

THE LOST RIGHT TO JURY TRIAL IN “ALL” CRIMINAL PROSECUTIONS

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ABSTRACT

The Sixth Amendment states that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” Similarly, Article III mandates that the trial of “all crimes, other than impeachment, shall be by jury.” Nonetheless, tens of thousands of federal defendants each year are denied a jury in “petty” cases with a potential sentence of six months or less. These cases can carry significant consequences and involve not only regulatory crimes but traditional crimes like theft, assault, and sexual abuse. This apparently blatant contradiction of the U.S. Constitution’s text is justified by the so-called “petty-offense exception,” originating in nineteenth-century Supreme Court dictum, which cited the Founding-era practice of allowing certain offenses deemed “petty” by Parliament or colonial charters to be summarily tried by a justice of the peace. While a couple of commentators over the last century have criticized this doctrine, it has never been fully litigated. Harnessing previously unexplored historical and textual sources, this Article offers the most comprehensive argument to date that the petty offense exception’s existing rationales are untenable. Indeed, as the sources reveal, controversial summary bench trials could just as naturally be read as inspiration for the Framers’ conspicuous decision to guarantee a jury in “all” criminal prosecutions. Ultimately, if one looks to text and history to interpret the jury right, it must at the very least extend to defendants formally charged by the U.S. Department of Justice in

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federal criminal court. The Article concludes by exploring the implications of a jury right in federal petty cases, including the importance of the right, implications for state defendants, and the Sixth Amendment right to counsel.

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INTRODUCTION

In my early days as a public defender in Washington, D.C., I represented a man accused—falsely, I believed—of assault. The

primary evidence against him was the testimony of a person of questionable credibility whose memory was impaired by significant drug use. Although the crime was labeled a “misdemeanor” rather than a “felony,” the proceedings were as formal as any other criminal case and the stakes were high. The United States Attorney’s Office (“USAO”) prosecuted the case under the auspices of the Department of Justice. Upon being convicted, my client was sentenced to 180 days in jail. He lost his job, was separated from his family, had the crime placed on his criminal record, and spent six months in a cell in the D.C. jail, a place notorious for tuberculosis outbreaks, insect infestations, allegations of staff abuse, and lack of access to medical care.¹

Hearing these facts, a reader might be forgiven for assuming that my client had the benefit of a jury trial before being sentenced to those six months in jail. After all, the Sixth Amendment guarantees, “In *all criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”² Similarly, Article III of the Constitution declares, “The Trial of *all Crimes*, except in Cases of Impeachment, shall be by Jury.”³ No other provision in the Constitution further limits these guarantees to particular criminal offenses or cases. Instead, they conspicuously apply to *all* crimes and criminal prosecutions.

And yet, courts around the country routinely deny jury trials in criminal prosecutions where the defendant is charged with a “petty” crime carrying a statutory maximum jail term of sixth months or less. This practice has great significance. Federal prosecutors file over sixty thousand petty misdemeanor charges each year,⁴ including charges against political protesters (on both sides of the aisle),⁵ impaired

1. See generally Madeleine Carlisle, *The Crisis at the D.C. Jail Began Decades Before Jan. 6 Defendants Started Raising Concerns*, TIME (Jan. 8, 2022, 7:00 AM), <https://time.com/6137882/dc-jail-conditions-january-6> [<https://perma.cc/HN7Z-VGYJ>] (describing the conditions of confinement in D.C. jail).

2. U.S. CONST. amend. VI (emphasis added).

3. U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

4. See, e.g., U.S. CTS., JUDICIAL BUSINESS 2017: U.S. MAGISTRATE JUDGES (2017), <https://www.uscourts.gov/statistics-reports/us-magistrate-judges-judicial-business-2017> [<https://perma.cc/V9GN-2XNC>] (noting over seventy thousand petty criminal charges filed in 2017); Mary C. Warner, Note, *The Trials and Tribulations of Petty Offenses in the Federal Courts*, 79 N.Y.U. L. REV. 2417, 2417 (2004) (noting a similar trend in the early 2000s of sixty thousand to seventy thousand federal petty misdemeanors filed annually).

5. See, e.g., Ryan Lucas, *Review of Federal Charges in Portland Unrest Shows Most Are Misdemeanors*, NPR (Sept. 5, 2020, 7:00 AM), <https://www.npr.org/2020/09/05/909245646/review->

driving in national parks,⁶ illegal entry into the United States,⁷ and physical assaults on Indian land.⁸ Meanwhile, state prosecutors in 2016 filed 13.2 million misdemeanor charges, including petty charges for traditional crimes such as assault,⁹ theft,¹⁰ and sex abuse.¹¹ Even petty regulatory offenses, like driving without a license, are a primary means by which people enter the criminal legal system or are exposed as undocumented.¹² Indeed, a subfield of “misdemeanors studies” now exists that highlights the outsized effects of misdemeanors on the justice system and on those accused.¹³ And make no mistake: all federal

of-federal-charges-in-portland-unrest-show-most-are-misdemeanors [<https://perma.cc/JEL7-LYZG>] (noting that more than 70 percent of charges in connection with the racial justice protests in Portland were for misdemeanors); Roger Parloff, *What Do – and Will – the Criminal Prosecutions of the Jan. 6 Capitol Rioters Tell Us?*, LAWFARE (Nov. 4, 2021, 10:41 AM), <https://www.lawfareblog.com/what-do%E2%80%94and-will%E2%80%94criminal-prosecutions-jan-6-capitol-rioters-tell-us> [<https://perma.cc/8SNV-DC4R>] (noting the “avalanche of petty-offense convictions” among those protesters pleading guilty).

6. See 36 C.F.R. § 4.23 (2022) (making impaired driving in a national park a six month federal misdemeanor); 36 C.F.R. § 1.3 (making violations of § 4 punishable by the penalties in 18 U.S.C. § 1865, which in turn imposes a penalty of up to six months’ imprisonment).

7. See generally Amy F. Kimpel, *Alienating Criminal Procedure* (July 3, 2022) (unpublished manuscript) (on file with author) (noting the tens of thousands of petty misdemeanor prosecutions for illegal entry annually at the southern border).

8. See Assimilative Crimes Act, 18 U.S.C. § 13 (making misdemeanor violations of state law on federal lands into a federal criminal offense); General Crimes Act, 18 U.S.C. § 1152 (extending federal criminal jurisdiction to Indian country).

9. D.C. CODE § 22-404 (2022) (simple assault; 180-day statutory maximum).

10. *Id.* § 22-3211 to -3212(b) (second-degree theft; 180 days).

11. *Id.* § 22-3006 (misdemeanor sex abuse; 180 days).

12. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316–17, 1321, 1325–26 (2012) (noting the high stakes for many defendants in being drawn into the criminal system for the first time through a misdemeanor charge).

13. To be sure, a small handful of scholars have been theorizing about misdemeanors for decades. See generally MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979) (explaining how low-level courts typically achieve goals of the criminal process through the accusation and pretrial supervision process, rather than through adjudication and sentencing). But more recently, a critical mass of scholars have focused on misdemeanors. See generally Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1641–44 (2021) (explaining the high stakes of order-maintenance misdemeanor prosecutions for norm creation and enforcement); Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 1014–18 (2020) (presenting a comprehensive empirical portrait of U.S. misdemeanor practice); ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018) (arguing that low-level courts engage in deliberate practices that simply manage populations, rather than providing assembly-line justice); ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018) (arguing that misdemeanors are overprosecuted and come with few procedural protections); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953 (2018) (arguing that

petty offenses, at the very least, are *crimes* and *criminal prosecutions* in any modern sense; they are formally charged by a criminal prosecutor from the USAO under the Department of Justice, brought in criminal court, involve a possible conviction of a federal crime, and may involve criminal punishment up to six months' incarceration (not to mention fines and possible collateral consequences, from deportation to sex offender registration).¹⁴

In justifying this apparently blatant contradiction of the Constitution's text in petty cases, courts invoke the so-called "petty offense exception," a doctrine that interprets the right to jury as inapplicable to crimes deemed petty by Congress or a state legislature. This exception originated in *Callan v. Wilson*,¹⁵ a case involving a serious federal conspiracy-to-commit-extortion charge in Washington, D.C.¹⁶ The Court held that the defendant was entitled to a jury (and that the jury right applied to the District), but it posited in dictum that the result would have been different had the offense been petty.¹⁷ The Court based this dictum on two premises: that the word "crime," while sometimes used broadly to mean a violation of "public law," is also sometimes used narrowly to mean a "serious or atrocious" offense¹⁸; and that the Framers were aware of and thus presumably approved the English and colonial practice of allowing justices of the peace to summarily try, without a jury, offenses labeled as "petty" or

misdeemeanors' high stakes stem largely from collateral consequences that, unlike formal penalties, do not lead to procedural protections); Irene Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 785–86 (2017) (arguing that overburdened public defender offices should not put their most junior and inexperienced attorneys in misdemeanor court); John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1 (2013) (arguing that the stakes and complexity of misdemeanor cases are high enough that they should trigger the right to counsel); Erica J. Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019 (2013) (explaining how the alleged right to counsel in misdemeanor cases involving probation sentences, since *Alabama v. Shelton*, 535 U.S. 654 (2002), is not recognized in practice); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011) (explaining the high stakes of misdemeanor arrests and convictions, from deportation to sex offender registration to loss of public housing).

14. See, e.g., Roberts, *supra* note 13, at 297–302 (listing various severe collateral consequences of misdemeanors); Warner, *supra* note 4, at 2421 (noting Class B misdemeanors that are petty but eligible for six months' incarceration).

15. *Callan v. Wilson*, 127 U.S. 540 (1888).

16. See *id.* at 555.

17. *Id.* at 556–57.

18. *Id.* at 549. While the Court did not explicitly cite Blackstone in defining "crime," this language tracks Blackstone's phrasing verbatim. See *infra* Part II.A.

“summary” by Parliament.¹⁹ Since *Callan*, the petty offense exception has become entrenched in federal and state case law.²⁰ It was buttressed by a 1926 law review article coauthored by then-Harvard Law Professor Felix Frankfurter and his student Thomas Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, which followed the *Callan* dictum in justifying the petty offense exception based on Blackstone and historical summary jurisdiction practices.²¹ Since 1970, when the Supreme Court drew the petty/nonpetty line at offenses carrying over a six-month statutory maximum sentence,²² defendants in both state and federal courts have routinely been denied a jury for all offenses carrying a potential sentence of six months or less.²³

This doctrine not only appears to contradict the Constitution’s text and originated in dictum, but it has since been treated as settled without further litigation challenging it.²⁴ Over the years, the occasional commentator has lamented that this exception is ahistorical and contradicts the Constitution’s text.²⁵ But the last commentary arguing against the exception was thirty years ago by Timothy Lynch of the Cato Institute,²⁶ before new historical research on summary

19. See *Callan*, 127 U.S. at 552–53.

20. See *infra* Part I.B. (explaining twentieth-century entrenchment of the doctrine).

21. See generally Felix Frankfurter & Thomas Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926) (“The profound reasons for a popular share in the administration of criminal justice did not cover this extensive range of petty offenses. Such is the verdict of the history that went into the Constitution.”).

22. See *infra* note 173 and accompanying text.

23. See, e.g., Warner, *supra* note 4, at 2422 (noting that federal crimes below Class A do not receive a jury trial); D.C. CODE § 16-705 (2022) (no jury trial for petty misdemeanors); LA. CODE CRIM. PROC. ANN. art. 779 (2012) (no jury trial for crimes punishable by six months or less); MISS. CODE ANN. § 99-33-9 (2013) (same).

24. See, e.g., *Baldwin v. New York*, 399 U.S. 66, 68 (1970) (explaining that the Court recently “reaffirmed the long-established view that so-called ‘petty offenses’ may be tried without a jury” in *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

25. See *infra* Section I.C (discussing the two main articles critiquing the exception); see also *infra* note 208 (citing sources that mention the issue in passing).

26. See generally Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J.L. & PUB. POL’Y 7 (1994) (arguing, among other things, that the Framers of the Constitution sought to abrogate the common-law petty offense doctrine). As this Article was nearing going to press, I was made aware of J.D. King’s excellent article discussing the petty offense exception, *Juries, Democracies, and Petty Crime*. King notes several reasons that the petty offense doctrine is counter to the text (citing Lynch) and argues against the exception on fairness, legitimacy, and administrability grounds as well. See John D. King, *Juries, Democracy, and Petty Crime*, 24 U. PA. J. CONST. L. 817, 818–22 (2022). In particular, he notes that abandoning the doctrine would obviate the need for difficult, subjective inquiries into which nonincarcerative qualities or

practices emerged²⁷ and before the triumph of various forms of textualism and originalism on the Supreme Court.²⁸ Litigants appear to have treated the exception as settled, focusing their arguments on why their offense is serious rather than petty.²⁹ Remarkably, nearly a century after Frankfurter and Corcoran's article, no challenge to the petty offense exception has ever (to my knowledge) been fully litigated.

This Article offers the most comprehensive argument to date, based on previously unexplored historical sources and text-based arguments, that the petty offense exception is untenable on its own terms. It explains why *Callan* and Frankfurter misused selective quotes from Blackstone,³⁰ and it draws upon contemporaneous dictionaries, commentaries, public usages, and court cases routinely describing summarily tried petty offenses as criminal prosecutions. It also draws upon pre-Founding and Founding era cases and commentaries to explain why controversial English and colonial summary practices could be just as easily read as the target of the Sixth Amendment's categorical language, rather than as a practice the Founders hoped to continue.³¹ It also makes clear that, perhaps most obviously, the modern ordinary and legal usage of "crime" and "criminal prosecution" includes formally charged offenses in criminal court that are prosecuted by the government and end in a criminal conviction and punishment. And it harnesses the recent insights of constitutional law scholars on the meaning of other constitutional provisions related to crimes and criminal cases.³²

consequences are sufficient to render an offense "serious." *Id.* at 818–19. While King does not present the text and history-based arguments I put forth here, the arguments in the two articles are entirely complementary.

27. See *infra* notes 317–331 (citing recent histories of summary trials in England).

28. See William Haun, *Tradition-Based Originalism and the Supreme Court*, AM. ENTER. INST. (Mar. 21, 2022), <https://www.aei.org/articles/tradition-based-originalism-and-the-supreme-court> [<https://perma.cc/S63K-4ECL>] (discussing the ascendancy of textualism and originalism since Justice Antonin Scalia's 1986 entry on the Court and noting that these theories now "predominate" on the Court and will give rise to new debates among textualists and originalists, rather than debates about the virtues of these theories compared with purposivism).

29. See, e.g., *infra* note 207 (citing examples of Ninth Circuit post-*Baldwin* case law, in which litigants argue only that their cases are not petty).

30. See *infra* Section II.C.

31. See *infra* Section II.B.

32. See *infra* Section II.B.

In arguing against the petty offense exception, this Article does not assume the correctness of a particular mode of constitutional interpretation, such as textualism or originalism.³³ Rather, it explains why the doctrine's ostensible justifications—its appeals to Blackstone, dictionaries, and English and colonial practices that the Court assumed the Framers intended to continue—are baseless. Starting from scratch with the categorical phrases “all crimes” and “all criminal prosecutions,” then, the question becomes how to interpret them. Other scholars have ably made the purposivist case for a broader jury right, based on the importance of the jury in ensuring fairness and accuracy.³⁴ These arguments are presumably buttressed, rather than threatened, by the arguments made here. After all, even nontextualists now routinely assume that the “text, where clear, governs”³⁵ and are quick to note where Founding-era clues point to a broad interpretation of criminal defendants' rights.³⁶ At any rate, given the current Supreme

33. The definition and desirability of these theories are both the subject of volumes of academic debate. See, e.g., Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 269 (2020) (distinguishing between “formalistic textualism” and “flexible textualism” and arguing for the former); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 558 (2006) (noting the debate over the meaning and desirability of originalism and urging a “common law originalism” that recognizes the Framers' knowledge of the indeterminacy of, and controversy surrounding, various common law approaches).

34. E.g., Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 647–50 (2013) (arguing for the extension of jury trials to juvenile cases because of the stakes involved and the fundamental importance of the right, as reflected in *Duncan v. Louisiana*); King, *supra* note 26 (arguing for extension of the jury right to all criminal offenses on fairness, legitimacy, and administrability grounds).

35. Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 5 (2018); see also James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1525 (2011) (“Progressive academics, for their part, have largely accepted the importance of text and history in constitutional interpretation.”); Justice Elena Kagan, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:29 (Nov. 17, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg&t=513s> [<https://perma.cc/F7LY-78AM>] (“[W]e're all textualists now.”); cf. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009) (arguing that “we can all care about framers' intentions, ratifiers' understandings, and original public meaning without being originalists”); Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1689–95 (2016) (arguing that judges are justifiably originalist in interpreting rules and nonoriginalist in interpreting standards).

36. See generally, e.g., Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 STAN. L. REV. 603 (2022) (making an originalist argument for a personal-knowledge warrant oath requirement and dismissing nonoriginalist critiques by noting that this argument restores, rather than limits, personal liberties and relates to a clear guarantee); Erica J. Hashimoto, *An Originalist Argument for a Sixth Amendment Right to Competent Counsel*, 99 IOWA L. REV. 1999 (2014) (arguing, based on Treason Act of 1696, that the Framers intended a basic level of competence in

Court's penchant for text-based analyses and examinations of Founding-era historical practices when interpreting the Sixth Amendment,³⁷ the continuing resilience of the petty offense exception, which seems to fly in the face of the plain text, seems curious.

Ultimately, for those who would look to text and history, the jury right must at a minimum include federal criminal cases in which defendants are formally prosecuted by a United States Attorney and subject to punishment. For those who do not view the text and history as dispositive or even particularly relevant, there are weighty reasons to interpret the jury right to include such cases. Other than perhaps a bald pragmatist appeal to cost and efficiency concerns, no justification appears to exist for treating the categorical language of Article III and the Sixth Amendment as exempting any federal criminal prosecution, whether or not Congress hopes to bypass the jury right by labeling the crime petty.

This Article proceeds in three parts. Part I explains how the petty offense exception began and became settled, its ostensible justifications, and the limits of litigants' and scholars' challenges to the exception. Part II explains the overwhelming case against the exception in light of the Constitution's plain text and contextual evidence of its meaning, including an in-depth exploration of Blackstone, English and colonial summary practices, and other historical sources relied on by Frankfurter and Corcoran. Part III explores the implications of recognizing a jury trial right in petty cases: the surprisingly vast effects in federal court; the even greater effects on state courts, unless the Court embraces "dual-track incorporation" of

defense attorneys, which would call *Strickland's* prejudice prong into doubt); cf. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 283 (2014) ("tak[ing] the Court at its word" that Founding-era historical practices are relevant to interpreting the Eighth Amendment but noting other historical evidence showing the Court's fines doctrine is ahistorical).

37. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004) (turning first to the text of the Confrontation Clause and then to its historical background to determine the meaning of "witnesses against"); *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (deeming significant, in deciding whether sentencing factors increasing punishment must be found by a jury, that "[a]ny possible distinction between an 'element'" and a "'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed" near the Founding); cf. *Timbs v. Indiana*, 139 S. Ct. 682, 687–89 (2019) (looking to the text and history of the Excessive Fines Clause to determine whether the right is sufficiently fundamental to be binding on states). But see Stephanos Bibas, *The Limits of Textualism in Interpreting the Confrontation Clause*, 37 HARV. J.L. & PUB. POL'Y 737, 741–42 (2014) (acknowledging that textualism and originalism do not offer clear answers to the question of what is a "witness" for Confrontation Clause purposes because "[i]t is not clear that there was a preexisting concept of what 'confrontation' meant in a criminal trial that the Framers meant to freeze in amber").

the jury right; and the possible effects on the Sixth Amendment right to counsel “in all criminal prosecutions.” The Article concludes by explaining why the right might be meaningful, even in an age of plea bargaining, and even amid recent critiques insisting that additional procedural rights will not enhance substantive justice.

I. THE EVOLUTION OF THE PETTY OFFENSE EXCEPTION

This Part briefly describes how the Court has come to interpret the jury right to apply only to nonpetty crimes, even as Article III requires a jury for “all crimes” other than impeachment, and even as the Sixth Amendment right applies to “all criminal prosecutions.” It then explores the few critiques of the petty offense exception and explains that nearly all modern litigation related to the jury right takes the exception as given. It focuses on arguing that various circumstances—such as aggregated sentences of multiple petty charges—render a prosecution nonpetty.

A. *The Exception’s Origin in Nineteenth Century Dictum*

For most of the country’s first century, the question of whether a defendant charged with a petty crime has a Sixth Amendment right to jury did not arise. To be sure, before and after the Sixth Amendment’s ratification, some U.S. cities had bustling municipal courts in which justices of the peace decided cases involving noncriminal municipal ordinance violations without a jury.³⁸ But the Sixth Amendment did not apply in these proceedings or to state criminal court proceedings; in fact, the Supreme Court did not deem any federal constitutional right binding on states until the late 1800s, well after ratification of the Fourteenth Amendment.³⁹ The Court did not recognize the jury right as binding on the states until *Duncan v. Louisiana*.⁴⁰

Meanwhile, those few federal crimes with potential sentences of six months or less appear to have been generally tried by jury until the

38. See Brief for Appellant at 8, *Callan v. Wilson*, 127 U.S. 540 (1888) (No. 1318) (citing state cases holding that municipal ordinance violations were not in criminal court).

39. Compare *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (holding the Fifth Amendment Takings Clause not binding on states), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, and *Hurtado v. California*, 110 U.S. 516, 538 (1884) (holding the right to indictment not binding on states), with *Chi., Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 241 (1897) (applying the Fifth Amendment Takings Clause to the state of Illinois).

40. *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968).

creation of the petty offense exception in 1888.⁴¹ These misdemeanors generally required indictment by grand jury as well. Not until 1930 did Congress start formally labeling certain offenses in the federal criminal code petty and allowing them to be charged by information (a brief charging document signed solely by the prosecution) rather than indictment (a charging document resulting from a grand jury's finding of probable cause to proceed with the case).⁴² Even where Congress may have had a compelling reason to fear local resistance to unpopular federal policy, such as in prosecutions for the six-month misdemeanor of impeding recovery of enslaved persons under the Fugitive Slave Act of 1850, it recognized the right to jury trial.⁴³ Likewise, despite frequent jury nullification in other federal laws meeting local resistance, such as the fine-only prohibitions of Thomas Jefferson's Embargo Laws⁴⁴ and the one-year misdemeanor for violations of the 1866 Civil Rights Act,⁴⁵ Congress took no action to try to remove the right to jury in such cases. Presumably, Congress would have pursued nonjury summary proceedings in such cases if it viewed them as a possibility.

Even as a matter of state law, the petty crime jury trial issue arose infrequently before the twentieth century. By the late 1800s, only two states, Massachusetts and New York, appear to have allowed nonjury trials by justices of the peace in criminal cases, both in cases of petty

41. See, e.g., *Cannon v. United States*, 116 U.S. 55, 60–61 (1885) (noting that the defendant was tried by jury for the six-month misdemeanor offense of bigamy by a man); *Ex parte Snow*, 120 U.S. 274, 277–78 (1887) (same); *In re The Ethan Allen*, 25 F. Cas. 1024, 1024–25 (C.C.D. Cal. 1868) (No. 15,059) (noting that a jury would determine guilt regarding a six-month federal misdemeanor charge for having too many passengers on a vessel); cf. *United States v. Thompson*, 12 F. 245, 246 (D. Or. 1882) (noting that a trial against a ship captain for the six-month misdemeanor of taking too many passengers on a vessel was “by the stipulation of the parties . . . tried by the court without a jury”).

42. See An Act To Amend Section 335 of the Criminal Code, Pub. L. No. 71-548, ch. 15, 46 Stat. 1029, 1029–30 (1930) (codified as amended at 18 U.S.C. § 541) (adding the category of “petty” offenses to Title 18’s “Criminal Code” and allowing charge by information or complaint).

43. E.g., Fugitive Slave Act of 1850, Pub. L. No. 31-60, § 7, 9 Stat. 462, 464 (repealed 1864) (making impeding recovery a six-month misdemeanor); JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 80–82 (1994) (discussing frequent jury nullification in Fugitive Slave Act cases).

44. See Douglas Lamar Jones, *‘The Caprice of Juries’: The Enforcement of the Jeffersonian Embargo in Massachusetts*, 24 AM. J. LEGAL HIST. 307, 327 (1980) (noting the relatively high jury acquittal rate in such cases, which were fine only).

