The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State

T. Ward Frampton*

Forty-five years since the U.S. Supreme Court first recognized the right to a criminal jury trial as “fundamental to the American scheme of justice,” jury trial rates (the prevalence of jury trials relative to bench trials) in American criminal adjudication actually vary dramatically by state. A sizable body of scholarship has generally explored the decrease in criminal trials, but this “Vanishing Trial” literature has largely ignored the notable state-by-state disparities in jury trial rates. After reviewing the historic role the Framers expected the jury trial to play in criminal adjudication, this Comment analyzes the existing data on jury trial rates and identifies surprising disparities from one jurisdiction to the next. The Comment then explores various state practices that may be sources of these variations, often pushing the jury trial to the margins of criminal adjudication and disadvantaging those accused of wrongdoing. The Comment concludes by contrasting the Supreme Court’s recent jurisprudence celebrating the centrality of the jury trial with the lived experiences of criminal defendants, and argues for a more substantive understanding of the Sixth Amendment’s trial by jury guarantee.

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INTRODUCTION

Among the litany of grievances that the American colonists harbored against the English Crown, the denial of the “great and inestimable privilege of being tried by their peers” in criminal trials aroused particular ire.2 Blackstone’s Commentaries heralded the jury trial as “the grand bulwark of [every Englishman’s] liberties,”3 and dissident colonists regarded the institution as one of “the most essential rights and liberties” they possessed.4 “The friends and adversaries of the plan of the convention,” Alexander Hamilton explained, “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.”5 In 1967, the Warren Court6 recognized the right to a jury trial as “fundamental to the American scheme of justice,” incorporating the Sixth Amendment’s jury trial guarantee against the states in Duncan v. Louisiana;7 in more recent years, the Court has continued to extol the “surpassing importance” of the jury trial in America’s criminal justice system.8

3. 4 WILLIAM BLACKSTONE, COMMENTARIES *342.
7. Duncan, 391 U.S. at 145.
The historic role of juries in "guard[ing] against a spirit of oppression and tyranny on the part of rulers" figured centrally in the Framers' high estimation of the institution. British and colonial juries defied the royal authorities by refusing to convict religious and political dissenters in several high-profile seventeenth- and early eighteenth-century cases, and as revolutionary fervor mounted in the colonies, juries often "functioned as resistance bodies" by refusing to indict or convict those charged with violating the Crown's odious customs laws. British authorities countered by trying colonists in admiralty courts before royal judges without the benefit of a jury, and by transporting colonists back to England to be tried by more hostile panels. In more quotidian cases, eighteenth-century juries regularly violated their oaths by returning verdicts that devalued the amount stolen by the accused. Such "pious perjury," as Blackstone dubbed the practice, spared the accused from automatic capital sentences that accompanied theft convictions above certain thresholds. These experiences weighed heavily on the Framers, who enshrined the institution of criminal jury trials in both Article III and the Sixth Amendment of the new Constitution. In short, the Founding Fathers saw jury trials as "a guardian of the individual against the sometimes cruel overreaching of government and its menials."

Recent scholarship has highlighted that the jury trial was not just an individual right, meant to insure against excessive or unjust deprivations of a defendant's liberty, but also a "collective right" vested in the broader community. In his 1835 study, Democracy in America, Alexis de Tocqueville celebrated this aspect of the jury trial, arguing that juries should be understood as political (as opposed to simply judicial) institutions in American democracy. De Tocqueville enthusiastically reported that the jury trial places

9. Id. at 477 (quoting 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) §§ 1773–74).


11. Id. at 73–75 (discussing the 1735 trial of publisher John Peter Zenger, accused of seditious libel for criticism of the royal governor).

12. Id. at 23–24.

13. Id. at 22–23.


15. 4 WILLIAM BLACKSTONE, COMMENTARIES ch. 17.


17. U.S. CONST. amend. VI.


20. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Henry Reeve trans., Lawbook Exchange ed. 2003) 263 (1838) ("To look upon the jury as a mere judicial institution is to confine our attention to a very narrow view of it; for however great its influence may be upon the decisions of the law courts, that influence is very subordinate to the powerful effects which it produces on the destinies
"the real direction of society in the hands of the governed, or of a portion of the governed, instead of leaving it under the authority of the Government." On this view, the benefits of America's faith in the jury trial flow not just to the accused, but to the jurors themselves, by "imbu[ing] all classes with a respect for the thing judged and with the notion of right."

In practice, however, the frequency of the jury trial in America today, measured against the frequency of bench trials before judges, varies dramatically from jurisdiction to jurisdiction. Despite the Court's consistent affirmation of the institution's fundamental role in the American criminal justice system, a closer look at state courts reveals surprising disparities in the frequency of both misdemeanor and felony jury trials. In some communities, the vast majority of the trial docket consists of jury trials; in others, jury trials are becoming increasingly rare. More troubling is that these discrepancies are not simply random: in many instances, they are the product of conscious efforts by state legislators and judiciaries to limit defendants' right to be tried by a jury of their peers. This Comment focuses on the state-by-state variation and the causes of such variation in the relative availability of jury trials in different jurisdictions.

If the right to a jury trial is "the spinal column of American democracy," this Comment identifies a severe case of scoliosis. While each state's "laboratory"-like ability to draft its own criminal laws has been lauded as one of the chief advantages of federalism, the variation in jury trial rates resulting from the fifty different laboratories suggests that the costs may outweigh the benefits. Recent Supreme Court jurisprudence has disavowed the idea that the jury trial is a "mere procedural formality," elevating the institution as "a fundamental reservation of power in our constitutional structure." As Alexander Hamilton argued, variation in the use of the jury trial may even have the disastrous consequence of undermining the institution as a whole:

The capricious operation of so dissimilar a method of trial in the same cases [based on geography], under the same Government, is of itself sufficient to indispose every well-regulated judgment towards it. Whether the cause should be tried with or without a jury, [should not] depend . . . on the accidental situation of the Court and parties.26

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21. Id.
22. Id. at 266.
26. THE FEDERALIST No. 83, at 425 (Alexander Hamilton) (Ian Shapiro ed., 2009). It should be noted that Hamilton was making a somewhat limited argument in favor of a consistent standard for jury trials in federal courts only. Until Duncan v. Louisiana in 1967, defendants in state courts could claim no protection under the federal constitutional jury trial guarantee. Nevertheless, post-
In a country where forty-seven million adults, a quarter of the adult population, now have criminal records, the form of criminal justice these defendants enjoy when brought to justice in different jurisdictions merits closer scrutiny.

This inquiry adds to, and in some instances, challenges existing scholarship in three areas. First, although academics have devoted considerable attention to the dramatic decline in criminal trials in general—a trend usually attributed to the rise of plea-bargaining—this “Vanishing Trial” literature almost entirely overlooks the type of trials that are still afforded in different parts of the United States. Because only a portion of those “un-vanished” criminal trials actually occur before juries—a small portion, in many courtrooms—this scholarship, in fact, understates the disappearance of a traditional American institution. Second, a highly charged debate currently surrounds the issue of “jury nullification,” the acquittal by a jury of a criminal defendant “even when the evidence indicates that the defendant has violated the law” as charged. Paul Butler, for instance, made the controversial argument that in prosecutions of black defendants for “nonviolent, malum prohibitum offenses, including ‘victimless’ crimes like narcotics offenses, there should be a presumption in favor of nullification.” But such arguments presuppose defendants’ ready access to a jury trial before their peers, an assumption that is often misplaced, particularly in the case of routine drug offenses or other low-level crimes. Finally, this Comment identifies a troubling disconnect between the Supreme Court’s more recent Sixth Amendment jurisprudence, which celebrates the supposed centrality of the jury trial in the American justice system, and the lived experience of many criminal defendants. Although the Court has emphasized “the need to give intelligible content to the right of jury trial,” which the Framers “meant to ensure [the people’s ultimate] control in the

incorporation, where federal constitutional guarantees play a dramatically expanded role in securing individual liberties, Hamilton’s concerns could apply equally to the operation of state courts.


31. See Butler, supra note 30, at 722–25 (discussing several “political and procedural concerns” for mass nullification strategy, but assuming availability of juries for nonviolent drug offenses).
judiciary,” the Court’s current, formalist approach to the Sixth Amendment’s jury trial guarantee has done just the opposite.\textsuperscript{32}

Part I presents empirical data about criminal “jury trial rates” (the frequency of criminal jury trials relative to criminal bench trials) across various American jurisdictions. Although nearly all states collect some statistics regarding criminal caseloads and the functioning of state court systems, less than half differentiate between the number of jury trials and bench trials afforded to criminal defendants.\textsuperscript{33} Moreover, due to different tallying methodologies and the incompleteness of some states’ data, cross-jurisdictional comparison is necessarily fraught with uncertainties. Nevertheless, the data are sufficient to support a basic observation that has important implications for those interested in American criminal procedure: the likelihood that an individual standing trial for a criminal offense will encounter a jury of his or her peers varies dramatically depending on where that trial takes place. As a select number of scholars who have observed this phenomenon have noted, “the reasons for [variation in jury trial rates] have not been fully explored”\textsuperscript{34} and “the fact that so little attention has been paid to criminal bench trials in the United States ought to be a matter of some concern.”\textsuperscript{35}

A host of factors undoubtedly contribute to this phenomenon, but perhaps the most fundamental explanation lies in the differences in state constitutional provisions, discussed in Part II. Although the Warren Court’s incorporation of the Sixth Amendment’s jury trial guarantee in \textit{Duncan v. Louisiana} was a landmark decision, the constitutions of all fifty states already contained analogous provisions, the large majority of which continue to give criminal defendants more robust rights than those mandated by the federal floor.\textsuperscript{36} Disparities have always existed in American defendants’ jury trial rights: certain offenses that would almost certainly be summarily tried before a judge in one state may be “jury-demandable” in another.\textsuperscript{37} This difference unquestionably accounts for some (though not all) of the disparities among states in jury trial rates that exist today.

Even within these varied constitutional frameworks, various state actors can alter and reshape the contours of the jury trial rights afforded criminal defendants. Part III examines additional ways in which some states have undertaken efforts to circumvent state constitutional jury requirements—

\begin{itemize}
\item \textsuperscript{32} Blakely v. Washington, 542 U.S 296, 305–06 (2004).
\item \textsuperscript{33} See Ostrom et al., \textit{supra} note 1.
\item \textsuperscript{34} RANDOLPH N. JONAKAIT, \textit{AMERICAN JURY SYSTEM} 7 (2003).
\item \textsuperscript{35} Sean Doran et al., \textit{Rethinking Adversariness in Nonjury Criminal Trials}, 23 \textit{AM. J. CRIM. L.} 1, 11 (1995).
\item \textsuperscript{36} See \textit{Duncan v. Louisiana}, 391 U.S. 145, 154–55 (1967) (rejecting dicta in previous cases, according to which the right to a jury trial was deemed not essential to ordered liberty, and concluding that “[t]he guarantees of jury trial in the Federal and State constitutions reflect a profound judgment about the way in which law should be enforced and justice administered.”).
\item \textsuperscript{37} \textit{Id}.
\end{itemize}
whether to deny those accused of wrongdoing the attendant advantages of a jury of their peers, or to improve judicial efficiency—without changing the actual language of constitutional guarantees. Among the practices discussed are: (A) legislative changes to sentencing regimes undertaken with the express purpose of making certain crimes non-"jury-demandable"; (B) narrower interpretations of state constitutional provisions that similarly eliminate the availability of juries for particular offenses; (C) the "aggregation" of multiple minor criminal charges, that together might result in significant jail time, in single bench trials; (D) the imposition of direct economic burdens on defendants contemplating a trial by jury; (E) reductions in the number of participants on criminal juries; and (F) the proliferation of "two-tier" jury systems, which require defendants to face bench trials before the possibility of a jury trial on de novo appeal. Each of these actions has, at least in some jurisdictions, further relegated juries to the margins of the American criminal justice system, oftentimes to the considerable detriment of criminal defendants.

