# THE PETTY OFFENSE EXCEPTION IN NEW YORK: THE ACCUSED PROSTITUTE'S RIGHT TO A JURY TRIAL

## I

### INTRODUCTION

The sixth amendment to the United States Constitution guarantees a trial "by an impartial jury" to all criminal defendants.[1] "Crime" under the sixth amendment has been held not to include petty offenses.[2] Those accused of petty offenses therefore do not enjoy the constitutional right to a jury trial.[3] What constitutes a petty offense, however, has been debated for some time.[4]

By 1970, the Supreme Court had articulated three factors for determining whether an offense is petty or serious: the treatment of the offense at common law,[5] the nature of the offense,[6] and the punishment of the offense.[7] Not until 1970, however, did the Court decide the maximum prison sentence for a petty offense.

In 1970, New York City was the only jurisdiction in the country which insisted that offenses punishable by more than six months may be petty.[8] The city, burdened with overcrowded courts, was adverse to granting jury trials to those facing possible prison sentences of less than one year.[9] In 1970, however, the Supreme Court forced New York to grant jury trials to those accused of offenses punishable by more than six months in prison.[10] New York conformed to the Court's command in *N. Y. Criminal Procedure Law* § 340.[11]

Despite the city's historic reluctance to grant jury trials, a New York City Criminal Court ruled in *People v. Link*[12] that it is unconstitutional to

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1. U.S. CONST. amend. VI.
2. Callan v. Wilson, 127 U.S. 540 (1888).
3. *Id.*
4. The Supreme Court's consideration of the issue began with Callan v. Wilson and has continued through Baldwin v. New York, 399 U.S. 66 (1970) and later cases.
5. *Callan*, 127 U.S. 540.
6. Natal v. Louisiana, 139 U.S. 621 (1891).
7. District of Columbia v. Clawans, 300 U.S. 617 (1937).
8. Baldwin v. New York, 399 U.S. at 72.
9. *Id.* New York defined crimes punishable by up to one year in prison as petty.
10. *Id.*
11. Section 340.40(2) (McKinney 1971) states:

> In any local criminal court a defendant who has entered a plea of not guilty to an information which charges a misdemeanor must be accorded a jury trial, . . . except that in the New York city criminal court the trial of an information which charges a misdemeanor for which the authorized term of imprisonment is not more than six months must be a single judge trial. . . .

12. 107 Misc. 2d 973, 436 N.Y.S.2d 581 (Crim. Ct. 1981).

deny a jury trial to an accused prostitute. Although the maximum prison sentence in New York City for a convicted prostitute is three months,[13] the Criminal Court found the offense sufficiently serious to warrant a jury trial.[14] The New York Supreme Court disagreed with the lower court, and overruled the Criminal Court's decision.[15]

Although *Link* retains no precedential value, the Criminal Court's criticism of New York's petty offense exception cannot be dismissed. This Note will explore the petty offense exception and evaluate the *Link* court's criticism of the exception. First, the Note will place the petty offense exception in its historical context by examining the Supreme Court's definition of "petty offense." It will then focus on New York's prostitution law and consider whether the law passes the test established by the Supreme Court. Finally, it will consider whether there is a fairer definition of "petty offense."

## II

### THE SUPREME COURT AND THE PETTY OFFENSE EXCEPTION

The United States Supreme Court first explored the petty offense exception to the right to a jury trial in 1888.[16] In *Callan v. Wilson*[17] the defendant was convicted of conspiracy and fined twenty-five dollars. When he failed to pay the fine he was sentenced to thirty days in jail. He then appealed the trial court's determination that conspiracy was a petty offense and therefore did not warrant a jury trial. To determine the seriousness of the offense, the Court looked at the characterization of conspiracy at common law. Since, under common law, conspiracy was an offense of "grave character," the Court found it serious and thus ruled that the defendant had the right to a jury trial.[18]

In 1891, the Court determined in *Natal v. Louisiana*[19] that the breach of an ordinance prohibiting the keeping of a private market within six blocks of a public market was a petty offense. Rather than basing this determination on common law treatment of the offense, however, the Court focused on contemporary treatment of and sentiment toward breach of the ordinance. Since the maximum punishment for the offense was a twenty-five dollar fine or thirty days in jail and the community viewed the breach as minor, the offense was found petty.[20]

The Court's analysis in *Natal* of the contemporary reaction to the offense marked a shift in focus from a historical study to a concern for how

13. N.Y. PENAL LAW § 230.00 (McKinney 1980).
14. *Link*, 107 Misc. 2d 973, 436 N.Y.S.2d 581.
15. Morgenthau v. Erlbaum, 112 Misc. 2d 30, 445 N.Y.S.2d 997 (Sup. Ct. 1981).
16. *Callan*, 127 U.S. 540 (1888).
17. *Id.*
18. *Id.* at 556.
19. 139 U.S. 621 (1891).
20. *Id.* at 624.

the conviction will affect the offender. The Court's review of the authorized punishment for the offense and of community reaction to conviction provided an indication of the serious repercussions of the offense on the defendant. Indeed, this focus on the defendant is supported by the sixth amendment guarantee of the right to a jury trial to protect the accused from unjust punishment and community condemnation.[21]

