JURIES, DEMOCRACY, AND PETTY CRIME

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ABSTRACT

The right to trial by jury in criminal cases is basic to the design of American criminal justice and to the structure of American government. Guaranteed by Article III of the Constitution, the Sixth Amendment, and every one of the original state constitutions, the criminal jury was seen as critically important not only to the protection of individual rights but also to the architecture of American democracy. The vast majority of criminal prosecutions today, however, are resolved without even the prospect of community review by a jury. Despite the textual clarity of the guarantee, the Supreme Court has long recognized a "petty offense" exception to the right to trial by jury.

As systems of mass adjudication and hyper-incarceration have developed over the past several decades, a parallel process of collateral consequences has also arisen and is now well-documented. Recognizing that a conviction for even a low-level offense can have devastating effects, some courts have begun to narrowly interpret the "petty offense" exception, especially where a conviction could have severe immigration-related consequences. As a result, some jurisdictions now provide stronger procedural protections for non-citizen defendants than for citizen defendants charged with similar offenses. Although these courts are certainly correct in characterizing these offenses as "serious" and thereby providing those defendants a right to a jury trial, their reasoning imports a defendant-specific subjectivity that is in tension with prior Supreme Court guidance, and the results pose questions of legitimacy as different defendants are treated differently because of citizenship status.

As advocates push to expand the right to trial by jury, the Supreme Court should revisit the "petty offense" exception in light of the expansive web of collateral consequences that has developed in the past few decades. In Ramos v. Louisiana*, the Court grappled with the question of stare decisis and overruled decades-old precedent on the constitutionality of non-unanimous jury verdicts, recognizing that the Court should be most willing to reconsider precedent in cases involving constitutional criminal procedure. At the same time, state legislatures should address the problem by extending the state right to jury trials to cover all criminal prosecutions. The implications of such changes would extend beyond a procedural reform that would affect the rights of individual defendants. Expansion of the jury trial right would constitute a meaningful structural reform in democratizing criminal justice at a time when such change is needed to establish the popular legitimacy of the criminal justice system.*

INTRODUCTION

The right to trial by jury is a defining feature of both the American system of criminal justice and the American form of government. Central to the

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vision of the Founders, the jury trial right is guaranteed both in Article III of the Constitution and in the Sixth Amendment to the Bill of Rights, as well as in every state constitution from the founding era. This fundamental right, however, has long been limited by a judicially-created exception for petty offenses. For well over a century, the Supreme Court has read into the federal constitutional jury trial guarantee an extra-textual limitation that exempts from its coverage the majority of criminal prosecutions. This "petty offense exception" has evolved over the years to establish a presumption that any criminal offense for which the maximum penalty is less than six months incarceration is outside of the scope of the jury trial right.

The presumption of pettiness can be rebutted if the defendant can show indicia other than incarceration that demonstrate that the offense should be considered serious. Since articulating this rebuttable presumption in 1989, the United States Supreme Court has not considered a case in which the defendant was successful in rebutting this presumption. State courts, however, have recently shown a willingness to expand the jury trial right to cases in which the defendant, if convicted, would face collateral consequences more severe than any direct punishment. Most commonly, courts considering misdemeanors that could result in deportation have on occasion found those defendants to be entitled to a jury trial even where the maximum potential period of incarceration is less than six months.

These decisions present a profound challenge to the viability of the petty offense exception to the jury trial right. It strains logic and common sense to argue that a criminal charge that could result in deportation (or the loss of the right to carry a firearm or to remain in one's home, for example) is not a serious offense. But because collateral consequences do not apply equally to all criminal defendants, the application of this doctrine requires a subjective, defendant-specific inquiry to determine whether a particular criminal offense is a serious one, as applied to that defendant. In cases involving immigration consequences, for example, a non-citizen now can enjoy greater constitutional protections than a citizen charged with the same offense. This subjective defendant-specific approach is unpredictable and cumbersome, and it conflicts with other Supreme Court guidance indicating that this analysis should be an objective one. Supreme Court doctrine on the petty offense exception is on a collision course with itself.[1] Because of the ubiquity and seriousness of collateral consequences for even minor criminal offenses

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1 *See* Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) ("The *Roe* framework . . . is clearly on a collision course with itself.").

in today's criminal justice system, the jury trial right should be applied categorically to all criminal offenses.

Strengthening the role of the jury in the American criminal justice system is important both symbolically and practically. Calls to reform and transform the way American police and courts address allegations of wrongdoing make this an opportune time to re-examine the system from top to bottom. An embrace of the criminal trial jury is at once a progressive step forward and a return to the principles of the past. In his First Inaugural Address, Thomas Jefferson argued that "[t]he wisdom of our Sages, & blood of our Heroes, have been devoted to the[] attainment [of trial by jury.] [It] should be the Creed of our political faith."[2] In contrast to this vision, we have created in practice a modern system of juryless adjudication, especially for low-level crimes. The prosecution of petty crimes, however, is part and parcel with the system of over-policing and mass incarceration that is rightly at the center of attention for today's reformers and abolitionists. Our current system of juryless adjudication should be addressed along with other solutions. One wonders how a democratically-selected New York jury might have reacted, for example, if asked to review the case of Eric Garner, charged with the sale of loose cigarettes?[3] Would the knowledge that a jury might review their actions have changed the behavior of those police officers in how they approached Garner?

Amidst recent calls for abolition and radical rethinking of the criminal justice system,[4] what is the value of a discrete doctrinal reform proposal like the expansion of the right to jury trial? Some might argue that such a reform serves more to legitimize the continuation of a structurally unjust and racist system than to effect any meaningful change.[5] Even if not actively counter-productive, is such a proposal tantamount to re-arranging the deck chairs on

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2 Thomas Jefferson, First Inaugural Address (Mar. 4, 1801) (transcript available in the Library of Congress).

3 Garner, of course, was the Black man who was killed by New York City police officers in 2014 after they arrested him on suspicion of selling loose cigarettes. *See* Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html [https://perma.cc/4EJU-UAKK].

4 *See* Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 UNBOUND: HARV. J. LEGAL LEFT 109 (2013) (calling for "an openness to unfinished alternatives—a willingness to engage in partial, in process, incomplete reformist efforts that seek to displace conventional criminal law administration as a primary mechanism for social order maintenance").

5 *See* Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2196–97 (2013) (critiquing rights discourse as diversion from racial and economic critiques of the criminal justice system and legitimation of the status quo).

the Titanic?[6] Of course, any procedural reform will fail to address and remediate problems of fairness and justice if it does not address broader structural problems with the system. A re-invigoration of the criminal jury, however, has the potential to be a fundamental change in the structure of criminal adjudication, if taken seriously. Just as Thomas Jefferson said that it should be "the Creed of our political faith,"[7] a meaningful embrace of trial by jury should be seen as a political change as much as an expansion of individual legal rights.

Another critique of this proposal has to do with the seeming obsolescence of the criminal trial itself as a means of adjudicating guilt. Justice Kennedy accurately described the American criminal justice system as "for the most part a system of pleas, not a system of trials."[8] Given the remarkably high rates of plea bargaining with all kinds of criminal charges, no doctrinal reform by itself will achieve meaningful change. But if an expansion of the right to criminal jury trial is seen as a step toward a re-invigoration of the jury in criminal adjudication, such a proposal could be an important part of a re-imagining of American criminal adjudication with affected communities, rather than judges, as central decisionmakers.

Expansion of the criminal jury right would be consistent with a broader momentum toward the re-democratization of criminal justice. Critics of the modern trend toward bureaucratization of the criminal adjudication system argue for a renewed engagement of communities with the system "not only because popular participation is good for defendants, but also because it strengthens American democracy."[9] As it has grown exponentially larger in the last several decades, criminal justice has become a vast bureaucracy, ruled not by citizens but by "a professionalized corps of officials and experts" applying specialized knowledge and expertise to identify a certain end and

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6 *See id.* at 2197 ("Procedural fairness not only produces faith in the outcome of individual trials; it reinforces faith in the legal system as a whole.") (quoting Michael O'Donnell, *Crime and Punishment: On William Stuntz*, THE NATION (Jan. 11, 2012), http://www.thenation.com/article/archive/crime-and-punishment-william-stuntz/ [https://perma.cc/W482-FYYG].

7 Thomas Jefferson, First Inaugural Address (Mar. 4, 1801) (transcript available in the Library of Congress).

8 Lafler v. Cooper, 566 U.S. 156, 170 (2012) (Kennedy, J.).

9 Daniel S. McConkie, Jr., *Criminal Justice Citizenship*, 72 FLA. L. REV. 1023, 1023–24 (2020); *see also* Jenny Carroll, *The Jury As Democracy*, 66 ALA. L. REV. 825 (2015) (examining the possibility of the jury as a unique democratic space); ANDREW GUTHRIE FERGUSON, WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION (2013) (exploring the opportunity jury duty provides to reflect on individual constitutional responsibilities); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014) (asserting that audience members in criminal courtrooms are uniquely situated to help restore public participation and accountability).

"us[ing] the technical apparatus of government to secure that end as efficiently as possible."[10] Against this powerful current is a movement to revitalize juries both to give legitimacy to a criminal justice system rightly under attack for its structural unfairness and racist underpinnings and also to give voice to the marginalized communities that are the subjects of that system.[11]

Just as the Founders saw the criminal jury as a protection against a corrupt or overzealous state, it could and should occupy the same role today. Described in 1788 as "the democratic branch of the judiciary power,"[12] juries composed of members of the community serve an important structural role, reviewing the conduct and decisions of police, prosecutors, and judges in carrying out the business of deciding culpability and punishment. Alexander Hamilton extolled the virtues of a judicial system with shared power between judges and juries, referring to the power-sharing system as "a double security . . . [which] tends to preserve the purity of both institutions."[13] In addition to the beneficial effects on the administration of justice, community participation in juries strengthens democracy itself.[14]

An expansion of the criminal jury trial right should be seen as one part of a much larger project: the democratization of the criminal adjudication process. Seen as a part of the re-centering of the adjudication process, however, away from professionals and bureaucrats to communities, a re-orientation of the criminal justice system around juries is a more profound structural shift. This move is one among many "non-reformist reforms" that

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10 Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1379 (2017) (emphasis omitted).

11 *See, e.g.*, Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 306–07 (2019) ("If we can value public participation beyond representation by police and prosecution, then we can . . . mov[e] toward local criminal adjudication that is more responsive to the multidimensional demands of the popular will."); *see also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003) (exploring whether and when the legislature should place the authority to apply laws that trigger criminal punishments with judges instead of juries); FERGUSON, *supra* note 9.

12 *Essays by a Farmer No. IV* (Mar. 21, 1788), *in* 5 THE COMPLETE ANTI-FEDERALIST 36, 38 (Herbert J. Storing, ed., 1981) (emphasis omitted).

13 THE FEDERALIST NO. 83, at 434 (Alexander Hamilton). Hamilton went on to elaborate on the importance of juries in the judicial system: "By increasing the obstacles to success, it discourages attempts to seduce the integrity of either. The temptations to prostitution, which the judges might have to surmount, must certainly be much fewer, while the co-operation of a jury is necessary, than they might be, if they had themselves the exclusive determination of all causes." *Id.*

14 Alexis de Tocqueville described jury service as a "free school" that would "[serve] to give the mind of all citizens a part of the habits of mind of the judge." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 448 (Eduardo Nolla ed., James T. Schleifer trans., 2010) (1835).