Part IV concludes by discussing these trends within the context of recent Supreme Court jurisprudence, which has regularly invoked "the need to preserve Sixth Amendment substance" in bolstering criminal defendants' rights.\textsuperscript{38} In sentencing cases, for example, the Court has insisted upon "preserving [the] ancient guarantee [of trial by jury] under a new set of circumstances... in a meaningful way guaranteeing that the jury w[ill] still stand between the individual and the power of the government...."\textsuperscript{39} In Confrontation Clause cases, the Court has likewise reinvigorated criminal defendants' procedural rights, citing the Framers' rejection of an inquisitorial, civil law tradition that "le[ft] too much discretion in judicial hands."\textsuperscript{40} But lofty rhetoric aside, this Comment suggests that the Court has done little to ensure that the core, substantive purpose of the Sixth Amendment's jury trial guarantee remains at the heart of criminal adjudication as the "great bulwark of [our] civil and political liberties."\textsuperscript{41}

I.
THE NUMBERS

In late 2003, the American Bar Association hosted a symposium on the "Vanishing Trial," a term used to describe the steadily declining role of trials in the American legal system. The event confirmed what many practitioners had long suspected: that, in both the criminal and civil contexts, trials were

\begin{itemize}
  \item \textsuperscript{38} United States v. Booker, 543 U.S. 220, 237 (2005).
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} Crawford v. Washington, 541 U.S. 36, 67 (2004). See also David Alan Sklansky, Anti-Inquisitorialism, 112 HARV. L. REV. 1649 (2009).
  \item \textsuperscript{41} Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting STORY, supra note 9, §§ 1773–74).
\end{itemize}
becoming increasingly rare over the past several decades. The findings presented “spawned a blizzard of publicity in both the legal and mass media.” Most scholarly scrutiny, however, focused on the disappearance of trials in civil suits, where private settlements and alternative dispute resolution have attained greater prominence, and on trends in the federal courts. Fewer articles explored trial trends in criminal proceedings, particularly in state courts (where the vast majority of American criminal proceedings take place), though scholars identified a similar decline in the frequency of trials there. Although criminal filings increased substantially over the past several decades, the vast majority of these cases ended with plea agreements, resulting in a dramatic decrease in the percentage of criminal cases that actually proceed to trial.

42. See Patricia Lee Refo, The Vanishing Trial, 1 J. EMP. L. STUD. 510, 511 (2004) (introducing symposium, built largely around data collected by Professor Marc Galanter, identifying and discussing the “Vanishing Trial” trend). Galanter’s widely-cited piece, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, supra note 28, remains the most comprehensive overview of the topic.

43. Refo, supra note 42, at 511.

44. See, e.g., Stephen B. Burbank, Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting to Bethlehem or Gomorrah, 1 J. EMP. L. STUD. 591, 591 (2004) (analyzing the impact of the federal summary judgment motion on civil trial dispositions, and concluding that the empirical data indicate that Rule 56 motions caused a substantial increase in early case termination from 1960 to 2000); Theodore Eisenberg, Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes, 1 J. EMP. L. STUD. 659, 659–61 (2004) (drawing on a sample comprised exclusively of civil cases to conclude that substantial variation exists between the appellate rates and appellate outcomes of tried and nontried cases); Thomas J. Stipanowich, ADR and the ‘Vanishing Trial’: The Growth and Impact of Alternative Dispute Resolution, supra note 42, at 510; Shari Seidman Diamond, What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial, 1 J. EMP. L. STUD. 591, 591 (2004) (analyzing the decline in civil trials as a result of the rise of discovery and expert witnesses, both of which forced litigants regularly to confront the question of whether to continue to invest in the outcome of the adjudication, thereby rendering settlement a more attractive option and creating financial disincentives for pursuing full-blow trials); see also Justice Scott Brister, The Decline in Jury Trials: What Would Wal-Mart Do?, 47 S. TEX. L. REV. 208–11 (2005) (explaining the decline in civil jury trials as a result of market forces, which have rendered trial by jury too expensive, both from the government’s perspective and from the perspective of individual jurors who incur lost time and wages when called to jury service).


46. See Galanter, supra note 28, at 510; Ostrom et al., supra note 1, at 764 (noting that “[o]verall, for the period 1976–2002, the number of criminal jury trials has declined by 15 percent (from 42,049 to 35,664) while the number of bench trials has declined by 10 percent (from 61,382 to 55,447).”).

47. See Galanter, supra note 28, passim.
Nevertheless, although the "Vanishing Trial" literature revealed an unsettling trend in the American justice system for proponents of trial adjudication, it generally overlooked an even more critical recent development: criminal defendants’ chances of having their cases heard before a jury vary considerably depending on the state in which they stand accused.48 Perhaps because of the difficulty in retrieving state court data that distinguishes between jury and bench trial rates, scholars documenting the overall quantitative decline in criminal trials have often overlooked qualitative differences in trials from one state to the next. As a result, the literature glosses over significant state-by-state variation in the likelihood that criminal defendants will encounter a jury of their peers. As one comprehensive survey of the American jury system recently observed, “Although the data may be limited, . . . it seems clear that the rate of bench trials [as opposed to jury trials] varies tremendously. . . . [L]ocal variations are not unusual, but the reasons for them have not been fully explored.”49 A 1995 study made a similar observation, noting that “the fact that so little attention has been paid to criminal bench trials in the United States ought to be a matter of some concern.”50

Although many states do not collect or publish statistics documenting the type of trial afforded in criminal adjudications, the National Center for State Courts (NCSC) provides such data for twenty-one jurisdictions (nineteen states, the District of Columbia, and Puerto Rico) for the three-decade period from 1976–2005.51 The statistics reveal marked variations in the frequency of jury trials relative to bench trials by state.

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48. Ostrom et al., supra note 1, at 764 (noting that Examining Trial Trends is one of the few studies that has distinguished between bench trial and jury trial rates in state courts). The shifting balance between criminal jury trials and bench trials is also noted in Frederick Schauer, On The Supposed Jury-Dependence of Evidence Law, 155 U. Pa. L. REV. 165, 172 n.31 (discussing developments in evidence law in the context of the “decline in the proportion of jury trials within the domain of [total] trials.”).

49. JONAKAIT, supra note 34, at 7.

50. Doran et al., supra note 35, at 11.

51. In 2006, the NCSC stopped tracking data from state courts on jury and bench trials, citing the administrative difficulties inherent in such collection. This “convenience sample” approach is less than ideal, but the reporting states do include over half the country’s population, and are relatively diverse in terms of region, population size, and crime rate. See Ostrom et al., supra note 1, at 760.
Table 1: Jury Trials vs. Bench Trials (Yearly Average, 2001–2005)

<table>
<thead>
<tr>
<th></th>
<th>Bench Trials</th>
<th>Jury Trials</th>
<th>Jury Trial Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>8</td>
<td>150</td>
<td>95</td>
</tr>
<tr>
<td>Arizona</td>
<td>191</td>
<td>1326</td>
<td>87</td>
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<tr>
<td>California²</td>
<td>27507</td>
<td>8479</td>
<td>24</td>
</tr>
<tr>
<td>Delaware</td>
<td>22</td>
<td>226</td>
<td>91</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>642</td>
<td>439</td>
<td>41</td>
</tr>
<tr>
<td>Florida</td>
<td>359</td>
<td>3872</td>
<td>92</td>
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<tr>
<td>Hawaii*</td>
<td>79</td>
<td>157</td>
<td>66</td>
</tr>
<tr>
<td>Indiana</td>
<td>5527</td>
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<td>19</td>
</tr>
<tr>
<td>Kansas</td>
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<td>42</td>
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<td>Maryland</td>
<td>1712</td>
<td>1314</td>
<td>43</td>
</tr>
<tr>
<td>Michigan</td>
<td>1023</td>
<td>1900</td>
<td>65</td>
</tr>
<tr>
<td>Missouri</td>
<td>1595</td>
<td>660</td>
<td>29</td>
</tr>
<tr>
<td>New Jersey*</td>
<td>221</td>
<td>1301</td>
<td>85</td>
</tr>
<tr>
<td>North Carolina</td>
<td>0</td>
<td>2853</td>
<td><strong>100</strong></td>
</tr>
<tr>
<td>Ohio</td>
<td>950</td>
<td>1717</td>
<td>64</td>
</tr>
<tr>
<td>Pennsylvania¹</td>
<td>5106</td>
<td>2661</td>
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<tr>
<td>Puerto Rico</td>
<td>7734</td>
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<tr>
<td>South Dakota³</td>
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<td>1157</td>
<td>3470</td>
<td>75</td>
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<tr>
<td>Vermont</td>
<td>32</td>
<td>126</td>
<td>80</td>
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<tr>
<td>Washington</td>
<td>753</td>
<td>1564</td>
<td>68</td>
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<td><strong>Federal Courts</strong></td>
<td><strong>3638</strong></td>
<td><strong>835</strong></td>
<td><strong>81</strong></td>
</tr>
</tbody>
</table>

* Data does not include misdemeanors
1 Data does not include bench or jury trial figures for 2005
2 Data does not include bench trial figures for 2005
3 Data does not include bench trial figures for 2004 or 2005
Some state-by-state variation is to be expected, but the extent of the disparities documented by the NCSC data is striking. In some states, the vast majority of the trial docket consists of bench trials; in others, jury trials constitute most of the trials held. For example, over the final five years for which figures are available, jury trials comprised less than 25 percent of all criminal trials in Puerto Rico, South Dakota, Indiana, and California. During the same period, over 85 percent of total trials in Delaware, Florida, Alaska, and North Carolina came before juries.

Although those studying the work of state courts have widely cited these NCSC statistics, there is good reason to be wary of the extent to which these statistics accurately portray the work of state courts. First, as those at NCSC who compiled the state court data note, "there are 50 states with at least 50 different ways of doing business and 50 different levels of commitment to data compilation." Some states record a jury trial only if a case is tried to judgment; others record a jury trial as soon as voir dire begins.

But there is a much larger problem with the figures that the NCSC presents as "total criminal trials," which plainly cannot represent the total number of criminal trials taking place in a given year. North Carolina, for example, which reports a 100 percent jury trial rate, omits from its reporting all

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52. See supra Figure 1.
53. Id.
54. See, e.g., Paul Holland, Sharing Stories: Narrative Lawyering in Bench Trials, 16 CLINICAL L. REV. 195, 196 (2009); Marc Galanter, The Hundred-Year Decline of Trials and the Thirty Years War, 57 STAN. L. REV. 1255, 1255-56 (2005) (analyzing the decrease in trial rates as the product of two interrelated phenomena: "a long-term and gradual decline in the portion of cases that terminate in trial and a steep drop in the absolute number of trials during the past twenty years.").
55. Ostrom et al., supra note 1, at 756.
56. Id. at 762 (describing the jury trial reporting practices of all states included in the study).
57. Id. at 759.
cases adjudicated in the state’s district courts—courts of limited jurisdiction where all low-level misdemeanors are first tried before a judge (subject to de novo review before a jury, should a conviction result). Other states with high jury trial rates similarly have lower courts (where bench trials would be more common) that are almost certainly not included in the reported numbers. Such difficulties have led at least one scholar to caution “modesty” when analyzing state court data, particularly in efforts to move beyond mere empirical identification of general trial patterns.

