Id.* In contrast, Professor Orland reported that during the entire four-year period of 1976 through 1979 only 574 corporations were convicted of federal crimes. Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501, 501-02 & n.4 (1980). In 1988, 328 of the 433 organizations whose cases reached disposition in federal court were convicted and sentenced. 1990 U.S. SENTENCING COMMISSION ANN. REP. 90.

7 *See generally* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990).

8 United States v. Yellow Freight Sys., 637 F.2d 1248, 1253-55 (9th Cir. 1980) (holding corporation has no Fifth Amendment right to indictment by federal grand jury because crime for which it was charged by information was not "infamous" as to it—in contrast to individuals charged with same offense—in that corporation was subject only to a fine and not imprisonment), *cert. denied*, 454 U.S. 815 (1981).

9 The Second Circuit has held that a corporation is entitled to the constitutional guarantee against double jeopardy. United States v. Security Nat'l Bank, 546 F.2d 492, 494-95 (2d Cir. 1976), *cert. denied*, 430 U.S. 950 (1977). One year after the Second Circuit decision, the Supreme Court held

rights to counsel[10] and a trial by jury.[11] This Article will explore a corporation's constitutional right to a criminal jury trial.

In May 1990, a federal grand jury indicted the NYNEX Corporation in the District Court for the District of Columbia for criminal contempt, charging that the company (one of the seven regional holding companies created as part of the break up of AT&T) had violated that court's consent decree entered in the course of the government's complex AT&T antitrust litigation.[12]

The government informed the court that it would seek a $1 million fine from NYNEX.[13] In its pretrial motions, NYNEX sought trial by jury. The government simultaneously moved for a bench trial, arguing that NYNEX was not entitled to a jury trial because "no corporation is ever constitutionally entitled to a jury trial for criminal contempt"[14] and because the $1 millon fine, if assessed against this particular corporate defendant, was not "serious"

---

that the Double Jeopardy Clause barred an appeal by the government from a judgment of acquittal in favor of corporate defendants, but the Court did not mention their non-individual status. United States v. Martin Linen Supply Co., 430 U.S. 564, 567-72, 575-76 (1977).

10 United States v. Rad-O-Lite of Phila., Inc., 612 F.2d 740, 743 (3d Cir. 1979) (holding that corporate defendant has same constitutional right to effective assistance of counsel as does individual); *cf.* United States v. Unimex, Inc., 991 F.2d 546, 550 (9th Cir. 1993) (holding that corporations have constitutional right to be represented by counsel but no constitutional right to appointed counsel).

11 *Compare* United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 665 (2d Cir. 1989) (finding that Sixth Amendment jury trial right is available to corporate criminal contemnor when fine exceeds $100,000), *cert. denied*, 493 U.S. 1021 (1990) *and* United States v. R.L. Polk & Co., 438 F.2d 377, 378-80 (6th Cir. 1971) (holding that corporate criminal contemnor has same right to jury trial as does individual defendant, and individual charged with criminal contempt has same Sixth Amendment right to jury trial as individual charged with any other criminal offense) *with* People v. Mature Enters., 352 N.Y.S.2d 346, *modified on other grounds*, 323 N.E.2d 704 (1974) (holding that corporate defendant not entitled to jury trial because it can only be fined, not imprisoned). *See infra* subpart IV.B.

12 Memorandum of Law in Support of NYNEX Corporation's Motion for a Jury Trial at 1-2, United States v. NYNEX Corp., 781 F. Supp. 19 (D.D.C. 1991) (Criminal No. 90-0238) [hereafter NYNEX Memorandum]. The indictment charged a violation of 18 U.S.C. § 401(3) (1988), a contempt offense. *NYNEX*, 781 F. Supp. at 21.

13 NYNEX Memorandum, *supra* note 12, at 2.

14 Memorandum of the United States in Support of its Motion for Bench Trial at 2 n.1, United States v. NYNEX Corp., 781 F. Supp. 19 (D.D.C. 1991) (Criminal No. 90-0238) [hereafter Memorandum of the United States].

enough to give rise to the constitutional right.[15] Judge Harold H. Greene (whose original 1982 decree was allegedly violated by NYNEX) ruled for the government on the jury trial issue in December, 1991.[16] On February 16, 1993, the district court convicted NYNEX of criminal contempt and imposed the $1 millon fine sought by the government.[17]

Unlike NYNEX, organizational criminal defendants are not often denied a jury at trial, and there are few reported cases that directly consider the issue. In fact, for Judge Greene to consider whether NYNEX's fine was constitutionally "serious," Judge Greene needed only to assume, "without deciding, that corporations have a jury trial right at all where only a fine is imposed."[18]

Perhaps the jury issue has not often arisen because the government usually does not see itself disadvantaged by the presence of a

---

15 Memorandum of the United States, *supra* note 14, at 1-2.

In its brief on appeal to the District of Columbia Circuit, the government took the position that the court of appeals did not have to reach the issue of whether a corporation is ever constitutionally entitled to a jury trial for criminal contempt because the fine here was not constitutionally "serious." Brief for Appellee United States of America at 15 n.5, 15-20, United States v. NYNEX Corp., 814 F. Supp. 133 (D.D.C. 1993), *rev'd and vacated on other grounds*, No. 93-3019, 1993 WL 462176 (D.C. Cir. Nov. 12, 1993) [hereafter Brief for the United States].

On November 12, 1993, as this Article was being prepared for printing, the United States Court of Appeals for the District of Columbia decided the *NYNEX* case, reversing and vacating the district court's judgment. *NYNEX*, 1993 WL 462176 at *6. The appellate court did not find it necessary to reach the "significant objection to the District Court's denial of the request for a jury trial." *Id.* at *2. Rather, the circuit court held that the record did not substantiate the trial court's finding that the consent decree at issue was sufficiently clear or specific to sustain a criminal contempt conviction. *Id.*

Because the District of Columbia Court of Appeals did not discuss a corporation's constitutional right to a jury trial—the subject of this Article—the text of this Article has not been revised.

16 *NYNEX*, 781 F. Supp. at 26-28.

17 United States v. NYNEX Corp., 814 F. Supp. 133 (D.D.C. 1993). On February 26, 1993, NYNEX appealed its conviction and fine to the United States Court of Appeals for the District of Columbia Circuit. Brief for Defendant-Appellant at 3, United States v. NYNEX Corp., 814 F. Supp. 133 (D.D.C. 1993), *rev'd and vacated on other grounds*, No. 93-3019, 1993 WL 462176 (D.C. Cir. Nov. 12, 1993) (*see supra* note 15 explaining circuit court's other grounds).

18 *NYNEX*, 781 F. Supp. at 27. The Supreme Court also took this "assumption" approach in a case relied upon by the district court. Muniz v. Hoffman, 422 U.S. 454, 477 (1975).

jury in criminal trials with corporate defendants (and thus does not oppose a corporation's jury request)[19] or because the appropriateness of a jury, or the other routine adjudicative rights of a criminal prosecution,[20] may simply be taken for granted by all the participants.[21] And, like most criminal defendants, corporate defendants usually plead guilty,[22] making a jury trial unnecessary.

Yet, because of the particular dynamic of a prosecution for disobeying a court order,[23] the issue of an organization's[24] constitu-

---

[19] Corporate prosecutions are a statistically small number, even in the federal justice system. Parker, *supra* note 6, at 521.

[20] Rules of procedure dealing with basic criminal trial rights commonly do not consider the status of a defendant. *E.g.*, FED. R. CRIM. P. 23(a) ("Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.").

[21] *See, e.g.*, New York Cent. & H.R.R.R. v. United States, 212 U.S. 481 (1909). In this landmark case, the Supreme Court upheld the constitutionality of portions of the Elkins Act, 49 U.S.C. §§ 41-43 (1976). The Act specifically made the common carrier corporation criminally responsible for shipping rate misdemeanors committed by any of its officers or employees. In the course of affirming the convictions and fines of both the railroad and its assistant traffic manager, the Court discussed the reasons why Congress could properly impute criminal liability to a corporation. But the Court did not discuss—nor was there any reason for it do so—the issues, if any, raised by trying both defendants before a jury in federal court.

[22] In 1988, for example, 81.7% of organizational defendants pleaded guilty and 6.1% entered pleas of nolo contendere. 1990 U.S. SENTENCING COMMISSION ANN. REP. 90.

[23] The government is not likely to open itself voluntarily to the possibility of jury nullification of a judicial decree that is the fruit of its trial victory; nor would the trial judge whose order is disobeyed be inclined to have another finder of fact consider a contempt of that order, regardless how carefully instructed the jury might be as to the limited issues before it.

[24] A corporation is but one type of "organization" subject to criminal prosecution. In this Article, the only organizational criminal defendants considered are corporations and, in a few cases, labor unions. The prosecution of any other type of organization is rare and may raise issues beyond the scope of this Article. The federal criminal code states: "As used in this title, the term 'organization' means a person other than an individual." 18 U.S.C. § 18 (1988). The criminal code also defines "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" unless the context of the statute indicates otherwise. 1 U.S.C. § 1 (1988). The United States Sentencing Commission defines an "organization" for purposes of application of the Guidelines by reference to 18 U.S.C. § 18 and includes "corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions

tional right to a jury has arisen in the context of criminal contempt indirectly in the Supreme Court, and directly in some federal courts of appeals.[25] As the Supreme Court has repeatedly declared that there is no difference between criminal contempt and any other criminal offense regarding the constitutional right to jury trial,[26] those contempt cases involving organizations, together with the Supreme Court decisions involving an individual's right to a criminal jury in traditional criminal prosecutions, provide important material for the consideration of a corporation's right to a jury trial.

The research for this Article suggests three possible answers to the question whether a corporation has a constitutional right to a criminal jury trial: (1) a corporation does have that right under the same law that grants a natural defendant that right; (2) a corporation does have that right, but, because of its non-natural attributes, only in limited situations yet to be clearly defined by the courts (and not in every circumstance where a natural person would have the right); or (3) a corporation does not have a constitutional right to a jury in any criminal case because of its organizational, non-natural status. This Article will consider the arguments for each of these possibilities, explore the policy considerations in each choice, and suggest a solution that attempts to reconcile the history and purpose of criminal trial by jury with the nature and function of corporate criminal liability.

Part I argues that paradoxes emerge from the development of the legal doctrine of corporate criminal liability and the constitutional right to a criminal jury trial that influence the inquiry of this Article. Part II considers the judicial development of a natural person's constitutional right to jury trial and the standard of "seriousness" of the offense based on the provided penalty. Part III then addresses fines and the judicial use of statutory reference points for decision-making under the Sixth Amendment, while Part IV reviews the significant area of criminal contempt cases, and the jury right

---

thereof, and non-profit organizations." UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 8A1.1 cmt.1 (1993) [hereafter U.S.S.G.].

25 *See supra* note 11; *see also infra* subpart IV.B.

26 Frank v. United States, 395 U.S. 147, 148 (1969) ("For purposes of the right to trial by jury, criminal contempt is treated just like all other criminal offenses."); Bloom v. Illinois, 391 U.S. 194, 201 (1968) ("[C]onvictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same.").

standard of the penalty actually imposed. Part V considers the implications of punishment by regulatory agencies and under the federal sentencing guidelines, and Part VI suggests a solution that comports both with the nature and purpose of corporate criminal liability and the constitutional doctrine of jury trial for criminal offenses.

I. BACKGROUND: LAW AND PARADOXES

Corporate criminal liability[27] and the right to a criminal jury trial[28] both have a strong American heritage,[29] and both legal concepts have developed with a basic incongruity. Corporate criminal liability includes, without doctrinal distinction, liability independent of moral culpability.[30] The Sixth Amendment jury right permits the nonjury trial of the largest category of criminal prosecutions in the nation.[31] Both legal concepts find justification

---

[27] *See generally* KATHLEEN F. BRICKEY, 1 CORPORATE CRIMINAL LIABILITY, §§ 2:05-2:08 (2d ed. 1992) [hereafter BRICKEY, TREATISE]; Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 397-404 (1982).

[28] *See generally* JAMES J. GOBERT, JURY SELECTION ch. 1 (2d ed. 1990); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 22.1 (2d ed. 1992); Andrew J. Gildea, Comment, *The Right to Trial by Jury*, 26 AM. CRIM. L. REV. 1507, 1507-22 (1989).

[29] Both legal doctrines have English origins. The doctrine of corporate criminal liability developed more rapidly in the United States than in England and is "generally unknown to civil law countries." BRICKEY, TREATISE, *supra* note 27, at 63. The American constitutional (federal and state) imperative of criminal jury trial has resulted in a much greater percentage of such trials in the United States than in England. *See, e.g.*, HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 12-14 (Phoenix ed. 1971); 22 THE NEW ENCYCLOPEDIA BRITANNICA 485-86 (Macropaedia 1989). "While the jury has taken root and prospered in American soil, it has withered in its original home . . . . Parliament is free to abolish jury trials at any time, and it has." James J. Gobert, *Trial by Jury*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 879 (1992).

[30] *See, e.g.*, Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L.Q. 329 (1993) [hereafter Bucy, *Cart*]; Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991) [hereafter Bucy, *Ethos*]; John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 195-96 (1991); Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 759-61 (1992).

[31] Offenses carrying less than a maximum six months' imprisonment presumptively can be tried without a jury under the Sixth Amendment. *See*

for these inconsistencies in pragmatism and social necessity, as well as in historical practice. It is these paradoxes that emerge in the consideration of a corporation's constitutional right to a criminal jury trial.

A. The Corporate Criminal Liability Paradox

As the Supreme Court has recognized on several occasions, Anglo-American criminal law is built upon the enlightened concept

---

infra subpart II.C. There are certainly many more such offenses charged in the United States than those with greater maximum punishments. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court noted that the District of Columbia Court of General Sessions processed the preliminary stages of 1500 felony cases, 7500 serious misdemeanors, *38,000 petty offenses*, and an equal number of traffic offenses per year. 407 U.S. at 34. There is no reason to think that these proportions are not relevant today. In that same case, Justice Powell noted: "There are thousands of statutes and ordinances which authorize imprisonment for six months or less, usually as an alternative to a fine. These offenses include some of the most trivial of misdemeanors . . . . They also include a variety of more serious misdemeanors." *Id.* at 52 (Powell, J., concurring). There seem to be few nationwide statistics available. One study of the American jury reports:

> Of the two kinds of crimes, felonies are about five times as likely to reach trial as are misdemeanors, and also more likely to be tried by a jury than a judge. Juries hear about 60% of all felony cases in state courts and 57% of those tried in federal court. The vast majority of all arrests, however, are for misdemeanors, about three-quarters of the federal caseload and more than 90% of those that reach state courts. Less than 1% of all misdemeanors in federal court are heard by a jury and not much more than that in state court, based on the sketchy figures available.

JOHN GUINTHER, THE JURY IN AMERICA 39-40 (1988) (footnotes omitted).

In the federal system, any misdemeanor or infraction may be tried by United States magistrate judges if the defendant consents. FED. R. CRIM. P. 58(a), (b). During the four-year period of the data considered by the United States Sentencing Commission, *see supra* note 6, there were approximately 200,000 criminal defendants sentenced in the federal district courts, but there were 320,000 additional defendants charged with petty offenses whose cases were disposed of by United States magistrates. Parker, *supra* note 6, at 521 & n.21. It is assumed that few of those trials were by jury. *Cf.* TIMOTHY J. FLANAGAN & KATHLEEN MAGUIRE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE 1991, at 76 (1992) (providing statistics that show 87% of trials by United States magistrates were for "petty offenses," rather than for "other misdemeanors").

Of course, because "[i]n the United States, the great majority of criminal cases are disposed of by a plea of guilty," LAFAVE & ISRAEL, *supra* note 28, § 21.1(a), most criminal cases do not reach the stage where a jury is empaneled, even if one would be provided upon the trial.

of moral blameworthiness, or mens rea.[32] Scholars of the criminal law have found moral culpability to be its most important distinguishing characteristic; blame predicated on intentional or reckless conduct by the defendant is the prerequisite for the social stigmatization that is the unique province of criminal law.[33] Yet, corporate criminal liability, particularly in its application in the federal courts, is a broadly encompassing doctrine based on vicarious liability that does not require blameworthy conduct by the defendant corporation's management or policy-makers, or by any employee of the corporation consistent with its policies. Criminal conduct by a lower-level employee in the course of job performance is enough to make the corporation criminally responsible.[34]

This contradiction with the basic concept of blameworthiness has not concerned American courts, particularly those in the federal system.[35] Through the adopted (and somewhat modified) tort doc-

---

[32] *See, e.g.*, Liparota v. United States, 471 U.S. 419, 426 (1985) ("[T]he failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law."); Morissette v. United States, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion."). The Court, however, has never imposed the doctrine of mens rea upon the legislature as a constitutional imperative and has explicitly retreated from the doctrine on occasion as a matter of statutory interpretation. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975); United States v. Dotterweich, 320 U.S. 277 (1943) (both cases giving a strict liability interpretation to the criminal liability section of the Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. § 333 (1976)).

[33] *See, e.g.*, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404-06, 422-25 (1958); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

[34] BRICKEY, TREATISE, *supra* note 27, §§ 3:01-3:04; Bucy, *Ethos*, *supra* note 30, at 2-4; Harry First, *General Principles Governing the Criminal Liability of Corporations, Their Employees and Officers*, *in* WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 5.03[3][a] (Otto G. Obermaier & Robert G. Morvillo eds., 1993).

Many states have adopted some form of the suggested trifurcated pattern of corporate liability set forth in § 2.07 of the Model Penal Code. In contrast to the expansive federal "common law" of corporate respondeat superior, the Model Penal Code generally limits liability for most criminal code offenses to those involving, or condoned by, a "high managerial agent" (one with policy-representing duties). Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 596-98, 601, 613-15, 629-34 (1988) [hereafter Brickey, *Model Penal Code*].

[35] *See, e.g.*, United States v. Illinois Cent. R.R., 303 U.S. 239 (1938); New York Cent. & H.R.R.R. v. United States, 212 U.S. 481 (1909); Commonwealth

trine of respondeat superior, a corporation, as an entity legally separate from its owners and employees, is criminally responsible for any unlawful act of any of its agents (directors, officers, managers, or any other employees) if that act is done within the broad scope of the agent's employment and, at least in part, for the corporation's benefit.[36]

Thus, although the owners of the corporation (its shareholders) have not placed their personal assets in jeopardy (the unique protection of the corporate form of ownership),[37] they are at risk to the extent of their investment for criminal conduct that they may individually deplore and, perhaps collectively through their chosen managers, have actively sought to prevent.[38]

It has been argued that such a doctrine of vicarious attribution is necessary because it may be difficult to identify and prosecute any natural defendant for a criminal violation arising from a corporation's profit-seeking activity.[39] The inevitable result of this broad theory of corporate liability has been the accentuated role of prosecutorial discretion—a characteristic of white collar crime in general.[40] Whether a "mom and pop" corporation should be prosecuted in addition to, or instead of, the obviously responsible individuals involved;[41] or whether a large, publicly traded company

---

v. Beneficial Fin. Co., 275 N.E.2d 33, 83-84 (Mass. 1971), *cert. denied*, 407 U.S. 910, and *cert. denied*, 407 U.S. 914 (1972).

[36] Bucy, *Cart, supra* note 30, at 333 (stating that as developed by courts, requirements of scope and benefit are "practically meaningless" as limitations of corporate liability).

[37] *See, e.g.*, Kathleen F. Brickey, *Close Corporations and the Criminal Law: On "Mom and Pop" and a Curious Rule*, 71 WASH. U. L.Q. 189, 199 n.41, 200 (1993) [hereafter Brickey, *"Mom and Pop"*].

[38] *See generally* Philip A. Lacovara & David P. Nicoli, *Vicarious Criminal Liability of Organizations: RICO as an Example of a Flawed Principle in Practice*, 64 ST. JOHN'S L. REV. 725, 735 (1990) (imputing guilt to organization when low-level employee defies management is unfair to organization and inconsistent with fundamental concepts of criminal law).

[39] *See, e.g., Beneficial Fin. Co.*, 275 N.E.2d at 84; BRICKEY, TREATISE, *supra* note 27, § 4:05.

[40] *See generally* Jed S. Rakoff, *The Exercise of Prosecutorial Discretion in Federal Business Fraud Prosecutions, in* CORRIGIBLE CORPORATIONS AND UNRULY LAW 173, 173-86 (Brent Fisse & Peter A. French eds., 1985); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Sanctions*, 92 HARV. L. REV. 1227, 1307-11 (1979) [hereafter *Developments*] (discussing administrative discretion in choosing between criminal and civil sanctions).

[41] The 1984-1987 organizational defendant data collected by the Sentencing Commission indicated that most corporate defendants were small, closely-held businesses. Only about 10% had more than 50 employees and $1

should be indicted when a low-level manager departed from corporate policy, or where no identifiable employee or officer can be criminally blamed, are questions left to the unreviewable choice of the prosecutor.[42] Not only has this unrestricted exercise of prosecutorial choice led to convictions in cases in which the corporate hierarchy[43] or the institutional practices and philosophy of the organization[44] were clearly involved in committing, encouraging, or condoning the criminal conduct; it has also led to a corporate conviction when the management has done a great deal to prevent the offense committed by a low-level employee.[45]

This expansive doctrine of federal corporate criminal liability has surely influenced Congress to increase the number and variety of white collar criminal offenses suitable for the prosecution of corporations[46] and to increase substantially the amount of criminal fines for crimes by organizations.[47] It also has apparently influenced the United States Sentencing Commission to introduce a culpability-

---

million in sales; less than 3% had traded stock. Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U. L. REV. 247, 251-52 (1991). These figures reflect the fact that "the vast majority of incorporated organizations in this country are closely held, and many are small, family owned businesses." Brickey, *"Mom and Pop," supra* note 37, at 192 (citation omitted).

42 One white collar defense attorney expressed this view:

> Corporate counsel may be able to turn the strict liability of a corporation to their advantage. A corporation may be rendered guilty by an employee's crime, despite its best efforts to promulgate and enforce a policy of compliance. However, most prosecutors will not be immune to a demonstration that the corporation did everything possible to maintain a lawful operation. Once again, prosecutors generally entertain the same concepts of "fault" as everyone else, and if a disparity can be demonstrated between the client's legal culpability and its "moral" guilt, significant ground may be gained in negotiating a disposition.

ALAN ZARKY, DEFENDING THE CORPORATION IN CRIMINAL PROSECUTIONS: A LEGAL AND PRACTICAL GUIDE TO THE RESPONSIBLE CORPORATE OFFICER AND COLLECTIVE KNOWLEDGE DOCTRINES 60 (1990).