In *Schick v. United States*[22] the Court continued its focus on the effect of conviction on the defendant in determining the seriousness of an offense. In general, the Court explained, an offense viewed by the community as "deeper and more atrocious" than a minor violation is a crime and therefore carries a right to a jury trial.[23] In *Schick* the Court considered the offense of knowingly purchasing or receiving for sale oleomargarine which was not stamped according to law. The Court found the violation petty rather than "atrocious," in part because it was punishable by only a fifty dollar fine.[24]

Despite the focus in *Natal* and *Schick* on the effect of a conviction on the accused, the Court continued to review the treatment of the offense at common law.[25] One reason for the continued viability of the common law test was a 1926 article by Felix Frankfurter and Thomas Corcoran.[26] Frankfurter and Corcoran explored the petty offense exception at common law. They explained that courts at common law disposed of petty offenses through the summary procedure of trials before a judge without a jury.[27] The article also provided an extensive listing of offenses categorized as petty or serious at common law. The authors argued that the Constitution allows contemporary courts to use this common law classification to determine if an offense is petty.[28]

Frankfurter and Corcoran did not condemn a court's review of the punishment and the nature of an offense in determining the seriousness of the offense. They found that "[b]roadly speaking, acts were dealt with summarily which did not offend too deeply the moral purposes of the community, which were not too close to society's danger, and were stigmatized by punishment relatively light."[29] Some courts today apply the standards described in the article in determining whether an offense is petty[30] even

21. *See* Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959) (an historical analysis of the sixth amendment).

22. 195 U.S. 65 (1904).

23. *Id.* at 69-70.

24. *Id.* at 67.

25. *E.g.*, District of Columbia v. Clawans, 300 U.S. at 624 n.1 (1937).

26. Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

27. *Id.* at 920.

28. *Id.* In their appendices the authors outline treatment of offenses in seven colonies including New York. *Id.* at 944, 983-1019.

29. *Id.* at 980-81.

30. *E.g.*, Duncan v. Louisiana, 391 U.S. 145, 160 (1968); *Clawans*, 300 U.S. at 624 n.1 (1937).

though there is some evidence that the treatment of an offense at common law is irrelevant in determining whether the defendant has a constitutional right to a jury trial.[31]

The common law test has not been universally adopted even after the Frankfurter and Corcoran article. In *District of Columbia v. Colts*[32] the Court acknowledged that the offense of reckless endangerment was indictable at common law, but held that the determination of whether an offense is petty "depends primarily upon the nature of the offense."[33] Even though the authorized punishment for the offense was a one hundred dollar fine and thirty days in prison,[34] the Court found that the offense, by nature, was of "such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense."[35] The Court ruled that the offense was therefore serious.[36]

Critics of the common law test suggest two reasons for its diminished importance. First, since attitudes toward some offenses have changed, it would be unfair to deny a jury trial to one accused of an offense which was, under common law, viewed as minor but is now considered serious.[37] Second, at common law, review of some offenses was beyond the realm of the secular. Ecclesiastical courts handled offenses against morals, so the secular courts did not have jurisdiction over such breaches.[38] To view these offenses as petty because the secular courts did not deal with them would therefore be inappropriate.[39]

In *District of Columbia v. Clawans*[40] the Court reviewed the treatment of the offense of selling goods without a license. The Court explained that to judge the seriousness of an offense a court must use "objective standards as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments."[41] The maximum authorized punishment, the Court found, provided an appropriately objective standard.[42] The authorized punishment for selling goods without a license was three months, and Congress and several states had endorsed denial of a jury trial under common law for those accused of offenses carrying such light sentences.[43] Since the offense was not one of moral turpitude, the Court accepted the Congressional findings and ruled that the offense was petty.[44]

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31. Kaye, supra note 21, at 273. Kaye adduced evidence that the Constitution guarantees a jury trial to those accused of any crime, be it petty or serious. Id. at 257-68.
32. 282 U.S. 63 (1930).
33. *Id.* at 73.
34. *Id.*
35. *Id.*
36. *Id.* at 74.
37. *Id.* at 65 (argument for petitioner).
38. *Id.*; Rex v. Delavel, 3 Burr. 1434, 1438 (K.B. 1763).
39. *Colts*, 282 U.S. at 65 (argument for petitioner).
40. 300 U.S. 617.
41. *Id.* at 628.
42. *Id.* at 625.
43. *Id.* at 628-29.
44. *Id.* at 630.

Since *Clawans*, the Supreme Court has most frequently determined the seriousness of an offense by looking at the punishment imposed.[45] To evaluate the punishment, the Supreme Court has focused on the maximum prison sentence authorized. The Court has chosen this focus because the authorized sentence is more indicative of legislative intent than is the court-imposed sentence.[46] The legislature, a representative political body having the resources to research and debate issues thoroughly, provides a more objective indication of the seriousness of an offense than does an individual court's decision on the proper sentence for a particular defendant.[47] In addition, it is impractical to evaluate the seriousness of an offense by the sentence imposed: while a decision on the right to a jury trial must be made before trial, a court cannot determine the actual sentence until after trial.

Congress has codified the federal petty offense exception in 18 U.S.C. § 1(3) (1976). Relying on *Duke v. United States*,[48] which offered Congress authority to summarily dispose of "a class of misdemeanors of minor gravity to be known as petty offenses,"[49] Congress concentrated on the punishment of the offense, classifying as petty those offenses with maximum prison sentences up to six months and with fines up to $500.