However, looking exclusively at the jury trial rate for felonies, a statistic collected by thirteen states, can help control the problem of underreporting from limited jurisdiction courts. Here we might expect to find more similarity between jurisdictions, since the trials counted are all necessarily jury demandable under the Sixth Amendment. Still, tremendous variation exists. In some states, such as Alaska, Vermont, the District of Columbia, and North Carolina, all or nearly all felony trials come before empanelled juries. In large jurisdictions like California, Texas, and Ohio, approximately three in ten felony trials are bench trials. In Indiana, which is one of the thirteen states tracking such trends, jury trials account for less than half of felony trials.

**Figure 2: Felony Jury Trials, as a Percentage of Total Trials, 1998–2002**

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59. For example, the NCSC reports that Delaware averaged just twenty-two bench trials per year during the five-year period depicted in the above graph. Yet Delaware’s court system includes eight “Alderman’s Courts” to preside over violations of lower-level offenses (traffic violations and misdemeanors) where no jury trials are held. For detailed diagrams of the court structures of all fifty states, see the annual State Court Caseload Statistics reports compiled by NCSC, available at www.ncsconline.org/d_research/csp/SCCS-pastreports.html.


61. NCSC Dataset, supra note 1.
A separate set of county-level data on felony trials—collected not by the NCSC, but by the Bureau of Justice Statistics (BJS)—evidences similar disparities. Since 1988, the BJS’s State Court Processing Statistics program has collected data biennially on felony prosecutions in a representative sample of America’s largest urban counties. The study’s unique sampling methodology limits the conclusions that can be drawn from the data, but the figures seem to corroborate the disparities revealed by the NCSC data. The most recently published cumulative figures (combining the nine surveys from 1988 through 2006) show jury trial rates of 93 percent in Pima County, Arizona (Tucson) and 90 percent in Honolulu County, Hawaii (Honolulu), but only 34 percent in Marion County, Indiana (Indianapolis) and 45 percent in Fulton County, Georgia (Atlanta). In America’s urban centers, the use of juries in trials for the most serious crimes varies considerably.

Table 2: Felony Trial in Select Large Urban Counties, 1988–2006

<table>
<thead>
<tr>
<th></th>
<th>Bench Trials</th>
<th>Jury Trials</th>
<th>Jury Trial Rate</th>
</tr>
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<tbody>
<tr>
<td>Pima, AZ</td>
<td>11</td>
<td>145</td>
<td>92</td>
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<tr>
<td>Los Angeles, CA</td>
<td>20</td>
<td>257</td>
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<td>Sacramento, CA</td>
<td>12</td>
<td>36</td>
<td>75</td>
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<tr>
<td>Broward, FL</td>
<td>5</td>
<td>41</td>
<td>89</td>
</tr>
<tr>
<td>Fulton, GA</td>
<td>107</td>
<td>87</td>
<td>45</td>
</tr>
<tr>
<td>Honolulu, HI</td>
<td>7</td>
<td>60</td>
<td>90</td>
</tr>
<tr>
<td>Marion, IN</td>
<td>125</td>
<td>65</td>
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<td>Hamilton, OH</td>
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<td>Philadelphia, PA</td>
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<td>King, WA</td>
<td>16</td>
<td>72</td>
<td>82</td>
</tr>
</tbody>
</table>


63. The study’s design seeks to approximate all felonies filed within a county during a given month. Depending on the population of the county, the researchers collected information on all felony filings for five, ten, fifteen, or twenty business days during the month. Id. at 15. See also BUREAU OF JUSTICE STATISTICS, DATA ADVISORY: STATE COURT PROCESSING STATISTICS DATA LIMITATION (2010), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/scpsdl_da.pdf.

In addition to interstate disparities, a close look at the data reveals additional intrastate and temporal disparities in jury trial rates. For example, in 1997 in Philadelphia, Pennsylvania there were 640 jury trials and 3,781 bench trials, representing a jury trial rate of approximately 14.5 percent. That same year, the statewide jury trial rate was at least twice as high, although the law guaranteeing the availability of jury trials was presumably uniform across Pennsylvania. And in California, comfortably the largest jurisdiction both in terms of population and criminal caseloads that reports such data to the NCSC, the jury trial rate has fallen from approximately 42 percent in 1976 to 21 percent some three decades later.

Table 3: California Trial Trends, 1976–2005

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Bench Trials</th>
<th>Total Jury Trials</th>
<th>Jury Trial Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1976</td>
<td>14,153</td>
<td>10,260</td>
<td>42</td>
</tr>
<tr>
<td>1977</td>
<td>11,886</td>
<td>10,912</td>
<td>48</td>
</tr>
<tr>
<td>1978</td>
<td>15,756</td>
<td>10,267</td>
<td>39</td>
</tr>
<tr>
<td>1979</td>
<td>7,439</td>
<td>9,580</td>
<td>56</td>
</tr>
<tr>
<td>1980</td>
<td>12,218</td>
<td>9,384</td>
<td>43</td>
</tr>
<tr>
<td>1981</td>
<td>12,136</td>
<td>9,159</td>
<td>43</td>
</tr>
<tr>
<td>1982</td>
<td>10,327</td>
<td>9,157</td>
<td>47</td>
</tr>
<tr>
<td>1983</td>
<td>12,864</td>
<td>8,590</td>
<td>40</td>
</tr>
<tr>
<td>1984</td>
<td>11,562</td>
<td>8,125</td>
<td>41</td>
</tr>
<tr>
<td>1985</td>
<td>13,336</td>
<td>7,314</td>
<td>35</td>
</tr>
<tr>
<td>1986</td>
<td>12,454</td>
<td>7,330</td>
<td>37</td>
</tr>
<tr>
<td>1987</td>
<td>13,832</td>
<td>7,621</td>
<td>36</td>
</tr>
<tr>
<td>1988</td>
<td>14,980</td>
<td>8,093</td>
<td>35</td>
</tr>
<tr>
<td>1989</td>
<td>21,747</td>
<td>12,232</td>
<td>36</td>
</tr>
<tr>
<td>1990</td>
<td>21,453</td>
<td>12,272</td>
<td>36</td>
</tr>
<tr>
<td>1991</td>
<td>21,561</td>
<td>13,063</td>
<td>38</td>
</tr>
</tbody>
</table>

66. JONAKAIT, supra note 34, at 7. (Note, however, that Jonakait does not have any source for the factual comparison to the Pennsylvania jury trial rate as a whole. The "twice as high" assertion is based on a comparison to the NCSC Dataset for that year).
Given these stark disparities in jury trial rates, it seems odd that these qualitative differences in the state courts' trial dockets have evaded significant scholarly scrutiny. The simplest explanation is that reliable court statistics have been infuriatingly difficult to compile and analyze. Collecting data from state courts is a trying task—particularly where the information sought requires a degree of disaggregation—and the NCSC is the only organization engaged in systematic efforts to collect national data from state courts. Moreover, beginning in 2006, the organization stopped collecting information on bench and jury trials, citing the administrative difficulty of compiling uniform information. This represents a major loss for those interested in studying criminal juries in the future. Still, what information is available seems sufficient to confirm that although the Supreme Court may recognize the right to a jury trial as "fundamental to the American scheme of justice," as a

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1 No information available for this year.

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67. See Robert Moog, *Piercing the Veil of Statewide Data: The Case of Vanishing Trials in North Carolina*, 6 J. Emp. L. Stud. 147, 171 (2009) ("Problems with the available data are not peculiar to one state or system. Issues have been raised by others regarding the selection, interpretation, comparability, and reliability of data when researching trial rates.").

68. Telephone Interview with Shauna Strickland, National Center for State Courts (Nov. 2010).

practical matter, the institution remains decidedly more fundamental to the justice systems of some states than to others.

II.

AN UNEVEN START: INTERSTATE VARIATION IN STATE CONSTITUTIONAL GUARANTEES

Although a host of undernoticed factors, discussed more fully in Part III, can distort jury trial rates, the differences among state constitutional laws appear most responsible for the differences in jury trial rates. As one scholar recently wrote, "[t]he phrase 'America's jury system' implies that there is only one. In fact, America has many jury systems." To understand how state law can so dramatically affect a federal constitutional right, a brief history of the Sixth Amendment and the "petty offense exception" is necessary.

Although the Framers undertook to enshrine the institution of criminal juries both in Article III and the Sixth Amendment, the right has never attached to all criminal proceedings. In both eighteenth-century England and in the Colonies, certain "petty offenses"—ranging from violations for swearing, vagrancy, and liquor laws to lesser larcenies—were regularly tried before magistrates without a jury. While this procedure was usually reserved for offenses that merited only minor punishments, sometimes stiffer fines, corporal punishment, and terms of imprisonment were tried in the absence of a jury as well. Although it had long been assumed in practice, in 1888 the Court explicitly held in Callan v. Wilson that the Framers implicitly preserved this distinction between petty and serious offenses and that the constitutional jury trial guarantee only applied to "offences of a serious or atrocious character." In 1904, the Court reaffirmed this distinction between offenses "of a deeper and more atrocious dye" and those "smaller faults and omissions of less consequence," declaring it "obvious that the intent [of the Framers] was to exclude from the constitutional requirement of a jury the trial of petty criminal

70. JONAKAIT, supra note 34, at 1.
71. U.S. CONST. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .").
72. U.S. CONST. amend. VI ("In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").
73. See generally Colleen P. Murphy, The Narrowing of the Entitlement to Criminal Jury Trial, 1997 Wis. L. REV. 133 (providing an excellent critical history of the Supreme Court's Sixth Amendment jury trial jurisprudence); Felix Frankfurter & Thomas G. Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 HARV. L. REV. 917 (1926) (differentiating between offenses for which the Constitution compels the provision of a jury trial, and those for which it does not).
74. See id.
75. Id. at 930 ("The miscreant who abstained from church on the Sabbath day paid one shilling to the use of the pious poor; the individual who tipped long at the alehouse was amerced only three shilling fourpence and in default of payment had to sober up for four hours in the stocks.").
76. Id.
offenses.”  

Thus, while Duncan was unquestionably a landmark decision, it could only extend the federal guarantees of a jury trial to state court defendants prosecuted for “non-petty” criminal offenses.

The Duncan Court declined to “settle . . . the exact location of the line between serious and petty offenses” for Sixth Amendment purposes, and although subsequent efforts to parse the difference have provided greater clarity, this evolving jurisprudence has not been without controversy. Duncan itself narrowly held that a prosecution for misdemeanor simple battery, a crime that carried a maximum potential sentence of two years imprisonment under Louisiana law, was sufficiently “serious” to warrant a jury trial, even though the defendant received a sentence of only sixty-days imprisonment and a small fine. The Court emphasized that it is the maximum potential sentence, and not the sentence actually meted out, that provides a more relevant gauge of a crime’s “seriousness.”

Although the focus on the length of the potential penalty in Duncan was not new, the weight afforded to it as the sole indicia of severity was. In previous cases, the Court had ruled that an offense’s potential sentence was but one of several factors to be considered in evaluating whether the right to a jury trial attached, along with the crime’s classification as “petty” or “serious” at common law and the moral quality of the proscribed act. But following Duncan, these other considerations dropped out of the Court’s calculus, and in 1970, the Court clarified that “no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized.” While the Court left open the possibility that crimes carrying shorter terms of imprisonment might also be deemed non-petty, more recent cases have

78. Schick v. United States, 195 U.S. 65, 69–70 (1904) (quoting 4 BLACKSTONE COMMENTARIES *5). See also Duncan v. Louisiana, 391 U.S. 145, 160 (1967) (“There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the 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.”).

