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Criminal Law—Due Process and the Right to Trial by Jury in State Criminal Procedure

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it essentially refuses to recognize the bargaining status of the lawful employee representative, and instead chooses to impose its settlement by the skillful and massive use of propaganda, the entire scheme bearing remarkable similarity to a corporate authoritarianism. Such an approach to collective bargaining runs head on into the general policy of the Act demanding that employees be free to participate in decision-making by exercising their right to bargain collectively over matters affecting the terms and conditions of their employment. More precisely, Boulwarism collides with the obligation implicit in both section 9(a) and section 8(a)(5) that the employer grant the lawful representative of his employees not merely formal recognition, but the "minimum recognition" necessary for meaningful, joint participation in the "shared process" of negotiations.[65] In sum, Boulwarism by its artful use of propaganda and tactics poses a serious threat to free employee participation in the fixing of the terms and conditions of employment, and thus is incompatible with the statutory duty to bargain and the tradition of collective bargaining itself.

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CRIMINAL LAW—DUE PROCESS AND THE RIGHT TO TRIAL BY JURY IN STATE CRIMINAL PROCEDURE

Appellant, Robert Baldwin, was arrested in New York City on August 10, 1968, and charged with the crime of jostling,[1] a Class A misdemeanor punishable by a sentence of imprisonment of up to one year.[2] The appellant was brought to trial in the New York City Criminal Court. Inasmuch as the New York City Criminal Court Act, section 40, provides "[a]ll trials in the court shall be without a jury,"[3] his pretrial motion for a jury trial was denied. The trial resulted in a conviction and imposition of the maximum sentence. The judgment was affirmed by both the Appellate Division and

65. General Electric Co., 150 N.L.R.B. 192, 194 (1964).

1. N.Y. PENAL LAW § 165.25 (McKinney 1967) provides that:
A person is guilty of jostling when, in a public place, he intentionally and unnecessarily:
1. Places his hand in the proximity of a person's pocket or handbag; or
2. Jostles or crowds another person at a time when a third person's hand is in the proximity of such person's pocket or handbag.
Jostling is a class A misdemeanor.
2. N.Y. PENAL LAW § 70.15(1) (McKinney 1967).
3. N.Y.C. CRIM. CT. ACT § 40 provides that:
All trials in the court shall be without a jury. All trials in the court shall be held before a single judge; provided, however, that where the defendant has been charged with a misdemeanor . . . he shall be advised that he has the right to a trial in a part of the court held by a panel of three of the judges thereof. . . .

the Court of Appeals,[4] which held that a defendant is not constitutionally entitled to a jury trial where the crime he is charged with carries a maximum possible term of one year. Subsequently, upon defendant's motion the United States Supreme Court granted leave to proceed *in forma pauperis*[5] and reversed. *Held,* where the crime that the defendant is charged with in a state court carries a possible sentence of more than six months, due process requires that the defendant be given a jury trial. *Baldwin v. New York,* 399 U.S. 66 (1970).

While the due process clause of the fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law,"[6] the exact meaning and scope of that provision has proven to be elusive. The Supreme Court initially rejected the proposition that the Bill of Rights has been incorporated into the fourteenth amendment and is thus binding upon the states.[7] Thus, in *Davidson v. New Orleans,*[8] where the constitutionality of a state assessment on certain real estate for the draining of swamp lands was challenged, the Court suggested that a "gradual process of judicial inclusion and exclusion"[9] was the wisest means of determining the intent and application of "due process of law." The basis for such determination was made clear in *Hurtado v. California,*[10] where the appellant had been charged with murder, not by indictment as is required by the fifth amendment, but by an information. In ruling upon the constitutionality of this procedure, the Court rejected the idea that due process includes the right to indictment. What due process does require, the Court explained, is adherence to those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ."[11] The same view was expressed in *Gitlow v. New York.*[12] There, the defendant was found responsible for a "manifesto" advocating the overthrow of the government by violent and unlawful means,

4. Hogan v. Rosenberg, 24 N.Y.2d 207, 247 N.E.2d 260, 299 N.Y.S.2d 424 (1969). The decision in the present case was handed down together with *Hogan v. Rosenberg* by the New York Court of Appeals since both cases dealt with the constitutionality of section 40 of the New York City Criminal Court Act.