43 *See, e.g.*, Nye & Nissen v. United States, 336 U.S. 613, 619 (1949).

44 *See generally* KIP SCHLEGEL, JUST DESERTS FOR CORPORATE CRIMINALS 75-90 (1990); Brickey, *Model Penal Code, supra* note 34, at 625-29; Bucy, *Ethos, supra* note 30, at 1133-38; First, *supra* note 34.

45 United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

46 BRICKEY, TREATISE, *supra* note 27, § 1:02.

47 *Id.* § 1:07.

based system of aggravation and mitigation as a multiplier for the basic fines for organizations.[48] Finally, the federal judicial concept of liability has drawn the criticism of recent commentators (who seek to bring about modification of the doctrine of indiscriminate vicarious corporate liability by introducing organizational mens rea concepts,[49] or by emphasizing the role of the sentencing process under the Sentencing Guidelines,[50] or by formally codifying the doctrine of corporate criminal liability).[51]

While this Article does not examine in depth the issues arising from the doctrine of corporate criminal liability, those issues implicitly color any attempt to develop a rational principle of a corporation's right to a criminal jury trial. If corporate criminal liability is based, in significant part, on vicarious responsibility rather than moral culpability, then how valid is it constitutionally to preclude a legislative or judicial judgment that a jury trial for a corporate defendant is not necessary or appropriate?[52] The defendant's personal liberty is not at risk in the exercise of the prosecutor's discretion to prosecute a corporation, because only a fine or governmental restrictions may result. In addition, because corporations can be prosecuted for criminal conduct undertaken by rogue employees against corporate policy and practice, there is in such a case little reason for the community to condemn the organization, or for investors to re-evaluate their risk. In that situation, the similarity is strong between the criminal prosecution of a corporation and the governmental regulation of that same business by civil punitive fines and other collateral penalties.[53] All of these factors seem to support the legislative option to limit a corporation's crimi-

---

48 U.S.S.G., *supra* note 24, §§ 8C2.5(b), (d)-(g), 8C2.6.

49 *See, e.g.*, Bucy, *Ethos*, *supra* note 30.

50 *See, e.g.*, Moore, *supra* note 30.

51 *See, e.g.*, Leonard Orland, *Beyond Organizational Guidelines: Toward A Model Federal Corporate Criminal Code*, 71 WASH U. L.Q. 357 (1993).

52 Liability without moral fault has been seen to weaken the impact of the criminal justice system in general. *See, e.g.*, HERBERT PACKER, LIMITS OF THE CRIMINAL SANCTION 261 (1968). But once that step has been taken by the legislature, an argument can now be made that the jury has lost its historical role because its primary function in a criminal trial is to determine moral culpability. Ann Hopkins, Comment, *Mens Rea and the Right to Trial by Jury*, 76 CAL. L. REV. 391, 397, 415-17 (1988).

53 Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1796-1805, 1849-52 (1992); David Yellen & Carl J. Mayer, *Coordinating Sanctions for Corporate Misconduct: Civil or Criminal Punishment?*, 29 AM. CRIM. L. REV. 961, 961-65 (1992).

nal jury right. However, regardless of the option chosen as a matter of federal legislative policy, our system of government has as its premise that the individual states have the right to choose their own policies unless there is a constitutional imperative for a uniform rule.

B. The Constitutional Jury Right Paradox

The focus on white collar crime and organizational criminal liability[54] can be increasingly expected to bring the unresolved issues of a corporation's federal constitutional criminal trial rights before the courts. Among those issues will likely be the right to trial by jury. Yet because of the paradoxical nature of that right as it has developed historically, and because of the incorporeal nature of the corporation (making imprisonment an unavailable sanction),[55] the courts may find the constitutional issue difficult to resolve rationally through consideration of text, history, precedent, and policy. Nevertheless, any such inquiry must surely begin with the nature of the criminal jury right itself.

The right to criminal trial by jury is recognized by Article III of the Constitution,[56] as well as by the Sixth Amendment.[57] The commands of both are textually unequivocal. Article III requires a jury for "the trial of all crimes" except impeachment, and the Sixth Amendment requires a trial by an impartial jury "in all criminal prosecutions."[58] Every state constitution today (as well as at the

---

[54] *See supra* notes 3-6 and accompanying text.

[55] *Contra* United States v. Allegheny Bottling Co., 695 F. Supp. 856, 859-60 (E.D. Va. 1988) (stating corporation can be imprisoned because imprisonment simply means restraint, not incarceration), *aff'd in part, rev'd in part sub nom.* Pepsico, Inc. v. Allegheny Bottling Co., 870 F.2d 655 (4th Cir. 1989) (trial court exceeded its power by sentencing corporation to imprisonment and suspending sentence), *cert. denied*, 110 S. Ct. 68 (1989).

[56] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

U.S. CONST. art. III, § 2, cl. 3.

[57] The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ." U.S. CONST. amend. IV.

[58] This slight difference in language between Article III and the Sixth Amendment regarding the scope of a criminal jury trial has not been found to

time of adoption of our federal constitution) contains, in some form, a guarantee of the right to jury trial in a criminal prosecution.[59] Yet the precise nature and scope of the federal constitutional right have remained elusive.

The ancient pedigree of the criminal jury trial and its elevated position in the period of English history before the establishment of the American colonies have been extensively documented.[60] The criminal jury trial came to America with America's first English colonies[61] and was considered among the inestimable rights of Englishmen to which the inhabitants of the American colonies were entitled by birth-right.[62] Blackstone, who was an ardent believer in the value of the criminal jury, called it a "palladium" of liberty.[63] His popularity among American lawyers in the late eighteenth century assured that his strong views on the importance of the jury were considered.[64]

---

be of significance. *See, e.g.*, Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 971 (1926). There is general agreement that the Sixth Amendment's purpose was not to affect the reach of the jury trial right, but to provide explicitly that such trials should be speedy, not held in secret, and tried in the locality of the crime. *See id.* at 970-71; Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1283 (1989).

59 *See* Duncan v. Louisiana, 391 U.S. 145, 153 (1968) ("The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.").

60 *E.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *349-55; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, ch. 4 (5th ed. 1956); JOHN PROFFATT, TRIAL BY JURY, ch. 1 (1877) (1986 ed.); Frankfurter & Corcoran, *supra* note 58, at 921-34.

61 PROFFATT, *supra* note 60, at 121-22.

62 *See* DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS, RESOLUTIONS 2, 5 (Oct. 14, 1774), *reprinted in* RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 287-88 (1959).

63 4 WILLIAM BLACKSTONE, COMMENTARIES *350. Alexander Hamilton used the same term in *The Federalist No. 83* when he referred to the Antifederalist belief that the jury was "the very palladium of free government." THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

64 Edmund Burke told the House of Commons in 1776 that nearly as many copies of Blackstone's *Commentaries* had been sold in America as in England (referring to the 1771-1772 edition which was the first law book of general character printed in the colonies). Charles M. Haar, *Preface to the Beacon Press Edition* of 4 THE COMMENTARIES, at xxii-xxiii (1962). Professor Haar states: "Because of the *Commentaries*, English common law became also the common law of the Unites States. . . . The *Commentaries* were a conduit of the ideas of

By the time of the Revolution, the criminal jury right took on a decidedly political cast in the American colonies. In order to more efficiently enforce revenue measures imposed on the colonists, the English government transferred cases traditionally tried by juries in common law colonial courts to other nonjury tribunals (with judges paid by the Crown) and also transported colonists to England for trial.[65] The jury right became a rallying cry against British oppression and an important symbol of resistance against imperial tyranny. Thus, the right was given prominence in the Declaration of Independence, where, before "a candid world," the King of England was excoriated "[f]or depriving us, in many cases, of the benefits of trial by jury; [and] for transporting us beyond seas to be tried for pretended offenses."[66]

However, despite the sanctity of the criminal jury right in both England and the colonies and despite its political importance to the emerging American states,[67] the right was not extended to every criminal prosecution, or even to most. Beginning in the mid-seventeenth century, and even more commonly in the eighteenth century, in both England and America, legislatures recognized the great cost and inefficiency of criminal adjudication by jury and repeatedly made exceptions to its application.[68] As the English Parliament secured its power against the monarchy, it increasingly chose to avoid the costs and inconvenience of summoning freeholders from the country to sit as petit jurors during the ever-lengthening Quarter Sessions.[69] Thus, Parliament commonly restricted criminal trial by jury as it created or revised many minor criminal offenses by assigning the trial of those offenses to justices

---

Locke and Montesquieu to the framers of the federal and state constitutions." *Id.* at xxiii.

65 Andrew J. Gildea, Comment, *The Right to Trial by Jury*, 26 AM. CRIM. L. REV. 1507, 1510-14 (1989); *see also* PERRY, *supra* note 62, at 281-82.

66 THE DECLARATION OF INDEPENDENCE paras. 2, 19, 20 (U.S. 1776).

67 *Cf.* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 127 (Richard D. Heffner ed., Mentor Paperback 1956) (1835) ("The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated.").

68 Frankfurter & Corcoran, *supra* note 58, at 925-27. This change took place over the centuries in England. "To the Englishman of the fourteenth century . . . it had become an 'ancient prerogative' to have twelve laymen stand between him and the vengeance of the king in a criminal prosecution of any kind, whether the charge were tippling at the inn or murder." *Id.* at 923.

69 *Id.* at 924-25; PLUCKNETT, *supra* note 60, at 438-39.

of the peace.[70] Blackstone, ever the staunch defender of the jury, decried the expansion of summary trials by these many enactments,[71] but his warning went unheeded in the face of the practical necessities of the times.[72]

The American colonial legislative bodies similarly made exceptions to trial by jury,[73] and later, even after the Revolution, the legislatures of the various states continued to provide extensively for the trial of designated criminal offenses without a jury.[74] These summarily tried offenses, both in England and America, are often referred to as "petty," yet many of the offenses carried quite serious punishments, including corporal punishment and imprisonment at hard labor, perhaps for a year.[75]

How then to reconcile this reality with the unqualified language of Article III of the Constitution and of the Sixth Amendment? This paradox has spawned over 100 years of judicial interpretation by the Supreme Court. The Framers left no recorded explanation, and the records of the Constitutional Convention and of the Bill of Rights debate during the First Congress are silent concerning the apparent contradiction.[76]

---

70 *See* SIR GEOFFREY CROSS & G. D. G. HALL, RADCLIFF AND CROSS—THE ENGLISH LEGAL SYSTEM 203-09 (4th ed. 1964).

71 4 WILLIAM BLACKSTONE, COMMENTARIES *280-81.

72 *See* Frankfurter & Corcoran, *supra* note 58, at 925, 933.

73 *Id.* at 934-37. The authors describe the status of summary criminal trial during the pre-Revolution colonial period as follows:

> Under the dominating pressure of a practical problem in the enforcement of law it had become common practice for Parliament to except new offenses from the protection of jury procedure. And so, successive companies of colonists carried with them a conception of the scope of trial by jury which dispensed with it in cases that doubtless touched the average Englishman's experience more than any other part of the criminal law.

Id. at 926-27.

74 *Id.* at 937.

75 *Id.* at 932-33.

76 A discussion of the bearing of the jury trial clause on summary proceedings is not found in the records of the Convention or of the ratification assemblies of the states. *Id.* at 970.

> So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice . . . .

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

Frankfurter and Corcoran, in their classic article published in the *Harvard Law Review* in 1926, *Petty Federal Offenses and Trial by Jury*,[77] set forth the basic assumption that has been adopted by the Supreme Court.[78] Their thesis is that: because summary offense legislation was prevalent in England for many years, and in the American colonies as well, it is not likely that the Constitution or the Sixth Amendment was intended to prevent the new federal Congress from continuing that practice within its limited jurisdiction.[79]

---

[77] Frankfurter & Corcoran, *supra* note 58.

[78] *See Duncan*, 391 U.S. at 159-60 & n.31 (citing Frankfurter & Corcoran, *supra* note 58; George Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959)).

[79] Frankfurter & Corcoran, *supra* note 58, at 970. ("But on the scope of trial by jury—that its safeguards applied only to 'serious offenses'—there was evidently a common understanding, born of experience, which dispensed with discussion and needed no expression.").

Frankfurter and Corcoran wrote before the Supreme Court began to use the Fourteenth Amendment's Due Process Clause to incorporate aspects of the Bill of Rights to limit states' legislative power over their own criminal procedures. Thus the impact of the Frankfurter and Cocoran thesis was limited to the reach of the federal government. The implications of the thesis became much more significant when the Court adopted it in *Duncan* in the context of what Justice Harlan, in dissent, aptly described as the "jot-for-jot" incorporation of the same constitutional rules of jury trial for both the federal government and the states. *Duncan*, 391 U.S. at 149, 181 (Harlan, J., dissenting opinion).

Yet, there has been little discussion of the contrary thesis, which can be summarized as follows: The Constitution was written by people, whether later labeled Federalists or Antifederalists, who, to one degree or another, distrusted centralized power, and believed in the preservation of freedom by keeping a significant amount of power in the local governments that were close to the people. Wilmarth, *supra* note 58, at 1305-06. The Constitution, and particularly its original amendments, expressed the principles of balance and separation of powers, not only within the branches of the federal government, but especially between the federal government and the states. *Id.* at 1268. There is therefore a reasonable argument to be made that the Framers and the ratifying state bodies did intend to require criminal jury trials for *all federal* criminal offenses created by Congress (particularly since the scope of the federal government's criminal jurisdiction was clearly not contemplated to replace the basic police power of the states). *See also* Kaye, *supra* note 78.

Neither the Framers,[80] the First Congress,[81] nor the ratifying bodies in the states[82] intended to restrict the established powers of the state legislatures in their prerogative to define the criminal jury right. That was a matter of state law. However, perhaps those same representatives of the people did fully intend to limit the power of the federal legislature to do so. If this is so, then perhaps it is also true that the Framers did not intend for the "petty offense" exception to the right to jury trial to be applicable in the federal criminal courts.[83] Thus, in *The Federalist No. 83*, Hamilton stated that "if nothing was said in the Constitution on the subject of juries, the legislature [Congress] would be at liberty either to adopt that institution or to let it alone. This discretion, in regard to criminal causes, is abridged by the express injunction of trial by jury in *all* such cases . . . ."[84]

As we shall see in the next Part of this Article, the Supreme Court did not take this approach. It decided instead that the well-established English and colonial "petty offense" exception was intended to apply to Congress, and was also later appropriately applied to the states in defining the scope of incorporation in the Fourteenth Amendment of the Sixth Amendment's right to jury trial.[85] The focus of the attention of the Court over the years then became the search for the elusive dividing line between offenses for which it was constitutionally proper to permit the legislature (either Congress or a state legislature) to exclude jury trial, and those for which it was constitutionally improper to do so. That inquiry, which continues today, in turn, has led the Court to attempt to discriminate between jury and nonjury offenses by reference to their "seriousness," as

---

80 Wilmarth, *supra* note 58, at 1272-74.

81 *Id.* at 1299. Madison, the principal author and sponsor of the Bill of Rights in the First Congress (as a method of derailing the Antifederalist opposition to the Constitution), made the only proposal in the House of Representatives to limit *state* power. *Id.* at 1289, 1299. He proposed to prohibit the states from "violat[ing] the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." The suggested amendment to the body of the Constitution was adopted by the House but defeated by the Senate. *Id.* at 1299. For a discussion of Madison's role in the consideration of the Bill of Rights in the First Congress see BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND 160-86 (expanded ed. 1992).

82 Wilmarth, *supra* note 58, at 1282-84.

83 *See supra* note 79.

84 THE FEDERALIST NO. 83, at 496-97 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

85 The Court so decided, not because of judicial deference to the legislative power of the states, but solely because of historical practice.

objectively expressed by the legislatively determined maximum penalty for the particular offense. Whether this principle can perform its constitutional function when only a fine is provided as punishment or when a defendant, such as a corporation, is incapable of being imprisoned is central to this Article's inquiry.

Finally, issues of text, history, and federalism aside, it is important to refer briefly to the debate over the efficacy of the jury itself.[86] There is significant unresolved contradiction there as well. Over the years, trial lawyers, judges, justices of the Supreme Court, and scholars of various social science disciplines have questioned the validity and the value of complex fact-finding by untutored and randomly selected juries in an overburdened criminal justice system.[87]

---

[86] In 1966, Kalven and Zeisel published their classic work, *The American Jury*, based on research conducted by the University of Chicago Jury Study Project. This study considered the reports of over 550 trial judges regarding their agreement or disagreement with criminal jury verdicts in over 3500 cases. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 33-36 (Phoenix ed. 1971). Their analysis showed that the trial judges agreed with the jury's verdict 75.4% of the time. *Id.* at 56. *The American Jury* has been called the "monumental work of this kind," and it is the work quoted most frequently by others, including the United States Supreme Court. JOHN GUINTHER, THE JURY IN AMERICA at xviii (1988). Some of the jury-favorable conclusions of *The American Jury* have been questioned by later scholars. *Id.* at xvii-xxi; *see, e.g.*, JOHN BALDWIN AND MICHAEL MCCONVILLE, JURY TRIALS 12 (1979).

[87] Kalven and Zeisel remark that "[t]he jury controversy has recruited some of the great names of political philosophy and the law." KALVEN & ZEISEL, *supra* note 86, at 4. They then list an extensive sampling of these notables and their works. *Id.* The authors' point is that, without empirical research, "this long tradition of controversy over the jury system has produced unsatisfactory debate." *Id.* at 4-5. They state:

> Much of the criticism has stemmed from not more than the a priori guess that, since the jury was employing laymen amateurs in what must be a technical and serious business, it could not be a good idea. In comparable fashion, the enthusiasts of the jury have tended to lapse into sentimentality and to equate literally the jury with democracy.

Id. at 5.

Justice Harlan, in his dissent in Duncan v. Louisiana, 391 U.S. 145 (1968), had this to say about juries (in part):

> It can hardly be gainsaid, however, that the principal original virtue of the jury trial—the limitations a jury imposes on a tyrannous judiciary—has largely disappeared. We no longer live in a medieval or colonial society. . . .
>
> The jury system can also be said to have some inherent defects, which are multiplied by the emergence of the criminal law from the relative simplicity that existed when the jury system was

Yet, many others of the same professions and expertise have chosen to defend strenuously the institution of the jury, especially in criminal cases.[88] Just how important a criminal jury trial is in achieving the appropriate result in a particular case or as a general political barrier against governmental oppression is thus yet another area of the jury right on which much has been said over the years, but with no clear resolution.

This Article cannot resolve (or even fully elucidate) these apparent paradoxes. They are mentioned here because, unquestionably, they also form part of the background of any judicial attempt today to decide whether a corporate organization can constitutionally demand the right to be tried by a jury in a criminal case despite a legislative or judicial determination to the contrary. The long history of the criminal jury right, its almost mythical stature in the American legal system as popularly viewed,[89] the realities of its cost and benefits, and its actual functional utility all provide parts of the foundation for considering the question to be discussed here: does Congress or a state legislature, or a federal or state court upon motion of the prosecution, have the power under the Constitution

---

> devised. It is a cumbersome process, not only imposing great cost in time and money on both the State and the jurors themselves, but also contributing to delay in the machinery of justice.

Duncan, 391 U.S. at 188 (Harlan, J., dissenting) (footnotes omitted).

Dean Erwin Griswold and Glanville Williams were modern jury critics. KALVEN & ZEISEL, *supra* note 86, at 5-6. Judge Jerome Frank was an outspoken opponent of the jury. BALDWIN & MCCONVILLE, *supra* note 86, at 4 n.13. And Chief Justice Warren Burger publicly expressed doubts about the jury system. GUINTHER, *supra* note 86, at xiv.

88 Blackstone, Jefferson, Pound, Wigmore, and Lord Devlin are a few on the long list of jury champions. KALVEN & ZEISEL, *supra* note 86, at 4-7; GUINTHER, *supra* note 86, at xiii; BALDWIN & MCCONVILLE, *supra* note 86, at 2-4. Lord Devlin wrote, in 1956, that "no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives." *Id.* at 2 n.3. G.K. Chesterton wrote:

> Our civilization has decided, and very justly decided that determining the guilt or innocence of men is a thing too important to be trusted to trained men. If it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things I felt in a jury box.

LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY at v (1973).

89 *See generally* RITA J. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY, ch. 2 (1980).

to refuse a corporation trial by jury for a criminal offense, and if so, when?

II. Development of the Individual Constitutional Right to a Criminal Jury Trial

A. *The Opening Chapter—The Federal "Petty/Serious" Demarcation*

"A corporation . . . does enjoy the same rights as individuals to trial by jury."[90] This assertion by the Fourth Circuit in *United States v. Troxler Hosiery Co.*[91] is certainly open to some doubt.[92] However, if accepted, that statement of a singular constitutional right requires an exploration of the constitutional right of an individual to a jury trial to determine the nature and scope of the corporate right. Yet, even if the *Troxler Hosiery* proposition is incorrect, the explanation for its erroneous premise lies in significant part within that same exploration.[93]

Neither Article III, section 2 nor the Sixth Amendment provides for a right to jury trial only for defendants prosecuted for serious criminal offenses.[94] "[A]ll crimes" and "all criminal prosecutions" are within the scope of those texts.[95] Yet for centuries, in England, common law magistrates tried certain lower-level criminal offenses without a jury. The American colonies and later the newly-estab-

---

90 United States v. Troxler Hosiery Co., 681 F.2d 934, 935 n.1 (4th Cir. 1982) (dictum) (citing United States v. R. L. Polk & Co., 438 F.2d 377, 379 (6th Cir. 1971)). *Polk* itself cites no authority for its recognition of "the fundamental principle that corporations enjoy the same rights as individuals to trial by jury". *Polk*, 438 F.2d at 379. Some writers rely on *Troxler* as authority for the proposition that a corporation has the same jury right as an individual. *See, e.g.*, James C. Cissell, Federal Criminal Trials § 1240 (3d ed. 1992); Eli Cohen et al., Project, *Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992*, 81 Geo. L.J. 853, 1297 n.1738 (1993) ("Corporations also enjoy a right to a jury trial in criminal cases.").

91 681 F.2d 934.

92 *See infra* subpart IV.B.

93 This Article will discuss several of the many cases decided by the Supreme Court over a 105 year span that specifically considered the right to a criminal jury trial under the Constitution and the nature of that right. Only one case from this group, Muniz v. Hoffman, 422 U.S. 454 (1975), considered the implications of the organizational status of the defendant (there, a labor union local).

94 *See supra* notes 56-58 and accompanying text.