79. Duncan, 391 U.S. at 161.

80. Id. at 160. In this respect, the Court’s jurisprudence on the Sixth Amendment’s jury trial guarantee has diverged from its interpretation of the Sixth Amendment’s right to counsel provision. See Scott v. Illinois, 440 U.S. 367, 373 (1979) (holding that the Sixth Amendment, which does require provision of counsel where imprisonment actually results, does not require provision of counsel in cases where imprisonment is merely an authorized penalty).

81. See Callan v. Wilson, 127 U.S. 540, 556 (1888) (holding that the Constitution entitled the defendant to trial by jury in a federal conspiracy prosecution, even though the defendant faced a fine of only twenty-five dollars, because of the “grave character” of the conspiracy charge); District of Columbia v. Colts, 282 U.S. 63, 73 (1930) (holding that reckless driving of motor vehicle above twenty-two miles-per-hour, subject to fine and short imprisonment, requires a jury trial because it is of “such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense”).

marked six-months imprisonment as the effective bright line separating “petty” from “serious” offenses for purposes of federal jury trial guarantees.83

A likely source of some interstate variation in jury trial rates, then, is the fact that most state constitutions contain analogues to the Sixth Amendment that provide broader jury trial provisions than their federal counterpart. In North Carolina, for example, which reported a 100 percent jury trial rate to the NCSC,84 the state constitution provides that “[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court.”85 Jury trials are viewed as so fundamental an institution in North Carolina that the state’s courts have interpreted this section of the constitution as prohibiting criminal defendants from waiving their right to a jury—effectively denying defendants the option of a bench trial in situations where the accused might consider it more advantageous.86 By contrast, Alaska, which similarly reports the use of criminal juries in more than nine out of ten trials, has a constitutional provision that mirrors the language of the Sixth Amendment (“in all criminal prosecutions”). Unlike the Supreme Court’s interpretation of the Sixth Amendment, however, the Alaska Supreme Court has construed the state constitutional provision as guaranteeing trial by jury in any prosecutions for which loss of liberty may result.87 Other states have even more generous

83. Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989) (noting that “we . . . find it appropriate to presume for purposes of the Sixth Amendment that society views . . . [an offense carrying a maximum prison term of six months or less] as ‘petty,’” and, accordingly, that a defendant is only entitled to a jury trial in “such circumstances . . . if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a ‘serious’ one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems ‘serious’ with onerous penalties that nonetheless ‘do not puncture the 6-month incarceration line.’”). To date, however, no defendant has been able to meet such a high burden, even in cases where five years of probation attached. See, e.g., United States v. Nachtigal, 507 U.S. 1, 5 (1993) (holding that a federal DUI offense, with its six-month maximum prison term established by Congress, is presumptively a “petty” offense under the Blanton standard, despite the possibility of a five-year probation term and $5,000 fine, because these penalties did not “approximate in severity the loss of liberty that a prison term entails.”).”

84. NCSC Dataset, supra note 1.

85. See supra Figure 1; N.C. CONST., art. I, § 24 (2010).

86. See State v. Hudson, 185 S.E.2d 189, 192–93 (N.C. 1971) (“It is equally rudimentary that a trial by jury in a criminal action cannot be waived by the accused in the Superior Court as long as his plea remains ‘not guilty.’”); Smith, supra note 65 (noting that twenty-five states empower a prosecutor to compel a jury trial, often by challenging a defendant’s waiver). In 1965, the U.S. Supreme Court rejected the argument that the Sixth Amendment grants a criminal defendant “the right to waive a jury trial whenever he believes such action to be in his best interest, regardless of whether the prosecution and the court are willing to acquiesce in the waiver.” Singer v. United States, 380 U.S. 24, 25 (1965).

87. Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970) (noting that a jury trial is required for any offense “a direct penalty for which may be incarceration in a jail or penal institution. It also includes offenses which may result in the loss of a valuable license, such as a driver’s license or a license to pursue a common calling, occupation, or business. It must also include offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term. Excluded from the requirement of jury trial are such relatively innocuous offenses as wrongful parking of motor vehicles, minor traffic violations, and violations which relate to the
guarantees, allowing for the option of a jury trial even where a criminal conviction might result only in a moderate fine.  

At the other end of the spectrum are states whose constitutional provisions have been interpreted to provide nothing beyond what the Sixth Amendment’s floor requires. Missouri and Pennsylvania, for example, both report relatively low jury rates among states reporting data—around three in ten trials take place before a jury. Although both state constitutions include “trial by jury” guarantees, neither constitution offers criminal defendants any benefits beyond those guaranteed by the Sixth Amendment. But even these states boast a relatively robust use of criminal juries compared to Puerto Rico, the clearest outlier in the NCSC data, where only around 200 of 8,000 total trials in a year are jury trials. As the U.S. Supreme Court explained in 1921, the Sixth Amendment affords no protection in Puerto Rican courts, and “the P[eu]rto Rican can not insist upon the right of trial by jury, except as his own representatives in his legislature shall confer it on him.”

Although these differences in state constitutional law may influence the composition of state courts’ criminal trial dockets, by no means do they fully account for the discrepancies seen in the data. First, while the availability of waiver may have some minor effect on jury trial rates, the extent to which state constitutional law exceeds the Sixth Amendment’s protections should have no bearing on discrepancies in felony jury trial rates (for which the right to a jury trial is already federally guaranteed). Second, several states have relatively robust constitutional provisions but low jury trial rates; conversely, states that offer no additional jury trial guarantees have jury trial rates that are relatively high. Other factors are plainly at work. The following section will explore other causes of the discrepancies in jury trial rates that cannot be accounted for by variation in state constitutional protections alone.

regulation of property, sanitation, building codes, fire codes, and other legal measures which can be considered regulatory rather than criminal in their thrust, so long as incarceration is not one of the possible modes of punishment.”).

88. Murphy, supra note 73, at 171–72 n.177.
89. See supra Figure 1.
90. Murphy, supra note 73, at 173 (noting that Montana and Pennsylvania are two of only ten states that have adopted the Supreme Court’s interpretation of the right to a jury trial, refusing to extend the right to offenses punishable by imprisonment of six months or less) (citing, for example, Ryan v. Moreland, 653 S.W.2d 244, 249–52 (Mo. Ct. App. 1983); Commonwealth v. Fischl, 525 A.2d 775, 777–78 (Pa. Super. Ct. 1987), overruled on other grounds by Commonwealth v. Geyer, 687 A.2d 815 (Pa. 1996)).
91. See supra Table 1.
93. Indiana, for example, permits a jury demand for petty misdemeanors, yet reports only a 19 percent jury trial rate. See supra Table 1; Murphy, supra note 73, at 171–72 n.177.
94. See supra Table 1; Murphy, supra note 73, at 171–72 n.182.
III. OTHER FACTORS THAT ERODE THE TRIAL BY JURY GUARANTEE

Given the data limitations for state courts, attempting to solve the riddle of why some states may be more inclined to afford criminal defendants jury trial rights than others is an inherently speculative undertaking. In some states, numerous factors might be at work, and drawing causal links between a particular policy or state action and changes in jury trial rates is nearly impossible. At the same time, it is clear that external forces are, in various ways, remaking states’ criminal trial dockets. Sections A, B, and C explore “structural changes” that have curtailed criminal defendants’ opportunities to demand a jury trial. By manipulating sentencing regimes, reinterpreting state constitutional provisions, and “aggregating” multiple smaller charges in a single trial, many states have altogether eliminated situations in which defendants enjoy the legal right to bring their case before a jury. But even where the right to a jury trial undoubtedly attaches, states can still produce disincentives and obstacles that influence defendants weighing their trial strategy. Sections D, E, and F address the economic burdens, procedural obstacles, and changes to the jury itself that have likely factored into the erosion of the “grand bulwark.”

A. Manipulating Sentencing Regimes

The U.S. Supreme Court’s emphasis on the potential length of imprisonment as the sole determinant of a crime’s seriousness for Sixth Amendment jury trial purposes, first signaled in Duncan and confirmed in subsequent decades, has provided states with an efficient way to determine whether the U.S. Constitution mandates jury trials. This bright-line approach represents a shift away from the common law, where “pettiness was not a rigidly fixed conception; demarcation between resort to jury trial and its dispensation was not mechanical.”\(^9\) Though criticized for disregarding the treatment of certain offenses at common law and the moral opprobrium that accompanies certain wrongdoing,\(^9\) the Court’s more recent approach has given states clear instructions on how to reduce the burden of jury trials for lesser offenses.

The District of Columbia is one jurisdiction that has taken advantage of this approach, lowering maximum sentences for many offenses to avoid triggering the jury trial requirement. In the late 1980s and early 1990s, the District’s jury trial rate remained relatively constant around 80 percent.\(^9\) In 1994, 78 percent of trials in the District were jury trials. But the next year, the jury trial rate dropped to below 50 percent, where it remained relatively

\(^9\) Frankfurter, supra note 73, at 980.
\(^9\) See Murphy, supra note 73.
\(^9\) NCSC Dataset, supra note 1.
constant in subsequent years. 98 The District of Columbia presents a clear example of the ways in which legislators can dramatically shift the composition of a criminal trial docket in a very short period of time. A crucial piece of legislation known as the “Misdemeanor Streamlining Act,” enacted by the Council of the District of Columbia in March 1994 was responsible for the drop. 99 The bill reduced the maximum potential sentences for most misdemeanor offenses from one year to 180 days, thereby removing such offenses from the ambit of Sixth Amendment protection. 100 The legislative history leaves little doubt that this shift—from jury trials to bench trials—was more than an incidental consequence of the Council’s reassessment of the moral quality of these offenses, but rather, the very purpose of the measure. 101 Concerned with the administrative burden and costs associated with jury trials, the “Misdemeanor Streamlining Act” took advantage of the bright-line rules to greatly reduce the District’s jury trial caseload.

**Figure 3: Jury Trial Rate, District of Columbia, 1987–2000**

Several individuals convicted of misdemeanors without the benefit of a jury challenged the constitutionality of the new sentencing scheme, arguing that it was a “naked attempt to eliminate the right to trial by jury” in the District of Columbia. 102 These petitioners argued that society still viewed their convictions

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98. *Id.*


100. *Id.*

101. *Foote v. United States*, 670 A.2d 366, 369–70 (D.C. 1996) (noting “various statements in the [Misdemeanor Streamlining Act]’s legislative history to the effect that its purpose was to reduce the length of sentences for various crimes to make them non-jury demandable”).

102. *Id.*
for possession of crack cocaine, assault, and possession of heroin as "serious," notwithstanding the reduced sentences declared by the D.C. Council; moreover, the petitioners argued that the other potential penalties—ranging from the activation of suspended sentences and public housing eviction, to employment consequences—belied the purported "pettiness" of the accused offense.\(^\text{103}\) The D.C. Court of Appeals rejected this argument, however, holding that the D.C. Council's reduction of maximum penalties remained "the most relevant criterion for judging 'the seriousness with which society regards the offense.'"\(^\text{104}\)

Other jurisdictions struggling with large caseloads and budget constraints have adopted similar measures. In the immediate wake of \textit{Duncan}, New Jersey and Louisiana reduced the penalties for certain misdemeanors rather than afford jury trials to those accused of such crimes.\(^\text{105}\) Hawaii similarly reduced the severity of the maximum sanction for various drunk-driving offenses in the early 1990s, in response to "a backlog of approximately 3,000 [jury demandable] cases" awaiting adjudication.\(^\text{106}\) Lawmakers expressed dismay that "it would take 5 to 6 Circuit Courts handling nothing but DUI jury trials to clear the backlog and keep up with new cases. At the same time, the [lower courts are] capable of disposing of non-jury DUI cases at the rate of 14 to 16 per day, per courtroom . . . ."\(^\text{107}\) Although the Hawaii Supreme Court initially balked at waiving the jury trial requirement for these newly recategorized offenses,\(^\text{108}\) it eventually embraced the reasoning adopted by the D.C. Court of Appeals and held such charges to be non-jury-demandable.\(^\text{109}\) Each of these changes produces shifts in the composition of states' criminal trial dockets, eliminating the possibility of a jury trial for certain offenses that had historically been jury eligible.