Rather than imputing to the Constitution a definition of "petty offense" as clear as that adopted by Congress, the Supreme Court has stated that the constitutional "boundaries of the petty offense category have always been ill-defined, if not ambulatory."[50] In *Duncan v. Louisiana*, the Court refrained from setting a maximum authorized punishment for petty offenses, holding only that an offense with a maximum sentence of two years is a serious crime.[51] The Court alluded to a six-month dividing line,[52] but stated that "the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance."[53] The Supreme Court therefore left it to the lower courts to balance factors suggested in previous Court decisions, and to decide which offenses are petty.

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45. *E.g.*, *Baldwin*, 399 U.S. 66; Duncan v. Louisiana, 391 U.S. 145 (1968).
46. Frank v. United States, 395 U.S. 147, 149 (1969).
47. *See* People v. Joseph M., 84 Misc. 2d 1046, 1047, 377 N.Y.S.2d 440 (Crim. Ct. 1975).
48. 301 U.S. 492 (1937).
49. *Id.* at 494.
50. 391 U.S. at 160.
51. *Id.* The defendant was accused of simple battery, a misdemeanor with a maximum punishment of two years in prison and a $300 fine. He was sentenced to sixty days in prison and fined $150.
52. *Id.* at 161.
53. *Id.* at 160.

The New York State legislature interpreted broadly the Supreme Court's deference to the state courts. New York City was the only jurisdiction in the country to define offenses punishable by more than six months in prison as petty.[54] In New York City an offense was deemed serious only if it was punishable by more than one year in prison.[55] The Supreme Court forced New York State to change this definition in 1970, when a three-justice plurality ruled that the definition of "petty offense" followed in New York City was unconstitutional.[56]

The Court in *Baldwin* searched for "objective criteria reflecting the seriousness with which society regards the offense."[57] The most "relevant" factor, the Court stated, is "the severity of the maximum authorized penalty."[58] The Court ruled that New York must conform to the federal courts and the other state courts, and define as serious offenses those punishable by more than six months in prison.[59]

Although *Baldwin* has made the authorized punishment for an offense the "most relevant . . . criteri[on]"[60] in deciding whether an offense is petty, it is not the only criterion. The Court has not ignored the other consequences of a conviction. In his opinion, Justice White recognized the effect on the accused of a conviction. He stated that "[i]ndeed, the 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 reputation."[61] Justice White recognized, however, that these "repercussions" must be balanced against other considerations. In explaining the Court's demarcation between petty and serious offenses, he stated that "[w]here the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages [to the defendant], onerous though they *may be*, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications."[62] By recognizing that the disadvantages to the defendant may at times be outweighed by the advantages to the judicial system, the Court implied that

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54. *Baldwin*, 399 U.S. at 71-72.

55. *Id.* at 69. (The New York Court of Appeals urged that the line between "petty" and "serious" be drawn to coincide with that between "misdemeanor" and "felony.")

56. *Baldwin*, 399 U.S. 66. The defendant was accused of jostling, a class A misdemeanor punishable by a maximum one year prison sentence. Justice White, joined by Justices Brennan and Marshall, wrote the opinion of the Court, finding the offense serious. Justices Black and Douglas joined in a concurrence. Justices Burger, Harlan and Stewart wrote separate dissents. Justice Blackmum took no part in the decision.

57. *Id.* at 68.

58. *Id.*

59. *Id.* at 73-74.

60. *Id.* at 68.

61. *Id.* at 73.

62. *Id.* (emphasis added). Justices Black and Douglas, in their concurrence, found this balancing test arbitrary: "This decision is reached by weighing the advantages to the defendant against the administrative inconvenience to the State inherent in a jury trial and magically concluding that the scale tips at six months' imprisonment." *Id.* at 75.

at times the disadvantages to the defendant may not be outweighed, and will require a jury trial even though the authorized prison sentence is less than six months.[63] The Court has therefore left open the possibility that factors other than the authorized punishment for the offense will be considered in determining the seriousness of the offense.

## III

## NEW YORK AND THE SUPREME COURT TESTS

### *A. The Response to* Baldwin v. New York

Before *Baldwin*, New York City denied jury trials to those accused of offenses punishable by less than one year in prison.[64] This policy was part of an effort to minimize the congestion of the courts.[65] Jury trials generally last longer than bench trials, so a court can, in a given amount of time, dispose of more bench trials than jury trials.[66]

New York's reluctance to grant jury trials did not disappear when the Supreme Court forced the city to constrict its petty offense exception.[67] The city's concern for its overcrowded calendars has led it to read *Baldwin* narrowly, and to measure the seriousness of an offense solely by the maximum prison sentence allowable under the offense. *Criminal Procedure Law* § 340.40 conforms to the clear mandate of *Baldwin*: it grants the right to a jury trial to all adults accused of offenses carrying prison sentences greater

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63. *See* United States v. Sanchez Meza, 547 F.2d 461, 463-64 (9th Cir. 1976) (interpreting *Baldwin* to allow consideration of the nature of the offense).

64. 399 U.S. at 71-72.

65. *See id.* at 73.

66. THE CRIMINAL JUSTICE SYSTEM—THE FINAL REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON CRIMINAL JUSTICE, 34 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK RECORD 329, 337, quoted in McQuillan, *A Judge's Reply to Curb on Jury Trials*, N.Y.L.J., June 1, 1979 at 1, col. 2.