95 U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI.

lished American states, before and after the adoption of the Constitution and its Bill of Rights, followed the same general practice.[96]

In 1888, in *Callan v. Wilson*,[97] the Supreme Court first considered a defendant's challenge to a criminal conviction based on this seeming contradiction between practice and constitutional language. In *Callan*, under a congressional enactment for the District of Columbia,[98] the defendant was convicted without a jury in police court for conspiring with other members of his musicians' union to engage in a boycott. He was sentenced to pay a fine of twenty-five dollars or to spend thirty days in jail. Under the procedure established by Congress for the District of Columbia, Callan could have appealed as of right to a higher level trial court, where he would have had a trial de novo by jury. Choosing to be imprisoned and not to appeal, Callan filed a habeas corpus action that reached the Supreme Court. The Court unanimously reversed his conviction and held that conspiracy was not within the category of "petty offenses" that could be constitutionally tried without a jury if Congress so designated.[99] Justice Harlan, writing for the Court, referred to English and American authority, and concluded that:

> [T]here is a class of petty or minor offenses, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury, and which, if committed in this District, may, under the authority of Congress, be tried by the court and without a jury . . . .[100]

Nevertheless, the Court found Callan's offense of conspiracy was not in that petty class because it was an indictable offense of a "grave character, affecting the public at large," despite the meager sentence Callan received.[101]

The Court hardly could have avoided acknowledging the long-established and wide-spread English and American practice of legislatively-authorized summary criminal trials. As the Court viewed the issue, it therefore had to decide whether the apparently unequivocal language of the Constitution required it to reject that

---

96 *See supra* notes 67-75 and accompanying text.

97 127 U.S. 540 (1888).

98 Because the Supreme Court did not apply the Sixth Amendment jury trial right to the states until 1968, *see infra* subpart II.B, all of the Court's early considerations of the Constitution's criminal jury right provisions arose in cases involving Congressional enactments.

99 *Callan*, 127 U.S. at 554-55.

100 *Id.* at 555.

101 *Id.* at 555-57.

familiar practice for the first time or to acquiesce in the historical practice and focus its decision on whether the crime here charged—common law conspiracy—was "petty" or "grave" by the nature of the offense at common law. In choosing acquiescence, the course became set for over 100 years during which the Supreme Court has seemingly struggled to define the scope of the constitutional right to jury trial in a criminal case.

In *Callan*, we are not told of the specific ordinance of conviction and its maximum possible penalty, even though that is the primary constitutional factor adopted by the Court in later years. The Court clearly based its holding on the nature of the offense and the fact that conspiracy was an offense indictable at common law, rather than on the minor penalty actually imposed. However, in its second consideration of the application of the constitutional criminal jury trial provisions, in *Schick v. United States*,[102] the Court did refer to the refinement of the prescribed penalty in making the demarcation between "petty" and "serious." There, in a prosecution for violating a provision of federal oleomargarine legislation providing for punishment by a fifty dollar fine, the Court permitted the conviction without a jury, stating that "the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors."[103] Thus, without attempting to establish the line where "serious" offenses began, an oleo offense punishable by a fifty dollar fine was determined to be "petty" by reference both to its regulatory nature and its possible penalty, and in such a case, the Court concluded, "there is no constitutional requirement of a jury."[104]

---

[102] 195 U.S. 65 (1904). In 1891, in Natal v. Louisiana, 139 U.S. 621 (1891), the Court had upheld a New Orleans ordinance that provided for summary trial by magistrate. The ordinance provided for a fine of $25 and imprisonment for 30 days if the fine was not paid. The Court rejected the defendants' argument on the merits that their Fourteenth Amendment privileges and immunities, due process, and equal protection rights had been violated, stating that "[t]he case is too plain for discussion." 139 U.S. at 623 (citing, inter alia, *Callan*, 127 U.S. at 553, 555).

[103] Schick v. United States, 195 U.S. 65, 68 (1904).

[104] *Id.* The issue in *Schick*, raised by the Court sua sponte, was whether the written waiver of jury trial by both the defendant and the United States was constitutionally permissible. The Court held that it was, not because jury waiver by a defendant was generally permissible, but because a jury trial was not constitutionally compelled in the case.

The early development of the constitutional right to jury trial in the Supreme Court—the rejection of a literal reading of the constitutional command and the consequent establishment of the foundation question of "petty" or "serious" offense—was solidified by the publication of the Frankfurter and Corcoran article in the *Harvard Law Review* in 1926.[105] More significant to the development of the "petty/serious" offense bifurcation than any other scholarly analysis, this article has been frequently relied on by the Supreme Court.[106] Frankfurter and Corcoran concluded that it was not conceivable that the Framers meant for the federal courts to discard the historically well-established practice of legislatures providing for the summary trial of "petty" offenses.[107] Yet, in their extensive discussion of examples of such offenses in the American states at the time of the adoption of the Constitution, the authors made no attempt to define the constitutionally permissible line between the two categories of offenses, nor did they suggest the principles or methodology of such an inquiry. They were content to leave such matters of constitutional dimension to the judgment of the courts,[108] a point of view the Supreme Court soon found unacceptable as too judicially subjective.

In 1930, in *District of Columbia v. Colts*,[109] the Supreme Court continued the approach of *Callan* to the constitutional "petty/serious" offense demarcation by again focusing on the common law nature of the offense. Colts was charged by an information filed in the District of Columbia Police Court for reckless driving, an offense that provided for a fine of $25 to $100 or imprisonment for ten to thirty days.[110] Congress had provided for trial by jury in the police court only if the offense charged carried a fine over $300 or imprisonment over ninety days, or the Constitution entitled the accused to a jury trial.[111] Fixing upon the distinction between malum prohibitum and malum in se offenses indictable at common law (and not the statutory penalties provided), the Court found reckless driving to be "an act of such obvious depravity that to character-

---

105 Frankfurter & Corcoran, *supra* note 58.

106 *See, e.g.*, Baldwin v. New York, 399 U.S. 66, 71 n.13 (1970) (plurality opinion); Duncan v. Louisiana, 391 U.S. 145, 159 n.31 (1968); District of Columbia v. Clawans, 300 U.S. 617, 624 n.1 (1937).

107 *See supra* notes 77-79 and accompanying text.

108 Frankfurter & Corcoran, *supra* note 58, at 981.

109 282 U.S. 63 (1930).

110 *Id.* at 70-71.

111 *Id.* at 71.

ize it as a petty offense would be to shock the general moral sense" and found Colts to be entitled to a jury trial under the Constitution.[112] Frankfurter and Corcoran had certainly not found such a clear principle of demarcation in operation in their historical survey, but the *Colts* Court made no reference to their work.

However, in 1937, in *District of Columbia v. Clawans*,[113] the Court now coupled the common law requirement of indictment by grand jury with the maximum sentence provided for the offense. It was this reference to the maximum penalty as an objective indication of the "serious" or "petty" nature of the offense[114] that established *Clawans* as an important point of departure for cases in the last half of the twentieth century.

In *Clawans*, Justice Stone spoke for the Court and relied on *Schick*, *Callan*, *Colts*, and *Natal v. Louisiana*,[115] as well as the Frankfurter/Corcoran article. He saw that the statutory maximum possible punishment of a $300 fine and ninety days' imprisonment provided the single controlling issue before the Court because of the clearly petty nature of the offense itself as a social threat,[116] and because such an offense was not prosecuted by indictment at common law.[117] Finding "the question is not free from doubt," the Court considered "whether the penalty, which may be imposed for the present offense, of ninety days in a common jail, is sufficient to bring it within the class of major offenses, for the trial of which a jury may be demanded."[118] Looking to the history of federal and state summary criminal offenses, Justice Stone expressed the Court's significant operative thesis that "[d]oubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments."[119]

---

112 *Id.* at 73-74.

113 300 U.S. 617 (1937).

114 *Id.* at 627-28.

115 139 U.S. 621 (1891); *see supra* note 102.

116 Clawans was convicted in the District of Columbia police court for engaging in the business of a dealer in secondhand personal property (the unused portion of railway excursion tickets). Under the provisions of the same congressional enactment described in District of Columbia v. Colts, 282 U.S. 63 (1930), *supra* text accompanying note 111, her demand for a jury trial was refused. *Clawans*, 300 U.S. at 623-24.

117 *Id.* at 625.

118 *Id.*

119 *Id.* at 628.

Congress provided for a summary trial for this offense that did not allow a punishment greater than ninety days because, in its legislative judgment, the offense was not constitutionally "serious" in terms of the jury trial requirement. Because Congress had thus expressed its judgment concerning the seriousness of the offense, the Court should not substitute its own values.[120]

Recognizing the historically established "petty offense" exception to criminal jury trial described by Frankfurter and Corcoran, the *Clawans* majority thus established the objective constitutional standard based on the maximum penalty expressed in the legislated offense. Because of the inherent difficulties in determining the scope of the constitutional jury right by reference to common law theory and practice, it was this approach alone that was to carry the day in the Court's two most recent attempts (in 1989 and 1993) to define the right.[121] But before considering the latest approach of the Supreme Court to the scope of the constitutional standard for criminal jury trial, it is relevant for our inquiry to consider the Court's shift of attention from the reach of the federal constitutional right (in regard to covered offenses) to the question of the applicability of that constitutional right—however it might be defined—to trials in state courts.

B. The Middle Chapter—Constitutional Incorporation and the Six Months Indicator

It was not until 1968, in *Duncan v. Louisiana*,[122] that the Supreme Court held that the Due Process Clause of the Fourteenth Amendment guarantees a right of jury trial in state as well as federal criminal cases.[123] In a case notable for its refinement of constitutional

---

120 *Id.* The majority also looked to state and English legislative practices for offenses that provided for similar penalties. *Id.* at 628-29. Then, having approved the denial of jury trial under the Constitution, the entire Court voted to reverse for a new trial because the trial judge improperly restricted cross-examination by the defendant. *Id.* at 630, 633.

121 *See* United States v. Nachtigal, 113 S. Ct. 1072 (1993); Blanton v. City of North Las Vegas, 489 U.S. 538, 541 n.5 (1989) ("Our decision to move away from inquiries into such matters as the nature of the offense when determining a defendant's right to a jury trial was presaged in *District of Columbia v. Clawans* . . . .") (citation omitted); *see infra* subpart II.C (discussing these recent cases).

122 391 U.S. 145 (1968).

123 Because all of the states but three—Louisiana, New Jersey and New York—had already provided jury trials for offenses with greater than six months' imprisonment (the minimal constitutional standard to be adopted

incorporation doctrine,[124] Justice White spoke for the majority of the Court, finding the Sixth Amendment criminal jury right is "fundamental to the American scheme of justice."[125] As part of its "new approach"[126] to the incorporation debate, the *Duncan* majority explicitly rejected the constitutional significance of its prior statements (in dicta), which were early indicators of the paradoxical

---

two years later by the Court, *see infra* text accompanying notes 156-59), the Court was not imposing a significant change on state practice in *Duncan*. *Id.* at 161 n.33. The limitation on state and congressional power implicit in *Duncan* is, of course, another matter.

124 The debate over incorporation of the first eight Amendments of the Bill of Rights into the due process restriction of the states in the Fourteenth Amendment found full blossom in the four opinions in *Duncan*. Justice White, for the majority, adopted the "new approach" of "selective incorporation" in applying the Sixth Amendment to the states through the Due Process Clause of the Fourteenth Amendment, and in so doing, he also decided that the state right guaranteed by the Constitution was the same as the federal right. *Id.* at 149 & n.14.

Justices Black and Douglas concurred but preferred the total incorporation of the first eight amendments. *Id.* at 170-71 (Black, J., concurring). Justice Fortas concurred also but argued that incorporation of the criminal jury right did not necessarily mean that the state right, in all its aspects, must be identical to that applied in the federal courts. *Id.* at 213 (Fortas, J., concurring). Justice Harlan, writing for himself and Justice Stewart in dissent, disagreed with both the selective and total incorporation approaches, preferring a case-by-case due process analysis. *Id.* at 173-83 (Harlan, J., dissenting). Justice Harlan strongly attacked what he labeled the "jot-for-jot" incorporation concept of the majority that made the states conform to federal constitutional concepts in every respect. *Id.* at 181. These philosophical divisions on the Court became particularly important for the application of the Sixth Amendment in later cases in which the Court was unable to agree upon a suitable constitutional explanation for the result favored by a majority and in which Justice Powell cast the key vote. *See, e.g.*, Ludwig v. Massachusetts, 427 U.S. 618 (1976) (5-4 decision) (Powell, J., concurring) (upholding state jury trial de novo under Sixth Amendment even though first trial was without jury (and even though such procedure was not acceptable in federal courts)); Apodaca v. Oregon, 406 U.S. 404 (1972) (5-4 decision) (Powell, J., concurring) (less than unanimous verdict acceptable in state (but not federal) jury trials).

125 *Duncan*, 391 U.S. at 149. This is in contrast to the view of the Court, in dictum, in Palko v. Connecticut, 302 U.S. 319 (1937), in which the Court took a more universal approach to what is fundamental. 302 U.S. at 325. In *Duncan*, Justice White looks only to "the American scheme of justice." *Duncan*, 391 U.S. at 149.

126 *Duncan*, 391 U.S. at 149 n.14.

nature of the Sixth Amendment right to criminal trial by jury. For example, in *Palko v. Connecticut*,[127] the Court had said that:

> The right to trial by jury . . . may have value and importance. Even so [it] is not of the very essence of a scheme of ordered liberty. . . . To abolish [it] is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [it].[128]

As in *Palko*, in 1937, the Court in *Duncan*, in 1968, certainly could not say that a procedurally fair and effective system of criminal adjudication required trial by jury. As we have seen, the summary criminal trial was a venerable process, and defense waiver of trial by jury in federal felony cases had been approved by the Court.[129] Certainly the Court was aware that the criminal justice systems of other countries had moved decisively away from criminal trial by a traditional jury, or had otherwise significantly restricted that right by legislation.[130]

Justice White proceeded, however, to mine the rich history of the criminal jury trial—from its (admittedly discredited) pedigree in the Magna Carta, through the Declaration and Bill of Rights of 1689, the eighteenth century writings of Blackstone, the Declaration of Independence, and the Constitution itself.[131] Combining the weight of that history with the fact that the constitutions and laws of every state guaranteed the basic right of criminal jury trial[132] and that the then-recently published study by Kalven and Zeisel[133] could be seen as empirically validating the efficacious function of the criminal jury,[134] the majority of the Court found sufficient grounds for concluding that "the right to jury trial in serious crimi-

---

127 302 U.S. 319 (1937).

128 *Id.* at 325 (citations omitted) (quoting Brown v. Mississippi, 297 U.S. 278, 285 (1936)). *Palko* held that the Fourteenth Amendment's Due Process Clause did not encompass at least certain aspects of the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 328.

129 Patton v. United States, 281 U.S. 276 (1930).

130 *Duncan*, 391 U.S. at 189 (Harlan, J., dissenting).

131 *Id.* at 151-53 & n.16. Justice White's opinion was recently characterized as "eloquent" and "faithful to the history and meaning of the Sixth Amendment." Walton v. Arizona, 497 U.S. 639, 711 (1990) (Stevens, J., dissenting).

132 *Duncan*, 391 U.S. at 153-54.

133 KALVEN & ZEISEL, *supra* note 86.

134 *Duncan*, 391 U.S. at 157.

nal cases is a fundamental right and hence must be recognized by the States."[135]

But what was the scope and reach of the majority's fundamental right? Referring to the Frankfurter/Corcoran article,[136] and to its 1966 decision in *Cheff v. Schnackenberg*,[137] the Court in *Duncan* could not avoid the nettlesome problem of the "petty/serious" offense dichotomy. Following *Clawans*, its answer was primarily based on the maximum possible penalty. However, that solution would confirm the fundamental ambiguity that now obstructs the articulation of a single rational principle of criminal jury trial for both natural defendants who are subject to imprisonment and organizational defendants that are not.

Duncan's offense of simple battery was legislatively labeled a misdemeanor under Louisiana law and was punishable under the state statute by a maximum of two years' imprisonment without hard labor and a $300 fine.[138] Duncan was sentenced to serve sixty days in the parish prison and to pay a fine of $150.[139] His request for jury trial was denied in the trial court because that right was granted under the Louisiana Constitution only for cases in which capital punishment or imprisonment at hard labor could be imposed.[140]

The bridge of Sixth Amendment incorporation having been crossed, Duncan's case raised a number of questions theretofore unanswered in the Supreme Court: If a simple battery was categorized as being in the class of the least serious criminal offense by penalty under the Louisiana Constitution, what was the standard to determine whether the United States Constitution required a jury trial for that offense or for any particular offense? If the constitutional gauge set by the Court was the level of "seriousness" of each offense as expressed by the legislature creating the offense, then could the trial of simple battery constitutionally require a jury in a

---

135 *Id.* at 154.

136 Frankfurter & Corcoran, *supra* note 58.

137 384 U.S. 373 (1966) (holding that six month federal criminal contempt sentence was short enough to be "petty"). *Cheff* involved a federal criminal contempt conviction of an officer of a corporation who was sentenced to six months in prison. The corporation for which he worked was also convicted and fined $100,000. Both defendants were tried without a jury. The Court granted certiorari only to the individual defendant and used its federal supervisory power to reverse his nonjury conviction. *See infra* subpart IV.A.

138 *Duncan*, 391 U.S. at 146.

139 *Id.*

140 *Id.* at 146 & n.1.

federal, but not a state court? In one state, but not another? Since *Cheff* had established that a punishment of six months or less was not per se "serious" in the federal courts, were offenses that provided for imprisonment for any period longer than six months necessarily constitutionally "serious," thus requiring a jury trial?

The Court's two-step holding in *Duncan* set the stage for its future jury right cases: (1) the Fourteenth Amendment guaranteed the right to jury trial "in all [state] criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee"[141] (that is, a federal standard of "seriousness" of the offense would uniformly govern the states); and, (2) the federal standard would be the objective standard articulated thirty-one years before in *Clawans*, where the Court had concluded that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment."[142] Thus, the constitutional standard was to be one of federal law, but its reference point remained changeable with the "seriousness" decision, at least in part, being dependent on the local legislature's determination of the maximum penalty.

> The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgments" of the crime in question. . . .
>
> . . . .
>
> In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans*, to refer to objective criteria, chiefly the existing laws and practices in the Nation.[143]

Acknowledging the constitutional validity of the "petty/serious" offense distinction,[144] the *Duncan* Court then looked to the maximum penalty provided by the Louisiana statute—two years' imprisonment and a $300 fine—for the resolution of the case. Noting the maximum penalties (six months' imprisonment and a $500 fine) for offenses falling under the definition of "petty offense" in the then-current federal statute (18 U.S.C. § 1) and the present and

---

141 *Id.* at 149.

142 *Id.* at 159-60 (citation omitted).

143 *Id.* at 160-61 (citation omitted) (quoting District of Columbia v. Clawans, 300 U.S. 617, 628 (1937)).

144 *Id.* at 158-62. The Court repeatedly refers to the constitutional jury right in the context of "serious" criminal cases. *See id.* at 154, 156, 158, 162.

historical practices in the states, the majority refused once again to settle the exact location of the line between "petty" and "serious" crimes based on penalty. The Court held only that an offense punishable by two years in prison was, "based on the past and contemporary standards in this country," a "serious" crime constitutionally entitling Duncan to a trial by jury.[145]

In reaching the decision to incorporate the Sixth Amendment jury right into the Fourteenth, the *Duncan* majority discussed its view of the purpose of the jury. Its conclusion that a "right to jury trial is granted to criminal defendants in order to prevent oppression by the Government"[146] is often quoted,[147] as is its statement that a jury provides an accused with "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[148]

The notion of the jury as a necessary barrier against political oppression (disputed by Justice Harlan in his dissent)[149] would seem, at first thought, to be an important indicator of the Court's view of any accused's right to a criminal jury trial, including a corporation. Yet, the Court in *Duncan* considered the history and purpose of the jury where human liberty was at stake. And, even in that sacred context, the Court did not question its established position that "petty" offenses were excluded from that purpose, although many of this country's citizens were being sent to jail for minor crimes without such protection against governmental oppression.

Finally, shortly after *Duncan*, the Court decided that the due process incorporation of the criminal jury right as a restriction on state power would not receive retroactive application, noting that the Court could not say that every trial without a jury, or any particular trial tried by a judge, was not fair solely because of the jury's absence.[150]

Thus, the jury was declared to be fundamental to the American criminal justice system in *Duncan*, but not because of any institu-

---

145 *Id.* at 162.

146 *Id.* at 155.

147 *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 86 n.8 (1986); Ballew v. Georgia, 435 U.S. 223, 229 (1978); Williams v. Florida, 399 U.S. 78, 100 (1970).

148 *Duncan*, 391 U.S. at 156. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12-13 (1986); Wainwright v. Witt, 469 U.S. 412, 439 (1985) (Brennan, J., dissenting); *Ballew*, 435 U.S. at 229.

149 *Duncan*, 391 U.S. at 188 (Harlan, J., dissenting).

150 DeStefano v. Woods, 392 U.S. 631, 633-34 (1968) (per curiam).

tional unfairness or questionable outcome implicit in its absence. And the right would continue to be appropriate only for "serious" crimes as measured by the punishment legislatively accorded the offense ("the length of the authorized prison term or the seriousness of other punishment").[151]

Two years after *Duncan*, in *Baldwin v. New York*,[152] the Court finally fixed the maximum level of permissible imprisonment without a jury at six months, relying, inter alia, on the Frankfurter/Corcoran article and on *Duncan*, *Cheff*, and *Clawans*.[153] The Court noted that those sources referred to six months' imprisonment as the most common historical dividing line between "petty" and "serious" offenses and that the federal definition of "petty" offense also

---

151 *Duncan*, 391 U.S. at 161. *Duncan*'s language—"or the seriousness of other punishment"—implying that more than imprisonment can be considered in a determination of constitutional "seriousness" is quoted in Baldwin v. New York, 399 U.S. 66, 70 (1970) (plurality opinion). *See infra* notes 152-60 and accompanying text (discussing *Baldwin*). That language directly led, twenty-one years later, to Blanton v. City of North Las Vegas, 489 U.S. 538 (1989). *See infra* subpart II.C (discussing *Blanton*). In *Blanton*, the Court considered the Sixth Amendment implication of a fine and other statutory punishments when they appear in addition to a possible maximum six months' imprisonment. *Blanton*, 489 U.S. at 542-43.

In Frank v. United States, 395 U.S. 147 (1969), decided a year after *Duncan*, a divided Court held that an individual found guilty of federal criminal contempt (treated like any other criminal offense for constitutional jury right purposes) and sentenced to three years' probation was not entitled to a jury trial under the Sixth Amendment. 395 U.S. at 150. However, if the probation were revoked, the maximum imprisonment permitted under Cheff v. Schnackenberg, 384 U.S. 373 (1966), would be six months. *Frank*, 395 U.S. at 151; *see infra* notes 224-26 and accompanying text (discussing *Cheff*).

