

# Under the Guise of Reform: How Marijuana Possession Is Exposing the Flaws in the Criminal Justice System’s Guarantee of a Right to a Jury Trial

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*ABSTRACT: Recent Supreme Court decisions have restricted a criminal defendant’s right to a jury trial. By setting the threshold to trigger a jury trial right at six-months imprisonment, the Supreme Court once feared that the legislature might classify serious crimes as petty, and take away a defendant’s right to a jury trial. But what if the opposite happened? What if the legislature classified an offense that Americans no longer believed was a crime out of the reach of their input by eliminating the jury? This is what has occurred in some states with minor marijuana possession. Even though a majority of Americans believe that marijuana possession should be legalized, some states are continuing to prosecute it as a crime without a jury trial. While waiting for marijuana reform, thousands of defendants will be prosecuted for a crime without the judicial check of a jury trial. Perhaps the electorate will respond through their votes, but democracy takes time, and at a cost to all the offenders who await judgment. This Note will examine how this offense managed to fall through the cracks of the judicial and legislative system at both the federal and state level. In highlighting these issues, this Note argues that the justice system should correct its flaws to prevent future offenses from suffering the same fate.*

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## I. INTRODUCTION

Americans' views towards the legality of marijuana are changing, and this shift has unintended consequences for an individual's right to a jury trial.<sup>1</sup> In 2012, a Rasmussen poll found that 56% of Americans support legalizing marijuana.<sup>2</sup> Within the past forty years, Americans have drastically shifted their perspective from one of adamant disapproval to ever-increasing approval.<sup>3</sup> Even with this overall growing trend, there are differences in approval ratings depending on region and political party affiliation.<sup>4</sup> As elected officials and legislatures grapple with this tension, some states have passed or are trying to pass legislation decreasing the penalty for marijuana possession.<sup>5</sup> At the federal level, legislators with increasing awareness of the disparity in state decriminalization measures have sought to defer to the states to control penalizing marijuana possession.<sup>6</sup> Although the Ending Federal Marijuana Prohibition Act did not leave the House of

1. See Elizabeth Mendes, *New High of 46% of Americans Support Legalizing Marijuana*, GALLUPPOLITICS (Oct. 28, 2010, 4:00 PM), <http://www.gallup.com/poll/144086/new-high-americans-support-legalizing-marijuana.aspx> (describing a Gallup poll that shows an upward trend in legalizing marijuana since 2000); *Majority Now Supports Legalizing Marijuana*, CTR. FOR PEOPLE AND THE PRESS, PEWRESEARCH (April 4, 2013), available at <http://www.people-press.org/2013/04/04/majority-now-supports-legalizing-marijuana/> (finding that a majority of Americans favor legalizing marijuana).

2. Lucia Graves, *56 Percent of Americans Favor Legal Marijuana in New Poll*, HUFFINGTON POST (May 22, 2012, 7:31 PM), [http://www.huffingtonpost.com/2012/05/22/legalize-marijuana-56-percent-rasmussen-poll\\_n\\_1537706.html](http://www.huffingtonpost.com/2012/05/22/legalize-marijuana-56-percent-rasmussen-poll_n_1537706.html) (citing *56% Favor Legalizing, Regulating Marijuana*, RASMUSSEN REPORTS (May 17, 2012), [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/may\\_2012/56\\_favor\\_legalizing\\_regulating\\_marijuana](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/may_2012/56_favor_legalizing_regulating_marijuana)).

3. See RASMUSSEN REPORTS, *supra* note 2 ("Approximately 8 in 10 Americans were *opposed* to legalizing [marijuana] . . . in the late 1960s and early 1970s"). This article also mentioned that, although medical marijuana is experiencing a downward trend in approval ratings, it is still relatively high at 70%. *Id.*

4. *Id.* (describing how approval is higher in the West and among liberals than in the South, the Midwest, and among conservatives).

5. For example, Massachusetts passed a law in 2009 that made marijuana possession of one ounce or less a civil offense punishable by a fine and forfeiture of the marijuana. MASS. GEN. LAWS ch. 94C, § 32L (2009), available at <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter94C/Section32L>; Ky. H. Journal, 2011 Reg. Sess., KY. REV. STAT. ANN. § 218A.1422 (West Supp. 2013) (detailing the legislative history of KY. REV. STAT. ANN. § 218A.1422 that amended possession of marijuana from a Class A to a Class B misdemeanor); see also *Decrim Passes House by One Vote, Fails in Senate*, MARIJUANA POLICY PROJECT, <http://www.mpp.org/states/new-hampshire/> (last updated Nov. 7, 2013) (describing how a New Hampshire bill decreasing the penalty for half an ounce of marijuana to a violation passed the House by a narrow margin, and failed in the Senate).

6. Ending Federal Marijuana Prohibition Act of 2011, H.R. 2306, 112th Cong. (1st Sess. 2011); see Daniel B. Wood, *Dramatic Change' to Marijuana Laws? What Bill Before Congress Would Do*, CHRISTIAN SCI. MONITOR (June 24, 2011), available at <http://www.csmonitor.com/USA/Politics/2011/0624/Dramatic-change-to-marijuana-laws-What-bill-before-Congress-would-do> (discussing how the Ending Federal Marijuana Prohibition Act would take marijuana off the schedule of controlled substances, and leave it to state legislatures to decide the legality of marijuana).

Representatives, it highlights the importance of states as key actors in the tumultuous process of classifying marijuana possession and setting appropriate penalties.<sup>7</sup>

The benefits and costs of decriminalizing marijuana have been debated. Proponents of decriminalization highlight the decreased cost of prosecution and arrest, as well as the possible increase in revenue from fines.<sup>8</sup> Furthermore, proponents argue decreasing the penalty will not increase marijuana use because the act of possession is still illegal, albeit with less severe consequences.<sup>9</sup> Opponents counter that marijuana is a gateway drug that leads to other drugs.<sup>10</sup> They also describe the possible adverse health effects associated with marijuana consumption.<sup>11</sup> However, the policy arguments and legal implications for and against legalizing marijuana are beyond the scope of this Note. This Note will instead focus on the steps states are taking towards decriminalizing marijuana.

Grappling with the push of the electorate to legalize marijuana, some states have decriminalized possession of small amounts of marijuana.<sup>12</sup> For example, Massachusetts treats possession of one ounce or less of marijuana as a civil offense similar to a traffic citation.<sup>13</sup> If an individual is caught with an ounce or less of marijuana, she will receive a citation, a \$100 fine, and be required to forfeit her marijuana to the law enforcement officer.<sup>14</sup>

On the other end of the spectrum, some states are staunchly opposed to marijuana reform, and they are considering increasing the penalties

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7. Ending Federal Marijuana Prohibition Act, H.R. 499 (2013) (removing marijuana from the Controlled Substance Act); Wood, *supra* note 6.

8. See Deborah Maloff, *A Review of the Effects of the Decriminalization of Marijuana*, 10 CONTEMP. DRUG PROBS. 307, 316–20 (1981) (describing how decriminalizing marijuana is correlated with decreasing arrest rates and law enforcement costs).

9. See Clifford F. Thies & Charles A. Register, *Decriminalization of Marijuana and the Demand for Alcohol, Marijuana and Cocaine*, 30 SOC. SCI. J. 385 (1993) (arguing the demand for drugs, including marijuana, is relatively inelastic and usage is not impacted by changes in the law related to “possession of small amounts of marijuana”).

10. See Thomas Kaplan & John Eligon, *Divide in Albany Kills Proposal on Marijuana*, N.Y. TIMES (June 19, 2012), <http://www.nytimes.com/2012/06/20/nyregion/cuomo-bill-on-marijuana-doomed-by-republican-opposition.html> (discussing the decriminalization debate in the New York State Senate where Senator John J. Flanagan said, “Marijuana still is a gateway drug to so many other much more dangerous things”).

11. See *DrugFacts: Marijuana*, NAT’L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/drugfacts/marijuana> (last visited Nov. 17, 2013) (explaining effects of marijuana on mental and physical health).

12. *States That Have Decriminalized Marijuana*, NORML.ORG, <http://norml.org/marijuana/personal/item/states-that-have-decriminalized> (last visited Nov. 17, 2013) (listing states that have decriminalized marijuana possession).