5. Baldwin v. New York, 395 U.S. 932 (1969). Supreme Court jurisdiction was based on 28 U.S.C. § 1257(2) (1969), which provides that the Supreme Court may review the decision of the highest state court in which a decision could be had, if the decision involves a challenge to the validity of a state constitutional provision or statute on the ground of its repugnancy to the United States Constitution, and if the state court has upheld its validity.

6. U.S. CONST. amend. XIV, § 1.

7. *See* Twining v. New Jersey, 211 U.S. 78 (1908); Maxwell v. Dow, 176 U.S. 581 (1900); Hurtado v. California, 110 U.S. 516 (1884).

8. 96 U.S. 97 (1877).

9. *Id.* at 104.

10. 110 U.S. 516 (1884).

11. *Id.* at 535.

12. 268 U.S. 652 (1925).

and hence convicted of criminal anarchy under a New York statute.[13] While upholding the constitutionality of the statute as a valid exercise of the police power, the Court nevertheless spoke of the freedoms of speech and of the press, which are protected by the first amendment from abridgement by Congress, as "fundamental personal rights . . . protected by the due process clause of the Fourteenth Amendment from impairment by the States."[14] Implicit in this decision was the initial awareness of the Court that select provisions of the Bill of Rights may be incorporated into the due process clause of the fourteenth amendment. In *Adamson v. California*,[15] certain statutory provisions were challenged as being repugnant to the fifth amendment's protection against self-incrimination. The provisions in issue permitted the court and counsel to comment on a defendant's failure to explain or deny evidence against him, and allowed the court and jury to consider the defendant's refusal to explain or deny such evidence. In discussing the relationship between the Bill of Rights and the fourteenth amendment, the Court reiterated that "[t]he due process clause of the Fourteenth Amendment . . . does not draw all the rights of the federal Bill of Rights under its protection,"[16] but only those rights "implicit in the concept of ordered liberty."[17] The development of this reasoning is exemplified in a long line of cases, which held it unlawful for a state to abridge by its statutes the freedoms of speech,[18] press,[19] religion,[20] peaceful assembly,[21] or the right of one accused of crime to the benefit of counsel.[22] On the other hand, the Court held that the states were not bound by constitutional guarantees of grand jury indictment,[23] trial by jury in civil cases,[24] nor protection from compulsory self-incrimination.[25]

Within recent years, the Court has, through the fourteenth amendment, incorporated an increasing number of provisions of the Bill of Rights

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13. Ch. 88, §§ 160, 161 [1909] N.Y. LAWS 132 Sess. 141.

14. 268 U.S. at 666.

15. 332 U.S. 47 (1947).

16. *Id.* at 53.

17. *Id.* at 54, *quoting* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

18. *See* Herndon v. Lowry, 301 U.S. 242 (1937); DeJonge v. Oregon, 299 U.S. 353 (1937).

19. *See* Grosjean v. American Press Co., 297 U.S. 233 (1936); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

20. *See* Hamilton v. Regents, 293 U.S. 245 (1934).

21. *See* Herndon v. Lowry, 301 U.S. 242 (1937); DeJonge v. Oregon, 299 U.S. 353 (1937).

22. *See* Powell v. Alabama, 287 U.S. 45 (1932).