45. See Civil Rights Act of 1866, § 2, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1983) (making violation of the Civil Rights Act a one-year misdemeanor); Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1181–88 (discussing southern juries’ resistance to Reconstruction Era federal civil rights laws).

larceny.⁴⁶ While the Massachusetts Supreme Judicial Court in *Jones v. Robbins*⁴⁷ held this practice constitutional under the state constitution's jury right provision, it did so only with the understanding that defendants in Boston's police courts (if they could afford it) had an "unqualified and unfettered right of appeal" from the police court "to a court sitting with a jury."⁴⁸ And while the New York Court for the Correction of Errors in *Murphy v. People*⁴⁹ also upheld a larceny conviction by a justice of the peace, it did so while applying the unusual wording of New York's state constitution, which guaranteed a jury only "in all cases in which it has been heretofore used."⁵⁰ Because parts of colonial New York allowed bench trials in cases of petty larceny, the Court deemed the practice constitutional. It noted, however, that the practice was "lamentable" and suggested that it would violate the broader *federal* jury right were that right applicable.⁵¹

The first person to argue before the Supreme Court that he was denied a jury trial in a misdemeanor case was convicted not in state or federal court, but in a hybrid of the two—the District of Columbia. In 1870, Congress created a "Police Court," much like the Boston police court at issue in *Jones*, to try "offenses against the United States committed in the District not deemed capital or otherwise infamous Crimes; that is to say, of all simple assaults and batteries and all other misdemeanors not punishable by imprisonment in the penitentiary; and of all offenses against the laws and ordinances of the District."⁵²

46. See Brief for Appellant at 10–12, *Callan v. Wilson*, 127 U.S. 540 (1888) (No. 1318). In addition, at least one other state suggested, in dicta, that the regime of *Jones v. Robbins*, 74 Mass. (8 Gray) 329 (1857), allowing an appeal of a summary conviction to a jury, would satisfy its state constitutional jury guarantee. *State v. Everett*, 14 Minn. 439, 445–46 (1869).

47. *Jones v. Robbins*, 74 Mass. (8 Gray) 329 (1857).

48. *Id.* at 334–35, 341. Notably, though, the Court vacated the conviction anyway, deeming the crime "infamous" (because of the potential prison sentence it carried), which triggered a state constitutional right to indictment by grand jury. *Id.* at 349–50.

49. *Murphy v. People*, 2 Cow. 815 (N.Y. 1824).

50. *Id.* at 816 (quoting N.Y. CONST. art. VII, § 2).

51. *Id.* at 817–18 (calling the practice "lamentable" and, though quoting the broad federal jury right language, noting that this applied "in the Federal Courts only"); see also *Jackson ex dem. Wood v. Wood*, 2 Cow. 819, 819–20 (N.Y. 1824) (deeming a witness's previous larceny conviction constitutional, even though not tried by jury, but conceding that if the Sixth Amendment applied to state proceedings, the conviction would be unconstitutional). In contrast, the New York high court in a different case struck down a law allowing nonjury criminal proceedings for failure to pay a liquor excise because the law was new and such a crime would have required a common-law jury. See *Wynehamer v. People*, 13 N.Y. 378, 487 (1856).

52. Brief for Appellant at 3, *Callan v. Wilson*, 127 U.S. 540 (1888) (No. 1318).

Those defendants tried in D.C. Police Court were charged by information rather than indictment and tried by a judge rather than jury,⁵³ although defendants who could afford an appeal could demand a federal trial by jury upon conviction in Police Court.⁵⁴ Perhaps for this reason, few defendants in the eighteen years between the Police Court's inception and Callan's Supreme Court appeal challenged the lack of a jury.

The first Police Court defendant to have his jury demand chosen for review by the Supreme Court was James Callan, accused of conspiring to extort money from a local musician and, upon his refusal to pay, boycotting his musical assembly.⁵⁵ Callan was convicted of conspiracy to commit extortion and sentenced to a fine and thirty days in jail.⁵⁶ While three other D.C. defendants before Callan had challenged in federal court the denial of their jury trial request, none of these cases squarely addressed whether petty federal crimes could be tried by a judge consistent with Article III and the Sixth Amendment. In the first two cases, lower federal courts had refused to recognize the Police Court's jurisdiction over libel, reasoning that—whatever the legal scope of the Police Court—the traditionally jury-demandable offense of libel was beyond it.⁵⁷ In the third case, the D.C. Supreme Court (the precursor to the District Court for the District of Columbia)⁵⁸ recognized the potential constitutional problem with denying a jury to a Police Court defendant convicted of six petty larcenies and sentenced to a three-year cumulative prison term, but it declined to address the issue given that the practice had already gone unchallenged for fourteen years.⁵⁹

53. D.C. CODE ch. 56, § 25 (1889).

54. *Id.* ch. 35, § 35.

55. *Callan*, 127 U.S. at 541–42.

56. *Id.* at 540.

57. *In re Dana*, 6 F. Cas. 1140, 1142 (C.C.S.D.N.Y. 1873) (No. 3554); *United States v. Buell*, 8 D.C. (1 MacArth.) 502, 503–04 (1874) (recognizing that the Police Court lacked jurisdiction over crimes like libel that carried potential jail time). *But see id.* (Humphreys, J., concurring) (opining that the Police Court could try a case that did not “rise above any little simple offense”).

58. *See U.S. District Courts for the District of Columbia and the District of Potomac: Legislative History*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/us-district-courts-district-columbia-and-district-potomac-legislative-history> [<https://perma.cc/E5HG-7HWZ>] (chronicling the establishment of the Supreme Court in 1863 and its eventual shift to the District Court).

59. *See In re Fry*, 14 D.C. (3 Mackey) 135, 136–38 (1884).

Callan argued in his brief that he was entitled to a jury trial, citing the three cases above.⁶⁰ Anticipating that the government would concede that conspiracy is a jury-demandable offense, Callan focused his brief on arguing that the right to appeal to a jury (if one could afford it) did not cure the violation and that the D.C. Police Court was somehow not exempted from the jury right.⁶¹ He reviewed the handful of state cases upholding bench trial convictions in municipal police courts, explaining how each involved a state constitution that limited the jury right to those crimes that had “heretofore” been jury demandable or involved civil rather than criminal judgments.⁶²

In response, the United States argued that Callan was not entitled to a jury trial for two reasons: the Sixth Amendment jury right did not apply to the District of Columbia⁶³ and the right to a *de novo* jury on appeal from the Police Court was sufficient to satisfy the Sixth Amendment.⁶⁴ As anticipated, the government declined to argue that the defendant’s crime of conspiracy was not jury demandable, although it included a passive nod in the last sentence of its brief to possible limits on the jury right: “It is proper to call the attention of the court to the view, supported by authority, that the guaranty of trial by jury has never been understood to embrace petty offenses.”⁶⁵ But the two cases cited in the sentence were weak support for that argument. One, *Byers v. Commonwealth*,⁶⁶ involved the Pennsylvania state constitution, which—unlike the Sixth Amendment—extended only to offenses that “heretofore” (before the state constitution’s ratification) were jury demandable.⁶⁷ Relying on the prevalence of summary proceedings in colonial Pennsylvania for offenses designated petty by Parliament, the *Byers* court affirmed the conviction.⁶⁸ The other, *McGear v. Woodruff*,⁶⁹ involved a private suit to recover a penalty for a municipal

60. Brief for Appellant at 7–9, *Callan*, 127 U.S. 540 (No. 1318).

61. *Id.* at 15–17.

62. *Id.* at 6–13.

63. Brief for Appellee at 5–10, *Callan*, 127 U.S. 540 (No. 1318).

64. *Id.* at 11–16.

65. *Id.* at 16.

66. *Byers v. Commonwealth*, 42 Pa. 89 (1862).

67. Brief of Appellant at 7, *Callan*, 127 U.S. 540 (No. 1318) (citing *Byers*, 42 Pa. 89 (holding that a petty larceny conviction in a Philadelphia municipal bench trial was not unconstitutional under this language)); PA. CONST. of 1838, art. IX, § 6.

68. *Byers*, 42 Pa. at 96–97.

69. *McGear v. Woodruff*, 33 N.J.L. 213 (N.J. Sup. Ct. 1868).

ordinance violation for obstructing a driveway.⁷⁰ The court, interpreting New Jersey's constitutional provision that "the right of a trial by jury shall remain inviolate," deemed these words to cover only those cases that were jury demandable before the state constitution's ratification.⁷¹ The court concluded that an "action of debt" to recover a penalty for violation of the "by-laws of a municipal corporation" was not jury demandable before the constitution's ratification, ending the matter.⁷² The court also noted that the case had not ended in a "conviction."⁷³ Even these two cases, then, rested on state constitution provisions that, unlike the Sixth Amendment, offered no categorical right to jury for all crimes or criminal prosecutions.

In rejecting the government's arguments and holding that Callan was entitled to a jury trial, the Supreme Court held both that the jury right applies to D.C. and that the right to appeal to a jury from a bench trial conviction was insufficient to satisfy the jury right.⁷⁴ Given the government's concession that a conspiracy charge was otherwise jury demandable, the Court could have ended its opinion there. But it also "concede[d]" in dictum that there may be some petty crimes beyond the scope of the Sixth Amendment's jury right.⁷⁵

Reflecting the fact that the government did not argue or brief the issue, the Court's dictum was not well supported. First, the Court cited as authority the same state cases relied on by the government that involved state constitutions explicitly limiting jury trials to those cases already jury demandable under the state laws in effect at ratification.⁷⁶ Some of the cases cited by the Court, as Callan had noted,⁷⁷ either

70. *Id.* at 214.

71. *Id.* at 216 (quoting N.J. CONST of 1844, art. I, § 7).

72. *Id.* at 217.

73. *Id.*

74. *Callan v. Wilson*, 127 U.S. 540, 550–52 (1888).

75. *Id.* at 555.

76. The Court explained:

According to many adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offenses that may be proceeded against summarily, and without a jury; and, in respect to other offenses, the constitutional requirement is satisfied if the right to a trial by jury in an appellate court is accorded to the accused. *Byers* . . . affords an illustration of the first of the above classes. . . . So, also, in New Jersey, where the constitution guarantied that "the right of trial by jury shall remain inviolate," . . .

Id. at 552–53 (citation omitted) (quoting *McGear*, 33 N.J.L. at 216).

77. Brief of Appellant at 10, *Callan*, 127 U.S. 540 (No. 1318).

conditioned their holdings on the right to appeal to a jury⁷⁸ or involved noncriminal violations of municipal bylaws.⁷⁹ Curiously, the Court cited, but offered no answer to, authority discussed in Callan's brief on the other side of the issue.⁸⁰

Ultimately, the Court concluded "without further reference to authorities" that resolution of the petty offense issue was unnecessary, given that Callan's offense "[did] not belong to that class. A conspiracy such as [that] charged against him and his codefendants [was] by no means a petty or trivial offense."⁸¹ Even so, the Court expressed its holding in language that, while unnecessary to the result, suggested a clear petty offense exception to the jury right:

Except in that class or grade of offenses called "petty offenses," which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged.⁸²

This dictum was highly influential in the years to come.

B. *The Twentieth-Century Entrenchment of the Exception*

This Subsection explains how *Callan's* dictum became solidified without meaningful litigation on the petty offense issue and how a questionably reasoned law review article, coauthored by future

78. *Callan*, 127 U.S. at 552–54 (citing *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 335, 342–43 (1857)); cf. *id.* (citing *In re Glen*, 54 Md. 572, 588 (1880), in which the defendant also had a right to appeal to jury, although the court did not explicitly rely on that fact). *But see* *State v. Conlin*, 27 Vt. 318, 323 (1855) (cited in *Callan* and holding that "minor offences punishable with fine only, or imprisonment in the county jail, for a brief and limited period, and having reference to the internal police of the state," may be tried by a judge, not jury).

79. *Callan*, 127 U.S. at 553; *see also* *City of Emporia v. Volmer*, 12 Kan. 622, 630–31 (1874) (relying on the violation being a municipal, not state, case, which allowed an appeal to a *de novo* jury). *But see* *Conlin*, 27 Vt. at 323 (allowing bench trial for a concededly criminal violation punished by fine for illegal selling liquor).

80. For example, it cited without discussion a New York federal judge's determination that a defendant could not be extradited to D.C. to face a nonjury trial for petty libel, even though he had a right to appeal to a jury, because such an arrangement violated the jury right. *Callan*, 127 U.S. at 554 (citing *In re Dana*, 6 F. Cas. 1140, 1142 (C.C.S.D.N.Y. 1873) (No. 3554)).

81. *Id.* at 555.

82. *Id.* at 557.

Supreme Court Justice Frankfurter, buttressed it. It then discusses Justice Hugo Black's impassioned resistance to the petty offense exception in both the jury and right-to-counsel context over the decades from the late 1930s until his death in 1971, and it theorizes why Justice Black's textualist views on the Sixth Amendment did not prevail.

1. *Affirming the Exception*: Schick v. United States (1904). The dictum in *Callan* would be repeated often over the next few decades, solidifying the doctrine that petty offenses are beyond the scope of the Sixth Amendment's jury right.⁸³ Even so, remarkably, in none of these later cases did a party present and brief the argument that a petty federal crime is still a "crime" and a "criminal prosecution" and should thus be jury demandable under Article III and the Sixth Amendment.⁸⁴ In some of these cases, the parties may have strategically chosen not to

83. See, e.g., *Natal v. Louisiana*, 139 U.S. 621, 623–24 (1891) (citing *Callan*, 127 U.S. at 553) (rejecting claims that a municipal ordinance was repealed or otherwise an unconstitutional legislative delegation of authority, stating that the case could be tried by a judge); *District of Columbia v. Colts*, 282 U.S. 63, 72–74 (1930) (holding that the D.C. offense of reckless driving endangering others was serious enough to warrant a jury trial and describing in dictum the petty-offense exception of *Callan* as "settled"); *Duncan v. Louisiana*, 391 U.S. 145, 146, 158 n.30 (1968) (citing *Callan*, 127 U.S. at 557) (noting in dictum, in a case involving a two-year serious offense, that incorporation of the jury right would not affect state petty offenses "if that [right] is construed, as it has been, to permit the trial of petty crimes" by judge); *Bloom v. Illinois*, 391 U.S. 194, 210–11 (1968) (holding that a twenty-four-month contempt sentence triggered the jury trial right and reaffirming the petty offense exception in dictum); *Frank v. United States*, 395 U.S. 147, 148, 152 (1969) (concluding petitioner's three-year probationary sentence was petty and thus he was not entitled to a jury trial); *Baldwin v. New York*, 399 U.S. 66, 73–74 (1970) (holding that offenses under six months are petty); *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543–45 (1989) (holding that additional shaming and community service penalties for state DUI offenders otherwise facing only six months' incarceration did not render the offense serious for jury purposes, where petitioner conceded that petty offenses would not trigger the right); *Lewis v. United States*, 518 U.S. 322, 327–28 (1996) (rejecting petitioner's claim that multiple six-month offenses were nonpetty in the aggregate, thus triggering the jury trial right, even though petitioner conceded that individual petty offenses were not jury demandable).

84. See Brief for Plaintiff in Error, *Natal*, 139 U.S. 621 (Nos. 271–74); Brief for the City of New Orleans, Defendant in Error, *Natal*, 139 U.S. 621 (Nos. 271–74); Brief for District of Columbia, *Colts*, 282 U.S. 63 (No. 96); Brief for the Respondent, *Colts*, 282 U.S. 63 (No. 96); Brief for Appellant, *Duncan*, 391 U.S. 145 (No. 410); Brief of the State of New York as Amicus Curiae, *Duncan*, 391 U.S. 145 (No. 410); Brief for Edward S. Bloom, Petitioner, *Bloom*, 391 U.S. 194 (No. 52); Brief for Respondent, State of Illinois, *Bloom*, 391 U.S. 194 (No. 52); Brief for the Petitioner, *Frank*, 395 U.S. 147 (No. 200); Brief for the United States, *Frank*, 395 U.S. 147 (No. 200); Brief for Appellant, *Baldwin*, 399 U.S. 66 (No. 188); Brief for the Appellee, *Baldwin*, 399 U.S. 66 (No. 188); Brief for the Petitioners, *Blanton*, 489 U.S. 538 (No. 87-1437); Brief for the Respondent, *Blanton*, 489 U.S. 538 (No. 87-1437); Brief for the Petitioner, *Lewis*, 518 U.S. 322 (No. 95-6465); Brief for the United States, *Lewis*, 518 U.S. 322 (No. 95-6465).

argue the issue; in others, the parties likely assumed the issue was decided. Perhaps the lack of litigation stemmed in part from poor lawyering or the fact that a “plain text” approach to interpreting statutes and the Constitution had not yet emerged.⁸⁵ In any event, the settling of this doctrine was not the result of further research or legal discourse among parties briefing both sides of the issue.

Just sixteen years after *Callan*, in *Schick v. United States*,⁸⁶ the Court reaffirmed the petty offense exception in yet another case in which doing so was not necessary to the result and in which no party argued against the exception.⁸⁷ Ironically, *Callan*’s author, the first Justice John Marshall Harlan, dissented in *Schick* and tried unsuccessfully to limit the very exception he helped create.⁸⁸ *Schick* and his codefendants were convicted of the federal crime of unlicensed sale of margarine and sentenced to pay a fine. The defendants sought and obtained a bench trial, presumably because their defenses were technical arguments about the constitutionality of their arrest. Though the parties focused their briefs on whether the statute was constitutional, the Court asked for another round of briefing on whether the defendants overstepped their rights by insisting on a bench trial, on the grounds that if the crime were one that had to be tried by jury, the bench trial may have deprived the Court of jurisdiction by rendering the judgment of guilt illegitimate and thus unreviewable.⁸⁹

In an unusual role reversal, the *Schick* defendants themselves insisted their offenses were petty and thus did not merit a jury, a strategic concession in support of their desire to have the Court exercise jurisdiction and declare their arrest unconstitutional.⁹⁰ Even

85. See *supra* note 36 and accompanying text.

86. *Schick v. United States*, 195 U.S. 65 (1904).

87. *Id.* at 68–69; see Supplemental Brief for Plaintiffs in Error on Question of Jurisdiction at 8, *Schick*, 195 U.S. 65 (Nos. 221–23); Supplemental Brief for the United States on the Question of Jurisdiction with Additional Remarks Upon the Merits at 6, *Schick*, 195 U.S. 65 (Nos. 221–23, 301).

88. See *Schick*, 195 U.S. at 80–82 (Harlan, J., dissenting).

89. *Id.* at 67 (majority opinion).

90. See, e.g., Supplemental Brief for Plaintiffs in Error at 5–6, *Schick*, 195 U.S. 65 (Nos. 222–23). Coincidentally, the son of Justice Harlan (and the father of the second Justice Harlan), John Maynard Harlan, wrote an intervening brief in *Schick*, arguing that defendants should lose their arguments on the constitutionality of their arrest but raising a tax-related issue that affected his client in an unrelated case. A Brief for Plaintiff in Error at 2, *Cliff v. United States*, 195 U.S. 159 (Nos. 1902-614, 1903-221) (on file with author). John Maynard Harlan’s brief explicitly noted it was not arguing the jury waiver issue, *id.* at 23, but it spent two pages noting the *Callan* dictum, written by his father. *Id.* at 23–25.

so, they dedicated only four pages to whether their offenses were jury demandable.⁹¹ The government, meanwhile, spent only three pages on the jurisdiction issue, hedging its arguments on waiver by noting *Callan* and a couple of cases that appeared to go the other way⁹² and spending the bulk of its supplemental brief on the merits. Thus, the *Schick* Court could have decided the waiver issue simply by accepting the parties' concessions or by holding simply that the jury right is waivable because "an accused may waive any privilege which he is given the right to enjoy."⁹³

Instead of deciding the case on these grounds, the *Schick* Court not only reached the petty offense issue but significantly expanded upon *Callan*'s dictum. The Court cited a portion of Blackstone's Commentaries for the proposition that "misdemeanors" as a class are different from "crimes." Specifically, the Court acknowledged that Blackstone defined both "crimes and misdemeanors" as "act[s] committed, or omitted, in violation of a public law" and described them as, "properly speaking, . . . mere[ly] synonymous terms."⁹⁴ But the Court highlighted Blackstone's subsequent observation that, in "common usage," the term "crime" denotes "offenses . . . of a deeper and more atrocious dye; while smaller faults and omissions of less consequence" are "'misdemeanors' only."⁹⁵

The Court's selective use of this passage to express Blackstone's views on whether the terms "crimes" and "criminal prosecutions" include crimes deemed petty by a legislature is misleading. As Part II discusses in more detail, Blackstone elsewhere in the volume declared that summary convictions for crimes deemed petty by Parliament were unjust deviations from the common right to jury in criminal cases.⁹⁶ To rely largely on Blackstone to deny jury trials in criminal prosecutions involving offenses deemed petty by Parliament would be ironic at best.

91. See Supplemental Brief for Plaintiffs in Error on Question of Jurisdiction at 7–11, *Schick*, 195 U.S. 65 (Nos. 221–23).

92. See, e.g., Supplemental Brief for the United States on the Question of Jurisdiction with Additional Remarks Upon the Merits at 7–8, *Schick*, 195 U.S. 65 (Nos. 221–23, 301) (noting cases upholding the right to jury for petty crimes, distinguishing them from the municipal offenses discussed in *Callan*, and noting that the practice of federal district courts was "to try all criminal cases, whether felonies or misdemeanors, by jury").

93. *Schick*, 195 U.S. at 72.

94. *Id.* at 69–70 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *5).

95. *Id.*

96. See *infra* note 307 and accompanying text.

The Court's reliance on Blackstone was not inspired by the parties; neither Schick nor the government argued that misdemeanors as a class were not crimes. On the contrary, the government explicitly described Schick's charge as a "criminal prosecution[]"⁹⁷ and stated in its supplemental brief that misdemeanors triable by jury at common law require a jury under the Sixth Amendment.⁹⁸ Given that the requirement of a jury in "all Crimes" in Article III was restated as "all criminal prosecutions" in the Sixth Amendment,⁹⁹ any relevance of Blackstone's note of the colloquial use of "crime" to mean particularly atrocious acts seems strained.

Indeed, the parties may well have recognized that treating misdemeanors as noncriminal would prove far too much.¹⁰⁰ After all, there was no question that some misdemeanors were jury demandable; a unanimous Court had held in *Callan*, for example, that James Callan's thirty-day conspiracy conviction and sentence without a jury was unconstitutional.¹⁰¹ Moreover, if the Constitution's many other references to crimes were interpreted as applying only to felonies or atrocious acts, then much of its language would be superfluous, including the requirement that "a capital, or otherwise infamous crime" be indicted by a grand jury.¹⁰² As far as I am aware, courts deny no other constitutional criminal procedure right by virtue of a case being a misdemeanor rather than a felony, except where the provision

97. Brief for the United States at 2, *Schick*, 195 U.S. 65 (Nos. 222–23) (noting that the "first three cases," including *Schick* and the cases involving two other criminal defendants, "were criminal prosecutions by information").

98. Supplemental Brief for the United States at 6, *Schick*, 195 U.S. 65 (Nos. 222–23).

99. See U.S. CONST. art. III, § 2; *id.* amend. VI.

100. See *infra* Part II.

101. In fact, the Court has since held that all misdemeanors subject to over six months' imprisonment are jury demandable. *Baldwin v. New York*, 399 U.S. 66, 72–73 (1970).