"aim to build grassroots power as they redress the crises of our times."[15] Any discrete doctrinal change—even one as expansive as extending jury rights for all criminal offenses—will have little effect on broader structures of power in the criminal justice system if not tied to a wider critique.[16]

Section One describes the history of the right to trial by jury and the development of the petty offense exception. Section Two examines the near-disappearance of the jury trial as a means of adjudicating criminal allegations, especially with regard to low-level offenses, and reflects on the significance of this development for the criminal justice system. Section Three traces the recent and dramatic rise of collateral consequences of criminal convictions. Section Four analyzes recent decisions of state courts giving broad reading to the jury trial right and declining to apply the petty offense exception in cases involving collateral consequences of misdemeanor convictions. Finally, Section Five argues that the realities of today's criminal justice system have rendered unworkable the offense-specific analysis that the Supreme Court created to determine when the right to jury trial applies. I conclude by arguing that courts, legislatures, and advocates should push for a more absolute jury trial right, as the constitutional text suggests.

I. THE JURY TRIAL RIGHT AND PETTY CRIMES

A. History of the Jury Trial Right

In the American system of criminal adjudication, no procedural right is more basic than the right to trial by jury. The Supreme Court has called this right "fundamental to the American scheme of justice,"[17] and Justice Hugo Black described it as "one of the fundamental aspects of criminal justice in the English-speaking world."[18] The founders of the Republic considered the

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15 Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 98 (2020). Akbar uses the term "non-reformist reforms," which was coined by André Gorz. *See id.* at 100–01 (citing ANDRÉ GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 7 (Martin A. Nicolaus & Victoria Ortiz trans., 1967)). Gorz used the term for a reform that does not adhere to "capitalist needs, criteria, and rationales" but rather calls for "the creation of new centers of democratic power." *Id.* at 7 n.3.

16 *See* Akbar, *supra* note 15, at 103 (arguing that "reform projects are contradictory gambits if the aim is transformation; they always have the possibility of reifying the status quo"). In explaining her distinction between reformist reforms and non-reformist reforms, Akbar argues that "[w]hereas reformist reforms aim to improve, ameliorate, legitimate, and even advance the underlying system, non-reformist reforms aim for political, economic, social transformation . . . . [Non-reformist reforms] aim to shift power away from elites and toward the masses of people." *Id.* at 104–05.

17 Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

18 DeBacker v. Brainard, 396 U.S. 28, 34 (1969) (Black, J., dissenting).

right so important that they included it both in Article III of the Constitution[19] and in the Sixth Amendment.[20]

The Constitution and Bill of Rights were drafted within a context of distrust of government and a desire to restrict the powers of the state.[21] Thomas Jefferson believed that trial by jury was "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[22] More than simply a safeguard available to individuals accused of crime, trial by jury was seen by the founders as essential to the democratic structure of the new republic. The decision to provide so strong a guarantee "reflected a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or a group of judges [as well as] an insistence upon community participation in the determination of guilt or innocence."[23] On virtually no other point was there such widespread agreement as the need to protect the right to trial by jury:

> The friends and adversaries of the [proposed constitution], if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them, it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.[24]

Even prior to the drafting of the Constitution or Bill of Rights, however, and long before the Supreme Court defined its contours in the American system, the right to trial by jury was well-established at English common law. Blackstone described the means by which criminal allegations were to be decided at common law: "the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours, indifferently chosen, and superior to all suspicion."[25]

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19 *See* U.S. CONST. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by jury . . . .").

20 *See* U.S. CONST. amend. VI (stating explicitly the rights of an accused in criminal prosecutions, including the right to a speedy public trial by an impartial jury).

21 *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1140 (1991) (outlining the concerns of Anti-Federalists about vesting powers in a federal government).

22 Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* 15 The PAPERS OF THOMAS JEFFERSON 266, 269) (Julian Boyd, ed., 1958).

23 Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

24 THE FEDERALIST NO. 83, at 432–33 (Alexander Hamilton) (George W. Carey & James McClellan, eds., 2001).

25 *Duncan*, 391 U.S. at 151–52 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (Thomas M. Cooley ed., 1899)).

Ultimately, the right can be traced back more than 800 years to Magna Carta.[26]

The text of the jury trial guarantee—both in Article III and in the Sixth Amendment—seems to allow for no exceptions. Just as Article III requires that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ,"[27] the Sixth Amendment guarantees that, "[i]n 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 . . . ."[28] Although neither the Constitution nor the Bill of Rights give further guidance on what is meant by "trial by an impartial jury," subsequent caselaw has interpreted the phrase to require unanimity,[29] and a trial jury selected without racial[30] or gender[31] discrimination.[32] Some members of the Constitutional Convention wanted the right to trial by jury to be explicitly guaranteed for all federal criminal charges.[33] By specifically exempting impeachment from the guarantee,[34] the Article III jury right seems implicitly to include all other federal charges.[35]

The right to trial by jury was seen as so fundamental to the structure of government that, notwithstanding the existence of the federal constitutional right, every state has also included a provision guaranteeing trial by jury in

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26 *See id.* at 151–52 (tracing the history of the right to trial by jury back to its origins).

27 U.S. CONST. art. III, § 2.

28 U.S. CONST. amend. VI. The American colonists demonstrated their clear support and enthusiasm for a jury trial right even before passage of the Constitution, mentioning the right in resolutions of the First Congress of the American Colonies in 1765 and in the Declaration of Independence. *See Duncan*, 391 U.S. at 152 (citing SOURCES OF OUR LIBERTIES 270 (Richard L. Perry ed., 1959)).

29 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020) (holding that the Sixth Amendment requires a unanimous verdict in order to convict).

30 *See* Batson v. Kentucky, 476 U.S. 79, 90 (1986) (prohibiting attorneys from using peremptory challenges to remove prospective jurors on the basis of race).

31 *See* J.E.B. v. Ala. *ex rel.* T.B., 511 U.S. 127, 146 (1994) (stating that the Equal Protection Clause prohibits discrimination in jury selection based on gender).

32 The Court has also discussed other requirements, such as requiring that venire pools feature a fair cross-section of the population. *See* Taylor v. Louisiana, 419 U.S. 522 (1975).

33 *See* Singer v. United States, 380 U.S. 24, 31 (1965) ("[S]ome of the framers apparently believed that the Constitution designated trial by jury as the exclusive method of determining guilt.").

34 *See* U.S. CONST. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.").

35 *See* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 489–90 (2009) (arguing that the "plain meaning [of a constitutional provision] constitutes a minimal baseline in protection of individual liberty" and that "it is difficult to claim that the Sixth Amendment provides lesser protections of individual liberty than that evident from a plain reading of the text").

their state constitutions.[36] This was the only such right that every single state constitution drafted during the Revolutionary period had in common.[37] As with the federal Constitution, the right was seen by states as not only protecting individual liberty but also as a means of structuring democracy and providing a check on government power.[38] Most states provide a broader right to a criminal jury than does the federal constitutional doctrine.[39]

B. The Petty Offense Exception to the Jury Trial Right

Although the text of both Article III and the Sixth Amendment is unambiguous and absolute, the Supreme Court has ruled that the constitutional right to trial by jury does not extend to "petty offenses."[40] This "petty offense exception" to the jury trial right dates back at least to the late nineteenth century, when the Court held that the jury trial right "could never have been intended to embrace every species of accusation involving either criminal or penal consequences."[41] The Court endorsed this historical argument many years later in *Duncan v. Louisiana*, drawing on history to support its conclusion: "So-called petty offenses were tried without juries both in England and in the Colonies . . . . There is no substantial evidence that the Framers intended to depart from this established common-law

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36 *See Duncan*, 391 U.S. at 153 (recognizing that every state constitution adopted by the original states included a constitutional provision protecting the right to a jury trial). *See also* David L. Hemond, *Brief Review of Right in 49 States to Jury Trial for Minor Crimes*, CONN. L. REVISION COMM'N (1998) https://www.cga.ct.gov/lrc/recommendations/1999%20recommendations/JuryTrial49StatesRpt.htm [https://perma.cc/VNA6-Z29N] (summarizing the right to criminal jury trial in each state); POUND CIV. JUST. INST., STATE CONSTITUTIONAL PROVISIONS, STATUTES, COURT DECISIONS, AND SCHOLARSHIP ON TRIAL BY JURY AND THE RIGHT TO REMEDY (James E. Rooks, Jr. ed., 2018).

37 *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 227 (1985) (noting that of the twelve states that framed constitutions, the only right secured by all was the trial by jury in criminal cases); Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133, 136 (explaining the importance of the right to criminal jury trial in American history).

38 *See Duncan*, 391 U.S. at 155–56 ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the government . . . . [The right is] an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."). *See also* Singer, 380 U.S. at 31 ("The [jury trial] clause was clearly intended to protect the accused from oppression by the Government.").

39 *See infra* section xx.

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

41 Callan v. Wilson, 127 U.S. 540, 552 (1888). *See also* Felix Frankfurter & Thomas G. Corcoran, *Petty Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926); George Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959).

practice . . . ."[42] The development of this doctrine, however, is open to critique on historical, textual, and practical grounds.

Rejecting a long history of evaluating the right to trial by jury by subjectively evaluating the moral stigma of an offense, the Supreme Court in 1968 opted for a more objective approach based on the legislatively authorized penalty for an offense. In *Duncan v. Louisiana* and later in *Baldwin v. New York*, the Court adopted "authorized imprisonment" as a general proxy for "seriousness of offense." Prior to these cases, courts had evaluated whether an offense was "petty," and therefore not within the scope of the federal constitutional right to trial by jury, by looking at the moral stigma that society attached to the allegation.[43]

This subjective "moral stigma" approach had led to some counter-intuitive results in the first few decades of the twentieth century. In *Schick v. United States*, for example, the Court considered the case of a man charged with the purchase for resale of oleomargarine that did not bear a tax stamp.[44] Although this could be classified as a type of tax fraud, the Court concluded that the offense was "not one necessarily involving any moral delinquency" and so found that it was a petty offense for which the defendant had no federal constitutional right to trial by jury.[45] Twenty-five years later, however, the Court came to a different conclusion in a case involving a charge entitled reckless driving "so as to endanger property and individuals."[46] In *District of Columbia v. Colts*, the Court held that the defendant was entitled to trial by jury because the charge involved an allegation of actions that were *malum in se* and "an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense."[47]

Because of the unpredictability of the subjective approach, the Supreme Court pursued a more mathematical approach in the late twentieth century, seeking "more 'objective indications of the seriousness with which society

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42 *Duncan*, 391 U.S. at 160.

43 In at least one 19th-century case, the Supreme Court looked to whether an offense was indictable at common law in order to determine whether it was a "serious offense" for purposes of the federal constitutional right to trial by jury. In *Callan v. Wilson*, the Court reversed a conviction for conspiracy on the grounds that, because conspiracy was an indictable offense at common law, it could not be considered a petty offense and therefore fell within the scope of the right to trial by jury. 127 U.S. 540, 557 (1888).

44 *See* Schick v. United States, 195 U.S. 65, 67 (1904) (stating the statutory requirements of the offense).

45 *See id.* at 67 (signaling that the small penalty was indicia of the seriousness of the offense).

46 282 U.S. 63, 70 (1930).