152 399 U.S. 66 (1970) (plurality opinion). Baldwin was convicted of the New York Class A misdemeanor of "jostling", an offense punishable by a maximum term of one year's imprisonment. *Id.* at 67. He was sentenced to that maximum after a nonjury trial in New York City, as provided (especially for that city) by New York state law. *Id.*

153 The Court held under its supervisory power in Cheff v. Schnackenberg, 384 U.S. 373 (1966), that a summary trial of federal criminal contempt was permissible if the maximum (imposed) imprisonment was six months or less. 384 U.S. at 380. The Court held in Duncan v. Louisiana, 391 U.S. 145 (1968), that a possible two years' imprisonment denoted a "serious" offense requiring a jury in state (and federal) courts. 391 U.S. at 161-62. Before Baldwin v. New York, 399 U.S. 66 (1970) (plurality opinion), the Court still had not fixed the precise constitutional dividing line between a "petty" and a "serious" offense.

set a six month maximum.[154] Thus, the *Baldwin* bright-line rule of six months was hardly a surprise.

In the plurality opinion in *Baldwin*,[155] Justice White struck down what he noted to be the last vestige of possible imprisonment for *over* six months by a nonjury trial—that of New York City.[156] He stated: "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."[157] Noting, as the Court had in *Duncan*, that the primary purpose of the jury is to prevent government oppression,[158] Justice White, aware of the contradiction that arises from the "petty offense" exception, stated as follows in the final paragraph of his opinion reversing Baldwin's conviction:

> [T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications. We cannot, however, conclude that these administrative conveniences, in light of the practices that now exist in every one of the

---

154 *Baldwin*, 399 U.S. at 68 & n.5, 69 & n.6, 71 & nn.12-13 (plurality opinion). The Court's federal statutory reference was 18 U.S.C. § 1, *repealed by* Pub. L. No. 98-473, title II, § 218(a)(1), Oct. 12, 1984, 98 Stat. 2027 (effective Nov. 1, 1987).

155 Justices Black and Douglas concurred in the Court's judgment, maintaining that the Sixth Amendment did not allow for any "petty offense" exceptions. *Baldwin*, 399 U.S. at 74-75 (Black, J., concurring). Chief Justice Burger dissented, taking the position that New York's trial scheme was constitutional under the Sixth Amendment. *Id.* at 76-77 (Burger, C.J., dissenting). Justices Harlan and Stewart separately dissented for the reasons stated in *Duncan*. *Id.* at 117 (Harlan, J., dissenting), *and id.* at 143 (Stewart, J., dissenting) (under the combined title of *Baldwin v. New York* and *Williams v. Florida*). Justice Blackmun took no part in the *Baldwin* decision. *Id.* at 74. Thus there were only three Justices whose opinions were expressed by Justice White in *Baldwin*, hardly a strong consensus for the constitutional definition of the upper-limit of the "petty offense" exception.

156 The New York state statutory scheme provided that all trials in the New York City Criminal Court—a court with jurisdiction limited to statutory misdemeanors and lesser offenses—be held before a single judge. For misdemeanors only, a defendant could choose to have the trial held before a panel of three judges. *Id.* at 67 n.2.

157 *Id.* at 72-73.

158 *Id.* at 72.

> 50 states as well as in the federal courts, can similarly justify denying an accused the important right to trial by jury where the possible penalty exceeds six months' imprisonment.[159]

Although establishing a constitutional bright line of punishment requiring a jury trial if a statute permits over six months' imprisonment of an individual,[160] *Baldwin* did not discuss whether other penalties in addition to imprisonment of less than six months, or instead of any imprisonment, might also serve as an objective legislative signal that the offense was determined to be "serious," and thus constitutionally require a trial by jury. Further, the Court did not state a principle that would govern whether a statute which only punished an individual by a fine could ever be constitutionally "serious" or whether a statute that punished only a non-natural entity (which could not be imprisoned) would ever be within the restriction of the Sixth Amendment right to jury trial.[161] The history of the criminal jury right, and the English and American textual authorities, and the near uniformity of state provisions—all of

---

159 *Id.* at 73-74.

160 *Id.* at 69.

161 *Baldwin* also did not consider the aggregation of multiple petty offenses in one trial, and the Court has yet to directly address this issue. United States v. Bencheck, 926 F.2d 1512, 1515 (10th Cir. 1991). The jury right is constitutionally determined by the "seriousness" of the particular offense charged as viewed by the legislature (and expressed by the maximum penalty provided in the offense). The logic of that principle seems to lead to the conclusion that if multiple "petty offenses" arise out of the same incident, because none of them are legislatively "serious," the defendant is not entitled to a jury trial, although the aggregate sentence may exceed six months. However, in Codispoti v. Pennsylvania, 418 U.S. 506 (1974), the Court held that the consecutive sentences of imprisonment that were actually imposed for a series of criminal contempts during a single trial should be aggregated for Sixth Amendment jury trial purposes. *See infra* subpart IV.A (discussing criminal contempt). Some courts have read *Duncan*, *Baldwin*, and *Codispoti* to require aggregation of the maximum sentences *authorized* by the offenses charged to determine the right to a jury. *See, e.g.*, United States v. Coppins, 953 F.2d 86, 90 (4th Cir. 1991). Other courts have held that a jury is not required when the trial judge promises not to sentence the defendant to more than six months' imprisonment (even though the aggregate maximum exceeds six months). *See, e.g.*, *Bencheck*, 926 F.2d at 1513, 1518, 1520. Courts have also held that a jury trial is not required where the total sentence *actually imposed* on the aggregate counts is less than six months. *See, e.g.*, Maita v. Whitmore, 508 F.2d 143, 146 (9th Cir. 1974), *cert. denied*, 421 U.S. 947 (1975); People v. DiLorenzo, 585 N.Y.S.2d 670, 673 (N.Y. Crim. Ct. 1992); *see also* Stephen C. Larson, Comment, United States v. Bencheck: *Aggregate Penalties and Jury Entitlement in Multiple Petty Offense Cases*, 69 DENV. U. L. REV. 763 (1992).

which the Court found persuasive in *Duncan* and *Baldwin*—would not provide solutions to these open issues.

Incorporation took the issue of the scope of the jury right from the limited criminal jurisdiction of the federal government (which has a disproportionally high number of serious felonies) to the broad, general criminal jurisdiction of the states (which has a disproportionally high number of "petty" offenses). However, prior to *Duncan* the Court had never precisely described the scope of the federal right, other than emphatically approving the "petty/serious" offense exception, referring to common law jury practices now long-obsolete (and never uniformly applicable in America), and using its supervisory power over the federal courts. Now, with incorporation, came the need to define the "petty/serious" constitutional demarcation for both the federal and state courts. But the Court did not need to consider any constitutional marker beyond individual imprisonment, and it chose not to reach beyond that need for a broader principle.

It would be almost twenty years before the Court would return to the scope of the Sixth Amendment jury right for individuals, then in the context of drunk driving—an offense of great social significance that often provides for a range of penalties in addition to imprisonment. It was thus reasonable to expect that *Blanton v. City of North Las Vegas*[162] would provide insight from the Court as to the Sixth Amendment implications of fines and other non-incarcerating criminal penalties—the type of punishment to which an organizational criminal defendant is uniquely limited.

C. *The Latest Chapter*—Blanton v. City of North Las Vegas *and* United States v. Nachtigal

Part II began with the hypothesis that an attempt to answer the question of a corporation's right to jury trial must certainly begin with a discussion of the criminal jury right of natural persons as that right has been fashioned over the years by the Supreme Court. The cases that indirectly present the issue of an organization's (rather than an individual's) constitutional right to a criminal jury trial will be considered in subpart IV.B. However, from the history of a natural person's criminal jury right, we have seen that the Court quickly accepted the firmly established historical starting point of summary trial for many minor criminal offenses but then was faced with the question of where to draw the constitutional line. Over the years,

[162] 489 U.S. 538 (1989).

the Court moved from a common law nature-of-the-offense analysis, a process fraught with judicial subjectivity and historical peculiarities, to an assessment of the maximum possible penalty provided by the legislature, a more objective approach to the constitutional difference between an offense that is "serious," and warrants a jury trial, and one that is not. But in the cases considered to this point, the Court did not articulate a constitutional difference between a punishment involving possible loss of human liberty and a statutory maximum punishment of a fine or other penalty (other than probation)[163] not involving incarceration.[164]

Obviously, because the monetary fine is the primary mode of corporate punishment (with probation a reinvigorated possibility in the federal system under the recently amended Sentencing Guidelines),[165] it is central to our inquiry to consider whether the statutory possibility of imprisonment is, in fact, the defining factor of the Court's natural person criminal jury right decisions.

Should a corporate-accused be provided a constitutional right to a jury trial for any offense for which—as a measure of its "seriousness"—the Congress or a state legislature has provided for imprisonment of a natural person for over six months (even though no individual is a defendant in the particular case)? If the answer to that question is yes, would that answer be unchanged if the same offense was then recast by the legislature in a separate criminal code chapter dealing solely with crimes by organizations but now providing only for a fine and probation? And should a corporation—or a natural person—be constitutionally entitled to a jury trial if a generally applicable offense specifies a significant financial penalty as well as imprisonment—but for *less than* six months, or if there is no provision for imprisonment at all? The Supreme Court moved a bit closer to suggesting the answers for these questions—

---

163 The defendant in Frank v. United States, 395 U.S. 147 (1969), received a suspended sentence and three years' probation for federal criminal contempt, a statutory offense with no specified maximum penalty. His Sixth Amendment attack on the denial of his jury demand was rejected by the Court (relying on Cheff v. Schnackenberg, 384 U.S. 373 (1966)).

164 Schick v. United States, 195 U.S. 65 (1904), involved a federal offense for which the only penalty was a $50 fine. All the other Supreme Court cases considered to this point exposed the defendant to some incarceration, however short.

165 U.S.S.G., *supra* note 24, §§ 8D1.1-8D1.5.

again in the context of cases involving only natural persons—in *Blanton v. City of North Las Vegas*[166] and *United States v. Nachtigal*.[167]

Blanton, decided by a unanimous Court in 1989, concerned the constitutional right to jury trial in a state criminal prosecution for driving under the influence of alcohol (DUI)—a question of great import for the country's criminal justice system, and one to which the states had not responded uniformly.[168] Unlike any of its other criminal jury right decisions since *Colts* in 1930,[169] here the Supreme Court spoke through a single opinion.

Blanton, a first-time offender charged under Nevada's DUI statute, faced a mandatory incarceration of two days with a possible maximum of six months; or, in the alternative, forty-eight hours of community work while identifiably dressed as a DUI offender. If convicted as a first offender, he additionally would suffer a mandatory fine of $200 ranging to a possible maximum fine of $1000. He also would automatically lose his driver's license for ninety days and would be required to attend an alcohol abuse course at his own expense.[170] Asserting his Sixth Amendment right, Blanton sought but was denied a jury trial in the Nevada courts. The Supreme Court, in an opinion by Justice Marshall, affirmed the ruling of the state supreme court.

---

166 489 U.S. 538 (1989).

167 113 S. Ct. 1072 (1993) (per curiam).

168 *See* Landry v. Hoepfner, 840 F.2d 1201, 1218-19 (5th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1083 (1989). In *Landry*, the Fifth Circuit rejected the habeas corpus appeal of a defendant convicted in Louisiana for driving while intoxicated (DWI). The Louisiana statute provided for a maximum penalty of six months' imprisonment, a $500 fine, and costs. *Id.* at 1203, 1216. In the course of its lengthy decision (which reviews the history of the "petty offense" exception in the Supreme Court), the en banc court rejected its panel's reliance on the collateral consequences of the conviction, particularly the suspension of driving privileges, as follows:

> [T]he Supreme Court's emphasis has been on the maximum *sentence* imposable and particularly on the maximum possible *confinement*. This was the case in *Clawans* and increasingly thereafter. In both *Duncan*'s and *Baldwin*'s discussions of current and late eighteenth century practice in the states, the only reference made is to the length of possible confinement.

Id. at 1215-16 (citations omitted). *Landry* is cited with approval twice in *Blanton*. *Blanton*, 489 U.S. at 541 n.5, 542.

169 District of Columbia v. Colts, 282 U.S. 63 (1930); *supra* notes 109-12 and accompanying text.

170 *Blanton*, 489 U.S. at 539-40.

In *Blanton*, the maximum imprisonment was statutorily set at six months, and thus clearly fell within the "petty offense" boundary of *Baldwin*. The Court's first-impression consideration of the additional non-incarcerating penalties provided by the state statute and the way in which those penalties were analyzed by the Court in the context of its "petty/serious" offense demarcation, make the case pertinent to the question of the jury right of a corporation.

Finding it "long settled" that the "petty/serious" offense distinction was determinative of the scope of the constitutional right of jury trial (citing *Duncan*, *Callan*, and *Clawans*),[171] Justice Marshall emphasized that the Court had moved from a focus on the nature of the offense and its treatment at common law (referring to the early approach of *Colts* and *Callan*)[172] to the more objective indication of social seriousness demonstrated most relevantly by the severity of the maximum penalty authorized by the legislature (citing the later approach of *Clawans*, *Frank*, *Duncan*, and *Baldwin*'s plurality opinion).[173]

This later line of precedent had as its defining feature the analysis of the Sixth Amendment implications of imprisonment for the maximum period provided by the statute before the Court. Now, for the first time, the Court was faced with the argument that the additional penalties to which Blanton was exposed by the Nevada DUI statute—beyond its provision for imprisonment up to six months—made his offense constitutionally "serious." Justice Marshall began his analysis by acknowledging that "[a] legislature's view of the seriousness of an offense is also reflected in the other [non-incarcerating] penalties that it attaches to the offense. We thus examine 'whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial.'"[174]

Recognizing *Duncan*'s undeveloped implication that other penalties might open the door to the Sixth Amendment right, Marshall described that entry as meager indeed: "Primary emphasis, however, must be placed on the maximum authorized period of incarceration. Penalties such as probation or a fine may engender 'a significant infringement of personal freedom,' but they cannot approximate in severity the loss of liberty that a prison term

---

171 *Id.* at 541.

172 *Id.*

173 *Id.* & n.5.

174 *Id.* at 542 (citation omitted) (quoting *Duncan*, 391 U.S. at 161).

entails."[175] Then, quoting from *Muniz v. Hoffman*,[176] Marshall concluded that "because incarceration is 'an intrinsically different' form of punishment, it is the most powerful indication whether an offense is 'serious.'"[177]

With this elevation of the importance of imprisonment to the Sixth Amendment calculation, the rule of the case was then declared (acknowledged as "albeit somewhat imprecise")[178] and applied to Nevada's DUI (first offense) provision, penalty by penalty. This analysis resulted in an affirmance of the Nevada court's decision that a nonjury trial was permissible because the offense was not constitutionally "serious." The rule announced by the Court is as follows:

> Although we did not hold in *Baldwin* that an offense carrying a maximum prison term of six months or less automatically qualifies as a "petty" offense, and decline to do so today, we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as "petty." A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one.[179]

Thus, in a case representing one of the major categories of summary criminal trials in this country, a case in which it had before it an issue of broad implication—the Sixth Amendment effect of non-incarceration penalties—the Court, in upholding the Nevada procedure, chose to reaffirm the great significance of the imprisonment aspect of the possible penalty. With little difficulty, it then found the defendant "unpersuasive" in his efforts to meet his newly-created burden of demonstrating that the other non-incarcerating penalties of the statute when coupled with the possible six months' imprisonment somehow made the offense become "serious."[180] In doing so, surely the Court was aware that in creating a defendant's burden of demonstrating "seriousness" (where the maximum possi-

---

175 *Id.* (quoting Frank v. United States, 395 U.S. 147, 151 (1969), which considered probation, but not fines).

176 422 U.S. 454, 477 (1975). *Muniz* is a federal criminal contempt case involving the jury trial right of a labor organization. *See infra* subpart IV.B (discussing *Muniz*).

177 *Blanton*, 489 U.S. at 542 (citation omitted).

178 *Id.* at 543.

179 *Id.* (footnote omitted).

180 *Id.* at 543-44.

ble imprisonment is six months or less), it gave no clue what objective standard would be applied to constitutionally measure such an effort. No principle is stated, no parameters are given, and no example of an unacceptable extreme is offered.[181]

While still espousing the cause of objectivity based on the legislative determination of penalty as stated in *Clawans*, the *Blanton* Court was willing to accept presumptively Nevada's judgment as to when the constitutional right of jury trial should apply, even though additional criminal penalties were required by the statute. Although the Court's opinion explicitly recognized the place of "other penalties" in the Sixth Amendment "seriousness" analysis, at the same time it significantly de-emphasized those other non-incarcerating penalties by referring to them only in the context of an offense for which a sentence of imprisonment (necessarily for six months or less, under *Baldwin*) is also possible. Thus, while quoting as his starting point *Duncan*'s reference to "the length of the authorized prison term or the seriousness of other punishment,"[182] Marshall soon spoke of the defendant's burden in terms of the necessary showing that "any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration"[183] are so severe as to clearly signify a legislative determination that the offense is "serious." The Court's primary focus was the identified bright-line objective measurement of legislative "seriousness"—the maximum prison sentence possible—and it was only the "rare situation" when the legislature "packs" an offense with (unspecified) "onerous" additional penalties that seemed to concern it.[184]

Blanton demonstrates, by its cursory analysis of the additional penalties there involved, that to evaluate other criminal punishments, such as a fine, as objective indicators of the legislative "seri-

---

[181] The Court found it "immaterial" that there was a minimum term required by the statute (two days in jail), found the 90-day license suspension "irrelevant" if it ran concurrently with the prison sentence (which the Court assumed), and found the possible $1000 fine to be constitutionally acceptable. *Id.* at 544. In considering the amount of the fine, the Court briefly referred to the $5000 maximum level set by Congress in its then-current definition of "petty offense," 18 U.S.C. § 1 (1982 & Supp. II 1984), and petitioners' failure to suggest that this congressional figure was "out of step" with state practice for offenses carrying prison terms of six months or less. *Blanton*, 489 U.S. at 544-45 & n.11.

[182] *Blanton*, 489 U.S. at 542.

[183] *Id.* at 543.

[184] *Id.*

ousness" of the particular offense is to be adrift without a constitutional chart. The Court much preferred the established guide of the maximum term of imprisonment. Unlike imprisonment, which is, in our social concept, a fungible punishment—to send any man or woman to prison for more than six months is "serious," there are no such objective social (or constitutional) standards for other penalties, particularly fines. Nor was the Court able to provide a reference point, other than to mention (in this *state* prosecution) the federal "petty offense" statutory limitation of a $5000 fine (for Class B or C misdemeanors, or infractions).[185]

In *United States v. Nachtigal*,[186] a 1993 per curiam opinion, the Court reemphasized the primacy of the maximum term of imprisonment expressed in *Blanton*. The defendant Nachtigal was convicted of driving while under the influence of alcohol in a national park.[187] A federal regulation made such an offense a Class B misdemeanor, punishable by a maximum six months' imprisonment[188] and by a $5000 fine.[189] The defendant was also subject to the alternate sentence of probation with conditions for a period not exceeding five years.[190] Although Nachtigal was exposed to a fine that was five times greater than that considered in *Blanton*,[191] the Court overruled the Ninth Circuit's determination that the trial judge improperly denied the defendant a jury,[192] finding the case "quite obviously controlled by our decision in *Blanton*."[193]

After reciting the *Blanton* rule of the presumption of "petty offense" that follows from six months' or less imprisonment,[194] the Court considered whether the $5000 maximum fine here created

---

185 *Id.* at 545 & n.11; *see infra* Part III (discussing statutory reference points for Sixth Amendment right to jury trial).

186 113 S. Ct. 1072 (1993) (per curiam).

187 *Id.*

188 *Id.* (citing 18 U.S.C. § 3581(b)(7) (1988)).

189 *Id.* (citing 18 U.S.C. § 3571(b)(6), (e) (1988)).

190 *Id.* (citing 18 U.S.C. § 3561(a)(3), (b)(2) (1988)).

191 Nachtigal's actual sentence was a $750 fine and one year's unsupervised probation. *Id.*

192 The Ninth Circuit relied on its pre-*Blanton* decision of United States v. Craner, 652 F.2d 23 (9th Cir. 1981); the fact that the Secretary of the Interior had set the highest possible penalty permitted under congressional authorization; and the fact that seven out of nine states in the circuit provided jury trials for DUI. *Nachtigal*, 113 S. Ct. at 1072.

193 *Nachtigal*, 113 S. Ct. at 1073.

194 *See supra* text accompanying note 179.

that "rare case" which lurked in the mind of the *Blanton* Court. The Court stated:

> While the maximum fine in this case is $4,000 greater than the one in *Blanton*, this monetary penalty "cannot approximate in severity the loss of liberty that a prison term entails."
>
> Nor do we believe that the parole alternative renders a DUI offense "serious." Like a monetary penalty, the liberty infringement caused by a term of probation is far less intrusive than incarceration. The discretionary probation conditions do not alter this conclusion; while they obviously entail a greater infringement on liberty than probation without attendant conditions, they do not approximate the severe loss of liberty caused by imprisonment for more than six months.[195]

The Court in *Nachtigal* did repeat the necessity to consider "other statutory penalties,"[196] but it did not indicate how to measure the constitutional seriousness of such penalties. Certainly, they have little weight in comparison to imprisonment and may always have insufficient weight when not coupled with possible incarceration. Meanwhile, unlike the Court in *Blanton*, *Baldwin*, and *Duncan*, the Court in *Nachtigal* did not even refer to the federal "petty offense" statute (with its current $5000 maximum fine for an individual's Class B or C misdemeanor or infraction).[197] Because the offense involved in the case was a federal regulatory violation, the omission of any mention of the federal "petty offense" provision (or any state statutory reference points) seems noteworthy. Perhaps, as will be discussed in the next Part, the Court felt such a statutory standard was constitutionally unworkable.[198]

---

195 *Nachtigal*, 113 S. Ct. at 1074 (footnote omitted) (quoting *Blanton*, 489 U.S. at 542).

196 *Id.* at 1073.

197 18 U.S.C. § 19 (1988) defines a "petty offense" in terms of 18 U.S.C. § 3571 (b)(6) or (7) for an individual and (c)(6) or (7) for an organization.

198 In the approximately four years between *Blanton* and *Nachtigal*, four federal circuit courts had occasion to apply the *Blanton* rule. Only one found that the defendant met the burden of demonstrating that the penalties in addition to imprisonment qualified him for a jury trial under the Sixth Amendment: Richter v. Fairbanks, 903 F.2d 1202 (8th Cir. 1990).