102. See, e.g., U.S. CONST. amend. V. The Fifth Amendment's requirement of an indictment in capital and otherwise "infamous" crimes reflected the common law requirement of an indictment in all capital and other felonies. See *Ex parte Wilson*, 114 U.S. 417, 423 (1885) (noting that the Fifth Amendment Indictment Clause "in effect, affirm[ed] the rule of the common law upon the same subject, substituting only, for capital crimes or felonies, 'a capital or otherwise infamous crime,' manifestly had in view that rule of the common law"). The broader term "infamous" covers any crime carrying the punishment of prison time—typically, but not necessarily, those designated "felonies" by a legislature. See, e.g., *Mackin v. United States*, 117 U.S. 348, 352–53 (1886) ("In most of the states and territories, by constitution or statute, . . . all crimes, or at least statutory crimes, not capital, are classed as felonies or as misdemeanors, accordingly as they are or are not punishable by imprisonment in the state prison or penitentiary.").

explicitly so provides, such as the Indictment Clause’s limitation to “infamous” crimes.¹⁰³

The *Schick* Court’s other support for interpreting the jury right as excluding petty offenses was its observation that the first draft of Article III stated “the trial of all criminal offenses . . . shall be by jury,” while the final version changed “criminal offenses” to “crimes.”¹⁰⁴ In the Court’s view, the “significance of this change” could not “be misunderstood,” given Blackstone’s description of the “popular understanding of the meaning of the word ‘crimes.’”¹⁰⁵ This argument, too, was not in the parties’ briefs.¹⁰⁶ Nor was it accompanied by any other reference to contemporaneous sources showing the Framers’ intent in changing criminal offenses to crimes.¹⁰⁷ Nor did the Court include an explanation of how the Sixth Amendment’s reference to a jury in “all criminal prosecutions” affected this claim.¹⁰⁸

In dissent, Justice Harlan—the very author of *Callan*—rejected the suggestion that the Framers’ use of the term “crimes” purposely excluded misdemeanors: “To say that ‘crimes’ means something different from ‘criminal offenses’ is something that I cannot comprehend. A crime is a criminal offense and a criminal offense is a crime.”¹⁰⁹ Justice Harlan also rejected the idea that misdemeanors were somehow not crimes. He noted that the Sixth Amendment’s reference to “all criminal prosecutions” is “clear and explicit,” leaving “no room for interpretation.”¹¹⁰ In turn, in Justice Harlan’s view, it was “not to be doubted” that *Schick* faced a “criminal prosecution,” in which “the established rules governing the conduct of trials in criminal cases” must apply. Indeed, he noted, “[i]t never occurred to the trial court” to see *Schick*’s case as anything but criminal, given that it was charged by “*criminal* information” and was tried “as if it were a criminal

103. U.S. CONST. amend V. *See generally infra* Part II.B (discussing other constitutional rights applicable to crimes, such as the Fifth Amendment Self-Incrimination Clause, and how the Court has interpreted them as applying broadly to all crimes except those explicitly exempted).

104. *Schick*, 195 U.S. at 70.

105. *Id.*

106. *See generally* Supplemental Brief for Plaintiffs in Error on Question of Jurisdiction, *Schick*, 195 U.S. 65 (Nos. 221–23); Supplemental Brief for the United States on the Question of Jurisdiction with Additional Remarks Upon the Merits, *Schick*, 195 U.S. 65 (Nos. 221–23, 301).

107. *See Schick*, 195 U.S. at 70–72.

108. *Id.*

109. *Id.* at 98 (Harlan, J., dissenting).

110. *Id.* at 78.

prosecution.”¹¹¹ Looking beyond Schick’s case, Justice Harlan recognized that “crime[s]” must at least include “penal laws” that “impos[e] punishment for an offense committed against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon.”¹¹² The fact that Schick’s “crime against the United States”¹¹³ was a misdemeanor did not make it any less a crime, given that the “ordinary meaning” of the terms “all crimes” and “all criminal prosecutions” suggested no exception for minor crimes.¹¹⁴

In Justice Harlan’s view, then, Schick’s so-called petty misdemeanor not only triggered a right to jury, but it *required* a jury, even over Schick’s objection.¹¹⁵ To be sure, Justice Harlan thought it possible for Congress, like Parliament, to legislatively designate a crime as summarily triable.¹¹⁶ In Justice Harlan’s view, that practice—though admittedly a “stranger” to the common law—might justify reading a petty offense exception into the Constitution.¹¹⁷ Even so, he acknowledged the issue as unresolved, leaving for another day whether a legislatively designated petty offense could be tried constitutionally without a jury.¹¹⁸ He also left unexplained how the Sixth Amendment’s and Article III’s categorical language could be squared with summary conviction of crimes, even if legislatively authorized.

2. *Frankfurter’s Article and Subsequent Cases Applying the Exception.* Twenty years after *Schick*, the petty offense exception received a scholarly boost from a 1926 law review article cowritten by then-Harvard Law professor Felix Frankfurter and his student (and future Franklin Delano Roosevelt confidante) Thomas Corcoran, *Petty*

111. *Id.* at 74.

112. *Id.* at 77 (quoting *Huntington v. Attrill*, 146 U.S. 657, 667 (1892)).

113. *Id.*

114. *Id.* at 79; *see also id.* at 83 (“[T]here is no warrant to construe [Article III] as if it read, ‘the trial of all crimes, except in cases of impeachment and in misdemeanors, shall be by jury.’”).

115. *Id.* at 80–81. Harlan concluded that because Congress had not labeled Schick’s crime petty, it was jury demandable. Indeed, he concluded that Schick could not have waived a jury; in his view, the question of “[c]rime or no crime, if the plea be not guilty, can be established in a court of the United States only by the verdict of a jury.” *Id.* at 96.

116. *Id.* at 97.

117. *Id.* at 80.

118. *Id.* at 97 (“Nor is it necessary to express any final judgment upon the question whether the particular crime here involved might, *by statute*, be placed in that class and tried without a jury.”).

Federal Offenses and the Constitutional Guaranty of Trial by Jury.¹¹⁹ The article came during the middle of Prohibition, when Volstead Act prosecutions for liquor distribution were frequent in federal court.¹²⁰ Taking as its starting point that the Constitution's text should be interpreted "by reference to the common law and to British institutions as they were when the instrument was framed and adopted,"¹²¹ the authors offered a more comprehensive version of the Court's own justification for the exception in *Callan* and *Schick*. The authors acknowledged there was no petty offense exception to the jury right at its beginnings, even as justices of the peace began to preside over "local criminal courts" in fourteenth-century England.¹²² But it noted the "nibbling away [of] the traditional procedure" rights with respect to minor offenses as the number of cases requiring adjudication increased.¹²³ It cataloged the increasing use of summary jurisdiction by Parliament to designate certain offenses—even ones punishable by large fines, corporal punishment, and imprisonment—as chargeable by information, often by a private party, and triable by justices of the peace rather than a petit jury.¹²⁴ It also showed how the colonies adopted, to a lesser extent, these summary practices.¹²⁵

Even so, Frankfurter and Corcoran acknowledged that summary convictions were convictions for "*crimes*,"¹²⁶ and that many summarily tried offenses were "formal *criminal prosecutions*," while others were mere *qui tam* or "civil actions of debt" against offenders by a private party or the state.¹²⁷ The authors openly acknowledged their approach was contrary to "a doctrinaire or merely textual interpretation of the[] clauses" in the Constitution guaranteeing a jury.¹²⁸ Rather than defaulting to a plain-language interpretation, Frankfurter and Corcoran suggested that such an interpretation would be unjustified

119. Frankfurter & Corcoran, *supra* note 21.

120. *See id.* at 920 (mentioning the Volstead Act).

121. *Id.* at 921 (quoting *Ex parte Grossman*, 267 U.S. 87, 108–09 (1925)).

122. *Id.* at 923.

123. *Id.* at 926.

124. *Id.* at 930–32.

125. *Id.* at 934–65 (examining the practice in colonial Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, and Virginia).

126. *Id.* at 933 (emphasis added) ("Alongside of trial before the popular tribunal was trial by magistrates. There were crimes and crimes. The great dividing line was the use of a jury.").

127. *Id.* at 937 & n.91 (emphasis added).

128. *Id.* at 967.

absent further evidence in the record that the Framers intended what they wrote. To the authors, the absence of any explicit talk among the Framers at the conventions about petty offenses signaled the Framers' intention to continue summary practices rather than to limit such practices by using the categorical language "all crimes" and "all criminal prosecutions."¹²⁹

The Supreme Court cited Frankfurter and Corcoran in the next (and only) case after *Schick* in which the petty offense exception was essential to the Court's holding: *District of Columbia v. Clawans*.¹³⁰ The *Clawans* Court held that the D.C. Police Court offense of reselling railway tickets without a license was petty and thus not jury demandable.¹³¹ But as in *Schick*, the parties in *Clawans* did not brief or otherwise argue for or against the petty offense exception.¹³² Instead, the parties took the exception as settled.¹³³ *Clawans* accordingly argued that her offense was nonpetty given that D.C. had previously recognized it by statute as jury demandable even when it was punishable only by thirty days in jail, and she argued that subsequent increases in the maximum penalty thereby proved that D.C. still viewed the offense as serious.¹³⁴ In one short paragraph, the Court declared the petty offense exception was "settled" and referenced the colonial practice where petty offenses were tried by "justices of the peace in England, and by police magistrates . . . in the Colonies."¹³⁵ Because "Congress itself," by labeling *Clawans*'s crime petty, "ha[d] expressed its deliberate judgment that the punishment is not too great to be summarily administered," the crime did not merit a jury trial.¹³⁶

129. *Id.* at 968–72. For example, the authors deemed significant that they "f[ou]nd not a trace of belief . . . that jury trial covered 'petty offenses,'" and assumed, in the absence of such evidence, that the Framers must have intended the phrase "all criminal prosecutions" to mean "all nonpetty criminal prosecutions." *Id.* at 971–74.

130. *District of Columbia v. Clawans*, 300 U.S. 617 (1937).

131. *Id.* at 626–27.

132. *See generally* Brief for District of Columbia, *Clawans*, 300 U.S. 617 (No. 103) (making no mention of petty offense issue); Brief for Respondent, *Clawans*, 300 U.S. 617 (No. 103) (same).

133. *See* Brief for District of Columbia, *Clawans*, 300 U.S. 617 (No. 103); Brief for Respondent, *Clawans*, 300 U.S. 617 (No. 103).

134. *See* Brief for Respondent at 5–21, *Clawans*, 300 U.S. 617 (No. 103), 1936 WL 40122, at *5–21; *see also* *Clawans v. District of Columbia*, 84 F.2d 265, 267–68 (D.C. Cir. 1936) (assuming *Schick* controlled but holding that the charge was "serious"), *aff'd*, 300 U.S. 617.

135. *Clawans*, 300 U.S. at 624.

136. *Id.* at 628.

Justices James McReynolds and Pierce Butler dissented in *Clawans*,¹³⁷ insisting that because Clawan's offense was indisputably a "crime," albeit a petty crime punishable by only ninety days in jail and a \$300 fine, it was "criminal within the Sixth Amendment."¹³⁸ The dissent noted the incongruity of denying a jury trial in such a case while recognizing a Seventh Amendment constitutional right to jury in all *civil* common-law cases involving a disputed sum over twenty dollars.¹³⁹ Ultimately, the dissent viewed Clawan's case as "show[ing] the grave danger to liberty when one accused must submit to the uncertain judgment of a single magistrate."¹⁴⁰

The same year as *Clawans*, the Court, in *Duke v. United States*,¹⁴¹ addressed the constitutionality of a new congressional law designating federal crimes petty when subject to six months or less incarceration and allowing such petty crimes to be charged by information or complaint rather than indictment.¹⁴² Notably, the Fourth Circuit below had been "divided and in doubt"¹⁴³ as to the law's constitutionality, given that the Fifth Amendment guarantees indictment by grand jury in any "capital, or otherwise infamous crime."¹⁴⁴ While the *Duke* Court held that petty misdemeanors are not "infamous" crimes for purposes of the Fifth Amendment,¹⁴⁵ the Court did not address whether such offenses are "criminal prosecutions" for purposes of Sixth Amendment rights. Indeed, the Court noted that legislation attempting to make petty crimes triable by commissioners rather than juries had "failed."¹⁴⁶ Three years after *Duke*, in 1940, Congress finally successfully passed a

137. Justice Harlan remained on the Court until his death in 1911, seven years after *Schick*. *John Marshall Harlan*, ENCYC. BRITANNICA (2022), <https://www.britannica.com/biography/John-Marshall-Harlan-United-States-jurist-1833-1911> [<https://perma.cc/U23Z-EP6V>].

138. *Clawans*, 300 U.S. at 633 (McReynolds, J., dissenting).

139. *Id.* at 633–34.

140. *Id.* at 634.

141. *Duke v. United States*, 301 U.S. 492 (1937).

142. *Id.* at 494–95 (describing new law and holding that petty misdemeanors were not "infamous" for purposes of the Fifth Amendment's Indictment Clause); *see also* FED. R. CRIM. P. 7, 58(b)(1) (allowing misdemeanors to proceed without indictment and citing *Duke* in Rule 7 advisory committee notes).

143. *Duke*, 103 U.S. at 493 (quoting the Fourth Circuit's certified question to the Court).

144. U.S. CONST. amend. V.

145. *See Duke*, 301 U.S. at 495.

146. *Id.* at 494.

law allowing federal offenses labeled petty to be tried summarily by commissioners.¹⁴⁷

3. *The Path Not Taken: Justice Black's "Literal" Interpretation of the Sixth Amendment Right to Jury and Counsel.* To be sure, the Frankfurter and Corcoran article, coupled with the lack of challenges to the petty offense exception over the last century, might lend an air of legitimacy, even inevitability, to the exception. And yet, it is worth noting that around the time Congress was statutorily cementing the exception, the Supreme Court welcomed a new member who would become the exception's harshest critic, Justice Hugo Black.¹⁴⁸ Justice Black consistently wrote, in dissent after dissent, that the Sixth Amendment's application to "all criminal prosecutions" included petty crimes. He made this argument not only in the jury context but also with respect to the Sixth Amendment's guarantee of "the assistance of counsel" in all criminal prosecutions.¹⁴⁹ Of course, as explained below, the right to counsel is obviously a different right than the jury right, with different underlying purposes. But Justice Black's compelling arguments that the Sixth Amendment's categorical language applied to petty offenses in the right-to-counsel context, and Congress's open concessions on this point in 1964 right-to-counsel legislation,¹⁵⁰ should raise concern that a petty offense exception makes equally little sense with respect to the Sixth Amendment jury right.

Justice Black, a "confessed textualist-originalist,"¹⁵¹ viewed the Sixth Amendment's "all criminal prosecutions" language as obviously categorical.¹⁵² But because the petty offense exception was already

147. See An Act To Confer Jurisdiction Upon Certain United States Commissioners To Try Petty Offenses Committed on Federal Reservations, Pub. L. No. 76-817, 54 Stat. 1058 (1940). See also FED. R. CRIM. P. 58(b)(2)(E)–(F) (noting that defendants accused of petty misdemeanors are not entitled to trial by jury or before a district court).

148. See *supra* notes 141–147 and accompanying text (noting that *Duke*, decided in 1937, upheld the right to proceed by information in misdemeanors and that *Duke* was followed in 1940 by an Act allowing trial of petty misdemeanors by commissioners). Justice Black joined the Court in 1937. Brian P. Smentkowski, *Hugo Black*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Hugo-L-Black> [<https://perma.cc/2B2R-NMCZ>], (last updated Sept. 21, 2022).

149. See *infra* notes 154–163 and accompanying text.

150. See *infra* notes 164–166 and accompanying text.

151. Akhil Reed Amar, *America's Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 997, 2008 n.33 (2006).

152. See, e.g., Rules of Proc. for the Trials of Minor Offenses Before Magistrates, 51 F.R.D. 197, 209 (1971) (Black, J., dissenting) ("By its own terms, the [Sixth] Amendment makes no exception for so-called 'petty offenses.'"); *Baldwin v. New York*, 399 U.S. 66, 76 (1970) (Black,

settled law by 1937,¹⁵³ Justice Black’s only chance to turn this view of the Sixth Amendment into doctrine was in the context of the right to *counsel*, not the right to *jury*. A year after joining the Court, he wrote in *Johnson v. Zerbst*¹⁵⁴ that the Sixth Amendment right to counsel—including appointed counsel for those who could not afford it—applied in all federal criminal prosecutions.¹⁵⁵ While *Zerbst* was a felony case,¹⁵⁶ and thus did not directly present the question whether the right to counsel applied in petty crimes as well, the United States’ brief not only conceded, but strategically relied on, the assumption that the right extended to petty offenses as well.¹⁵⁷ State courts, meanwhile, routinely interpreted (and still interpret) similar “all criminal prosecutions” language in their *state* constitutions as including petty misdemeanors for right-to-counsel purposes.¹⁵⁸

J., concurring) (arguing that the jury right applies to “all criminal prosecutions,” not just serious ones); *Cheff v. Schnackenberg*, 384 U.S. 373, 391 (1966) (Black, J., dissenting) (“The Constitution . . . requires a trial by jury for the crime of criminal contempt, as it does for all other crimes.”); *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938) (writing for the Court in holding that the Sixth Amendment right to counsel applies in all federal criminal prosecutions).

153. See *supra* note 135 and accompanying text.

154. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

155. *Id.* at 462–63.

156. *Id.* at 459–60.

157. The United States argued in its *Zerbst* brief that Johnson had waived his right to counsel (in a felony case), and it cited *Schick v. United States* (involving a federal misdemeanor deemed petty for jury trial purposes) for the proposition that the “constitutional privilege” of the right to counsel can be waived in either a petty or felony case. Brief for the United States at 10–11, *Johnson v. Zerbst*, 304 U.S. 458 (1938) (No. 699), 1938 WL 63891, at *10–11. The premise underlying the government’s waiver argument—that the right to counsel applies in petty cases like *Schick*—was not treated as controversial in *Zerbst*. See *Zerbst*, 304 U.S. at 465; see also *Evans v. Rives*, 126 F.2d 633, 634, 638–41 (D.C. Cir. 1942) (applying *Zerbst* to one-year misdemeanor for failure to pay child support).

158. See *State v. Young*, 863 N.W.2d 249, 272 (Iowa 2015) (collecting cases); see also *Decker v. State*, 150 N.E. 74, 76 (Ohio 1925) (noting the Ohio Constitution, which provides for counsel to appear “in every trial in every court,” includes misdemeanor prosecutions (quoting OHIO CONST. art. I, § 10)); *Bolkovac v. State*, 98 N.E.2d 250, 252–53 (Ind. 1951) (observing the Indiana Constitution provides for the right to counsel in “all criminal prosecutions” and makes no distinction between felonies and misdemeanors (quoting IND. CONST. art. I, § 13)); *Hunter v. State*, 288 P.2d 425, 428 (Okla. Crim. App. 1955) (noting the “all criminal prosecutions” language under the Oklahoma Constitution and finding that “[n]o distinction is drawn between a felony or misdemeanor” (quoting OKLA. CONST. art. II, § 20)); *In re Johnson*, 398 P.2d 420, 422 (Cal. 1965) (noting the California Constitution, which provides counsel “[i]n criminal prosecutions, in any court whatever,” includes misdemeanors (quoting CAL. CONST. art. I, § 13)); *Brown v. Multnomah Cnty. Dist. Ct.*, 570 P.2d 52, 55 (Or. 1977) (en banc) (observing that “all criminal prosecutions” in the Oregon Constitution includes all conduct that the legislature has defined as a criminal offense (quoting OR. CONST. art. I, § 11)).

Congress, for its part, appeared to acknowledge that any petty offense exception to the right to counsel would violate the plain text of the Sixth Amendment. Although in codifying *Zerbst* the Criminal Justice Act of 1964 explicitly exempted petty offenses from its statutorily guaranteed right to appointed counsel,¹⁵⁹ the conference report conceded both that the House version's application to "all criminal cases" would thereby "includ[e] petty offenses," and that the Sixth Amendment "is without doubt applicable to petty offenses."¹⁶⁰ Nonetheless, the Committee expressed hope that lawyers would be provided in such offenses on a pro bono basis and that congressional funding could be focused on more serious crimes.¹⁶¹

Justice Black would not accept Congress's acknowledged divergence from the Sixth Amendment's plain text in the Criminal Justice Act's exclusion of petty crimes from the federally funded right to counsel. In 1971, the year Justice Black died, he dissented from an opinion approving new rules for federal magistrates that did not provide for appointed counsel in petty cases,¹⁶² opining that, "[b]y its own terms, the [Sixth] Amendment makes no exception for so-called 'petty offenses.'"¹⁶³

While two of Justice Black's opportunities to promote his literal reading of the Sixth Amendment were in the right-to-counsel context where no petty offense exception had yet been established, he also

159. Criminal Justice Act of 1964, Pub. L. No. 88-455, § 3006A(b), 78 Stat. 552, 552 (1964) (codified as amended at 18 U.S.C. § 3006A).

160. H.R. REP. NO. 88-1709, at 7 (1964) (Conf. Rep.), as reprinted in 1964 U.S.C.C.A.N. 3000, 3002.

161. *Id.*; see also *Amendments to the Criminal Justice Act of 1964: Hearing on S. 1461 Before the S. Comm on the Judiciary*, 91st Cong. 328 (1969) (report of Dallin Oaks, Professor of L., Univ. of Chi.) ("The framers of the [Criminal Justice] [A]ct did not doubt—although prominent courts do—that the sixth amendment right-to-counsel guarantees applied to misdemeanors and petty offenses as well as felonies. Rather, they excluded petty offenses as a matter of priority of expenditures."); cf. H.R. REP. NO. 88-864, at 3 (1963), as reprinted in 1964 U.S.C.C.A.N. 2990, 2992 ("Subsection (a) of this new section of title 18 provides that *in every criminal case arising under the laws of the United States*, the U.S. commissioner or the court must advise the defendant . . . that counsel will be appointed . . . if he is financially unable to retain counsel." (emphasis added)).

162. See Federal Magistrates Act, Pub. L. No. 90-578, § 301(c), 82 Stat. 1107, 1115–18 (1968) (giving the newly created category of "magistrates" the power to try petty offenses); *Rules of Proc. for the Trials of Minor Offenses Before Magistrates*, 51 F.R.D. 197, 203 (1971) (noting that in all petty offense cases, the magistrate shall "inform the defendant of his right to counsel" even though rules for other cases said appointed counsel as well).

163. *Rules of Proc. for the Trial of Minor Offenses Before Magistrates*, 51 F.R.D. at 209 (Black, J., dissenting).

wrote separately or joined opinions condemning the exception in jury-trial-related cases. His first chance to criticize the exception was in *Cheff v. Schnackenberg*.¹⁶⁴ Cheff—a corporate officer who violated a Federal Trade Commission order—was sentenced to six months in prison for contempt of the Seventh Circuit, while his codefendants were merely punished by fines.¹⁶⁵ Cheff argued that his sentence, under the unusual circumstances of the case, showed that the offense was nonpetty.¹⁶⁶ The Court disagreed.¹⁶⁷ In dissent, Justice William O. Douglas (joined by Justice Black) argued that “[t]he Constitution . . . requires a trial by jury for the crime of criminal contempt, as it does for all other crimes.”¹⁶⁸ Reflecting the fact that direct contempt before a judge is a sui generis event involving a proceeding different from a typical charge, trial, and sentencing,¹⁶⁹ Justices Douglas and Black entertained the possibility that a judge might have some ability to enforce courtroom integrity through a nonjury direct contempt conviction in the absence of a jail sentence.¹⁷⁰ But they rejected the Court’s distinction between petty and nonpetty criminal contempts.¹⁷¹

Justice Black’s most full-throated condemnation of the petty offense exception to the jury right was in *Baldwin v. New York*,¹⁷² in which the Court formally declared the petty/nonpetty line at six

164. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

165. *Id.* at 376–77.

166. See Brief for the Petitioner at 22, *Cheff*, 384 U.S. 373 (No. 67), 1966 WL 100456, at *22 (arguing that a six-month prison sentence for violating a Federal Trade Commission order, imposed by a federal court of appeals, “is so substantial that it carries with it all of the odium attached to a sentence of two or three years”).

167. See *Cheff*, 384 U.S. at 378–80.

168. *Id.* at 391 (Douglas, J., dissenting).

169. See generally Robert P. Wolf, *Criminal Contempt and Trial by Jury*, 8 WM. & MARY L. REV. 76 (1966) (explaining the Court’s differential treatment of direct contempt). The United States Court of Military Appeals has similarly observed:

There is sound cause to accord special status to contempt proceedings, and refuse to characterize them as trials. The power to punish for contempt is inherent in every Federal court. It is summary in nature, and is the primary instrument through which a court safeguards its own authority. Thus, in their very essence, contempt proceedings are sui generis. They possess none of the touchstones of a trial, as we know them. In the case of a direct criminal contempt, there need not be indictment, nor jury, nor the reception of evidence, nor opportunity extended to the defendant to be heard, nor the entry of a formal judgment.

United States v. Sinigar, 20 C.M.R. 46, 53–54 (C.M.A. 1955) (citation omitted).

170. See *Cheff* at 392 (Douglas, J., dissenting).

171. *Id.* at 392–94.