47 *Id.* at 73.

regards the offense.'"[48] The defendant in *Duncan v. Louisiana* was charged with battery, an offense classified as a misdemeanor under state law and that carried a maximum sentence of two years of incarceration and a fine of $300.[49] Mr. Duncan's request for a trial by jury was denied and he was tried and convicted by a judge, who sentenced him to a 60-day period of incarceration and a $150 fine.[50] After noting that "the boundaries of the petty offense category have always been ill-defined," the Court established the legislatively-created maximum penalty as the primary indicator of whether an offense should be considered petty or serious for purposes of the federal constitutional right to trial by jury.[51] Unlike in the context of the federal constitutional right to appointed counsel, which the Court had established five years prior in *Gideon v. Wainwright*,[52] the *Duncan* Court focused its analysis on the maximum authorized sentence rather than the sentence actually imposed.

The *Duncan* Court did not draw a bright line between serious and petty offenses based on authorized imprisonment but established that an offense carrying a maximum sentence of two years could not be considered petty. The Court further made clear that the maximum authorized sentence, rather than the sentence actually imposed, was the salient factor for purposes of the federal constitutional right to trial by jury.[53] In describing how to distinguish between petty and serious crimes, the Court sought to determine the opinion of the local legislature, looking to "the penalty authorized by the law of the locality . . . 'as a gauge of its social and ethical judgments.'"[54] Years earlier, the Court had hinted at a desire to move away from subjective analysis and toward objective standards and consistency in determining when the jury right applies, holding that "[d]oubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments."[55] The

48 *Blanton*, 489 U.S. at 541 (quoting Frank v. United States, 395 U.S. 147, 148 (1969)).

49 *See* Duncan v. Louisiana, 391 U.S. 145, 146 (1968) (outlining the penalty for simple battery under Louisiana law).

50 *See id.* at 146 (summarizing the disposition of the case at the trial court level).

51 *Id.* at 160.

52 *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that counsel must be provided to ensure a fair trial in a serious criminal case).

53 *See Duncan*, 391 U.S. at 159 ("[T]he 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.").

54 *Id.* at 160 (quoting District of Columbia v. Clawans, 300 U.S. 617, 628 (1937)).

55 *Clawans*, 300 U.S. at 628 (1937).

Court reiterated this need for objectivity in *Duncan*, promising to "refer to objective criteria"[56] in deciding when the petty offense exception should apply.[57]

The Court broadened the scope of the jury right two years later in *Baldwin v. New York*.[58] The defendant in *Baldwin* was charged with a single count of jostling,[59] which carried a maximum potential sentence of one year.[60] The Court agreed with the defendant that the one-year maximum potential penalty was sufficient for the offense to qualify as a serious offense, entitling him to a jury trial. Justices Black and Douglas, concurring in the judgment, would have found that there was no petty offense exception to the right to trial by jury. Hewing closely to the text of the Sixth Amendment and the Article III jury guarantee, Justice Black wrote that balancing efficiency with a clear constitutional safeguard for criminal defendants constituted "judicial mutilation of our written Constitution."[61] Because the text of the constitutional jury trial guarantee referred to "all crimes," he argued, the Court should not create a limitation to its scope.[62]

Most recently, the Court considered the issue of whether an offense could be considered serious even though the maximum authorized imprisonment fell below the six-month presumptive standard established in *Baldwin*. In the quarter century after *Baldwin*, some courts had held that other factors could render an offense "serious" for purposes of the federal constitutional right to trial by jury even when the maximum authorized imprisonment fell below six months.[63] In *Blanton v. City of North Las Vegas*, the Court considered a case involving the charge of driving under the influence of alcohol, punishable by a maximum sentence of six months in jail and a fine of $1,000. The

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56 *See Duncan*, 391 U.S. at 161 (offering the standard used to determine whether the authorized crime of seriousness of the punishment was sufficient to require a jury trial).

57 *See also* Frank v. United States, 395 U.S. 147, 148 (1969) ("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 . . . . The most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission.") (quoting *Clawans*, 300 U.S. at 628).

58 *See* Baldwin v. New York, 399 U.S. 66, 68 (1970) (recounting the decision in *Duncan* and stating the need for clarification on the line between petty and serious offenses).

59 *See id.* at 67 n.1 (defining "jostling" as a form of pickpocketing).

60 *See id.* at 67 (assigning the crime of jostling a maximum punishment of one-year imprisonment).

61 *Id.* at 75 (Black, J., concurring).

62 *Id.*

63 *See e.g.*, United States v. Craner, 652 F.2d 23, 24 (9th Cir. 1981) (finding that the offense is serious not due to the punishment but because the crime itself is serious); United States v. Hamdan, 552 F.2d 276, 280 (9th Cir. 1977) (holding that a $500 fine is evidence a crime is serious); Rife v. Godbehere, 814 F.2d 563, 564–65 (9th Cir. 1987) (holding that where judges can issue consecutive sentences, the crime can be considered serious enough to require a jury trial).

legislature had mandated additional penalties, however, that could include community service, alcohol education classes, and the drivers' license suspension of anyone convicted of this offense. The defendants in *Blanton* argued that these additional consequences, in addition to the potential incarceration and fine, rendered the offense serious and entitled them to trial by jury.

Recognizing the presumptive line drawn in *Baldwin* by the legislatively-authorized maximum penalties, the *Blanton* Court explained that even defendants charged with presumptively petty offenses could, in "rare situation[s]," 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."[64] The defendants in *Blanton* were not able to make this showing, but the Court made clear that legislative factors other than simply incarceration and fine were relevant factors in this determination. If the legislature "packs an offense it deems 'serious' with onerous penalties that nonetheless 'do not puncture the 6-month incarceration line,'" [65] then the right to trial by jury may still apply.

The *Blanton* standard, like the early twentieth-century focus on "moral stigma," has been criticized as being too subjective and unpredictable. *Blanton* was a very fact-specific opinion and provided little guidance to lower courts attempting to interpret what might elevate a presumptively petty offense to a serious one. The petitioner in that case argued that, in addition to the six-month maximum period of incarceration that he faced for a charge of driving under the influence, the additional potential consequences made his charge a serious offense and therefore, entitled him to a jury.[66] The potential additional consequences cited by the petitioner included: (1) 48 hours of community service dressed in clothing identifying him as someone convicted of DUI; (2) a fine of $1,000; (3) a suspension of his driver's license; and (4) mandatory alcohol abuse education at his own expense.[67] The Court found that it could not fully evaluate the stigmatizing clothing requirement because the record failed to describe the clothing or the circumstances in

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

65 *See id.* (ensuring that a trial is available to defendants where the legislature has included additional consequences, but the term of incarceration is less than six months) (quoting Pet'rs' Br. at 16, Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989) (No. 87-1437)).

66 *See id.* at 543–44 (assessing whether the term of imprisonment and additional statutory penalties were sufficient to consider DUI a serious offense).

67 *See id.* at 539–40 (listing the alternative punishments that a court may impose for the offense of DUI in this case).

which it was required to be worn and, similarly, dismissed without much consideration the license suspension because the record was not clear on whether the suspension would be concurrent with any term of incarceration, in which case it would likely be irrelevant.[68] After discounting these potential additional consequences because of an unclear record, the Court held that even "[v]iewed together, the statutory penalties are not so severe that DUI must be deemed a 'serious' offense for purposes of the Sixth Amendment."[69]

The Supreme Court further narrowed the jury trial right in *Lewis v. United States*, in which it held that a defendant facing multiple misdemeanor charges carrying an aggregate potential sentence of over six months is not constitutionally guaranteed a jury trial.[70] As long as no single charge carried a potential sentence of six months or more, reasoned the Court, the defendant was not charged with a "serious offense" and therefore was not entitled to a jury trial.[71] Concurring separately, Justice Kennedy referred to the majority opinion as "one of the most serious incursions on the right to jury trial in the Court's history."[72]

Despite its long history, the petty offense exception has been the subject of scholarly criticism, subject to attack on textual, historical, and practical grounds. Of the various procedural safeguards found in the Sixth Amendment, most apply universally, without regard to seriousness of crime. But two such safeguards—the right to trial by jury and the right to counsel—apply only to "serious" crimes, and the subset of "serious" crimes is defined differently for each right.[73] Textually, it is difficult to justify this disparity since the term "in all criminal prosecutions" applies to each of the provisions of the Sixth Amendment.

Supporters of the petty offense exception argue that the textual guarantees in the Bill of Rights must be interpreted in light of the common

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68 *Id.* at 544, 544 n.9 (minimizing the seriousness of the suspension because of the potential concurrent prison sentence and availability of a restricted license after 45 days).

69 *Id.* at 545.

70 Lewis v. United States, 518 U.S. 322, 323 (1996).

71 *See id.* at 323–24 (declining to grant a right to jury trial when a defendant is prosecuted for multiple petty offenses).

72 *Id.* at 331 (Kennedy, J., concurring). Justices Kennedy and Breyer concurred with the majority in Lewis because the trial judge had said in advance of trial that the total aggregate sentence would not exceed six months. Justices Stevens and Ginsburg dissented, arguing that the critical factor is what the legislature authorized rather than what the judge actually imposed.

73 *See* Duncan v. Louisiana, 391 U.S. 145, 159–60 (1968) (applying the right to a jury trial only to serious crimes and defining seriousness); Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972) (concluding that under some circumstances petty offenses may require the representation of counsel).

law as it existed at the time of the enactment of those rights. Because common law appears to have recognized a petty offense exception to the jury right, as the Court reasoned in *Callan v. Wilson*,[74] the Sixth Amendment must be read to include such an exception as well. The Court, however, has on many occasions held that the procedural safeguards in the Bill of Rights are broader and more protective than practices at common law.[75]

Others have argued that there was no petty offense exception to the jury trial right at common law, and that both the text and the history of the right to trial by jury support application of the right to all criminal charges.[76]

> [I]t appears that one Supreme Court opinion carelessly expressed support for the petty offense doctrine in dictum while a later Court cavalierly attached precedential value to those statements without examining the context in which they were made. Several years later, in a stunning ipse dixit, the Supreme Court declared the petty offense issue to be "settled."[77]

Notwithstanding these criticisms, the Court has recognized the petty offense exception for more than a century and unanimously endorsed the idea when it most recently came before the Court.[78]

The Court's use of history in crafting the petty offense exception has come under scrutiny and criticism. While cases in the early part of the twentieth century invoked the common law at the time of the ratification to justify the exclusion of petty crimes from the jury right, this analysis may have been founded on a misunderstanding of the historical practices.

> While it is undoubtedly true that petty crimes were subject to summary trials during the common law, so were non-petty crimes. Moreover, as far as the

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74 Callan v. Wilson, 127 U.S. 540, 557 (1888). *But see* Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J. L. & PUB. POLICY 7, 13 & n.72 (1994) (critiquing the Court's reasoning in *Callan*).

75 *See, e.g.*, Ferguson v. Georgia, 365 U.S. 570 (1961); Chambers v. Mississippi, 410 U.S. 284 (1973); Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J. L. & PUB. POLICY 7, 13 (1994).

76 *See* Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J. L. & PUB. POLICY 7, 13 (1994) ("Indeed, it is far from evident that the common law recognized a petty offense exception to the right to trial by jury.") (citing George Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245, 246–47 (1959)); *see also* Schick v. United States, 195 U.S. 65, 78 (1904) (Harlan, J., dissenting) ("The words of the Constitution upon this subject are clear and explicit. They leave no room for interpretation. Its express mandate is that 'the *trial* of *all* crimes, except in cases of impeachment, *shall be* by jury.'").

77 Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J. L. & PUB. POLICY 7, 14 (1994).