13. MASS. GEN. LAWS ch. 94, § 32L (2009), available at <http://www.lawlib.state.ma.us/subject/about/marijuana.html>.

14. *Id.*

associated with marijuana possession.<sup>15</sup> One ounce of marijuana in Florida carries a maximum penalty of five years imprisonment and a fine of \$6,000.<sup>16</sup> Thus, for the same amount of marijuana, an individual in Florida could face imprisonment, a hefty fine, and a possible criminal record,<sup>17</sup> whereas an individual in Massachusetts suffers only a ticket and a small fine.<sup>18</sup>

Between these two extremes, some states are decreasing the maximum criminal penalty attached to marijuana possession, but stop short of decriminalization.<sup>19</sup> For example, in May 2012, Maryland followed in the footsteps of other states and decreased the criminal penalty for possession of small amounts of marijuana.<sup>20</sup> Instead of a maximum penalty of one year imprisonment and a \$1,000 fine,<sup>21</sup> the new law reduces the penalty “to imprisonment not exceeding 90 days or a fine not exceeding \$500 or both.”<sup>22</sup>

Legislators, prosecutors, and proponents of Maryland’s new marijuana *de minimis*-quantity law speak about judicial efficiency, but they fail to cite one of the essential differences between the 2011 decriminalization bill and this new law: the defendant’s right to a jury trial.<sup>23</sup> Even legislative opponents did not focus on this point, but instead relied on the argument that marijuana is a gateway drug.<sup>24</sup> Under Maryland law, the threshold for triggering the right to a jury trial in a criminal case is over ninety-days of imprisonment.<sup>25</sup> Maryland’s new marijuana *de minimis* law has a maximum penalty of ninety days—just one day shy of triggering a defendant’s jury trial

15. Jessica Rao, *Tough Marijuana States Southern Discomfort*, CNBC (Apr. 20, 2010), [http://www.cnbc.com/id/36179399/Tough\\_Marijuana\\_States\\_Southern\\_Discomfort](http://www.cnbc.com/id/36179399/Tough_Marijuana_States_Southern_Discomfort).

16. *Id.*

17. *Id.*

18. MASS. GEN. LAWS ch. 94, §32L (2009).

19. See *State Laws*, NORML.ORG, <http://norml.org/laws> (last visited Nov. 17, 2013) (listing marijuana-possession laws by state).

20. MD. CODE ANN., CRIM. LAW § 5-601(c)(2)(ii) (West Supp. 2012).

21. *Id.* § 5-601(c)(2) (repealed and amended), available at [http://mlis.state.md.us/2012rs/chapters\\_noln/Ch\\_194\\_hbo350E.pdf](http://mlis.state.md.us/2012rs/chapters_noln/Ch_194_hbo350E.pdf).

22. *Id.* § 5-601(c)(2)(ii).

23. The Maryland Constitution guarantees “In all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury.” MD. CONST. ART. 21; see David Hill, *Penalty Will Drop for Pot Possession in Maryland*, WASH. TIMES (May 1, 2012), <http://www.washingtontimes.com/news/2012/may/1/penalties-will-drop-for-pot-possession-in-maryland/?page=all> (explaining why proponents support the marijuana *de minimis* bill).

24. Republican Susan K. McComas said, “I’ve had clients where marijuana has been a gateway drug and they’ve gotten into worse things. Every time we do something, in the street they figure out how to get around it.” Hill, *supra* note 23.

25. MD. CODE ANN. § 4-302 2(i) (“Unless the penalty for the offense with which the defendant is charged permits imprisonment for a period in excess of 90 days, a defendant is not entitled to a jury trial in a criminal case.”).

right.<sup>26</sup> By foreclosing this right, defendants charged with marijuana possession under ten grams no longer have a choice between a jury trial and a bench trial—they must have a bench trial.<sup>27</sup>

Maryland's new law decreases the maximum penalty for marijuana possession, but because the maximum penalty was rarely reached under the old law, this is not a significant change in actual practice.<sup>28</sup> The law might also increase judicial efficiency and lower expenses in Maryland, but at a significant cost to jury trial rights. The right to a jury trial in criminal cases has a long history in the United States,<sup>29</sup> and states should be hesitant to dismiss it in the name of cost-cutting initiatives. As the Founders feared, the jury trial right is particularly vulnerable to eradication “not by gross denial, but by erosion” as a consequence of implementing jury trial alternatives.<sup>30</sup> The Maryland law abides by the Sixth Amendment jury trial right under the United States Constitution,<sup>31</sup> but states are free to enact more protective legislation that would ensure the defendant's right to a jury trial is not gradually diminished.<sup>32</sup>

This Note argues that states enacting marijuana reform legislation should be mindful of a defendant's jury trial right. States should either maintain legislation that triggers a jury trial right or completely decriminalize marijuana possession because the benefits of intermediate legislation, which only decreases the maximum penalty without guaranteeing a right to a jury trial, do not outweigh the cost of denying a defendant's right to a jury trial. Part II of this Note will explain the history and importance of the right to a jury trial. Part III examines how state constitutional language influences judicial interpretation of the right to a jury trial in marijuana-possession cases. Part III also weighs the costs and benefits of different state legislation categorizing marijuana as a civil offense, a petty crime without a jury trial right, or a criminal offense with a right to a jury trial. It will also analyze how states can ensure that an individual's rights are not compromised in the process of marijuana reform. Part IV argues that different state approaches affect the state's criminal justice system in all stages, including arrest, prosecution, trial, incarceration, and release and

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26. *Id.* § 5-601(c)(2)(ii).

27. *Id.* § 4-302.

28. Hill, *supra* note 23.

29. *See* *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968) (explaining the history of the jury trial derived from America's British common law roots).

30. *Jones v. United States*, 526 U.S. 227, 248 (1999) (citing L. LEVY, *FREEDOM OF SPEECH AND PRESS IN AMERICAN HISTORY* 1225–26 (1963)).

31. *Duncan*, 391 U.S. at 149 (holding that the federal provisions of the right to a jury trial extend to the states under the Fourteenth Amendment).

32. For example, Arizona extends a right to a jury trial to crimes that received a jury trial at the time its constitution was enacted. *See* *Derendal v. Griffith*, 104 P.3d 147, 150 (Ariz. 2005) (“Article 2, Section 23 mandates that we retain the Rothweiler test's first prong: the relationship of the offense to common law crimes.”).

legislatures should be mindful of these consequences when passing legislation.

## II. IMPORTANCE OF THE JURY TRIAL RIGHT

The right to a jury trial in a criminal case is arguably America's oldest<sup>33</sup> and most treasured<sup>34</sup> right. It is also one that the Founders recognized may be vulnerable to attack at both the state and federal level.<sup>35</sup> Among the safeguards arising from the interpretation of the Bill of Rights, which was meant to protect individuals' rights against governmental abuse, was judicial review.<sup>36</sup> However, the American criminal justice system is changing under the pressures of our society,<sup>37</sup> and judicial review is slowly taking power *away* from the jury.<sup>38</sup> Currently, the federal and state legislative branches are influencing the judiciary's protection of the right to a jury trial in criminal

33. See WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY* 46 (2002) (chronicling the criminal justice system in England and how the jury came into being before the advent of defense lawyers); DAVID E. KYRVIG, *EXPLICIT AND AUTHENTIC ACTS AMENDING THE U.S. CONSTITUTION, 1776-1995*, \*89 (1996) (citing LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 412 (Oxford Univ. Press 1969)) (noting that "the only right universally secured [by state constitutions prior to the Bill of Rights] was trial by jury in criminal cases").

34. See LEONARD W. LEVY, *CONSTITUTIONAL OPINIONS ASPECTS OF THE BILL OF RIGHTS* 119-20 (1986) (depicting James Madison's fight for the Bill of Rights and stating that an amendment securing a trial by jury in criminal cases against state violation was the most important amendment).

35. See KYRVIG, *supra* note 33, at 98 (explaining how James Madison feared that the right to a jury trial needed to be secured against state and federal government attacks). Indeed, whenever the criminal justice system falters, the legislature and judiciary often look to the jury trial as the source of their ills. See Felix Frankfurter et al., *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 920 (1926) ("One of the procedural features around which controversy gathers, whenever administration of the criminal law is attacked, is the requirement of trial by jury.")

36. See *Marbury v. Madison*, 5 U.S. 137 (1803); LEVY, *supra* note 34, at 118 ("Jefferson believed that an independent court could withstand oppressive majority impulses by holding unconstitutional any acts violating a bill of rights").

37. See LEVY, *supra* note 34, at 223 (describing the increasing number of crimes and prosecutor's burgeoning caseloads); see also Laurence A. Benner, *Eliminating Excessive Public Defender Workload*, 26 CRIM. JUST. 24 (2011) (discussing how the economic recession and limited tax revenue have strained indigent defense services). One example of the pressure is the increasing incarceration rate. A study found that in Washington there were diminishing returns for locking up more individuals. PEW CTR. ON THE STATES, *STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS* 5 (2011) (citing WASH. STATE INST. FOR PUB. POLICY, *THE CRIMINAL JUSTICE SYSTEM IN WASHINGTON STATE: INCARCERATION RATES, TAXPAYER COSTS, CRIME RATES, AND PRISON ECONOMICS* (Jan. 2003)) ("Researchers calculate that we are past diminishing returns, where each individual additional prison cell provides less and less public safety benefit.")

