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Petty Offenses, Serious Consequences: Multiple Petty Offenses and the Sixth Amendment Right to Jury Trial

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> We cannot exclude recognition of a scale of moral values according to which some offenses are heinous and some are not.... To the discriminating judgment there is also a difference between a maximum of ten days in jail and the risk of five years' imprisonment. What about three months? What about six months? Here we reach the everlasting enigma in law and in life: When is far too far?[1]

Although the Sixth Amendment guarantees the right to jury trial for all criminal defendants,[2] the Supreme Court long has held that certain criminal offenses are not serious enough to trigger this right.[3] Since petty[4] offenses such as traffic violations and small-time misdemeanors are not worth the public expense of empaneling a jury, the Court has held that these offenses may be tried before a judge without violating the Sixth Amendment. The existence of this "petty-offense exception" to the right to jury trial never has been seriously challenged,[5] but the scope of the exception repeatedly has been the subject of judicial scrutiny.

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1. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 HARV. L. REV. 917, 981 (1926).

2. *See* U.S. CONST. amend. VI ("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 . . . .").

The right to jury trial is guaranteed in Article III as well as the Sixth Amendment. *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."). The scope of the Article III guarantee, however, is considered identical to that of the Sixth Amendment. *See* Frankfurter & Corcoran, *supra* note 1, at 971; George Kaye, *Petty Offenders Have No Peers!,* 26 U. CHI. L. REV. 245, 260 (1959). Although the arguments herein apply to both guarantees, this Note refers only to the Sixth Amendment.

3. *See* Duncan v. Louisiana, 391 U.S. 145, 160 (1968) ("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."); Callan v. Wilson, 127 U.S. 540, 552 (1888) ("[W]hen it is declared that the party is entitled to a speedy trial by an impartial jury . . . [i]t could never have been intended to embrace every species of accusation involving either criminal or penal consequences."); *see also* Frankfurter & Corcoran, *supra* note 1, at 979 ("The Supreme Court, therefore, has given emphatic recognition to the common-law and colonial exemption of 'petty offenses' from the constitutional requirement of jury trial. The implication of exemption is itself part of the Constitution."). *But see* Kaye, *supra* note 2, at 273 (arguing that the petty-offense exception cannot be squared with the plain language of the Constitution).

4. The words *petty* and *serious* are used as Sixth Amendment terms of art throughout this Note. When these words are used to express their ordinary meaning, they will appear in quotation marks.

5. *See Duncan,* 391 U.S. at 158 ("[W]e hold no constitutional doubts about the practices ... of accepting waivers of jury trial and prosecuting petty crimes without extending a right to

In *Blanton v. City of North Las Vegas,*[6] the Supreme Court set forth the definitive standard for distinguishing petty offenses from serious crimes.[7] The benchmark used by the Court is the maximum prison term assigned to each offense by the legislature. Where the penalty exceeds six months' imprisonment, the offense is serious enough to trigger the right to jury trial. Where the penalty is six months' imprisonment or less, there is a strong presumption that the offense is petty; therefore, a defendant accused of that offense has no Sixth Amendment right to jury trial.

The *Blanton* decision, however, provides little guidance in a case where multiple offenses, each of which otherwise would be considered petty, are joined together in a single trial. In such a case, no individual offense would have a statutory penalty of more than six months' imprisonment, but a conviction on all charges could expose the defendant to a lengthy prison term without the opportunity to invoke the procedural safeguards of a jury trial.[8] Lower courts have responded to the problem of applying the *Blanton* standard to multiple petty offenses in three different ways. Some courts apply the standard to each offense individually, regardless of whether other offenses are joined on the same charging instrument.[9] Others add up the possible penalties for all joined offenses and assume that the right to jury trial exists whenever the six-month limit is exceeded by the aggregate potential penalty.[10] Still others refuse requests for jury trial unless the sentence imposed for all offenses in fact will exceed six months' imprisonment.[11]

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jury trial."); United States v. Bencheck, 926 F.2d 1512, 1515 (10th Cir. 1991) ("[I]t is not our function to even question the validity of the petty-offense exception."). Indeed, the judiciary probably could not function without the petty-offense exception:

> For example, 83,092 petty offenses, 56,763 of which were traffic offenses, were disposed of by United States Magistrates in 1987. The federal judiciary, as it is presently constituted, cannot conduct over 83,000 jury trials in one year for this one class of cases in addition to the jury trials that are required for serious criminal cases and civil cases.

926 F.2d at 1515 (citation omitted).

6. 489 U.S. 538 (1989).

7. The standard more appropriately would be called the *Baldwin-Blanton* standard. In United States v. Baldwin, 399 U.S. 66 (1970), the Court held for the first time that a statutory offense having a maximum penalty exceeding six months' imprisonment automatically triggers the Sixth Amendment right to jury trial. This case left open the question of whether an offense with a maximum penalty of less than six months can trigger the Sixth Amendment. *Blanton* considered that issue and held that such offenses are presumed petty. For the sake of brevity, this Note refers to the six-month standard that is central to both of these cases as the *Blanton* standard.

8. This Note assumes that the right to jury trial always favors defendants who, of course, may waive the right whenever it appears advantageous to do so. *See Duncan,* 391 U.S. at 158 ("[T]he fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court.").

9. *See, e.g.,* United States v. Lewis, 65 F.3d 252 (2d Cir. 1995).

10. *See, e.g.,* United States v. Coppins, 953 F.2d 86 (4th Cir. 1991).

11. *See, e.g.,* United States v. Bencheck, 926 F.2d 1512 (10th Cir. 1991).

This Note argues that a criminal defendant accused of multiple offenses has no Sixth Amendment right to jury trial unless one or more of the offenses — considered individually — is serious under the *Blanton* standard. Part I explores one principal that pervades the Supreme Court jurisprudence regarding the petty-offense exception: community preferences determine whether a criminal charge is petty or serious. The Court measures community preferences by looking to the maximum penalty set by the legislature; if no statutory penalty exists, then the Court uses the sentence imposed by the judge as a substitute. Part II argues that, for multiple petty offenses, the *Blanton* standard should be applied to each offense individually because this is the only approach consistent with the Court's petty-offense-exception jurisprudence. Therefore, this Note concludes that multiple petty offenses do not trigger the Sixth Amendment right to jury trial.

I. WHAT MAKES A PETTY OFFENSE *PETTY?*

The Supreme Court has offered several principles for distinguishing petty offenses from serious crimes. At first inspection, these principles may seem contradictory. This Part argues, however, that careful examination of the Court's decisions reveals a hierarchy among them. Section I.A explores the fundamental principle that community preferences determine whether an offense is petty or serious and argues that the consequences for a particular defendant should not determine whether an offense is petty or serious. Section I.B asserts that the maximum penalty set by the legislature for criminal offenses is the best indicator of community preferences. Section I.C argues that, absent a maximum penalty set by the legislature, the sentence imposed by the judge is the second-best indicator of community preferences.

A. *Community Preferences*

The principle that community preferences[12] determine whether a criminal charge is petty or serious recurs throughout the Supreme

12. The phrase "community preferences" is a composite of various phrases employed by the courts and commentators to denote the public's perception of the "seriousness" of an offense. In Frank v. United States, 395 U.S. 147, 148 (1969), the Supreme Court used the phrase "the seriousness with which society regards the offense" to express this concept. This language has been quoted in subsequent Supreme Court decisions. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989); Baldwin v. New York, 399 U.S. 66, 68 (1970). This Note uses "community preferences" to avoid any confusion resulting from the use of the term *serious* to express both society's judgment concerning an offense and the constitutional status of that offense.

The most complete definition of "community preferences" is suggested by Frankfurter and Corcoran in the following passage:

> In subjecting certain conduct to the summary procedure of magistrates, unguarded by the popular element, there was an exercise of moral judgment dividing behavior into

Court's petty-offense-exception jurisprudence. The Court first recognized the connection between community preferences and the petty-offense exception in *District of Columbia v. Clawans.*[13] Since that decision, the Court frequently has reiterated the need to link the application of the petty-offense exception to community preferences.[14]

This principle follows directly from the need for efficient allocation of the right to jury trial. The petty-offense exception exists because this right is too expensive for the public to finance in every criminal prosecution. Efficient allocation of this scarce resource demands that the right to jury trial be reserved for defendants accused of crimes "serious" enough to merit expensive procedural safeguards.[15] Because the public bears the cost of conducting jury trials, the public also should decide where to draw the line between petty and serious crimes.