78 *See Blanton*, 489 U.S. at 543 (1989) (defining offenses with maximum prison terms of six months or less as presumptively petty); United States v. Nachtigal, 507 U.S. 1, 3–4 (1993) (requiring a determination that an offensive serious to entitle a defendant to a trial); Lewis v. United States, 518 U.S. 322, 326–27 (1996) (stating that petty offenses are not triable by jury unless they are sufficiently serious).

> colonies go, many either had no constitutional right to a jury trial or had limited that right to serious crimes or even capital cases.[79]

Most convincingly, none of the relatively few federal crimes at the time of the drafting could have been characterized as "petty" and, because the Constitution and Bill of Rights was directed at constraining the power of the federal government, it makes little sense to argue that the Framers considered the treatment of petty crimes in any way.[80]

Some constitutional rules of criminal procedure are absolute and others vary according to the severity of the crime being adjudicated.[81] In *Brinegar v. United States*, Justice Jackson, in dissent, argued that the government should face greater constraints investigating and prosecuting petty crimes than serious crimes.[82] The Court has approved of this principle in certain contexts, holding that certain punishments are constitutionally impermissible for less serious crimes or for crimes committed by juveniles,[83] and that police are entitled to use deadly force only in certain circumstances involving suspects who may have committed certain serious crimes.[84] The "petty offense" exception to the Sixth Amendment, which applies in different ways to the right to trial by jury and the right to counsel, is another example of the variable applicability of constitutional rules of criminal procedure.

II. DISAPPEARANCE OF CRIMINAL JURY TRIALS

The near disappearance of criminal trials as a means of adjudicating guilt is well-documented.[85] Although the total number of federal criminal defendants more than doubled between 1962 and 2002,[86] the number of

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79 Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 522 (2009) (citing George Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245, 248–57 (1959)).

80 *See id.* at 549 (listing federal crimes in existence at the time of the ratification of the Sixth Amendment).

81 *See generally* Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957 (2004).

82 Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting) (stating that judicial exceptions should depend on the gravity of the offense).

83 *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that the imposition of the death penalty for the crime of rape violates the Eighth Amendment prohibition on cruel and unusual punishment); Miller v. Alabama, 567 U.S. 460, 489 (2012) (ruling that a mandatory sentence of life without parole for juveniles violates the Eighth Amendment).

84 Tennessee v. Garner, 471 U.S. 1, 3 (1985) (requiring police officers to have probable cause that a fleeing unarmed felony suspect poses a significant threat of death or serious bodily injury to the officer or others before using deadly force).

85 *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDS. 459, 501 (2004) (tracing the declining number of trials in the United States).

86 *See id.* at 492 (documenting the rise in criminal caseload from 33,110 in 1962 to 76,827 in 2002).

federal criminal trials fell substantially over the same period.[87] Juries decided 8.2% of federal criminal cases in 1962 but only 2.04% of federal criminal cases in 2015.[88] During the last four decades of the twentieth century, the number of federal district court judges doubled, even while the trial rate fell by 30%.[89] Today fewer than 3% of criminal convictions in federal court are obtained by trial.[90] Never before have juries played such a diminished role in deciding criminal cases.[91]

State courts too have seen a marked reduction in the number of criminal trials. Again, the increased volume of criminal cases has not resulted in an increased number of trials. From 1976 to 2002, according to one study, the number of state criminal cases resolved by jury trial fell from 3.4% to 1.3% and the number of state criminal cases resolved by bench trial fell from 5.0% to 2.0%.[92] Although the size of the criminal justice has swelled dramatically over the past fifty years,[93] trials have all but disappeared as a means of resolving those cases. This has been consistent for felonies as well as misdemeanors.[94]

One reason given for the sharp reduction in criminal trials is the advent of sentencing guidelines systems in the 1980s and the Supreme Court's 1989 ruling in *Mistretta* upholding the constitutionality of such guidelines systems.[95] Like most sentencing guidelines systems, the Federal Sentencing Guidelines effectively impose a hefty tax on the exercise of a defendant's right to trial

87 *See id.* at 493 (citing a 30% drop in the number of federal criminal trials from 5,097 in 1962 to 3,574 in 2002).

88 *See* Richard Lorren Jolly, *Expanding the Search for America's Missing Jury*, 116 MICH. L. REV. 925, 925 (2018) (illustrating the decline in cases decided by jury over time).

89 Galanter, *supra* note 85, at 493.

90 *See* U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, GUILTY PLEAS AND TRIALS IN EACH CIRCUIT AND DISTRICT, TABLE 10 (2015) (reporting that just 2.9% of cases in all circuit and districts went to trial). In 1962, by contrast, 15% of federal criminal convictions were obtained by trial. *See also* Galanter, *supra* note 85, at 493 (2004) (reporting the percentage of criminal dispositions by trial as only 5% in 2002).

91 *See* Jolly, *supra* note 88, at 925 ("Juries today determine fewer cases than at any other point in the nation's history.").

92 Galanter, *supra* note 85, at 510.

93 *See id.* at 492 (2004) (showing the rise in criminal caseload from 33,110 in 1962 to 76,827 in 2002).

94 *See id.* at 510 ("[T]rials as a portion of felony dispositions fell from 8.9 percent in 1976 to 3.2 percent in 2002.").

95 *See* Mistretta v. United States, 488 U.S. 361, 412 (1989) (holding that Congress may delegate the task of formulating sentencing guidelines to a judicial commission). Fifteen years later, the Court determined that the mandatory nature of the Federal Sentencing Guidelines violated the Sixth Amendment. United States v. Booker, 543 U.S. 220, 245 (2005).

and, by increasing the cost of exercising the right, discourage its use.[96] Other changes in the criminal justice system have been put forward as reasons for the decrease in criminal trials, including the proliferation of mandatory minimum sentences,[97] policies of the Department of Justice and state and local prosecutors regarding plea bargaining practices, [98] and charging decisions and priorities resulting in a different mix of cases. Others argue that judges have come to see themselves more as managerial technocrats encouraging parties to reach a mutually agreeable settlement rather than arbiters of the law presiding over trials.[99]

The disappearance of criminal jury trials has coincided with a precipitous increase in the use of incarceration as a tool to punish and control populations that are the subjects of the criminal justice system. Even as the crime rate fell, incarceration rates continued to rise through the 1980s, 1990s and 2000s. [100] Throughout most of the twentieth century, the U.S. incarceration rate remained relatively static at around 110 people incarcerated per thousand.[101] But around 1980, the incarcerated population grew at an astounding rate until the Great Recession in 2008, when it peaked at just over 750 people incarcerated per thousand.[102]

The United States Supreme Court recently has begun to reckon with the reality that trials of any kind have become a rarity in criminal adjudication.[103]

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96 The Federal Sentencing Guidelines do this by allowing for a reduction in the criminal offense level for "acceptance of responsibility." *See* U.S.S.G. Manual § 3E1.1. Although such a reduction is still theoretically possible for a defendant who exercise their right to trial, few judges would grant such a reduction after a trial in which the defendant was found guilty. *See* U.S.S.G. Manual § 3E1.1, application note 2.

97 *See* Galanter, *supra* note 85, at 495 (suggesting the impact of mandatory minimums on criminal trial rates in addition to increased funding for law enforcement).

98 *See, e.g.*, Ashcroft Memo (Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003)).

99 *See* Steven Baicker-McKee, *Reconceptualizing Managerial Judges*, 65 AM. U. L. REV. 353, 354 (2015) (portraying judges as coercive toward settlement of cases on their dockets).

100 *See* William T. Pizzi, *The Effects of the "Vanishing Trial" on Our Incarceration Rate*, 28 FED. SENT'G REP. 330, 330 (2016) (tracking the increase of the U.S. incarceration rate through the decades).

101 *See* Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1226–27 (2010).

102 PRISONERS IN 2019, BUREAU OF JUSTICE STATISTICS (October 2020), https://www.bjs.gov/content/pub/pdf/p19_sum.pdf [https://perma.cc/JL8G-9QJW] (describing the change in rates of imprisonment over time).

103 *See* Lafler v. Cooper, 566 U.S. 156, 170 (2012); *see also* Missouri v. Frye, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.") (citing DEP'T OF JUST., BUREAU OF STAT., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, ONLINE, TABLE 5.22.2009; DEP'T OF JUST., BUREAU OF JUSTICE STAT., S. ROSENMERKEL, M. DUROSE & D. FAROLE, FELONY SENTENCES IN STATE COURTS 2006).

Because of the prevalence of juryless adjudication, the Court in *Lafler v. Cooper* and *Missouri v. Frye* found that the constitutional guarantee of the effective assistance of counsel extended not only to trial but also to plea negotiations.[104] For the vast majority of criminal defendants, the charge of conviction and length of sentence is determined privately, between prosecutor and defense lawyer, rather than in a public and adversarial proceeding.[105]

The absence of criminal trials and accompanying disappearance of jurors from the architecture of American criminal justice has had profound effects on how decisions are reached and how Americans conceive of the system of deciding criminal cases. As efficiency has come to dominate discussions of criminal courts, democratic ideals of citizen involvement in these important decisions have taken a back seat. Community members have lost the ability to weigh in on issues of importance by serving on juries and even judges are not meaningfully able to keep tabs on police and prosecutors, if all they are ordinarily called upon to do is accept plea agreements that were negotiated in private.[106]

The shift away from community involvement in determining guilt has a profound impact on both how communities conceive of the criminal process and on how criminal defendants are impacted. Bench trials can result in an "adversarial deficit" for criminal defendants that allows police and prosecutorial practices to go unchecked.[107] But even in a system that rarely sees criminal defendants exercise their right to trial by jury, the existence of the right has an effect on outcomes as parties engage in plea negotiation "in the shadow of trial" and ever-cognizant of what a jury might decide.[108]

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104 *See Lafler*, 566 U.S. at 162 (holding that, during plea negotiations, defendants are "entitled to the effective assistance of competent counsel"); *Frye*, 566 U.S. at 143–44 (reasoning that, because of the high rate of cases resolved by plea negotiations, "it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process").

105 *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) ("To a large extent, this kind of horse trading determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.").

106 *See* Daniel S. McConkie, Jr., *Criminal Justice Citizenship*, 72 FLA. L. REV. 1023, 1029 (2020) ("The decline of the jury trial has upset the carefully balanced separation of powers that should define the American system.") (citing Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV 989, 1033–34 (2006)).

107 Sean Doran, John D. Jackson, & Michael L. Siegel, *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 27 (1995).

108 *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

Although plea negotiation occurs in an imperfect market, legal entitlements can be bargained away by defendants in a way that dramatically affects sentencing and other outcomes.

III. THE RISE OF COLLATERAL CONSEQUENCES

Although rates of arrest, prosecution, and incarceration have risen dramatically over the past half century,[109] the impact of the criminal justice system is felt not only in incarceration and other direct consequences but also by the collateral consequences that flow from a criminal conviction.[110] Scholars and reformers have turned their attention to the impact of collateral consequences in recent years and have come to recognize this parallel criminal justice system as troubling and pernicious.[111] The informal system of collateral consequences that attend a criminal conviction suffers from the same pervasive racial bias and deficits of reliability as the formal system of criminal adjudication but also is much harder to reform due to its decentralized nature.[112] This is especially true in the world of low-level offenses, where defendants are much less likely to serve time behind bars but can still suffer all manner of consequences in their lives as a result of even a misdemeanor conviction.[113]

In the years since the Supreme Court last addressed the issue of jury trial rights for presumptively petty offenses,[114] access by public and private actors to criminal histories has changed dramatically. The advent of electronic

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109 *See* John D. King, *Beyond 'Life and Liberty,' The Evolving Right to Counsel*, 48 HARV. C.R. C. L. L. REV. 1, 20 (2013) (correlating the rise of crimes, arrests, and prosecutions that have flowed from the broken windows policing model in recent decades).