38. Cf. DWYER, *supra* note 33 (summarizing the ways power has been taken away from the jury in both civil and criminal contexts).

cases.<sup>39</sup> This Part of the Note will outline the judicial precedents interpreting the right to a jury trial, the systemic shortfalls between the court and the legislature, and how legislatures define crime.

#### A. THE ORIGINS OF THE JURY TRIAL RIGHT

The Sixth Amendment states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”<sup>40</sup> The Court has extended the Sixth Amendment to the states under the Due Process Clause of the Fourteenth Amendment.<sup>41</sup> This means that states must at least guarantee a defendant the same right to a jury trial in state court as a defendant would enjoy in federal court.<sup>42</sup> The states may also make laws that are more protective of a defendant’s right to a jury trial.<sup>43</sup>

Although the right to a jury trial is important, the Supreme Court has determined that the right does not attach in all criminal cases.<sup>44</sup> The dividing line is whether a crime is classified as petty.<sup>45</sup> In 1970, the Court decided that any crime with a possibility of imprisonment for at least six months cannot be classified as petty.<sup>46</sup> Therefore, when a defendant’s crime

39. See BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE 4* (1991) (discussing how “internal political forces within each state” influence state judges’ constitutional interpretations); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 5 (1997) (discussing how legislatures have great discretion over defining the nature of our criminal justice system).

40. U.S. CONST. amend. VI. Article III of the Constitution also guarantees a right to a jury trial. It states in relevant part, “The trial of all crimes, except in cases by impeachment, shall be by jury . . . .” U.S. CONST. art. III, § 2. Since this Note focuses on the individual right to a jury trial in state courts, it will refer to the Sixth Amendment right to a jury trial. See Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 *IND. L.J.* 397 (2009) (arguing that the two constitutional provisions should be interpreted as providing a communal right instead of an individual right of the accused).

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

42. *Id.*

43. See JOSEPH G. COOK ET AL., *CRIMINAL PROCEDURE 15–16* (7th ed. 2009) (listing cases where states have provided broader rights than are otherwise afforded by the federal Constitution).

44. *Baldwin v. New York*, 399 U.S. 66, 69 (1970). This is different from other rights guaranteed under the Sixth Amendment, including the right to counsel. See *Argersinger v. Hamlin*, 407 U.S. 25, 44 (1972) (holding that the right to counsel applies to misdemeanors).

45. See *Baldwin*, 399 U.S. at 66 (determining when a defendant’s Sixth Amendment right is triggered). But within two years of *Baldwin*, in the right to counsel context, the Court took a different view on what is meant by a petty offense. *Argersinger*, 407 U.S. at 47–48 (“The consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label ‘petty.’”).

46. *Baldwin*, 399 U.S. at 69. At least one scholar argued that this focus on severity of penalty and imprisonment, particularly has unnecessarily narrowed a defendant’s right to a jury

carries a penalty of at least six-months imprisonment, a defendant is entitled to a jury trial.<sup>47</sup> Below the six-month threshold, a crime is not automatically classified as petty, but a defendant must prove that it is a serious crime deserving a jury trial before a jury trial will be granted.<sup>48</sup> The Court, in an earlier analysis, described the difficulty in determining what penalty threshold should implicate a jury trial.<sup>49</sup> The Court decided to let legislatures determine the classification of crime above or below the six-month threshold because they are accountable to the electorate and the changing views of society.<sup>50</sup>

#### B. UNINTENDED CONSEQUENCES OF LEGISLATIVE DISCRETION

As a result of the Court's decisions, the legislature has broad discretion to determine which crimes deserve a jury trial right.<sup>51</sup> Although the criminal justice system separates the power of process and substance between the judicial and legislative branches,<sup>52</sup> this separation may have some unintended consequences.<sup>53</sup> The consequences may be exacerbated when the constitutional right involved is an individual right meant to protect the individual from the tyranny of the majority.<sup>54</sup>

Unlike other constitutional rights, the right to a jury trial is particularly susceptible to the criticism of a legislature: the jury is an easy scapegoat for

trial. Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133.

47. *Baldwin*, 399 U.S. at 69.

48. *Blanton v. City of N. Las Vegas, Nev.*, 489 U.S. 538, 543 (1989) (stating a defendant must prove "that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are *so severe* that they clearly reflect a legislative determination that the offense in question is a 'serious' one" (emphasis added)).

49. *See* *Dist. of Columbia v. Clawans*, 300 U.S. 617, 633 (1937).

50. *See id.* ("We are aware that those standards of action and of policy which find expression in the common and statute law may vary from generation to generation. . . . [C]ommonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial . . .").

51. *Blanton*, 489 U.S. at 543 (explaining that if a legislature attaches a penalty of six months, then it is presumed it views the crime as petty).

52. *See* Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 802 (2004) ("[C]ourts define procedural entitlements, legislatures fund them, and lawyers implement them."); Stuntz, *supra* note 39, at 5 ("[T]he criminal justice system is characterized by extraordinary discretion—over the definition of crimes (legislatures can criminalize as much as they wish), over enforcement (police and prosecutors can arrest and charge whom they wish), and over funding (legislatures can allocate resources as they wish).").

53. Stuntz, *supra* note 39, at 5 ("In a system so dominated by discretionary decisions, *discrimination is easy*, and constitutional law has surprisingly little to say about it." (emphasis added)).

54. LEVY, *supra* note 34, at 118 (explaining James Madison's concerns over adequately protecting individual rights when the government "was the instrument of the majority").

the troubles of criminal justice administration, including caseload and expense.<sup>55</sup> Further, the perceived cost associated with a constitutional right, such as administrative costs, has been correlated with the degree to which its implementation is effective and how broadly the court applies it.<sup>56</sup> For example, *Miranda* rights are arguably easy to implement, so a court may be more willing to enforce them.<sup>57</sup> According to this theory, and assuming a jury trial is more costly and time consuming than other constitutional rights,<sup>58</sup> the legislature has more incentive to define its scope and implementation.<sup>59</sup> Since the Court gave the legislature power to define crime, and the legislature has monetary control, the legislature has the ability to usurp the individual right to a jury trial in some cases.<sup>60</sup> The individual who is left out of this equation is the defendant,<sup>61</sup> who when given the choice more often than not would prefer a jury to a bench trial.<sup>62</sup>

### C. THE VALUE OF A JURY TRIAL

As the U.S. Supreme Court has noted, it is up to state discretion to determine how to manage a state's criminal justice system.<sup>63</sup> This Subpart

55. See DWYER, *supra* note 33, at 5–6 (“We have problems of expense, delay trial quality, and access to justice, but to treat these by abandoning the jury would be like amputating an arm to cure a case of influenza.”).

56. See Brown, *supra* note 52, at 806–07 (describing how lower cost initiatives such as *Miranda* rights are more widespread compared to more costly endeavors such as right to counsel).

57. *Id.*

58. Cf. Adam M. Gershowitz, *12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 961, 996–97 (explaining the time-consuming nature of jury trials compared to bench trials).

59. See Brown, *supra* note 52, at 806–07 (arguing that funding determines scope of constitutional rights).

60. For example, if a minority of the electorate in a state where marijuana possession was classified as a petty crime believed that it should be a civil offense, they would be unable to influence the outcome of a trial as a juror, or to choose a jury trial as a defendant. On the other hand, voters may be increasingly concerned about criminal justice reform. See Radley Balko, *Americans Voting Smarter About Crime, Justice at the Polls*, HUFFINGTON POST (Nov. 14, 2012, 12:03 PM), [http://www.huffingtonpost.com/2012/11/14/criminal-justice-america-crime-drugs\\_n\\_2125639.html](http://www.huffingtonpost.com/2012/11/14/criminal-justice-america-crime-drugs_n_2125639.html) (discussing criminal justice reform propositions in the 2012 election).

61. *Baldwin v. New York* 399 U.S. 66, 73–74 (1970) (acknowledging that the defendant may not think that six-months imprisonment and the social consequences is petty, but this concern is outweighed by the need for a speedy and efficient trial system).

62. Cf. Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone*, 83 WASH. U. L. Q. 151, 162 (2005) (describing that in federal cases defense lawyers rarely waived a jury trial right). *But see id.* at 180–81 (stating that in federal cases with lower penalties, the defense might be more likely to waive a jury trial right due to case overload and cost).