The principle that community preferences determine whether a criminal offense is petty or serious has an important corollary: consequences for individual defendants should not determine whether charges trigger the right to jury trial. Deference to community preferences follows logically from the need for efficiency in allocating the scarce right to jury trial. No such justification exists for condi-

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serious affairs and minor misdeeds. . . . Broadly 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.

Frankfurter & Corcoran, *supra* note 1, at 980-81. For other formulations of this concept, see District of Columbia v. Clawans, 300 U.S. 617, 628 (1937) (referring to the "community['s] . . . social and ethical judgments"); Haar v. Hanrahan, 708 F.2d 1547, 1549 (10th Cir. 1983) (referring to "the opprobrium that society attaches to the crime charged"); United States v. Craner, 652 F.2d 23, 24 (9th Cir. 1981) (referring to "the general normative judgment of the seriousness of an offense").

13. 300 U.S. 617, 628 (1937) ("Doubts must be resolved . . . 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.*" (emphasis added)). Implicit recognition of this principle dates back further still. Earlier Supreme Court cases decided whether an offense was petty or serious by looking to common law practices. But the common law status of an offense depended on whether summary disposition had been authorized by the British Parliament for that offense. *See* Frankfurter & Corcoran, *supra* note 1, at 932-33. Thus, community preferences concerning an offense were incorporated directly — via Parliament — into the common law status of the offense as petty or serious.

14. *See Blanton,* 489 U.S. at 541 ("In recent years, however, we have sought more 'objective indications of the *seriousness with which society regards the offense.*' " (emphasis added)); *Baldwin,* 399 U.S. at 68 ("In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the *seriousness with which society regards the offense* . . . ." (emphasis added)); *Frank,* 395 U.S. at 148 ("In determining whether a particular offense can be classified as 'petty,' this Court has sought objective indications of the *seriousness with which society regards the offense.*" (emphasis added)); Duncan v. Louisiana, 391 U.S. 145, 160 (1968) ("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." (emphasis added) (citation omitted)).

15. *See Duncan,* 391 U.S. at 160 ("[T]he possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.").

tioning this right on the consequences facing individual defendants. A "serious" consequence to one defendant may be a trivial imposition on another.[16] Therefore, if the seriousness of an offense or set of offenses is determined according to how "serious" individual defendants view a potential sentence, the right to jury trial will be allocated haphazardly — wasted on some defendants and denied unjustly to others.

The Supreme Court has endorsed this corollary almost as frequently as it has endorsed the principle itself. In *Clawans,* the Court stated that the sympathy of a judge for a particular defendant should carry no weight in deciding whether to allocate the right to jury trial.[17] In *Codispoti v. Pennsylvania,*[18] the Court stated specifically that the threat of a lengthy prison sentence alone is not sufficient to trigger the right to jury trial. In both *Blanton v. City of North Las Vegas* and *Baldwin v. New York,* the Court recognized that a defendant sentenced to six months' imprisonment is unlikely to view this sentence as a "petty" consequence but nevertheless endorsed the rule that a six-month sentence does not trigger the right to jury trial.[19] Indeed, the strict six-month rule in *Blanton* itself contradicts any notion that consequences to the defendant should be weighed in deciding whether an offense is petty or serious.

This corollary also finds support in the history of the petty-offense exception. The exception evolved from the practice in England and the American colonies of denying the right to jury trial for certain offenses recognized as "petty" by the legislature.[20] When

16. The converse is also true. *See Baldwin,* 399 U.S. at 73 ("Indeed, 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 his reputation.").

17. *See Clawans,* 300 U.S. at 628 ("Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards . . . .").

18. 418 U.S. 506, 512 (1974) ("[W]e plainly cannot accept petitioners' argument that a [defendant] is entitled to a jury trial simply because a strong possibility exists that he will face a substantial term of imprisonment upon conviction, regardless of the penalty actually imposed.").

19. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 542-43 (1989); *Baldwin,* 399 U.S. at 73.

20. In their classic defense of the petty-offense exception, Frankfurter and Corcoran describe the practice in England at the time of American colonization as follows:

> Thus drastically limited does the right of trial by jury seem to have been known to Englishmen for two centuries preceding the separation of the colonies. Alongside of trial before the popular tribunal was trial by magistrates. There were crimes and crimes. The great dividing line was the use of a jury. The settled practice in which the founders of the American colonies grew up reserved for the justices innumerable cases in which the balance of social convenience, as expressed in legislation, insisted that proceedings be concluded speedily and inexpensively.

Frankfurter & Corcoran, *supra* note 1, at 933. Although restricting its use in various ways, the American colonies retained the English custom of nonjury adjudication. *See id.* at 936 ("Despite these differences, all the colonies, to some extent at least, re-lived the experience of the mother country, and resorted to summary jurisdiction for minor offenses with full loyalty to their conception of the Englishman's right to trial by jury.").

the Constitution was adopted, courts assumed that these common law exceptions were incorporated into the Sixth Amendment.[21] The application of these exceptions depended entirely on statutory dictates and common law precedent, not on the consequences facing a particular defendant. Indeed, many of the offenses considered "petty" at common law carried penalties that would be considered "serious" by today's standards.[22]

B. *The Maximum Statutory Penalty*

The Supreme Court repeatedly has recognized that the best measure of community preferences concerning a criminal offense is the maximum penalty[23] set by the legislature.[24] The assumptions

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21. *See id.* at 969 ("The exclusion of [the] 'petty offense' had been, as we have seen, the accepted doctrine of the colonies and thereafter in the states .... The makers of the Constitution took all this history and practice for granted.").

22. *See* District of Columbia v. Clawans, 300 U.S. 617, 626 (1937) ("[T]here were petty offenses, triable summarily under English statutes, which carried possible sentences of imprisonment for periods from three to twelve months."); *see also* Frankfurter & Corcoran, *supra* note 1, at 932-33 (listing petty offenses from English common law, some of which carry penalties of corporal punishment or imprisonment for up to one year).

23. The penalty authorized by the legislature includes not only the authorized prison term but also any other penalty authorized by the legislature, such as a fine or probation. In *Blanton*, Melvin Blanton was charged with drunk driving which, under Nevada law, carried a maximum penalty of six months' imprisonment, a maximum $1,000 fine, a mandatory penalty of attendance at an alcohol-abuse education course, and an automatic 90-day driver's license suspension. *See* 489 U.S. at 539-40. The Court first concluded that the maximum period of incarceration was insufficient to trigger a right to jury trial. *See* 489 U.S. at 543. The Court next considered whether any of the other penalties implied that the community viewed drunk driving as a serious offense.

> 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. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems "serious" with onerous penalties that nonetheless "do not puncture the 6-month incarceration line."

489 U.S. at 543 (quoting Brief for Petitioners). The Court concluded that none of the additional penalties rendered the offense serious and that no constitutional right to trial by jury therefore existed. *See* 489 U.S. at 543-44.

Since the decision in *Blanton,* few penalties other than the maximum prison term have been held sufficiently serious to trigger the right to jury trial. *Compare* United States v. Nachtigal, 113 S. Ct. 1072 (1993) (holding that a $5,000 fine and alternative of 5 years' probation did not render an offense serious) *with* Richter v. Fairbanks, 903 F.2d 1202 (8th Cir. 1990) (holding that a 15-year driver's license suspension rendered an offense serious) *and* State v. Wiltshire, 491 N.W.2d 324 (Neb. 1992) (same).

24. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 511 (1974) ("[T]he judgment about the seriousness of the crime is normally heavily influenced by the penalty authorized by the legislature...."); Baldwin v. New York, 399 U.S. 66, 68 (1970) ("In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the seriousness with which society regards the offense, and we have found the most relevant such criteria in the severity of the maximum authorized penalty." (citations omitted)); Frank v. United States, 395 U.S. 147, 149 (1969) ("In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion."); Duncan v. Louisiana, 391 U.S. 145, 159 (1968) ("[T]he penalty authorized for a particular crime is of major relevance in determining whether it is serious or not...."); *see also Blanton,* 489 U.S. at 541 (quoting *Baldwin*).

underlying this rule are that the legislature is in the best position to gauge societal preferences[25] and that the legislature fixes the maximum penalty for an offense based on how "serious" society regards the offense.[26] The maximum statutory penalty, therefore, is relevant to the allocation of the right to jury trial because there is a logical relationship between the statutory penalty and community preferences.[27]

The practice of looking to the maximum statutory penalty to determine whether this right attaches is a relatively recent innovation. Early Supreme Court cases followed the haphazard approach of distinguishing between petty and serious offenses by reference to English common law.[28] Subsequent decisions modified this ap-

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25. *See Blanton*, 489 U.S. at 541-42 ("The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is 'far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect.' " (alteration in original) (quoting Landry v. Hoepfner, 840 F.2d 1201, 1209 (5th Cir. 1988))).