In *Richter*, the defendant was charged with a third-offense DWI in violation of a Nebraska city ordinance. That ordinance specified a maximum penalty of six months' imprisonment, a $500 fine, and a 15-year driver's license revocation. 903 F.2d at 1203. Applying the rule of *Blanton*, the court held: "[W]e conclude that the 15-year license revocation, considered together with the maximum six month prison term, is a severe enough penalty to indicate that the Nebraska legislature considers third-offense DWI a serious crime." *Id.* at 1204.

What then do *Blanton* and *Nachtigal* add to the inquiry concerning the jury right of a corporation? After *Blanton*, if an offense carries a maximum prison term of six months or less, the offense is not regarded as "serious" for purposes of a natural person's right to jury trial, regardless of the additional penalties provided, unless the defendant meets the burden of proving otherwise under some presently uncertain reference point. The additional penalties that are relevant to the inquiry after *Blanton* most certainly include fines and other disabilities provided in the particular statutory statement of the offense. Thus, it would seem that if a corporation has a constitutional right to a jury trial at all, those additional penalties would be included in a calculation of the seriousness of the offense for constitutional purposes.

But we are left with many more questions than answers. The Court has given substantial indication that it will regard a fine or probation as a legislative indicator of constitutional "seriousness" only if coupled with a provision for imprisonment. In any event, the Court has found itself unwilling or unable to construct a bright-line Sixth Amendment test for monetary fines that is based on a fundamental constitutional principle. Any figure set too high would deprive many defendants of the "inestimable"[199] constitu-

---

In United States v. Paternostro, 966 F.2d 907 (5th Cir. 1992), the court, citing *Blanton*, refused to find that a probationary period of up to five years (provided under 18 U.S.C. § 3561(b)) when coupled with the offense's maximum penalty of six months' imprisonment and a $5000 fine indicated that Congress intended to make failure to abide by the terms of a Shoreline Use permit a constitutionally serious offense. 966 F.2d at 913.

In United States v. Novotny, 968 F.2d 22 (10th Cir. 1992) (unpublished opinion at 1992 WL 121728), *cert. denied*, 113 S. Ct. 1252 (1993), the court held that the defendant did not show that any additional penalties he faced were "serious" enough to entitle him to a federal jury trial. 1992 WL 121728 at *3. The Court also found that there was "no evidence in the record suggesting the government was 'corrupt or overzealous' in charging Defendant, and . . . there was no indication that the judge was 'compliant, biased, or eccentric'." *Id.* (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

In United States v. LaValley, 957 F.2d 1309 (6th Cir.), *cert. denied*, 113 S. Ct. 460 (1992), the court refused to find that a five year term of supervised release coupled with the maximum statutory punishment of six months' incarceration and a $5000 fine meant that the offense was not "petty" within the meaning of *Blanton*. 957 F.2d at 1312. The Court reached this conclusion even though the defendant's license to practice law in Michigan might be revoked. *Id.* at 1313.

[199] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

tional safeguard described in *Duncan*;[200] any figure set too low would devalue the worth of human freedom that is now, in effect, priced by the six months' presumption of non-seriousness in the *Blanton* rule.

After 105 years of Supreme Court-developed constitutional doctrine, we still are left without an identifiable principle upon which to decide an individual's Sixth Amendment right to a jury trial based on exposure to a fine only. And we are surely left without a constitutional principle to decide whether an organization, which can only be fined or regulated by the state—but can not spend one day in prison, should be entitled to the constitutional jury right if a legislative body decides to deny it.

III. The Statutory Reference Point Approach to the Sixth Amendment

We have seen in Part II that the Supreme Court frequently turned to the federal "petty offense" definition in Title 18 as an objective reference point for the "seriousness" of the offense as expressed by its maximum penalty.[201] *Duncan* and *Baldwin* both

---

[200] Unlike a prison sentence, a fine is not a fungible punishment. Therefore, a $5000 fine could be either "petty" or "serious," depending upon the nature and wealth of a particular defendant, the harm caused, and the gain to the defendant resulting from the offense.

[201] In 1930, Congress established a federal statutory definition of "petty offense" governed by the maximum penalty provided in the substantive offense. That definition, first codified at 18 U.S.C. § 541, stated:

> [A]ll offenses the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more that $500, or both, shall be deemed to be petty offenses . . . .

Act of Dec. 16, 1930, ch. 15, 46 Stat. 1029, 1029-30.

In 1948, Congress redefined "petty offense," codifying a simplified definition in 18 U.S.C. § 1(3). That new definition maintained the core characteristics of six months' imprisonment and a $500 fine from the 1930 enactment, as follows:

> (3) 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.

Act of June 25, 1948, ch. 645, 62 Stat. 684.

In 1984, Congress departed from the $500 fine standard (which had applied to both individual and entity defendants) for the first time in over 50 years, when it amended 18 U.S.C. § 1(3) to read:

> (3) Any misdemeanor, the penalty for which, as set forth in the provision defining the offense, does not exceed imprisonment for

used the six months maximum of 18 U.S.C. § 1(3)[202] and the almost unanimous state practice of providing a jury trial for offenses punishable by six months as justification for rejecting a maximum two years' imprisonment (in *Duncan*), and then adopting a maximum six months' imprisonment (in *Baldwin*) as the dividing line between "petty" and "serious" offenses for Sixth Amendment purposes. After *Baldwin*, other courts continued to refer to 18 U.S.C. § 1(3) to resolve the much more difficult question of when,

---

> a period of six months or a fine of not more that $5,000 for an individual and $10,000 for a person other than an individual or both, is a petty offense.

Criminal Fine Enforcement Act of 1934, Pub. L. No. 98-596, § 8, 98 Stat. 3134, 3138, amended section *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 218(a)(1), 98 Stat. 1987, 2027 (effective Nov. 1, 1987).

For offenses committed after November 1987, there is no longer a "petty offense" category in the federal criminal code. Although 18 U.S.C. § 19 (1988) is entitled "Petty offense defined," that section now references another section of Title 18, as follows:

> As used in this title, the term "petty offense" means a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual or section 3571(c)(6) or (7) in the case of an organization.

Enacted by Criminal Fine Improvements Act of 1987, Pub. L. 100-185, § 4(a), 101 Stat. 1279, as *amended by* Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. 100-690, § 7089(a), 102 Stat. 4395, 4409. (*See, supra* note 24 for United States Code definition of an "organization.").

Under 18 U.S.C. § 3571(b)(6), (7) (1988) (the first pair of subsections referred to by 18 U.S.C. § 19), an individual found guilty of a Class B or C misdemeanor or an infraction may be fined a maximum of $5000 if the offense did not result in death. (A Class B misdemeanor is punishable by a maximum of six months' imprisonment under 18 U.S.C. § 3559(a)(7) (1988); a Class C misdemeanor is punishable by a maximum of 30 days' imprisonment under 18 U.S.C. § 3559(a)(8); and an infraction is punishable by a maximum of five days' imprisonment under 18 U.S.C. § 3559(a)(9) (1988)). Under 18 U.S.C. § 3571(c)(6), (7) (1988) (the second pair of subsections referred to by 18 U.S.C. § 19), an organization is punishable by a maximum fine of $10,000 for either a Class B or C misdemeanor not resulting in death or for an infraction.

The punishment of Class B or C misdemeanors or infractions is not regulated by the United States Sentencing Guidelines. U.S.S.G., *supra* note 24, § 1B1.9.

[202] Baldwin v. New York, 399 U.S. 66, 70-71 & n.12 (1970) (plurality opinion); Duncan v. Louisiana, 391 U.S. 145, 161 & n.32 (1968).

if ever, the possible fine component of the punishment pushes an otherwise "petty" offense over the line to a "serious" offense.[203]

That statutory reference was perhaps doomed to failure for several reasons. As some have recognized, the Congress did not provide the "petty offense" definition as an indirect device to govern the right to jury trial in the federal courts.[204] That was not the statute's purpose, but rather it was part of Congress' effort to clarify and label the various levels of federal criminal offenses by their maximum possible punishments and then to consistently use those

---

[203] *See, e.g.*, United States v. McAlister, 630 F.2d 772 (10th Cir. 1980) (maximum statutory fine of $1000 in section prohibiting trespass upon nuclear plant site, 42 U.S.C. § 2278a(a), (b) (1988), 10 C.F.R. §§ 860.3, .5(a) (1993)—with no imprisonment provided—entitles defendant to a jury trial under the Sixth Amendment, finding 18 U.S.C. § 1(3) to be "highly relevant"); United States v. Hamdan, 552 F.2d 276 (9th Cir. 1977) (per curiam) ($1000 maximum fine provided by federal immigration statute, 8 U.S.C. § 1306(c) (1988)—which also provided for imprisonment of six months or less—made offense "serious" because it exceeded $500 maximum fine in 18 U.S.C. § 1(3)); United States v. R.L. Polk & Co., 438 F.2d 377 (6th Cir. 1971) ($500 fine specified in 18 U.S.C. § 1(3) controlled whether defendant-corporation's federal contempt fine was "petty").

[204] In 1984, when Congress amended 18 U.S.C. § 1(3) to raise the maximum fine from $500 to $5000 for a "petty offense" and created for the first time a separate $10,000 fine for a non-individual's "petty offense," Congress was aware that federal courts had referred in the past to that section for the purpose of defining the jury trial right. H.R. 906, 98th Cong., 2d Sess. 19-20 (1984). Similarly, in 1987, when Congress defined "petty offense" in the new 18 U.S.C. § 19, it was aware of the use of the federal statutory definition as "a measure of the seriousness of an offense for purposes of the right to trial by jury." H.R. 390, 100th Cong., 1st Sess. 4-5 (1987).

However, Congress' awareness of the use of its "petty offense" penalty definition as a reference point is not at all the same as establishing that Congress can set the constitutional standard for a federal jury trial under the Sixth Amendment, let alone for all the states. Thus, Senior Judge Will stated in United States v. Kozel, 908 F.2d 205 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 969 (1991):

> Section 19 is not grounds by itself for refusing a jury demand. Congress cannot narrow the scope of the jury trial clauses by statutory enactment. The government has missed the mark. . . .
>
> Nothing in § 19 creates a statutory entitlement to a jury trial, for criminal contempt or any other crime. There's no mention of juries in § 19 and no implication that a right to jury trial should be read in. . . . Section 19 neither expands nor limits a defendant's statutory right to a jury trial for criminal contempt and may inform but does not control interpretation of the jury clauses in Article III and the Sixth Amendment.

908 F.2d at 206-07 (footnote omitted).

labels throughout the procedural sections of Title 18 and the Federal Rules of Criminal Procedure.[205]

There is no general federal criminal jury right statute, and the applicable federal rule simply governs the procedure in "[c]ases required to be tried by jury."[206] But even if there were such a federal statute, that legislative declaration could no more directly dictate the constitutional standard than could the now-repealed 18 U.S.C. § 1(3) "petty offense" definition indirectly dictate it. Certainly, the federal courts would be bound to give such a hypothetical congressional provision full effect if the criteria for providing a jury that it set forth met, or exceeded, the requirement of the Sixth Amendment. But Congress could not narrow the constitutional right in the federal courts. And it is difficult to conceive how any such action by Congress, however expansively the jury right were described, could in any way control the legislative expression of "seriousness" that must be judicially explored for each state offense when the Sixth Amendment right to jury trial is considered. The Court suggested as much in *Blanton*, when it referred to the $5000 level set by Congress in 18 U.S.C. § 1(3), as amended, but only to note that the "petitioners do not suggest that this congressional figure is out of step with state practice for offenses carrying prison sentences of six months or less."[207] Just what role the congressional punishment levels—particularly for fines—will play if the Supreme Court chooses to decide that a particular fine alone is enough to indicate "seriousness" remains to be seen. As in *Duncan*, *Baldwin*,

---

[205] Although there is now no category of "petty offense" in the federal criminal code, Rule 58 of the Federal Rules of Criminal Procedure, governing "Procedures for Misdemeanors and Other Petty Offenses," still refers to a "petty offense" as defined in 18 U.S.C. § 19 (1988). FED. R. CRIM. P. 58(a)(3), and Advisory Committee Notes, "1990 Addition."

The relevant portion of Rule 58 provides:

> (b)(2) At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of:
>
> . . . .
>
> (F) unless the charge is a petty offense, the right to trial by jury before either a magistrate or a judge of the district court. . . .

FED. R. CRIM. P. 58(b)(2)(F).

[206] FED. R. CRIM. P. 23(a); *see supra* note 20 (quoting full text of Rule 23(a)).

[207] Blanton v. City of North Las Vegas, 489 U.S. 538, 544-45 (1989). As the Court said, "The question is not whether other States consider drunken driving a 'serious' offense, but whether Nevada does." *Id.* at 545 n.11 (citation omitted).

and *Blanton*, there is a recognition that a fine penalty (perhaps only in conjunction with imprisonment of less than six months) is somehow relevant; but, as the Court said in 1975, in *Muniz v. Hoffman*, the federal definition of petty offense in 18 U.S.C. § 1(3) has "no talismanic significance,"[208] even for the federal courts. (The *Muniz* Court refused therefore to accept the proposition that a hypothetical fine of $501—one dollar in excess of the then 18 U.S.C. § 1(3) maximum of $500—would require a jury trial for a large corporation or labor union contemnor.)[209]

As will be seen in Part IV, because there seems to be no other constitutional anchor, some federal courts of appeal have continued to refer to the maximum fine levels set in the statutory references contained in 18 U.S.C. § 19 (or to the earlier 18 U.S.C. § 1(3), as amended) in analyzing federal criminal contempt fines for "seriousness," despite the limiting language just quoted from *Muniz*.

Turning once again to the pending NYNEX litigation, it is interesting to note that the defendant-appellant corporation in *United States v. NYNEX*[210] grounds its argument in the District of Columbia Court of Appeals on the fact that Congress has set the maximum fine for an organization for a Class B or C misdemeanor or an infraction at $10,000 in the sentencing provisions referenced in 18 U.S.C. § 19. Therefore, NYNEX Corporation argues that any criminal fine greater than $10,000 constitutionally entitles it to a jury trial.[211]

Although it is perhaps comprehensible how such a judicially-adopted standard might be appropriate for adoption in the federal system under the supervisory power of the Court (as in *Cheff*),[212] the concept of a congressionally-set figure (even one directly specified rather than inferred) as a constitutional triggering mechanism for jury trials in either federal or state courts is troublesome indeed. Also, in a practical sense, it seems highly unlikely (as shown by the difficulty experienced by the Second Circuit in *United States v. Twen-*

---

208 Muniz v. Hoffman, 422 U.S. 454, 477 (1975); *see infra* subpart IV.B (discussing *Muniz*).

209 *Id.* at 477.

210 *See supra* notes 12-18 and accompanying text.

211 Brief for Defendant-Appellant at 14-15 and Reply Brief for Defendant-Appellant at 2, United States v. NYNEX Corp., 814 F. Supp. 133 (D.D.C. 1993), *rev'd and vacated on other grounds*, No. 93-3019, 1993 WL 462176 (D.C. Cir. Nov. 12, 1993) (*see supra* note 15 explaining circuit court's other grounds).

212 Cheff v. Schnackenberg, 384 U.S. 373 (1966); *see supra* note 137.

tieth Century Fox Film Corp.[213]) that a maximum fine as low as $10,001 would be pragmatically suitable as a constitutional marker of "seriousness" for every organizational defendant. That sum is obviously not a very high figure, even for the small businesses that make up the large majority of corporate enterprises, and to analogize $10,001 to more than six months in prison as a constitutional requirement for a jury trial seems intuitively inappropriate.

Finally, although NYNEX Corporation seeks to make 18 U.S.C. § 19 into a constitutional anchor, it neglects to note that while Congress did incorporate in that section the 18 U.S.C. § 3571(c)(6), (7) maximum fine of $10,000 for organizations, in the very next provision of the fine statute, § 3571(d), Congress also provided for an alternative maximum fine *for any offense* of twice the gain or loss.[214] Should that alternative level of fine also be the constitutional measure of the "petty offense" standard? If not, and 18 U.S.C. § 19's "petty offense" is limited to its reference to 18 U.S.C. § 3571(c)(6), (7) and the maximum fine of $10,000 specified therein, then it would seem that some Class B and C misdemeanors or infractions would not be constitutionally entitled to a jury trial, but the exact same offenses (if they were proven to have resulted in a loss or gain which, when doubled, exceeded $10,000) would be, if the sentencing court chose the alternative maximum fine.[215] Accordingly, 18 U.S.C. § 19 does not seem to be a suitable constitutional standard for either individual or organizational fines, or one that is even appropriate as a statutory standard for the federal courts.

---

[213] 882 F.2d 656 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990); *see infra* subpart IV.B.

[214] Section 3571(d) provides:

> ALTERNATIVE FINE BASED ON GAIN OR LOSS. If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

18 U.S.C. § 3571(d) (1988).

Under 18 U.S.C. § 1 (1988), the term "person" includes a corporation. *See supra* note 24.

[215] This in turn would require either a determination of the actual amount of the gain or loss from the relevant offense conduct before the trial or limit the trial court's discretion in sentencing these classes of offenses to a $10,000 fine. The first alternative seems fraught with practical problems and adds another layer of complexity to criminal adjudications. The second alternative defeats the will of Congress expressed in the alternative fine provision.

IV. The Criminal Contempt Cases and the Standard of the Penalty Actually Imposed

A. The Natural Person Cases

Because of the nature of criminal contempt of court, a corporation or other organization is most likely to be denied a jury trial when charged with that crime (for example, NYNEX Corporation).[216] The Supreme Court has yet to consider a case that has compelled a decision whether any organization, in any criminal case, has a jury right under the Sixth Amendment. If such a case does reach the Court, it most likely will be a criminal contempt conviction because of the frequency of prosecutions for that offense and the conflicting lower court decisions in that area. To explore this area for clues to whether a corporation has a constitutional right to a jury trial, it is necessary to begin with a brief review of the law of criminal contempt of court and the jury right thereunder as it pertains to individual defendants.

In order to uphold the integrity of the judicial system, criminal contempt of court treats injury inflicted upon the court as a public crime.[217] The offense can be committed by various means (such as by disrupting the administration of justice, or disobeying orders of the court entered to carry out its judgments), and can be judged and punished under the inherent power of the court. Under the common law, criminal contempt had always been tried without a jury's interposition, in order to most effectively protect the administration of justice.[218] In the federal system, criminal contempt may be pursued by the court itself through a direct finding if the contempt is committed in its presence.[219] If the contempt is committed out of the presence of the court, the contemnor must be given

---

216 *See supra* notes 12-18 and accompanying text.

217 *See, e.g.*, United States v. Barnett, 376 U.S. 681, 698-99 (1964); Douglass v. First Nat'l Realty Corp., 543 F.2d 894, 897-98 nn.17-21 (D.C. Cir. 1976).

The essential distinction between civil contempt of court, which empowers a court to enter remedial orders to compel future compliance, and criminal contempt, which unconditionally punishes a completed offense against the state, is often difficult to discern, particularly if both civil and criminal contempt are involved in the same litigation. *See, e.g.*, Bagwell v. International Union, United Mine Workers of Am., 423 S.E.2d 349 (Va. 1992), *cert. granted*, 113 S. Ct. 2439 (1993).

218 *See, e.g.*, Bloom v. Illinois, 391 U.S. 194, 195-97, 198 n.2 (1968); Green v. United States, 356 U.S. 165, 183-87 (1958).

219 Fed. R. Crim. P. 42(a).

notice of a hearing by an order to show cause,[220] or the criminal contemnor must be indicted and prosecuted under a specific statutory provision, such as 18 U.S.C. § 401(3), the general contempt of court provision.[221]

Because of the special nature of criminal contempt[222] and because neither the inherent power of the court nor 18 U.S.C. § 401(3), which is based on that power, provide any penalty limitations, the question arises whether a criminal contempt defendant has the constitutional right to a jury trial, and if so, when.

In *United States v. Barnett*,[223] in 1964, a bare majority of the Supreme Court, following its prior cases and the common law, held that criminal contempt proceedings did not by their nature fall within the jury trial requirements of Article III of the Constitution or the Sixth Amendment, leaving open the question of the constitutional impact of the severity of the penalty. In *Cheff v. Schnackenberg*,[224] two terms later, the Court significantly advanced the constitutional jury right in criminal contempt cases by deciding that Cheff's punishment of six months' imprisonment "can be treated

---

220 *Id.* at 42(b).

221 Section 401, which is the charging mechanism for most of the criminal contempt cases to be considered in this Article states, in part, as follows:

> A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> . . . .
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401(3) (1988).

The Antitrust Division of the Department of Justice elected to proceed against NYNEX Corporation by charging criminal contempt in violation of 18 U.S.C. § 401(3). United States v. NYNEX Corp., 781 F. Supp. 19, 21, 28 (D.D.C. 1991).

See the discussion of the development of the federal contempt power to include disobedience to court orders in United States v. Dixon, 113 S. Ct. 2849, 2854 (1993) (finding that protection of Double Jeopardy Clause attaches in certain criminal contempt proceedings).

222 The offense of criminal contempt is often referred to as *sui generis* because of its unique nature. *See* Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966). For Sixth Amendment jury trial purposes, the Court has been emphatic in its refusal to draw a distinction between criminal contempt and any other crime. Frank v. United States, 395 U.S. 147, 148 (1969) ("For purposes of the right to trial by jury, criminal contempt is treated just like all other criminal offenses.").

223 376 U.S. 681 (1964).

224 384 U.S. 373 (1966).

only as 'petty' in the eyes of the statute [18 U.S.C. § 1] and our prior decisions," and therefore no jury trial was required.[225] Realizing, however, that the federal courts would be "left at sea" in future cases in imposing sentences greater than six months, in the exercise of its supervisory power, the *Cheff* majority ruled further that sentences for criminal contempt in excess of six months may not be imposed by federal courts without a jury trial or waiver.[226]

The doctrine of *Cheff* was further developed in *Bloom v. Illinois*,[227] decided by the Supreme Court on the same day as *Duncan v. Louisiana*.[228] The Court in *Bloom* was directly faced with the questions whether the Constitution itself required the states (and the federal government, by the necessary implication of *Duncan*) to provide a jury trial for criminal contempt of court, and if so, whether Bloom's state sentence of twenty-four months' imprisonment should be upheld, despite the refusal of his jury demand.