110 *See id.* at 23 ("These collateral consequences often constitute a far more serious form of punishment than the direct consequences of a conviction, especially for the many people convicted of low-level crimes who are never sentenced to incarceration.").

111 *See id.* at 33 (explaining the ability of collateral consequences to operate outside of the scope of the criminal justice system because such consequences are not imposed in open court or subjected to a proportionality analysis).

112 *See id.* at 46–47 (listing some of the challenges in targeting the system of collateral consequences for reform).

113 *See generally* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018); Gabriel J. Chin & Margaret C. Love, *Status as Punishment: A Critical Guide to* Padilla v. Kentucky, 25 CRIM. JUST. 21 ("Modern criminal convictions do much more than send people to prison and impose fines pursuant to court order. Convictions are the basis for scores or hundreds of additional state and federal consequences, automatically imposed or potentially made available by statute or regulation.").

114 *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989) (holding that offenses carrying a maximum prison term of six months or less are presumed "petty" for the purposes of the Sixth Amendment).

databases and ubiquitous internet access has amplified the criminal backgrounds of those convicted of all kinds of offenses and made them easy for any potential employer or government agency to find.[115] This easy access has come as government and private parties have multiplied the ways in which a prior criminal conviction can interfere with one's life.[116] Researchers have compiled thousands of separate collateral consequences that attach to various kinds of criminal convictions at federal, state, and local levels.[117] These post-conviction consequences are enacted by federal, state, and local governments and encompass convictions from other states and even juvenile adjudications.[118] Beyond the most basic and well-known immigration-related consequences, it is inconceivable that any judge, prosecutor, or defense lawyer could know all of the ways in which a particular charge might result in a life-altering restriction of freedom after the fact.[119]

Of course, the phenomenon of collateral consequences is not new. Justice Powell concurred separately in *Argersinger v. Hamlin* to emphasize that it might be the fact of conviction, rather than the fact of imprisonment, that has the greatest impact on the person convicted of a crime.[120] Criminal history has

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115 *See* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 31 (2013) [hereinafter *Beyond "Life and Liberty"*] ("Criminal background checks are now quick, cheap, and available online, and can search all levels of criminal conviction from throughout the country.").

116 *See National Inventory of the Collateral Consequences of Conviction*, NAT'L INST. OF JUST., https://nij.ojp.gov/topics/articles/national-inventory-collateral-consequences-conviction [https://perma.cc/SQV9-TQZ2] (last visited May 31, 2021); *see generally* CECELIA KLINGELE, MARGARET C. LOVE & JENNY M. ROBERTS, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE (2016). On increased access to criminal backgrounds, *see also* King, *Beyond "Life and Liberty"*, *supra* note 115, at 31 n.193 (chronicling the inability of a convicted criminal to escape their convictions).

117 KLINGELE, LOVE & ROBERTS, *supra* note 116.

118 *See In re* Zoie H., 937 N.W.2d 801, 807–09 (2020) (addressing whether the seriousness consideration applies to juvenile adjudications).

119 For an interesting proposal and taxonomy of collateral consequences, see Emily Ahdieh, *The Deportation Trigger: Collateral Consequences and the Constitutional Right to a Trial by Jury*, 30 GEO. MASON U. C.R. L.J. 65 (2019). The author distinguishes first between collateral consequences that are certain to be imposed and those that are only imposed based on the discretion of some other actor, and then distinguishes further between collateral consequences imposed by the jurisdiction of conviction and those imposed by another jurisdiction.

120 *See* Argersinger v. Hamlin, 407 U.S. 25, 47–48 (1972) (Powell, J., concurring) ("The consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record in employability, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty.' Serious consequences also may result from convictions not punishable by imprisonment. . . . Losing one's driver's license is more serious for some individuals than a brief stay in jail.").

been called a "negative curriculum vitae"[121] and "a form of electronic branding."[122] As the data continues to accumulate showing the racially disparate and unreliable outcomes of the criminal justice system—especially the misdemeanor criminal justice system—the parallel system of collateral consequences acts as a magnifier of these disparities and injustices.

The problems of collateral consequences and mass incarceration are not solved by simply reducing penalties for low-level offenses. Over the past ten years, many states have legalized the possession of marijuana, while others have reduced the potential penalties and even eliminated the possibility of jail time.[123] Other jurisdictions have informally "decriminalized" the possession and use of marijuana, with prosecutors agreeing not to seek jail time.[124] While reducing the impact of the direct consequences of these convictions, however, such policies have not addressed the collateral consequences of what remains in most states a criminal conviction. Except where state legislation has explicitly legalized this behavior, these reforms may have succeeded only in reducing the procedural safeguards for defendants and widening the net of the criminal justice system and the collateral consequences that go along with a conviction.[125]

IV. LOWER COURT RESPONSES TO *DUNCAN*

Recent cases show a willingness of lower courts to push back on the restrictive application of *Duncan* and to expand the scope of the jury right. And while the expansion of the right to trial by jury on a case-by-case basis is a welcome development, the reasoning of these cases casts doubt on the continued viability of the petty offense doctrine more generally.

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121 James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 177 (2008). *See also* John P. Gross, *What Matters More: A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55, 85–86 (2013) (discussing the difference in availability of criminal records from when Argersinger was decided and today).

122 Gross, *supra* note 121, at 86.

123 *See* Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 383 (discussing the mainstream trend toward decriminalization and legalization of marijuana).

124 *See id.* (detailing the changed perspective of prosecutors toward marijuana convictions).

125 *See* Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1816–17 (2013) ("[R]eforms that do no more than reduce penalties are of limited benefit to noncitizen defendants because convictions can still trigger immigration consequences . . . . [W]here such reforms result in reduced access to counsel, noncitizens will be much less likely to become aware of the removal consequences that may still follow other minor offenses.").

Jean-Baptiste Bado, a pastor from Burkina Faso, arrived in the United States in 2005 seeking asylum based on his political and religious beliefs.[126] While his asylum application was pending, however, he was charged in the District of Columbia with three counts of misdemeanor sexual abuse of a minor.[127] The charges were each punishable by a maximum term of incarceration of 180 days and a maximum fine of $1,000.[128] Although categorized under D.C. law as a misdemeanor, the charge is also considered an aggravated felony for purposes of United States immigration law,[129] and any conviction of such a charge would render Bado ineligible for asylum[130] and removable from the United States.[131]

Although D.C. law provides for criminal jury trials only in cases for which the maximum punishment exceeds six months,[132] Bado requested a jury trial pursuant to the Sixth Amendment. The trial judge denied his request for a jury trial and, at the conclusion of a bench trial, convicted Bado of one count of misdemeanor sexual abuse of a minor. On appeal, the District of Columbia Court of Appeals considered whether the immigration consequences of Bado's conviction were relevant to the consideration of the "seriousness" of the charge against him and entitled him to a jury trial. By a vote of 6-2, the Court held that it did, and the Court reversed his misdemeanor conviction.

Sitting en banc, the *Bado* majority began with the presumption that the offense in question was petty because it was punishable by no more than 180 days in jail and a $1,000 fine. As the Supreme Court instructed in *Blanton*, however, the D.C. Court of Appeals went on to consider whether additional potential penalties were sufficient to overcome the presumption of pettiness and trigger the protections of the Sixth Amendment's right to trial by jury. The Court found that the penalty of deportation, along with the other

126 *See* Bado v. United States, 186 A.3d 1243, 1247 (D.C. 2018) (providing background information regarding the appellant fleeing from Burkina Faso).

127 *See id.* (halting his application because if convicted, Bado would be barred from receiving political asylum).

128 *See* D.C. Code § 22-3010.01 (2020) (specifying that an individual convicted under this code section "shall be imprisoned for not more than 180 days, or fined not more than the amount set forth in § 22-3571.01, or both.").

129 *See* 8 U.S.C. § 1101(a)(43)(A) (listing the sexual abuse of a minor as an "aggravated felony").

130 *See* 8 U.S.C. §§ 1158(b)(2)(A)(ii) (excepting from eligibility aliens convicted by a final judgement of a particularly serious crime who constitute a danger to the community); *see also* 1158(b)(2)(B)(i) (defining an "aggravated felony" as a particularly serious crime).

131 *See* 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

132 *See* D.C. Code § 16-705(b)(1)(A) (2020) (allowing a trial by jury for offenses which are punishable by imprisonment for more than 180 days or fine or penalty exceeding $1,000).

penalties that the D.C. Council attached to the offense, were relevant and sufficiently serious to require trial by jury.

The *Bado* Court found that deportation was a far more serious additional consequence than the penalties considered by the Supreme Court in either *Blanton* or in *Nachtigal*: "Like incarceration, deportation separates a person from established ties to family, work, study, and community. In this forced physical separation, it is similar 'in severity [to] the loss of liberty that a prison term entails.'"[133] In describing the devastating personal and community consequences of deportation, the D.C. Court of Appeals acknowledged that "removal is considered by many immigrants to be worse than incarceration, such that 'preserving the . . . right to remain in the United States may be more important . . . than any potential jail sentence.'"[134] Based on the severity of the immigration-related consequence of even a misdemeanor conviction for Bado, the Court held that the situation presented the "rare situation" that the Court had described in *Blanton* in which the defendant was entitled to a trial by jury even though the statutory maximum term of imprisonment did not "puncture the six-month incarceration line."[135]

Rejecting the prosecution's argument that deportation was not a "penalty" that should be considered in the analysis regarding seriousness, the *Bado* Court held that deportation was clearly a penalty and that the *Blanton* analysis did not meaningfully distinguish between penal and civil sanctions.[136] When the Supreme Court in *Blanton* referred to evaluating the seriousness of an offense based upon the penalties attached to that offense, the Court was clear that it meant more than just the maximum term of incarceration:

> In using the word 'penalty,' we do not refer solely to the maximum prison term authorized for a particular offense. A legislature's view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense. We thus examine 'whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial.'[137]

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133 Bado v. United States, 186 A.3d 1243, 1250 (D.C. 2018) (quoting Blanton v. City of North Las Vegas, 489 U.S. 538, 542 (1989)).

134 *Id.* at 1251 (quoting Lee v. United States, 137 S. Ct. 1958, 1968 (2017)); *see also* Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (calling deportation "a particularly severe 'penalty'") (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (noting that "deportation is a drastic measure and at times the equivalent of banishment or exile").

135 *Bado*, 186 A.3d at 1252 (quoting Blanton, 489 U.S. at 543).

136 *See id.* at 1252 (refusing to find that *Blanton*'s use of the term penalty referred solely to the statutory "penalties," but also to other penalties which attach to an offense).

137 *Blanton*, 489 U.S. at 542 (internal citations and punctuation omitted) (quoting Duncan v. Louisiana, 391 U.S. 145, 161 (1968)).

Although the *Blanton* Court found that the penalties at issue in that case —a driver's license suspension—did not rise to the level of seriousness that triggered the federal constitutional right to jury trial, the Court did factor that collateral consequence into its calculus. The *Bado* Court held that it made no difference that the sentencing court itself could not order deportation as a direct consequence of the criminal conviction, or even that the immigration-related consequence was imposed by an entirely separate sovereign. Because the consequence to Bado of a conviction was sufficiently serious, held the Court, he was entitled to a trial by jury pursuant to the Sixth Amendment.