63. See *Gonzalez v. Raich*, 545 U.S. 1, 42–43 (2005) (Scalia, J., concurring) (citations omitted) (“This case exemplifies the role of states as laboratories. The States’ core police powers have always included authority to define criminal law . . . .”); see also *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968) (discussing that states in certain situations can determine whether or not to have a jury trial).

will outline what states will lose by taking away the jury trial right in marijuana-possession cases.

### 1. Bench Trial vs. Jury Trial

This Note does not propose to generally eliminate bench trials,<sup>64</sup> but in the case of marijuana reform, where the jury may be more congruous with the community than current laws, bench trials are inadequate. By relying on a judge who may be more insular and removed from the community than a jury, the defendant will lose the additional safeguard of community common sense. Also, a judge may be subject to influence from political and special interest groups.<sup>65</sup>

Moreover, a judge may use different criteria for determining the case's outcome. For example, a judge may weigh a criminal record differently than a jury member from a high crime area where criminal records are more common.<sup>66</sup> When police tend to patrol high-drug areas in low-income neighborhoods, the likelihood that the defendant has a criminal record will be greater.<sup>67</sup> In addition, judges may have a propensity to consider inadmissible evidence that is relevant.<sup>68</sup> And even if evidence is inappropriately admitted, having more than one person receiving the information can counter-balance the prejudicial effect.<sup>69</sup>

64. See Appleman, *supra* note 40, at 440–46 (arguing that bench trials should be eliminated because they provide “inadequate justice”); cf. Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1 (1995) (arguing that there needs to be more procedural safeguards in a bench trial to make up for the lack of a jury).

65. See, e.g., DWYER, *supra* note 33, at 158 (stating that individual judges may be more prone to tyranny); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 87–88 (1966) (validating the benefit of more people reaching a conclusion than just one); LATZER, *supra* note 39, at 4 (describing the effect of political influences on judges); Gershowitz, *supra* note 58, at 988 (explaining how judges are more likely to convict DWI offenders because of outside pressure from interest groups).

66. On the other hand, a jury is not immune to bias. One study showed that a criminal record may influence a jury more in a “weak” case where there is less evidence for conviction. Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify on Trial Outcomes*, THE LEGAL WORKSHOP, CORNELL L. REV. (Sept. 14, 2009), <http://legalworkshop.org/2009/09/14/taking-a-stand-on-taking-the-stand-the-effect-of-a-prior-criminal-record-on-the-decision-to-testify-and-on-trial-outcomes> (“We find that the fact-finder’s knowledge of a defendant’s criminal record is linked to conviction rates in weak (but not strong) cases.”).

67. See Brian Freskos, *Police Use Traffic Patrols in High Crime Areas as Deterrent*, STAR NEWS ONLINE (June 11, 2012), <http://www.starnewsonline.com/article/20120611/ARTICLES/120619955> (describing how police officers use traffic stops in high-crime areas to deter crime).

68. See Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1253–54 (2005) (describing how in certain situations judges have difficulty not considering inadmissible evidence).

69. *Id.* at 1278 (citing Jeffrey Kerwin & David R. Shaffer, *Mock Jurors Versus Mock Juries: The Role of Deliberations in Reactions to Inadmissible Testimony*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 153, 160 (1994)) (“[Most trial judges] have little if any, opportunity for group deliberation

It is arguable that a bench trial gives prosecutors a greater chance at conviction. In a drug possession case, which may be easier to prove, the prosecutor has an initial advantage.<sup>70</sup> When making the decision whether or not to charge someone, a prosecutor considers possible defenses, criminal record, and race.<sup>71</sup> It has been suggested that a prosecutor is more likely to charge someone who has fewer defense tactics, a criminal record, or fits into a racial stereotype.<sup>72</sup> This evidence does not suggest that a bench trial is better than a jury trial for a defendant, but when a state legislature eliminates a jury trial right, the defendant loses the opportunity to look at her case and weigh the two options.

Taking away the jury trial would leave the defendant without a choice between a jury trial and a bench trial.<sup>73</sup> Defendants often do not exercise their right to a jury trial in misdemeanor cases,<sup>74</sup> possibly for fear of a longer sentence,<sup>75</sup> a lack of finances, or a lack of incentives—they just want to quickly resolve their cases.<sup>76</sup> Defendants probably will not select a jury trial unless they think it will be to their advantage, meaning that the jurors will be more lenient toward them or understand their situation better than a judge.<sup>77</sup> Therefore, in a marijuana-possession case, it may not be the cost of a jury trial that is driving the state's decision, but the desire to cut off an option that would give the defendant leverage. By foreclosing the jury trial option, the defendant cannot bargain with the state to get a lower penalty such as a fine because the defendant has no alternative.

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with peers. . . . and though evidence is mixed, some studies do suggest that deliberations can improve jurors' ability to disregard inadmissible information.”).

70. See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 836 (2001) (“So broad is the reach of possession offenses, and so easy are they to detect, and then to prove . . .”). Simple possession crimes are “easy to detect” because of an individual’s eroding Fourth Amendment privacy rights and easy to prove because of the “expansive reading of possession statutes . . . includ[ing] the inapplicability of many defenses.” *Id.* at 856, 858.

71. See DWYER, *supra* note 33, at 149–50 (discussing racial stereotyping); Stuntz, *supra* note 39, at 38–39 (arguing that limited resources affect prosecutorial and defense decisions).

72. See DWYER, *supra* note 33, at 149–50.

73. There is an argument that ensuring a jury trial would foreclose a defendant’s ability to plea bargain because there would not be an option for a lesser penalty marijuana possession. This would not necessarily be the case if the legislature attached a jury trial right for all marijuana cases regardless of the penalty. Then during plea bargaining the defendant could agree to both a guilty plea and choose not to have a jury trial.

74. JOHN H. LINDQUIST, MISDEMEANOR CRIME: TRIVIAL CRIMINAL PURSUIT 21 (1988) (“A few (misdemeanants) request a jury trial . . .”).

75. Doran et al., *supra* note 64, at 9 n.34.

76. *But see* Gershowitz, *supra* note 58, at 983 (arguing that affluent DWI offenders are more likely to take their cases to trial).

77. *Cf.* Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495 (2006) (discussing, in the context of plea bargaining, that a defendant is concerned about the outcome of his individual case whereas prosecutors care about conviction rates generally).

## 2. Community Response

Although the state legislature is held accountable to its electorate, certain issues that do not gain substantial voter interest may be overlooked and passed into law without much public debate.<sup>78</sup> Even if marijuana decriminalization has gained more political attention in recent elections,<sup>79</sup> the particular issue of whether or not a defendant receives a jury trial is not at the heart of the debate.<sup>80</sup> This absence may be partially explained by the fact that most Americans dread jury duty, and the media has often portrayed the jury in a negative light.<sup>81</sup> It is more politically salient for lawmakers to frame marijuana decriminalization as a cost-savings initiative than to humanize drug users or criminal defendants.<sup>82</sup> Focusing on costs is arguably legitimate in the decriminalization context because marijuana possession becomes a civil offense. The problem is that, concurrently, politicians supporting bills that lower the marijuana penalty but do not decriminalize it use the same expense arguments, but few highlight the fact that a criminal defendant's rights are part of the decision.<sup>83</sup> This technique allows politicians passing similar legislation to hide behind the guise of decriminalization and reform,<sup>84</sup> while the electorate may not realize the legislation's impact on defendants and the right to a jury trial.

Historically, the jury has been a place where citizens voice their communal interests prior to the legislature changing the law: examples

78. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 781 (2006) (“[P]oliticians ignore the interests of criminal suspects and defendants . . .”).

79. See, e.g., David Sands, *Detroit Marijuana Ballot Measure Proposal M, Could Lead to Partial Decriminalization*, HUFFINGTON POST (Oct. 26, 2012, 5:19 PM), [http://www.huffingtonpost.com/2012/10/26/detroit-marijuana-ballot-proposal\\_n\\_2025577.html](http://www.huffingtonpost.com/2012/10/26/detroit-marijuana-ballot-proposal_n_2025577.html) (Detroit ballot initiative); cf. Kristen Mack, *Chicago OKs Pot Tickets*, CHI. TRIB. (June 28, 2012), [http://articles.chicagotribune.com/2012-06-28/news/ct-met-chicago-city-council-0628-20120628\\_1\\_pot-possession-possession-of-small-amounts-pot-tickets](http://articles.chicagotribune.com/2012-06-28/news/ct-met-chicago-city-council-0628-20120628_1_pot-possession-possession-of-small-amounts-pot-tickets) (Chicago City Council initiative).