26. *See Blanton*, 489 U.S. at 541 ("In fixing the maximum penalty for a crime, a legislature 'include[s] within the definition of the crime itself a judgment about the seriousness of the offense.' " (alteration in original) (quoting *Frank*, 395 U.S. at 149)); *Duncan*, 391 U.S. at 162 n.35 ("[A] legislative judgment as to the seriousness of the crime is imbedded in the statute in the form of an express authorization to impose a heavy penalty for the crime in question."); *see also* United States v. Craner, 652 F.2d 23, 24 (9th Cir. 1981) ("An offense is not 'serious' because it is severely punished; it is severely punished because it is 'serious.' ").

27. *See* Cheff v. Schnackenberg, 384 U.S. 373, 390-91 (1966) (Douglas, J., dissenting) ("The relevance of the sentence, as we have seen, is that it sheds light on the seriousness with which the community and the legislature regard the offense."); United States v. Coppins, 953 F.2d 86, 89 (4th Cir. 1991) ("[T]he most relevant objective indicator is now recognized as being the severity of any maximum penalty that may have been legislatively authorized, reflecting as that does a legislative, hence societal, judgment about the seriousness of the offense."); *see also Frank*, 395 U.S. at 157-59 (Warren, C.J., dissenting) (arguing that probation statute penalties should not be used to determine whether offenses are petty because Congress did not intend that these penalties apply to any particular offense).

28. In Callan v. Wilson, 127 U.S. 540 (1888), the Supreme Court first recognized that the petty-offense exception evolved out of common law practices. Justice Harlan wrote:

> The third article of the Constitution provides for a jury in the trial of 'all crimes, except in cases of impeachment.' The word 'crime,' in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury.

127 U.S. at 549. Taking as its premise that the petty-offense exception evolved from a practice predating the Constitution, the Court concluded that only those offenses exempted from trial by jury at common law could be called petty. All other offenses triggered the right to jury trial. Justice Harlan wrote,

> Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged.

127 U.S. at 557. Following this decision, courts determined whether a defendant could assert a constitutional right to jury trial by researching common law practices. If the offense could be tried summarily at common law, no constitutional right to jury trial existed. If the common law offense required trial by jury, then that right was guaranteed by the Sixth Amend-

proach to avoid dependence on murky common law precedents. In *District of Columbia v. Clawans*,[29] the Court held that the severity of the potential penalty could transform an offense considered petty at common law into a serious offense.[30] Thus, the Court departed from mechanical adherence to common law precedent in determining whether an offense was petty or serious.

More recent Supreme Court decisions have abandoned entirely the use of common law precedent to distinguish between petty and serious offenses. In *Duncan v. Louisiana*,[31] the Court concluded that the maximum statutory penalty alone may indicate that an offense is serious, thus triggering the right to jury trial. Justice White wrote, "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."[32] Subsequent decisions interpreting the petty-offense exception cite *Duncan* for the proposition that the maximum penalty set by the legislature should play a primary role in deciding whether an offense is petty or serious.[33]

C. *The Sentence Imposed*

The rule that the maximum penalty set by the legislature is the best indicator of community preferences cannot apply in cases where no maximum statutory penalty exists for an offense. For example, in many jurisdictions criminal contempt has no maximum statutory penalty.[34] To deal with this problem, the Supreme Court

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ment. *See, e.g.*, District of Columbia v. Colts, 282 U.S. 63, 73 (1930) (holding that reckless driving triggered the right to jury trial because "[i]t was an indictable offense at common law").

29. 300 U.S. 617 (1937).

30. *See* 300 U.S. at 625 ("[T]his Court has refused to foreclose consideration of the severity of the penalty as an element to be considered in determining whether a statutory offense, in other respects trivial and not a crime at common law, must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial prescribed by the Constitution.").

31. 391 U.S. 145 (1968).

32. 391 U.S. at 159.

33. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989); Baldwin v. New York, 399 U.S. 66, 68 (1970).

34. *See Duncan*, 391 U.S. at 162 n.35 ("[C]riminal contempt is unique in that legislative bodies frequently authorize punishment without stating the extent of the penalty which can be imposed."); *see also* Frank v. United States, 395 U.S. 147, 149 & n.1 (1969) (noting the various federal criminal contempt provisions); Bloom v. Illinois, 391 U.S. 194, 206 n.8 (1968) (describing state criminal contempt provisions).

Criminal contempts always have been treated as a unique class of offenses under the Sixth Amendment. Early Supreme Court cases denied the right to trial by jury to those accused of criminal contempt, regardless of the punishment involved. Green v. United States, 356 U.S. 165 (1958), summarizes the logic of these early cases. The Supreme Court noted that when the Constitution was created it had been common practice in England and colonial America to try contempt charges summarily, *see* 356 U.S. at 184-86, and then stated:

stated an alternative rule for criminal contempts in *Bloom v. Illinois*.[35] In cases where no maximum statutory penalty exists for a criminal offense, the sentence imposed by the judge is the best indicator of community preferences regarding the offense.[36]

> The principle that criminal contempts of court are not required to be tried by a jury under Article III or the Sixth Amendment is firmly rooted in our traditions. . . . In various respects, such as the absence of a statutory limitation of the amount of a fine or the length of a prison sentence which may be imposed for their commission, criminal contempts have always differed from the usual statutory crime under federal law. As to trial by jury and indictment by grand jury, they possess a unique character under the Constitution.

356 U.S. at 187.

A few years after *Green*, the Supreme Court began to waver in its conviction that the Sixth Amendment right to jury trial did not apply to criminal contemnors. In United States v. Barnett, 376 U.S. 681 (1964), the Court declined to create a general right to jury trial for those accused of criminal contempt but hinted in a footnote that the Constitution might bar courts from imposing substantial penalties for criminal contempt without affording defendants the right to trial by jury. *See* 376 U.S. at 695 n.12 ("Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses.").

In Cheff v. Schnackenberg, 384 U.S. 373 (1966), the Court again declined to extend a constitutional right to jury trial to all criminal contemnors. But, in the exercise of its supervisory power, the Court barred federal courts from imposing sentences of more than six months' imprisonment for criminal contemnors unless they had been afforded the opportunity for a jury trial. *See* 384 U.S. at 380.

In 1968, the Supreme Court finally abolished the per se rule that criminal contemnors have no right to jury trial under the Sixth Amendment in Bloom v. Illinois, 391 U.S. 194 (1968).

> [W]e are acutely aware of the responsibility we assume in entertaining challenges to a constitutional principle which is firmly entrenched and which has behind it weighty and ancient authority. Our deliberations have convinced us, however, 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, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial.

391 U.S. at 197-98.

35. 391 U.S. 194 (1968). The rule in *Bloom* is not, strictly speaking, a rule for criminal contempts. Criminal contempts that have been assigned a statutory penalty by a legislature are not evaluated by the sentence imposed but by the maximum penalty. *See infra* text accompanying notes 40-43 (discussing Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968)).

36. *See Bloom*, 391 U.S. at 211 ("[W]hen the legislature has not expressed a judgment 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.").

This rule is counterintuitive. How can the right to jury trial, which must be allocated at the outset of trial, depend on the sentence eventually imposed, which is not known until the end of trial? The answer is that the rule functions by imposing limits on sentencing discretion. If a judge denies a motion for jury trial, then the sentence imposed cannot exceed six months' imprisonment. If, after hearing the evidence, the judge wishes to sentence the defendant to more than six months, then the judge must grant a new trial or else the sentence will be reduced on appeal. The Court made the practical impact of this rule clear in Taylor v. Hayes, 418 U.S. 488 (1974). Justice White wrote:

> It is argued that a State should not be permitted, after conviction, to reduce the sentence to less than six months and thereby obviate a jury trial. The thrust of our decisions, however, is to the contrary: in the absence of legislative authorization of serious penalties for contempt, a State may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months. We discern no material difference

A cursory reading of the *Bloom* decision suggests that the Court based its decision on the consequences facing the defendant, rather than community preferences. The sentence imposed, after all, *is* the consequence facing the defendant. The *Bloom* rule, however, did not result from sympathy for defendants facing a sentence of more than six months' imprisonment.[37] The sentence imposed is relevant to the right to jury trial because it represents the judge's estimation of community preferences regarding a particular offense.[38] Therefore, the rule that, under some circumstances, the sentence imposed may determine the right to jury trial is not an exception to the principle that community preferences determine whether a criminal offense is petty or serious.