Because of the two year sentence, the Court could not properly avoid the constitutional jury trial issue in *Bloom*. First, the majority held that "serious" contempts are "so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the states . . . . The Constitution guarantees the right to jury trial in state court prosecutions for contempt just as it does for other crimes."[229] But, having likened serious contempts to other serious crimes,[230] the Court found itself faced with a significant difference between them. Under both Illinois and federal law, there was no legislatively provided maximum penalty for the contempt offense. How then could the objective determination of "seriousness" (as required by *Clawans*, and later by *Baldwin*) be

---

225 *Id.* at 380. The prior decisions referred to by the Court include District of Columbia v. Clawans, 300 U.S. 617 (1937); District of Columbia v. Colts, 282 U.S. 63 (1930); Schick v. United States, 195 U.S. 65 (1904); Natal v. Louisiana, 139 U.S. 621 (1891); and Callan v. Wilson, 127 U.S. 540 (1888). *Cheff*, 384 U.S. at 379; *see supra* subpart II.A (discussing these cases).

226 *Cheff*, 384 U.S. at 380. Cheff, a former president and chairman of the board of Holland Furnace Company, was found guilty of criminal contempt of the Court of Appeals of the Seventh Circuit and sentenced to six months' imprisonment. The corporation itself was also found guilty of contempt and fined $100,000. Although both Cheff and the corporation appealed the jury issue, the Court granted only Cheff's petition for certiorari. *Id.* at 375.

227 391 U.S. 194 (1968).

228 391 U.S. 145 (1968).

229 *Bloom*, 391 U.S. at 198, 199-200.

230 *See also* Codispoti v. Pennsylvania, 418 U.S. 506, 516 (1974); Taylor v. Hayes, 418 U.S. 488, 495 (1974).

undertaken by the reviewing Court since contempt obviously could be, under the Court's decisions in *Barnett* and *Cheff*, either "petty" or "serious"?[231] The objective test of legislatively determined "seriousness," as expressed by the statute's maximum permissible imprisonment, was not available here. The Court in *Bloom* (finding the ruling principle to be implicit in *Cheff*'s holding that the six months' imprisonment there imposed was "petty") answered the question as follows:

> Under the rule in *Cheff*, when the legislature has not expressed a judgement as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the penalty actually imposed as the best evidence of the seriousness of the offense. See *Duncan*, [391 U.S.] at 162, n. 35.[232]

Having determined in its earlier natural person cases that a constitutional right to a jury trial was a function of the "petty" or "serious" nature of the offense itself—as objectively indicated by the maximum possible penalty of imprisonment provided by the offense statute, the Court, in criminal contempt cases, was now forced to slide to the measure of the seriousness of the penalty of imprisonment actually imposed—certainly among the most subjective and discretionary of all judicial functions. The stated purpose of the jury right is to prevent "oppression by the Government," including that of a "compliant, biased, or eccentric judge,"[233] but in criminal contempt cases, the Supreme Court decided that the constitutional level of "seriousness" was to be determined by the single judge herself. The paradox of the "petty offense" exception to the Sixth Amendment seems inescapable.

B. The Entity Cases and Muniz v. Hoffman

It was not until *Muniz v. Hoffman*,[234] in 1975, that the Supreme Court approached, but did not reach, the issue of an organization's constitutional right to a jury trial for criminal contempt. In that case, a labor union local and Muniz, a local officer, were charged with criminal contempt for violating injunctions of the federal dis-

---

231 "We accept the judgement of *Barnett* and *Cheff* that criminal contempt is a petty offense unless the punishment makes it a serious one; but, in our view, dispensing with the jury in the trial of contempts subjected to serious punishment represents an unacceptable construction of the Constitution . . . ." *Bloom*, 391 U.S. at 198.

232 *Id.* at 211.

233 *Duncan*, 391 U.S. at 155-56.

234 422 U.S. 454 (1975).

trict court against illegal picketing. Refusing a jury trial demand, the district court found both defendants guilty of criminal contempt and sentenced Muniz to a suspended sentence with a year's probation and the local to a $10,000 fine.[235] After the Ninth Circuit affirmed, the Supreme Court granted certiorari to consider whether the local had a constitutional right to a jury trial (and whether Muniz and the local had a statutory right to a jury trial under 18 U.S.C. § 3692).[236]

Justice White, writing for the majority of the Court,[237] refused to reach the direct question raised by the argument of the respondent National Labor Relations Board—"that there is no constitutional right to a jury trial in any criminal contempt case where only a fine is imposed on a corporation or labor union."[238] The Court decided only that the $10,000 fine imposed on this particular local (which had 13,000 dues paying members) was not of such magnitude that the union was deprived of whatever right to jury trial it *might* have under the Sixth Amendment.[239]

Reviewing the development in the Supreme Court of the constitutional right to jury trial for natural person contemnors, Justice White recognized that the Court "has as yet not addressed the question whether and in what circumstances, if at all, the imposition of a fine for criminal contempt, unaccompanied by imprisonment, may require a jury trial."[240] However, the Court did not find it necessary to answer that basic question directly either.

Justice White noted that in determining the "petty/serious" jury trial boundary, the Court in the past had referred to state and federal practices, including the federal legislative definition of "petty offense" under 18 U.S.C. § 1(3), but had "accorded [that statutory

---

235 *Id.* at 457.

236 *Id.* at 458.

237 The five-member majority agreed with the Ninth Circuit that neither defendant had a statutory right to a jury trial under 18 U.S.C. § 3692 (1988), a contempt provision specifically dealing with labor disputes. *Muniz*, 422 U.S. at 474. The majority also agreed that the local did not have a constitutional right to jury trial. *Id.* at 475. Certiorari on the constitutional issue was limited to the local. *Id.* at 479 n.4 (Douglas, J., dissenting). Justice Douglas dissented on both grounds. *Id.* at 478-79 (Douglas, J., dissenting). Justices Stewart, Marshall, and Powell dissented only on the statutory grounds. *Id.* at 481 (Stewart, J., dissenting).

238 *Id.* at 477.

239 *Id.*

240 *Id.* at 476.

definition] no talismanic significance."[241] Concluding that the Court could not accept the proposition that a contempt must be considered a serious crime under all circumstances in which the punishment is a fine of more than $500 (the maximum fine then provided by the federal petty offense statute) unaccompanied by imprisonment, Justice White stated as follows:

> It is one thing to hold that deprivation of an individual's liberty beyond a six-month term should not be imposed without the protections of a jury trial, but it is quite another to suggest that . . . a jury is required where any fine greater than $500 is contemplated. From the standpoint of *determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor*, imprisonment and fines are intrinsically different. 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.[242]

Then, applying the test of the "seriousness of the risk and the extent of the possible deprivation faced by a contemnor," the Court found that the local was not entitled to a jury trial.

As in several of the Court's past efforts, the majority opinion in *Muniz* raised more questions concerning the constitutional jury right than it answered. The opinion is but a mandatory way-station along the road toward a further development of the right, not only for entity and individual criminal contempt defendants, but for any defendant in any criminal case where the only possible penalties are non-incarcerating.[243] There are still many pieces of the puzzle yet to be provided, but *Muniz* helps little to suggest their likely shape. Perhaps the most significant missing piece in the full development of the constitutional right to a jury trial is the lack of principle or precedent to decide whether a natural defendant is ever constitutionally entitled to a jury trial for an offense for which no imprisonment is possible for the statutory violation; or for an offense for which, because the maximum possible imprisonment is less than six months, the provision for a significant fine becomes an issue pertinent to the decision.[244]

---

241 *Id.* at 477.

242 *Id.* (emphasis added).

243 This is so, in part, because of the Court's repeated statements that there is no difference for Sixth Amendment jury trial purposes between criminal contempt and any other kind of crime. *See supra* note 26.

244 Because of *Blanton*'s presumptive rule of "petty offense" based on the provision for imprisonment of six months or less, the defendant in *Blanton*

Having decided that a right to jury trial exists only for "serious" offenses and that the determination of the "serious" or "petty" nature of a particular offense would be an impermissible subjective judicial exercise if not primarily guided by the offense penalty,[245] the Supreme Court then added to the already multi-layered syllogism by finding that the offense of criminal contempt can itself be either "petty" or "serious." But if there is no statutory provision specifying the penalty, the penalty actually assessed after conviction for the contempt (usually fixed in severity by the request of the prosecutor prior to the trial)[246] would then govern whether the jury right was constitutionally required.

All this complexity, perhaps unavoidable given the paradoxical development of the constitutional jury right, would be of lesser moment if the end result yielded a rational, workable rule—such as the bright line drawn by the Court in *Baldwin* based on the maximum possible imprisonment provided by the offense statute. As the Court recognized in both *Blanton*[247] and *Muniz*,[248] however, the legislature often chooses to accomplish its criminal justice goals through the punishment of unacceptable conduct by a variety of penalties in addition to, or instead of incarceration (and for some defendants, such as unions and corporations, incarceration is not a possibility). If the "seriousness" of an offense qualifying it for the constitutional right to jury trial is determined by the necessary presence of the possibility of some incarceration, then the Supreme Court will likely eventually decide that neither individual nor entity defendants are constitutionally entitled to a jury trial when there is no imprisonment possible for the criminal offense.

If, however, possible incarceration is not the defining quality of the Sixth Amendment right and *Muniz* and *Blanton* are read to imply that a high level of fine alone might be an indicator of constitutional "seriousness" for jury trial purposes, the choice that then must be made is of the method to measure that "seriousness" objec-

---

failed in his burden to prove that the Nevada DUI statute's fine and license revocation provisions made the offense constitutionally "serious." Blanton v. City of North Las Vegas, 489 U.S. 538, 543-45 (1989).

245 The federal or state courts would then apply a federal standard of "seriousness" in constitutionally evaluating each offense statute.

246 *See, e.g.*, United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 662 n.3 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990); United States v. NYNEX Corp., 781 F. Supp. 19, 26 (D.D.C. 1991).

247 *Blanton*, 489 U.S. at 543.

248 Muniz v. Hoffman, 422 U.S. 454, 476-77 (1975).

tively and to determine on what side of the constitutional line the offense falls. As we have seen, the Court had often referred in its jury right cases to 18 U.S.C. § 1(3), the now-repealed federal "petty offense" definition (and its successor, 18 U.S.C. § 19)[249] and, despite *Muniz*'s refusal to accord that federal definition (with its maximum fine) "talismanic" significance, some lower federal courts continue to seek a congressionally defined bright line for fines in cases involving natural defendants.[250]

Yet, *Muniz* did break new ground by its newly refined rule of the "seriousness of the risk and the extent of the possible deprivation faced by a contemnor."[251] This standard of "seriousness" led the Court to look at the dollar amount of the fine imposed (there $10,000) and to consider the magnitude of the deprivation to the union local with its 13,000 dues paying members.[252] Therefore, in criminal contempt cases at least, the federal standard for constitutional entitlement to a jury trial (if there is no statutorily specified penalty and if imprisonment over six months is not imposed, or possible) has perhaps become one of the "seriousness" of the actual impact of the fine upon the particular non-natural defendant.[253]

---

249 *See supra* notes 201-02 and accompanying text.

250 Since *Muniz*, two federal circuits have found for the natural defendant's right to jury trial because the maximum fine provided for the offense exceeded the then-current $500 maximum of 18 U.S.C. § 1(3). *See* United States v. Hamdan, 552 F.2d 276 (9th Cir. 1977) (per curiam) ($1000 maximum fine together with maximum imprisonment of six months entitled defendant who made false statement to Immigration and Naturalization Service to jury trial, referring to 18 U.S.C. § 1(3)); Douglass v. First Nat'l Realty Corp., 543 F.2d 894 (D.C. Cir. 1976) ($5000 criminal contempt fine against natural defendant reduced to $500 because rejection of 18 U.S.C. § 1(3) standard in *Muniz* applied only to entity defendants). *But see* Girard v. Goins, 575 F.2d 160 (8th Cir. 1978) (sentencing habeas corpus petitioners to fines ranging from $2500 to $10,000 entitled them to jury trial, following "seriousness of the risk and the extent of possible deprivation" standard of *Muniz*, 422 U.S. at 477).

251 *Muniz*, 422 U.S. at 477.

252 *Id.*

253 Because *Muniz* refused to reach the underlying Sixth Amendment question of whether a corporation or a union ever has a constitutional jury right, holding only that the contempt fine in issue was not "serious" for the union, there is no certainty that the Court would find any organization entitled to a jury trial, regardless of the "seriousness" of the impact of the fine. *Id.*

Such a standard seems fraught with the difficulty of determining the actual impact of a particular maximum fine upon a particular organizational contemnor and then determining—under a yet to be identified constitutional standard—whether that impact is "serious," especially when the defendant's financial circumstance is not as obvious as that of the defendants in *Muniz* or in *NYNEX*.

In addition, the same impact standard applied to a natural person contemnor with only a fine penalty exposure seems both intuitively inappropriate and judicially impractical, yet logically compelled by that reading of *Muniz*. Thus, in non-obvious cases, the impact standard would require a factual hearing prior to trial to determine the "seriousness" of the impact upon either the corporate or individual defendant. Such a cumbersome procedure would defeat the purpose of proceeding without a jury—speedy, efficient, and less costly criminal adjudication.

Muniz's apparent requirement of a penalty impact assessment in non-imprisonment criminal contempts has not blossomed in the federal circuit court cases involving corporate defendants. In *Musidor, B.V. v. Great American Screen*,[254] both an individual and a corporate defendant were convicted of criminal contempt for violating preliminary injunctions of the federal district court. The individual defendant was sentenced to sixty days' imprisonment and the corporate defendant was fined $10,000.[255] On appeal, both argued that a jury trial was constitutionally required.[256] The court noted that the record did not reflect that a jury was requested[257] and then proceeded to consider the merits of the constitutional issue. Quoting at length from *Muniz* and applying the impact doctrine of that case, the Second Circuit upheld the $10,000 fine against the entity defendant because its illicit sale of Rolling Stone T-shirts in violation of the court's orders yielded revenue greatly in excess of the fine the court imposed. Rejecting the 18 U.S.C. § 1(3) reference point, as the Court had done in *Muniz*, the amount of the fine here was determined not to be constitutionally "serious" in light of the actual profit obtained by the organization through the contempt.[258]

---

254 658 F.2d 60 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982).

255 *Id.* at 63.

256 *Id.* at 65.

257 *Id.*

258 *Id.* at 66. This standard would always permit a contempt proceeding without a jury, regardless of the amount of fine contemplated or sentenced, if the unlawful profit from the contempt exceeded that amount.

However, in the more recent case of *United States v. Twentieth Century Fox Film Corp.*,[259] a different panel of the same court found *Musidor* to be "of limited force" because that decision relied in part on the fact that a jury trial had not been requested.[260] The *Fox Film* court then made clear that it was not content with a *Muniz*-derived standard of "seriousness" that looked to the resources of the corporate contemnor and the actual impact of the fine imposed upon it.

Fox Film had been convicted and fined $500,000 by the federal district court for a violation of a film industry antitrust consent decree after being charged with criminal contempt by the government pursuant to 18 U.S.C. § 401(3).[261] A regional manager of Fox Film, upon whose conduct the corporation's criminal liability was premised, was also convicted and sentenced to pay a $5000 fine.[262] Fox Film's pretrial request for a jury was denied by the district court because "a corporation, facing only a fine, was not entitled to a jury trial, regardless of the amount of the fine."[263]

The Second Circuit reversed Fox Film's conviction and sentence and remanded for further proceedings in which the government could choose either to proceed with a jury trial or to lower its penalty demand.[264] In so doing, the court brushed aside the government's argument that a corporation charged with criminal contempt is never entitled to a jury trial[265] and also explicitly rejected the standard of penalty impact, which it itself had applied in *Musidor* and which the Fourth Circuit had since followed in *United States v. Troxler Hosiery Co.*[266]

The conviction of the individual defendant was affirmed because his sentence did not exceed six months' imprisonment. *Id.*

259 882 F.2d 656 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990).

260 *Id.* at 663.

261 *Id.* at 658-59.

262 *Id.* at 658. The manager agreed to a nonjury trial and did not appeal. *Id.*

263 *Id.* The judge later supplemented his pretrial ruling denying Fox Film a jury trial with the observation that the $500,000 fine, being less than one percent of the company's net earnings, was not large enough to require a jury. *Id.* at 659.

264 *Id.* at 665.

265 *Id.* at 663.

266 *Id.* at 663-64 (citing *Troxler Hosiery*, 681 F.2d 934 (4th Cir. 1982)). In a case much like *Musidor* because of the court's focus on the likely amount of profit to the corporation arising from the criminal contempt, *Troxler Hosiery* upheld the nonjury conviction and $80,000 fine of a corporation with a net worth of over $500,000. *See supra* note 90 and accompanying text.

Refusing to be compelled by *Muniz* into an analysis of Fox Film's financial resources and also refusing to be governed in its constitutional decision by the now-current federal $10,000 statutory maximum for organizational fines for Class B and C misdemeanors and infractions,[267] the Second Circuit ruled that corporations do have a definite constitutional right to a jury trial and that a fine of $100,000 provides an absolute bright-line limit above which the Sixth Amendment entitles all corporations and all other organizations to a jury trial for criminal contempts, regardless of the particular defendant's financial resources.[268] But, the court also stated that for fines below the $100,000 threshold, it would then be appropriate to consider whether the fine had a significant financial impact on the particular organization.[269]

Therefore, in the Second Circuit, the absolute dollar figure of $100,000 now stands for corporations—as does the six months' imprisonment level for individuals in *Baldwin*—as the defining element of constitutional "seriousness" if reached, but a lesser fine would not necessarily exclude a "seriousness" finding. However, in *Blanton*, the Court established a presumption against the defendant that imprisonment for six months or less is constitutionally "petty," while the Second Circuit does not establish such a burden-shifting presumption for fines less than $100,000. It would, of course, have difficulty doing so because a given term of imprisonment can be presumed to be as "petty" for one person as for another, while to a publicly-traded multinational corporation, a $95,000 fine, for example, is obviously more "petty" than a $50,000 fine to a "mom and pop" firm with six-figure annual gross revenue.

The Second Circuit thus rather boldly attempted to solve the puzzle of objective measurement of a fine's "seriousness" for constitutional jury trial purposes by creating—out of whole cloth—its own bright-line analogy to the Supreme Court's six months' imprisonment rule. And, as with the six months rule for all natural defendants regardless of the offense, the measure of "seriousness" expressed by the Second Circuit's $100,000 fine rule would seem to apply logically to all organizational criminal defendants, not just those charged with criminal contempt.

In the course of its justification for its new fixed-dollar amount rule, the Second Circuit said in passing that "an amendment that

---

267 18 U.S.C. §§ 19, 3571(c)(6), (7) (1988).

268 *Fox Film*, 882 F.2d at 663-65.

269 *Id.* at 665.

guarantees a jury trial for all offenses that are 'serious' would be trivialized by an interpretation that renders it inapplicable, for example, to a fine of $1,000,000."[270] In so doing, that court rather gratuitously issued a challenge which was soon accepted by Judge Greene in *United States v. NYNEX Corp.*[271]

In his memorandum opinion, Judge Greene took an expansive view of *Muniz*, and in his preliminary discussion did not seem to limit his reach only to criminal contempt:

> Offenses carrying a potential sentence of over six months' imprisonment are always deemed sufficiently serious to warrant a trial by jury. Muniz v. Hoffman, 422 U.S. 454, 477 (1975).
>
> The law is more ambiguous, however, regarding corporate defendants facing only fines, not imprisonment. The Supreme Court, noting that "imprisonment and fines are intrinsically different," has specifically left open the question whether a right to a jury trial exists when a corporate defendant faces only a fine. *Id.*
>
> . . . .
>
> Assuming, without deciding, that corporations have a jury trial right at all where only a fine is imposed, the issue is whether the $1,000,000 fine the government has proposed against NYNEX is serious enough to implicate the Sixth Amendment.
>
> As a practical matter the answer must be no. Such a fine is simply not serious to a corporation of NYNEX'S magnitude. A $1,000,000 fine would, for example, constitute one-tenth of one percent of NYNEX's average annual net income of over $1 billion. Such a fine would barely scratch the surface of NYNEX's considerable financial resources.[272]

Thus establishing himself as a *Muniz* literalist, Judge Greene rejected the Second Circuit's $100,000 bright-line threshold in *Fox Film*, noting that the Fourth Circuit had also used *Muniz*'s particular defendant penalty impact approach in *Troxler Hosiery*.[273] The Judge suggested that the *Fox Film* test would unfairly benefit larger firms that will have a constitutional right to a jury trial no matter how small an impact the $100,000 threshold fine had on their net worth, and that the approach would yield only a limited benefit to judicial economy because the Second Circuit's fixed-dollar rule still required comparison of the fine to a particular firm's resources to

---

270 *Id.* at 664.

271 781 F. Supp. 19 (D.D.C. 1990); *see supra* notes 12-18 and accompanying text.

272 *NYNEX*, 781 F. Supp. at 27 (footnote omitted).

273 *Id.* at 27-28.

measure constitutional "seriousness" when the penalty was below $100,000.[274]

NYNEX Corporation urged the district court to be guided by the fact that Congress had provided for a maximum felony fine for organizations of $500,000[275] and the government had sought a penalty twice as severe.[276] But again, Judge Greene used the language of *Muniz*, and found that congressional enactment to be of no "talismanic significance."[277]

In summary, seeking to discover whether a corporation has a constitutional right to a jury trial by reference to organizational contempt cases, we find that the Supreme Court and the United States District Court for the District of Columbia only so assumed, but did not so decide, when the fine for criminal contempt was $10,000 (for the union local in *Muniz*) or $1 million (in *NYNEX*). Neither of those amounts was considered "serious" enough for the particular defendants to force the resolution of the underlying constitutional issue. We also find that the Second Circuit did reach the constitutional issue, holding that Fox Film Corporation did have a constitutional right to a jury because the fine against it exceeded the $100,000 figure arbitrarily set by the court. But no court has yet followed *Fox Film*, and the defendant-appellant in *NYNEX*, in its brief on appeal, rejected that $100,000 bright line for the $10,000 maximum fine provided for in §§ 18 U.S.C. 19, 3571(c)(6), (7), urging the adoption of that amount as the constitutional standard.[278]

---

274 *Id.* at 28.

275 18 U.S.C. § 3571(c)(3) (1988).

276 *NYNEX*, 781 F. Supp. at 28. This argument ignores the provision in 18 U.S.C. § 3571(d) (1988) that provides for an alternate fine of an amount no greater than twice the gain or loss involved in the offense.

277 *Id.* That the court's ruling against NYNEX on the jury issue was in accord with the judge's own inclinations is clear from note 14 of his memorandum opinion. There, the court declines to exercise its discretion to try the case by jury "because the case will in part involve complex issues that will more appropriately and efficiently be resolved by the bench." *Id.* at 28 n.14.