172. *Baldwin v. New York*, 399 U.S. 66 (1970).

months.¹⁷³ Justice Black, joined by Justice Douglas, argued that the petty offense exception had, since its inception, violated the plain text of the Constitution by treating the phrase “all crimes” as if it read “all serious crimes.”¹⁷⁴ Justice Black accused the plurality of further deviating from the text by now “judicially amend[ing]” the phrase “all crimes” with “all crimes in which punishment for more than six months is authorized.”¹⁷⁵ To Justice Black, this amounted to “judicial mutilation of our written Constitution.”¹⁷⁶ Because “[t]hose who wrote and adopted our Constitution and Bill of Rights” had already “engaged in all the balancing necessary” when “decid[ing] that the value of a jury trial far outweighed its costs for ‘all crimes’ and ‘[i]n all criminal prosecutions,’” Justice Black viewed as illegitimate the Court’s own weighing of the “advantages to the defendant against the administrative inconvenience to the State” of a jury trial in “magically concluding that the scale tips” at six months.¹⁷⁷ To Justice Black, Baldwin’s misdemeanor conviction for “jostling” was “a ‘crime’ in any relevant sense of that word,” whatever the statutory maximum.¹⁷⁸ Even Chief Justice Warren Burger, dissenting from the Court’s grant of a jury to Baldwin on grounds that state defendants had no right to a jury in a one-year misdemeanor, acknowledged that the categorical language of the Sixth Amendment and Article III would presumably require a jury if the case were in federal, rather than state, court.¹⁷⁹

Although Justice Black never convinced his colleagues to rethink the petty offense exception, it is worth noting the Court came close to adopting his categorical reading of the Sixth Amendment for right-to-counsel purposes a year after his death. The Court unanimously held in *Argersinger v. Hamlin*¹⁸⁰ that the right to appointed counsel applied in petty state cases where the defendant receives a jail sentence.¹⁸¹ Notably, the state of Florida (the respondent in *Argersinger*) did not argue that petty crimes are not criminal prosecutions. Rather, it argued against a textualist approach to the Sixth Amendment, insisting that

173. *See id.* at 69.

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

175. *Id.*

176. *Id.*

177. *Id.* (third alteration in original).

178. *Id.* at 75–76.

179. *Id.* at 76–77 (Burger, C.J., dissenting).

180. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

181. *Id.* at 37.

the “‘absolute right’ to counsel in all criminal prosecutions must be qualified by practical exigencies,”¹⁸² and noting that the Court had already abandoned a literal approach with respect to the jury right and could thus do the same here.¹⁸³ Although the Court agreed with *Argersinger* that he deserved a lawyer, it relied narrowly on the fact that *Argersinger* was sentenced to jail.¹⁸⁴ The Court did not yet have five votes to adopt Justice Black’s view and declare the right applicable to literally “all criminal prosecutions.”

Although the Court seven years later in *Scott v. Illinois*¹⁸⁵ squarely rejected extending the Sixth Amendment right to counsel to “all criminal prosecutions,” it did so only with a thin majority and over a vigorous dissent.¹⁸⁶ *Scott* was convicted of a nonpetty, jury-demandable misdemeanor, but because he received no jail time as a sentence, the trial court denied his request for appointed counsel.¹⁸⁷ In arguing his conviction violated the Sixth Amendment, *Scott* insisted that the right to counsel covers “all criminal prosecutions” and cannot be trumped by policy or efficiency concerns.¹⁸⁸ *Scott* did not, however, offer a full briefing of the meaning of “criminal prosecution.”¹⁸⁹ In response, the

182. Brief for the Respondent at 10, *Argersinger*, 407 U.S. 25 (No. 70-5015), 1971 WL 126424, at *10.

183. *Id.* at 12–13 (arguing that “criminal prosecutions” should have the same meaning for jury and counsel).

184. *Argersinger*, 407 U.S. at 51 (Powell, J., concurring in result).

185. *Scott v. Illinois*, 440 U.S. 367 (1979).

186. *Id.* at 373–74 (5–4 decision); *id.* at 375–89 (Brennan, J., dissenting).

187. *Id.* at 368–69 (majority opinion).

188. See, e.g., Brief for the Petitioner, *Scott*, 440 U.S. 367 (No. 17-1177), 1978 WL 206716, at *8 (“[W]hatever the Court eventually may determine to be the outer reaches of the definition of a ‘criminal prosecution’ for the purposes of the Sixth Amendment, petitioner’s prosecution clearly fits that definition since misdemeanor-theft has all of the many indicia of a traditional criminal offense.”); *id.* at *12 (arguing that the Sixth Amendment “applies the right to counsel ‘in all criminal prosecutions.’ It does not apply the right, as the State of Illinois would have it, ‘in all criminal prosecutions except for misdemeanor prosecutions not resulting in imprisonment’”); *id.* at *16 (“[T]he misdemeanor-theft prosecution of petitioner *Scott* is a ‘criminal prosecution’ within any reasonable construction of the Amendment’s language.”); see also Reply Brief for the Petitioner, *Scott*, 440 U.S. 367 (No. 17-1177), 1978 WL 223555, at *7 (arguing that Illinois’s position “makes the Sixth Amendment’s explicit application ‘in all criminal prosecutions’ totally meaningless”).

189. *Scott* did argue that his theft was *malum in se* and thus bore all the hallmarks of a traditional crime, Brief for the Petitioner, *Scott*, 440 U.S. 367 (No. 17-1177), 1978 WL 206716, at *8, *16–18, and that any “reasonable construction” of the phrase “all criminal prosecutions” includes misdemeanor prosecutions. *Id.* at *16–17. He also noted that the *Argersinger* Court found “no historical support” for limiting the right to counsel to serious cases. *Id.* at *12. But he did not otherwise engage sources such as dictionaries, other constitutional provisions’ use of

state of Illinois, like Florida in *Argersinger*, did not claim that the Framers intended the term criminal prosecutions exclude petty offenses; rather, it focused on the impracticability of a literal reading of, or “absolut[ist]’ position” toward, the text: the cost of juries and lawyers and the fact that the Court had already deviated from the text in establishing the petty offense exception to the jury right.¹⁹⁰

In holding that the Sixth Amendment right to appointed counsel does not apply in cases where the defendant was not sentenced to jail time,¹⁹¹ the *Scott* Court conspicuously avoided relying on the premise that the Framers intended “all criminal prosecutions” mean only certain crimes. Instead, it took a decidedly pragmatic approach to the issue, reasoning that its previous departures from the text forgave further departures if otherwise justified on pragmatic grounds. It first noted, echoing the state’s brief, that the Court’s previous “decided cases departed from the literal meaning of the Sixth Amendment.”¹⁹² For example, the Court reasoned, the Framers likely did not anticipate a right to appointed counsel at all in drafting the Sixth Amendment, and yet the Court in *Gideon v. Wainwright*¹⁹³ had recognized such a right.¹⁹⁴ It then appeared to take what might even be described as an anti-originalist approach, noting that to the extent the Framers intended by the text to codify the English common-law right to counsel, that right was not worth protecting because it “perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors.”¹⁹⁵ Finally, the Court reverted to pragmatic arguments,

“crime,” historical sources shedding light on the common or the Framers’ understanding of the term “crime,” etc. *See id.* at *16–22.

190. Brief for the Respondent, *Scott*, 440 U.S. 367 (No. 17-1177), 1978 WL 206719, at *10–13 (arguing against an “absolute right” and that the jury right and right to counsel have in common “their cost”); *id.* at *10 (“Neither the history of the Sixth Amendment nor the precedents of this Court support the view that the burden imposed on the State cannot be considered in defining the scope of a right.”).

191. *Scott*, 440 U.S. at 373–74.

192. *Id.* at 372.

193. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

194. *Scott*, 440 U.S. at 370–71 (citing *Gideon*, 372 U.S. at 339).

195. *Id.* at 372. Perhaps counterintuitively, the English right to counsel in felonies came long after the right had been established in jury-demandable misdemeanors for reasons related to the higher stakes for the Crown in felony acquittals and the legal fiction that the judge himself would act as “counsel” to the accused in felony cases. *See generally* JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 14 (2002) (“[T]he states had dramatically departed from the restrictive English common law rule regarding retention of counsel in serious criminal prosecutions.”).

noting that a literal approach to the Sixth Amendment, at least in state court, would reach an untenably broad number of modern state regulatory offenses.¹⁹⁶

The *Scott* dissenters, to be sure, placed the text of the Sixth Amendment front and center, emphasizing the “all” in “all criminal prosecutions” and arguing that the Court’s opinion ignored the “plain wording of the Sixth Amendment.”¹⁹⁷ But even these statements were more rhetorical flourish than a full-throated, text-based argument. Moreover, these same Justices had arguably set the stage for *Scott* by agreeing to write *Argersinger* in a way that emphasized actual imprisonment rather than the categorical phrase “all criminal prosecutions.”¹⁹⁸ In short, the *Scott* dissenters were focused more on fairness-based arguments for a broader right to counsel than on resurrecting Justice Black’s critiques of the Court’s various attempts to judicially amend the phrase “all criminal prosecutions.”

Although *Scott* is still good law,¹⁹⁹ and Justice Black’s categorical view of the Sixth Amendment right to counsel has been officially rejected, it is worth noting that *Scott* was a state, not a federal, case.²⁰⁰ As a result, its pragmatic reasoning—which might well justify limiting a right in state court where only those guarantees in the Bill of Rights deemed sufficiently fundamental are binding under the doctrine of selective incorporation²⁰¹—seems out of place if applied to federal court. As of this writing, the Court has still not squarely addressed whether a federal defendant has a Sixth Amendment right to counsel in federal misdemeanors where the defendant is not sentenced to jail

196. *Scott*, 440 U.S. at 372 (“The range of human conduct regulated by state criminal laws is much broader than that of the federal criminal laws, particularly on the ‘petty’ offense part of the spectrum. As a matter of constitutional adjudication, we are, therefore, less willing to extrapolate an already extended line . . .”). At least some scholars begrudgingly agreed with the *Scott* majority on this point. See, e.g., Lawrence Herman & Charles A. Thompson, *Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine*, 17 AM. CRIM. L. REV. 71, 78–80 (1979) (noting the “doctrinally pure” alternative of providing counsel in literally “all criminal prosecutions” but stating that this approach would likely be cost prohibitive and thus not persuasive).

197. *Scott*, 440 U.S. 367, 375–76 (Brennan, J., dissenting).

198. See *supra* note 184 and accompanying text.

199. The Supreme Court has favorably cited *Scott* as recently as 2016. E.g., *United States v. Bryant*, 579 U.S. 140, 143 (2016).

200. See *Scott*, 440 U.S. at 368.

201. See *infra* notes 343–347 and accompanying text.

time.²⁰² Congress, for its part, seems to have assumed that *Scott* applies in federal court; the rules of federal criminal procedure were amended after *Scott* to explicitly allow federal judges to deny appointed counsel in petty cases where the government declines to seek a jail sentence.²⁰³ Yet the federal courts following *Scott* have not grappled with the plain text of the Sixth Amendment; rather, they simply reason that because the Sixth Amendment has the same meaning in federal and state court, *Scott* must apply in federal court as well.²⁰⁴

In sum, the “petty offense exception” began in nineteenth century dictum in *Callan v. Wilson*, based on the Court’s misguided assumption that the jury right in the U.S. Constitution should apply only to serious, rather than petty, crimes. While the issue was never fully and fairly litigated in or after *Callan*, the Court in future opinions treated the matter as settled, over the occasional dissent. Meanwhile, the Court partially, though not fully, imported the petty offense exception to the right-to-counsel context, declining to adopt Justice Black’s literal reading of the Sixth Amendment as applying to all crimes. In 2022, federal defendants prosecuted by the Department of Justice for six-month misdemeanor crimes have no right to a jury, and no right to counsel, when the government declines to seek a jail sentence.

C. *Limited Critiques of the Exception*

The staying power of such a thinly justified exception to the Constitution’s plain text is surely explained in part by the lack of challenges to the doctrine once Frankfurter and Corcoran and the Court described it as “settled” in the early twentieth century.²⁰⁵

202. See, e.g., *United States v. Tobey*, No. 2:19-cr-00150, 2020 WL 1451590, at *4 (E.D. Cal. Mar. 25, 2020), *aff’d*, 845 F.App’x 662 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 615 (2021) (noting Ninth Circuit case law on the open question of whether *Scott* applies to federal defendants).

203. See FED. R. CRIM. P. 58(b)(2)(C) (requiring judges to apprise defendants of “the right to request the appointment of counsel if the defendant is unable to retain counsel—unless the charge is a petty offense for which the appointment of counsel is not required”); *id.* 58(a)(2) (“In a case involving a petty offense for which no sentence of imprisonment will be imposed, the court may follow any provision of these rules that is not inconsistent with this rule and that the court considers appropriate.”).

204. See, e.g., *United States v. Bryant*, 579 U.S. 140, 143 (2016) (assuming, in passing, that *Scott* applies to both state and federal cases); *United States v. Reilly*, 948 F.2d 648, 650, 654 (10th Cir. 1991) (citing *Scott*, 440 U.S. at 374) (affirming the fine-only sentence of an indigent pro se defendant charged with leaving property unattended in a national park); *United States v. Doe*, 743 F.2d 1033, 1038 (4th Cir. 1984) (citing *Scott*, 440 U.S. at 373) (stating that “only offenses where a sentence of imprisonment is imposed give the defendant a right to appointed counsel”).

205. See *supra* note 84 and accompanying text.

Remarkably, James Callan—of *Callan v. Wilson*—appears to still be the only Supreme Court litigant to have fully briefed the issue. Given that the petty-offense analysis in *Callan* was dictum, one might expect at least some federal litigants to have urged trial or lower appellate federal courts to grant them a jury trial.²⁰⁶ Nonetheless, to my knowledge, the issue has not been raised.²⁰⁷

Legal commentators have also largely left the doctrine alone. Aside from Frankfurter and Corcoran’s article, only two law review articles have ever explored the purported textual and historical bases of the doctrine in depth.²⁰⁸ The first was in 1959 by Chicago lawyer George Kaye.²⁰⁹ Kaye focused on three arguments: (1) the sparse constitutional debates about Article III and the Sixth Amendment offer no evidence that the Framers intended to exempt offenses deemed petty by Congress²¹⁰; (2) because English and colonial summary practices were part of the law of the land rather than

206. See, e.g., *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (describing dicta as statements in a court opinion that are “not necessarily essential to the decision” (quoting *Stover v. Stover*, 483 A.2d 783 (Md. Ct. Spec. App. 1984))). Particularly where the issue was not disputed by the parties and thus not “refined by the fires of adversary presentation,” *id.* at 293, litigants would have a colorable argument that lower courts should not treat the issue as properly adjudicated.

207. For example, the Ninth Circuit has never squarely held that a federal petty misdemeanor is not a “criminal prosecution” for jury trial purposes in a case where the issue was disputed. Instead, its cases (and the litigants therein) have simply taken the exception as a given and determined whether the offense is petty or serious. See, e.g., *United States v. Wallen*, 874 F.3d 620, 625–26 (9th Cir. 2017) (rejecting appellant’s claim that killing a grizzly bear was a serious offense because of \$15,000 restitution and five-year probationary period); *Hoffman v. Int’l Longshoremen’s and Warehousemen’s Union, Local 10*, 492 F.2d 929, 936 (9th Cir. 1974) (rejecting appellants’ arguments that \$500 contempt fine was serious).

208. A few have mentioned how the doctrine contradicts the Constitution’s text but have not otherwise analyzed the issue in depth. See, e.g., Stephen A. Siegel, *Textualism on Trial: Article III’s Jury Trial Provision, the “Petty Offense” Exception, and Other Departures from Clear Constitutional Text*, 51 HOUS. L. REV. 89, 92 (2013) (noting that the petty offense exception violates “clear and concrete constitutional text without a workaround to provide cover,” thus challenging scholar Mark Tushnet’s thesis that clear departures from text are always justified by workarounds that still appear to be loyal to text); Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 520 (2009) (referring in passing to the petty offense exception to the jury right as an example of the Court’s “textually inconsistent construction” of the term “all criminal prosecutions”); Note, *The Trial of Petty Offenses by Federal Magistrates: Collision with Amendment VI*, 1 U. BALT. L. REV. 59, 66 (1971) (describing the petty offense exception as “blatantly demonic” but offering little analysis on the jury issue).

209. See generally George Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959). Justice Douglas cited Kaye’s article in his *Cheff* dissent. *Cheff v. Schnackenberg*, 384 U.S. 375, 391 n.10 (1966) (Douglas, J. dissenting).

210. See Kaye, *supra* note 209, at 260–67.

exceptions to some generally applicable categorical jury right, they offer no evidence that the new, generally applicable right in the Constitution should be read as having an exception²¹¹; and (3) the Constitution's "all crimes" and "all criminal prosecutions" phrasing is notably different from some state constitutions explicitly exempting certain crimes.²¹²

The second article critiquing the doctrine was by Timothy Lynch of the Cato Institute in 1994.²¹³ Lynch's three primary arguments were: (1) constitutional provisions guaranteeing individual rights against the government should "enjoy a liberal construction" and evidence from constitutional debates should not trump the plain text²¹⁴; (2) Article III's categorical language contrasts with other Articles in which the drafters designated federal powers as applying only to certain crimes²¹⁵; and (3) the existence of a common law practice does not mean the Framers intended to continue it; after all, other constitutional provisions, such as compulsory process, went beyond what the common law guaranteed.²¹⁶

What these previous critiques have not focused on is the common understanding both at the Founding and in the modern era that petty offenses tried summarily by a judge are crimes and criminal prosecutions.

211. See *id.* at 246–48. Kaye also explains that the Virginia Declaration of Rights, while broadly applicable to crimes, must have had the legal status of a legislative enactment because bills of attainder were passed denying particular persons jury trials in serious offenses without apparent contradiction. *Id.* at 250–51.

212. See *id.* at 257–58 (noting, for example, that Indiana's 1818 constitution guarantees only that "in all criminal cases *except in petit misdemeanors*, which shall be punishable by fine only, not exceeding three dollars, in such manner as the Legislature may prescribe by law, the right of trial by jury shall remain inviolate," and North Carolina's 1868 constitution guarantees that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. *The legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal*" (first quoting IND. CONST. of 1816, art. I, § 5; then quoting N.C. CONST. of 1868, art. I, § 24 (emphasis added))).

213. Lynch, *supra* note 26.

214. *Id.* at 10.

215. *Id.* at 12 (discussing, for example, Congress's Article I power to "define and punish Piracies and Felonies" (emphasis removed)).

216. *Id.* at 13. Lynch went on to discuss why public policy and stare decisis considerations should not persuade the Court to continue the exception. *Id.* at 14–16.

II. THE INDEFENSIBILITY OF THE PETTY OFFENSE EXCEPTION ON ITS OWN TERMS

This Part makes three points. First, the petty offense exception contradicts the ordinary public understanding of the phrases “all crimes” and “all criminal prosecutions”; those terms were understood in both 1791 and today to include petty crimes. Second, there appears to be no other contextual evidence to suggest these terms somehow refer only to serious crimes. On the contrary, the use of “crimes” elsewhere in the Constitution, the difference between the Constitution’s language and more qualified language in some state constitutions, and the use of “crimes” by Blackstone and in dictionaries all corroborate that the term “crimes” includes all formally charged offenses prosecuted in criminal court. Third, the exception is based on a misunderstanding of historical sources such as Blackstone and the existence of English and colonial summary trial practices. Blackstone recognized petty offenses as criminal prosecutions, and he and other Framing-era commentators and post-Founding state courts were highly critical of these practices.²¹⁷ Thus, from the point of view of jurists who believe in enforcing categorical textual guarantees of individual liberties in the Bill of Rights,²¹⁸ whether or not they identify as a particular brand of textualist, the petty offense exception seems indefensible, at least on the grounds offered thus far.

217. See *infra* notes 225–230.

218. It is true that other constitutional provisions have been held by the Supreme Court to mean something other than their “literal” phrasing. But aside from the Sixth Amendment right to jury and right to counsel, none of these provisions has been interpreted in a way that restricts an otherwise categorically guaranteed fundamental individual right enshrined in the Bill of Rights, and most have been justified on grounds that invoke other parts of constitutional text or otherwise at least attempt to grapple with fealty to text. See, e.g., Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1810–11 (1997) (noting the metaphorical and alliterative phrase “life or limb” in the Double Jeopardy Clause really meant all crimes); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1665 (2004) (explaining how the Court has justified apparently countertextual expansions of sovereign immunity to federal jurisdiction in part by reference to other parts of the Constitution’s text, but also disagreeing with the Court’s approach, arguing both that its attempts to invoke Article III are unpersuasive and that “the heightened protection assigned to minority interests in the amendment process may make it especially crucial for a court to adhere to the compromises embedded in a precise constitutional text”).

A. *The Ordinary Meaning of “Crimes” and “Criminal Prosecutions”*

The Sixth Amendment’s categorical language guaranteeing “in all criminal prosecutions . . . the right to a . . . trial, by an impartial jury” does not on its face appear to hinge on the seriousness of the prosecution.²¹⁹ Neither does Article III’s mandate that the “Trial of all Crimes” except impeachment “shall be by Jury.”²²⁰ If interpreted literally, these passages should presumably cover all crimes and any criminal prosecution, period. The question becomes what the terms “crimes” and “criminal prosecutions” include.

The meaning of terms like “crime” and “criminal prosecution” are mercifully clearer than more amorphous terms in constitutional criminal procedural provisions, such as the right of an accused to be “confronted with the witnesses against” him or what constitutes “cruel and unusual” punishment.²²¹ Still, even the most apparently clear terms require some contextual clues as to their meaning. One common starting point is the ordinary public understanding of a term.²²² Of course, those inquiring into ordinary meaning might debate about whether to look at the understanding of a term at the time of *enactment* (which might better reflect the intended meaning of the term to the drafters) versus at the time of *interpretation* (which might better reflect the term’s meaning in the eyes of those who have the most pressing reliance interests).²²³

219. U.S. CONST. amend. VI.

220. *Id.* art. III, § 2.

221. See, e.g., Stephanos Bibas, *The Limits of Textualism in Interpreting the Confrontation Clause*, 37 HARV. J.L. & PUB. POL’Y 737, 737–38 (2014) (arguing the importance of a text-centered approach to constitutional criminal procedure but acknowledging that textualism and originalism do not offer bright-line answers to the question of what is a “witness” for Confrontation Clause purposes).

222. See WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 35 (2016) (“There are excellent reasons for the primacy of the ordinary meaning rule.”).

223. See generally Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018) (noting why both time frames might offer important interpretive insights); Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1140 (“Unlike the textualists, however, those adopting a contemporary meaning approach should not consider the ordinary public meaning at the time of statutory enactment, but rather at the time of interpretation.”); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1524 (1989) (arguing that constitutional terms “should be interpreted as they are now understood, or as they have been understood, by the American political community”); Bertrall L. Ross II, *Paths of Resistance to Our Imperial First Amendment*, 113 MICH. L. REV. 917, 924–25 (2015) (“Originalists have

Here, the ordinary meaning at the time of enactment and interpretation is the same: formally prosecuted petty offenses subject to criminal punishment have always been understood, then and now, to be crimes and criminal prosecutions. To begin, several sources make clear that, at the time of the Founding, the understanding of a “criminal prosecution” and “crime” included petty crimes.

1. *Blackstone*. As a reminder, the *Schick* Court attempted to buttress the petty offense exception by referencing Blackstone’s Commentaries.²²⁴ In particular, while Blackstone notes that “crime[s], or misdemeanor[s]” are both “act[s] committed, or omitted, in violation of a public law” and are, “properly speaking, . . . mere[ly] synonymous terms,” he also notes that in “common usage” the former denotes “offenses as are of a deeper and more atrocious dye.”²²⁵ But the Court failed to notice, or at least to cite, Blackstone’s many references to petty offenses as crimes. In fact, Blackstone dedicates an entire section in his volume on “public wrongs” to summary convictions for petty offenses, describing them in criminal terms as the “conviction of offenders,”²²⁶ and “the party accused” in a summary proceeding as “acquitted or condemned.” He also explicitly describes “proceedings in the courts of criminal jurisdiction,” which are contrasted with “civil causes,” as being “divisible into two kinds[:] *summary* and *regular*.”²²⁷ His section on “Courts of Criminal Jurisdiction” also discusses “petty session[s].”²²⁸ His section on “Modes of Prosecution” includes “presentments of petty offences.”²²⁹ What sets apart summarily tried petty offenses, Blackstone explains, is not that they are not criminal, but that they are “smaller misdemeanors

increasingly coalesced around an approach to constitutional-meaning elaboration that focuses on the public meaning of words or phrases at the time the constitutional provision in question was written.”).

224. *See supra* notes 94–95 and accompanying text.

225. *Schick v. United States*, 195 U.S. 65, 69–70 (1904) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *5).

226. 4 WILLIAM BLACKSTONE, COMMENTARIES *280.

227. *Id.*

228. *Id.* at *273.