The rule in *Bloom* also is not an exception to the rule in *Duncan* that the maximum statutory penalty set by the legislature is the best indication of community preferences. The two rules simply apply to different fact situations.[39] The statutory penalty controls the right to jury trial whenever a maximum statutory penalty exists for a charged offense. In the absence of such, the sentence imposed controls. In *Dyke v. Taylor Implement Manufacturing Co.*,[40] the Court stated the hierarchical relationship between these two rules in clear terms. The petitioner, Wayne Dyke, was convicted of criminal contempt which, pursuant to a Tennessee statute, carried a maximum penalty of ten days' imprisonment. Not surprisingly — given the short sentence involved — the Court held that Mr. Dyke had no Sixth Amendment right to jury trial. The Court stated that the basis for this outcome was the statutory penalty, not the sentence imposed. Justice White wrote,

> Alleged criminal contemnors must be given a jury trial, therefore, unless the legislature has authorized a maximum penalty within the "petty offense" limit or, if the legislature has made no judgment about

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between this choice and permitting the State, after conviction, to reduce a sentence to six months or less rather than to retry the contempt with a jury.

418 U.S. at 496. The important point to understand is that, by this circuitous route, the right to jury trial is allocated only to those defendants who, in the eyes of the judge, have committed offenses worthy of a "serious" penalty.

37. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974) ("[W]e plainly cannot accept petitioners' argument that a contemnor is entitled to a jury trial simply because a strong possibility exists that he will face a substantial term of imprisonment upon conviction, regardless of the punishment actually imposed.").

38. *See Frank*, 395 U.S. at 149 ("[T]his court has held that in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed in the best indication of the seriousness of the particular offense.").

39. In fact, the decisions in *Bloom* and *Duncan* were both handed down on May 20, 1968, and both majority opinions were authored by Justice White. The decisions are printed consecutively in the official reporter. *See* Duncan v. Louisiana, 391 U.S. 145 (1968); *Bloom*, 391 U.S. at 194.

40. 391 U.S. 216 (1968).

> the maximum penalty that can be imposed, unless the penalty actually imposed is within that limit.[41]

Under this formula, the *Duncan* rule for offenses with a maximum statutory penalty takes precedence over the *Bloom* rule for offenses without a maximum.[42] Therefore, in most circumstances, the maximum statutory penalty controls the Sixth Amendment right to jury trial.

The same conclusion regarding the hierarchy between the statutory penalty and the sentence imposed can be inferred by the Supreme Court's repeated statement that objective criteria of community preferences are preferable to subjective criteria.[43] Statutory penalties are more objective because they are based on the experience of numerous legislators, presumably elected precisely because they are in touch with the preferences of society.[44] Sentences imposed are more subjective because they normally are based on an individual judge's discretion.

II. Judicial Approaches to Multiple Petty Offenses

The Supreme Court's use of two different rules for measuring community preferences has been a source of confusion for lower courts trying to apply the petty-offense exception to multiple petty offenses. Further complicating matters, lower courts sometimes apply these rules mechanically, losing sight of the overarching principle that community preferences must determine whether an offense — or set of offenses — is petty or serious. This Part explores the disagreement among lower courts concerning application of these rules to situations where multiple petty offenses are joined for trial.

Courts have adopted three different methods for determining whether multiple petty offenses trigger the Sixth Amendment right to jury trial. The methods are similar in that they each incorporate the six-month standard articulated by the Supreme Court in *Blanton v. City of North Las Vegas.* The methods disagree, how-

41. 391 U.S. at 219-20.

42. *See also Frank*, 395 U.S. at 149 & n.2 (qualifying the rule that, for criminal contempts, the sentence imposed is the best indication of community preferences by stating, "[i]f the statute creating the offense specifies a maximum penalty, then of course that penalty is the relevant criterion"); *Duncan*, 391 U.S. at 162 n.35 (arguing that the sentence imposed is irrelevant "where a legislative judgment as to the seriousness of the crime is imbedded in the statute in the form of an express authorization to impose a heavy penalty for the crime in question").

43. *See* United States v. Nachtigal, 113 S. Ct. 1072, 1073 (1993); Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989); Baldwin v. New York, 399 U.S. 66, 68 (1970); *Frank*, 395 U.S. at 148; District of Columbia v. Clawans, 300 U.S. 617, 628 (1937) ("Doubts 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.").

44. *See Blanton*, 489 U.S. at 541-42.

ever, concerning how penalties associated with a set of offenses should be evaluated under the six-month standard.

First, some courts argue that the maximum penalty for each offense charged should be compared individually to the six-month standard, regardless of whether the offense is joined with other offenses.[45] This approach is called the "Individual Penalty Approach."[46] The Second Circuit adopted this approach in *United States v. Lewis.*[47] Ray Lewis was charged with two counts of obstructing the mail, an offense punishable by six months' imprisonment. A judge convicted Mr. Lewis on both counts and sentenced him to three years' probation.[48] Mr. Lewis appealed the conviction, arguing that his Sixth Amendment right to jury trial had been violated because the aggregate penalty that the judge could have imposed following a conviction on both counts exceeded the six-month *Blanton* standard.[49] The Second Circuit rejected this argument and affirmed the conviction noting that, under the rule in *Blanton,* the right to jury trial depends upon indications from Congress that the offense in question is serious. The court concluded that "[b]ecause Congress has given no indication that multiple offenses are more serious by virtue of their multiplicity than are single offenses of the same nature, the right to a jury trial cannot depend upon the maximum potential aggregate term of incarceration."[50]

Second, some courts argue that the aggregate of the maximum penalties for all joined offenses should be compared to the six-month *Blanton* standard.[51] This approach is called the "Aggregate

45. *See* United States v. Lewis, 65 F.3d 252, 254-55 (2d Cir. 1995); City of Fort Lauderdale v. Byrd, 242 So. 2d 494, 497 (Fla. Dist. Ct. App. 1970); *see also* United States v. Coppins, 953 F.2d 86, 92 (4th Cir. 1991) (Niemeyer, J., dissenting); *cf.* Scott v. District of Columbia, 122 A.2d 579, 581 (D.C. 1956) (applying this approach to the right to jury trial under District of Columbia law); City of Monroe v. Wilhite, 233 So. 2d 535, 536 (La. 1970) (same under Louisiana law); State v. James, 415 P.2d 543, 546 (N.M. 1966) (same under New Mexico law).

46. Courts adopting the approaches described in this section use inconsistent terms — or no term at all — to describe their approaches. This Note adopts a uniform descriptive set of terms. In the case of the Individual Penalty Approach, no court has named this method of applying the *Blanton* standard.

47. 65 F.3d 252 (2d Cir. 1995).

48. *See* 65 F.3d at 253. Although the Second Circuit adopted the Individual Penalty Approach knowing that Mr. Lewis had been sentenced to probation, the approach also has been adopted where the defendant was sentenced to a fine, *see Wilhite,* 233 So. 2d at 535, and where the sentence was not yet determined, *see Byrd,* 242 So. 2d at 494.

No court has applied the Individual Penalty Approach to deny a defendant the right to jury trial and then sentenced that defendant to more than six months' imprisonment. Such an outcome, however, would be consistent with the approach.

49. *See Lewis,* 65 F.3d at 253.

50. 65 F.3d at 253; *see also* United States v. Coppins, 953 F.2d 86, 92 (4th Cir. 1991) (Niemeyer, J., dissenting) ("This is the case where multiple zeros still add up to zero.").

51. *See Coppins,* 953 F.2d at 89-90; United States v. Potvin, 481 F.2d 380, 382-83 (10th Cir. 1973), *modified,* Haar v. Hanrahan, 708 F.2d 1547 (10th Cir. 1983); United States v. Musgrave, 695 F. Supp. 231, 233 (W.D. Va. 1988); United States v. Coleman, 664 F. Supp.

Penalty Approach."[52] The Fourth Circuit adopted this approach in *United States v. Coppins.*[53] Mildred Coppins was charged with simple assault, assault by beating, and trespassing — all in connection with a scuffle with police at the entrance of a military base. Although the three offenses carried a maximum aggregate penalty of 15 months' imprisonment, Ms. Coppins was denied a jury trial, convicted by a judge, and sentenced to pay a fine of $170. On appeal, Ms. Coppins argued that the aggregate penalty, not each offense individually, should have been compared to the six-month *Blanton* standard to determine whether she was entitled to jury trial. The Fourth Circuit agreed, remanding the case for a jury trial notwithstanding the fact that the sentence actually imposed — a $170 fine — implied that the trial judge regarded the set of offenses as petty.