67. In 1979, the New York Bar Association tried to limit the effect of *Baldwin*. It recommended reclassifying certain class A misdemeanors to fit them into the petty offense exception. The Bar explained that this reclassification would "enormously expand the trial capacity of the Criminal Court" since an average jury trial lasts from two to four days, while a nonjury trial may last only a few hours. Governor Carey endorsed this proposal. McQuillan cited the governor's speech in *A Judge's Reply to Curb on Jury Trials*. *Id.* at 1.

New York judges and lawyers applauded the governor's endorsement. New York City District Attorney Morgenthau explained that although he would theoretically prefer providing juries for all criminal defendants, congestion in New York courts makes it impossible to do so. Because of this congestion, most cases are disposed of before trial. The governor's suggestion would diminish the overcrowding and allow more trials. *Morgenthau Backs Governor on Jury Trial Curb*, N.Y.L.J. June 12, 1979 at 1, col. 2. Judge Lang, an Acting Judge of the State Supreme Court believed the suggestion would "not only unclog the traffic jam now clogging the Criminal Court despite the Herculean efforts of the judges; it . . . [would] change the psychological climate and engender a new impetus to try more cases, both jury and non-jury." Lang, *Not All Misdemeanors Warrant Jury Trials*, N.Y.L.J. June 13, 1979 at 2, col. 3.

than six months.[68] Beyond this concession, New York has refused to allow any diminution of the petty offense exception.[69]

### *B. Prostitution and New York's Petty Offense Exception*

In the midst of New York's criticism of jury trials, Judge Erlbaum of the Criminal Court of the City of New York tried to enlarge the right to a jury trial beyond *N.Y. Crim. Proc. Law* § 340.40(2). Under *New York Penal Law* § 230.00, prostitution is a class B misdemeanor, punishable by a maximum three month jail sentence.[70] Therefore the six month cutoff point provided in *Crim. Proc. Law* § 340.40 denies an accused prostitute a jury trial. Judge Erlbaum found *Crim. Proc. Law* § 340.40(2) unconstitutional as applied to prostitution.[71]

To arrive at this ruling, Judge Erlbaum looked beyond the authorized prison sentence to analyze the seriousness of the offense. He reviewed the governmental sanctions other than a possible prison sentence or a fine to which a convicted prostitute is exposed, as well as the nature of the offense, and concluded that the offense is serious.[72] The New York Supreme Court disagreed.[73] It ruled that court congestion and possible extension of the lower court ruling to other offenses now categorized as petty outweighed the concerns of accused prostitutes. The court in *Erlbaum* found that by classifying prostitution as a class B misdemeanor, the legislature defined prostitution as a petty offense.[74] *Baldwin* allows deference to this legislative determination.[75]

*Link* and *Erlbaum* highlight the absence of a coherent, unified standard for establishing the seriousness of an offense and the different interpretations of the petty offense exception that result when courts attempt to apply

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68. N.Y. CRIM. PROC. LAW § 340.40(7) (McKinney 1971) denies youthful offenders the right to a jury trial. People v. Joseph M., 84 Misc. 2d 1046, 377 N.Y.S.2d 440 (Crim. Ct. 1975) sustained the constitutionality of this section.

69. The court in People v. Long, N.Y.L.J. June 21, 1979, at 10, col. 6 (N.Y. Crim. Ct. 1979) refused to grant a jury trial to an accused prostitute. It found that overcrowded court calendars were a more important consideration than the equal protection argument that while those accused of prostitution outside New York City have a right to a jury trial, those in the city do not. *Id.* at 11, col. 1.

70. Memorandum compiled by Pretrial Service Agency, *Disposition Rates of Prostitutes* (April 27, 1976), suggests that most convicted prostitutes receive a fine and no jail sentence.

71. *Link*, 107 Misc. 2d 973, 436 N.Y.S.2d 581.

72. *Id.* at 977, 436 N.Y.S.2d at 585.

73. Morgenthau v. Erlbaum, 112 Misc. 2d 30, 445 N.Y.S.2d 997 (N.Y. Sup. Ct. 1981). The District Attorney had moved to prohibit enforcement of *Link* pursuant to N.Y. CIV. PRAC. LAW § 7804(f) (1963). In deciding whether to prohibit enforcement under § 7804(f), the reviewing court considers the gravity of the harm, the excess of power used by the lower court, the availability of a remedy and the effectiveness of prohibition if there is no other remedy. *Id.* at 4 (quoting Matter of Dondi v. Jones, 40 N.Y.2d 8, 13, 351 N.E.2d 650, 386 N.Y.S.2d 4, 8 (1976)).

74. 112 Misc. 2d 30, 445 N.Y.S.2d 997.

75. 599 U.S. 66 (1970).

it to prostitution cases. The *Link* court emphasized the nature of the offense particularly as to moral turpitude and collateral punishment.[76] In contrast, the *Erlbaum* court relied on *Baldwin's* maximum sentence test.[77] To evaluate these differing approaches one must analyze the major tests and consider the appropriateness of applying them to prostitution.