23. Hurtado v. California, 110 U.S. 516 (1884).

24. Walker v. Sauvinet, 92 U.S. 90 (1875).

25. Twining v. New Jersey, 211 U.S. 78 (1908).

on a selective and individual basis.[26] In *Wolf v. Colorado*,[27] the defendant, a physician, was convicted in a state court of conspiracy to commit abortion, even though his appointment books, which were admitted into evidence, had been seized from his office in the course of an unlawful search and seizure. The United States Supreme Court affirmed the conviction, holding that although the fourth amendment's prohibition against unreasonable searches and seizures applies to the states through the fourteenth amendment, evidence so obtained in a state prosecution was admissible in a state court.[28] In *Gideon v. Wainwright*[29] the petitioner was charged with breaking and entering a poolroom with intent to commit a misdemeanor which, under Florida law, was a felony. Petitioner's request for court appointed counsel was denied, based upon the Florida practice that counsel was only provided in cases involving capital offenses. The petitioner was convicted and sentenced to serve five years in the state prison. Subsequently, he filed a habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel denied him his constitutional right to be so represented. The Florida Supreme Court, without an opinion, denied relief.[30] The United States Supreme Court reversed, holding that the sixth amendment provision of right to counsel in all criminal prosecutions is made obligatory on the states by the fourteenth amendment, and that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him. And in *Pointer v. Texas*,[31] defendant was arrested and brought before a state judge for a preliminary hearing on a robbery charge. Although the complaining witness testified, the defendant, who had no counsel, did not cross-examine the witness. Defendant was later indicted and tried. The witness had moved to another state and the transcript of his testimony at the hearing was introduced over defendant's objection that he was denied the right of confrontation. Subsequently, the defendant was convicted, and the conviction was affirmed

26. *E.g.*, Benton v. Maryland, 395 U.S. 784 (1969) ("double jeopardy" protection of fifth amendment); Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to jury trial); Kolpfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation with opposing witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Robinson v. California, 370 U.S. 660 (1962) (eighth amendment protection against cruel and unusual punishment). This theory of selective incorporation is to be contrasted with the total incorporation doctrine espoused by Mr. Justice Black, in which due process under the fourteenth amendment means no more and no less, with respect to the States, than the Bill of Rights means vis-à-vis the national government. The theory was first announced in Adamson v. California, 322 U.S. 47, 68 (1947) (dissenting opinion).

27. 338 U.S. 25 (1949).

28. 117 Colo. 279, 187 P.2d 926 (1947). In Mapp v. Ohio, 367 U.S. 643 (1961), the exclusion remedy was adopted.

29. 372 U.S. 335 (1963).

30. Gideon v. Cochran, 135 So. 2d 746 (1961).

31. 380 U.S. 400 (1965).

by the Court of Criminal Appeals of Texas.[32] The United States Supreme Court reversed, holding that,

> . . . [t]he petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the *Sixth Amendment* and that guarantee . . . is 'to be *enforced against the States under the Fourteenth Amendment* according to the same standards that protect those personal rights against federal encroachment.'[33] (emphasis added)

The Court's increased concern with the protection of individual liberties from encroachment by state action evident in recent cases, is no more apparent than with respect to the Court's position regarding the right to trial by jury in state criminal proceedings. The sixth amendment provides that in all criminal prosecutions the accused shall be entitled to trial by jury.[34] The Court's early attitude with respect to the application of this guarantee to state criminal proceedings is indicated in *Maxwell v. Dow*[35] where the Court held that the due process clause of the fourteenth amendment did not prevent a state from trying a defendant for a non-capital offense with fewer than a twelve member jury. In the course of the opinion, however, the Court stated that "[t]rial by jury has never been affirmed to be a necessary requisite of due process of law."[36] Similarly, in *Snyder v. Commonwealth of Massachusetts*,[37] where it was held that the appellant's rights under the fourteenth amendment were not infringed by the jury's view of the scene of the murder without the defendant's presence, the Court stated that:

> [State] procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar. Consistently with that amendment, trial by jury may be abolished.[38]

Likewise in *Palko v. Connecticut*,[39] which dealt with the constitutionality of a statute affording to the state, with the consent of the trial court, the same right of appeal as the accused, the Court said:

> This court has ruled that consistently with the [sixth and seventh] amendments trial by jury may be modified by a state or abolished altogether.[40]

In *Irvin v. Dowd*,[41] a habeas corpus proceeding, the Court held that a murder conviction handed down by a jury which was not impartial according

32. Pointer v. State, 375 S.W.2d 293 (Tex. Crim. App. 1963).
33. 380 U.S. 400, 406, *quoting* Malloy v. Hogan, 378 U.S. 1, 10 (1964).
34. U.S. CONST. amend. VI.
35. 176 U.S. 581 (1900).
36. *Id.* at 603.
37. 291 U.S. 97 (1934).
38. *Id.* at 105.
39. 302 U.S. 319 (1937).
40. *Id.* at 324.
41. 366 U.S. 717 (1961).

to constitutional standards was a violation of the Federal Constitution. There again, the Court stated that "the Fourteenth Amendment does not demand the use of jury trials in a state's criminal procedure."[42] It is clear from these opinions that the Court did not regard the right to trial by jury in state criminal proceedings as an essential element of due process of law.