Third, some courts argue that no Sixth Amendment right to jury trial exists unless the sentence eventually imposed on the defendant exceeds the six-month *Blanton* standard.[54] This approach is called the "Sentence Imposed Approach."[55] The Ninth Circuit adopted this approach in *Rife v. Godbehere.*[56] William Rife was charged with three counts of a misdemeanor punishable by up to six months' imprisonment.[57] After denying Mr. Rife's motion for jury trial, the trial judge convicted Mr. Rife on all three counts and sentenced him to one year in prison.[58] Mr. Rife appealed the convic-

548, 549 (D.D.C. 1985); United States v. O'Connor, 660 F. Supp. 955, 956 (N.D. Ga. 1987); *see also* United States v. Bencheck, 926 F.2d 1512, 1522 (10th Cir. 1991) (Ebel, J., dissenting).

52. This approach also has been called the "objective approach." *See Bencheck*, 926 F.2d at 1517; *Haar*, 708 F.2d at 1553.

53. 953 F.2d 86 (4th Cir. 1991).

54. *See Bencheck*, 926 F.2d at 1512; *Rife*, 814 F.2d at 563; *Haar*, 708 F.2d at 1547; Bruce v. State, 614 P.2d 813 (Ariz. 1980); *see also* Maita v. Whitmore, 508 F.2d 143 (9th Cir. 1974) (adopting the Sentence Imposed Approach for multiple criminal contempts where each count has a maximum statutory penalty of six months' imprisonment).

55. This approach also has been called the "subjective approach." *See Bencheck*, 926 F.2d at 1518; *Haar*, 708 F.2d at 1553.

56. 814 F.2d 563 (9th Cir. 1987). Although this case predates the *Blanton* decision, it came after the six-month ceiling on petty offenses was announced in Baldwin v. New York, 399 U.S. 66 (1970). Since *Blanton* effectively expanded the scope of petty offenses, there is no reason to think that the outcome in *Rife* would be different today. For a post-*Blanton* decision adopting the Sentence Imposed Approach, see *Bencheck*, 926 F.2d at 1512.

57. *See Rife*, 814 F.2d at 564. Rife was charged with unlawful use of the telephone to terrify, intimidate, threaten, annoy, or harass, which is a class-one misdemeanor. *See* ARIZ. REV. STAT. ANN. § 13-2916 (1989). Class-one misdemeanors are punishable by up to six months' imprisonment. *See* ARIZ. REV. STAT. ANN. § 13-707 (1989).

58. The initial sentence also included six years' probation and a $3,000 fine. *See Rife*, 814 F.2d at 564. Although Rife's initial sentence was "serious" under the *Blanton* standard, other cases adopting the Sentence Imposed Approach have involved restrictions or putative restrictions on the sentencing discretion of the trial judge.

Haar was the first case to adopt the Sentence Imposed Approach for statutory offenses. Stephen Haar was convicted of two petty offenses in a magistrate proceeding and sentenced to six months in prison. On trial *de novo,* the district court denied Mr. Haar's request for a

tion twice and eventually his sentence was reduced to six months. The Ninth Circuit affirmed the conviction, holding that the trial judge may have violated Mr. Rife's Sixth Amendment right to jury trial by sentencing him to more than six months but that this violation was remedied when the sentence was reduced on appeal.[59]

This Part compares the reasoning behind each of these judicial approaches to Supreme Court doctrine regarding the petty-offense exception explored in Part I. Section II.A argues that the Individual Penalty Approach is consistent with Supreme Court principles. Section II.B argues that the Aggregate Penalty Approach conflicts with the principle that community preferences determine whether a criminal charge is petty or serious. Section II.C argues that the Sentence Imposed Approach is contrary to the rule that the statutory penalty set by the legislature is the best indication of community preferences.

A. *The Individual Penalty Approach*

The Individual Penalty Approach is consistent with both the principle that community preferences determine the seriousness of an offense or set of offenses[60] and the rule that the maximum penalty set by the legislature is the best indicator of community preferences.[61] Courts adopting this approach apply the six-month *Blanton* standard to each offense charged, regardless of whether an offense is joined with other offenses. The result is that a defendant charged with multiple offenses has a right to jury trial only if at least one of the offenses charged is punishable by more than six months' imprisonment. Because the Individual Penalty Approach is a literal

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jury trial because, pursuant to a local court rule, the court could not impose a sentence greater than that previously imposed by the magistrate. Owing to this procedural quirk, Mr. Haar faced a sentence of no greater than six months' imprisonment. The Tenth Circuit affirmed Mr. Haar's nonjury conviction, holding that "a defendant is entitled to a jury trial for multiple petty offenses . . . only if he is actually threatened at the commencement of trial with an aggregate potential penalty of greater than six months' imprisonment." *Haar*, 708 F.2d at 1553.

Bencheck is another example of the Sentence Imposed Approach. Kevin Bencheck was charged with several offenses — each having a maximum penalty of six months' imprisonment — stemming from a traffic stop near a military base. The judge denied Mr. Bencheck's motion for jury trial, promising him that under no circumstances would he be sentenced to more than six months in prison. After convicting Mr. Bencheck on four offenses, the judge sentenced him to a total of 10 days in jail. The Tenth Circuit affirmed the conviction, holding that denial of the right to jury trial is "not repugnant to the United States Constitution" as long as the sentence imposed does not exceed the six-month *Blanton* standard. *Bencheck*, 926 F.2d at 1520.

59. *See Rife*, 814 F.2d at 565. In effect, the court held that as long as the sentence eventually imposed does not exceed six months' imprisonment, a trial judge is free to deny a motion for jury trial. If the sentence imposed following a bench trial exceeds six months, then the defendant is entitled to a sentence reduction or a new trial before a jury. *See supra* note 36.

60. *See supra* section I.A.

61. *See supra* section I.B.

application of the *Blanton* rule for nonjoined offenses, it is facially consistent with the principles of petty-offense-exception jurisprudence.

Critics of the Individual Penalty Approach argue that it allows "serious" sentences to be imposed without triggering the right to jury trial. Defendants facing like consequences from criminal charges ought to be treated alike under the Sixth Amendment. For example, a defendant facing five years' imprisonment for multiple petty offenses should have the same right to jury trial as one facing five years' imprisonment for a single offense.

Though intuitively appealing, this argument's focus on the consequences to the defendant contradicts the fundamental principle that the right to jury trial must be allocated according to community preferences. This principle implies that the right to jury trial should not be allocated according to the consequences facing individual defendants.[62] For this reason, the Supreme Court has noted repeatedly that the consequences to individual defendants should not control the right to jury trial.[63]

The argument that "serious" penalties alone should trigger the right to jury trial also ignores the fact that, under any rule for multiple offenses, the rule in *Blanton* allows "serious" penalties to accrue without triggering the right to jury trial. For example, suppose that a defendant convicted of a petty offense and sentenced to six months in prison commits a second petty offense while incarcerated.[64] In the trial on the second offense,[65] the defendant could not assert the right to jury trial based on the fact that he is already in prison because the rule in *Blanton* forecloses the possibility of looking beyond the maximum penalty of the offense charged.[66] If the defendant is convicted on the second charge and sentenced to an

62. *See supra* section I.A.

63. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974) ("[W]e plainly cannot accept petitioners' argument that a contemnor is entitled to a jury trial simply because a strong possibility exists that he will face a substantial term of imprisonment upon conviction . . . ."); Duncan v. Louisiana, 391 U.S. 145, 160 (1968) ("[T]he possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications."). This conclusion also is implicit in the oft-repeated statement that objective measures of seriousness must be preferred over subjective ones. *See supra* note 43.

64. Incarceration is not essential to the example. Under the same logic used in this example, the defendant might commit the second offense soon after being released or even many years later. Regardless of the total amount of time involved, the defendant will still serve a total of a year in prison based on two petty offenses.

65. Of course, the two offenses cannot be joined for trial because the defendant already has been convicted of the first offense. But this is not a necessary ingredient of the example. "Serious" penalties also could result where a prosecutor declines to join two alleged offenses, and the defendant has no statutory right to joinder. *See infra* text accompanying notes 89-91.

66. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989) ("A defendant is entitled to a jury trial . . . only if he can demonstrate that . . . statutory penalties . . . are so

additional six months behind bars, he will spend a total of a year in prison — a "serious" penalty — for committing two petty offenses.[67] Because the *Blanton* rule itself creates the possibility of a "serious" penalty resulting from multiple petty offenses, the possibility of a "serious" penalty alone cannot be sufficient to trigger the right to jury trial.[68]

Critics of the Individual Penalty Approach also argue that it fails to reflect community preferences in situations where a set of *related* offenses is regarded as more serious than the same set of unrelated offenses. The classic example of this situation is felony murder. Causing an accidental death during the course of committing a felony is far more serious in the eyes of society than causing an accidental death and committing a felony on two different occasions.[69] The same phenomenon exists in the context of petty offenses. For example, speeding through a red light likely would be regarded by society as more serious than speeding and running a red light on two different occasions. Critics argue that the Individual Penalty Approach fails to account for this difference in community preferences. Therefore, the approach does not trigger the right to jury trial for some sets of offenses regarded as serious by society.