\textbf{B. Reinterpreting State Constitutional Provisions}

Over the past three decades, several states' supreme courts have narrowed the scope of their constitutional jury trial guarantees. As recently as 1980, for example, South Dakota interpreted its constitution to preserve the jury trial guarantee for any offense for which a penalty of twenty dollars or more could be imposed.\(^\text{110}\) That right has since been limited to only those offenses which

\begin{footnotesize}
\begin{itemize}
  \item 104. \textit{Day}, 682 A.2d at 1127 (quoting Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989)).
  \item 107. \textit{Id.}
  \item 108. State v. Jordan, 825 P.2d 1065 (Haw. 1992) (holding that a reduction in the maximum period of incarceration for first and second DUI offenses did not eliminate the right to a jury trial for those offenses).
  \item 109. \textit{Nakata}, 878 P.2d at 699 (holding that there was no constitutional right to a jury trial for a first DUI conviction where the maximum authorized term of imprisonment was five days).
\end{itemize}
\end{footnotesize}
carry potential imprisonment, and may be circumvented in prosecutions for offenses that do carry potential imprisonment where a judge offers the defendant pretrial assurance that no jail time will be imposed.

The Hawaii Supreme Court has similarly narrowed the extent to which the state constitution eclipses the Sixth Amendment by adopting a new framework for analyzing challenges brought under the state constitutional jury trial provision. Previously, the court evaluated a defendant's ability to demand a jury trial when charged with a particular offense by balancing (1) the crime's traditional treatment at common law, (2) the "gravity" of the allegation (public harm, moral delinquency, and disgrace associated with the offense), and (3) the maximum penalty authorized by the legislature. Beginning in 1994, the Hawaii Supreme Court held that "[p]rimary emphasis . . . must be placed on the maximum authorized period of incarceration," mirroring the more recent approach adopted by the U.S. Supreme Court in evaluating Sixth Amendment claims. Again, this new approach eliminates the right to a jury trial for numerous offenses such as prostitution, DUI, or drug charges that carry significant social opprobrium but only maximum sentences of thirty days imprisonment.

Prior to 2005, the Arizona Supreme Court employed a similar three-pronged approach to decide whether the state constitution guaranteed a right to a jury trial, but this, too, has been abandoned. For thirty-nine years, the Arizona Supreme Court assessed three factors—the relationship of the offense to common law crimes, the maximum statutory penalties attached, and "the moral quality of the act"—to determine whether the defendant could demand a jury trial. Each prong could independently create a basis for a jury trial, regardless of the other two. But in 2005, the court abandoned this test, ruling that the Arizona constitution provided for no greater right to a jury trial than the Sixth Amendment, unless the defendant could identify a common law

111. State v. Wikle, 291 N.W.2d 792 (S.D. 1980) (holding that the defendant was not entitled to a jury trial for violation of a city ordinance for which a fine of twenty dollars or more could be imposed with no possibility of incarceration).
113. HAW. CONST. art. I, § 14. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ."); Nakata, 878 P.2d at 705.
114. Id. at 706.
115. Id. at 707 (noting that the word "penalty" refers not only to the maximum prison term authorized for a particular offense, but to the other penalties that the legislature attached to the offense as well).
116. Id.; State v. Sullivan, 36 P.3d 803 (Haw. 2001) (holding that a defendant's first DUI was a "petty offense" for which there was no right to a jury trial under the Sixth Amendment where the maximum authorized term of imprisonment was thirty days and the defendant was sentenced to a fourteen-hour minimum drug abuse rehabilitation program, a ninety-day license suspension, seventy-two hours of community service, and a fine of four hundred dollars).
antecedent to the offense charged for which a jury trial was required. Almost immediately, certain offenses for which a jury trial previously attached no longer qualified, including marijuana possession, interference with judicial proceedings, false reporting to a law enforcement agency, leaving the scene of an accident, and violation of topless dancing regulations.

In each of these jurisdictions, courts have reinterpreted state constitutional provisions to limit the right to a jury trial. As a result, thousands of cases every year that might otherwise have been decided by a jury are now adjudicated by a judge.

C. "Aggregation" and "Serious" Crimes

Just as state lawmakers and judges can reduce jury trial rates in a particular jurisdiction, prosecutors can also prevent criminal defendants from availing themselves of juries through creative charging decisions that "aggregate" multiple petty offenses. The Sixth Amendment guarantees a criminal defendant the right to a jury trial when charged with an offense that carries with it a potential term of imprisonment greater than six months. The Supreme Court has ruled that the six-month line demarcates a "serious" offense, and where individuals face potential imprisonment for more than six months, heightened procedural protections are constitutionally required. But in 1996, the Court ruled that no such Sixth Amendment right extends to prosecutions of multiple petty offenses which, in the aggregate, may result in imprisonment for more than six months.

The danger of such an approach, which Justice Kennedy warned marked "one of the most serious incursions on the right to jury trial in the Court’s history," is illustrated by the case of Attila Cosby, a George Washington University student accused in 2000 of committing rape. Prosecutors initially

120. Derendal, 104 P.3d at 147 (holding that an offense for which the maximum statutory penalty is less than six months incarceration is presumptively a petty offense to which the Sixth Amendment right to a jury trial does not attach, but that a defendant may rebut this presumption by showing that the legislature has packed an offense it deems "serious" with onerous penalties that nonetheless do not puncture the six-month incarceration line).
127. Id. at 331 (Kennedy, J., concurring in the judgment).
charged Cosby with “first-degree sexual abuse,” a serious felony that would have entitled him to a jury trial.\textsuperscript{129} The single felony rape charge was dropped a month later, but prosecutors later recharged Cosby for the same incident with nine separate misdemeanors, including two counts of sexual abuse, two counts of “attempted threats,” two counts of attempted possession of a prohibited weapon, two counts of theft, and simple assault.\textsuperscript{130} Although Cosby faced nearly three and one-half years in prison—and conviction would require registry as a sex offender—none of the individual misdemeanor charges carried a potential sentence of more than 180 days in jail. He therefore was not entitled to a jury trial, and after a three-week bench trial, he was convicted and sentenced to two and one-half years in prison.\textsuperscript{132}

But the D.C. Council offered a way forward. After the Cosby case, the Council passed the “Misdemeanor Jury Trial Act of 2002.”\textsuperscript{133} The law requires that trials be jury-demandable “where a defendant charged with more than one offense is exposed to a cumulative maximum fine of more than $4,000 or a cumulative maximum term of imprisonment of more than 2 years.”\textsuperscript{134} As the D.C. Court of Appeals recently noted, the bill “changed local practice in significant respects,” and at least in the most egregious cases, ensured that criminal defendants retained their right to a jury trial.\textsuperscript{135} Thus, although the Supreme Court allows a prosecutor eager to avoid a jury trial to aggregate multiple “petty” offenses, such trials are now required to be jury-demandable in the District of Columbia.

To the extent that differences in the composition of trial dockets between various jurisdictions represent a “volitional” choice on the part of defendants, several factors merit examination as possible explanations for why defendants in certain areas might be more likely to waive their right to a jury trial.

\textbf{D. Direct Economic Burdens}

In a vigorous defense of the criminal jury trial in 1999, Justice Scalia wrote that the “jury-trial guarantee . . . has never been efficient; but it has always been free.”\textsuperscript{136} For all of the inconveniences and added costs it entails, the right to a jury trial has long been understood to be part of “the price that all

\begin{itemize}
  \item Petula Dvorak & Josh Barr, \textit{GWU Athlete Charged with Sexual Assault}, WASH. POST, May 18, 2000, at B5.
  \item \textit{See} D.C. CODE § 22-4001 (Supp. 2011).
  \item D.C. CODE §16-705(b)(1)(A)-(B) (Supp. 2011).
  \item \textit{Id}.
  \item Davis v. United States, 984 A.2d 1255, 1260 (D.C. 2009).
\end{itemize}
free nations must pay for their liberty." In many states, however, criminal defendants who seek to exercise their fundamental right to a jury trial have been forced to shoulder part of that burden. Simply put, the jury trial guarantee is not "free" in many states.

One (recently repealed) Montana law exemplifies novel ways that states have managed to burden the jury trial rights of the accused. Up until July 2011, the Montana Legislature required convicted indigent defendants to repay some of the legal costs expended on their behalf by the Office of the State Public Defender (OPD). Although the Sixth Amendment guarantees those accused of criminal wrongdoing the right to court-appointed counsel, the Supreme Court has ruled that such "recoupment" measures are constitutional, provided they include, as the Montana measure does, an exception limiting collection to indigent defendants the court deems able to pay. Montana's approach uniquely burdened the right to a criminal jury trial, however, in the particular manner in which it assessed the amount to be recouped. For criminal defendants who waived their right to a jury trial—either by pleading guilty or opting for a bench trial—the law imposed a maximum recoupment charge of $150 (for misdemeanors) or $500 (for felonies), regardless of the expense of the defense. For those who availed themselves of their right to a jury, however, the law mandated recoupment for all "costs of counsel and other costs and expenses" incurred on the defendant's behalf. Such costs included payment for all "hours spent on the case" by defense attorneys, "witness and interpreter fees and expenses," and "transcript fees." Thus, under Montana law, a defendant convicted of a serious felony after a lengthy jury trial could be assessed tens of thousands of dollars in legal fees, depending on the complexity of the case and the hours expended on her behalf. Another identically

137. 4 WILLIAM BLACKSTONE, COMMENTARIES *350.
139. Fuller v. Oregon, 417 U.S. 40, 45 (1974) (holding that a prerequisite to requiring a person to repay the costs of his legal defense is that he "is or will be able to pay them").
140. MONT. CODE ANN. § 46-8-113 (2009).
141. Id. at § 47-1-201 (2009).
142. Id.
143. See, e.g., State v. Stout, 237 P.3d 37, 50 (Mont. 2010) (holding that the District Court was within its power under the Montana statute to order a convicted Office of the Public Defender (OPD)
situat[ed defendant would be assessed a maximum fee of $500 if she was found guilty of the same felony after a bench trial or a guilty plea.\textsuperscript{144}

Discouraging criminal defendants from exercising their right to a jury trial was not just an unhappy side effect of the Montana recoupment scheme, but rather one of its central purposes. When the original measure was first enacted, the bill’s sponsor, Senator Jim Shockley, explained that the new law would reduce costs by dissuading defendants from fully availing themselves of the safeguards of Montana’s justice system:

If [a defendant] knows he’s never going to have to pay [his] bill, hey, we’re going to plead not guilty in [Justice of the Peace] court and get convicted, we’re going [to] plead not guilty in District Court and get convicted, and then we’re going to the Supreme Court. Why? It’s not costing him a nickel, or her a nickel. So if the person who have the money to pay, and some of them do, have to pay, they’re not going to be appealing as much, and they’re not going to be pleading not guilty.