In *Duncan v. Louisiana*,[43] however, the Court reconsidered this position. The appellant was charged with simple battery, which, under Louisiana law, was a misdemeanor with a maximum sentence of two years imprisonment and a $300 fine.[44] The trial court denied appellant's motion for a trial by jury on the ground that the Louisiana Constitution allowed trial by jury only in cases where capital punishment or imprisonment at hard labor may be imposed.[45] The defendant was convicted and sentenced to 60 days imprisonment and a fine of $150.[46] On appeal, the Supreme Court reversed, holding that the sixth amendment, as made applicable to the states through the fourteenth amendment, required that defendants who are accused of serious crimes be afforded the right to trial by jury.[47] In defending its position in light of its prior assertions to the contrary, the Court noted that none of those cases in which such assertions were found dealt specifically with the question of the right to trial by jury in state criminal proceedings.[48] The statements found therein, to the effect that the fourteenth amendment does not demand the use of jury trials in state criminal procedure, therefore, were dicta and did not have weight of precedent.[49]

The major issue raised in *Duncan*, but left unanswered, was what constitutes "petty" and "serious" offenses for purposes of the right to a jury trial. The court has long held that "petty" offenses are exempt from the requirements of jury trial.[50] In attempting to separate those offenses that are "petty" from those which are not, the Court looked both to the nature

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42. *Id.* at 721.

43. 391 U.S. 145 (1968).

44. LA. REV. STAT. 14:35 (1950), *as amended*, LA. REV. STAT. 14:35 (1968).

45. LA. CONST. art. VII § 41.

46. 391 U.S. 145, 146 (1968).

47. *Id.* at 149.

48. *Id.* at 154-55.

49. The Court in *Duncan* specifically rejected the dicta found in both *Palko* and *Snyder*. 391 U.S. 145, 155 (1968).

50. *See* Duncan v. Louisiana, 391 U.S. 145 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966); District of Columbia v. Clawans, 300 U.S. 617 (1937); District of Columbia v. Colts, 282 U.S. 63 (1930); Schick v. United States, 195 U.S. 65 (1904); Natal v. Louisiana, 139 U.S. 621 (1891); Callan v. Wilson, 127 U.S. 540 (1888); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926). *But see* Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959).

of the offense[51] and to the severity of the maximum authorized penalty.[52] The more recent trend, however, has been to rely primarily on the length of possible imprisonment as the most relevant criterion.[53] Thus the Court has held that the maximum authorized sentence of six months is short enough to permit classification of the offense as "petty,"[54] but that a two year possible sentence is "serious," requiring an opportunity for jury trial.[55] Within the federal system it has been well established that an opportunity for a trial by jury must be provided when the maximum possible sentence exceeds six months.[56]

In the instant case, the majority initially reaffirmed the *Duncan*[57] decision as to incorporation through the fourteenth amendment of the sixth amendment right to trial by jury and then centered on the issue of distinguishing "serious" and "petty" crimes.[58] The Court sought "objective criteria" reflecting the seriousness with which society regards the offense,[59] and fixed upon the maximum authorized penalty as the most relevant indicator.[60] It noted that with few exceptions, crimes triable without a jury in the American States since the late 18th century were generally punishable by no more than six months prison terms,[61] and further, that under present practice the statute in question was the only instance in 50 states in which a defendant could be denied the right to trial by jury where the maximum sentence exceeded six months.[62] Relying on such overwhelming uniformity, the Court reasoned that the proper delineation between "petty" and "serious" crimes was six months.[63] While recognizing that from the viewpoint of the accused, imprisonment for however short a time is serious, the Court rationalized that the benefit resulting from speedy and inexpensive non-jury

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51. *See* District of Columbia v. Colts, 282 U.S. 63 (1930); Callan v. Wilson, 127 U.S. 540 (1888).