But this argument overlooks the fact that legislatures do account for some situations where sets of related offenses are more serious than sets of offenses committed in isolation by defining independent offenses that incorporate sets of lesser offenses. The felony murder rule is the perfect example. Because society believes that causing a death during the commission of a felony is more serious than causing death and committing a felony on two different occasions, legislatures have passed laws authorizing an enhanced

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severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one.").

67. In theory, there is no limit to the amount of time a defendant could spend in prison — without the benefit of a jury trial — based solely on the commission of petty offenses.

68. The Individual Penalty Approach affects only the right to jury trial under Article III and the Sixth Amendment and therefore is compatible with due process limits on prison sentences that may be imposed without a jury trial. It would be an odd argument, of course, to claim that due process requires a broader right to trial by jury than the explicit guarantee contained in the Sixth Amendment.

This approach also has no impact on the right to jury trial under state constitutions or under federal or state statutes. Indeed, there is nothing to prevent a legislature from passing a statute enhancing the maximum penalty for multiple petty offenses in order to trigger this right under *Blanton*. *Cf.* United States v. Lewis, 65 F.3d 252, 255 (2d Cir. 1995) (arguing that 18 U.S.C. § 3584(a) (1994), which states the general rule in federal sentencing that "[m]ultiple terms of imprisonment imposed at the same time run concurrently," implies that Congress views multiple offenses as no more serious than a single offense). For these reasons, critics of this approach may be mollified by the fact that limits may be placed on "serious" consequences flowing from petty offenses without doing violence to settled petty-offense-exception jurisprudence.

69. *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.5 (2d ed. 1986 & Supp. 1995) (discussing the history and application of the felony murder rule).

penalty for this combination of offenses.[70] By the same token, legislatures have passed laws against reckless driving which may be invoked to impose an enhanced penalty against a driver, such as one who speeds through a red light egregiously violating the rules of the road.[71] Thus, the objection that the Individual Penalty Approach does not account directly for community preferences concerning certain sets of related offenses is tempered by the fact that legislatures indirectly account for such situations by creating new offenses with enhanced penalties.[72]

The fact that legislatures define some serious crimes so that they include sets of petty offenses raises yet another concern. Critics argue that the Individual Penalty Approach offers a new opportunity for prosecutorial abuse by allowing a serious crime to be broken down into a set of petty offenses for the purpose of imposing a "serious" sentence without triggering the right to jury trial. For example, a person suspected of punching a victim five times with the intent of inflicting grievous bodily injury may be charged with one count of aggravated assault, a serious offense, or with five counts of simple assault, a petty offense. Under the Individual Penalty Approach, the prosecutor can dictate the suspect's Sixth Amendment right to jury trial through the exercise of his charging discretion. By charging a set of petty offenses instead of a single serious offense, the prosecutor effectively can eliminate the defendant's right to jury trial.[73]

Although the charging discretion of the prosecutor is always susceptible to abuse, the risk that a suspect in fact will receive an unjust "serious" penalty based on multiple petty offenses is limited. A bench trial does not imply an unfair trial.[74] In order for a prosecutor to succeed in imposing a "serious" penalty for petty offenses, the trial judge must cooperate with the prosecutor's efforts. Only if the judge convicts the defendant on enough counts, imposes long enough sentences for each offense, and orders the sentences to be

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70. *See, e.g.*, 18 U.S.C. § 1111 (1994) (including felony murder in the definition of first-degree murder).

71. *See, e.g.*, N.Y. VEH. & TRAF. LAW § 1212 (McKinney Supp. 1995).

72. *See* United States v. Coppins, 953 F.2d 86, 92 (4th Cir. 1991) (Niemeyer, J., dissenting) ("Only when one charge is elevated in seriousness by the existence of the other, such as under a recidivism statute, would multiple charging cause the elevation of the seriousness of a single offense. And in those cases, the statutorily enhanced sentence resolves the analysis." (citation omitted)).

73. This scenario could give rise to the ironic defense of vindictive nonprosecution. *Cf.* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.5(a) (1984 & Supp. 1991) (discussing the defense of vindictive prosecution).

74. *See* Duncan v. Louisiana, 391 U.S. 145, 158 (1968) ("We would not assert, however, that every criminal trial — or any particular trial — held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury."). Indeed, some argue that nonjury trials may be fairer than jury trials. *Cf.* 391 U.S. at 188-89 (Harlan, J., dissenting).

served consecutively will the prosecutor accomplish his goal of imposing a "serious" sentence based on multiple petty offenses. As a result, the risk of negative consequences to the defendant arising from this variant of prosecutorial abuse is probably small.

B. *Aggregate Penalty Approach*

The Aggregate Penalty Approach contradicts the principle that community preferences determine whether a criminal offense is petty or serious.[75] This approach triggers the right to jury trial whenever the aggregate penalty for a set of joined, petty offenses exceeds the six-month *Blanton* standard. Although courts adopting this approach pay lip service to the importance of community preferences,[76] they do not suggest any reasonable basis for concluding that the aggregate penalty is related to community preferences concerning the set of offenses. Without some link between the aggregate penalty and community preferences, the Aggregate Penalty Approach cannot be squared with petty-offense-exception jurisprudence.

For individual offenses, a logical connection exists between community preferences and the allocation of the right to jury trial. When a legislature sets the maximum penalty for a statutory offense, it includes within that penalty an assessment of community preferences concerning the offense.[77] Because legislators are constantly in touch with their constituents, and legislators can modify statutory penalties whenever public sentiment shifts,[78] courts reasonably can assume that the maximum statutory penalty accurately reflects community preferences. The reasonableness of the six-month *Blanton* standard depends on this logical connection.[79] Without a direct correlation between legislative action and community preferences, the *Blanton* standard would be senseless — allocating the right to jury trial solely on the basis of legislative whim.

When statutory penalties are aggregated, the cause-and-effect relationship between community preferences and the maximum penalty disappears. No advocate of the Aggregate Penalty Approach has argued that legislatures in fact consider the various ways in which penalties might be aggregated when setting the maximum penalty for particular offenses. But, unless legislatures do assign maximum penalties with aggregation in mind, the crucial link con-

75. *See supra* section I.A (discussing community preferences).

76. *See Coppins*, 953 F.2d at 89; United States v. O'Connor, 660 F. Supp. 955, 956 (N.D. Ga. 1987).

77. *See supra* note 26.

78. *See supra* note 25.

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

necting community preferences to the maximum penalty is absent.[80] For this reason, courts adopting the Aggregate Penalty Approach run the risk of allocating the right to jury trial without reference to community preferences.

Even if aggregate penalties are not connected directly to community preferences through the legislature, advocates of the Aggregate Penalty Approach still argue that aggregation provides the best estimate available of community preferences concerning sets of petty offenses.[81] If a set of petty offenses, considered as a whole, generally is more serious than any one of the offenses making up the set,[82] the Aggregate Penalty Approach, though imperfect, may be the best available method for estimating the difference between the seriousness of an individual petty offense and the seriousness of a set of petty offenses.

The problem with this "best estimate" argument is that the Aggregate Penalty Approach does not trigger the right to jury trial for all sets of offenses that have an aggregate penalty exceeding six months but only those sets that have been joined for trial. The aggregate penalty for a particular set of offenses is the same regardless of whether the constituent offenses have been joined. Therefore, if this approach is justified by its ability to gauge public sentiment regarding a set of offenses, then joined and nonjoined offenses should be treated alike. But joined and nonjoined offenses

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80. Even if a legislature did construct a scheme of maximum penalties designed to be aggregated by the courts — an enormously difficult endeavor given the possibility that any offense may be joined with any other offense — the question of whether such an artificial scheme actually reflects community preferences would remain. There is no reason to assume that community preferences aggregate as easily as maximum terms of imprisonment.