229. *Id.* at *301.

against the public or common wealth,” which Parliament has streamlined, without the right to indictment or jury.²³⁰

2. *Dictionaries.* The Supreme Court has looked to “[l]egal dictionaries in existence” at the time of drafting when interpreting the meaning of text.²³¹ While selective quotations from certain dictionaries might support one side or another of this issue, pre-Founding and Founding-era dictionaries generally take the following approach: the term “crime” can be used in both broad and narrow ways, like in Blackstone; the term “misdemeanors” is sometimes colloquially referred to as separate from crimes (“crimes and misdemeanors”) and other times as crimes themselves (minor crimes lower than felonies); and the term “prosecution” typically includes any criminal proceeding, whether serious or minor. Ultimately, while such dictionaries offer less than dispositive evidence against the petty offense doctrine, they certainly do not offer strong support for it. At the very least, it is hard to read these definitions and imagine that the term “criminal prosecution” somehow excludes misdemeanors formally charged by the Department of Justice by criminal information and punishable by imprisonment.

Looking first to pre-1791 dictionaries, Samuel Johnson’s 1755 English dictionary defines “criminal” broadly: “1. Faulty; contrary to right; contrary to duty; contrary to law. . . . 2. Guilty; tainted with crime; not innocent. . . . 3. Not civil; as a *criminal* prosecution.”²³² If one were guided only by this definition, a criminal prosecution would appear to be anything prosecuted in a criminal court, rather than a civil suit. Johnson defines “crime” in ways both broad and narrow, as “[a]n act contrary to right; an offence; a great fault; an act of wickedness.” But he also appears to treat both a “felony” and “misdemeanor” as crimes, albeit of differing degrees, defining the former as “[a] crime denounced capital by the law; an enormous crime” and the latter as an “[o]ffence;

230. *Id.* at *272. *See also id.* at *281 (noting that summary convictions are, in a sense, a “species of mercy to the delinquents, who would be ruined by the expence and delay of frequent prosecutions by action or indictment”).

231. *E.g.*, *Molzof v. United States*, 502 U.S. 301, 307 (1992) (looking to dictionaries at the time of the Federal Tort Claims Act’s passage to determine the meaning of “punitive damages” as used in the statute).

232. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 515 (London, W. Strahan, 1755).

ill behaviour; something less than an atrocious crime.”²³³ Other pre-1791 dictionaries similarly offer support for both a broad and narrow reading of crime.²³⁴

Post-Founding U.S. dictionaries similarly reflect the broad and narrow colloquial uses of “crime.” On one hand, the 1806 edition of Webster’s initial compendium of the English language broadly defined “crime” as “a violation of law to the injury of the public, a public offense, sin,” and “criminal” as “guilty, faulty, not civil.”²³⁵ Webster’s 1828 definition of “criminal” was also broad: “relating to crimes; opposed to civil; as a *criminal* code; *criminal* law”; “[a] person who has committed an offense against public law” or, “[m]ore particularly, a person indicted or charged with a public offense, and one who is found guilty, by verdict, confession[,] or proof.”²³⁶ To be sure, the 1828 edition, like Blackstone, notes that the term “crime” is sometimes used in a “more common and restricted sense” to mean a “public wrong” “of a deeper and more atrocious nature,” such as “treason, murder, robbery, theft, arson, etc.”²³⁷ But of course, no one would credibly argue that constitutional trial rights guaranteed in “all crimes” or “all

233. *Id.* at 797; 2 *id.* at 1329.

234. See, e.g., ROBERT CAWDREY, A TABLE ALPHABETICALL (4th ed., London, W.I. 1617) (defining “criminal [sic]” as “fault,” with no definitions of “misdemeanor” or “prosecute” or permutations thereof); HENRY COCKERAM, THE ENGLISH DICTIONARIE OF 1623, at 43, 122, 154 (New York, Huntington Press 1930) (1623) (defining “prosecute” as “To follow, to pursue”; “crime” broadly as “A fault”; and not defining “misdemeanor”); N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (3d ed., London, 1726) (defining “crime” as “a Fault, a foul Deed, an Offence, a Sin”; “misdemeanor” as “a behaving one’s self ill; an Offence or Fault”; “High misdemeanor” as a “Crime of a heinous Nature, next to High Treason”; and “[t]o prosecute” as “to pursue, carry on, or go on with, to sue one at Law”); G. GORDON & P. MILLER, DICTIONARIUM BRITANNICUM (N. Bailey, ed., London, 1730) (defining “crime” as “a fault, a foul deed, an offence, a sin,” and “[a] criminal” as “an offender,” and “To Prosecute” as “to pursue, carry on or go on with; also to sue at [l]aw,”; and “Misdemeanour” as “a behaving ones self ill; an offence or fault” and a “High Misdemeanor” as a “Crime of a heinous Nature, and next to high Treason”); JOHN KERSEY, DICTIONARIUM ANGLO-BRITANNICUM (3d ed., London, 1721) (defining “Crime” as “a foul Deed, or Offence; a great Sin”; “Criminal” as “guilty of some Crime, or high Misdemeanor; also that relates to the Tryal of such Offences”; “Misdemeanour” as “a misdeameaning, or behaving, one’s self ill; an Offence; or Fault”; “high Misdemeanour” as “a Crime of a heinous Nature; next to High Treason”; and “To Prosecute” as “to pursue, carry on, or go on with, to sue at law”).

235. NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 72 (Stoney’s Press 1806).

236. *Crime*, NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, N. Convere 1828) [hereinafter WEBSTER, AMERICAN DICTIONARY], <https://webstersdictionary1828.com/Dictionary/crime> [https://perma.cc/2J6G-TNSA].

237. *Id.*

criminal prosecutions” are limited to treason, murder, robbery, and arson cases. And if “theft” is a crime, then the routine denial of a jury in petty theft cases is presumably unconstitutional.²³⁸ In any event, Webster’s 1828 edition goes on to explicitly distinguish mere “trespasses” from “misdemeanors,” the former encompassing “minor wrongs against public rights.”²³⁹ Whereas misdemeanors are “punishable by indictment, information, or public prosecution,” “trespasses or private injuries” are generally dealt with through civil “suit[s].”²⁴⁰ The dictionary of the primary U.S. competitor to Webster, Joseph Worcester,²⁴¹ defined “crime” as having both a broad and narrow meaning, but it appears to squarely treat “misdemeanors” as criminal prosecutions.²⁴² In terms of early U.S. legal dictionaries, John Bouvier’s 1843 edition of *A Law Dictionary* defines crime both broadly as “an act committed or omitted in violation of a public law, either forbidding or commanding it” and narrowly: “This word, in its most general signification comprehends all offences, but, in its limited sense, it is confined to felony.”²⁴³

238. See, e.g., D.C. CODE § 22-3212 (2016) (designating theft of property valued at less than one thousand dollars as a 180-day criminal misdemeanor).

239. WEBSTER, AMERICAN DICTIONARY, *supra* note 236 (distinguishing between “trespasses” and “misdemeanors” in defining “crime”).

240. *Id.*

241. See HOWARD JACKSON, LEXICOGRAPHY: AN INTRODUCTION 63–64 (2002) (describing Worcester as a “competitor” of Webster in a twenty-year “dictionary war,” and Worcester’s 1860 dictionary as being, for a time before Webster’s ultimate triumph, “recognised [sic] on both sides of the Atlantic as the best available dictionary”).

242. See, e.g., JOSEPH WORCESTER, DICTIONARY OF THE ENGLISH LANGUAGE, PART 1, at 337 (1860) (defining “crime” as “[a]n infraction of law, but particularly of human law, and so distinguished from . . . sin; an offence against society or against morals, as far as they are amenable to the laws; a great offence; a felony” and citing Blackstone for the proposition that “[a] *crime* or misdemeanor is an act committed or omitted in violation of a public law”); *id.* (“A *felony* is a capital crime, or a heinous offence; a *misdemeanor* is a minor crime, or less than a crime.”); *id.* (defining “criminal” broadly as “not civil; as, ‘[a] *criminal* prosecution”); *id.* at Part 2, 914 (defining “misdemeanor” as “[a] lower kind of crime; an indictable offence not amounting to a felony”); *id.* at Part 2, 1144 (defining “prosecution” as “[t]he act of conducting a judicial proceeding: — the conducting of a judicial proceeding in behalf of a complainant, as distinguished from *defence*: — the conducting of a criminal proceeding in behalf of the government, as by indictment or information”).

243. I JOHN BOUVIER, A LEGAL DICTIONARY 384 (2d ed. Philadelphia T. & J. W. Johnson, Law Booksellers 1843); *cf. id.* at 346 (defining “conviction” as including “a record of the summary proceedings upon any penal statute before one or more justices of the peace,” ending in conviction and sentence). Bouvier also defines “prosecution” broadly as “the means adopted to bring a supposed offender to justice and punishment by due course of law,” including not only by indictment but “by an information.” II JOHN BOUVIER, A LEGAL DICTIONARY 382 (2d ed. Philadelphia T. & J. W. Johnson, Law Booksellers 1843).

Ultimately, the fact that “crime” can be colloquially understood to mean particularly deeply and atrocious acts, even now,²⁴⁴ seems minimally relevant in understanding the use of the phrases “all crimes” and “all criminal prosecutions” in reference to the jury right. No litigant or jurist has argued, to my knowledge, that the important procedural rights enumerated in the Sixth Amendment apply only to “deeper and more atrocious” acts.²⁴⁵ While the Framers could have limited Article III or the Sixth Amendment in this way, as with the Fifth Amendment right to indictment only in a “capital, or otherwise infamous crime,” they did not. Instead, the Article III right to jury applies in “all Crimes” except impeachment, and the trial rights of the Sixth Amendment, including the jury, apply not only to indictable offenses (such as the Fifth Amendment) or “high Crimes and Misdemeanors” (such as the Impeachment Clause) but to “all criminal prosecutions.”²⁴⁶

3. *Other treatises and cases discussing summarily tried petty offenses.* Beyond Blackstone and dictionaries, other pre- and post-Founding sources routinely described petty offenses as crimes. Indeed, the very controversy over summary nonjury trials for some statutory petty offenses centered on the assumption that these offenses were crimes and thus at common law would be jury demandable.²⁴⁷ For example, commentators describing the adjudication of petty crimes by justices of the peace in England routinely describe such offenses in criminal terms. One 1830 treatise noted how some accused of and prosecuted summarily for petty offenses would “lay in gaol [jail] for many weeks before their trial” even as they might be “innocent of the charge against them,” and, whether guilty or not guilty, might become

244. The latest edition of Webster’s defines “crime” both broadly as “an illegal act for which someone can be punished by the government” and narrowly as “a grave offense especially against morality.” *Crime*, MERRIAM-WEBSTER (July 4, 2021), <https://www.merriam-webster.com/dictionary/crime> [https://perma.cc/EE69-RX3T].

245. *Cf. supra* notes 225 & 237 (discussing this definition).

246. *Compare* U.S. CONST. art. III, § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”), *and id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .”), *with id.* art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”), *and id.* amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .”).

247. *See infra* notes 316–321 and accompanying text.

“familiarized with vice, and prepared for the commission of deeper crimes.”²⁴⁸ English barrister Matthew Bacon noted in 1768 that even a minor offense could not be charged by information unless the facts set forth a “reasonable cause for the prosecution,” given that the case was still a “public prosecution.”²⁴⁹ Likewise, even as New York passed a statute in 1732 allowing summary trials for certain minor offenses, the law explicitly described these offenses as “criminal.”²⁵⁰ Several early and late nineteenth century treatises also described summarily tried petty offenses as explicitly criminal.²⁵¹ Moreover, from the early days after the Constitution’s ratification to the present day, both the Supreme Court and Congress have routinely acknowledged that non-jury-demandable petty offenses are still crimes.²⁵² Likewise, U.S. state

248. 1 LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 586 n.70 (1956) (quoting *AN ALPHABETICAL ARRANGEMENT OF MR. PEEL’S ACTS, BY A BARRISTER* 53 (2d ed. 1830)).

249. 5 MATTHEW BACON, *A NEW ABRIDGEMENT OF THE LAW* 180 (Henry Gwyllim, Bird Wilson & John Bouvier eds., 3d ed. 1852) (1768) (emphasis added).

250. See Act of Oct. 14, 1732, at 933 (allowing summary proceeding for “any misdemeanour breach of the Peace or other criminal offense, under the degree of Grand Larceny”).

251. 1 DAVID HUME, *COMMENTARIES ON THE LAWS OF SCOTLAND, RESPECTING TRIAL FOR CRIMES* 43 (1800) (describing “the petty nature of the trespass” and “venial transgressions” as being the “subject of a proper criminal process in any of the inferior courts”); 1 JOSEPH CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* *106 (1816) (describing “all criminal causes, from high treason down to the most trivial misdemeanour or breach of the peace”); 2 JAMES FITZJAMES STEPHENS, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 263, 266 (London, MacMillan and Co. 1883) (describing petty “police” offenses such as vagrancy, “which are usually punished by courts of summary jurisdiction” and “regarded as a part of the criminal law”); cf. CHITTY, *supra*, at *617 (“And in analogy to cases technically criminal, it is an invariable rule that in all summary proceedings before justices under penal statutes, the evidence must be given in the presence of the defendant.”); THOMAS STARKIE, *A TREATISE ON CRIMINAL PLEADING* 69–70 (London 1822) (positing that “[t]he law distributes crime into three great classes; treason, felonies, and misdemeanors inferior to felony,” and that each involves a “conviction” and “punishment”); GREGORY J. DURSTON, *WHORES AND HIGHWAYMEN: CRIME AND JUSTICE IN THE EIGHTEENTH-CENTURY METROPOLIS* 426 (2012) (“At the opposite end of the penal spectrum, prosecution of lesser crimes, especially those determined summarily, was, *de facto*, often in the hands of a local official.”).

252. For example, the Supreme Court, in declining to incorporate the right to indictment, noted that such a right, if applied to “all cases of imprisonment for crime,” would apply “not only to felonies, but to misdemeanors and petty offenses” as well. *Hurtado v. California*, 110 U.S. 516, 524 (1884). Likewise, the *Callan* Court appeared to implicitly recognize that petty offenses are “criminal prosecutions” in noting the general “guaranty of an impartial jury to the accused in a criminal prosecution” “[e]xcept in that class or grade of offenses called ‘petty offenses.’” *Callan v. Wilson*, 127 U.S. 540, 557 (1888) (emphasis added). See also, e.g., *Mayor of New York v. Miln*, 36 U.S. 102, 140 (1837) (noting that defendants were “liable to the laws of that state, and amongst others, to its criminal laws; and this too, not only for treason, murder and other crimes of that degree of atrocity, but for the most petty offence which can be imagined”); *Duke v. United States*,

courts²⁵³ and English courts post-ratification routinely refer to summarily tried petty offenses as criminal proceedings.²⁵⁴

The case for treating formally charged petty offenses within the ordinary meaning of crimes and criminal prosecutions is even more obvious if one looks to how these words are commonly used and understood today. For example, the twentieth-century Supreme Court

301 U.S. 492, 494 (1937) (“The original section divides crimes into felonies and misdemeanors. The evident object of the proviso was to bring about a subdivision of misdemeanors by creating a class of misdemeanors of minor gravity to be known as petty offenses”); *Duncan v. Louisiana*, 391 U.S. 145, 158 n.30 (1968) (noting in dictum, in a case involving a two-year serious offense, that incorporation of jury right would not affect state petty offenses “if that [right] is construed, as it has been, to permit the trial of petty crimes” by judge); *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632 n.5 (1988) (“We have recognized that certain specific constitutional protections, such as the right to trial by jury, are not applicable to those criminal contempts that can be classified as petty offenses, as is true of other petty crimes as well.”); cf. JOINT CONGRESSIONAL COMMITTEE APPOINTED FOR THE PURPOSE, A SYSTEM OF CIVIL AND CRIMINAL LAW FOR THE DISTRICT OF COLUMBIA, AND FOR THE ORGANIZATION OF THE COURTS THEREIN, S. DOC. NO. 22-85, at 66–67 (2d Sess. 1833) (appointing justices of the peace to hear both civil cases and “all offences, crimes, and misdemeanors” punishable by two years imprisonment or less, appointing public prosecutors, and describing the justices’ jurisdiction as extending to “prosecutions which may arise under the penal or criminal laws of this District”).

253. See, e.g., *Harrison v. Chiles*, 13 Ky. 194, 197 (1823) (“It will be conceded, that the words, ‘criminal prosecutions,’ do, in these clauses, include all proceedings for offenses against government, for misdemeanors only, and penalties imposed by statutes, on account of *mala prohibita*, as well as the higher grades of crimes, termed felonies and treason.”); *Goddard v. State*, 12 Conn. 448, 450, 451 (1838) (holding that the right to jury does not extend to “all criminal prosecutions” but only to those charged “by indictment or information,” unlike the right to counsel, which extends to municipal proceedings charged by a “tything-man”); *Withers v. State*, 36 Ala. 252, 263–64 (1860) (noting that the right to counsel applies “in all ‘criminal prosecutions,’” including “every prosecution for a violation of the criminal laws of the State, in a court authorized to determine the question of guilt or innocence by a judgment of acquittal or conviction, *no matter how trifling the alleged offense, or how insignificant the punishment awarded*” (emphasis added) (citation omitted) (quoting ALA. CONST. art. I, § 10)).

254. See, e.g., *Morgan v. Brown* (1836) 11 Eng. Rep. 881, 882 (KB) (“[A] summary conviction of assault . . . is made a bar to any *further criminal proceeding*.” (emphasis added)); *Attorney General v. Radloff* (1854) 156 Eng. Rep. 366, 373 (Exch.) (“[I]f the proceeding is one which may affect the defendant at once, by the imprisonment of his body, in the event of a verdict of guilty, so that he is liable as a public offender—that I consider a criminal proceeding.”); *Parker v. Green* (1862) 121 Eng. Rep. 1084, 1087 (KB) (analyzing whether defendants may or must testify in summarily tried petty offenses and noting that the law applies to “any criminal proceeding” where someone “is charged with the commission of any indictable offence, or any offence punishable on summary conviction”). As stated in *Parker*:

The words in this latter section, “any offence punishable on summary conviction,” are to be read in conjunction with the preceding words, “in any criminal proceeding,” which override the whole sentence. There are several kinds of summary convictions before justices of the peace which are not criminal, but civil proceedings, and where consequently the defendant is a competent witness—such, for instance, as proceedings in bastardy, and many forms of fiscal proceedings.

Id.

itself, in determining whether contempt is a crime in *Bloom v. Illinois*,²⁵⁵ concluded that a crime is, “in the ordinary sense . . . a violation of the law, a public wrong which is punishable by fine or imprisonment or both.”²⁵⁶ *Bloom* quoted an earlier observation by Justice Oliver Wendell Holmes that “contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.”²⁵⁷ More recently, in *Rothgery v. Gillespie County*,²⁵⁸ where the Court held 8–1 that the Sixth Amendment right to counsel “[i]n all criminal prosecutions”²⁵⁹ attaches at a pretrial bail hearing regardless if a prosecutor is present or has filed formal charges, all nine Justices agreed that the filing of a formal criminal charge, such as an information, indictment, or presentment, is a commencement of a criminal prosecution.²⁶⁰ As Justice Clarence Thomas noted, after consulting numerous common-law sources, “the term ‘criminal prosecutio[n]’ in the Sixth Amendment *refers to the*

255. *Bloom v. Illinois*, 391 U.S. 194 (1968).

256. *Id.* at 201 (holding that “serious” nonsummary contempt charges in state court required a jury trial because they were crimes, and according to precedent, serious state crimes are jury demandable). While the *Bloom* Court in dictum suggested that petty contempt charges carrying at most six months imprisonment would not be jury demandable, it was merely following the petty/nonpetty line set by previous cases. *Id.* at 198 (“We accept the judgment of *Barnett and Cheff* that criminal contempt is a petty offense unless the punishment makes it a serious one . . .”). It did not purport to analyze whether summary contempt is or is not a crime. *See id.* More broadly, direct criminal contempt in the presence of a judge has been treated as a sui generis proceeding different from a typical criminal “trial” or “case,” a fact justifying the prosecution of even the most serious contempts by information rather than indictment, which would otherwise run afoul of the Fifth Amendment right to indictment in cases involving a capital “or otherwise infamous crime.” *See Green v. United States*, 356 U.S. 165, 184–85 (1958). The correctness of this line of cases is beyond the scope of this Article.

257. *Bloom*, 391 U.S. at 201 (quoting *Gompers v. United States*, 233 U.S. 604, 610 (1914)); *see also id.* at 201 n.3 (quoting *Green*, 356 U.S. at 201 (1958) (Black, J., dissenting) (“[C]riminal contempt is manifestly a crime by every relevant test of reason or history.”)).

258. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191 (2008).

259. U.S. CONST. amend VI.

260. *Rothgery*, 554 U.S. at 213. Justice Thomas opined that the hearing was not the commencement of a prosecution absent a prosecutor or formal charge, but that the filing of an information or other formal charge would have sufficed. *See id.* at 223–24 (Thomas, J., dissenting); *see also id.* at 198 (“We have, for purposes of the right to counsel, pegged commencement to ‘the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment[.]’” (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984))).

commencement of a criminal suit by filing formal charges in a court with jurisdiction to try and punish the defendant.”²⁶¹

In turn, federal petty misdemeanors, at the very least, are formally charged offenses, either by information or violation notice; prosecuted by the USAO²⁶²; punished under Title 18 (on “Crimes and Criminal Procedure”) of the United States Code by possible fine and imprisonment²⁶³; and described by the government itself as a “criminal offense” for which the defendant will have a “criminal record.”²⁶⁴ Take, for example, a defendant charged under 36 C.F.R. § 1004.10(a), for the crime of “operating a motor vehicle” in the Presidio, a federal enclave in San Francisco,²⁶⁵ in an unauthorized parking area.²⁶⁶ A person who is convicted of violating § 1004.10(a) “shall be punished by a fine” and up to six months’ incarceration.²⁶⁷ True, Congress has labeled such six-

261. *Rothgery*, 554 U.S. at 223 (Thomas, J., dissenting) (emphasis added). As Justice Thomas notes, Webster’s American Dictionary “define[s] ‘prosecution’ as ‘[t]he institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment,’ and not[es] that ‘[p]rosecutions may be by presentment, information or indictment.’” *Id.* at 221–22 (second and fourth alterations in original) (quoting WEBSTER, AMERICAN DICTIONARY, *supra* note 236); *id.* at 220 (defining a criminal “prosecution” as the point of “formal accusation” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *301)); *id.* at 221 (defining “prosecution” as “instituting a criminal suit” by way of indictment, information, or presentment (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *309)).

262. *See, e.g.*, Warner, *supra* note 4, at 2431 (noting that federal petty offenses are prosecuted by the USAO); *Petty Offenses*, OFF. OF THE FED. PUB. DEF. [hereinafter *Petty Offenses*], <https://www.ndcalfpd.org/petty-offenses> [<https://perma.cc/8JU2-23S4>] (providing instructions to those accused of petty federal offenses and noting that the USAO prosecutes the cases).

263. *See* 18 U.S.C. § 3559 (classifying criminal offenses into Class A, B, and C misdemeanors, and infractions, all subject to both imprisonment and fines).

264. A petty misdemeanor is charged either by information directly in district court or by “violation notice” by a law enforcement agency and then prosecuted by the USAO. Both the Central Violations Bureau (which handles violation notices) and the U.S. District Court’s website warn defendants that they may have a federal criminal record once they admit guilt in a case involving a violation notice, even for a petty offense that does not require a court appearance. *See, e.g.*, *Received a United States District Court Violation Notice*, CENT. VIOLATIONS BUREAU, https://www.cvb.uscourts.gov/cvbpaygov/faces/pages/cvb_options.html [<https://perma.cc/J4TA-WNM2>] (explaining that by paying a fine “you may be admitting to a criminal offense and a conviction may appear in a public record with adverse consequences to you”); *Central Violations Bureau – Federal Ticket*, U.S. DIST. CT. CENT. DIST. CAL., <https://www.cacd.uscourts.gov/clerk-services/cvb> [<https://perma.cc/84SU-ENMV>] (same). I am not aware of any federal petty offense, whether an infraction or Class B or C misdemeanor, that the United States takes to be noncriminal for purposes of reporting criminal record.

265. *See* Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, §§ 101–03, 110 Stat. 4093, 4097–4101 (defining and establishing the Presidio Trust).

266. 36 C.F.R. § 1004.10(a) (2021).