80. See TEX. DEMOCRATIC PARTY, *2012 Texas Democratic Party Platform* 29, <http://txdemocrats.bytrilogy.com/pdf/2012-platform.pdf> (last visited Nov. 17, 2013) (discussing marijuana decriminalization in terms of law enforcement savings and public health, not right to a jury trial); David Harrison, *Marijuana Bills Tempt Cash-Starved States*, STATELINE (Apr. 5, 2010), <http://www.pewstates.org/projects/stateline/headlines/marijuana-bills-tempt-cash-starved-states-85899377887> (arguing marijuana ballot measures are related to state budget issues).

81. Cf. DWYER, *supra* note 33, at 2 (asking what Americans would do if they viewed the right to vote in the same way they view jury duty).

82. See TEX. DEMOCRATIC PARTY, *supra* note 80 (“Decriminalization of marijuana does not mean we endorse marijuana use . . .”).

83. Jeremy Arias, *Maryland Sees Shifting Attitudes on Marijuana*, GAZETTE (July 17, 2012), <http://www.gazette.net/article/20120717/NEWS/707179934/maryland-sees-shifting-attitudes-on-marijuana&template=gazette> (last visited Nov. 17, 2013) (discussing how lawmakers view marijuana possession as a cost-saving reform that will lighten the burden on the criminal justice system).

84. Phillip Smith, *Marijuana Reform Bills Pass in Maryland*, STOPTHEDRUGWAR.ORG (Apr. 11, 2012), [http://stopthedrugwar.org/chronicle/2012/apr/11/marijuana\\_reform\\_bills\\_pass\\_mary](http://stopthedrugwar.org/chronicle/2012/apr/11/marijuana_reform_bills_pass_mary) (indicating this was a positive measure on the way to stopping the drug war).

include refusing to convict people who helped slave fugitives, protestors of the Vietnam War, and people who stole during the Great Depression.<sup>85</sup> This communal voice parallels the Founders' envisioned purpose of the jury as a safeguard against governmental interest and the tyranny of the majority.<sup>86</sup> The jurors are an important insight into whether current laws, particularly controversial ones, are "attuned to community values."<sup>87</sup> In the absence of a concerned electorate or indirect electorate accountability, the jury becomes an essential direct check on legislative power.

### 3. Jury Nullification & Acquittal

Because the legislature is tasked with defining criminal distinctions and the judiciary outlines procedure, the jury acts as a bridge between safeguarding criminal procedure and holding the legislature accountable for its definition of crime.<sup>88</sup> Two ways, among others, that jurors can influence the outcome of a case are acquittal and nullification.

Depending on the type of crime, a jury may be more or less willing to acquit a defendant.<sup>89</sup> Preferences can change over time as the perception of a crime or its penalty changes within a certain community.<sup>90</sup> Driving under the influence ("DUI") is one example of jury acquittal evolution: jury willingness to acquit drunk drivers has increased over time.<sup>91</sup>

DUI cases could be important indicators for how juries may act toward marijuana possession during the present efforts for reform, including consideration of alternative measures outside the law to regulate behavior, juror empathy, and shifting perspectives toward the crime.<sup>92</sup> The failure of legal measures to influence DUI rates has led the public to consider

85. DWYER, *supra* note 33, at 73–74; cf. Joan Biskupic, *In Jury Rooms, A Form of Civil Protest Grows; Activists Registering Disdain for Laws with a 'Not Guilty,'* WASH. POST, Feb. 8, 1999, A01 (discussing how jurors are deciding to protest laws that they do not agree with or think are being unjustly applied to certain individuals); see also HIROSHI FUKURAI & RICHARD KROOTH, *RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION* (2003) (discussing "merciful acquittals" in history including the Boston Tea Party activists and proponents of the civil rights movement).

86. LEVY, *supra* note 34, at 118; Appleman, *supra* note 40, at 439 ("The right to a jury trial . . . [allowed] the average citizen a way to contribute to the politics of the local as well as the greater national polity simultaneously.").

87. DWYER, *supra* note 33, at 81.

88. See *id.* at xiv (outlining that there is a widening gap between the number of people represented by each public official, and how the jury can help remedy this).

89. ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868*, at 72 (2006).

90. *Id.*

91. *Id.* ("[J]ury willingness to acquit drunk drivers has . . . in fact increased since 1958.").

92. There are some differences between the offenses, such as DUI is illegal in all fifty states at all times, whereas the law treats marijuana differently depending on the place and situation. KALVEN & ZEISEL, *supra* note 65, at 286–97 (defining unpopular laws and the juries' response).

alternative strategies including car safety measures, public education advertising campaigns, and alcohol treatment.<sup>93</sup> There is also some evidence that when no one is injured in DUI cases, the public is less likely to feel the same way towards drunk drivers as they do toward “true criminals.”<sup>94</sup>

Marijuana reform is undergoing similar shifts, including using alternative measures such as treatment and drug courts.<sup>95</sup> Analogous to the situation for DUI cases, changing marijuana-possession sanctions does little to deter drug use, including marijuana use.<sup>96</sup> Also, when a juror personally knows someone who has smoked marijuana or driven while drunk, it may impact his ability to serve without bias.<sup>97</sup> Furthermore, the public is considering whether marijuana possession is a direct threat to public safety,<sup>98</sup> resulting in a greater divergence of opinions on how to handle marijuana reform.

There is anecdotal evidence that as public perception of marijuana changes, it is more difficult to empanel jurors who are willing to convict marijuana possessors.<sup>99</sup> This juror resistance could be even greater than in DUI cases because the DUI public safety hazard is arguably greater than marijuana use,<sup>100</sup> and jurors tend to believe that driving while intoxicated is

93. Brandon K. Applegate et al., *Public Support for Drunk-Driving Countermeasures: Social Policy for Saving Lives*, 41 CRIME & DELINQ. 171, 177–78, 184–85 (1995).

94. TASLITZ, *supra* note 89, at 72.

95. MICHAEL J. REZNICEK, BLOWING SMOKE: RETHINKING THE WAR ON DRUGS WITHOUT PROHIBITION AND REHAB 103–04 (2012) (discussing marijuana counter-measures).

96. Thies & Register, *supra* note 9.

97. In terms of defining juror leniency to certain laws, marijuana possession fits under “unpopular laws” because it is justified on “moral and social” grounds, and many people have used or know someone who has used marijuana. KALVEN & ZEISEL, *supra* note 65, at 286–97.

98. REZNICEK, *supra* note 95, at 42–43 (discussing marijuana possession and public safety). *But see* CANNABIS PHILOSOPHY FOR EVERYONE: WHAT WERE WE JUST TALKING ABOUT? 183 (Dale Jacquette ed. 2010) (discussing how purchasing marijuana from an illegal market can be harmful).

99. *See* Lisa Provence, *Not Guilty: Jury Acquits in Two Pot-Plant Case*, THE HOOK (July 18, 2012, 7:34 PM), <http://www.readthehook.com/104750/the-philip-cobbs-case-of-the-two-marijuana-plants> (describing Virginia case where six jurors were dismissed because they did not agree with the marijuana-possession law). In Mendocino County, California, a county known for its tolerance of marijuana cultivation, it is “rare” for a jury to convict in a marijuana case. DOUG FINE, TOO HIGH TO FAIL: CANNABIS AND THE NEW GREEN ECONOMIC REVOLUTION xxxiii (2012).

100. *See* REZNICEK, *supra* note 95, at 42–43 (citing NAT’L COMM’N, *The Report of the National Commission and Marijuana and Drug Abuse; Marijuana: A Signal of Misunderstanding, Commissioned by President Richard M. Nixon* (Washington, DC: National Commission, 1972)) (arguing that marijuana use is not a public safety hazard); Injury Prevention & Control: Motor Vehicle Safety, CTR. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/Motorvehiclesafety/Impaired\\_Driving/data.html](http://www.cdc.gov/Motorvehiclesafety/Impaired_Driving/data.html) (last visited Nov. 17, 2013) (citing that almost one-third of motor vehicle crash fatalities involve drivers under the influence of alcohol); *cf.* R. Andrew Sewell et al., *The Effect of Cannabis Compared with Alcohol on Driving*, 18 AM. J. ADDICTIONS 185, 189 (showing that studies have mixed results about whether driving under the influence of marijuana increases accidents whereas there is a direct connection between driving under the influence of alcohol and accidents).

a problem.<sup>101</sup> By contrast, in marijuana-possession cases, the public is not often directly affected,<sup>102</sup> so jurors may feel that marijuana possessors are not “true criminals” and be more lenient. If jurors’ attitudes toward DUIs are in any way similar to their attitudes toward marijuana, foreclosing a defendant’s right to a jury trial may cut off the community’s input and the possibility of acquitting defendants that they believe have not committed a crime.