81. Thus far, only one court has cast the argument in terms of estimating community preferences. *See* Haar v. Hanrahan, 708 F.2d 1547, 1552 (10th Cir. 1983) ("The aggregate of the statutorily prescribed penalties provides the objective indicia of the opprobrium that society attaches to the entire criminal act and is thus the appropriate measure of the act's seriousness."). That court, however, rejected the Aggregate Penalty Approach in favor of the Sentence Imposed Approach. *See* 708 F.2d at 1553. Courts that have adopted the Aggregate Penalty Approach usually justify it by arguing that potential consequences to the defendant are "serious" whenever the aggregate penalty exceeds six months. *See, e.g.,* United States v. Potvin, 481 F.2d 380, 382 (10th Cir. 1973) ("We believe that the defendants can view as no less serious a possible penalty of a year in prison when charged with two offenses arising out of the same act, transaction, or occurrence, than if charged with one offense having a potential penalty of one year's imprisonment."). This justification, however, plainly contradicts the principle that consequences to the defendant should not determine whether an offense is petty or serious. *See supra* text accompanying notes 16-19.

82. No advocate of this approach explicitly argues that *society* always regards a set of offenses as more serious than the sum of the individual constituent offenses. Indeed, such a proposition would be difficult to establish. For example, society's judgment concerning two parking violations is probably identical to its judgment concerning one parking violation. *See* United States v. Lewis, 65 F.3d 252, 255 (2d Cir. 1995) ("Congress has not indicated that multiple offenses for which a defendant is prosecuted jointly are necessarily any more serious in their aggregate than the most serious individual offense."). For this reason, it is a common practice for courts to impose concurrent sentences, especially in the petty offense context. *See, e.g.,* 18 U.S.C. § 3584(a) (1994).

must be treated differently because, under *Blanton,* a set of nonjoined offenses may not trigger the right to jury trial even if the aggregate penalty exceeds six months' imprisonment.[83]

In response to this problem, advocates of the Aggregate Penalty Approach could argue that society considers joined sets of offenses to be more serious than nonjoined sets of offenses. But there is no reason to believe that community preferences are related to the decision to join offenses.[84] Joinder is simply a procedural device designed to promote efficiency in the courts.[85] Community preferences concerning a set of offenses are not related to the decision to join those offenses for trial.[86] The prosecutor's decision to join offenses for trial is normally influenced only by concerns about efficiency in the presentation of evidence and fairness to the defendant.[87]

The arbitrary distinction between joined and nonjoined offenses under the Aggregate Penalty Approach also creates a perverse incentive for prosecutors to refuse to join offenses in order to avoid expensive jury trials.[88] Joinder of offenses may be desirable for the defendant as well as the prosecutor.[89] But if joinder itself creates expensive procedural rights — as it does under the Aggregate Pen-

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83. *See, e.g., Lewis,* 65 F.3d at 255 (noting, in a case with multiple petty offenses that the Government could have tried separately, that the defendant himself "admit[ted] that under such a circumstance he would not have been entitled to a jury trial").

84. *See* 65 F.3d at 255 ("The mere fact that the government chose to consolidate the charges provides no greater justification for a jury trial than if the charges were tried separately.").

85. *See* City of Fort Lauderdale v. Byrd, 242 So. 2d 494, 497 (Fla. Dist. Ct. App. 1970) ("The joinder of offenses for purposes of trial is a procedural device designed to promote efficiency and convenience and has nothing to do with the nature of the individual offense as serious or petty."); State v. James, 415 P.2d 543, 546 (N.M. 1966) ("The consolidation of the petty offenses for trial does not change their nature, nor can they when combined be classed as a felony."), *overruled by* State v. Sanchez, 786 P.2d 42, 46 (N.M. 1990); *see also* United States v. Coppins, 953 F.2d 86, 91 (4th Cir. 1991) (Niemeyer, J., dissenting) ("Simply because the offenses were tried together or on one charging document is, in my judgment, irrelevant to the constitutional inquiry."); 2 LAFAVE & ISRAEL, *supra* note 73, § 17.1(a).

86. Even if prosecutors did attempt to estimate community preferences when deciding whether to join offenses, such subjective speculation has been proscribed specifically by the Supreme Court. In Blanton v. City of North Las Vegas, 489 U.S. 538 (1988), the Supreme Court stated that "the judiciary should not substitute its judgment as to seriousness for that of a legislature." 489 U.S. at 541. Arguably, the same admonition applies to members of the executive branch. After all, individual prosecutors have no better insight into community preferences than individual judges. Therefore, attempts by a prosecutor to account for community preferences when deciding whether to join offenses probably would not be regarded by the Supreme Court as objective indications of seriousness. *Cf.* 489 U.S. at 541 ("In recent years, however, we have sought more 'objective indications of the seriousness with which society regards the offense.' ").

87. *See* 2 LAFAVE & ISRAEL, *supra* note 73, § 17.1(a), at 354.

88. The prosecutor always has discretion, as an initial matter, to refuse to join related offenses. *See* 2 LAFAVE & ISRAEL, *supra* note 73, § 17.3(a). The court may choose to consolidate related indictments or informations sua sponte. *See* 2 *id.* Note that private parties have no authority to force the prosecutor to charge offenses all at once. *See* 2 *id.* § 13.3(a).

89. Professors LaFave and Israel describe the advantages of joinder as follows:

alty Approach — prosecutors will avoid joining offenses and, instead, charge each offense in a separate indictment or information.[90] This result is the worst of all possible worlds for the defendant, who is both denied the right to jury trial for the set of offenses and denied the advantages of a single trial for all related charges.

C. *Sentence Imposed Approach*

The Sentence Imposed Approach contradicts the rule that the maximum penalty set by the legislature is the best indication of community preferences. In sentencing a person convicted of multiple offenses, a judge does provide an indication of community preferences concerning the set of offenses charged. The Supreme Court has deferred to this subjective judgment where the crime is criminal contempt because no statutory indication of community preferences exists for that offense. But for offenses carrying a maximum statutory penalty, the Supreme Court consistently has held that the legislature's estimation of community preferences must be preferred to that of the judiciary.[91]

Advocates of the Sentence Imposed Approach argue that the rule in *Codispoti v. Pennsylvania*[92] should control in cases where multiple petty offenses are joined for trial.[93] In *Codispoti,* the Supreme Court considered the question of whether multiple criminal contempts, arising out of a single trial, trigger the Sixth Amend-

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The provisions permitting joinder of related offenses have generally been favorably viewed by commentators, for such joinder may have substantial advantages for both the prosecution and the defendant: "The joint trial of offenses that share common factual circumstances enables the state to avoid the duplication of evidence required by separate trials, to reduce the inconvenience to victims and witnesses, to minimize the time required to dispose of the offenses . . . . A single trial will eliminate the harassment, trauma, expense, and prolonged publicity of multiple trials. A single trial may result in a faster disposition of all cases, may increase the possibility of concurrent sentences in the event of conviction, and may prevent the application of enhanced sentencing statutes."

2 LAFAVE & ISRAEL, *supra* note 73, § 17.1(a) (quoting 2 ABA STANDARDS FOR CRIMINAL JUSTICE § 13-2.1 cmt. (2d ed. 1980)).

90. *See* United States v. Lewis, 65 F.3d 252, 255 (2d Cir. 1995) ("Moreover, the question of Lewis's right to a jury trial could have been obviated altogether had the government chosen to simply charge both counts of obstructing the mail in separate informations."); United States v. Coppins, 953 F.2d 86, 92 (4th Cir. 1991) (Niemeyer, J., dissenting) ("If each petty offense were charged in a separate charging document and tried separately, the defendant would be tried by the court each time, even if the sentences on each were imposed consecutively.").

91. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 541-42 (1989); District of Columbia v. Clawans, 300 U.S. 617, 628 (1937).

92. 418 U.S. 506 (1974).

93. *See* United States v. Bencheck, 926 F.2d 1512, 1518-19 (10th Cir. 1991); Rife v. Godbehere, 814 F.2d 563, 564-65 (9th Cir. 1987). *But see* Haar v. Hanrahan, 708 F.2d 1547, 1550 n.14 (10th Cir. 1983) (stating that *Codispoti* has "limited precedential value . . . because of the unusual nature of criminal contempt charges").

ment right to jury trial.[94] Dominick Codispoti acted as his own counsel in a criminal trial that resulted in a conviction. During the course of the trial, he was charged with seven counts of criminal contempt. Mr. Codispoti's motion for a jury trial was denied, and he eventually was convicted of all seven counts of criminal contempt.[95] Although Mr. Codispoti was not sentenced to more than six months for any single contempt charge, his sentence aggregated to more than three years in prison.[96] The Supreme Court rejected the contention that each count of criminal contempt was a separate petty offense[97] and held that the rule in *Bloom v. Illinois*[98] controls where multiple charges of criminal contempt arise out of a single trial.[99] Thus, Mr. Codispoti improperly was denied his Sixth Amendment right to jury trial because the sentence imposed exceeded six months in prison.