52. *See* Frank v. United States, 395 U.S. 147 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Dyke v. Taylor Implement Co., 391 U.S. 216 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966); District of Columbia v. Clawans, 300 U.S. 617 (1937); Natal v. Louisiana, 139 U.S. 621 (1891).

53. Frank v. United States, 395 U.S. 147 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Dyke v. Taylor Implement Co., 391 U.S. 216 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

54. Dyke v. Taylor Implement Co., 391 U.S. 216 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

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

56. 18 U.S.C. § 1(3) (1966) provides that:
"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."

57. 399 U.S. 66, 68 (1970).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 71.

62. *Id.*

63. *Id.* at 73-74.

adjudications outweighed the disadvantages to those accused of crimes within the now defined "petty" classification.[64]

Mr. Justice Black, concurring, rejected the premise that the right to trial by jury is determined by a distinction between "petty" and "serious" offenses. Noting that the Constitution guarantees trial by jury "in all criminal prosecutions"[65] and "in all crimes,"[66] Mr. Justice Black concluded that the petty-serious distinction is in effect an unwarranted judicial amendment.[67]

Mr. Chief Justice Burger dissented. While agreeing that the right to trial by jury extended to only "serious" crimes,[68] the Chief Justice saw nothing in the "serious" crime coverage of the sixth or fourteenth amendments that would require the Court to invalidate the statute in question.[69] Nor did he feel compelled by the "near uniform judgment of the nation" to read into the Constitution something not found there.[70]

Mr. Justice Harlan also dissented,[71] stating his position that the "incorporation" theory implicit in the majority opinion, namely that the provisions of the Bill of Rights are incorporated into the fourteenth amendment on a selective and individual basis, is unacceptable.[72] To Justice Harlan, the "incorporation" theory limits the concept of due process by confining it within the bounds of those rights enumerated in the first eight amendments,[73] and imposes upon the states a rigid uniformity through coerced conformity to federal standards.[74] In his opinion, the decision in *Williams v. Florida*,[75] handed down the same day as the decision in the instant case, demonstrated the Court's recognition of the undesirability of imposing upon the administration of state criminal justice the logical consequences of *Duncan* and the present case under "incorporation."[76] Since incorporation of the sixth amendment right to jury trial means absorption "jot for jot and

64. *Id.* at 73.
65. U.S. CONST. amend. VI.
66. U.S. CONST. art. III, § 2, cl. 3.
67. 399 U.S. at 75.
68. *Id.* at 77.
69. *Id.*
70. *Id.*
71. The dissenting opinion of Mr. Justice Harlan is found in 399 U.S. at 117.
72. Mr. Justice Harlan has reiterated his argument for non-incorporation in a number of opinions: Benton v. Maryland, 395 U.S. 784, 801 (1969) (dissenting opinion); Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (dissenting opinion); Griswold v. Connecticut, 381 U.S. 479, 499 (1966) (concurring opinion); Pointer v. Texas, 380 U.S. 400, 408 (1965) (concurring opinion); Malloy v. Hogan, 378 U.S. 1, 14 (1964) (dissenting opinion); Ker v. California, 374 U.S. 23, 44 (1963) (concurring opinion); Gideon v. Wainwright, 372 U.S. 335, 349 (1963) (concurring opinion); Mapp v. Ohio, 367 U.S. 643, 672 (1961) (dissenting opinion).
73. Duncan v. Louisiana, 391 U.S. 145, 174-75 (1968).
74. 399 U.S. at 130.
75. 399 U.S. 78 (1970).
76. *Id.* at 118.

case by case,"[77] the Court in *Williams,* faced with the prospect of invalidating the common practice in the states of providing less than a twelve member jury, sought to temper the effect of the decision in *Duncan,*[78] and thus upheld the validity of the Florida procedure providing six member juries in the trial of non-capital criminal offenses. In so doing, Justice Harlan concluded, the Court unfortunately was compelled to dilute the settled meaning of the federal right to a trial by jury.[79]

It is evident from the trend of recent decisions that a majority of the Court has, either through implication or expressly, accepted the incorporation theory of imposing the Bill of Rights upon the states through the fourteenth amendment.[80] Further, the extent to which the Bill of Rights has already been carried over into the fourteenth amendment suggests that whether such incorporation should be "total" or "selective" is merely an academic question.[81] Moreover, even though it is too early to assess the effect that Chief Justice Burger and Justice Blackmun will have on future decisions, given the present composition of the Court, it is unlikely that there will be a change in its position.[82]

Although, in terms of immediate effect, the impact of the decision in the instant case is limited to New York City,[83] in the future it is likely to

77. *Id.* at 129.