The second way juries can influence the law is through nullification.<sup>103</sup> Jury nullification can be based on a larger social concern or a disagreement with the legal result in a specific case.<sup>104</sup> Although juries may think a marijuana-possession penalty is too harsh,<sup>105</sup> this Note elects to focus on jury nullification of marijuana-possession cases as a proxy for the larger societal issue of marijuana reform.<sup>106</sup> Jury nullification is a way for citizens to espouse their opposition to a particular crime.<sup>107</sup> Whereas the reasons behind a single jury acquittal are ambiguous, repetitive jury nullification clearly states to the government, “we disagree.”<sup>108</sup> In the case of marijuana possession, there is some evidence that the threat of nullification has led prosecutors to

101. See Rebecca Snyder Bromley, *Jury Leniency in Drinking and Driving Cases: Has It Changed? 1958 Versus 1993*, 20 LAW & PSYCHOL. REV. 27, 33 (1996) (explaining that certain jurors would like to see harsher penalties for DUIs).

102. See Jeffrey A. Roth, *Psychoactive Substances and Violence*, NAT’L INST. JUST., Feb. 1994, at 4 (“Marijuana and opiates temporarily inhibit violent behavior . . .”). One police officer, when comparing alcohol and cannabis, said that he would prefer getting “a call that involves someone using cannabis than an alcohol-related one” because there was usually less violence. FINE, *supra* note 99, at 8.

103. Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 993 (2006) (“Jury nullification . . . is an important part of the jury’s role in a criminal trial. It supports democratic and antityrannical values and can assist the disempowered in resisting majoritarian control.”).

104. BLACK’S LAW DICTIONARY 936 (9th ed. 2009) (defining jury nullification as “[a] jury’s knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury’s sense of justice, morality, or fairness”).

105. For example, a person could agree with a lesser penalty and no jury trial, but this is less likely now that over half of Americans favor legalization, which involves no criminal or civil sanctions. See RASMUSSEN REPORTS, *supra* note 2 (showing over half of Americans favor treating marijuana like alcohol and tobacco).

106. Cf. DWYER, *supra* note 33, at 62 (discussing how marijuana reform advocates are using jury nullification as a vehicle for change).

107. Paul Butler, Op-Ed., *Jurors Need to Know That They Can Say No*, N.Y. TIMES (Dec. 20, 2011), available at <http://www.nytimes.com/2011/12/21/opinion/jurors-can-say-no.html>; cf. Rubenstein, *supra* note 103 (espousing a middle ground approach to jury nullification that allows them to exercise their position as fact-finders and representatives of the communal conscience).

108. BLACK’S LAW DICTIONARY, *supra* note 104, at 936 (defining jury nullification as a way for jurors “to send a message about some social issue that is larger than the case itself”); see Butler, *supra* note 107 (discussing how jury nullification can influence prosecutorial decision making and the law).

lobby for laws that take away the jury trial.<sup>109</sup> This is an unintended consequence of juror revolt because instead of reforming the system, lawmakers who respond to this plea take the choice away from the people and put it in the prosecutors' hands.

Juror input is particularly important for preserving racial equality in criminal law enforcement.<sup>110</sup> It is widely recognized that there is a disparity in the American criminal justice system among different races.<sup>111</sup> Jurors, although only present during the trial, have the power to influence multiple stages of the criminal justice process from arrest to conviction to incarceration.<sup>112</sup> This is perhaps the only chance citizens may have to directly influence all three stages. On a larger scale, these stages can have a critical impact on an alleged offender's life. For example, conviction may influence future marijuana use—fueling, instead of healing, the problem.<sup>113</sup>

In all three stages of cases involving drug possession, there is a disproportionate representation of African Americans.<sup>114</sup> Prosecutorial discretion<sup>115</sup> and law enforcement tactics<sup>116</sup> can explain some of the

109. Butler, *supra* note 107 (“[P]rosecutors have responded to juror who are fed up . . . by lobbying lawmakers to take away the right to a jury trial in drug cases. That is precisely the kind of power grab that the Constitution’s framers were so concerned about.”).

110. See FUKURAI & KROOTH, *supra* note 85, at 176 (accounting for the jury experience interacting with law enforcement among minorities in urban areas).

111. See James Williams, *Racial Disparities in the Criminal Justice System*, N.C. BAR ASSOC. (Feb. 9, 2011), <http://criminaljustice.ncbar.org/newsletters/criminaljusticefeb11/racialdisparities.aspx> (discussing how there is disparity in arrest rates, convictions, and incarceration).

112. Jurors can indirectly influence law enforcement arrests. If a jury refuses to convict marijuana possessors then it may result in fewer arrests. For example, in Mendocino, California, police officers no longer arrest people for marijuana possession in part because of jury decisions. FINE, *supra* note 99, at xxxiii. When deciding whether or not to prosecute a case, prosecutors may consider how the case would fare in front of a jury. See Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1256 (2011). A grand jury may also refuse to indict an individual, even though recent scholarship has noted the grand jury’s diminished role. See Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171 (2008).

113. Thies & Register, *supra* note 9 (“Having been convicted, having been fired, feeling discriminated against and not being satisfied on the job were each found to have increased the number of marijuana users in both the 1984 and 1988 samples.”).

114. See Peter Reuter, Paul Hirschfield & Curt Davies, *Assessing the Crack-Down on Marijuana in Maryland* 2, 7 (May 2001) (unpublished manuscript), available at [http://www.drugpolicy.org/docUploads/md\\_mj\\_crackdown.pdf](http://www.drugpolicy.org/docUploads/md_mj_crackdown.pdf) (finding that in Maryland African Americans were twice as likely to get arrested for marijuana possession than Whites and were more likely to spend time in pre-trial jail than Whites); cf. *Race and the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/race-and-drug-war> (last visited Nov. 17, 2013) (“[P]eople of color are far more likely to be stopped, searched, arrested, prosecuted, convicted and incarcerated for drug law violations than whites.”).

115. See DWYER, *supra* note 33, at 149–50 (“A prosecutor deciding whether to charge a suspect with the most serious possible crime or some lesser offense is required by law to be race-neutral, but unconscious stereotyping may enter in; the statistics do not tell us how much of the death penalty disparity is caused by prosecutors’ charging decisions rather than by anything that happens at trial.”).

disparity. Although the law does not necessarily recognize racial stereotyping and its effects, it is a part of human reality.<sup>117</sup> Because lawyers and law enforcement officers may have a racial bias,<sup>118</sup> it is important for the jury to serve as a community counterweight. Paul Butler argues that in some nonviolent crimes, such as drug possession, it is better for the African-American community to use its power of jury nullification.<sup>119</sup> He argues that the jury is an important tool for internal destruction and rebuilding of the criminal justice system.<sup>120</sup>

#### 4. Law Enforcement Accountability & Constitutional Erosion

As public perception shifts regarding marijuana possession and use, the undercurrents of the movement seem analogous to what occurred during alcohol prohibition. One striking similarity in the scholarship of the two events is their enforcement effect on constitutional rights.<sup>121</sup> During Prohibition, the public became concerned that Supreme Court decisions regarding enforcement were eroding citizens' Fourth and Fifth Amendment rights.<sup>122</sup> Similarly, the "war on drugs" has raised concerns that the judiciary is chipping away at the individual guarantees of the Fourth Amendment<sup>123</sup> and granting more power to law enforcement to find drugs.<sup>124</sup> During Prohibition, one of the tools at the public's disposal to control law enforcement decision making was jury acquittal.<sup>125</sup> Jurors made it difficult for prosecutors to convict liquor law violators.<sup>126</sup> If it becomes difficult to get

116. See *Race, Ethnicity, and the Criminal Justice System*, AM. SOCIOLOGICAL ASSOC. (Sept. 2007), <http://www.asanet.org/images/press/docs/pdf/ASARaceCrime.pdf> (describing disparity in criminal justice system).

117. See David Cole & John Lamberth, Op-Ed., *The Fallacy of Racial Profiling*, N.Y. TIMES (May 13, 2001), <http://www.nytimes.com/2001/05/13/opinion/the-fallacy-of-racial-profiling.html> ("It is no longer news that racial profiling occurs; study after study over the past five years have confirmed that police disproportionately stop and search minorities. What is news . . . is that . . . racial profiling doesn't work.").

118. See *id.* ("In Maryland, for example, 73 percent of those stopped and searched on a section of Interstate 95 were black, yet state police reported that *equal percentages* of the whites and blacks who were searched, statewide, had drugs or other contraband." (emphasis added)).

119. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995).

120. *Id.* at 680.