*1. Common Law*

Running a house of prostitution was an indictable offense at common law. Those accused of the offense are therefore usually allowed jury trials.[78] Prostitution, on the other hand, was not indictable under common law: Courts Christian had exclusive control of the offense.[79] In 1979, a New York court denied a jury trial to an accused prostitute, in part because of the offense's status at common law.[80]

Not all courts focus on treatment at common law in deciding whether an offense is serious. The court in *Link* found that common law indictment was not "an indispensable requirement"[81] in determining the seriousness of prostitution. In *Erlbaum* the court did not even mention treatment at common law. Such disregard of the common law status of an offense is supported by a recent decision by the District Court for the District of Columbia.[82]

*2. Nature of the Offense*

In *People v. Link*, Judge Erlbaum recognized that Baldwin allowed consideration of factors other than the maximum authorized prison sentence in determining the seriousness of the offense.[83] After reviewing the

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76. 107 Misc. 2d 973, 436 N.Y.S.2d 581.

77. 112 Misc. 2d 30, 445 N.Y.S.2d 997.

78. *E.g.*, Warren v. People, 3 Parker Crim. Rep. 544 (N.Y. Sup. Ct. 1857); Commonwealth v. Wesley, 171 Pa. Super. 566, 91 A.2d 298 (Super. Ct. 1952); Miller v. Commonwealth, 88 Va. 618, 14 S.E. 161 (1892).

79. *See* People v. Bailey, 105 Misc. 2d 772, 773 n.5, 432 N.Y.S.2d 789, 791 n.5 (Crim. Ct. 1980).

80. People v. Long, N.Y.L.J. June 21, 1979, at 10, col. 6 (N.Y. Crim. Ct. 1979).

81. 107 Misc. 2d at 975 n.19, 436 N.Y.S.2d at 583 n.19.

82. United States v. Woods, 450 F. Supp. 1335, 1345 (D.C. 1978) (the court found treatment at common law is irrelevant in determining the seriousness of the offense of driving while intoxicated).

83. 107 Misc. 2d at 974, 436 N.Y.S.2d at 582. *See also* United States v. Sanchez Mesa, 547 F.2d 461, 463 (9th Cir. 1976) (*Baldwin* implicitly found not to exclude consideration of nature of offense in deciding its seriousness, even if prison sentence is six months or less); United States v. Woods, 450 F. Supp. at 1341-42 (*Baldwin* found to require a determination of the nature of the offense in reviewing the seriousness of an offense threatening a prison sentence less the six months). *See also* McQuillan, supra note 66, at 4, col. 4. Some courts look to the maximum authorized prison sentence to decide the seriousness of an offense. People v. Long, N.Y.L.J., June 21, 1979, at 10, col. 6 (N.Y. Crim. Ct. 1979). Other courts look to the prison sentence if the offense is *malum prohibitum*, but find all *malum in se* offenses serious. Matter of Gold v. Gartenstein, 100 Misc. 2d 253, 418 N.Y.S.2d 852, 856

punishment of the offense of prostitution, Judge Erlbaum concluded that its three month maximum sentence did not accurately reflect the seriousness of the offense.[84] Pointing to *Taylor v. Hayes*,[85] *Ludwig v. Massachusetts*,[86] and *Scott v. Illinois*,[87] Judge Erlbaum reasoned that the nature of an offense still provides a basis for evaluating the seriousness of the offense.[88] After assessing the views of "the community and its designated officials," he ruled that prostitution is, by nature, a serious offense.[89]

The court in *Erlbaum* vacated the decision in *Link*, defining the nature of the offense of prostitution by its authorized punishment rather than concentrating on the nature of the offense itself.[90] A closer look at New York's treatment of prostitution, however, throws some doubt on the views of prostitution found in both *Link* and *Erlbaum*.

Popular sentiment concerning prostitution is difficult to determine. In trying to arrive at such a determination, Judge Erlbaum in *Link* relied on his own evaluation of the community's opinion of prostitution:

> . . . the label "prostitute" is to denominate the creature to whom it is affixed as, through and through, unprincipled, a low-life, one who would sell out any loyalty, desecrate any covenant, and, literally as well as characterologically as one willing to do just about anything for the right price. It is well-nigh inevitable that a woman so branded will be banned from the office, the factory, the home and the church.[91]

To support this conclusion, Erlbaum cited a line of cases, most of which are at least twenty years old.[92] Community opinion on prostitution seems to have become somewhat less condemnatory since most of these cases were decided. In a 1977 case,[93] a New York court found the criminalization of prostitution an unconstitutional invasion of one's privacy. The decision was ultimately reversed,[94] but the court's refusal to find that prostitution is even a petty offense weakens Erlbaum's conclusion that society

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(Sup. Ct. 1979). Still other courts are searching for a definition of punishment broader than the authorized prison sentence. Baldwin v. N.Y., 399 U.S. 66 at 69. Supreme Court decisions do not specifically endorse any of these variations.

84. 107 Misc. 2d at 977, 436 N.Y.S.2d at 586.

85. 418 U.S. 488 (1974).

86. 427 U.S. 618 (1976).

87. 440 U.S. 367 (1979).

88. 107 Misc. 2d at 976, 436 N.Y.S.2d at 583.

89. *Id.* at 979.

90. 112 Misc. 2d 30, 445 N.Y.S. 997.

91. 107 Misc. 2d at 977, 436 N.Y.S.2d at 585.

92. *E.g.*, People v. Luciano, 277 N.Y. 348, 14 N.E.2d 433 (Ct. App. 1938); Remedco Corp. v. Bryn Mawr Hotel Corp., 45 Misc. 2d 586, 257 N.Y.S.2d 525 (Civ. Ct. 1965); Hauer v. Manigault, 160 Misc. 758, 290 N.Y.S. 778 (Mun. Ct. 1936).