The majority in *Bado* was untroubled by two pragmatic arguments made by the dissenting judges. First, the dissent argued that the majority opinion presented an unacceptable anomaly in treatment between citizen and non-citizen defendants. Second, the dissent warned that the majority opinion promised to set courts on a slippery slope of defendants arguing that their subjective circumstances rendered an otherwise apparently petty offense serious as applied to them. With regard to the "slippery slope" argument, the *Bado* majority simply held that this was not "a factor whose relevance can be gleaned from *Blanton*, which focused on the possible penalties faced by the accused . . . ."[138]

In his concurring opinion, Judge Washington focused on the disparity that the decision had created between citizens and non-citizens charged with the same offense. Although the outcome was, in his opinion, faithful to the standard set forth in *Blanton*, the resulting constitutional disparity "could undermine the public's trust and confidence in our courts to resolve criminal cases fairly" and should be remedied by the legislature.[139] The statutory fix, of course, would be for the legislature to guarantee trial by jury for any criminal case. Restoring this right, according to Judge Washington, "could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial."[140]

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138 *Bado*, 186 A.3d at 1256; *see also id.* at 1260 n.35 ("The government also argues that, if the possibility of removal is considered in a *Blanton* analysis, all sorts of other consequences that may follow after a conviction could also be factors, such as termination of employment and ineligibility for gun ownership. These are not before us.").

139 *See* Bado, 186 A.3d at 1262 (Washington, J., concurring) (calling upon the legislature to address the disparity between citizens and noncitizens).

140 *Id.* at 1264 (Washington, J., concurring).

Just a few months after the D.C. Court of Appeals decided *Bado*, the Court of Appeals of New York addressed the same issue and came to the same conclusion. In *People v. Suazo*,[141] the defendant was initially charged with a variety of domestic assault-related offenses, which entitled him to a trial by jury. Just prior to trial, however, the prosecution moved to reduce certain of the offenses to attempts, which lowered the maximum potential term of incarceration for any single charge to three months.[142] The non-citizen defendant, Saylor Suazo, argued that the consequences of a conviction for him included not only the direct consequences that could be imposed by the sentencing judge but also deportation.[143] On this basis, he argued that he was entitled to a trial by jury under *Duncan* and *Blanton*. The judge denied Suazo's motion for a jury trial, heard the case without a jury, and convicted Suazo of several of the charged offenses.

Reviewing the conviction, the *Suazo* Court held that "[t]here can be no serious dispute that, if deemed a penalty for Sixth Amendment purposes, deportation or removal is a penalty of the utmost severity."[144] Not only can the process entail detention that can far exceed the length of any criminal sentence that might have resulted, the end result—permanent separation from "friends, family, home, and livelihood"—often far exceeds in severity than any period of incarceration that would result from a low-level offense.[145] As in *Bado*, the prosecution argued that, although deportation was undoubtedly a serious consequence of a criminal conviction, it was merely a civil collateral consequence and so should not be factored into the Sixth

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141 *See* People v. Suazo, 118 N.E.3d 168 (N.Y. 2018) (holding that a noncitizen defendant charged with a deportable crime was entitled to a jury trial under the Sixth Amendment).

142 *See id*. at 171–72 (discussing how the prosecutor reduced the charges before trial to offenses that were triable without a jury). This "strategic undercharging" is an example of prosecutorial gamesmanship. *See, e.g.*, Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775 (2016) (explaining why and when prosecutors are more likely to engage in strategic undercharging); John D. King, *Gamesmanship and Criminal Process*, 58 AM. CRIM. L. REV. 47 (2021) (exploring various examples of prosecutorial gamesmanship in the criminal justice system and how these practices impact the legitimacy of the system).

143 The prosecution agreed that conviction of certain of the charged offenses would subject Suazo to deportation but argued that such collateral consequences of a criminal conviction were not relevant for purposes of determining whether a defendant has a right to trial by jury. *See Suazo*, 118 N.E.3d at 172 (discussing how the prosecution opposed defendant's motion solely on the grounds that "deportation is a collateral consequence arising out of federal law that does not constitute a criminal penalty for purposes of the Sixth Amendment right to a jury trial").

144 *Id.* at 175.

145 *See id.* at 176 ("A noncitizen who is adjudicated deportable may first face additional detention, followed by the often-greater toll of separation from friends, family, home, and livelihood by actual forced removal from the country and return to a land to which that person may have no significant ties.").

Amendment analysis.[146] Moreover, argued the prosecution, it was the federal government—a separate sovereign—that was imposing the consequence, so it had no relevance to the seriousness with which New York viewed the offense.

The Court of Appeals of New York rejected both of these arguments. First, the *Suazo* Court held that deportation and criminal convictions are so "enmeshed" and closely connected to each other that deportation should be factored into the determination of seriousness.[147] The *Suazo* Court drew no distinction between collateral consequences that operated as a result of New York state or federal law, holding instead that the collateral consequence of deportation "reflects *society's view* that the misconduct underlying the conviction is of the type that violates social norms of proper behavior and stirs community outrage to such an extreme extent that it provides a basis for the convicted person to be exiled from home, family, community, and country."[148] The *Suazo* Court pointed out that the Supreme Court had only considered other state-imposed consequences in its analysis of the petty offense exception to the jury trial right and had never held that federally-imposed penalties must be excluded from that analysis "simply because they are imposed by a legislature other than the local one."[149]

As in *Bado*, the *Suazo* Court chose not to address the question of disparity between citizen and noncitizen defendants charged with the same offense. Acknowledging the prosecution's argument that the Sixth Amendment "does not permit a distinction between the right to a jury trial for citizens and noncitizens,"[150] the *Suazo* Court held that the issue was not properly before it and so did not decide it.[151]

The *Suazo* dissent argued that the only relevant criteria in the seriousness analysis were "the penalties imposed by the New York State Legislature for the specific offense at issue."[152] In addition, the dissent argued that any consideration of deportation would undercut the objective analysis of

146 *See id.* at 176–77.

147 *See id.* at 177 (citing Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010)) (stating that deportation is intimately related to the criminal process and often inevitable for a large number of noncitizens convicted of crimes).

148 *Id.* at 179 (emphasis added); *see also id.* at 177 ("The salient fact is that a legislative body authorized to attach a penalty to a state conviction has determined that the crime warrants the onerous penalty of deportation.").

149 *Id.*

150 *Id.* at 181.

151 *See id.* (declining to address the issue of whether a citizen in the defendant's position would have been entitled to a jury trial when charged with an otherwise deportable offense).

152 *Id.* at 183 (Garcia, J., dissenting).

seriousness that the Supreme Court had prescribed.[153] Finally, the dissent argued that the majority's approach would send courts down a slippery slope, and that no clear line could be drawn between the immigration consequences at issue in that case and future cases involving collateral consequences, including, for example, the loss of public housing.[154]

Deportation is, of course, not the only collateral consequence that can elevate an offense from presumptively petty to serious. The state of Nevada passed a law limiting the right to carry a firearm of those people convicted of misdemeanor domestic battery. Although the maximum sentence for a conviction of the misdemeanor domestic battery remained six months and therefore within the presumption of pettiness established in *Blanton*,[155] the Supreme Court of Nevada held that the firearm-related collateral consequence rebutted that presumption and entitled any defendant charged with that offense to a jury trial.[156] The unanimous en banc opinion was short and straightforward:

> [A]lthough not included in the statute proscribing misdemeanor domestic battery, our Legislature has imposed a limitation on the possession of a firearm in Nevada that automatically and directly flows from a conviction for misdemeanor domestic battery. In our opinion, this new penalty . . . "clearly reflect[s] a legislative determination that the offense [of misdemeanor domestic battery] is a serious one."[157]

This decision overruled an earlier decision by the same court[158] and is further evidence of a willingness on the part of state courts to broadly interpret the jury trial right in light of the broad and expanding web of collateral consequences.

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153 *See id.* at 185 ("[T]he Supreme Court has explicitly rejected consideration of a defendant's circumstances as part of the penalty analysis: an objective indication of the seriousness with which society regards the offense . . . is used to determine whether a jury trial is required, not the particularities of an individual case.") (citations and internal punctuation omitted).

154 *See id.* at 187 arguing that the majority's opinion opened the door to apportion severity "'when . . . so many civil laws today impose similarly severe sanctions'") (quoting Sessions v. Dimaya, 138 S.Ct. 1204, 1231 (2018).

155 *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989) (presuming that society will regard an offense that is punishable by a term of six months or less to be "petty").

156 *See* Andersen v. Eighth Jud. Dist. Ct., 448 P.3d 1120, 1124 (Nev. 2019) ("[T]he right affected here convinces us that the additional penalty is so severe as to categorize the offense as serious.").

157 *Id.* at 1123–24 (citing *Blanton*, 489 U.S. at 543).

158 *See id.* (concluding that misdemeanor of domestic battery is a serious offense, thus overturning *Amezcua*).

The federal constitutional guarantee, of course, is only a floor beneath which states cannot sink.[159] State courts are free to give a more protective analysis to state guarantees of jury trial rights, and state legislatures are free to enact statutory safeguards extending the right to trial by jury to a broader class of criminal defendants than is encompassed by the Sixth Amendment.

V. MOVING BEYOND THE PRESUMPTION OF PETTINESS

The dramatic rise in collateral consequences has profoundly changed the reality of low-level criminal adjudication in the last few decades. Punishment following a criminal conviction is no longer a matter of incarceration, threatened incarceration, and fines.[160] Punishment now consists of those things but also a host of collateral consequences, some internal to the criminal justice system but many external to that system. Justice Powell's concurring opinion in *Argersinger v. Hamlin* questioned the centrality of imprisonment to the analysis of whether the right to counsel extended to misdemeanors: the rationale in the majority opinion "for extending the right to counsel to all cases in which the penalty of any imprisonment is imposed applies equally well to cases in which other penalties may be imposed."[161] The same rationale applies to the jury right, especially as the realities of today's criminal justice system demonstrate that direct punishment often pales in comparison with the collateral consequences of a conviction.

Today, an entire system of collateral consequences has evolved, and does not respect any boundaries between "serious" and "petty" offenses. Although felonies carry a more serious stigma and more certain extra-judicial consequences, many crimes that carry short potential jail sentences can also trigger these life-altering formal and informal penalties.[162] Discussion of discrete single collateral consequences can never capture the entire "web" of consequences that alter a convicted person's life. It is the marking as a convicted person that opens one up to further punishment by state and

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159 *See* Landry v. Hoepfner, 840 F.2d 1201, 1205–06 (5th Cir. 1988) ("[T]he doctrine is one of *federal* constitutional law. It does not prevent the states—or the federal government—from granting a jury trial right in petty offenses; it speaks only to when the United States Constitution mandates such a right.").

160 *See* John Gross, *What Matters More: A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55, 80 (2013) (arguing that the Supreme Court decisions in *Argersinger* and *Scott* failed to predict the "wide range of enmeshed penalties that result from a criminal conviction" today).

161 Argersinger v. Hamlin, 407 U.S. 25, 52 (1972) (Powell, J., concurring).

162 *See* John Gross, *What Matters More: A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55, 81 (2013) ("It would be a mistake to look at a specific consequence of a conviction; instead, we must view all of the potential consequences of a conviction as a web of enmeshed penalties.").

private actors, which happens today in a way that is markedly different from even the recent past, when cases like *Duncan* and *Blanton* were decided.