267. *Id.* § 1001.3.

month-sentence crimes petty,²⁶⁸ bringing them within Criminal Rule 58, for “Petty Offenses and Other Misdemeanors,” which allows judges to deny defendants appointed counsel and a jury.²⁶⁹ But these defendants are formally accused either by an information directly filed by the USAO or by a violation ticket filed by a law enforcement agency and prosecuted by the USAO.²⁷⁰ The person must appear on a “petty offense calendar” and engage in plea negotiations with an Assistant United States Attorney (“AUSA”).²⁷¹ If they decide to fight the charge, they must undergo a criminal trial against an AUSA and before a magistrate.²⁷² If the person is convicted after trial or admits guilt, they will not only face punishment but will have a criminal record.²⁷³

B. Other Constitutional Provisions as Context

The common understanding of the terms “all crimes” and “all criminal prosecutions” as including all formally charged criminal offenses—and not merely serious crimes—is also reflected in the Framers’ choice of language in other parts of the Constitution dealing

268. See 18 U.S.C. § 3559(a)(7) (defining six-month misdemeanor as a “Class B misdemeanor”); *id.* § 19 (defining a Class B misdemeanor as a “petty offense”). Again, the term “petty” is a term of art typically used in the right-to-jury-trial context, given the *Baldwin v. New York* six-month line. See *supra* notes 23, 173 and accompanying text.

269. FED. R. CRIM. P. 58.

270. See *Petty Offenses*, *supra* note 262 (explaining how defendants come to be charged with petty offenses); E-mail from Heather Angove, Assistant Fed. Pub. Def., to Author (May 10, 2021, 3:03 PM) (on file with author) (explaining that AUSAs prosecute petty cases and cases are charged by ticket or information).

271. See *Petty Offense Docket/Traffic Tickets*, U.S. DIST. CT. N. DIST. CAL., <https://www.cand.uscourts.gov/about/court-programs/petty-offense-docket-traffic-tickets> [<https://perma.cc/YD7X-3TTS>] (explaining that even for petty offenses not requiring a court appearance, the person will negotiate with an AUSA).

272. See *Petty Offenses*, *supra* note 262.

273. *Id.* (noting that the person will have a criminal conviction if they lose). Of course, not all wrongful acts or state sanctions of behavior are crimes. See, e.g., *Turner v. Rogers*, 564 U.S. 431, 441, 448 (2011) (holding that person incarcerated on civil infraction for failure to pay child support was not entitled to counsel and noting that the Sixth Amendment applies only to criminal cases); see also *Gagnon v. Scarpelli*, 411 U.S. 778, 788–89 (1973) (holding that a person might have a due process right to counsel in probation revocation hearings but noting that such hearings are not part of the criminal prosecution and thus do not fall under the Sixth Amendment); *In re Gault*, 387 U.S. 1, 57, 59 (1967) (holding that juveniles have a due process right to counsel in delinquency proceedings but not a Sixth Amendment right to counsel because such proceedings are not criminal); *Salerno v. United States*, 481 U.S. 739, 748 (1987) (upholding constitutionality of dangerousness-based pretrial detention and noting several other noncriminal contexts in which people are lawfully incarcerated, such as for material witness warrants, disease quarantine, and deportation proceedings).

with crimes. Even looking no further than the other trial rights guaranteed in the Sixth Amendment, no court or commentator in the history of the United States, as far as I have been able to discern, has suggested that a criminal defendant could be denied the rights to confrontation, to know the nature and cause of the accusation, to the correct vicinage, to public trial, to speedy trial, or to compulsory process, simply because the offense is petty or the punishment is merely a fine or corporal. On the contrary, these rights have all been deemed applicable to petty offenses.²⁷⁴

The Constitution uses categorical language in one other place dealing with crimes: the Fifth Amendment self-incrimination clause, which applies in “any criminal case.”²⁷⁵ To my knowledge, no scholar or litigant has suggested that the right against self-incrimination applies only to serious crimes. On the contrary, while the Supreme Court has not addressed that precise issue, the Court has held that *Miranda v. Arizona*²⁷⁶ applies to custodial interrogations, even in traffic misdemeanors.²⁷⁷ In addition, though in less obviously categorical terms, the Thirteenth Amendment allows involuntary servitude as “punishment for crime whereof the party shall have been duly convicted.”²⁷⁸ This Amendment was not passed until after the Civil

274. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 28 (1972) (stating that no court has ever held that “the trial of a petty offense may be held in secret, or without notice to the accused of the charges, or that in such cases the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf.” (quoting John M. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 705 (1968))); Brief for the United States as Amicus Curiae at 9, *Argersinger*, 407 U.S. 25 (No. 70-5015), 1971 WL 126425, at *9 (conceding this point). It is true that none of these trial rights applies to summary *contempt* proceedings, in which a judge personally witnesses a contemptuous act and immediately punishes the actor, without a trial. See *Cooke v. United States*, 267 U.S. 517, 534 (1925) (“Such summary vindication of the court’s dignity and authority is necessary. It has always been so in the courts of the common law, and the punishment imposed is due process of law.”). But contempt proceedings are unusual precisely because they are not prosecuted by government; they are immediate punishments imposed by the trial court itself through a power that is “incidental to their general power to exercise judicial functions.” *In re Terry*, 128 U.S. 289, 304 (1888); see also *Middendorf v. Henry*, 425 U.S. 25, 40–42 (1976) (concluding that military tribunals are nonadversarial and thus not prosecutions by the state).

275. U.S. CONST. amend. V.

276. *Miranda v. Arizona*, 384 U.S. 436 (1966).

277. See *Berkemer v. McCarty*, 468 U.S. 420, 434 (1984) (“We hold therefore that a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested.” (footnote omitted)).

278. U.S. CONST. amend. XIII, § 1.

War and is thus not contemporaneous with the Sixth Amendment's ratification.²⁷⁹ Nonetheless, it has been notoriously used to punish people—historically overwhelmingly, though not exclusively, Black people in the South—for petty as well as serious crimes.²⁸⁰ The history of using involuntary servitude to punish Black people for vagrancy, theft, and other petty crimes is horrifying, and this Article is not suggesting that an interpretation of the Thirteenth Amendment allowing such practices is the correct one. But this history is also stark evidence that courts have been willing to treat petty offenses as crimes when determining the constitutionality of a punishment as odious as slavery but not yet for purposes of guaranteeing the fundamental right to a jury, even as both jury provisions in the Constitution contain the categorical modifier “all.” Courts' willingness to do the former but not the latter is conspicuous.

In contrast, the Framers chose more limiting language for other rights or powers. For example, the Seventh Amendment right to jury trial in civil legal cases extends only to “[s]uits at common law, where the value in controversy shall exceed twenty dollars,”²⁸¹ the Fifth Amendment right to indictment applies only to “capital, or otherwise infamous crime[s],”²⁸² and Article I grants Congress power “[t]o define and punish Piracies and Felonies,” not other crimes, “committed on the high Seas.”²⁸³ It would seem that when the Framers wanted to specify that a provision apply only to certain offenses and not others, they so specified. And when they wished to categorically include all offenses (“any” and “all”), they did.

279. *Thirteenth Amendment*, ENCYC. BRITANNICA (2022), <https://www.britannica.com/topic/Thirteenth-Amendment> [<https://perma.cc/QD7B-DBW6>].

280. See, e.g., Meagan Flynn, *Kanye West's Baffling 13th Amendment Twitter Outburst: Maybe Not So Baffling After All*, WASH. POST (Oct. 1, 2018, 7:08 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/10/01/kanye-wests-baffling-13th-amendment-twitter-outburst-maybe-not-so-baffling-after-all> [<https://perma.cc/ZZN8-QCDQ>] (noting the history of punishing Black people for vagrancy, theft, and other petty crimes through convict-leasing); see also *Howerton v. Mississippi Cnty.*, 361 F. Supp. 356, 364 (E.D. Ark. 1973) (“Courts have long held that reasonable work requirements may be imposed on one convicted of a crime, whether misdemeanor or felony, without running afoul of the Thirteenth or Eighth Amendments.”); *Stone v. City of Paducah*, 86 S.W. 531, 534 (Ky. 1905) (holding that misdemeanors are included in “crime” under the Thirteenth Amendment).

281. U.S. CONST. amend. VII.

282. U.S. CONST. amend V.

283. U.S. CONST. art. I, § 8, cl. 10.

Nonetheless, two other constitutional provisions applying to crimes merit discussion because courts or scholars have held or argued that their scope is limited to serious offenses or are, at least, ambiguous. The first is Article IV's Interstate Extradition Clause, which provides, "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."²⁸⁴ In 1860, the Supreme Court in *Kentucky v. Dennison*²⁸⁵ described the phrase "treason, felony, or other crime" as broad, extending not only to felonies but to indictable (infamous) misdemeanors.²⁸⁶ Ironically, even as the Court's point was to broadly construe the term crime, its language might implicitly suggest to the modern reader that crime excludes petty, nonindictable misdemeanors. However, read in light of modern shifts in charging practices, the Court's comment was clearly intended to reach, at minimum, any crime charged by the state.²⁸⁷

The second context in which the term crime has been construed more narrowly is the Fourteenth Amendment's allowance of disenfranchisement for "rebellion, or other crime."²⁸⁸ Law Professor Richard Re and a co-author, Christopher Re, have argued, primarily citing dictionary definitions and the petty offense exception to the jury right, that Reconstruction-era sources are inconclusive as to whether

284. U.S. CONST. art IV, § 2, cl. 2.

285. *Kentucky v. Dennison*, 65 U.S. 66 (1860).

286. *Id.* at 76 (interpreting U.S. CONST. art. IV, § 2). The Court rejected the state's argument that a misdemeanor was not extraditable, citing Blackstone for the proposition that "[c]rime is synonymous with misdemeanor" and noting that the phrase "other crime" replaced "high misdemeanor" from the first draft of the Clause, the latter of which may have been "too limited." *Id.*

287. In describing the breadth of the clause, the Court defined "crime" as "includ[ing] every offence below felony *punished by indictment* as an offence against the public." *Id.* (emphasis added). Not only was that statement dictum (because the case involved an indictable misdemeanor), but that limit would be nonsensical today: many states and the federal government have eliminated the indictment requirement from all misdemeanors, *see, e.g., Siercke v. Siercke*, 476 P.3d 376, 386 (Idaho 2020) (noting that all misdemeanors are now charged by information rather than indictment in Idaho), making the Court's definition of "crime" synonymous with "felony," untenably rendering the phrase "other crime" in "treason, felony, or other crime" superfluous.

288. U.S. CONST. amend. XIV, § 2.

this phrase included minor offenses.²⁸⁹ One way to think about this clause, according to Re and Re, is that it applies to other crimes of comparable seriousness to “rebellion,” the only named crime in the clause.²⁹⁰ Another way to distinguish the disenfranchisement clause from the jury right in Article III and the Sixth Amendment is that the disenfranchisement clause purports to inflict punishment for the crimes within its scope, whereas the jury clauses purport to guarantee a critical right for the crimes within its scope. To interpret “other crimes” narrowly in comparison to “rebellion” in the same clause seems less problematic, from a textualist perspective, than interpreting a phrase with the term “all” — “all crimes” and “all criminal prosecutions” — as excluding a large swath of federal crimes. After all, the fact remains that cases involving formally charged petty offenses are treated as criminal prosecutions for all other trial rights besides jury and counsel and are routinely described as — and punished as — criminal.

The *Schick* Court also deemed significant that the first draft of the Constitution stated, “[T]he trial of all *criminal offenses* . . . shall be by jury,” while the final version changed “criminal offenses” to “crimes.”²⁹¹ In the Court’s view, the “significance of this change” could not “be misunderstood.”²⁹² The Court declared, without much in the way of analysis:

[W]hen the change was made from ‘criminal offenses’ to ‘crimes,’ and made in the light of the popular understanding of the meaning of the word ‘crimes,’ as stated by Blackstone, it is obvious that the intent was

289. See Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1652–53 (2012); see also Harvey v. Brewer, 605 F.3d 1067, 1077 (9th Cir. 2010) (holding that the term “crime” in the disenfranchisement clause was not limited to common-law felonies, reasoning that “when the 39th Congress meant to specify felonies at common law, it was quite capable of using that phrase”). As a side note, the phrase “high crimes and misdemeanors” in the Impeachment Clause appears to be a term of art borrowed from earlier English impeachment law, which described noncriminal as well as criminal conduct. See, e.g., Frank O. Bowman III, *The Common Misconception About “High Crimes and Misdemeanors,”* ATLANTIC (Oct. 22, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/what-does-high-crimes-and-misdemeanors-actually-mean/600343> [https://perma.cc/7V3A-QLX3].

290. See Re & Re, *supra* note 289, at 1653–54 (noting that “other crime” presumably means a crime comparable to rebellion in seriousness).

291. *Schick v. United States*, 195 U.S. 65, 70 (1904).

292. *Id.*

to exclude from the constitutional requirement of a jury the trial of petty criminal offenses.²⁹³

C. *The Court's Misuse of Common-Law Summary Bench Trial Practices*

Aside from invoking Blackstone's mundane observation that "crimes" and "misdemeanors" might colloquially be used to mean grave and minor offenses, respectively,²⁹⁴ the Supreme Court has offered no reason to interpret the terms "all crimes" and "all criminal prosecutions" to mean only serious offenses. Instead, in a time before textualism arose as a recognized school of constitutional interpretation, the Court in cases like *Callan* and *Schick* appeared content to reason that it should interpret the constitutional jury trial right as incorporating limits placed on the jury right by Parliament and colonial practices.²⁹⁵

There are several problems with this reasoning. First, from the perspective of jurists who purport to look to the Constitution's text first (or even at all), the best evidence of the Framers' view of allowing summary convictions without a jury is presumably the categorical language of the Sixth Amendment itself.²⁹⁶ Even then-Professor Frankfurter, in his 1926 law review article supportive of the exception, freely acknowledged that charges brought by the state ending in punishment are "formal criminal prosecutions."²⁹⁷ What has changed since 1926 is not the Constitution, or the definition of crime, but the Court's philosophy of constitutional interpretation. The current Court,

293. *Id. But see id.* at 98 (Harlan, J., dissenting) ("To say that 'crimes' means something different from 'criminal offenses' is something that I cannot comprehend. A crime is a criminal offense and a criminal offense is a crime.").

294. *See supra* Part I.

295. *See Callan v. Wilson*, 127 U.S. 540, 552 (1888) (noting that the laws of England have long allowed summary jurisdiction over certain petty crimes); *Schick*, 195 U.S. at 70–71 (adopting *Callan's* reasoning).

296. *See, e.g.*, RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 26–27 (1985) (arguing that when it comes to constitutional debates with many divergent views, "the best evidence of textual intention is the language of the text itself"); *cf. W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98–99 (1991) (stating that the "best evidence" of legislative intent "is the statutory text" itself, and that the Court is bound by the text where it is "unambiguous"); *Soldal v. Cook Cnty.*, 506 U.S. 56, 61–62 (1992) (holding that disconnection and towing of trailer was a "seizure" under the Fourth Amendment because it was literally a seizure, regardless of the plausibility of the government's claim that the Framers intended the Amendment to only protect "privacy interests").

297. Frankfurter & Corcoran, *supra* note 21, at 937.

newly dominated by those who purport to look to the ordinary meaning of the Constitution's text first and foremost,²⁹⁸ would find little comfort in Frankfurter's article.

Second, the categorical Sixth Amendment and Article III jury right stands in contrast to those *state constitutions* ratified by 1791 that conspicuously covered only certain crimes or only what was jury demandable before ratification. While some states extended their jury guarantee to "all criminal prosecutions" or "all prosecutions for criminal offences,"²⁹⁹ other states extended their jury right only to offenses that "heretofore" (before the state constitution's ratification) were jury demandable.³⁰⁰ Other states, such as Massachusetts and New Hampshire, limited their jury right only to crimes carrying "capital" or "infamous" punishments.³⁰¹ After 1791, other states as they joined the Union similarly chose for their jury right either categorical language covering all criminal cases³⁰² (with many making explicit that

298. See generally Haun, *supra* note 28 (explaining the dominance of originalism and textualism on the current Court).

299. See, e.g., DEL. DECL. OF RTS., § 14 (1776) ("That in all prosecutions for criminal offences, every man hath a right to . . . trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."); MD. CONST. of 1776, Decl. of Rts. art. 19 ("That in all capital or criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury . . ."); N.J. CONST. of 1776, art. 22 ("[T]hat the inestimable Right of Trial by Jury shall remain confirmed, as a Part of the Law of this Colony without Repeal for ever."); VA. CONST. of 1776, Bill of Rts., § 8 ("That in all capital or criminal prosecutions a man hath a right . . . to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty . . ."); VT. CONST. of 1777, ch. 1, art. X ("That in all prosecutions for criminal offences, a man hath a right to . . . a speedy public trial by an impartial jury of the country; without the unanimous consent of which jury, he cannot be found guilty . . .").

300. See *supra* note 67 and accompanying text; see also N.C. CONST. of 1776, Decl. of Rts., § IX ("That no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used.")

301. See MASS. CONST. pt. 1, art. XII ("And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."); N.H. CONST., pt. 1, art. 16 ("Nor shall the Legislature make any law that shall subject any person to a capital punishment, (excepting for the government of the army and navy, and the militia in actual service) without trial by jury.")

302. See MICH. CONST. of 1835, art. I, § 10; R.I. CONST. of 1842, art. 1, § 10; IOWA CONST. of 1846, art. II, §§ 9–10; OR. CONST. art. I, § 11; KAN. CONST. Bill of Rts., § 10; cf. MINN. CONST. art. I, § 4 ("The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy, but a jury trial may be waived by the parties in all cases in the manner prescribed by law."); NEB. CONST. of 1866, art. I, § 7 ("In all criminal prosecutions and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury . . ."); W. VA. CONST. of 1863, art. II, § 8 ("The trial of crimes and misdemeanors, unless herein otherwise provided, shall be by jury . . .").

“criminal” was opposed to “civil”),³⁰³ or language explicitly limiting the jury and other trial rights only to certain crimes. For example, some explicitly limited the jury right to offenses charged by the grand jury³⁰⁴; offenses jury demandable at the time of ratification³⁰⁵; or offenses with a particular fine or imprisonment amount.³⁰⁶ In sum, if the Framers had

303. See CAL. CONST. of 1849, art. I, § 3 (“The right of trial by jury shall be secured to all, and remain inviolate forever; but a jury trial may be waived by the parties, in all civil cases, in the manner to be prescribed by law.”); COLO. CONST. art. II, § 23 (“The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law.”); MONT. CONST. of 1889, art. III, § 23 (“The right to trial by jury shall be secured to all, and remain inviolate, but in all civil cases and in all criminal cases not amounting to felony, upon default of appearance or by consent of the parties . . . a trial by jury may be waived . . .”); N.D. CONST. art. I, § 7 (“The right of trial by jury shall be secured to all, and remain inviolate; but a jury in civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law.”); IDAHO CONST. art. I, § 7 (1890) (“The right of trial by jury shall remain inviolate; but” allowing that in “misdemeanors five-sixths of the jury may render a verdict” and that a jury “may be waived in all criminal cases . . .”); WYO. CONST. art. I, § 9 (amended 1980) (“The right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law.”); UTAH CONST. art. I, § 10 (“In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.”); *cf.* OR. CONST. art. I, §§ 11, 17 (noting in § 11 what rights apply in “all criminal prosecutions,” and followed by “[i]n all civil cases the right of Trial by Jury shall remain inviolate”); *id.* art. I, § 16 (“In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, *as in civil cases.*” (emphasis added)).

304. See TENN. CONST. of 1796, art. 11, § 9 (“[T]he accused hath a right . . . in prosecutions by Indictment or presentment, [to] a Speedy public trial by an impartial Jury . . .”); OHIO CONST. of 1803, art. VIII, § 11 (“[The accused has a right] in prosecutions by indictment or presentment, [to] a speedy public trial, by an impartial jury . . .”); LA. CONST. of 1812, art. VI, § 18 (“[The accused have the right in] prosecutions by indictment or information, [to] a speedy public trial by an impartial jury of the vicinage . . .”); IND. CONST. of 1816, art. I, § 13 (“[The accused hath a right] in prosecutions by indictment, or presentment, [to] a speedy public trial by an impartial Jury . . .”); ALA. CONST. of 1819, art. I, § 10 (using substantially similar language); CONN. CONST. of 1818, art. I, § 9 (same); ILL. CONST. of 1818, art. VIII, § 9 (same); MISS. CONST. of 1817, art. I, § 10 (1817) (same); MO. CONST. of 1820, art. XIII, § 9 (1820) (same); ARK. CONST. of 1836, art. II, § 11 (same); FLA. CONST. OF 1838, art. I, § 10 (same); WIS. CONST. art. I, § 7 (same); *cf.* ME. CONST. art. I, § 6 (1820) (“In all criminal prosecutions, the accused shall have a right to . . . except in trials by martial law or impeachment, [trial] by a Jury . . .”).

305. See, e.g., KY. CONST. of 1792, art. XII, § 6 (“That trial by jury shall be as heretofore, and the right thereof remain inviolate.”); N.M. CONST. art. II, § 12 (“The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate.”).

306. See, e.g., OKLA. CONST. art. II, § 19 (“The right of trial by jury shall be and remain inviolate, except in civil cases” with \$1,500 or less in dispute “or in criminal cases” punishable by a “fine only,” of \$1,500 or less.); N.M. CONST. art. VI, § 23 (requiring that in the “trial of misdemeanors in which the punishment [is] imprisonment in the penitentiary, or in which the fine [is] in excess of one thousand dollars . . . [a] jury for the trial of such cases shall consist of six

wanted to simply freeze in time the types of cases that happened to be jury demandable in 1791 under English and colonial statutes, or to limit the jury only to certain serious crimes, they could have done so using the language these states did.

Third, even if there were evidence that the Framers intended the Sixth Amendment to mirror the common law jury trial right, that right did, in fact, cover petty crimes. As both Justice Harlan and William Blackstone explicitly noted, the acts of Parliament establishing special summary proceedings for certain offenses were in *derogation of* the common law.³⁰⁷ Bench trials for crimes were a “stranger to” the common law.³⁰⁸ Far from interpreting the Sixth Amendment as codifying the common law jury right, adherents of the petty offense exception interpret it as limited by English and colonial parliamentary exceptions to that common-law right.³⁰⁹ But there is no evidence that the Framers intended the Bill of Rights to incorporate whatever exceptions to common-law rights Parliament had in mind; on the contrary, the Declaration of Independence itself expressed outrage at Parliament’s extension of admiralty jurisdiction in a manner that denied Americans jury trials in traditionally jury-demandable cases.³¹⁰ Of course, a pragmatist could look to summary practices as evidence

men”); *cf.* MINN. CONST. art. 6, § 5 (amended 1982) (“The district courts shall have original jurisdiction in all civil cases, both in law and equity, where the amount in controversy exceeds one hundred dollars, and in all criminal cases where the punishment shall exceed three months imprisonment, or a fine of more than one hundred dollars . . .”); OKLA. CONST. art. II, § 17 (“No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information.”); TEX. CONST. of 1845, art. IV, § 19 (guaranteeing a jury “[i]n all cases where Justices of the Peace . . . shall have jurisdiction in the trial of causes where the penalty . . . is fine or imprisonment”). Tennessee actually gave the jury power to review sentences in cases with fines over fifty dollars. TENN. CONST. of 1796, art. V, § 11 (“No fine shall be laid on any Citizen of this State that shall exceed fifty Dollars, unless it shall be assessed by a Jury of his Peers . . .”).

307. *Schick v. United States*, 195 U.S. 65, 80 (1904) (Harlan, J., dissenting); 4 WILLIAM BLACKSTONE, COMMENTARIES *278–84.

308. *See supra* note 117 and accompanying text.

309. *See supra* Part I.B.2.

310. The Declaration of Independence lists the denial of the right to jury as a grievance (“For depriving us in many cases, of the benefits of Trial by Jury”), before condemning the King “[f]or transporting us beyond Seas to be tried for pretended offences.” THE DECLARATION OF INDEPENDENCE paras. 20–21 (U.S. 1776). The drafters may have been particularly outraged over Parliament’s extension of admiralty jurisdiction to U.S. cases that would be jury demandable in England but were tried without a jury at sea. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340 n.3 (1979) (Rehnquist, J., dissenting) (citing 11 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 110 (1966), for the proposition that the Framers’ inclusion of this phrase in the Declaration was inspired by outrage over Parliament’s extension of admiralty jurisdiction).

of the types of compromises and conveniences legislatures of the past have been willing to abide by and conclude that such practices would be good policy today. However, that is no reason to impute those views to the drafters of Article III or the Sixth Amendment.