93. In re P., 92 Misc. 2d 62, 80-83, 400 N.Y.S.2d 455, 464-67 (Fam. Ct. 1977), *rev'd sub nom In re* Dora P., 418 N.Y.S.2d 597, 68 A.D.2d 719 (App. Div. 1979).

94. In re Dora P., 418 N.Y.S.2d 597, 68 A.D.2d 719 (App. Div. 1979).

views the offense as serious. Indeed, others share the 1977 New York court's view that prostitution is a victimless offense, and would not exist if people did not willingly subsidize it. Many people believe that, because it is a victimless offense, prostitution should be legalized.[95]

The people's views on the criminalization of prostitution do not prove that it is a petty offense; neither do they prove it is serious. They merely illustrate the difficulty in assessing community values, and the problems in relying on such an assessment to decide the seriousness of an offense. To determine the nature of an offense, a more concrete test must be used.

Procedural treatment of the accused prostitute may provide a clearer indication of the nature of the offense. The Manhattan Office of the District Attorney, for instance, has a uniform policy against agreeing to an adjournment in contemplation of dismissal only for those accused of prostitution.[96] Ordinarily, one who has no prior record and is accused of a misdemeanor will move for a dismissal without objection from the District Attorney.[97] If the motion is granted, the judge will adjourn "the action without date ordered with a view to ultimate dismissal of the accusatory instrument in furtherance of justice."[98] If the case is not restored on the calendar within six months, it is deemed to have been dismissed.[99] The Office of the District Attorney believes, however, that prostitution is too serious to warrant such a dismissal.[100] Prostitution, the Office contends, is a national problem, and leads to other crimes.[101] The District Attorney also has a policy against plea bargaining with those accused of prostitution.[102] One court has suggested that this policy reflects strong moral condemnation of the offense.[103]

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95. *See, e.g.*, Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979); Rosenbleet, Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373 (1973).

96. *Link*, 107 Misc. 2d at 979, 436 N.Y.S.2d at 586; Transcript of Colloquy, People v. Smith, No. 0N009081 (N.Y. Crim. Ct. March 4, 1980) (on file at N.Y.U. Review of Law & Social Change).

97. Transcript of Colloquy, *supra* note 96; *Link*, 107 Misc. 2d at 979, 436 N.Y.S.2d at 586.

98. N.Y. CRIM. PROC. LAW § 170.55 (McKinney 1981-82).

99. *Id.*

100. Transcript of Colloquy, *supra* note 96, at 5. (The District Attorney believes prostitution leads to crimes such as theft.)

101. *Id.* In People v. James, 98 Misc. 2d 755, 415 N.Y.S.2d 342 (Crim. Ct. 1979), the judge dismissed the charges over the District Attorney's objections. The Pre-Trial Service Agency has followed the District Attorney's lead in its policy concerning accused prostitutes. The Agency regularly interviews accused misdemeanants to determine their eligibility for pretrial release. Due to the prostitutes' high disposition, the Agency does not interview accused prostitutes. Directive #D-48, N.Y. Crim. Ct. (Nov. 17, 1976). It is therefore more difficult for an accused prostitute to be released on bail. Such threat of detention may coerce the defendant into pleading guilty and paying the fine.

102. 98 Misc. 2d at 756, 415 N.Y.S.2d at 343.

103. *Id.* The court's conclusion is shared by Mary DeBourbonne, who is in charge of public relations for the Manhattan office of the District Attorney. The offense, she explained, contributes to the "general decay of the neighborhood," and as such, deserves the

These policies of the Office of the District Attorney suggest that the Office views the offense of prostitution as serious. If the offense is as onerous as the Office asserts, however, it follows that those who maintain their innocence should have the right to present their defense to a group of their peers.[104] Yet the District Attorney tries to escape jury trials by pointing to the maximum authorized prison sentence, and saying that the light sentence forecloses the defendant from a jury trial. By defining the offense by its punishment, the District Attorney is free to treat the offense as serious when formulating the office's policy decisions, but to have it categorized as a petty offense when arguing against the right to a jury trial. Thus the District Attorney's position not only warps the definition of "petty offense," but also abridges the right to a jury trial which would otherwise be available to those accused of prostitution.[105]

Finally, the District Attorney asserts that a jury trial is unnecessary. The officials point to the high rate of guilty pleas among accused prostitutes and say that procedural safeguards are not needed since the accused are almost always guilty.[106] Contrary to constitutional mandate, this argument rests on the assumption that the accused prostitute is guilty until proven innocent. In particular, it ignores the rights of those who do not choose to plead guilty. Providing the procedural safeguard of a jury trial would benefit the defendants who maintain their innocence without impeding the administration of justice for those who choose to avoid trial by pleading guilty.

As the example of the Manhattan Office of the District Attorney has shown, judging the seriousness of an offense by the nature of that offense does not produce a clear test. Different people view an offense in different ways. Indeed, groups such as the Manhattan Office of the District Attorney have manipulated the vagueness of this test to suit their ends.