If you say not guilty doesn’t cost you anything, hey. I’d like to meet the jury, but if you’re paying for it, it makes a big difference.\textsuperscript{145}

At another hearing, to audible laughter, the state senator explained the rationale for treating defendants opting for a bench trial akin to those pleading guilty: “A bench trial to me is like pleading guilty slowly.”\textsuperscript{146} While Senator Shockley later denied that there was any intent to unduly coerce indigent defendants into waiving their right to a jury trial,\textsuperscript{147} the legislative history and structure of the recoupment scheme plainly presented indigent defendants a stark choice when contemplating potential trial strategies.

Because Montana does not maintain court statistics that distinguish between bench and jury trials, it is difficult to gauge the effect this measure had on jury trial rates. However, some anecdotal evidence indicates that the measure weighed heavily on the minds of criminal defendants and their public defenders. “I don’t like recoupment generally, but I’d almost prefer they charge the same regardless [of whether defendant opts for a jury or bench trial], rather than how it [was] set up,” said Eric Brewer, a Montana public defender. “It’s not a fair choice to have to tell your client, ‘We have a better shot with a jury, client to reimburse the defense costs of $57,127 incurred through the trial).\textsuperscript{147}

144. In the 2011 legislative session, the Montana Legislature narrowly voted to increase recoupment costs against criminal defendants, and in so doing, closed the gap between bench trials and jury trials. The new provision calls for a $250 charge for pretrial misdemeanor guilty pleas; an $800 charge for pretrial felony guilty pleas; and full costs and expenses in the event of a trial (regardless of whether the defendant opts for a bench or jury trial). See S.B. 187, 62nd Leg., Reg. Sess. (Mont. 2011), available at http://data.opi.mt.gov/bills/2011/billpdf/SB0187.pdf.


but it might end up costing you a lot more."  

Although Montana's particular approach to creating economic disincentives appears to be unique, many states place direct economic burdens on criminal defendants' right to a jury trial in the form of "jury fees" or "jury taxes." These charges present criminal defendants with a similarly grim dilemma: forego the opportunity to be tried by a jury, or risk a harsher sanction upon conviction.

"Jury taxes" on criminal defendants did not exist at common law, but state legislators have authorized courts to collect such fees in many jurisdictions since the nineteenth century. In Virginia, for example, "compensation to witnesses and jurors" was taxable against a convicted criminal defendant as early as 1819. Indiana passed a statute in 1843 providing for the inclusion of all "costs of prosecution" in judgments against a convicted defendant, which the Supreme Court of Indiana assumed included a "jury fee." And four years later, legislators in Missouri passed an act "to promote the payment of jurors in St. Louis County," which similarly authorized the assessment of a jury tax against those convicted of a criminal offense. By century's end, jury taxes existed in several other states, including Kansas, Ohio, Washington, and Nebraska.

Most state court litigation has focused on whether the imposition of such jury costs was properly authorized by statute, and has avoided the constitutional

149. Comment, Charging Costs of Prosecution to the Defendant, 59 GEO. L.J. 991 (1971). See, e.g., State v. Mulvaney, 293 A.2d 668, 669 (N.J. 1972) ("Costs [for convicted defendant] were unknown at common law. Authority to impose them must be found in statute."); Gooch v. State, 685 N.E.2d 152, 155 (Ind. Ct. App. 1997) ("Absent [statutory] authority, the trial court had no power to assess jury costs against [the defendant]"); Saunders v. People, 165 P. 781, 782 (Colo. 1917) ("Costs are a creature of statute unknown to the common law. At common law there were no costs.").
150. See Anglea v. Commonwealth, 51 Va. (10 Gratt.) 696, 705 (1853) (discussing 1819 statute); Souther v. Commonwealth, 48 Va. (7 Gratt.) 673, 684 (1851) (upholding one dollar per juror per day fee against defendant convicted of beating a slave to death). A 1916 case from a Court of Common Pleas of Pennsylvania notes state legislation providing for juror fees as early as 1795, but it is unclear from the discussion whether such juror stipends were necessarily taxable against the convicted defendant. Commonwealth v. Dawson, 26 Pa. D. 452, 1916 WL 3607 (Pa. Com. Pl. 1916).
151. Krutz v. State, 4 Ind. 647 (1853) (upholding imposition of nine separate jury fines upon conviction on multiple counts of "retailing spirituous liquor," although there was "but one trial had in said cases").
152. State v. Wright, 13 Mo. 243 (1850).
153. See State v. Thomson, 360 P.2d 871 (Kan. 1961) ("[T]his court almost one hundred years ago laid to rest all contentions advanced in support of appellant's position the trial court erred in assessing jury fees against him as a part of its judgment.").
155. State v. Grimes, 35 P. 361, 363 (Wash. 1893) (noted that "[a] prisoner, when convicted, is chargeable with a jury fee of $12, which goes into the cost bill against him").
156. Shaw v. State, 22 N.W. 772 (Neb. 1885) (upholding a jury tax of six dollars assessed upon a misdemeanor conviction as within the "taxing power of the legislature").
issues such fees pose. For example, in 1917 a Colorado county court imposed $118.50 in jury fees, mileage, and per diem against a woman convicted of beating a fourteen-year-old girl "in a brutal and unlawful manner." On review, the Supreme Court of Colorado invalidated the judgment, and in strong language, highlighted the fundamental impropriety of assessing such fees:

In the next place, defendant did not ask for a jury; she did not want a jury; she did not want to be tried at all. There would have been no jury summoned and no trial if she had had her desire. The trial was forced upon her against her will by the prosecution, the Constitution gave her the right of trial by jury, and it was the duty of the county to furnish a jury in the manner provided by the Constitution and laws of the state.

But in the very next sentence, the court noted that the state statute nevertheless allowed for counties to charge "a jury fee of five dollars," reducing the defendant's fine to that amount.

In a small handful of cases, however, courts have addressed the constitutionality of such provisions head-on. In 1885, for example, the Supreme Court of Michigan, commenting on the assessment of costs in a criminal case, noted that "it would be monstrous to establish a practice of punishing persons convicted of misdemeanors for demanding what the constitution of the state gives them, . . . a trial by jury." Analogizing to the "poll tax," which the

157. See, e.g., Gooch v. State, 685 N.E.2d 152, 155 (Ind. Ct. App. 1997) ("[N]owhere in this statute is to be found the authority for a trial court to assess a convicted defendant with jury fees. We need not determine whether the legislature could properly direct a trial court to assess jury fees against a convicted defendant, for it has not done so."); State v. Morehart, 183 N.W. 960, 960 (Minn. 1921) ("[W]e have no hesitation in saying that such fees [for jurors] were not taxable against defendant. It has been the policy of the state to treat the expenses of criminal trials as county burdens."); State v. Jungclaus, 126 N.W.2d 858, 864 (Neb. 1964) ("The trial court was in error in not sustaining defendant's motion to retax the costs by eliminating therefrom the cost of meals for jurors and the cost of the jury and mileage in the amount of $390.95."); State v. Mulvaney, 293 A.2d 668, 669 n.1, 670 & n.2 (N.J. 1972) (holding that a $6,945.18 tax for juror salaries, food, and hotel costs exceeds the $15 "costs of prosecution" fee authorized by statute); Arnold v. State, 306 P.2d 368, 376-77 (Wyo. 1957) ("It has also been suggested that to tax as costs the fees and expenses of the jury panel or even those of the trial jurors alone, amounts to coercion and infringes a constitutional safeguard. The right to trial by jury in criminal prosecutions is inviolate and may not be hampered either directly or indirectly. . . . Conceivably that might be such a deterrent as would move even an innocent person to plead guilty in some cases and induce him to forego his constitutional right of trial by jury. . . . However, it is not necessary to dispose of the question on constitutional grounds at this time and consequently we will not now pass upon that point.").

159. Id. at 245.
160. Id.
161. People v. Kennedy, 25 N.W. 318 (Mich. 1885), cited with approval in People v. Hope, 297 N.W. 206, 208 (Mich. 1941) ("[A]ssessing costs against a defendant for a jury in a criminal case is not permissible under the laws of this State. Every person charged with a criminal offense has a constitutional right to a trial by jury.").
Supreme Court invalidated in 1966,\(^\text{162}\) the Supreme Court of New Hampshire similarly abolished criminal jury fees in 1979.\(^\text{163}\) There the court rejected the argument that the jury fee placed only a nominal burden on defendants, and held that “a criminal defendant cannot be required to purchase a jury trial—even for so nominal a sum as eight dollars.”\(^\text{164}\) At least four states have explicitly rejected this constitutional argument.\(^\text{165}\)

While never ruling on the constitutionality of the practice, the federal courts have evinced skepticism toward jury fees, and have repeatedly rejected their assessment when challenged.\(^\text{166}\) In many of these cases, the court simply held that there was no legal authority (conferred by either statute or local rule) for the assessment of jury costs.\(^\text{167}\) In some opinions, however, the court has gone further and emphasized that jury costs are more appropriately borne by the government as an inherent expense of running a criminal justice system:

The government pays the costs of summoning the jury and their attendance; it pays the salary of the judge and the District Attorney, and of the marshals. None of these items are chargeable in the costs taxed against the defendant. The statute authorizes the court in a criminal case to order the jury kept together and maintained during the trial. It seems to me that under these circumstances this charge is one the government assumes in giving to the various litigants a tribunal in which the trials may be had, and therefore is not properly chargeable against a defendant who is being tried on a criminal prosecution.\(^\text{168}\)


164. Id.

165. State v. Wright, 13 Mo. 243, 244 (1850) (rejecting defendant’s argument that jury tax violated state constitutional guarantee “that right and justice ought to be administered without sale, denial or delay”); State v. Fertterer, 841 P.2d 467 (Mont. 1992) (“[T]he constitutionality of the foregoing statute [allowing courts to assign costs of jury service as part of sentence] has been upheld against claims of a violation of due process rights under the Constitution.”), overruled on other grounds by State v. Gatts, 928 P.2d 114 (Mont. 1996); Kincaid v. Commonwealth, 105 S.E.2d 846, 848 (Va. 1958) (rejecting defendants argument “that the taxing of the costs of the jury is an invasion of the constitutional right of the accused to a trial by jury”); State ex rel. Ring v. Boober, 488 S.E.2d 66, 71 (W. Va. 1997) (rejecting argument that potential jury fee “imposed unreasonable burden upon the exercise of an indigent defendant’s constitutional right to a jury trial”).

166. The sole exception appears to be a 2010 case in the Sixth Circuit where, pursuant to a local rule, a criminal defendant was ordered to pay for the cost of impaneling a jury where he changed his plea to guilty on the day of the trial. United States v. Carradine, 621 F.3d 575 (6th Cir. 2010). However, two points bear emphasis about the jury tax in this case. First, the defendant neglected to raise his claim to the district court, so the appellate court was engaged only in “plain error” review. Second, the local rule only dealt with cases where “the defendant pleads guilty after the jury has been summoned,” thereby discouraging late guilty pleas, not jury trials themselves.

167. See United States v. Banks-Giombetti, 245 F.3d 949, 953 (7th Cir. 2001) (noting that the statute “does not list jury costs as a [taxable] cost of prosecution”); Gleckman v. United States, 80 F.2d 394, 403 (8th Cir. 1935) (“We do not find any authority for holding that such governmental expense can be taxed against one convicted of a criminal offense as ‘costs of the prosecution’ in the absence of statute or established local practice.”); United States v. Wilson, 193 F. 1007, 1007 (S.D.N.Y. 1911) (“It has not been the practice in this district to tax the fees of trial jurors . . . .”).