278 *See supra* notes 210-11 and accompanying text (discussing *NYNEX* brief).

V. The Administrative Punishment of Corporations and the Sentencing Guidelines

A. Administrative Punishment

The Supreme Court has long recognized the constitutionality of congressional provisions that permit civil actions by the federal government, in either the district court or in administrative adjudications, to assess or collect fixed monetary sanctions that are punitive in effect.[279] Until recently,[280] the Court has deferred to congressional judgment, as expressed by a statute's provisions for the civil assessment or collection of the penalty, and found that the constitutional and procedural requirements for criminal punishment simply did not apply.[281]

Two of the Court's significant cases that are illustrative of this development and which indirectly involve the Sixth Amendment right to jury trial are *Hepner v. United States*[282] and *Atlas Roofing Co. v. Occupational Safety and Health Review Commission.*[283] In *Hepner,* an early case, the government brought an action in debt under a 1903 act of Congress that provided for a $1,000 "forfeiture" for each

---

279 *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law,* 101 Yale L.J. 1795, 1820-35 (1992) (providing extensive discussion of Supreme Court's development of law of "civil" judicial and administrative punishment). As Professor Mann summarizes in his conclusion, Congress has taken full advantage of the door opened to it by the Court:

> Since at least the early nineteenth century, Congress has granted federal administrative agencies the power to impose punitive sanctions in civil procedural settings, first through the initiation of lawsuits in courts and later through purely administrative assessment. As the federal bureaucracy has grown, the power to impose punitive civil sanctions has been extended to more executive offices and independent agencies. At the same time, punitive sanctions have become more severe . . . .

Id. at 1871.

280 United States v. Halper, 490 U.S. 435 (1989); *see infra* notes 294-304 and accompanying text.

281 Mann, *supra* note 279, at 1820-36. The principal cases discussed by Professor Mann are United States v. Ward, 448 U.S. 242 (1980); Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909); and Stockwell v. United States, 80 U.S. (13 Wall.) 531 (1871).

282 213 U.S. 103 (1909).

283 430 U.S. 442 (1977).

alien illegally imported into the United States to perform labor.[284] In a jury trial, the federal district court granted a directed verdict for the government. The court of appeals certified a question to the Supreme Court that asked, in effect, whether the proceeding was civil, and therefore permitted a directed verdict, or criminal, and therefore did not, under the Sixth Amendment's jury right. Deferring to the intent of Congress, the Court affirmed the directed verdict, finding the fixed statutory penalty to be civil.[285] Justice Harlan, for the majority, stated:

> It must be taken as settled law that a certain sum, or a sum which can be readily reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal. . . . But there can be no doubt that the words of the statute on which the present suit is based are broad enough to embrace, and were intended to embrace, a civil action to recover the prescribed penalty.[286]

In *Atlas Roofing*, the petitioners had argued in the Third and Fifth Circuits that the fine penalties assessed against them by the Occupational Safety and Health Review Commission for violations of the OSHA statute[287] violated both their Sixth and Seventh Amendment rights to a jury trial.[288] The Court granted certiorari only on the Seventh Amendment issue,[289] although petitioners requested that

---

284 *Hepner*, 213 U.S. at 104-05.

285 *Id.* at 115.

286 *Id.* at 108-09.

287 The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1988). Petitioner Atlas Roofing Co. was fined $600 for a "serious violation" and petitioner Irey was fined $5000 for a "willful violation" of the Act. *Atlas Roofing*, 430 U.S. at 447-48.

288 *Atlas Roofing*, 430 U.S. at 448-49 & n.5.

289 *Id.* at 449. In Ross v. Bernhard, 396 U.S. 531 (1970), the Supreme Court stated that a suit by a corporate entity to enforce a legal right was an action at common law carrying the right to jury trial at the time of the adoption of the Seventh Amendment. *Id.* at 533-34. Therefore, the Seventh Amendment's jury right attached to the contract and tort issues raised in a shareholders' derivative action for money damages. *Id.* at 533, 541-43.

The Seventh Amendment's guarantee of a civil jury trial is not applicable in state courts. *E.g.*, Letendre v. Fugate, 701 F.2d 1093, 1094 (4th Cir.), *cert. denied*, 464 U.S. 837 (1983); Olesen v. Trust Co. of Chicago, 245 F.2d 522, 524 (7th Cir.), *cert. denied*, 355 U.S. 896 (1957).

The Seventh Amendment in part provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

the Court consider both Amendments.[290] Finding the Seventh Amendment to be merely declarative of the law existing at the time of its adoption, the Court refused to prohibit Congress from adopting a scheme of administrative adjudication of penalties for the violation of congressionally created public rights.[291]

Although the Court did not review the Fifth Circuit's finding that the penalty was civil rather than criminal in nature, Justice White, for a unanimous Court,[292] chose to write this curious and ambiguous dictum in a footnote:

> Finally, it should be noted that, if the fines involved in these cases were made criminal fines instead of civil fines, the Seventh Amendment would be inapplicable by its terms. The Sixth Amendment would then govern the employer's right to a jury and under our prior cases no jury trial would be required. Muniz v. Hoffman. It would be odd to hold that Congress could avoid the jury-trial requirement by labeling the civil penalties criminal fines but not by assigning their adjudication to an administrative agency.[293]

Thus, any analysis of the Sixth Amendment right of corporations must take into account the reality that such organizations are frequently assessed punitive fines, often for the same conduct that is also made criminal, in an administrative context that bypasses the need for a criminal, or even a civil, jury. The constitutional significance of this type of civil punishment was emphasized in 1989, in *United States v. Halper*.[294]

In *Halper*, the Court overcame its past reluctance to recognize forthrightly that defendants were, in fact, being punished by the adjudications of administrative agencies and by the assessment of non-compensatory fines in civil actions brought by the government under various statutes in federal district court. Halper was the manager of a medical laboratory services company who was convicted in

---

290 *Atlas Roofing*, 430 U.S. at 449 & n.5.

291 *Id.* at 455, 459-60. The Court approved *Atlas Roofing* and further explained its "public rights" doctrine in Granfinanciera v. Nordberg, 492 U.S. 33, 51-53 (1989). *Cf.* Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005 (1992).

292 *Atlas Roofing*, 430 U.S. at 461. Justice Blackmun did not participate.

293 *Id.* at 460 n.15 (citation omitted). Justice White does not explain why the employers would not be entitled to a jury under the Sixth Amendment. One assumption is that the fines ($600 and $5000) assessed against the two petitioner companies were not large enough to have a "serious" impact. Under this assumption, if petitioners' argument were accepted, the Seventh Amendment would require a civil jury trial for these fine penalties, while the Sixth Amendment would not.

294 490 U.S. 435 (1989).

federal court for criminal violations of the false claims and mail fraud statutes for submitting sixty-five false Medicare benefit claims.[295] He was sentenced to imprisonment for two years and fined $5000.[296]

The government then brought an action in the district court under the civil False Claims Act,[297] seeking the authorized recovery of more than $130,000, despite the fact that Halper's false claims to Blue Cross only amounted to $585.[298] The district court found the civil False Claims Act to be unconstitutional as applied because of the prohibition against multiple punishments in the Double Jeopardy Clause of the Fifth Amendment.[299] The government appealed directly to the Supreme Court.[300]

The government argued on appeal that punishment in a sense relevant to the Double Jeopardy Clause could be "meted out only in criminal proceedings"[301] and that "whether proceedings are criminal or civil is a matter of statutory construction."[302] Although not rejecting the historical accuracy of the government's position, the unanimous Court held that under the Double Jeopardy Clause, a defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction is not fairly characterized as remedial to the government.[303]

In the course of the Court's opinion, the following comments were made by Justice Blackmun:

> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be

---

295 *Id.* at 437.

296 *Id.*

297 *Id.* at 438 & n.3 (citing provisions of False Claims Act, 31 U.S.C. §§ 3729-3731 (1988)).

298 *Id.* at 438. At the time that the government sought the civil penalties, the False Claims Act provided for a mandatory $2000 penalty for each false claim, plus twice the amount of damages, plus costs. 31 U.S.C. § 3729 (1982).

299 *Halper*, 490 U.S. at 438-40.

300 *Id.* at 440.

301 *Id.* at 447.

302 *Id.*

303 *Id.* at 448-49. The Court agreed with the district court that the $130,000 penalty was so disproportionate to the government's loss that it was punishment rather than remediation, but the Court remanded to give the government an opportunity to show otherwise. *Id.* at 452.

> served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and criminal law . . . . Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.
>
> . . . [I]t follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.[304]

It is beyond the scope of this Article to explore fully the issues raised by the fact that punitive monetary fines, as well as other punitive collateral sanctions, are imposed in civil proceedings. However, if such fines are in fact routinely imposed on corporations in administrative proceedings,[305] then what difference, of a constitutional dimension, arises if that same punishment is imposed in a criminal trial conducted with expansive criminal procedural rules (including proof beyond reasonable doubt and presumption of innocence) but without a right to a jury under the Sixth Amendment?

The significance of the point seems hardly overstated because, as Professor Mann points out: "The grant of broad punitive powers to administrative agencies has caused most of the state's punitive sanctioning to occur in the context of civil proceedings."[306]

It is not just the number of civil punitive sanctions but also their large monetary amounts that form a significant aspect of punish-

---

304 *Id.* at 447-48 (citations and footnote omitted). The Court recognized the difficulty that would be encountered in fixing the point between making the government whole and providing a punishment that implicates the Double Jeopardy Clause. *Id.* at 449. The Court made clear that in the ordinary case, liquidated damages or a fixed penalty plus double damages can be said to be in the remedial category. *Id.* It is only in the "rare" case where the fixed penalty is overwhelmingly disproportionate and has no rational relationship to repaying the government for its loss that the rule—called "one of reason"—would apply. *Id.* at 449-50.

In Austin v. United States, 113 S. Ct. 2801 (1993), the Court, finding that civil in rem forfeiture under 21 U.S.C. § 881(a)(4), (7) (1988) implicates the Eighth Amendment, quoted extensively from *Halper.* The Court stated that "[t]hus the question is not . . . whether forfeiture . . . is civil or criminal, but whether it is punishment." 113 S. Ct. at 2806.

305 *See, e.g.*, Erica Clements, Comment, *The Seventh Amendment Right to Jury Trial in Civil Penalties Actions: A Post-Tull Examination of the Insider Trading Sanctions Act of 1984*, 43 U. MIAMI L. REV. 361, 374 (1988) ("Twenty-seven federal departments and agencies enforce approximately 348 statutes involving civil penalties . . . .").

306 Mann, *supra* note 279, at 1862 (footnote omitted).

ment today—particularly for corporations. Professors Yellen and Mayer, Reporters to the Research Project on Collateral Sanctions of the American Bar Association's Section of Criminal Justice, in discussing the significance of governmental collateral civil sanctions, state as follows:

> For corporations, the criminal penalty is often merely the visible tip of the liability iceberg. According to statistics of federal prosecutions gathered in one study,[307] from 1984 to 1990, 624 convicted corporate defendants paid criminal fines totalling approximately $215 million, but were assessed collateral sanctions (including restitution and forfeiture) totalling more than four times that amount, or $986 million. The severity of these collateral consequences has grown considerably in recent years.[308]

Collateral civil penalties are most common for white collar offenses, and ninety-five percent of organizational prosecutions are for such offenses.[309] Because organizations cannot be imprisoned, they are punished largely by monetary sanctions in both civil and criminal proceedings, and "[t]he average collateral monetary sanction imposed on an organization far exceeds the average criminal fine, and the gap between them may be increasing."[310] For example, in six years the amount collected by the U.S. Department of Justice in civil actions under the False Claims Act (which now provides for civil penalties up to $10,000 per false claim, plus treble damages)[311] increased each year from 1985—when $27 million was collected—to 1990—when $257 million was paid to the government.[312] And, using just one of many administrative agency examples, the proposed civil penalties issued by the Occupational Safety and Health Administration (OSHA) increased each year from $9,190,039 in 1985, to $45,004,519 in 1988.[313]

---

307 The authors are referring to, and cite, Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990,* 71 B.U. L. REV. 247, 254-55 and tbls. 1 & 2 (1991).

308 Yellen & Mayer, *supra* note 53, at 963. The Project's final report is found in A.B.A. SEC. CRIM. J., WHITE COLLAR CRIME COMM., COLLATERAL CONSEQUENCES OF CONVICTIONS OF ORGANIZATIONS (1991).

309 Yellen & Mayer, *supra* note 53, at 965 n.16 (relying on Parker, *supra* note 6).

310 *Id.* at 967.

311 31 U.S.C. §§ 3729-3731 (1988 & Supp. III 1991).

312 Yellen & Mayer, *supra* note 53, at 980-82.

313 *Id.* at 998.

None of these punitive fines were assessed in the protective procedural environment of a criminal trial.[314] If today's reality for corporations is that "there is scant distinction between civil and criminal law" because of the number and variety of collateral sanctions imposed on a corporation,[315] what strength is there to the argument that a corporation must, as a matter of constitutional imperative based on a fundamental notion of American jurisprudence, be afforded a criminal jury trial, despite a legislative determination to the contrary?

B. The Sentencing Guidelines and the New Chapter Eight

On November 1, 1991, after several years of consideration and multiple drafts, the United States Sentencing Commission's approach to the sentencing of organizations came into effect as

---

314 In Tull v. United States, 481 U.S. 412 (1987), the Court decided that the Seventh Amendment right to jury trial did extend to cases in federal court when a civil action is brought by the government to enforce federal statutory penalties, but only for the determination of liability, not the amount of the fine. *Id.* at 422-27. The Court, as is usual in Seventh Amendment jurisprudence, did not look to policy but to the historical analogy between the judicial assessment of civil penalties and the 18th century common law action in debt. *Id.* at 418-19.

As Professor Mann points out, this holding creates "a curious anomaly" because Congress can bypass the Seventh Amendment jury right simply by assigning the assessment power to an administrative agency under the holding of *Atlas Roofing*. Mann, *supra* note 279, at 1835 n.141.

In *Tull*, the government sought civil penalties from an individual real estate developer for dumping fill on wetlands in violation of certain provisions of the Clean Water Act (33 U.S.C. § 1311 (1988); 33 C.F.R. § 323.2(a)(1)-(7) (1986)). *Tull*, 481 U.S. at 414. Section 1319(d) of that Act, which then provided for a civil penalty of up to $10,000 per violation day, was a basis of the government's suit in the district court. *Id.* at 414-15. Section 1319 also provides for criminal penalties of imprisonment and fines in subsection (c). 33 U.S.C. § 1319(c) (Supp. 1990). If, in a similar statutory enforcement scheme, the maximum sentence of imprisonment were six months or less (which is *not* the case in § 1319(c)), then the *Tull* doctrine could result in another "curious anomaly." In this hypothetical situation, the defendant would be entitled to a civil jury trial under the Seventh Amendment before civil punishment for his conduct, but not be entitled to a jury trial under the Sixth Amendment before being imprisoned and fined for the same conduct. In the same vein as Justice White's curious footnote in *Atlas Roofing*, *see supra* note 293 and accompanying text, it would be odd that Congress could avoid the jury trial requirements of both the Seventh Amendment (as expressed in *Tull*) and the Sixth Amendment by labeling the civil fine penalties as criminal. Justice White did not express concern with this possible anomaly in *Tull*.

315 Yellen & Mayer, *supra* note 53, at 1023.

chapter eight of the United States Sentencing Guidelines.[316] The Guidelines for organizations are the subject of intense scholarly analysis as part of recent examinations of the appropriate punishment, if any, for organizational criminal offenses[317] and the recognition of the importance of collateral sanctions as a consequence of the criminal conviction of organizations.[318] Although it is beyond the scope of this Article to explore the controversies that have been generated by the organizational Guidelines, at the core of the discourse are the basic concepts of corporate criminal liability discussed in Part I of this Article.[319] The construct of federal sentencing of corporations is relevant to the issue of corporate jury trial because the constitutional jury right, under the traditional approach of the Supreme Court, must be an expression of the legislature's view of the "seriousness" of the offense as objectively expressed by the maximum punishment for the offense.[320]

The Guidelines as a whole do not govern sentencing for either individuals or organizations for Class B or C misdemeanor offenses or infractions (as they are defined in 18 U.S.C. § 3571).[321] Thus, chapter eight provides the Commission's mechanism for achieving relative judicial uniformity in sentencing organizations for what in constitutional right-to-jury terms would all necessarily be "serious" federal offenses if committed by individuals. What emerges from a consideration of the Guidelines from the point of view of this Article's inquiry is the distinctive nature of the fine—and particularly, the organizational fine—as compared to the sanction of imprisonment.

Although the Guidelines have as their stated purpose the reasonable uniformity and proportionality of sentencing of all similar offenders for similar offenses,[322] the socio-economic status of a particular individual defendant is not an appropriate sentencing factor

---

316 Moore, *supra* note 30, at 744, 780-81.

317 *See, e.g.*, Bucy, *Cart, supra* note 30; Jeffrey S. Parker, *Rules Without . . . : Some Critical Reflections On The Federal Corporate Sentencing Guidelines*, 71 WASH. U. L.Q. 397 (1993).

318 *See* Yellen & Mayer, *supra* note 53; *supra* notes 307-313 and accompanying text.

319 *See* Nagel & Swenson, *infra* note 340 and accompanying text (discussing impact of doctrine of corporate defendant's vicarious liability on Commission's approach to organizational sanctions).

320 *Cf.* Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989).

321 U.S.S.G., *supra* note 24, §§ 1B1.9, 8A1.1.

322 *Id.* § 1 A3 (Policy Statement).

in determining whether an offender is similar.[323] A rich defendant and a poor defendant should be sentenced to imprisonment for the same period, all other appropriate Guideline factors being roughly equal. However, this basic notion of the equal effect of punishment is not carried through in the approach of the Guidelines or their underlying statutes to fines for individuals or organizations.

Title 18 U.S.C. § 3571(a) provides that "[a] defendant who has been found guilty of an offense may be sentenced to pay a fine"; and § 3571(c) also uses permissive language for the fining of an organization.[324] Then, in § 3572(a), Congress specifically provides that the individual defendant's income, earning capacity, and financial resources, as well as the burden the fine will impose are among the several factors to be considered in setting the amount and terms of a fine.[325] Section 5E1.2, the "Fines for Individual Defendants" Guideline, is written within the scope of this language and states that, for individual defendants, "[t]he court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine."[326]

These directives are in contrast to the approach of Congress and the Sentencing Commission to imprisonment and probation. That approach, seeking uniformity, discourages the consideration of the impact of the sentence upon the particular defendant. Thus, for a natural defendant, the seriousness of the offense conduct,[327] specific objective adjusting factors,[328] and the individual's criminal history[329] all indicate whether probation or imprisonment is appro-

---

323 *Id.* § 5H1.10.

324 18 U.S.C. § 3571(a) (1988); 18 U.S.C. § 3571(c) (1988).

325 18 U.S.C. § 3572(a)(1), (2) (1988). The same section lists the factors to be considered in fining an organization. Although they are perhaps tangentially related to ability to pay and financial hardship, these factors—the organization's size, the measures taken to discipline the responsible officer, director or employee, and to prevent recurrence—seem more a measure of aspects other than financial condition. 18 U.S.C. § 3572(a)(7) (1988).

326 U.S.S.G., *supra* note 24, § 5E1.2(a). The Guidelines also state as follows:

> If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine.

Id. § 5E1.2(f).

327 U.S.S.G. Ch. 2 (Offense Conduct).

328 *Id.* Ch. 3 (Adjustments).

329 *Id.* Ch. 4 (Criminal History and Criminal Livelihood).

priate and what the range of the term of those sanctions should be. The fine is an additional, and usually secondary, sanction.

But, this, of course, cannot be the case with organizational defendants, which cannot be imprisoned. For those defendants, the fine is the most, and perhaps only, significant sanction. Yet, as with individuals under chapter five of the Guidelines,[330] in chapter eight, organizational resources are taken into account in deciding whether to fine an organization in the first place and the amount and terms of the fine. Thus, if an organization is without adequate financial resources, the complex process of establishing a base fine,[331] fine multiplier,[332] and determining the fine range[333] is not even to be undertaken.[334] If a fine is imposed, fine payment schedules are to be worked out for organizations that cannot pay upon imposition[335] and a fine is not to be so high that it will cause the risk of fiscal death of the organization (other than an organization formed or operated with a criminal purpose).[336] In addition, the Guidelines provide that in determining an organization's fine within the range calculated as appropriate, "any collateral consequences of conviction" should be taken into account[337] and that a fine imposed upon a closely-held organization may be offset by the fine imposed for the same offense conduct on an owner of at least five percent.[338]

---

330 *See supra* note 326 and accompanying text.

331 *See* U.S.S.G., *supra* note 24, §§ 8C2.3 (Offense Level), 8C2.4 (Base Fine).

332 *See id.* §§ 8C2.5 (Culpability Score), 8C2.6 (Minimum and Maximum Multipliers).

333 *See id.* § 8C2.7 (Guideline Fine Range-Organizations).

334 *Id.* § 8C2.2.

335 *Id.* § 8C3.2(b). This assumes the organization is not one "operated primarily for a criminal purpose or primarily by criminal means". *Id.* §§ 8C1.1, 8C3.2(a).

336 The Guidelines state:

> The court may impose a fine below that otherwise required by § 8C2.7 (Guideline Fine Range-Organizations) and § 8C2.9 (Disgorgement) if the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required . . . .
>
> *Provided*, that the reduction under this subsection shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization.

Id. § 8C3.3(b).

337 *Id.* § 8C2.8(3) (Policy Statement).

338 *Id.* § 8C3.4.

All these adjustments of the organization's fine under the Guidelines, together with the mitigation factors of the Guidelines that reduce the fine multipliers,[339] certainly stand, at least in part, in recognition that organizational liability is a species of vicarious liability built on an expansive notion of respondeat superior.[340] The Guidelines also clearly recognize that an organization is ethereal, after all. A corporation cannot serve a prison sentence and by that unique sanction receive its just desserts or serve as a deterrent. If there are no organizational assets to reach, the purposes of sentencing recognized by the Congress and the Guidelines simply cannot be served.[341]

Finally, it should be noted that these impact-related adjustment factors for fines in the Guidelines seem to be somewhat of a reverse image of the Court's assessment of the fine's impact upon the particular organization as the measure of Sixth Amendment "seriousness" in *Muniz v. Hoffman*.[342] Under *Muniz*, if the imposed fine has little actual impact on the organization, regardless of the fine's amount, it would be deemed not "serious" enough to compel the jury right; under the Guidelines, if the actual impact of the imposed fine upon the organization is too "serious," the court is then directed to soften the blow to accommodate the organization's financial circumstances and to preserve its viability.