121. MITCH EARLEYWINE, UNDERSTANDING MARIJUANA: A NEW LOOK AT THE SCIENTIFIC EVIDENCE 236 (2002).

122. KYRVIG, *supra* note 33, at 276–77 (discussing search and seizure without a warrant of car carrying alcohol and wiretapping a bootlegger).

123. EARLEYWINE, *supra* note 121, at 236.

124. *Id.* (discussing how judges are giving law enforcement great discretion to investigate drugs).

125. DWYER, *supra* note 33, at 77.

126. *Id.* ("The 1929–30 acquittal rate in federal liquor law prosecutions was 13 percent for cases tried in Kansas, Oklahoma, and Nebraska, 48 percent in New England, and 60 percent in New York").

marijuana-possession convictions, it is likely that prosecutors will stop charging offenders, and law enforcement will look to other types of crime.<sup>127</sup>

If a prosecutor is unable to secure a conviction by jury trial, it is less likely that law enforcement will actively seek drug-possession arrests,<sup>128</sup> and the Court will have fewer opportunities to erode Fourth Amendment rights. Even if the public agrees with penalizing marijuana possession, the jurors still serve as protection for Fourth Amendment guarantees because they can disagree with how the evidence was obtained and weigh that in their decision. Under social contract theory, there should be a balance between the government controlling violence, and the public checking the government through direct or indirect measures.<sup>129</sup>

The jury trial right might be even more susceptible to erosion because unlike other criminal justice rights, such as *Miranda* rights, the right against unreasonable search and seizure, and the right against self-incrimination, the jury trial right does not have an adequate means of enforcement. The other rights are protected by the exclusionary rule, meaning that any evidence obtained in violation of one's rights will be excluded from trial.<sup>130</sup> The exclusionary rule disincentivizes law enforcement from abusing those constitutional safeguards. Because the possibility of a jury trial influences law enforcement tactics, it may also be thought of as a constitutional safeguard. However, there is little protection for the right to a jury trial. Looking at the other rights, courts can penalize the law enforcement officer and the prosecutor for infringing on the defendant's right.<sup>131</sup> To enforce the right to a jury trial, the court and the legislature must scrutinize the judicial system

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127. REZNICEK, *supra* note 95, at 46 (citing FED. BUREAU OF INVESTIGATION, FBI'S UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES, 2009, available at <http://www2.fbi.gov/ucr/cius2009/arrests/index.html>) (estimating that sixteen percent of all arrests are for marijuana possession); see also Reuter, Hirschfield & Davies, *supra* note 114, at 3 (estimating that there are around 13,500 marijuana-possession arrests in Maryland annually).

128. Reuter, Hirschfield & Davies, *supra* note 114, at 13-15 (describing how traffic stops led to drug possession arrests as well as patrolling "drug hot spots").

129. TASLITZ, *supra* note 89, at 79 ("[T]he state is necessary to taming private violence that would fray the bonds of peoplehood, and, simultaneously, an energized People acting directly or through their branches of government is necessary to taming state violence.").

130. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing constitutional safeguards to exclude statements elicited without warnings of defendant's rights); *Spano v. New York*, 360 U.S. 315 (1959) (holding that defendant's right to counsel was violated and therefore incriminating statements made in absence of counsel were excluded); *Weeks v. United States*, 232 U.S. 383 (1914) (holding that evidence obtained in violation of the Fourth Amendment will be excluded from trial).

131. Although deterrence may not have been the initial reason behind the exclusionary rule, it is now the main premise. See *United States v. Calandra*, 414 U.S. 338 (1974). But see Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 460-61 (2010) (noting that the exclusionary rule may not deter police misconduct because police are more concerned about arrests than conviction, the probability of evidence being excluded under this rule is very low, and officers may not be able to get a conviction without the acts of misconduct necessary to obtain the evidence).

absent a direct check on the prosecutor or law enforcement. And, as noted in *Wolf v. Colorado*, “self-scrutiny is a lofty ideal.”<sup>132</sup> Instead of disincentivizing prosecutors and officers, restrictions on jury trials encourage them by offering an easier, less time-consuming road to conviction. Therefore, the judicial and legislative controls are inadequate and are causing the jury trial right’s gradual decline.

### III. STATE APPROACHES TO MARIJUANA POSSESSION

When determining whether a defendant will have a jury trial right in a marijuana-possession case, a state legislature can set the penalty for small amounts of marijuana possession in three different ways: a penalty guaranteeing a jury trial, a criminal penalty without a jury trial, and decriminalization (hereinafter jury trial option, middle ground, and decriminalization).<sup>133</sup> As discussed in Part II.A, all states are bound by the Supreme Court decision that ensures a jury trial in criminal cases where the defendant faces a possible penalty of at least six months of imprisonment.<sup>134</sup> The purpose of this jury trial extension is to act as a safeguard against capricious law enforcement at both the state and federal level.<sup>135</sup> Below this six-month threshold in state cases, state legislatures may decide whether criminal defendants will be guaranteed a jury trial right even if it is not guaranteed under the Sixth Amendment.<sup>136</sup>

This Note will focus on a state’s ability to secure a more robust right to a jury trial and explain why this would be in its best interest. States are important arbiters of justice; they handle most criminal cases,<sup>137</sup> and most litigation occurs at the state level.<sup>138</sup> Not only do states define their criminal justice systems, but they also serve as a gauge to help federal courts decide whether their decisions are working.<sup>139</sup> Along with the oversight of the

132. *Wolf v. Colorado*, 338 U.S. 25, 42 (1949).

133. Outside the context of a jury trial right, one could classify the crime of marijuana possession as prohibition, legalization, and decriminalization. EARLEYWINE, *supra* note 121, at 223.

134. *Baldwin v. New York* 399, U.S. 66, 69 (1970) (setting the threshold at six-months imprisonment); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that the right to a jury trial extends to all state cases that would require a jury trial in federal court).

135. *Duncan*, 391 U.S. at 156 (“The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.”).

136. *Juries In-Depth: Right to a Jury Trial*, AM. JUDICATURE SOC’Y, [http://216.36.221.170/jc/juries/jc\\_right\\_overview.asp](http://216.36.221.170/jc/juries/jc_right_overview.asp) (last visited Nov. 17, 2013).

137. Leipold, *supra* note 62, at 223.

138. DWYER, *supra* note 33, at 127.

139. *See Baldwin*, 399 U.S. at 72–73 (“This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn-on the basis of the possible penalty alone-between offenses that are and that are not regarded as ‘serious’ for purposes of trial by jury.”).

federal courts, the state legislature is a looking glass for the citizen's view of crime severity and definition.<sup>140</sup> With this enormous responsibility, the right to a jury trial is in the hands of state governments.

As Justice Brandeis famously said in his dissent in *New State Ice Co. v. Liebmann*, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."<sup>141</sup> It was not beyond the Court's purview that a state may employ an adequate alternative system to the jury,<sup>142</sup> but no system has yet been developed, so the jury remains an integral element of each state's criminal justice system.<sup>143</sup> What the Court may not have foreseen is the increasing number of drug possession charges that have overwhelmed the system<sup>144</sup> and led to critical state decisions on how to create an efficient and less-expensive system. Within this over-burdened system, one of the first items on the judicial chopping block is the right to a jury trial.<sup>145</sup> Although the jury trial is a procedural expense, its removal may not cure the criminal justice system's problems and may have greater unrealized costs.<sup>146</sup> This Part will outline the three approaches to marijuana possession using the examples of Iowa (jury trial option), Maryland (middle ground), and Massachusetts (decriminalization).

#### A. JURY TRIAL OPTION

In Iowa, possession of small amounts of marijuana is a crime under Iowa Code section 124.401(5).<sup>147</sup> Crimes are categorized as simple misdemeanor, serious misdemeanor, and aggravated misdemeanor depending on the maximum fine and incarceration attached to the crime.<sup>148</sup> First-time possession of marijuana is classified as a serious misdemeanor and

140. *Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000) ("The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment.")

141. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

142. *Duncan v. Louisiana*, 391 U.S. 145, 148-49 & n.14 (1968) ("[Q]uestion . . . is whether given this kind of system a particular procedure is fundamental-whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.")

143. *See id.* (stating that since no state has formed an alternative to the jury trial, the criminal system has grown up around the jury trial system and become reliant on it).

144. DWYER, *supra* note 33, at 126 ("Drug-related prosecutions . . . in . . . Washington, now account for more than half of all arrests."). *But see* *Blakely v. Washington*, 542 U.S. 296, 327 (2004) (Kennedy & Breyer, JJ., dissenting) (arguing that greater discretion should be given to the states than Congress because the state must have the flexibility to respond to its state-specific interest).