78. *Id.*

79. *Id.* at 138.

80. *E.g.,* Benton v. Maryland, 395 U.S. 784 (1969) ("double jeopardy" protection of fifth amendment); Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to jury trial); Kolpfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation with opposing witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Robinson v. California, 370 U.S. 660 (1962) (eighth amendment protection against cruel and unusal punishment).

81. With the exception of the second amendment right to keep and bear arms, the third amendment protection against the quartering of soldiers, the fifth amendment protection of indictment by grand jury, and the seventh amendment right to jury trial in civil suits wherein the value in controversy exceeds twenty dollars, all the rights and privileges of the Bill of Rights have been incorporated into the fourteenth amendment and thus applied to the states.

82. It is interesting to examine the past performance of the Justices in this area. In those cases cited in note 26, *supra,* we find the following results: Justice Brennan joined in the majority seven times; Justice Douglas joined in the majority in five decisions and concurred in the remaining two; Justice Black joined in the majority six times and concurred in the remaining one; Justice White joined in the majority in four decisions, concurred in one and dissented in two; Justice Stewart joined the majority in three decisions, concurred in one, and dissented in the remaining three; Justice Harlan concurred in four of the decisions, and dissented in the remaining three; Justice Marshall joined the majority in both decisions in which he took part (*Benton* and *Duncan*). Chief Justice Burger and Justice Blackmun were not sitting on the Court in any of the decisions. Although not conclusive in any sense, these results do provide some basis for predicting results in the near future.

83. Recall that at the time of this decision, New York City was the only jurisdiction in the fifty states in which a defendant could be denied the right to trial by jury where the maximum sentence exceeded six months. Baldwin v. New York, 399 U.S. 66, 71 (1970).

have a profound effect upon the administration of criminal justice in those cities where the circumstances which led to the adoption of the New York City scheme are duplicated. In this regard, the statistics presented by the New York Court of Appeals in affirming the present case are significant.

> From July, 1966 through December, 1968 the New York City Criminal Court disposed of 321,368 nontraffic misdemeanor cases, whereas in the next largest city, Buffalo, the City Court disposed of 8,189 nontraffic misdemeanors. Although it is true that the population of New York City is approximately 15 times as large as Buffalo's, the figures still reflect an enormous disproportion, since New York City's caseload is more than 39 times as great. Moreover, only 78 judges were available in the New York City Criminal Court to hear those 321,368 misdemeanors whereas in Buffalo there were 12 judges available to hear the 8,189 misdemeanors, a ratio of 6½ to 1, as compared to the caseload ratio of 39 to 1.[84]

Thus, the rationale behind the New York scheme was that disadvantages to the accused were outweighed by the benefits which resulted from quick and inexpensive non-jury adjudications. If, in fact, the right to jury trial were dependent upon such a balancing of interest, the inherent logic of the proposition would suggest that were the New York City caseload to increase still more, the right to jury trial could be denied in cases where the maximum possible sentence exceeded one year imprisonment.[85] Since the Court has held that trial by jury is fundamental to the American scheme of justice,[86] it is necessary to insure that at some point the demands of local administrative problems not be allowed to infringe upon that right. In deciding the instant case, in terms of present state practice, the Court could have drawn the line at either of two points: six months,[87] or one year.[88] Had the line been drawn at one year, it is very likely that the end

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84. Hogan v. Rosenberg, 24 N.Y.2d 207, 218, 247 N.E.2d 260, 266, 299 N.Y.S.2d 424, 432 (1969). As one New York City Court judge wrote:

> This court is the most overworked and understaffed court of any community. . . . The court is open and does business 365 days a year. This includes Saturdays, Sundays and holidays. . . . The day court hours are from 9:30 a.m. to 5 p.m. . . . [N]ighttime hours begin at 7:30 p.m. The judge rarely finishes his work before one or two o'clock the following morning.