As with the right to counsel,[163] the presumptions and premises underlying the doctrine of the right to trial by jury have been undermined by the trajectory of the criminal justice system. The rise of collateral consequences has rendered incarceration an imperfect and inadequate lodestar to determining the seriousness of an offense. As a result, courts should embrace a broader understanding of the federal constitutional right to trial by jury in criminal cases, state legislatures should enact legislative assurances of the right to trial by jury in all criminal cases, and advocates for those accused of crimes should be aggressively litigating the right to trial by jury in cases that involve low-level offenses.

A. The Supreme Court should expand the scope of the right to a jury trial

Justice Black referred to the judicially-created petty offense exception as the "judicial mutilation of our written Constitution."[164] Although that perspective never commanded a majority, the Supreme Court earlier had acknowledged that the precise contours of what constitutes a petty and a serious crime are fluid and evolving with history, holding that "a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribes."[165] Because of the evolving realities of low-level criminal charging, adjudication, and the collateral consequences that now result, the Court should revisit this doctrine.

Recent developments in Sixth Amendment doctrine supports a broad reconsideration of the scope of the jury trial right and whether cases recognizing a petty offense exception were wrongly decided. In *Ramos v. Louisiana*, the Court overruled clear existing precedent on the issue of non-unanimous jury verdicts, holding that a state rule allowing for conviction by a non-unanimous jury violates the Sixth Amendment as applied to the states through the Fourteenth Amendment.[166] *Apodaca v. Oregon* had held exactly the contrary almost a half century earlier.[167]

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163 *See* King, *Beyond "Life and Liberty"*, *supra* note 115 (describing the impact of the evolution of the criminal justice system on the right to counsel).

164 Baldwin v. New York, 399 U.S. 66, 75 (1970) (Black, J., concurring).

165 District of Columbia v. Clawans, 300 U.S. 617, 627 (1937).

166 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1398–99 (2020) (overruling *Apodaca* and holding that the Sixth Amendment requires conviction by unanimous jury verdict).

167 *See* Apodaca v. Oregon, 406 U.S. 404, 410–11 (1972) (holding that nonunanimous jury verdicts in criminal trials do not violate the Sixth Amendment).

One of the fascinating aspects of the various opinions in *Ramos* was the Justices' competing views on the doctrine of stare decisis, given that none of them appear to have considered *Apodaca* to have been correctly decided. Justice Gorsuch's opinion, which was joined by Justices Ginsburg and Breyer, avoids the thicket of stare decisis by arguing that *Apodaca* was such a fractured decision that it did not create any relevant precedent that bound the Court.[168] Because of the unique nature of the way that *Apodaca* was decided, argues Justice Gorsuch, the Court could rule that the Constitution forbids non-unanimous juries and not really have to overrule anything. In a dissenting opinion joined by Chief Justice Roberts and in relevant part by Justice Kagan, Justice Alito argues that, whether or not it was correctly decided, *Apodaca* had established a precedent that had been settled for nearly fifty years and that the Court should respect, calling *Apodaca* "an important and long-established decision."[169] Seeing no reason to disturb the precedent even while failing to defend the logic of it, the dissenters would have affirmed Ramos's conviction and allowed states to use non-unanimous juries.

In *Ramos*, three of the Justices said there effectively was no precedent to overrule and three others would have followed the precedent that allowed for non-unanimous jury verdicts. The three remaining Justices acknowledged the precedent but agreed that it should be reversed, each writing separately. Justice Thomas took the most extreme and least deferential approach to stare decisis, arguing that if the Supreme Court believes a precedent is wrongly decided, it is under no obligation to follow that precedent and should not follow it. Any stricter understanding of stare decisis "does not comport with [the Court's] judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law."[170]

Justice Sotomayor proposed another standard that would give relatively little deference to prior rulings in criminal cases, arguing that the doctrine of stare decisis is least powerful in such cases involving a question of the constitutionality of trial procedures, especially in cases that could result in the

168 *See Ramos*, 140 S. Ct. at 1398–99 ("[W]hile Justice Powell's vote secured a favorable judgment for the States in *Apodaca*, it's never been clear what rationale could support a similar result in future cases.").

169 *Id.* at 1425 (Alito, J., dissenting).

170 *See id.* at 1421 (Thomas, J., concurring) (quoting Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring)).

defendant's loss of liberty.[171] After quoting the Court's ruling in *Alleyne* that "[t]he force of *stare decisis* is at its nadir in cases concerning [criminal] procedur[e] rules that implicate fundamental constitutional protections," [172] Justice Sotomayor argued that

> the constitutional protection here ranks among the most essential: the right to put the State to its burden, in a jury trial that comports with the Sixth Amendment, before facing criminal punishment. . . . Where the State's power to imprison . . . rests on an erroneous interpretation of the jury-trial right, the Court should not hesitate to reconsider its precedents.[173]

Justice Kavanaugh attempted in *Ramos* to articulate a more deferential standard for when the Court should overrule precedent, taking a more conservative approach than Justices Thomas or Sotomayor. Like Justice Sotomayor, Justice Kavanaugh recognized that the doctrine of stare decisis is relatively weak in constitutional cases, as opposed to statutory cases.[174] With this in mind, he proposed that the Court should overrule constitutional precedent when (1) that precedent is "grievously or egregiously wrong"; (2) the precedent "has caused significant negative jurisprudential or real-word consequences"; and (3) the overruling of the precedent would not "unduly upset reliance interests."[175] A more stringent test than those proposed by the other dissenters, Justice Kavanaugh's proposal "set[s] a high (but not insurmountable) bar for overruling a precedent."[176]

The various opinions in *Ramos* demonstrate an opening for the Court to reconsider another constitutional criminal procedure decision that drastically curtailed the right of the criminally accused. Just as the Court showed a willingness to revisit a longstanding and erroneous interpretation of the constitutional meaning of "jury" in *Ramos*, the Court should revisit the interpretation of the meaning of "criminal prosecution" for purposes of the jury trial right. As some members of the Court adopt a more absolute textualism, it becomes more and more difficult to understand that "in all criminal prosecutions" means "in some criminal prosecutions." Justice

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171 *See id.* at 1410 (Sotomayor, J., concurring) ("While overruling precedent must be rare, this Court should not shy away from correcting its errors where the right to avoid imprisonment pursuant to unconstitutional procedures hangs in the balance.").

172 Alleyne v. United Sates, 570 U.S. 99, 116 n.5 (2013).

173 *Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring).

174 Justice Kavanaugh quoted Chief Justice Roberts's concurring opinion in *Citizens United*, in which he wrote that the Court "must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*." *Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J., concurring) (quoting Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring)).

175 *See id.* at 1414–15 (outlining the circumstances under which the Court should overrule precedent).

176 *Id.* at 1415.

Gorsuch's recent opinions in *Bostock* and *McGirt* were notable not only for their far-reaching results but also for the textualist logic by which the court arrived at those decisions.[177] And the fact that the more liberal justices signed onto the textualist reasoning in those opinions may signal that "textualism is now the leading method of statutory interpretation before the Supreme Court."[178] As a more absolute textualism takes hold, principles of judicial restraint carry less weight.[179] A wider variety of judges, then, might be willing to consider arguments that the constitutional right to trial by jury applies—as the language suggests—to all criminal offenses.

Whether or not the doctrinal and historical critiques of the Court's creation of the petty offense exception are correct, contemporary developments demand its reconsideration. Even if a petty offense exception were once justified by history and common law, the current doctrine is no longer a meaningful and workable standard and should be discarded. The Court should not be hesitant to reverse itself on the issue of the petty offense exception because it has recently held that principles of stare decisis are at their weakest in cases involving procedure and in cases involving constitutional rights. The Court's recent embrace of the unanimity requirement and rejection of the precedent in *Apodaca* demonstrate a path forward in reconsidering wrong steps in constitutional criminal procedure that harm criminal defendants and are not textually required.

B. State legislatures should guarantee a jury trial for all criminal offenses

Most states guarantee criminal defendants a broader right to trial by jury than the federal constitutional guarantee, either by state constitution or statute.[180] Generally, the states can be divided into three groups: (1) those that guarantee the right to trial by jury for any criminal offense; (2) those that

177 *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (holding that Title VII of the Civil Rights Act of 1964 protects gay and transgender employees from being fired on the basis of their sexual orientation based on the text of the Act); McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (upholding the text of a treaty granting Indian reservations to certain tribes based on the text of the treaty and lack of congressional intent otherwise).

178 Noah Feldman, *The Battle Over Scalia's Legacy*, N.Y. REV. BOOKS, at 68 (Dec. 17, 2020).

179 *See id.* (advancing the theory that there is a tension between principles of judicial restraint, originalism, and textualism, thus forcing judges to choose).

180 *See* T. Ward Frampton, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 186 (2012) (noting the variation by jurisdiction of the rights to trial by jury in criminal cases).

guarantee the right for any jailable offense; and (3) those that adhere to the federal constitutional minimum, as explained in *Duncan* and *Blanton*.[181]

Although states generally can be broken into these three categories, there are subtler distinctions in how the states define those criminal offenses that trigger a state right to trial by jury. Twenty states provide the right to a jury trial to virtually anyone charged with a criminal offense.[182] Seven additional states extend this right to anyone charged with a crime that carries any possibility of incarceration.[183] Three states—Delaware, Hawaii, and New Mexico—provide a jury right for anyone charged with a criminal offense punishable by incarceration for much shorter periods of time than would trigger the federal constitutional jury right.[184] Four states expand on the federal constitutional jury trial right only by allowing the right to those offenses that were triable to a jury when the relevant state constitutional

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181 *See* Bado v. United States, 186 A.3d 1243, 1265 n.1 (D.C. 2018) (Washington, J., concurring); *see also* T. Ward Frampton, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 200 (2012) ("A likely source of some interstate variation in jury trial rates . . . is the fact that most state constitutions contain analogues to the Sixth Amendment that provide broader jury trial provisions than their federal counterpart.").

182 *See* Murphy, *supra* note 37, at 172 n.178 (collecting citations to state constitutional provisions and other authorities that provide for criminal jury trial rights for all criminal offenses). An example of such a state constitutional provision is North Carolina's, which provides that "no person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. CONST. art. I, § 24; *see also* City of Pasco v. Mace, 653 P.2d 618, 625 (Wash. 1982), Bradford v. Longmont Municipal Court, 830 P.2d 1135, 1136 (Colo. App. 1992).

183 *See* Murphy, *supra* note 37, at 172 n.178 (collecting citations to state constitutional provisions and other authorities that provide for criminal jury trial rights for any jailable criminal offenses). States that follow this approach are Maryland, Minnesota, New Hampshire, North Carolina, Oklahoma, West Virginia, and Wyoming. *See id.* Although Alaska's Constitution guarantees the right to trial by jury "in all criminal prosecutions," the Alaska Supreme Court has interpreted this provision to apply only to those offenses that carry some prospect of incarceration. *See* Frampton, *supra* note 180 at 200 (contrasting the United States Supreme Court interpretation of the Sixth Amendment with the Alaska Supreme Court's interpretation); Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970) (extending the right to trial by jury to any criminal offense in which incarceration may result).