Does such a scheme of organizational punishment warrant the right to criminal jury trial deemed fundamental to the American criminal justice system in *Duncan v. Louisiana*?[343] If so, because the

---

339 *See id.* §§ 8C2.5(f) (Effective Program to Prevent and Detect Violations of Law), 8C2.5(g) (Self Reporting, Cooperation, and Acceptance of Responsibility). A satisfactory corporate compliance program and the non-involvement of responsible corporate personnel will not excuse the crime under the Guidelines, but will soften the fine, and will not mandate judicial supervision through probation. *Id.* §§ 8C2.5, 8D1.1.

340 The doctrine of vicarious liability presented an additional dilemma for the Commission because it meant that very different kinds of corporations would be presented at sentencing, ranging from a company that took reasonable measures to prevent offenses, but whose employees broke the law despite its efforts, to a company whose senior management directed, or tacitly approved of the criminal offense. In order to facilitate drawing reasonable distinctions among the many types of convicted organizations, the Commission formulated a "culpability score."

Nagel & Swenson, *supra* note 3, at 235.

341 *See* 18 U.S.C. § 3553(a), (b) (1988); U.S.S.G., *supra* note 24, § 1A2.

342 422 U.S. 454 (1975).

343 391 U.S. 145 (1968).

Guidelines apply only to offenses greater than Class B misdemeanors, then does every minimum fine under the Guidelines necessarily represent a federal "serious offense," as legislatively determined by congressional approval of the Guideline ranges?[344] Did Congress intend that *any* fine provision, in and of itself, reflect its judgment of the "seriousness" of the offense, even though the imposition of such punishment upon either an individual or an organization may be foreclosed or adjusted downward by the sentencing court based upon its assessment of the financial resources of the particular defendant?

All of these questions are posed to assist an understanding of the unique nature of fine sanctions in the federal sentencing system, and in the various state systems as well. As a matter of shared common-sense, and as a matter of constitutional principle, terms of imprisonment and fines are simply not comparable. They are both traditional legislative sanctions for crimes. Yet imprisonment may readily be taken as a measure of the "seriousness" with which the legislature regards an offense regardless who the defendant may be; a fine is different in quality and effect, depending upon the assets of the defendant. The Sentencing Guidelines, by their flexible approach to fine adjustment totally apart from the culpability of the organization, seem to reinforce this analysis.

VI. An Approach to Solution

The analysis in each Part of this Article leads to the conclusion that a corporation does not have a right to a jury trial under the Sixth Amendment. Certainly a legislature—either federal or state—may provide for a jury trial for corporate defendants but that is a legislative choice unconstrained by a uniformly applicable federal constitutional imperative. Because of concerns for efficiency, cost, and more effective regulation of complex economic corporate criminal behavior, a legislature may decide to preclude a jury trial for corporate offenders in general or only for particular offenses. And a judge may similarly decide in cases involving a corporate defendant charged with criminal contempt to try the case without a jury, at least as far as the United States Constitution governs that choice.

Why should this be so? The Supreme Court has considered many criminal cases in which corporate defendants were tried by a

---

[344] U.S.S.G., *supra* note 24, § 1A2.

jury,[345] and there are English cases as well,[346] but none of those cases considered the issue of a corporation's right to a jury trial. It was not until *Muniz v. Hoffman*,[347] in 1975, in the context of a union's criminal contempt, that the Supreme Court referred to the issue but refused to decide it (finding instead that the fine there was not "serious" enough in its impact on the union to require reaching the basic constitutional question).[348] Although federal courts of appeals have considered the issue after *Muniz*, even when the jury right was found to be applicable to a corporation, the Second Circuit expressly struggled to find a constitutional principle upon which to measure the applicability of the right based on the amount of the fine in a particular case.[349]

Lacking any compelling precedent for a corporation's right to a jury trial, if the legal inquiry is traditionally pursued, then certainly the long and extensive development by the Supreme Court of the law of an individual's Sixth Amendment right to a jury trial must be carefully considered. The early cases in the Court involving individual defendants resulted in a pragmatic resolution of the apparent contradiction between the Constitution, which twice requires an unqualified right to a jury trial for every criminal prosecution, and the historically prominent practice of trying a large number of minor criminal offenses without a jury if the legislature so determined. In so doing, the Court, at its first opportunity, recognized a "petty offense" exception to the constitutional jury right[350] and thus created the necessity for a constitutional differentiation between a "petty" and a "serious" offense that continues to dominate jury trial constitutional jurisprudence. Of particular importance to the "petty offense" exception was the early recognition, in *Clawans*, that it was the legislative determination of the "seriousness" of the

---

345 *E.g.*, United States v. United States Gypsum Co., 438 U.S. 422 (1978) (jury trial of corporate and individual defendants); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (jury trial of corporate defendants); New York Cent. & H.R.R.R. v. United States, 212 U.S. 481 (1909) (jury trial of corporate and individual defendants); *cf.* United States v. Illinois Cent. R.R., 303 U.S. 239 (1938) (jury trial waived by defendant corporation).

346 *E.g.*, The King v. I.C.R. Haulage, Ltd., 1944 K.B. 551 (jury trial of corporate defendant); The Queen v. Great N. of Eng. Ry., 115 Eng. Rep. 1294 (Q.B. 1846) (jury trial of corporate defendant).

347 422 U.S. 454 (1975).

348 *Id.* at 477; *see supra* notes 237-39 and accompanying text.

349 United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 663-65 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990).

350 Callan v. Wilson, 127 U.S. 540, 555 (1888).

offense, as primarily expressed by the maximum punishment provided in the offense statute, that governed the constitutional determination, rather than subjective judicial reaction to inconclusive common law analysis.[351]

The Court in *Clawans* was not concerned with the imposition of a uniform constitutional standard upon the states. The incorporation debate did not reach its apex—perhaps only coincidentally concerning the Sixth Amendment right to jury trial—until *Duncan v. Louisiana* in 1968.[352] But, in finding the right to jury trial fundamental to the American system of justice as an institutional barrier against governmental oppression,[353] the Court now needed a constitutional standard for the imposition of the right across the nation.

After *Duncan* recognized the "petty offense" exception to the Sixth Amendment in the course of its incorporation decision,[354] it remained for *Baldwin*, two years later, to fashion that exception into a bright-line rule based on the legislative provision for more than six months' imprisonment.[355]

Thus, the two strands of constitutional development—the need to find an objective indicator of the legislative determination of the "seriousness" of the offense while accommodating the "petty offense" exception and the constitutional decision to restrict the states' legislative option by incorporation of the Sixth Amendment jury right as fundamental—came together in the single focus upon the offense's provision for the deprivation of human liberty in excess of six months. It is this focus that has been strongly reaffirmed in the Court's most recent Sixth Amendment decisions in *Blanton*[356] and *Nachtigal*.[357]

In no case has the Court held, or even indicated, that an individual exposed only to a criminal fine penalty would be entitled to the Sixth Amendment right to jury trial. Although both *Duncan* and *Baldwin* did mention the relevance of "other punishment,"[358] the Court in *Blanton* and *Nachtigal* has read those references to pertain to the significant class of cases where both imprisonment (of less

---

351 *See* District of Columbia v. Clawans, 300 U.S. 617, 628 (1937).
352 391 U.S. 145 (1968).
353 *Id.* at 148-49, 155-56.
354 *Id.* at 160.
355 Baldwin v. New York, 399 U.S. 66, 69 (1970) (plurality opinion).
356 Blanton v. City of North Las Vegas, 489 U.S. 538 (1989).
357 United States v. Nachtigal, 113 S. Ct. 1072 (1993) (per curiam).
358 *See Duncan*, 391 U.S. at 161; *Baldwin*, 399 U.S. at 70.

than six months) and other punishments—including fines—are provided.[359]

It was that issue that *Blanton* focused upon (in the context of DUI), leaving wide open what a defendant must do in future cases to meet the burden of persuasion that an offense with a punishment of less than six months is pushed into the "serious" category by the legislative provision of other penalties.

This entire line of jury right cases, as developed over 100 years, does not support the constitutional principle that any defendant—natural or corporate—subject only to a criminal fine must be tried by jury. Such a principle should not be judicially created now.

Certainly part of the justification for this resolution is that a jury trial has never been suggested to be a necessary prerequisite to a fair criminal trial—to the contrary, the Court has recognized that other sound fact-finding procedures are possible and do exist.[360] The English colonial oppression that provided the crucible for this country's birth and fed the fear of the Antifederalists is no longer relevant;[361] defense lawyers now play active roles that were rare until late in the eighteenth century;[362] and jurors are no longer expected to know the law but to follow the court's detailed legal instructions.[363] Although not explicitly compelled to do so under the Constitution, every state, and the federal government as well, provides at least one appeal as of right from a criminal conviction.[364]

Just why a jury trial is a fundamental necessity is not readily apparent. In any particular case, there is arguably more likelihood of a corrupt juror than a corrupt judge.[365] A prosecutor's ill-

---

359 *See Blanton*, 489 U.S. at 543; *Nachtigal*, 113 S. Ct. at 1073.

360 *See* DeStefano v. Woods, 392 U.S. 631, 633-34 (1968) (per curiam); *Duncan*, 391 U.S. at 189 (Harlan, J., dissenting).

361 *Duncan*, 391 U.S. at 188 (Harlan, J., dissenting).

362 *See, e.g.*, Godinez v. Moran, 113 S. Ct. 2680, 2687 n.11 (1993); Randolph N. Jonakait, *Supreme Court Review: Foreword: Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. CRIM. L. & CRIMINOLOGY 713, 739-40 (1992) (explaining that defense attorneys not present in criminal trials on regular basis until close to time of Constitution's adoption).

363 Sparf & Hansen v. United States, 156 U.S. 51, 102 (1895).

364 LAFAVE & ISRAEL, *supra* note 28, § 27.1.

365 GOBERT, *supra* note 28, at 7. Gobert states: "The odds of an irrational or corrupt juror are mathematically twelve times that of an irrational or corrupt judge—greater still, perhaps, because judges are chosen with an eye towards their integrity, and are constantly subject to press and public scrutiny." *Id.* (footnote omitted).

founded choice to go to trial will usually result in a corrective response from the bench, before or after a jury deliberates, and will be scrutinized in an evidentiary review by the appellate court, if appropriate. Kalven and Zeisel's classic jury study in the 1960s is under revisionists' attack,[366] but even on its own terms, the study established only that judges and criminal juries agreed seventy-five percent of the time.[367] Does that conclusion mean that in those cases of agreement a jury was apparently not necessary to achieve the correct result, or that in the twenty-five percent of cases in which there was disagreement the jury, rather than the judge, was correct?

In any event, when a person's liberty is at stake, the legal and cultural significance of the jury in the criminal justice system cannot be denied, and the Court is not at all likely to do so. Further, it is not the intention of this Article to depreciate the value of the criminal jury to the community. The issue, however, is whether the essential qualities and purposes underlying that value are such that a legislative judgment not to extend the jury right to a criminal case in which only a fine is possible must be constitutionally invalidated.

The argument is stronger that every natural defendant exposed to *any* possible term of imprisonment is entitled to a jury trial under the Sixth Amendment. Yet the Court—although recognizing the serious impact upon a person's life of even a short term of imprisonment[368]—has not taken this obvious step to protect a large group of incarcerated criminal defendants in this country. It is the hope of this Author that the Court some day will do so, for as recognized long ago in *Clawans*, as our civilization advances, punishments once thought mild come to be considered harsh.[369] The trend in the states is apparently now toward the provision of jury trial for individ-

---

366 BALDWIN & MCCONVILLE, *supra* note 86, at 8, 11-12.

367 *Id.* at 12.

368 Baldwin v. New York, 399 U.S. 66, 73 (1970) (plurality opinion).

369 If the right to trial by jury is constitutionally fundamental, then that right ought to apply whenever the loss of personal liberty is a practical possibility. *See* ABA STANDARDS FOR CRIMINAL JUSTICE Standard 15-1.1(a) (Approved by ABA's House of Delegates Aug. 1993) ("Jury trial should be available to a party, including the state, in criminal prosecutions in which confinement in jail or prison may be imposed."), *reprinted in* 53 CRIM. L. REP. (BNA) No. 24, at 2347 (Sept. 29, 1993).

In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Supreme Court held that the Sixth Amendment right to counsel extended to even "petty offenses" for which the defendant was actually sentenced to *any* term of imprisonment. 407 U.S. at 36-37. The analogy to the right to trial by jury when a defendant is

ual defendants in most criminal cases, particularly in DUI prosecutions, as a matter of local policy choice.[370]

But what then of organizational defendants, particularly corporations? We have seen that corporate exposure to criminal liability in the federal system is not unlikely (depending upon prosecutorial discretion) because of the extremely broad reach of the respondeat superior doctrine and because of the expansion by Congress (and some states) of the number of applicable offenses grounded in economic regulation and fraud. Two factors emerge here in considering the jury trial right: First, because corporate guilt is not necessarily fault-based under the law, the decision of the corporate entity's criminal liability may be less appropriate for a jury than for a judge. This is so because that decision is, in many significant respects, indistinguishable in result from the large number of administrative adjudications leading to perhaps even greater monetary fines and collateral sanctions.[371] Second, the monetary stakes

---

subject to any imprisonment is certainly not perfect but, in today's society, the power of its message is perhaps stronger than in years past.

370 *Cf.* Landry v. Hoepfner, 840 F.2d. 1201, 1218 (5th Cir. 1988) ("[M]ost states do not follow the 'petty offense' doctrine at all (or do so only for offenses as to which no confinement is authorized.)"), *cert. denied*, 489 U.S. 1083 (1989); LAFAVE & ISRAEL, *supra* note 28, § 1.5(b) (stating that most states grant defendants jury trials for petty offenses).

371 The stigma that arises from the publicity concerning a criminal conviction may differentiate between a corporation's criminal conviction and an adverse administrative adjudication, even if the amount of monetary sanction is the same. *Cf.* Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions*, 56 S. CAL. L. REV. 1141, 1150-54 (1983); Richard S. Gruner, *Beyond Fines: Innovative Corporate Sentences Under Federal Sentencing Guidelines*, 71 WASH. U. L.Q. 261, 322-24 (1993). Studies have shown that corporations suffer some adverse economic effects in the marketplace, at least over the short term, after a criminal conviction that is widely publicized. *See, e.g.*, Ronald Cass, Comment, *Sentencing Corporations: The Guidelines' White Collar Blues*, 71 B.U. L. REV. 291, 303-04 (1991); Moore, *supra* note 30, at 755 & n.65. However, it is not at all clear whether the measured reaction in the marketplace is because a crime was publicly exposed or because the corporate defendant was subjected to a significant criminal fine and perhaps exposed to other unpredictable consequences of a collateral nature that might have even greater economic impact. That a corporation that is publicly fined a million dollars under the civil False Claims Act, 31 U.S.C. §§ 3729-3731 (1988), (for fraudulent claims, for example), or publicly assessed a similar penalty by the SEC (for defrauding investors) does not suffer a marketplace reaction, while the corporation that pleads guilty to the same conduct in a criminal court and is fined a significantly lesser amount does suffer such a reaction, remains to be demonstrated.

of a corporate criminal fine are limited to the assets of the corporate entity itself (and not the personal resources of the investors); and even then, the Sentencing Guidelines require that a court must consider the fine's impact on the particular organization's viability.

Let us assume, however, for argument's sake, that a corporation should have a Sixth Amendment right to jury trial based on the often repeated rationale of *Duncan* of the barrier to governmental oppression.[372] How and where can the constitutional line be drawn between when a legislature must provide a jury trial for a corporation and when it is free to choose not to do so? This Article's analysis suggests that the issue must circle back upon itself. Because there is no rational constitutional principle available for such a decision, the constitutional jury right—which restricts legislative choice—should not be extended to non-natural defendants.

One obvious proposal is simply to provide a jury trial for every defendant prosecuted for a statutory offense that provides for a maximum penalty of more than six months' imprisonment, whether the defendant happens to be an individual or corporation. The difficulty with this resolution is that it would not include a legislative approach to organizational crime and defendants that resulted in a specification of offenses committed by corporations, separate from and independent of those offenses applicable only to individuals—similar as those offenses might be. The constitutional right to jury trial would then fortuitously depend on where in the criminal code the offense was specified by the legislature—either as an "all-persons" provision or as a separate organizational offense with a penalty only of a fine and probation.

The issue, therefore, must inevitably come down to whether a fine alone can support a constitutional jury trial imperative, for either an individual or an organization. But that issue necessarily requires that a line be rationally drawn between some fines and others, between "petty" and "serious" fine offenses. In cases involving individual defendants (all with exposure to imprisonment), *Duncan*, *Baldwin*, and *Blanton* each referred to the federal statutory petty offense fine maximum,[373] but the Court never chose that reference point as a constitutional standard and, in fact, explicitly

---

[372] Duncan v. Louisiana, 391 U.S. 145, 155 (1968). This rationale is arguably undercut by the routine imposition of punitive sanctions by the government upon organizations in administrative proceedings.

[373] Blanton v. City of North Las Vegas, 489 U.S. 538, 544-45 (1989); Baldwin v. New York, 399 U.S. 66, 70-71 (1970) (plurality opinion); *Duncan*, 391 U.S. at 161.

rejected it in *Muniz* for organizational defendants—for obvious reasons.[374] That such a statutory figure was doomed to economic obsolescence,[375] only emphasizes the incongruity of fixing a judicial construction of the Constitution upon a legislative determination. This constitutional concept becomes even more problematic when it is the fifty states that are forced by a federal court to adopt the congressional standard.

Six months and a day in jail can be intuitively accepted as the same serious punishment for a rich or poor man in New York City or for a rich or poor man in Sioux City, Iowa. But can the same be said of a $1,000 fine or a $10,000 fine?[376] In *Muniz*, the Court attempted to approach this issue by deciding, at least in the situation of an organizational defendant, that it is not the amount of the fine that should govern the "seriousness" of the offense for the right to jury trial purposes but the impact of the fine upon the particular defendant organization.[377] But the practical difficulty of such an approach is apparent both for corporate defendants and for individuals. Only the cases involving a small fine imposed on a defendant with great resources or a large fine imposed on a defendant with few resources would be obvious. Other cases would require, before a trial on the merits, an exploration of the particu-

---

374 Muniz v. Hoffman, 422 U.S. 454, 476-77 (1975).

375 At the time *Muniz* was decided, the maximum fine for a petty offense under 18 U.S.C. § 1(3) was $500. *Id.* at 477. The maximum fine under the current "petty offense" definition is $5000 for an individual and $10,000 for an organization. 18 U.S.C. § 19 (1988) (referring to 18 U.S.C. § 3571(b)(6) or (7) (1988) and § 3571(c)(6) or (7) (1988)).

376 *See* DOUGLAS C. MCDONALD ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE, DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS (April 1992) (providing interesting report on recent American experiments with "day fines," which calibrate criminal fine both to gravity of offense and defendant's realistic ability to pay—usually looking to standard unit of defendant's daily pay). Under the day fine concept: "[A] sentence of five punishment units, or five days' pay, will involve a large sum of money for high-income offenders and a smaller sum for poorer people. Punishment is then made more equal: the fine paid is more precisely tailored to offenders' different abilities to pay." *Id.* at 2.

This approach to fines would not permit the fine to be capped by a maximum dollar amount in the offense statute, as is traditionally now done. *Id.* Thus, a measure of the "seriousness" of the offense for constitutional jury right purposes could not be accomplished by reference to the fine provided in the offense statute.

377 *Muniz*, 422 U.S. at 477.

lar defendant's assets, liabilities, and cash flow. Such an approach seems counter-intuitive and strongly raises the paradox of the "petty offense" exception to the jury right. If a jury trial is a fundamental constitutional right, how can it be said that the right should be reserved only for those defendants with limited resources at the time of trial for whom a maximum fine would have serious impact? This concept really makes little sense, and the federal courts of appeals[378] and the district court in *NYNEX*[379] have thus struggled for constitutional direction without a functioning compass. Finally, such an approach, while adding layers of complexity to an already overburdened criminal justice system by constitutional imperative, seems to contradict the basic constitutional object still accepted by the Court—to determine the "seriousness" of the offense by looking to the maximum punishment set by the legislature.[380]

Therefore, lacking a rational constitutional principle to which state and federal legislators must conform, the Sixth Amendment right to jury trial should not be interpreted to preclude a legislative judgement that a corporation should be tried without a jury.

CONCLUSION

Regardless of how the District of Columbia Court of Appeals decides the constitutional jury trial right issue in *U.S. v. NYNEX Corp.*, Supreme Court precedent will not provide a satisfactory answer. That Court has never decided the foundational question of whether any organization is ever constitutionally required to have a criminal jury choice despite a contrary legislative or judicial determination. Because a jury finding of guilt is not intrinsically necessary for a fair trial and because there has long been a "petty offense" exception to the jury right which is primarily grounded in the length of incarceration provided by the offense, lower courts that have attempted to decide whether the jury right applies to any defendant subject only to a fine have floundered on the lack of a constitutional principle or appropriate reference point.

---

[378] United States v. Twentieth Century Fox Film Corp., 882 F.2d 656 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990); United States v. Troxler Hosiery Co., 681 F.2d 934 (4th Cir. 1982); Musidor, B.V. v. Great Am. Screen, 658 F.2d 60 (2d Cir. 1981) *cert. denied*, 455 U.S. 944 (1982); United States v. R. L. Polk & Co., 438 F.2d 377 (6th Cir. 1971).

[379] United States v. NYNEX Corp., 781 F. Supp. 19, 27-28 (D.D.C. 1991).

[380] United States v. Nachtigal, 113 S. Ct. 1072, 1073 (1993) (per curiam).

A consideration of the Sixth Amendment's history and purpose together with the pragmatic development of the Court's "petty/serious" offense jury right distinction does not provide a principled constitutional basis for precluding a legislative body—either federal or state—from deciding that criminal trials of organizations should be conducted in general, or for specific offenses, without juries. Similarly, an organizational defendant charged with criminal contempt should be provided with a jury trial only if the legislature or the trial court in its discretion so decides. The distinct nature of organizational criminal culpability based on vicarious liability and the limitation of corporate punishment to fines (adjusted under the federal Sentencing Guidelines to a particular organization's resources) or to probation (as opposed to the loss of personal liberty by imprisonment) argue against a newly-created judicial constitutional imperative restricting the legislative choice to eliminate juries in criminal cases involving corporations. That such a choice might be made by the legislature is not at all strange in light of the complexity of white collar crime and the expansive punitive sanctions routinely imposed upon corporations at the government's behest in administrative proceedings.