168. United States v. Murphy, 59 F.2d 734, 735 (S.D. Ala. 1932).
Jury costs, the Eighth Circuit explained, are part of "the general expense of maintaining the system of courts and the administration of justice, all of which is an ordinary burden of government." Indeed, in a more recent case, the Eighth Circuit found plain error where a district court assessed over $3,000 in jury costs against a convicted defendant, even though such an assessment was consistent with local rule.

While it is difficult to quantify the impact such "jury taxes" have on defendants' trial strategies, economic disincentives can and will affect jury trial rates. Consider the "Rights Statements" provided to criminal defendants at their arraignment in West Virginia courts:

The magistrate has informed me that I have the right to demand a jury trial and that if I want a jury trial I must let the magistrate know. . . . If I do not demand a jury trial . . . the magistrate will try my case without a jury. I understand as well that if I have a jury brought in, the jury fee will be assessed against me if I am convicted.

In a 1997 case, a criminal defendant accused of misdemeanor receipt of stolen property waived his right to a jury trial after being read the "Rights Statements" but later argued that the "notification amounts to a threat so as to effectively coerce a defendant to waive a jury trial." Though recognizing that the right to a jury trial is a "fundamental constitutional guarantee," the Supreme Court of Appeals of West Virginia rejected the defendant's argument. The court concluded that such a statement did not "have an unconditional chilling effect on the exercise of [the right to a] trial by jury."

Another recent case in Iowa, arising from the arrest of thirteen anti-war protesters engaged in nonviolent civil disobedience, similarly illustrates the coercive effect such fees may have. The arrested protesters demanded a jury trial, and each was ultimately convicted of one count of misdemeanor trespassing, upon a joint trial before a single jury. At sentencing, however, the district court attached a one hundred dollar "jury fee" to each of the thirteen sentences, essentially charging the defendants $1,300 for the privilege of a single misdemeanor jury trial. The protestors appealed the jury fees to the Supreme Court of Iowa—arguing that "the court was trying to recover multiple times for the same costs"—but the court upheld the assessment under Iowa law.

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169. Gleckman, 80 F.2d at 403.
170. United States v. Mink, 476 F.3d 558 (8th Cir. 2007).
172. Id. at 71.
173. Id. at 69.
174. Id. at 72.
176. Id. The defendants challenged the fees only under the cost recovery provisions of the Iowa Code and did not challenge the constitutionality of the jury fee itself. Brief of Defendant-Appellant, State v. Basinger, 721 N.W.2d 783 (Iowa 2006) (No. 05-0621), 2006 WL 4915846.
Sally Frank, attorney for the protesters in the case, explains that such dramatic fees can have a significant effect on the trial choices of criminal defendants. The jury tax “definitely inhibits a lot of defendants in Iowa” from going to a jury trial, and along with other fees (like public defender recoupment costs), is part of a “whole movement in the criminal justice system to shift costs to the poor, who are least able to pay.” Yet getting before a jury is often critical for a criminal defendant, both in political and nonpolitical cases:

Generally, if you want to talk about broader issues [beyond narrow factual innocence], it only makes sense to do it with a jury. Although you can’t argue for jury nullification, you can hope for some of that. And that’s not going to happen before a judge.

At $1,300, though, the costs of such a forum are steep.

Despite the prevalence of jury fees, long-standing disagreements among the states as to their constitutionality and the stark questions of constitutionality posed by measures such as those employed in Montana, little scholarly attention has focused on such economic burdens imposed on criminal defendants’ right to a jury trial. Without more detailed statistics—Montana, for example, does not compile information on the method of criminal trial dispositions—it is difficult to assess the impact of such burdens on criminal defendants’ decisions as they navigate the criminal justice system. If nothing else, however, these examples demonstrate that Blackstone’s faith in the imperviousness of the jury system to overt attacks—his confidence that “none will be so hardy” as to openly undermine the “sacred and inviolate [palladium]” of the jury—may have been misplaced.

E. Two-Tier Trial Systems

Another hurdle states have placed between criminal defendants and jury trials, without actually eliminating their availability, is the proliferation of “two-tier” court structures. Under such systems, the accused is originally tried in one court, without a jury, before having the opportunity to make a de novo appeal to a second court, with a jury. In 1888, the Supreme Court rejected the practice for prosecutions in the District of Columbia, ruling that “the guarantee of an impartial jury . . . secures to [the accused] the right to enjoy

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177. Telephone Interview with Sally Frank, Drake University Legal Clinic (July 2011).
178. Id.
179. Id.
180. 4 WILLIAM BLACKSTONE, COMMENTARIES *350.
181. The proliferation of two-tier trial systems might also be regarded as a “structural change” affecting jury trial rates, like the factors discussed in Sections III.A–C, supra, insofar as such systems undoubtedly produce more bench trials than would otherwise occur. Unlike those factors, however, two-tier systems do not altogether eliminate the possibility of an (eventual) jury trial for defendants. From the perspective of the defendant, then, such systems function more like the other “volitional” factors discussed in Sections III.D and III.F, altering the calculus of incentives and disincentives defendants must weigh in adopting a trial strategy.
that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged." 

But the practice carried on in state courts, and eight years after its landmark 1968 ruling incorporating the Sixth Amendment’s jury trial guarantee, the Supreme Court heard a challenge to the constitutionality of the practice in *Ludwig v. Massachusetts*. Under the challenged Massachusetts trial system, defendants accused of many crimes—including felonies carrying potential sentences of up to five years—were required to first stand trial in the lower-tier court without a jury. If convicted, the defendant was entitled to a de novo retrial before a jury, and the lower-tier court’s verdict would be vacated pending retrial. In the meantime, however, the convicted defendant could suffer “adverse collateral consequences” as a result of the initial verdict, including revocation of parole, loss of the defendant’s driver’s license, and, as the dissenting opinion in *Ludwig* noted, the reputational injury of being a convicted criminal. This system unconstitutionally burdened the right to a jury trial, the petitioner argued, “(1) by imposing the financial cost of an additional trial; (2) by subjecting an accused to a potentially harsher sentence if he seeks a trial de novo in the second tier; and (3) by imposing the increased psychological and physical hardships of two trials.” In a 5–4 decision, the Supreme Court rejected each of these arguments in turn.

Although reaffirming that criminal defendants accused of non-petty offenses in state courts enjoy the right to a jury trial, the Supreme Court held that the Sixth Amendment included no guarantee of a jury trial “in the first instance.” First, the Court held that because a defendant could circumvent the lower-tier trial by “admitting sufficient findings of fact,” and immediately appealing to the higher tier, Massachusetts’s system did not impose any additional financial burdens on the accused. The Court then ruled that the “mere possibility” of an enhanced sentence did not unconstitutionally burden the exercise of a criminal defendant’s right to a jury trial, and that the danger of vindictive sentencing during second trials did “not inhere in the two-tier

184. *Id.* at 620–21.
185. *Id.* at 622.
186. *Id.* at 637 (Stevens, J., dissenting).
187. *Id.* at 626.
188. *Id.* at 620.
189. *Id.* at 621. This caveat distinguished the Massachusetts system from a two-tier trial system in the District of Columbia, ruled unconstitutional nearly a century earlier, which required defendants to fully try the case at the lower level. *See Callan v. Wilson*, 127 U.S. 540 (1888). Justice Stevens’s dissent in *Ludwig* countered that Massachusetts’s procedural approach was still unfair to those accused of wrongdoing: “The choice between admitting the truth and also the prima facie sufficiency of evidence the defendant considers false or misleading, on the one hand, or insisting on a full nonjury trial on the other, is not an insignificant price to pay for the exercise of a constitutional right.” *Ludwig*, 427 U.S. at 636 (Stevens, J., dissenting).
Although acknowledging the "adverse psychological and physical effects that delay in obtaining the final adjudication of one's guilt or innocence may engender," the Court held that the Sixth Amendment's Speedy Trial Clause provided an adequate mechanism to ensure that such deleterious effects would not be too severe.\(^{191}\)

The Court's ruling left states free to design judicial systems that placed significant hurdles between criminal defendants and juries. Although many states had already developed multi-tiered systems by the mid-1970s,\(^{192}\) these approaches varied with respect to the rights afforded defendants in the lower tiers. In many systems, criminal defendants were able to demand juries even in the lower tier; other states allowed defendants to bypass the first tier altogether, thereby avoiding the ordeal of an unnecessary bench trial.\(^{193}\) After Ludwig, the Court authorized states to force criminal defendants through a criminal adjudication where the right to a jury trial does not exist, even for serious crimes. Delaware, for example, filters certain serious crimes, including sexual assaults, into a family court in which jury trials are unavailable, subject to appeal.\(^{194}\) Relying on Ludwig, the Supreme Court of Delaware rejected a challenge to the practice in 1979, highlighting the "benefits derived by the defendant from an expeditious and normally more private disposition of the case" before a bench trial.\(^{195}\) Other states have been wary of such an approach, however. The Supreme Court of Missouri, for example, rejected the applicability of Ludwig in obscenity prosecutions, highlighting the jury's important role in the determination of contemporary community standards and the importance that freedom of expression not be curtailed absent participation of a jury.\(^{196}\) The stance that states adopt toward these questions can thus significantly alter the availability of the jury trial to criminal defendants.

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190. Id. at 627 (majority opinion) (citing Colten v. Kentucky, 407 U.S. 104, 112–19 (1972)).
191. Id. at 628. In a spirited dissent in Ludwig, Justice Stevens took pains to emphasize how such two-tier systems can alter the composition of state courts' trial dockets:

> I cannot accept the Court's naive assumption that the first-tier proceeding is virtually meaningless. If it is meaningless for the defendant, it must be equally meaningless for the Commonwealth. But if so, why does the Commonwealth insist on the requirement that the defendant must submit to the first trial? Only, I suggest, because it believes the number of jury trials that would be avoided by the required practice exceeds the number that would take place in an optional system. In short, the very purpose of the requirement is to discourage jury trials by placing a burden on the exercise of the constitutional right.

Id. at 635 (Stevens, J., dissenting).
192. See Colten, 407 U.S. at 112 n.4.
193. See Ludwig, 427 U.S. at 620.
195. Id. at 75. The Court's magnanimous conclusion that the challenged two-tier structure was the "better course from the point of view of the defendant" was, presumably, not shared by the defendant.
196. City of Kansas City v. Darby, 544 S.W.2d 529, 530 (Mo. 1976) (en banc) ("The essential question is whether it is constitutionally permissible to allow a municipal judge to restrict freedom of expression prior to the time a jury is made available in circuit court. We think not.").
Finally, in addition to making it more difficult for criminal defendants to gain access to a jury trial, the Court has also redefined the term "jury" itself, abandoning the long-standing assumption that the jury right protected by the Sixth Amendment consisted of a twelve-person panel. Since criminal defendants ordinarily need to sow "reasonable doubt" in the mind of only one juror to avoid conviction,\(^{197}\) limiting the size of criminal juries undermines the comparative advantage that defendants enjoy by insisting on a trial of their peers;\(^ {198}\) it also greatly reduces the likelihood of minority representation on juries, which likewise may figure prominently in the trial decisions of many defendants.\(^ {199}\) Smaller jury panels may thus make the prospect of trial by jury less attractive to defendants, and to the extent the shift away from criminal jury trials is volitional on criminal defendants' part, the changing definition of the term "jury" likely bears some responsibility.