### *3. Punishment of the Offense*

*Baldwin* would seem to designate the offense of prostitution as petty: Prostitution carries with it a maximum penalty of three months in prison; *Baldwin* classifies as serious all offenses with sentences greater than six months. Indeed, the court in *People v. Long*[107] found that prostitution's

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harshest punishment available. (Interview on October 25, 1981.) An additional justification for this harsh position is the lengthy records of most accused prostitutes. Indeed, DeBourbonne pointed out that the D.A. has introduced a proposal to impose a mandatory jail sentence for repeated prostitution offenders. (Notes from interview on file at office of Review of Law & Social Change)

104. *See Woman Files Federal Suit Under Loitering Law*, N.Y.L.J. July 27, 1978 at 2, col. 6, reporting a suit against the New York Police Department for false arrest. The plaintiff was arrested for prostitution.

105. *Erlbaum*, 112 Misc. 2d 30, 445 N.Y.S.2d 997.

106. Directive #D-48, N.Y. Crim. Ct. (Nov. 17, 1976).

107. N.Y.L.J. June 21, 1979, at 10, col. 6 (N.Y. Crim. Ct. 1979).

relatively light sentence proved that it is a petty offense.[108] In arriving at this ruling, however, the court ignored consequences of conviction other than the prison sentence imposed.[109] To decide whether prostitution is a serious offense by examining the punishment of convicted prostitutes, one must look at the collateral sanctions enacted as well as at the prison sentence. Only then does one get an accurate picture of legislative intent.

The Supreme Court has recognized a distinction between punitive governmental actions and regulatory restraints.[110] This distinction, however, has been applied only to determine which governmental actions require a determination of guilt before they are imposed.[111] Since the purpose of examining the punishment of an offense to determine the seriousness of that offense is to determine the effect on the accused of a conviction, regulatory restraints as well as traditional punishments must be considered: Both types of governmental sanctions affect the convicted defendant.

Legislatures have imposed numerous collateral sanctions against those convicted of offenses "involving moral turpitude," and of "infamous" crimes.[112] Such consequences of conviction include loss of property rights, restrictions on employment, restrictions on licenses and loss of insurance benefits.[113] The New York legislature has found prostitution an offense serious enough to warrant collateral sanctions. If a multiple dwelling is used as a house of prostitution, the landlord may terminate the lease and recover possession by summary proceedings.[114] Without state authority, no one with

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108. *Id.* at 11, col. 1. *See also* Marshall v. United States, 302 A.2d 746, 747 (D.C. 1973) (noting that a long line of cases has held prostitution to fall within the statutory definition of petty offenses). A review of the maximum prison sentences allowed in other jurisdictions reveals that in 1973, more than half of the states authorized a prison sentence greater than six months. Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, *supra* note 95, at 422-27. While some states have recently decreased the prison sentences for prostitution, others have retained lengthy sentences. *E.g.*, IOWA CODE ANN. tit. XXXV, § 725.1 (West 1976) (maximum prison sentence two years); OKLA. STAT. tit. 21, § 1031 (1981) (maximum prison sentence one year); R.I. GEN. LAWS ANN. tit. II, § 11-34-5 (1981) (maximum prison sentence five years).

109. *See infra* text accompanying notes 113-119.

110. Bell v. Wolfish, 441 U.S. 520, 537-38 (1978). The Court quotes its previous description in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963), of "punishment":

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. (footnotes omitted)

111. *Id.* at 537.

112. Special Project, *The Collateral Consequences of a Criminal Conviction*, VAN. L. REV. 929, 957-60 (1970).

113. Id.; *see generally* 5 UNITED STATES PRISON LAW (1977, 1980 Supp.).

114. N.Y. MULT. DWELL. LAW § 352 (Consol. 1977); *see, e.g.*, 138 West 49th St. Corp. v. Hotel Coleman, Inc., 237 N.Y.S 441 (N.Y. Civ. Ct. 1963). *See also* N.Y. REAL PROP. LAW

a liquor license may employ one convicted of a felony or a specified offense such as prostitution.[115] Testimony at a divorce proceeding by one convicted of prostitution must be corroborated.[116]

Federal sanctions against convicted prostitutes may provide additional punishment of those convicted of prostitution in New York. These sanctions include the deportation of aliens convicted of prostitution,[117] and the ineligibility of convicted prostitutes for visas.[118]

The convicted prostitute is therefore vulnerable to legislative sanctions far beyond a three month prison sentence. The numerous sanctions make the offense of prostitution a more serious offense, from the defendant's point of view, than the three month prison sentence indicates.

## IV

### A Suggested Focus in Determining the Seriousness of an Offense

The courts in *Baldwin* and *Erlbaum* expressed the fear that expanding the right to jury trials will aggravate the problem of overcrowed courts.[119] This fear must not impede constitutional rights. The United States Constitution provides that all people accused of an offense are assumed to be innocent until proven guilty. The right to a jury trial is one of the most important procedural safeguards which enforces this presumption. Exceptions to this right must be narrowly drawn to avoid impinging on constitutional guarantees. Nevertheless New York, in the interest of efficiency, minimizes this constitutional mandate, and denies the right to a jury trial to those accused of prostitution.

Since the order in *People v. Link* never took effect,[120] those accused of prostitution in New York have never had the right to a jury trial. Thus, the theory that granting such a right would further congest the courts has never been tested. There are indications, however, that granting the right would

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§ 231 (Consol. 1980) (voiding leases where the premises are used for illegal "trade, manufacturing or other business," including prostitution).

115. N.Y. Alco. Bev. Cont. Law §102(2)(h) (McKinney 1970) (other specified convictions include illegal possession of a gun or of burglar's tools; aiding a prison escape; unlawful entry of a building; ownership of a still). *See, e.g.*, Inner Circle Restaurant, Inc. v. State Liquor Authority, 30 N.Y.2d 541, 281 N.E.2d 183, 330 N.Y.S.2d 389 (1972).