People v. Moses, 294 N.Y.S.2d 12, 21 (N.Y.C. City Ct. 1968).

85. It is also logical to conclude that in those areas where administrative problems are virtually non-existent, the balancing process would call for a trial by jury in all criminal prosecutions.

86. Duncan v. Louisiana, 391 U.S. 145 (1968). The decision in Williams v. Florida, 399 U.S. 78 (1970), left unanswered two important questions regarding the right to trial by jury. From the decision, it is unclear as to what is the minimum number at which a jury remains such in a functional sense. Secondly, the Court specifically avoids discussion as to the degree of unanimity required for a verdict.

87. Baldwin v. New York, 399 U.S. 66, 71 (1970).

88. In most states, the maximum sentence for a misdemeanor is one year. In drawing the line at that point, therefore, the Court, in most instances, would have made the "petty" classification synonymous with misdemeanor.

result would be the denial of trial by jury where jury trials are presently made available. Thus, the effect of the present case could have been contraction rather than an expansion of the right to jury trial. Related with this is the fact that were the line drawn at one year, the pressure upon criminal courts to reform for the sake of more efficient administration to that extent would have been diminished. The logic is simple. It is easier and less expensive to try more criminal offenses to the bench than to add more judges and expand facilities, in order to cope with problems of backlog and caseload. Thus, in drawing the line as it has, the Court has not ignored the practical problems of administering criminal justice in our cities. Implicit in *Baldwin* is an admonition to those charged with the administration of such systems, that while the problems are real, the solution is not infringement upon constitutional rights and privileges.[89]

PAUL A. BATTAGLIA

DIVORCE LAW—DEFECTIVE MEXICAN DIVORCE DECREE ACCORDED NEW YORK RECOGNITION DUE TO SUBSEQUENT APPEARANCE, THROUGH AN ATTORNEY, OF PARTY ABSENT FROM THE MEXICAN ACTION

Plaintiff and defendant were married in 1938 in the State of New York and continued to reside there until 1950 when the defendant abandoned their residence. The defendant obtained a Mexican divorce decree in 1960 by personally appearing before a civil court in Juarez, Mexico. The plaintiff did not appear in that proceeding, nor did she receive service of process.[1] In 1962 the plaintiff signed a document styled, "Defendant's Special Power of Attorney,"[2] which empowered a Mexican attorney to appear in plain-

89. The Court in *Baldwin* rather summarily dismissed the proposed three judge panel provided for by § 40 of the N.Y.C. CRIM. CT. ACT as a sufficient substitute for the constitutional guarantee of jury trial. The Court suggested that the "primary purpose of the jury is to prevent the possibility of oppression by the government." Thus, they concluded, the proposed panel "can hardly serve as a substitute for a jury trial." Baldwin v. New York, 399 U.S. 66, 72 n.20 (1970).

1. New York will not recognize a Mexican decree in which one of the parties thereto is neither present, nor served with process. Rosenbaum v. Rosenbaum, 309 N.Y. 371, 130 N.E.2d 902 (1955); Caldwell v. Caldwell, 298 N.Y. 146, 151, 81 N.E.2d 60, 63 (1948), *modifying* 272 App. Div. 1025, 73 N.Y.S.2d 683 (2d Dep't 1947); Lamb v. Lamb, 307 N.Y.S.2d 318, 321 (Fam. Ct. 1969).

2. The opinion of the Appellate Division gave the following as the relevant text of the power of attorney:

> [T]o appear for and represent me in the divorce action that my husband . . . has instituted against me . . . and to state in my name, that I am in complete conformity with the judgment which was rendered in the said action, that I submit myself expressly to the jurisdiction of the Court and that I accept the aforesaid judgment as final and conclusive; and generally to act . . . with *full power of substitution*, hereby ratifying and confirming and holding valid all that my said attorney shall lawfully do or cause to be done by virtue of these presents.

Ramm v. Ramm, 34 App. Div. 2d 667, 668, 310 N.Y.S.2d 111, 113 (2d Dep't 1970) (emphasis added) [hereinafter cited as instant case].