Advocates of the Sentence Imposed Approach argue that, although the maximum penalty fixed by the legislature provides a clear, objective indication of community preferences for individual offenses, no legislative indication of community preferences exists for *sets* of offenses. Therefore, multiple petty offenses are analogous to multiple criminal contempts, and, following *Codispoti,* the sentence imposed by the judge provides the best indication of community preferences.

This reasoning, however, ignores the fact that legislatures do identify "serious" sets of petty offenses by defining crimes with enhanced statutory penalties that incorporate multiple petty offenses.[100] By defining serious crimes that may be charged in lieu of sets of petty offenses, legislatures provide an objective indication of community preferences regarding certain sets of petty offenses.

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94. *Codispoti* is the only Supreme Court case addressing the problem of applying the petty-offense exception to multiple offenses joined for trial.

95. *See Codispoti*, 418 U.S. at 507-09. Initially, Mr. Codispoti was convicted summarily on all seven counts by the judge that presided over his criminal case and received a sentence of 7-14 years in prison. Although the convictions were affirmed by the Pennsylvania Supreme Court, the Supreme Court vacated the judgment in Mayberry v. Pennsylvania, 400 U.S. 455 (1971), and remanded the case for retrial before a different judge. It was only at this point that Mr. Codispoti had the opportunity to request a jury trial. *See* 418 U.S. at 507-08.

96. *See* 418 U.S. at 509.

97. *See* 418 U.S. at 517 ("We find unavailing respondent's contrary argument that [Mr. Codispoti's] contempts were separate offenses and that, because no more than a six months' sentence was imposed for any single offense, each contempt was necessarily a petty offense triable without a jury.").

98. 391 U.S. 194 (1968). *Bloom* was the first case to recognize that criminal contempts trigger the Sixth Amendment right to jury trial. The rule in *Bloom* is that, where no maximum statutory penalty exists for an offense, the sentence imposed determines whether an offense is petty or serious. For a discussion of *Bloom,* see *supra* section I.C.

99. *See Codispoti*, 418 U.S. at 517 ("In terms of the sentence imposed, which was obviously several times more than six months, [Mr. Codispoti] was tried for what was equivalent to a serious offense and was entitled to a jury trial.").

100. *See supra* text accompanying notes 70-72.

Some sets of petty offenses are "serious," and they may be charged as a single serious offense.[101] Other sets of petty offenses can be charged only as multiple petty offenses. Since legislatures do respond to community preferences in some cases by fashioning "serious" penalties for multiple petty offenses, courts should assume that legislatures also are responding to community preferences when they decline to create "serious" penalties for other sets of petty offenses.

Even if legislatures did not provide enhanced penalties for "serious" sets of petty offenses, the rule in *Codispoti* would be inapposite for multiple statutory offenses because some indication of community preferences exists in the maximum penalty for each offense. The rule for criminal contempts in *Bloom,* which was adopted in *Codispoti,* applies only to criminal contempts where no statutory penalty exists.[102] In cases where a statutory penalty does exist, the Supreme Court uniformly has held that the sentence imposed is irrelevant as a measure of community preferences.[103] Applying the rule in *Codispoti* to multiple statutory offenses, therefore, ignores the Supreme Court's repeated admonition to avoid substituting the judicial measures of community preferences for those of the legislature.[104]

Advocates of the Sentence Imposed Approach also argue that it protects defendants from overzealous prosecution by ensuring that sentences exceeding six months in prison are not imposed without a jury trial.[105] The overarching purpose of the Sixth Amendment right to jury trial is to protect defendants against oppression by the government.[106] The Sentence Imposed Approach bows to this fundamental principle by providing this right whenever a "serious" penalty is imposed.

Reliance on the purpose behind the right to jury trial, however, ignores the necessity of drawing a reasonable line — firmly grounded in the principles underlying the petty-offense exception

101. For example, legislatures could define a single serious offense that would encompass all multiple petty offenses, such as by creating a recidivist statute.

102. *See* Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 219-20 (1968).

103. *See* Taylor v. Hayes, 418 U.S. 488, 496 (1974); Frank v. United States, 395 U.S. 147, 149 (1969); Duncan v. Louisiana, 391 U.S. 145, 162 n.35 (1968).

104. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 541-42 (1989); District of Columbia v. Clawans, 300 U.S. 617, 628 (1937).

105. *See* United States v. Bencheck, 926 F.2d 1512, 1519 (10th Cir. 1991) ("[T]here is a need for interposing the common sense judgment of a jury between the government and the defendant . . . ."); Haar v. Hanrahan, 708 F.2d 1547, 1552 (10th Cir. 1983) ("The approach thus protects the defendant from vindictive prosecution, interposing the jury between the government and the defendant in all cases where there is a risk of serious punishment and a consequent possibility of prosecutorial abuse.").

106. *See Duncan,* 391 U.S. at 155-56.

— between offenses that trigger the right and those that do not.[107] Nobody can deny that the right to jury trial is a procedural safeguard designed to benefit defendants. But the need to exempt the least serious offenses from a blanket right to jury trial is equally well-established.[108] Deference to the overarching purpose of this right would imply that the petty-offense exception always should be construed narrowly. The Supreme Court, however, specifically has repudiated this view by repeatedly declining invitations to restrict application of the petty-offense exception.[109] Because the purpose behind the right to jury trial — the desire to provide a procedural safeguard to criminal defendants — stands fundamentally opposed to the existence of a petty-offense exception, it provides little guidance to courts seeking to draw lines defining the scope of that exception.

Underlying both of these arguments in favor of the Sentence Imposed Approach is the common-sense idea that multiple petty offenses and single serious offenses should be treated alike under the Sixth Amendment because, from the defendant's point of view, it makes no difference whether a lengthy sentence results from one offense or multiple offenses.[110] This notion, however, contradicts the fundamental principle that community preferences determine whether a criminal offense is petty or serious and its corollary, that the consequences to the defendant should not determine the seriousness of a criminal offense.[111] Although it may seem reasonable to treat defendants facing identical sentences alike under the Sixth Amendment, the Supreme Court repeatedly has stated that the

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107. *See* 391 U.S. at 160-61 ("[I]t is necessary to draw a line in the spectrum of crime, separating petty from serious infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little.").

108. *See supra* notes 3, 5.

109. *See* United States v. Nachtigal, 113 S. Ct. 1072, 1074 (1993) (denying the right to jury trial even though the maximum penalty for the offense in question was set by the Secretary of the Interior); Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989) (denying the right to jury trial even though mandatory penalties other than the maximum period of incarceration could have been considered "serious"); Taylor v. Hayes, 418 U.S. 488, 495-96 (1974) (denying the right to jury trial even though the defendant initially was sentenced to more than four years in prison); Frank v. United States, 395 U.S. 147, 148 (1969) (denying the right to jury trial even though the defendant was sentenced to three years' probation); District of Columbia v. Clawans, 300 U.S. 617, 625-26 (1937) (denying the right to jury trial even though the defendant was sentenced to 90 days in prison).

110. *See* United States v. Bencheck, 926 F.2d 1512, 1518 (10th Cir. 1991). Justice White made an analogous observation when arguing that all individual offenses having a statutory penalty of greater than six months' imprisonment necessarily trigger the Sixth Amendment right to jury trial. *See* United States v. Baldwin, 399 U.S. 66, 73 (1970) ("One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that face him, and the consequences that faced appellant here.").

111. *See supra* section I.A.

scarce right to jury trial cannot be allocated according to the mercurial concerns of individual defendants.[112]

CONCLUSION

The petty-offense exception is something of an anomaly in Sixth Amendment jurisprudence. It is justified by the practical need for the efficient allocation of scarce judicial resources, at the expense of the democratic ideals which counsel broad application of the right to jury trial. Because the petty-offense exception runs counter to democratic instincts, it is particularly important that it be applied in a reasoned manner.

Efficient allocation of the right to jury trial requires courts to assess community preferences concerning an offense or set of offenses in order to determine whether this right attaches for a given defendant. Of the three approaches for allocating the right to jury trial to defendants accused of multiple offenses, only the Individual Penalty Approach gives due regard to community preferences. The other approaches extend the right to a jury to cases where the legislature has expressed the community's unwillingness to endure the expense that a jury trial entails. These approaches thus ignore the Supreme Court's command that courts heed community preferences regarding the seriousness of criminal offenses. Consequently, courts should adopt the Individual Penalty Approach so that scarce judicial resources are not wasted.

112. *See supra* text accompanying notes 16-19.