116. Yates v. Yates, 211 N.Y. 163, 169, 105 N.E. 195 (1914); Simmons v. Simmons, 270 A.D. 88, 58 N.Y.S.2d 558 (App. Div. 1945).

117. 8 U.S.C. § 1182(a) (12) (1976). Section 1182 only punishes those convicted of offenses with prison sentences of more than one year or those convicted of offenses of moral turpitude. Prostitution is thus singled out as an offense of moral turpitude. *See, e.g.*, Marlow v. Immigration and Naturalization Service, 457 F.2d 1314 (9th Cir. 1972); Greene v. Immigration and Naturalization Service, 313 F.2d 148 (9th Cir. 1963).

118. 8 U.S.C. § 182(a) (12) (1976). Other first offenders convicted of petty offenses are allowed visas unless expressly so prohibited by § 1182. *Id.* at § 1182(a) (9).

119. *Baldwin*, 399 U.S. at 73; *Erlbaum*, 112 Misc.2d at 33, 445 N.Y.S.2d at 999.

120. *Link*, 107 Misc. 2d at 980, 436 N.Y.S.2d at 587. Judge Erlbaum stayed the order, pending the prosecution's Article 78 motion. Since the prosecution's motion succeeded, Judge Erlbaum's order never went into effect.

not congest the courts. The most direct indication is the high disposition rate of those accused of prostitution,[121] which suggests that most defendants prefer pleading guilty and paying the fine. Since the right to a jury trial attaches only with a plea of not guilty, giving the right to accused prostitutes probably would not produce many jury trials. The California experience provides further evidence that the administrative burden of this expanded right has been slight: California's granting of jury trials to everyone accused of a criminal offense has produced no additional congestion of the state's courts.[122]

To define the petty offense exception to the right to a jury trial, the courts must apply a concrete test.[123] Only then will they avoid arbitrary rulings based on their personal outlook. This Note has shown that neither common law nor community sentiment provides such a test. One must instead look to the sanctions imposed on those accused and convicted of the offense. In evaluating these sanctions, it is inaccurate and unfair to look only at the authorized prison sentence.

The Manhattan Office of the District Attorney's policy regarding prostitution suggests that the offense is serious. This is consistent with the fact that convicted prostitutes are exposed to numerous collateral sanctions which do not threaten those convicted of offenses carrying similar prison sentences. These sanctions must be considered in determining whether an accused prostitute has a right to a jury trial.

## V

## CONCLUSION

The Supreme Court cases exploring the petty offense exception have led most courts to decide the seriousness of the offense by considering only the maximum prison sentence allowed. Although the punishment of the offense is the fairest and most measurable test, the prison sentence is not the only consequence of conviction. The disposition of the offense and the collateral sanctions to which the offender is exposed pose additional threats. To protect adequately the accused's constitutional right to a jury trial, the court, when determining the seriousness of the offense, must consider all government sanctions that threaten the accused.

MICHELENA HALLIE

*As this Note went to press, the New York Court of Appeals decided in* Morganthau v. Erlbaum, *N.Y.L.J., June 15, 1983, at 31, col. 1 (N.Y. Ct.*

121. Directive #D-48, N.Y. Crim. Ct. (Nov. 17, 1976).
122. *Baldwin*, 399 U.S. at 74 n.22 (1970) (Black. J., concurring).
123. *See* D.C. v. Clawans, 300 U.S. at 628.

*App. June 7, 1983) that* Crim. Proc. Law. § *340.40(2) does not violate the sixth amendment by denying a jury trial to an accused prostitute. The Court of Appeals' decision upholds the Supreme Court's decision in* Erlbaum *which overruled the Criminal Court's decision in* Link.

*The Court of Appeals looked to decisions by the United States Supreme Court to find the proper standard for determining the seriousness of an offense. The court found that recent Supreme Court decisions had relied almost exclusively on the maximum prison sentence authorized to determine the seriousness of an offense and that these decisions had established six months as the dividing line between petty and serious offenses.*

*Using the six month rule, the court determined that prostitution is a petty offense because under* Penal Law § *230.00 prostitution carries a maximum sentence of three months. The court concluded that there is no right to a jury trial since prostitution is a " 'petty' offense within the meaning of the Sixth Amendment . . . ."*

*The other factors used by the Criminal Court in* Link *to determine the seriousness of prostitution were dismissed by the Court of Appeals. The Court of Appeals presumed that the Legislature had weighed these factors in establishing sentences. Therefore, it would be inappropriate for judges to weigh again these same factors: "To allow a judge to weigh these same criteria and reach a different conclusion as to a crime's seriousness would be to permit an improper usurpation of the legislative function."*

*The court reasoned that judicial weighing of these "subjective" factors would lead to inconsistent sentences. "The overriding problem would be the lack of predictability and consistency in determining when a jury trial would be granted . . . . As a result, persons charged with identical offenses would find that their right to a jury depended only on the judge before whom they happened to appear [and] not on the offense charged."*

*The Court of Appeals' decision has effectively closed the door to the possibility that New York courts will consider factors other than the maximum prison sentence allowed in determining the seriousness of the offense. It seems clear that only the United States Supreme Court can open the door again.*