184 *See* Murphy, *supra* note 37, at 173 n.179 (collecting citations to state constitutional provisions and other authorities that provide for criminal jury trial rights for criminal offenses that allow for some period incarceration fewer than six months). The Supreme Court of Hawaii has recognized the right to a trial by jury for any criminal offense carrying a potential term of imprisonment of more than thirty days, while Delaware and New Mexico provide the right for criminal offenses carrying maximum terms of incarceration of ninety days or more. *Id.*

provisions were enacted.[185] Only ten states provide a right to criminal jury trial that is exactly co-extensive with the federal constitutional minimum.[186]

State legislatures can avoid the theoretical and practical problems of evaluating the petty offense exception by simply extending the scope of the state constitutional right to cover all criminal charges. The experience of the majority of states shows that this approach is workable and affordable. Even where states provide broad guarantees of the right to trial by jury for low-level offenses, practical considerations limit the exercise of this right. One powerful disincentive to a defendant's exercise of the jury right is the "trial tax" that similarly discourages a defendant going to trial at all.[187] A sentencing judge intent on punishing a defendant for not pleading guilty can certainly send a message to a defendant who insists on empaneling a jury, if that jury ends up convicting. Whenever a judge has discretion to impose a sentence within a broad range, that judge has the ability to powerfully incentivize the waiver of any of a defendant's rights.

Some states have formal mechanisms built in that discourage the use of a jury by a defendant, especially in low-level cases. Virginia, for example, provides defendants the right to a jury trial in all criminal cases[188] but until very recently required that the jury impose a sentence in case of conviction.[189] The practice of jury sentencing, which still exists in a handful of states, has the effect of dampening the enthusiasm of defendants for exercising their right to trial by jury. Before the 2020 legislative change, the Virginia rules further provided that sentencing juries do not have access to the state's

185 *See id.* at 173 n.180 (collecting citations to state constitutional provisions and other authorities that provide for criminal jury trial rights for offenses that were eligible for jury trial at the advent of the provision). States that follow this approach are Connecticut, Rhode Island, South Carolina, and Virginia. *Id.*

186 *See id.* at 173 n.182 (collecting citations to state constitutional provisions and other authority that provide for criminal jury trial rights equivalent to that of the federal minimum). The states that provide no protection beyond the federal constitutional minimum are Georgia, Massachusetts, Missouri, Nebraska, Nevada, New Jersey, Oregon, Pennsylvania, Texas, and Washington. *Id.*

187 *See* Frampton, *supra* note 180, at 210 (describing the economic burden placed on criminal defendants through a jury tax which some states have authorized).

188 *See* VA. CONST. art. I, § 8 ("That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty.").

189 2020 Bill Tracking VA S.B. 5007, https://lis.virginia.gov/cgi-bin/legp604.exe?202+sum+SB5007 [https://perma.cc/JQM8-GXYA] (summarizing the progress of the recently enacted Virginia law which puts sentencing in the court's hands unless the accused requests sentencing by the jury).

sentencing guidelines, which could moderate the more punitive approach that some jurors might take and that many defendants would fear.[190]

CONCLUSION

One of the problems with tying the federal constitutional jury right to state or local determinations of seriousness is a lack of consistency in federal constitutional law. The same Sixth Amendment confers a right to trial by jury to a defendant charged with possession of cocaine on the south side of the Potomac River in Virginia,[191] but not to the same defendant after she crosses into the District of Columbia.[192] The contingency with which the right applies now varies not only based on geography but also on citizenship status. A citizen and a noncitizen charged with the same offense in the same jurisdiction may have different entitlements to the right to trial by jury.[193]

Variability in the application of federal constitutional rights encourages states to manipulate their criminal penalty structures to avoid being required to provide counsel and juries to misdemeanor defendants. Although some will celebrate this as one of the benefits of federalism,[194] an inconsistent application can corrode shared national values and erode a perception of fairness in the judicial system.

Bright-line federal constitutional rules protect federalism by keeping federal courts from second-guessing state courts on whether a particular set

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190 *See* VA. CODE ANN. §19.2-298.01(A) (2019) ("In cases tried by a jury, the jury shall not be presented any information regarding sentencing guidelines.").

191 *See* VA. CODE ANN. § 19.2-260 (incorporating Va. Code Ann. § 8.01-336 for application in the criminal trial context).

192 *See* D.C. CODE § 16-705; *see also* Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 149–50 (2009) ("[T]ying federal rights to the majoritarian democratic preferences of jurisdictions in which individuals are physically located renders such rights captive to state and local political prerogative. Moreover, the very process of making federal rights contingent on state and local political borders, not national citizen status, negatively affects an array of other important values, including the nation's shared sense of constitutional commitment and the premise of rights equality associated with it.").

193 *See* Bado v. United States, 186 A.3d 1243, 1256 (D.C. 2018) (arguing that considering removal a penalty under *Blanton* analysis would create an anomaly under which a noncitizen would be entitled to a jury trial but a citizen would not); New York v. Suazo, 118 N.E.3d 168, 181 (N.Y. 2018) (denying the argument the Sixth Amendment does not allow a distinction between the right for citizens and noncitizens).

194 *See* Logan, *supra* note 192, at 161 ("A chief benefit of contingent constitutionalism relates to its federalism-enforcing characteristics: it permits state and local normative choices to be maintained, at once preserving what the Anti-Federalists lauded as subnational 'individuality' and voiding the political self-abnegation typically associated with absorption into a federal union.").

of facts gives rise to a constitutional violation. It strains the imagination to classify as "petty" an offense that can lead directly to a person's permanent removal from community and country, and so it is difficult to argue with the conclusion of those courts that have held that a noncitizen has the right to a jury trial when a conviction would trigger deportation. But this logic divests the state of power to classify an offense as petty and effectively "designate[s] Congress as the relevant authority for purposes of determining when a jury trial is warranted for a [state] crime."[195] A far preferable approach would be for courts to do away with the petty offense exception and give the federal constitutional right to trial by jury its broadest application, an approach that would be categorical, absolute, and predictable.

As the doctrine continues to develop and courts consider whether certain offenses are "serious" because of the collateral consequences attached to them, legislatures will be put in the position of having to weigh whether it is worth imposing a particular collateral consequence if doing so brings with it additional procedural safeguards. A legislature may decide to eliminate or forego attaching a collateral consequence (like the loss of firearm rights) to a particular offense (like domestic assault) to avoid extending a right to trial by jury to those accused of such a crime. The calculus worries advocates, especially in the domestic violence context.[196] Categorically extending the jury trial right to all criminal offenses would avoid this weighing altogether and allow legislatures to decide on which collateral consequences are appropriate without regard to how those decisions would affect trial procedures.[197]

Critics of expanding the scope of the jury trial right focus on the inefficiency of such a system.[198] The experience of those states that already provide such a right shows this concern to be exaggerated. Moreover, the inefficiency of empaneling a jury for every criminal offense is not a bug in the system but a feature. The procedural and financial cost of ensuring a community voice in the adjudication of guilt could serve to keep the scope and volume of the criminal justice system relatively small. In *Duncan v. Louisiana*, however, the Court embraced efficiency as a virtue in allowing for

195 *Suazo*, 118 N.E.3d at 188 (Garcia, J., dissenting).

196 Debra Cassens Weiss, *Victim Advocates Concerned After Nevada Top Court Gives Jury Trial Right to Accused Domestic Batterers*, A.B.A. J. (Sept. 19, 2019, 10:47 AM), https://www.abajournal.com/news/article/victim-advocates-concerned-after-nevada-top-court-gives-jury-trial-right-to-accused-domestic-batterers [https://perma.cc/K989-ZPN2].

197 *See generally* Petition for Writ of Certiorari, Zoie H. v. Nebraska, 937 N.W.2d 801 (2020).

198 *See* Weiss, *supra* note 196 (cautioning that misdemeanor courts are not equipped for jury trials and that expansion of the right could have devastating effects).

adjudication of petty offenses without a jury, defending the exception to the jury trial right as allowing for "efficient law enforcement" and "simplified judicial administration."[199] Because jury trials are expensive, the right to trial by jury "can therefore be said to have an important social function: It pressures government resources toward the most destructive conduct within the polity."[200] The cost of a jury trial can discipline over-charging and over-criminalization.

Even if jury trials are rarely used in states where the right attaches to misdemeanors, the very option of a defendant to exercise that right changes the calculus of pre-trial negotiations and can lead to better and fairer outcomes.[201] The threat of a jury trial forces prosecutors to be more careful in their charging decisions.[202] Without a jury to screen for factual guilt and with almost no prospect of appellate review,[203] there is often no meaningful check on a prosecutor who is inclined to charge low-level offenses where there is little evidence of guilt.[204] Because the direct consequences of most misdemeanors are so slight, many such prosecutions are disposed of with a quick guilty plea and no jail time.[205] The true consequence to the defendant is sometimes only discovered well after the conclusion of the criminal case.

A system of adjudication designed to avoid juries is necessarily less reliable than one that allows for the prospect of jury review, even if that option is infrequently used. Many misdemeanor courtrooms so value

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199 391 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.").

200 Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J.L. & PUB. POLICY 7, 15 (1994).

201 *See* Bibas, *supra* note 108, at 2479 (stating that a client's plea bargaining posture improves when they have the ability to go to trial).

202 *See* Cade, *supra* note 125, at 1781 ("Noncitizens may well be charged and prosecuted for low-level offenses irrespective of the merits of their arrests."); *see also* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1705–11 (2010) (discussing prosecutorial incentives).

203 *See generally* Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933 (2019).

204 *See* Cade, *supra* note 125, at 1781 (arguing that "prosecutors are more likely to reflexively file charges in low-stakes cases, even on weak evidence"); Bowers, *supra* note 202, at 1700–03; Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1126–27 (2008); Issa Kohler-Hausmann, *Managerial Justice & Mass Misdemeanors*, 66 STAN. L. REV. 611, 643 fig. 9 (2014).

205 *See* John D. King, *The Meaning of a Misdemeanor in a Post-Ferguson World: Evaluating the Reliability of Prior Conviction Evidence*, 54 GA. L. REV. 927, 938 (2020) ("As long as the process costs of adjudicating a misdemeanor exceed the direct consequences of a conviction, it will continue to be a rare defendant in most misdemeanor systems who fights their charge by going to trial."); *see also* Cade, *supra* note 125, at 1782 ("When it comes to petty cases, prosecutors . . . have an interest in expediently securing as many convictions as possible, even if the punishment imposed is mild.").

efficiency over accuracy and reliability that it can be difficult and costly for a defendant to exercise the procedural rights that are theoretically available.[206]

Eliminating the petty offense exception to the jury trial right—whether by constitutional re-interpretation, legislative enactment, or case-by-case advocacy—would result in a criminal adjudication system that is more just, more democratic, and more faithful to the ideals of those who drafted the constitutional right to trial by jury. As some state courts have begun to recognize, the direct penalties associated with a particular offense can pale in comparison with the harsh collateral consequences of a conviction for that offense. Application of the current federal constitutional doctrine in this area leads to results that, while understandable, are difficult to square with other democratic principles. Rather than invite a subjective and unpredictable case-by-case and defendant-by-defendant analysis of whether a particular criminal prosecution is "petty" or "serious," courts and legislatures should recognize a categorical and absolute right to trial by jury for all criminal prosecutions.

206 *See* Cade, *supra* note 125, at 1784 ("Categorical charging and fixed-price plea deals are efficient ways of doing business, and prosecutors have little reason to invest in the extra effort that would be required to give misdemeanor cases particularized evaluation.").