Finally, and most fundamentally, the existence of English and colonial common-law practices controversially limiting the jury right in certain petty cases in no way proves that the Framers intended to continue that practice. After all, other constitutional procedure rights exceed what English common law guaranteed. For example, Professor Jim Tomkovicz has noted that the American right to counsel “in all criminal prosecutions,” which clearly covers felonies, went far beyond the English common-law rule of denying lawyers in felony (but not misdemeanor) cases.³¹¹ And although trials of impeachment were not jury demandable at common law, the Framers still explicitly exempted them from Article III’s jury trial right, suggesting that the Framers intended the baseline right to apply even to crimes not jury demandable at common law.³¹² Likewise, as Tim Lynch notes in his 1994 article *Rethinking the Petty Offense Doctrine*, the Compulsory Process Clause and the right of self-representation both exceed what was guaranteed at common law.³¹³ In contrast, other constitutional provisions explicitly mirrored or referenced the common law right or existing practices. For example, the Fifth Amendment Indictment Clause “in effect, affirm[s] the rule of the common law,” which covered capital crimes and felonies, by “substituting . . . ‘a capital or otherwise infamous crime.’”³¹⁴ Similarly, the Seventh Amendment right to civil juries in legal disputes above twenty dollars³¹⁵ allowed the continuance of existing practices: “Justices of the peace historically could hear

311. See generally JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL* 14 (2002) (“[T]he states had dramatically departed from the restrictive English common law rule regarding retention of counsel in serious criminal prosecutions.”).

312. At the time of ratification, impeachment was already a political affair, not a criminal offense to be decided by a criminal jury at common law. See Mary L. Volcansek, *British Antecedents for U.S. Impeachment Practices: Continuity and Change*, 14 JUST. SYS. J. 40, 44 & n.12, 52–54 (1990) (explaining that impeachment was decided by the House of Lords but “without formal trials” and without any requirement of unanimity or continuity of judges, in part because in some cases “guilt . . . ‘was obvious enough’”). If Article III’s “all Crimes” language should be read narrowly to include only those crimes that were jury demandable at common law, the exclusion of “Cases of Impeachment” would have been superfluous. See U.S. CONST. art. III, § 2.

313. See, e.g., Lynch, *supra* note 26, at 14, 17, 20 n.75.

314. *Ex parte Wilson*, 114 U.S. 417, 423 (1885).

315. U.S. CONST. amend VII.

claims when the amount in controversy was below a certain threshold.”³¹⁶ The Sixth Amendment contains no such limiting language. It also seems particularly odd that the Framers would newly insist upon a jury trial in a civil dispute involving more than twenty dollars but not in a petty criminal prosecution involving a fine of more than twenty dollars and/or a prison sentence of up to six months.

Ultimately, the historical evidence seems equally consistent with the conclusion that the Framers rejected controversial summary jurisdiction practices. The Framers had every reason to be skeptical of summary proceedings rather than to want to replicate them through an implicit petty offense exception to the Sixth Amendment’s trial rights. By one account, summary proceedings had their origin in Henry VIII’s desire to wield control through his notorious henchmen.³¹⁷ While summary proceedings were conducted in the “Petty Sessions” and involved only crimes labeled minor by Parliament, in reality they often involved traditional *malum in se* crimes like assault and theft or other typically felonious conduct.³¹⁸ People accused of these petty crimes were often held in jail for long periods pretrial and, upon conviction,

316. See Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665, 1673 n.49, 1674 (2005); see also Margreth Barrett, *The Constitutional Right to Jury Trial: A Historical Exception for Small Monetary Claims*, 39 HASTINGS L.J. 125, 129 (1987) (“During the relevant historical periods, England and many American colonies and territories provided a procedure for adjudicating small monetary claims that afforded no access to a jury.”).

317. NORMA LANDAU, *THE JUSTICES OF THE PEACE, 1679–1760*, at 343 (1984).

318. See Kaye, *supra* note 209, at 247 (noting that summary practices extended to “serious derelictions”); Bruce P. Smith, *Did the Presumption of Innocence Exist in Summary Proceedings?*, 23 LAW & HIST. REV. 191, 196 (2005) [hereinafter Smith, *Summary Proceedings*] (noting one commentator’s concession that “it [was] well known that magistrates [were] in the practice of applying their summary jurisdiction even beyond the spirit, certainly beyond the words, of the law . . . assuming to themselves the power of adjudicating in cases of actual felony, by treating them as misdemeanors” (emphasis omitted) (citation omitted) (quoting Letter from James Traill to House of Commons Select Committee on Metropolis Police Offices (Dec. 1, 1837)); *id.* at 194 (noting that several statutes covering traditionally felonious conduct allowed magistrates a choice between proceeding, on the same allegation, either in summary trial or committing the defendant to face felony charges); *cf.* United States v. Watson, 423 U.S. 411, 439–40 (1976) (Marshall, J., dissenting) (discussing the range of serious offenses considered misdemeanors at common law (citing Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 572–73 (1924))).

might be subject to serious punishment, from large fines to corporal punishment³¹⁹ to “transportation” (banishment)³²⁰ to imprisonment.³²¹

Parliament’s questionable motivation in expanding summary jurisdiction even to traditional *malum in se* crimes like larceny was precisely to sometimes circumvent procedural rights that would otherwise hamper conviction rates.³²² Indeed, summary proceedings were sufficiently brazen in their curtailment of procedural rights, including the very burden of proof on the government,³²³ that to use them as a template for interpreting the Constitution would negate numerous other bedrock rights, starting with the presumption of innocence.

In particular, in the decades before the Sixth Amendment’s ratification, the power of summary conviction was the subject of growing concern and sometimes outright criticism among judges and commentators. Many judges in the early eighteenth century “disliked the abrogation of trial by jury”³²⁴ that came with Parliament’s approval of summary convictions, considering it “legal but suspect,”³²⁵ but

319. See 1 WILLIAM BLACKSTONE, COMMENTARIES *280 (describing how after summary proceedings, a magistrate who convicts an offender may “apprehend the offender, in case corporal punishment is to be inflicted on him; or else to levy the penalty incurred”); DURSTON, *supra* note 251, at 374 (noting that, “in lieu of payment,” summary conviction punishments could include, for example, “[a] period in the stocks or pillory, a whipping, or a short custodial sentence . . . depending on the offence involved”); see, e.g., *id.* at 381 (noting that the Bumboat Act of 1762 prohibited unexplained possession of ships equipment, such as rope, and was “punishable by a forty-shilling fine, with a month’s imprisonment in lieu of payment”).

320. See, e.g., Smith, *Summary Proceedings*, *supra* note 318, at 195 (noting that “every person convict[ed] [summarily] of having knowingly bought or received ‘any stolen lead, iron, copper, brass, bell metal[,] or solder’ was to ‘be transported for fourteen years,’ even in cases where ‘the principal felon or felons’ had not been convicted” (third alteration in original) (quoting Lead and Iron Act of 1756, 29 Geo. II, c. 30 § 1)).

321. See LANDAU, *supra* note 317, at 23; Smith, *Summary Proceedings*, *supra* note 318, at 199 (noting that some summary offense carried “substantial fines or multiple-month stints in the house of correction” as punishment).

322. See Bruce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750–1850*, 23 LAW & HIST. REV. 133, 154 (2005) [hereinafter Smith, *Presumption of Guilt*].

323. See *id.* at 135; see also Bruce P. Smith, *The Emergence of Public Prosecution in London, 1790–1850*, 18 YALE J.L. & HUMANS. 29, 62 (2006) (“By resorting to summary proceedings that eased detection, aided apprehension, spurred the initiation of cases, bypassed juries, and required suspects to ‘explain away’ their guilt, the English state developed a system of prosecution that addressed these defects and, more strikingly, dispensed with private victims as well.”).

324. LANDAU, *supra* note 317, at 349.

325. *Id.* at 350.

“nonetheless felt bound to respect Parliament’s intent.”³²⁶ These cases often seemed a means of trying felonious conduct without the procedural protections of the common law. For example, laws like the Lead and Iron Act of 1756 increased summary jurisdiction over some crimes, like certain thefts, that were traditionally felonies.³²⁷ By the 1750s, because of this dramatic increase in summary jurisdiction, there was “a common and popular complaint” that magistrates had “too much power.”³²⁸ Blackstone in 1765 decried the recent rise of summary convictions “of late” as being problematic, stating that, “[I]f a check be not timely given,” such cases “threaten the disuse of our admirable and truly English trial by jury.”³²⁹ Blackstone goes on to say that while summary convictions have their advantages, “[t]his change in the administration of justice hath however had some mischievous effects; as, [t]he almost entire disuse and contempt of . . . the king’s ancient courts of common law, formerly much revered and respected.”³³⁰ In

326. *Id.* at 349. Landau cites a number of other sources to establish that these summary practices were controversial for denying a jury right in derogation of the common law. *See id.* at 350 (noting how Lord Chief Justice Holt once wrote, “the defendant is put to a summary trial different from magna charta, for it is a fundamental privilege of an Englishman to be tried by a jury” (quoting WILLIAM PALEY, *THE LAW AND PRACTICE OF SUMMARY CONVICTIONS ON PENAL STATUTES BY JUSTICES OF THE PEACE* 50 (London 1814))); *id.* at 343 (noting that a preface to Michael Dalton’s *The Countrey Justice* “damned summary conviction” because its elimination of the jury right “may tend to the subversion of both liberty and property” (quoting *Preface* to MICHAEL DALTON, *THE COUNTRY JUSTICE* (London, G. Sawbridge, T. Roycroft & W. Rawlins 1677))); *id.* at 344 (noting that Blackstone described summary conviction as “fundamentally opposed to the spirit of our constitution”); *see also* 3 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 159 (London, 1756) (“The power of a justice of the peace is in restraint of the common law, and in abundance of instances is a tacit repeal of that famous clause in the great charter, that a man shall be tried by his equals . . .”).

327. *See* Smith, *Summary Proceedings*, *supra* note 318, at 194 (discussing how magistrates under these acts could decide, based on the same conduct, to proceed either in felony court or summary proceedings); Smith, *Presumption of Guilt*, *supra* note 322, at 157–59 (noting how some larcenies were tried summarily under the Lead and Iron Act, and how the Vagrancy Act of 1744 also extended the reach of summary proceedings); Lead and Iron Act, 29 Geo. II (1765), at pt. V (allowing those arrested for stealing to be “deemed and adjudged guilty of a Misdemeanor” by a justice of the peace); Vagrancy Act, 17 Geo. II (1744), at pts. VII, IX (allowing justices of the peace to punish “vagabonds” and “incorrigible rogues” with corporal punishment or time in the House of Corrections).

328. *See* DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 14–15 (1989) (quoting *Preface* to HENRY FIELDING, *AN ENQUIRY INTO THE LATE INCREASE OF ROBBERS, WITH SOME PROPOSALS FOR REMEDYING THIS GROWING EVIL*, at xxviii (2d ed., London 1751)).

329. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *280–81.

330. *Id.* at *281–82 (footnote omitted). Notably, Blackstone warned:

short, the “quality of summary justice had a bad reputation amongst many eighteenth-century observers.”³³¹

Closer to the Sixth Amendment’s ratification, the criticism in England of summary convictions continued. One justice of the peace in 1786 commented that the “mode of summary proceedings” had replaced traditional rights, such as the right to indictment, in a way that made English justices some of the most powerful judges in the world.³³² The Whig Party leader, archrival of George III, and correspondent of Benjamin Franklin and John Adams, Charles James Fox,³³³ was an opponent of expansions of summary jurisdiction. In 1792 (a year after the Sixth Amendment’s ratification),³³⁴ he delivered an impassioned speech against one of the Acts expanding summary jurisdiction. He

[T]he extensive power of a justice of the peace, which even in the hands of men of honour is highly formidable, will be prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice, or personal resentment. And from these ill consequences we may collect the prudent foresight of our antient lawgivers, who suffered neither the property nor the punishment of the subject to be determined by the opinion of any one or two men; and we may also observe the necessity of not deviating any farther from our antient constitution, by ordaining new penalties to be inflicted upon summary convictions.

Id. at *282.

331. DURSTON, *supra* note 251, at 376.

332. *Id.* at 372 (quoting HENRY ZOUCH, HINTS RESPECTING THE PUBLIC POLICE 1 (London, 1786)).

333. See Charles James Fox, GOV.UK, <https://www.gov.uk/government/history/past-foreign-secretaries/charles-fox> [<https://perma.cc/K3E9-5D68>] (noting Fox was a Whig leader and enemy of George III); Letter from Charles James Fox to Benjamin Franklin (Apr. 19, 1783), <https://founders.archives.gov/documents/Franklin/01-39-02-0307> [<https://perma.cc/2VAB-S8XX>] (discussing trade issues); Letter from John Adams to Abigail Adams (Nov. 18, 1783), <https://founders.archives.gov/documents/Adams/04-05-02-0149> [<https://perma.cc/6JT2-AWN9>] (telling Abigail that he had a “cordial” meeting with Fox); cf. Letter from John Adams to Edmund Jenings (July 17, 1782), <https://founders.archives.gov/documents/Adams/06-13-02-0113> [<https://perma.cc/EN2W-LV3M>] (writing that Fox was an “able” man and discussing his potential to become prime minister with apparent approval). See generally GEORGE M. WRONG, WASHINGTON AND HIS COMRADES IN ARMS: A CHRONICLE OF THE WAR OF INDEPENDENCE 71 (Allen Johnson ed., 1920) (“Both [Thomas] Coke and [Charles] Fox, and no doubt many others, wore waistcoats of blue and buff because these were the colors of the uniforms of Washington’s army.”). On January 26, 1793, Fox distributed a public letter arguing against King George III’s call to war against France’s post-revolutionary government. CHARLES JAMES FOX, A LETTER FROM THE RIGHT HONOURABLE CHARLES JAMES FOX, TO THE WORTHY AND INDEPENDENT ELECTORS OF THE CITY AND LIBERTY OF WESTMINSTER 24–25 (London, 1793). Thomas Jefferson appears to have sent this letter as an attachment to a letter to George Washington a few months later. Letter from Thomas Jefferson to George Washington (May 5, 1793), <https://founders.archives.gov/documents/Jefferson/01-25-02-0606> [<https://perma.cc/4WZ7-N4G6>] (attaching a copy of Fox’s “pamphlet” and also mentioning the Marquis de LaFayette).

334. See Brian P. Smentkowski, *Sixth Amendment*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Sixth-Amendment> [<https://perma.cc/47HN-XCY4>].

argued first that summary practices tended to unfairly detain and convict poor people, declaring that “[n]o man should . . . be permitted to say . . . I will imprison a man for what I know I cannot prove, merely because he is in a situation that will not enable him to procure bail.”³³⁵ Instead, he insisted that “if you think [a man] guilty,” let him “be tried by a jury,” rather than “let a magistrate . . . inflict punishment on a man whom a jury would acquit.”³³⁶ Even the Prime Minister during the American Revolution, Lord North, acknowledged the “dictatorial power” of metropolitan justices in summary proceedings.³³⁷ While there is little available direct evidence about the Framers’ views of summary convictions and their limits on procedural rights in petty offenses, they may well have been aware of, and shared, these concerns.

Notably, several U.S. state courts after ratification would come to doubt the constitutional viability of local practices allowing summary convictions.³³⁸ In New York, summary convictions were upheld, notwithstanding withering criticism by at least one jurist, only because New York’s state constitution, like several others discussed above, extended the right only to those cases that were previously jury demandable.³³⁹

335. 4 THE SPEECHES OF THE RIGHT HONOURABLE CHARLES JAMES FOX IN THE HOUSE OF COMMONS 434 (London, 1815).

336. *Id.*

337. DURSTON, *supra* note 251, at 382 (quoting John M. Beattie, *Garrow and the Detectives Lawyers and Policemen at the Old Bailey in the Late Eighteenth Century*, 11 CRIME, HIST. & SOC’YS 5, 21 (2007)).

338. *See, e.g.,* Geter v. Comm’rs for Tobacco Inspection, 1 S.C.L. (1 Bay) 354, 356 (1794) (“[T]hese kind of summary jurisdictions, without the intervention of a jury, are in restraint of the common law: that nothing shall be construed in favour of them; but the intendment of law is always against them.”); Slaughter v. People, 2 Doug. 334, 337 (Mich. 1842) (reversing summary conviction for keeping a house of ill-repute and reversing a fine because the offense was clearly criminal and thus had to be indicted by state law); Barter v. Commonwealth, 3 Pen. & W. 253, 253 (Pa. 1831) (“If the charter did give the right to confer a power to imprison on summary conviction, and without appeal to a jury, it would be so far unconstitutional and void.”). *But see* Pittsburgh, Pa., Ordinance No. XIII, *reprinted in* BY-LAWS AND ORDINANCES OF THE CITY OF PITTSBURGH, AND THE ACTS OF ASSEMBLY RELATING THERETO; WITH NOTES AND REFERENCES TO JUDICIAL DECISIONS THEREON, AND AN APPENDIX, RELATING TO SEVERAL SUBJECTS CONNECTED WITH THE LAWS AND POLICE OF THE CITY CORPORATION 296 (Pittsburgh, Johnson & Stockton 1828) (continuing the practice of summary convictions but acknowledging that they were “introduced in derogation of the common law” right to jury in criminal prosecutions).

339. *See In re Morris*, 2 Edm. Sel. Cas. 381, 384–85 (N.Y. Sup. Ct. 1853) (upholding nonjury conviction because New York’s constitution states that the jury right “in all cases in which it has been heretofore used shall remain inviolate forever” but lamenting the high rate of false

Ultimately, the right to a jury in “all crimes” and in “all criminal prosecutions” is one of those sufficiently clear textual guarantees of a significant individual liberty that its failure to be enforced literally is conspicuous. Perhaps because of the petty offense exception’s long and obscured history, courts, scholars, and litigants have let it lie. It is time to eliminate the exception, once and for all. The next, and in some ways more difficult question, is whether, and how, a jury trial right in petty offenses would affect criminal justice on the ground.

III. IMPLICATIONS OF A JURY RIGHT IN FEDERAL PETTY OFFENSES

This Part explores the implications of recognizing a right to jury trial in federal petty misdemeanors.

To begin with, recognizing such a right in federal court alone would be a significant change. As explained previously, federal prosecutors file over sixty thousand petty misdemeanor charges each year, from regulatory offenses to violent assaults.³⁴⁰ For those convicted, these cases end in a federal criminal record, possible jail time or onerous release conditions, and all the potential collateral consequences that flow from a misdemeanor criminal conviction.³⁴¹ In particular, Professor Amy Kimpel in a forthcoming article, *Alienating Criminal Procedure*, documents the procedural irregularities of petty misdemeanor illegal entry prosecutions along the southern border, where massive groups of defendants (sometimes fifty or more) are arraigned, plead guilty, and are sentenced before a magistrate all in one day.³⁴²

But the implications of the right could theoretically extend beyond the federal right to jury. First, recognition of the right would, under current doctrine, also entail recognition of a coterminous right to jury in state court. Second, the arguments here might have implications for enforcing the Sixth Amendment right to counsel in “all criminal prosecutions.” This Part addresses these issues and then explores

convictions in summary trials); *see also supra* notes 67, 300, 305 and accompanying text (discussing other state constitutions that only extend the right to jury trials to cases that were previously jury demandable).

340. *See supra* notes 4–7 and accompanying text.

341. *See supra* notes 12–14 and accompanying text.

342. *See Kimpel, supra* note 7, at 4 (discussing assembly-line conviction and punishment for federal petty misdemeanor of illegal entry in southern border districts).

whether a broader jury right would be meaningful in practice, given the constraints of the modern criminal system.

A. *A Right to Jury Trial in State Petty Misdemeanors?*

Were the Supreme Court to recognize a federal right to jury trial in petty misdemeanors, it would be hard pressed under current law not to recognize a coterminous right in state court because of the doctrine of “single-track incorporation.” Until the Civil War, the Supreme Court applied the Bill of Rights only to the federal government.³⁴³ But the Court would later interpret the Fourteenth Amendment, ratified in 1868,³⁴⁴ as incorporating parts of the Bill of Rights, thereby rendering these parts applicable to the states as well as the federal government.³⁴⁵ The Court has since settled on a “selective incorporation” approach that determines, on a piecemeal basis, whether a particular guarantee in the Bill of Rights is “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”³⁴⁶ If so, it is binding on the states through the Due Process Clause.³⁴⁷ Under this selective incorporation approach, the Court had no trouble holding in *Duncan v. Louisiana* that the jury right is sufficiently fundamental to bind states.³⁴⁸

In turn, under existing doctrine, once the Court deems a right sufficiently fundamental to bind states, that right has the same meaning

343. See, e.g., *Barron v. Mayor of Balt.*, 32 U.S. (7 Pet.) 243, 247 (1833) (holding that the Fifth Amendment’s Takings Clause does not apply to states).

344. See *infra* note 372.

345. See U.S. CONST. amend. XIV, § 1. There has been some debate as to what part of the Fourteenth Amendment incorporates the Bill of Rights, and to what extent. Justice Hugo Black and others believed that the architect of the Fourteenth Amendment, John Bingham, intended to automatically incorporate the entire Bill of Rights into the Amendment and render them binding on state governments. See *Adamson v. California*, 332 U.S. 46, 74, 76 n.7 (Black, J., dissenting), *overruled by Malloy v. Hogan*, 378 U.S. 1 (1964). Justice Clarence Thomas, in contrast, has insisted that the Privileges or Immunities Clause renders the entirety of Bill of Rights binding on states, at least with respect to citizens. See *McDonald v. City of Chicago*, 561 U.S. 742, 835, 837–38 (2010) (Thomas, J., concurring). To date, the Court has declined to adopt these approaches, and instead follows a “selective incorporation” approach through the Due Process Clause. See *infra* note 348 and accompanying text.

346. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

347. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (applying selective incorporation doctrine via the Due Process Clause and holding that the right against double jeopardy is not sufficiently fundamental), *overruled by Benton v. Maryland*, 395 U.S. 784, 795 (1969) (deeming double jeopardy guarantee fundamental).

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

and scope in state and federal court. A majority of the Court declared as early as 1964 that incorporated constitutional rights do not have a different meaning in state and federal court.³⁴⁹ While at least one Justice—Justice Lewis F. Powell—suggested in a concurring opinion in *Apodaca v. Oregon*³⁵⁰ that the right to jury unanimity was part of the federal jury right but should not apply to states,³⁵¹ the Court has three times since explicitly rejected Justice Powell’s would-be “dual-track incorporation” approach. First, the Court in *Timbs v. Indiana*³⁵² rejected dual-track incorporation in the context of the Eighth Amendment’s Excessive Fines Clause, reasoning that “if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.”³⁵³ Second, the Court in *Ramos v. Louisiana*³⁵⁴ held that the jury unanimity requirement applies in state court and that the Fourteenth Amendment does not contemplate a “watered-down” version of a right in state court.³⁵⁵ Most recently, the Court in *New York State Rifle and Pistol Association v. Bruen*³⁵⁶ struck down a New York law prohibiting carrying a firearm outside the home except with a license based on a showing of “proper cause,” reaffirming that “individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government.”³⁵⁷ Thus, the Court’s recognition of a jury right in petty misdemeanors in federal court would, under current doctrine, require recognition of the same right in state court.

Yet requiring a jury trial for all state petty misdemeanors would be a much more dramatic result than recognizing the right in federal

349. See *Malloy*, 378 U.S. at 10–11 (interpreting federal and state rights against self-incrimination as coterminous after incorporation and noting that the same is true for other constitutional contexts, such as the First Amendment, Fourth Amendment, and Sixth Amendment right to counsel).

350. *Apodaca v. Oregon*, 406 U.S. 404 (1972), *abrogated by Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020).

351. See *Johnson v. Louisiana*, 406 U.S. 356, 371, 373–74, 380 (1972) (Powell, J., concurring), *abrogated by Ramos*, 140 S. Ct. at 1397. Justice Powell’s *Johnson* concurrence applied to its companion case, *Apodaca*, as well. *Id.* at 366.

352. *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

353. *Id.* at 687.

354. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

355. *Id.* at 1397–98.

356. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

357. *Id.* at 2137.

court. While the number of federal petty misdemeanor prosecutions annually is large, it is dwarfed by the millions of state court misdemeanors prosecuted each year. Moreover, federal six-month misdemeanors before *Callan* appear to have been treated as jury demandable,³⁵⁸ meaning that eliminating the exception in federal court would merely return federal practice to what it originally was. In contrast, municipal police courts summarily trying various petty offenses, at least in certain jurisdictions, existed long before *Callan*.³⁵⁹ The reality is that the right to jury, like the right to counsel, is unusual among criminal procedure rights in that full enforcement in modern state courts would be significantly more difficult than in modern federal court given the vast number of cases and variety of local practices.³⁶⁰

On the other hand, the summary practices of municipal police courts, like the English summary practices that preceded them, have never operated without controversy, even in colonial times.³⁶¹ Moreover, the effect on state courts of eliminating the petty offense exception would depend on whether, and how, states modify their charging and offense classification practices in response. States might, for example, bring fewer misdemeanor charges, decriminalize certain offenses,³⁶² or more aggressively attempt to resolve charges without

358. See *supra* notes 41–45 and accompanying text.

359. See, e.g., Frankfurter & Corcoran, *supra* note 21, at 934–65 (examining summary practices in colonial Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, and Virginia).

360. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 158 n.30 (1968) (acknowledging that uniformity in the enforcement of the Sixth Amendment “is a more obvious and immediate consideration” in federal court than in state court); *id.* at 171 (Fortas, J., concurring) (noting reasons to apply the jury trial right differently in state than federal court); *Baldwin v. New York*, 399 U.S. 66, 76 (1970) (Burger, J., dissenting) (same); Brief for Respondent at 10–13, *Scott v. Illinois*, 440 U.S. 367 (1979) (No. 77-1177) (arguing against an “absolute right” and that the jury right and right to counsel have “their cost” in common).

361. See *supra* Part II.C.

362. Administrative infractions and civil suits are noncriminal and not subject to the procedural protections of the Fifth and Sixth Amendments. See, e.g., *Turner v. Rogers*, 564 U.S. 431, 435, 441 (2011) (holding that a person incarcerated on civil infraction for failure to pay child support was not entitled to counsel and noting that the Sixth Amendment applies only to criminal cases); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (listing factors to determine whether a sanction for conduct is regulatory or punitive, the latter of which is subject to criminal procedural rights of the Fifth and Sixth Amendments). Even traffic violations are treated as criminal offenses in some states, a practice that itself is being reconsidered precisely because the criminal designation leads to criminal sanctions arguably inappropriate for such minor offenses. See, e.g., Merrill Balassone, *Taking Minor Traffic Tickets out of Criminal Court*, CAL. CTS.

trial.³⁶³ In fact, states engaged in such modifications in response to *Baldwin* in 1970, when the Court set the line between petty and nonpetty offenses at six months.³⁶⁴ In *Baldwin*'s wake, some states modified their misdemeanor codes to reduce certain statutory maximums from one or two years to six months or less, deliberately eliminating overnight the right to jury trial for those offenses.³⁶⁵ Such legislative work-arounds suggest that reviving the jury right might simply restore state practices to what they were before *Baldwin*. Of course, the massive state misdemeanor system of 2022 could never look the way it did in 1970. But part of the reason for that might be inappropriate charging practices that take advantage of a lack of procedure to allow more cases to be brought.

The alternative to this potentially dramatic change to state court practices would be for the Court to backtrack on its condemnation of dual track incorporation and apply a watered-down version of the jury right in state court that would apply only to serious offenses. That path, too, would be radical in its own way, given the certainty with which the Court rejected dual-track incorporation in *Timbs*, *Ramos*, and *Bruen*. Dual-track incorporation also would seem an awkward fit with the view of Justice Thomas, and perhaps others on the Court, that the Fourteenth Amendment automatically incorporates the entire Bill of Rights.³⁶⁶

NEWSROOM (July 5, 2017), <https://newsroom.courts.ca.gov/news/taking-minor-traffic-tickets-out-criminal-court> [<https://perma.cc/VR4P-SJ3E>] (describing a proposal of the Commission on the Future of California's Court System to move certain traffic offenses from criminal court to civil court to reduce the criminal caseload and overly punitive outcomes).

363. See *infra* Part III.B.

364. See *supra* note 173 and accompanying text.

365. See Robert P. Connolly, Note, *The Petty Offense Exception and the Right to a Jury Trial*, 49 FORDHAM L. REV. 205, 225–26 (1980); *Bado v. U.S.*, 186 A.3d 1243, 1263–65 (D.C. 2018) (Washington, J., concurring) (criticizing the 1994 D.C. Misdemeanor Streamlining Act for purposely eliminating jury trials for various misdemeanors traditionally jury demandable).

366. See *supra* note 345 and accompanying text. A “dual track” approach would involve a case-by-case determination that particular rights or aspects of rights (such as the unanimity requirement for criminal juries) are less critical as applied to state than federal court, which is an inherently selective approach. Cf. Will Baude, *Originalism and Dual-Track Incorporation*, REASON: THE VOLOKH CONSPIRACY (Apr. 24, 2020), <https://reason.com/volokh/2020/04/24/originalism-and-dual-track-incorporation> [<https://perma.cc/B2VV-6BQ6>] (noting that a selective, fundamental-rights view of incorporation allows for “daylight” between the fundamental rights protected by the Fourteenth Amendment and the “positive . . . constitutional rights codified in 1791”).

But there are ways the Court could justify a dual-track approach with respect to extending the jury right to all criminal prosecutions in federal but not state court. First, the Court could simply recognize that its prior cases pose very different questions in terms of cost and practicability of enforcing rights in state court. The cases in which the Court explicitly rejected dual-track incorporation have involved rights that are generally just as, or nearly as, practicable to enforce in state court as in federal court. The immediate cost to states of requiring juries to be unanimous, avoiding excessive fines, or legalizing the carrying of firearms, is surely relatively small compared to the cost to states of requiring juries in all criminal prosecutions. The only other comparably expensive right that is binding on states but could be further extended in scope is the right to counsel, but at the time of *Gideon v. Wainwright*, which recognized a right to appointed counsel in state court,³⁶⁷ most states already guaranteed such a right in all felonies.³⁶⁸ And at least one scholar has suggested the right to appointed counsel might itself be a good candidate for dual-track incorporation because the *Scott v. Illinois* “actual imprisonment” standard is so blatantly violative of the Sixth Amendment’s text (and thus makes little sense when applied to federal court) but might save states significant money.³⁶⁹ More broadly, others have argued that it is perfectly natural for different levels of government to have different versions of a right.³⁷⁰

Second, the Court could justify a dual-track incorporation approach to rights that had a different commonly understood meaning in 1791 than in 1868, the year of the Fourteenth Amendment’s ratification. One scholar has argued that originalists should always consider dual-track incorporation a valid option, both because the public understanding of a right may have shifted from 1791 to Reconstruction and because selective incorporation of rights (for those

367. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

368. See Brief for Petitioner at 29, *Gideon*, 372 U.S. 335 (No. 155) (noting that thirty-five states already provided such a right in felonies like *Gideon*’s).

369. Chhablani, *supra* note 208, at 518–23.

370. See, e.g., Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1528 (2005) (arguing that a constitutional principle may be applied differently to different levels of government); see also Kristina M. Campbell, *Can Rights Be Different? Justice Stevens’ Dissent in McDonald v. City of Chicago*, 19 TEX. WESLEYAN L. REV. 733, 748–59 (2013) (discussing the implications of Justice John Paul Stevens’s dissent in *McDonald* for dual-track incorporation).

who believe in it) allows for “daylight” between a right’s original meaning and its enforcement in state courts.³⁷¹ The *Bruen* Court also hinted at such an approach.³⁷² With respect to whether to abandon the petty offense exception in state court, this approach bears no obvious answer. On one hand, the common public understanding of a criminal prosecution, and whether a state six-month criminal misdemeanor prosecuted under state law qualifies, does not appear to have been appreciably different in 1868 than in 1791. On the other hand, the drafters of the Fourteenth Amendment might have been more wary of juries overall, including in minor offenses, given anticipated local resistance to Reconstruction Era civil rights prosecutions.³⁷³

Ultimately, it is difficult to read *Duncan v. Louisiana*, in which the Court waxed poetic about the importance of the jury trial right as a check on judges and the state, and to allow summary practices in state court to continue unabated, even as courts enforce the right in federal petty misdemeanors. But if the choice is between enforcing the *Baldwin* six-month petty offense line in both federal and state court and enforcing it only in state court, the latter is more defensible.

B. *A Right to Counsel in All Criminal Prosecutions?*

If the Court recognized that the phrase “all criminal prosecutions” in the Sixth Amendment included all formally charged crimes subject to punishment in criminal court, that holding would have implications for more than just the jury right. The right to *counsel* is still only constitutionally guaranteed in cases involving actual imprisonment, per *Scott v. Illinois*.³⁷⁴ Indeed, under *Scott*, even a *nonpetty, jury-demandable misdemeanor or felony* offense carries no Sixth Amendment right to counsel if the defendant is not sentenced to incarceration.³⁷⁵

371. Baude, *supra* note 366.

372. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2138 (2022) (noting the “ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)” but declining to further address the issue because of its conclusion that the Second Amendment’s meaning in 1791 and 1868 was similar).

373. See Bressler, *supra* note 45, at 1136 (arguing that “Reconstruction Congresses sought to reduce jury power” for fear jurors would nullify).

374. *Scott v. Illinois*, 440 U.S. 367, 374–75 (1979).

375. As Professor Beth Colgan has pointed out, even the states in *Gideon* argued that there is no distinction, for right-to-counsel purposes, between incarcerative and nonincarcerative

There are only two ways to reconcile the *Scott* “actual imprisonment” standard with a new commitment to enforcing the Sixth Amendment’s trial rights in “all criminal prosecutions.” The first would be to embrace dual-track incorporation and recognize a right to counsel in all *federal* criminal prosecutions, while limiting it in state court on cost or federalism grounds. Given the Court’s vehemence in rejecting dual-track incorporation in recent years, that approach seems unlikely. Were the Court to take it, the resulting expansion of the federal right would be dramatic in itself.³⁷⁶ Indeed, over half of federal defendants whose cases end in criminal charges, including traffic offenses, drug crimes, fraud, impaired driving, and immigration offenses, proceed pro se.³⁷⁷

The second way to reconcile *Scott* with a literal reading of “all criminal prosecutions” would be for the Court to recognize a Sixth Amendment right to *retained*, but not *appointed*, counsel in cases without an actual jail or prison sentence. This approach, too, would be a dramatic departure from existing doctrine. While *Scott* involved the right to appointed counsel, the Court has implied, and lower courts have assumed, that the right to retained counsel and right to appointed counsel are coterminous.³⁷⁸ The broad language of *Gideon v. Wainwright*, in which the Court held the Sixth Amendment right to counsel—and to appointed counsel—binding on states, certainly made

punishments. Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 118 (2019). Indeed, a conviction alone is a deprivation of liberty. *See, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 410 (1985) (Rehnquist, J., dissenting) (distinguishing the right to effective assistance of appellate counsel with the opportunity to be heard in the denial of public assistance benefits because in the former, the appellant’s “‘liberty’ was deprived by his lawful state criminal conviction,” not his unsuccessful appeal).

376. *See supra* note 204 and accompanying text.

377. Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 492 n.133 (2007). Hashimoto has conducted the most comprehensive empirical examination of the right to counsel in federal petty misdemeanors. She notes huge gaps in available data but estimates that, for the period 2000–2005, 64 percent of federal misdemeanor defendants proceeded pro se. *Id.* at 489–90 & 489 n.128. Because some federal misdemeanors are deemed by statute as nonpetty (if they carry more than six months’ maximum sentence), this statistic alone does not show how many petty misdemeanor cases are pro se.

378. Indeed, some state courts have cited *Scott* in denying defendants the right to *retained* counsel as well. *See, e.g.*, *People v. MacArthur*, 731 N.E.2d 883, 887–88 (Ill. App. Ct. 2000) (holding that because the rights to retained and appointed counsel are coextensive, defendant had no right to retained counsel in a case not involving a jail sentence); *Layton City v. Longcrier*, 943 P.2d 655, 658 (Utah Ct. App. 1997) (same). *But see* *United States v. Ashurst*, No. 2:11–po–124, 2012 WL 1344824, at *1 (M.D. Ala. Apr. 18, 2012) (concluding that a magistrate judge likely erred in telling defendant he had no right to retained counsel, even in a case involving a fine only).

no distinction between the two.³⁷⁹ The assumption by lower courts that the two rights are coterminous makes sense; after all, the Sixth Amendment states that the accused “shall enjoy the right to . . . the Assistance of Counsel,”³⁸⁰ and without the right to appointed counsel, indigent defendants would not “enjoy the right” to the assistance of counsel.³⁸¹ As a leading treatise puts it,

Supreme Court precedent . . . indicate[s] that . . . proceedings . . . subject to the Sixth Amendment right to counsel are . . . the same whether the issue is being represented by retained counsel or requiring the state to appoint counsel Indeed . . . there is but a single Sixth Amendment right to counsel, encompassing both retained and appointed counsel.³⁸²

To be sure, there are at least two current Justices who appear willing to hold that the Sixth Amendment guarantees only a right to retained, not appointed, counsel.³⁸³ But even if the Court were to interpret the right in this way, it would still have to contend with a line of cases—still good law—in which the Court has recognized a right to appointed counsel on equal protection or due process grounds.³⁸⁴

379. See *Gideon v. Wainwright*, 372 U.S. 335, 344–35 (1963).

380. U.S. CONST. amend. VI.

381. But see Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 707 (1996) [hereinafter Amar, *Sixth Amendment*] (stating without elaboration that “[t]he text of the Counsel Clause can be read either way”).

382. WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* 694 (6th ed. 2017); see also *State v. Young*, 863 N.W.2d 249, 261 (Iowa 2015) (“[I]f there is a due process right to retained counsel, there is also a due process right to appointed counsel when a defendant cannot pay for retained counsel.”); see also *Powell v. Alabama*, 287 U.S. 45, 72 (1932) (“In a case such as this . . . the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.”).

383. See, e.g., *Garza v. Idaho*, 139 S. Ct. 738, 757–58 (2019) (Thomas, J., dissenting) (noting there was no right to appointed counsel at common law and arguing that neither *Gideon* nor its immediate precedents “attempted to square the expansive rights they recognized with the original meaning” of the right to counsel). Justice Gorsuch joined Justice Thomas’s *Garza* opinion. *Id.* at 750.

384. See, e.g., *Douglas v. California*, 372 U.S. 353, 357–58 (1963) (recognizing a right to appointed counsel on direct appeal, even though there is no constitutional right to an appeal); *id.* (“[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.”); *id.* (stating that without a right to appointed counsel on appeal, “[t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal”); *Anders v. California*, 386 U.S. 738, 745 (1967) (holding that states must “assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel”); *Swenson v. Bosler*, 386 U.S. 258, 259 (1967) (per curiam)

Several scholars have also argued that the right to appointed counsel could—and should—be grounded in either equal protection³⁸⁵ or due process.³⁸⁶ Ultimately, the primary barrier to litigants arguing for a broader right to counsel in both state and federal court is likely the specter of overturning *Gideon*.³⁸⁷

CONCLUSION: WOULD A BROADER JURY RIGHT BE MEANINGFUL?

This Article has argued that the petty offense exception to the jury trial right is untenable on its own terms. A final remaining question is whether a broader jury right would change anything on the ground.

(holding that the advantage of appellate assistance “may not be denied to a criminal defendant, solely because of his indigency”); *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969) (rejecting on equal protection grounds the State’s position that an indigent could be denied a free transcript of his conviction for violation of a municipal ordinance for purposes of appeal because it was a petty offense); *cf. Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion) (concluding that an indigent defendant must be given a free transcript where access to a transcript is necessary to a meaningful appeal, even though there is no constitutional right to appeal); *id.* at 18 (“There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance.”). While Justice Frankfurter only concurred in the judgment, he agreed with the plurality that “when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such a review.” *Id.* at 22–24 (Frankfurter, J., concurring).

385. See, e.g., Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon’s Promise: Using Equal Protection To Address the Denial of Counsel in Misdemeanor Cases*, 85 *FORDHAM L. REV.* 2299, 2304–05 (2017).

386. See, e.g., Amar, *Sixth Amendment*, *supra* note 381, at 707–08 & n.249 (“[T]he indigent’s right to appointed counsel could also be derived from the innocence-protecting spirit of the Due Process Clause In today’s world, an indigent defendant without counsel runs an undue risk of being convicted, even if wholly innocent.”); Tracey L. Meares, *What’s Wrong with Gideon?*, 70 *U. CHI. L. REV.* 215, 215 (2003); Tracey Maclin, *A Criminal Procedure Regime Based on Instrumental Values*, 2 *CONST. COMMENT.* 197, 213 (2005) (arguing that *Gideon*’s holding “is not supported by the text of the Sixth Amendment,” and is “better supported by an instrumental due process model rather than ‘a formalistic focus on the textually referenced ‘assistance of counsel’” (quoting DONALD A. DRIPPS, *ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE* 117 (2003))).

387. In a separate article, I offer a more detailed history of how the petty offense exception interacts with the right to counsel and offer results of original historical research, revealing that the right to counsel in nonjury summary proceedings in England, while limited, was recognized as an important and routine practice, especially when the accuser was a local official or a private party with counsel. See, e.g., *Cox v. Coleridge* (1822) 1 B. & C. 37, 49 (K.B.) (Abbott, C.J.) (noting that even where magistrates perform a ministerial role (in bail and commitment hearings) rather than judicial role (in summary proceedings), thus where the right to counsel is less important, “in practice, magistrates do permit, on many occasions, the presence of advocates for the parties accused”).

Would the right become yet another bargaining chip in the plea process, or even encourage more coercive pleas by making trials more expensive?³⁸⁸ On the other hand, even as a bargaining chip, the right might offer defendants who plead guilty—or who agree to waive a jury in exchange for lenience³⁸⁹—a discount more accurately calibrated to the rights they give up. Making petty offenses jury demandable might also curtail some of the more controversial “papering down” charging practices, in which a serious case that should end in either a full acquittal or felony conviction after a jury verdict ends instead in prosecutors dismissing the more serious count because of proof problems and securing a bench trial on a lesser, more-easily-proven charge.³⁹⁰ A broader right might also increase the number of trials, if people charged with petty offenses are more willing to take a chance on a jury trial rather than accept a plea.

In some ways, juries might be particularly influential in petty cases. Imagine, for example, an unhoused person facing a charge of unlawful entry into a parking garage, an undocumented immigrant facing a driving without a license or illegal entry charge,³⁹¹ a person facing a charge of marijuana possession in a jurisdiction where it is still illegal under state law, or a person facing a simple assault charge with a viable self-defense claim that is likely to be more sympathetic to a

388. See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 299–302 (2011) (arguing that *Gideon* and other procedural rights have made trials too expensive and encouraged coercive pleas and artificially high sentencing schemes to give prosecutors leverage in plea negotiations); ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 99–101 (2003) (arguing that plea bargaining is the “ugly child” of “adversarial legalism,” an American focus on rights and adversarial litigation over rights rather than substantive outcomes).

389. See generally John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181 (2015) (arguing that reformers should consider which trial rights might be waived in exchange for leniency, from jury to standard of proof).

390. This is the phenomenon I believe was on display in the case described at the beginning of the paper. Cf. JOSHUA DRESSLER, GEORGE C. THOMAS III & DANIEL S. MEDWED, *CRIMINAL PROCEDURE: PROSECUTING CRIME* 1106, 1111 (7th ed. 2020) (raising ethical concerns with prosecuting a serious felony assault charge as a misdemeanor in exchange for waiver of procedural rights).

391. Indeed, as Professor Amy Kimpel has noted in the immigration context, federal lawmakers reduced the maximum penalty for illegal entry from twelve to six months precisely to remove the jury trial right, out of concern that community members in southern border districts were too often declining to indict or convict defendants of immigration offenses on extralegal grounds, such as disagreement with federal immigration policy. See Kimpel, *supra* note 7, at 22–23 (citing Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65, 83–84 (2012)) (noting that jury nullification was one impetus for reducing the maximum penalty for illegal entry to six months).

local jury than a judge.³⁹² Defendants in such cases might desire a jury as factfinder, both because of the jury's more diverse voice in finding facts³⁹³ and the greater likelihood of nullification.³⁹⁴

Moreover, in the petty offense context, the jury right might be less open to the critique from some progressive scholars that criminal procedure rights lend a veneer of legitimacy to overly punitive convictions and sentences.³⁹⁵ Because of the natural limit on the state's ability to inflict severe punishment in petty cases, additional procedural protections might actually lead to lower conviction rates and more lenient pleas without widening the net. A jury in a petty case might be especially powerful if told of the punishment and collateral consequences, or if given a greater role in sentencing. While jury punishment is somewhat of a third rail in felony cases, there might, perhaps counterintuitively, be more reason to allow juries greater power over sentencing in petty cases.³⁹⁶ Of course, the expanded right might carry unintended legislative consequences; just as some jurisdictions responded to *Baldwin* by reducing statutory maximums to

392. Cf. Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 321 (2012) (arguing, counterintuitively, for grand juries in misdemeanor cases); Josh Bowers, *Legal Guilty, Normative Innocence, and the Equitable Decision Not To Prosecute*, 110 COLUM. L. REV. 1655, 1658–69 (2010) (noting that easy, minor cases might actually be the most normatively difficult to prosecute); Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 334–35, 352, 362 (2017) (explaining the limits and promise of MPC § 2.12, de minimis crimes, and judicial reluctance to exercise the power of dismissal).

393. To be sure, the diversity of a jury's voice depends on the jury itself being diverse, a questionable assumption. See, e.g., Annie Sloan, Note, "What To Do About Batson?": *Using a Court Rule To Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 260 (2020) (calling for more research to explore the efficacy of new state rules limiting racial proxies in peremptories); Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 788–89 (2020) (arguing that peremptory challenge reforms alone will not solve disparities in jury selection without attention to "for cause" challenges as well).

394. Of course, courts have an awkward relationship with jury nullification, recognizing its impressive pedigree but refusing to instruct juries on their power to nullify. See generally *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972) (discussing the history and benefits of nullification, while declining to recognize as error the failure to instruct the jury on its power to nullify).

395. See generally Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013) (citing critical race theory as support for the argument that public defenders and other procedural rights legitimate the system by making it look fair, even as the outcomes are overly punitive).

396. See generally Bowers, *supra* note 392 (arguing for grand juries to address the normative reasonableness of misdemeanor charges); Daniel Epps & William Ortman, *The Informed Jury*, 75 VAND. L. REV. 823 (arguing that juries should know and consider the severity of a defendant's potential sentence).

eliminate the jury right,³⁹⁷ perhaps a broader right would motivate legislatures to increase statutory maximums. But given that defendants do not appear to be sentenced to jail time for petty offenses in large numbers,³⁹⁸ slight increases in misdemeanor sentencing ranges would probably not affect actual sentences in most cases.

One final thought is that reviving the jury in petty offenses might bring the number of misdemeanors in line with traditional principles of limited government and criminal liability. To be sure, the USAO argued against a recent proposal to statutorily expand the jury right in misdemeanors in Washington, D.C., on grounds that there are too many misdemeanors to make such a right practicable.³⁹⁹ But the answer to that sort of “too much justice” concern could be to restore charging practices to what they were before misdemeanor court was so expansive or, as criminologists Norval Morris and Gordon Hawkins argued to the White House over forty years ago, to develop an “administrative law of crime” to deal with minor offenses.⁴⁰⁰ In a time where both the Black Lives Matter movement and the libertarian-leaning Manhattan Institute are bemoaning the bloated criminal state,⁴⁰¹ such reforms might actually be possible.

397. See *supra* note 365 and accompanying text; Kimpel, *supra* note 7, at 22–23 (discussing reduction of illegal entry penalty to eliminate jury right).

398. For example, over 60 percent of federal misdemeanor defendants appear pro se, see Hashimoto, *supra* note 377, at 490, and *Scott* requires a lawyer in any case involving jail time. Thus, these cases involve no jail time.

399. See Elana Suttenger, Assistant U.S. Att’y, Statement to the D.C. Council’s Comm. on the Judiciary and Pub. Safety (Dec. 16, 2021), <https://www.justice.gov/usao-dc/pr/us-attorneys-office-testifies-hearing-revised-criminal-code-act-2021> [<https://perma.cc/64JD-5F66>].

400. See James B. Jacobs, *In Memoriam: Norval Morris (1923–2004)*, 72 U. CHI. L. REV. 455, 459 (2005) (attributing the concept of an “administrative law of crime” to Morris and Hawkins in their 1977 *Letter to the President on Crime Control*).

401. See, e.g., Rafael A. Mangual, *The Criminal-Justice Reform No One’s Talking About*, MANHATTAN INST. (Oct. 31, 2017), <https://www.manhattan-institute.org/html/criminal-justice-reform-no-ones-talking-about-10746.html> [<https://perma.cc/Q9WV-775Q>] (condemning as “overcriminalization” the vast number of regulatory crimes created by agencies rather than Congress); Bench Ansfield, *How a 50-Year-Old Study Was Misconstrued To Create Destructive Broken-Windows Policing*, WASH. POST (Dec. 27, 2019), <https://www.washingtonpost.com/outlook/2019/12/27/how-year-old-study-was-misconstrued-create-destructive-broken-windows-policing> [<https://perma.cc/C2SM-U9XP>] (citing the Movement for Black Lives as challenging “broken-windows” policing of minor offenses as a racialized form of overpolicing of communities for little public safety benefit).