The Court first announced this new standard just twenty-five months after incorporating the Sixth Amendment's jury trial guarantee in *Duncan*, rejecting an appeal from a man convicted of robbery by a six-man jury in *Williams v. Florida*.\(^ {200}\) Although recognizing that the Court had previously "assumed" the requirement of a twelve-person panel—indeed, the Court explicitly so held in 1898—the *Williams* Court found that the traditional twelve-person panel requirement was an "accidental feature of the jury . . . [not] immutably codified into our Constitution."\(^ {201}\) The Court noted that earlier drafts of the Sixth Amendment sought to preserve the right to a criminal jury trial with "accustomed requisites," but that this modifier was removed from the ultimately ratified version.\(^ {202}\) Unable to discern a clear intent on the part of the framers to *maintain* the traditional requirement that a panel consist of twelve

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197. In 1972, the Court also abrogated the traditional requirement of jury unanimity for verdicts reached in state courts, upholding two less-than-unanimous convictions from Louisiana and Oregon. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). In the four decades since *Apodaca*, however, no states have followed Oregon and Louisiana's lead in abolishing the requirement of a unanimous verdict for offenses. Oklahoma has historically allowed for nonunanimous jury verdicts, as well, but only in trials for petty offenses. *OKLA. CONST. art. II, § 19.*

198. See Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW & HUM. BEHAV. 455, 459 ("Fifteen studies collected information on the number of hung juries. . . . The findings show that the effect of jury size on hung juries is significant for both the unweighted and weighted analyses.").

199. *Id.* at 457 ("The results of this meta-analysis confirm that 12-person juries are more likely than 6-person juries to contain at least one member of whatever minority group is under consideration.").


201. *Id.* at 90.

202. *Id.* at 94–97.
Although defendants accused of felonies may still demand a twelve-person jury in the vast majority of states—only Connecticut and Florida deny defendants a twelve-person jury for homicide trials—Williams has still had a major impact regarding the trial of lesser crimes. When Williams was decided, the Court identified only eight states that employed six-person juries for misdemeanors. By 2004, over thirty states relied on six-person juries for some or all crimes; several more made use of juries of seven, eight, or ten for certain crimes. In a large number of criminal trials, then, the “great bulwark of [our] civil and political liberties” is no longer as robust as it was in the past.

When the Court declined to extend Williams in 1978—holding that criminal juries require a minimum of six jurors—it persuasively articulated many of the reasons why juries with less than twelve jurors significantly disadvantage criminal defendants. Relying heavily on empirical studies submitted by the petitioner, the Court emphasized that smaller juries more frequently convict innocent defendants, are less likely to foster effective group deliberation, produce inconsistent verdicts, and often fail to represent accurate cross-sections of the community—particularly by failing to include minority groups. More recent empirical work continues to support these findings.

Simply put, the “jury advantage” that criminal defendants once enjoyed has been reduced along with the size of the jury panel. The benefits of going before a jury in certain jurisdictions may be significantly reduced, altering the

203. Id. at 100.
204. Id. at 139–41 (Appendix to Opinion of Harlan, J.) (noting that only six-person juries were demandable for misdemeanor offenses in Alaska, Georgia, Iowa, Kentucky, Mississippi, Oklahoma, Oregon, and Virginia).
206. 3 STORY, supra note 9, §§ 1773–74.
207. Bellows v. Georgia, 435 U.S. 223 (1978) (holding that a jury in a state criminal trial of only five persons deprives criminal defendants of their right to a jury trial, as guaranteed by the Sixth and Fourteenth Amendments).
208. Id. at 234.
209. Id. at 232.
210. Id. at 234–35.
211. Id. at 236–37.
frequency with which these defendants opt for a trial by jury. Limitations in state court data make it difficult to draw any firm causal links: some states employ juries of different sizes for different offenses but report only a cumulative, statewide jury trial rate. However, factors discussed elsewhere in this Comment may have a greater effect on total rates. But by allowing states to reduce the number of jurors required to constitute a formal “jury,” the Court has produced even greater unevenness in the “grand bulwark.”

CONCLUSION

In his study Democracy in America, Alexis de Tocqueville noted that “[i]n no country is criminal justice administered with more mildness than in the United States.”213 One hundred seventy years later, an observer would be hard-pressed to draw the same conclusion. The U.S. incarceration rate (753 per 100,000) exceeds that of any country on Earth, and more than triples that of the next-highest developed country.214 In 2008, the population of America’s jails and prisons reached 2.3 million, at an estimated expense to local, state, and federal governments of $75 billion.215 These figures alone might prompt a reconsideration of the institution the Founders believed would serve as the “grand bulwark” of its citizens’ liberties.

Of course, the jury system is not without its drawbacks. As one scholar has remarked:

[T]he American jury trial . . . has become one of the most cumbersome and expensive fact-finding mechanisms that humankind has devised. Features [of trial by jury] include our prolonged insulting, privacy-invading jury selection process; our wrangling over evidentiary issues; our frequently repetitive (as well as pointless and degrading) cross-examination by lawyers; and our formulation and delivery of jury instruction that, all the empirical studies tell us, jurors frequently fail to understand.216

In the past year, jury verdicts in several high-profile cases triggered significant public outcry, from the racially-charged case of police officer Johannes Mehserle, acquitted of second-degree murder and voluntary manslaughter in the killing of Oscar Grant,217 to the sensational trial of Casey Anthony, acquitted of

215. Id. at 4.
first-degree murder in the death of her young daughter.218 This Comment does not mean to dismiss the very real costs and risks inherent in trial by jury.219

But it does seek to examine the yawning divide that exists between the lived experiences of many criminal defendants and the Court’s more recent Sixth Amendment jurisprudence, which has repeatedly lauded the centrality of trial by jury in the American justice system. In a series of cases dealing with sentencing determinations, the Court has taken pains to emphasize the historic role juries have served in checking the unbridled authority of judges and other government actors.220 The Court has emphasized “the need to give intelligible content” to the right to a jury trial, which exists as “a fundamental reservation of power in our constitutional structure.”221 It has celebrated the jury system’s “surpassing importance” in criminal adjudication,222 and emphasized that our commitment to jury trials “extends down the centuries . . . as the great bulwark of [our] civil and political liberties.”223

One way to give substantive meaning to this lofty rhetoric would be to reconsider the rigid formalism that has guided the determination of “petty” offenses for the past four decades.224 The historical record is clear that there was a certain class of criminal offenses in 1791 for which no right to a jury trial attached,225 and it seems unlikely that the Framers understood prosecutions for relatively minor offenses to be at the crux of the “spirit of oppression” against


219. The Court’s more recent Sixth Amendment opinions, however, contain compelling rejoinders to such argumentation, particularly on the issue of administrative inconvenience. See, e.g., United States v. Booker, 543 U.S. 220, 243-44 (2005) (the “right to a jury trial . . . has always outweighed the interest in concluding trials swiftly”); Blakely v. Washington, 542 U.S. 296, 306-07, 313 (2004) (“The jury . . . function[s] as circuitbreaker in the State’s machinery of justice. . . . [O]ur decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers’ paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.”); Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J. concurring) (“[T]he dissenting opinion sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. . . . [B]ut the founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.”).

220. See United States v. Polizzi, 549 F. Supp. 2d 308, 427-31 (2008) (discussing that recent opinions “show the Supreme Court is willing to strike down precedents and statutes that impinge on the historical functions of the jury. The opinions do so in the teeth of arguments that pro-jury doctrines could have adverse consequences, such as reducing the efficiency of adjudicatory process, creating unfair sentencing disparities, and throwing the federal criminal courts into disarray.”).

221. Blakely, 542 U.S. at 306.

222. Apprendi, 530 U.S. at 476.

223. Id. at 477 (internal citations omitted).


which they rebelled. But it is equally indisputable that criminal prosecutions have increased to an extent that would be wholly unrecognizable to earlier generations. Consider that approximately forty-seven million Americans, a quarter of the adult population, now "have criminal records on file with federal or state criminal justice agencies," and that over 70 percent of these individuals were convicted only of relatively minor, nonfelony, offenses. If the Court is to insist upon "preserving [the] ancient guarantee [of trial by jury] under a new set of circumstances," perhaps such circumstances merit more weight.

Also militating in favor of broadening the availability of jury trials is the proliferation of collateral consequences that attach to even minor convictions, many of which were also unknown at common law. Misdemeanor convictions can be outcome determinative in child custody cases or expulsion from public housing, for example. For immigrants, they can result in the denial of a green card or deportation. Students convicted of minor marijuana offenses may become ineligible for student loans. Although the Court's bright-line approach may be far easier to navigate from an administrative perspective, it shows little regard for the "long-reaching and significant collateral effects on a person's future" that may result from nominally "petty" convictions.

Jury-less convictions for ostensibly petty crimes also increasingly carry dramatic consequences for defendants tried for subsequent offenses. In Louisiana, for example, possession of marijuana is ordinarily a petty offense, carrying a potential jail sentence of no more than six months—and, consequently, no opportunity for a trial by jury. But upon conviction for a third possession of marijuana offense, state law provides that "the offender shall be sentenced to imprisonment with or without hard labor for not more than twenty years, and may, in addition, be sentenced to pay a fine of not more than five thousand dollars." Critics have argued that such sentencing regimes violate the Sixth Amendment—that prior nonjury demandable misdemeanor adjudications should not be used to so radically increase potential criminal liability for subsequent offenses—but the Supreme Court recently declined to hear such a challenge.

226. Apprendi, 530 U.S. at 477.
227. See John Schmidt et. al., supra note 214, at 13 (discussing historical incarceration rates).
228. Travis, supra note 27, at 18.
231. Id.
232. Id.
233. Id.
236. Brief for National Association of Criminal Defense Attorneys (NACDL) as Amici Curiae Supporting Petitioners at 9, George v. Louisiana, No. 10-1017 (U.S. Mar. 14, 2011) (challenging "recent practice of a number of jurisdictions [including Nevada, California, New Mexico, the District..."
Even if the Court remains committed to preserving the present six-month dividing line between "petty" and "serious" crimes, however, the practice of charging criminal defendants a "tax" for the privilege of having their case heard by a jury should be abolished. As noted earlier, although it has been a long-standing practice in some states to countenance such fees, "jury taxes" were unknown at common law. At least with respect to the Confrontation Clause, the Court's recent Sixth Amendment jurisprudence has emphasized that eighteenth-century jury trial practice establishes the standard with which modern criminal adjudication must conform. Innovative practices like jury taxes—whatever their practical benefits—plainly do not. But an alternate line of constitutional argument, one less single-mindedly focused on jury taxes' historical pedigree, could also challenge the practice as unduly impinging upon a "fundamental right." In many respects, the right to a trial by jury is analogous to the right to vote, which the Court ruled could not be burdened by even a nominal charge of $1.50. The Court has made this analogy itself, explaining that "just as suffrage ensures the people's ultimate control in the legislative and executive branches, [the] jury trial is meant to ensure their control in the judiciary." And as the Court made clear in Harper, "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." Jury taxes, whatever their benefit to state coffers, cannot withstand such scrutiny.

The Court has highlighted its cognizance of "the Framers' fears 'that the jury right could be lost not only by gross denial, but by erosion.'" While the disappearance of trials generally from the criminal process has already largely accomplished this feat, this Comment has illustrated ways in which state actors can exacerbate the problem. The extent to which a criminal defendant benefits from the "sacred palladium" in America today varies dramatically depending on where he or she stands accused, and in some areas, the institution has come to play an increasingly marginal role in the criminal process. The time has come to shore up the "grand bulwark."

237. See supra Section III.D.
238. See generally David A. Sklansky, Hearsay's Last Hurrah, 2009 SUP. CT. REV. 1, 64, 74 (critiquing "empty formalism" of recent Confrontation Clause cases, advocating instead a strategy that "seeks to understand what a clause signified when it was adopted—what evils it aimed to prevent, and why—and then asks how we can best be faithful to those purposes today").
241. Id.