145. *See* DWYER, *supra* note 33 (discussing the demise of the jury).

146. *See id.* at 5-6.

147. IOWA CODE ANN. § 124.401(5) (West 2006).

148. *Id.* § 903.1 (West 2006).

is punishable by a fine of up to a thousand dollars and/or six months in jail.<sup>149</sup> Notwithstanding the penalty or the crime, an individual can demand a jury trial as long as she does it in a “timely manner.”<sup>150</sup>

Under the Iowa Constitution, simple misdemeanors, crimes where the fine does not exceed one-hundred dollars or imprisonment for thirty days, “shall be tried summarily by a Justice of the Peace.”<sup>151</sup> The Iowa Supreme Court has interpreted the intent of that constitutional provision as “safeguard[ing] the right to a trial by jury from violation or destruction; it was not intended to prevent the legislature from extending the right to further areas of litigation.”<sup>152</sup> The court held that an individual may demand a jury trial even for simple misdemeanors.<sup>153</sup> Therefore, no matter what criminal penalty the legislature gives marijuana possession, the defendant can always ask for a jury trial. This takes power away from the legislature but restores the defendant’s choice between a bench and a jury trial.

### B. THE DANGEROUS MIDDLE GROUND

#### 1. Legislature’s Role: Decreasing the Criminal Penalty

On May 2, 2012, Maryland passed a bill titled “Possession of Marijuana – De Minimis Quantity,” stating that anyone convicted of possessing less than ten grams of marijuana would face a maximum penalty of ninety-days imprisonment or a \$500 fine.<sup>154</sup> By reducing the penalty to ninety-days imprisonment, the legislature took away the criminal defendant’s right to a jury trial.<sup>155</sup> According to the Maryland legislature, this crime is considered petty and does not require a jury trial. They named the bill *de minimis*, which derives from the Roman phrase *de mimimis non curat lex*, “the law does not concern itself with trifles.”<sup>156</sup> This phrase usually refers to offenses that a jury would acquit or the judge would consider a waste of time.<sup>157</sup> It can also be inferred that a prosecutor has a duty not to charge individuals with *de minimis* crimes because they are so minor.<sup>158</sup> This section will outline how

149. *Id.* § 124.401(5) (West 2006).

150. IOWA R. CIV. P. 1.902(2) (“A party desiring a jury trial of an issue must make written demand therefor not later than ten days after the last pleading directed to that issue.”).

151. IOWA CONST. art. I, § 11.

152. *Marzen v. Klousia*, 316 N.W.2d 688, 691 (Iowa 1982).

153. *See id.* (holding that demand for a jury trial in a simple misdemeanor case is constitutional under IOWA CONST. art. I, § 11).

154. MD. CODE ANN., CRIM. LAW § 5-601(c)(2)(ii) (West Supp. 2012).

155. *Id.* § 4-302 2(i) (“[U]nless the penalty for the offense with which the defendant is charged permits imprisonment for a period in excess of 90 days, a defendant is not entitled to a jury trial in a criminal case.”).

156. KALVEN, JR. & ZEISEL, *supra* note 65, at 258 & n.1.

157. *Id.* at 258 nn.1, 2.

158. *Id.* at 259 (“[I]t must be a *chief aspect* of the prosecutor’s discretion that trivial complaints are screened out of the system.”).

Maryland's law circumvents safeguards meant to protect criminal defendants, including law enforcement tactics and the right to a jury trial.

Individuals who are in favor of the new law point out that marijuana arrests make up most of the drug arrests in Maryland, which takes law enforcement resources away from more violent, serious crimes.<sup>159</sup> Nevertheless marijuana possession remains illegal and allows for arrest and imprisonment.<sup>160</sup> Even with the passage of this bill, law enforcement will still be actively engaging in drug enforcement unless marijuana is decriminalized.<sup>161</sup> Easy passage of the bill was attributed in part to the state prosecutor's support.<sup>162</sup> The main sponsor of the bill was Democratic Senator Bill Raskin, who said that marijuana laws were too complex, and that the maximum penalty was hardly ever reached, so the law should be changed to reflect "actual practice."<sup>163</sup> Citing judicial efficiency, he said, "We should be getting people into treatment rather than having their cases drag on for a year or two."<sup>164</sup>

Prior to passing the new *de minimis* bill, Maryland law enforcement supported a 2011 proposal that would make possession of small amounts of marijuana a civil offense with a \$100 fine.<sup>165</sup> This is not surprising, considering the amount of resources that are spent on arresting,<sup>166</sup> prosecuting, and incarcerating<sup>167</sup> marijuana possessors.

159. Arias, *supra* note 83; see American Civil Liberties Union, *Testimony Before the House Judiciary Committee* (Feb. 21, 2012), available at [http://www.aclu-md.org/uploaded\\_files/0000/0249/hb\\_350\\_criminal\\_law\\_-\\_possession\\_of\\_marijuana.pdf](http://www.aclu-md.org/uploaded_files/0000/0249/hb_350_criminal_law_-_possession_of_marijuana.pdf) (supporting the bill because it may decrease law enforcement costs and incarceration time).

160. MD. CODE ANN., CRIM. LAW § 5-601 (West 2002 & Supp. 2013); see *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that the arrest of an individual for committing a misdemeanor while in the presence of a law enforcement officer, such as possessing certain quantities of marijuana in some states, does not violate an individual's Fourth Amendment rights).

161. Arias, *supra* note 83. Lieutenant Stephen D'Ovidio, who heads the Drug Enforcement Section in Montgomery County said, "It is still the most widely available illegal drug in Montgomery County by far, and we're going to keep targeting it as such until the law is changed." *Id.*

162. Hill, *supra* note 23.

163. *Id.*

164. *Id.*

165. Press Release, Law Enforcement Against Prohibition, Former Baltimore Cop Testifies for Bill to Decriminalize Marijuana in Maryland (Feb. 21, 2011), available at [http://copssaylegalize.blogspot.com/2011\\_02\\_01\\_archive.html](http://copssaylegalize.blogspot.com/2011_02_01_archive.html) (quoting Neil Franklin, a former narcotics officer, "The current laws force police officers in Maryland to waste hour after hour processing marijuana possession arrests. Can you imagine how many more burglaries, rapes, and murders we could solve if we put these wasted man-hours to good use?").

166. See REZNICEK, *supra* note 95, at 46 (citing FED. BUREAU OF INVESTIGATION, *supra* note 127).

167. *Id.* at 46 (citing ETHAN NADELMANN, ANNUAL REPORT 2010: MAKING YOUR VOICE HEARD, DRUG POLICY ALLIANCE, 2010, available at [http://drugpolicy.org/docUploads/DPA\\_Annual\\_Report\\_2010.pdf](http://drugpolicy.org/docUploads/DPA_Annual_Report_2010.pdf)) (increasing inmates from 50,000 to 500,000 from 1980 to 2010).

On a national level, it is estimated that 16% of arrests are for marijuana possession,<sup>168</sup> and the number of prison inmates incarcerated for nonviolent drug charges has increased by a factor of ten since 1980.<sup>169</sup> The high arrest and incarceration percentages for marijuana possession may be more significant in Maryland. One study estimated that in the 1990s, marijuana-only arrests accounted for 46% of all arrests in Baltimore.<sup>170</sup> It further stated that between 1991 and 1997, African Americans were twice as likely to be arrested as Whites, and spend more time in pre-trial jail.<sup>171</sup> This increase in African-American arrests was not correlated with an increase in marijuana use, but rather may have resulted from a change in law enforcement tactics such as targeting high drug areas and a focus on drug enforcement overall.<sup>172</sup> It is more likely that individuals living in high drug areas are low-income, minority individuals who may not have the resources to afford counsel.<sup>173</sup> Individuals who are unable to afford counsel may apply for a court-appointed attorney, which will lead to a more overwhelmed public defender.<sup>174</sup> Since passage of the marijuana *de minimis* bill, a majority of marijuana-possession charges filed have been for less than ten grams.<sup>175</sup> Once again in 2013, another bill was proposed to decriminalize marijuana, and it failed to gain support in the House of Representatives.<sup>176</sup> By failing to pass these measures and removing the jury trial, the Maryland *de minimis* law shifts the burden onto the lower courts and attorneys already dealing with a large number of misdemeanors.<sup>177</sup> Whether or not in favor of

168. *Id.* (citing FED. BUREAU OF INVESTIGATION, *supra* note 127).

169. *Id.* (citing NADELMANN, *supra* note 167).

170. See JEFFREY A. MIRON, THE EFFECT OF MARIJUANA DECRIMINALIZATION ON THE BUDGETS OF MASSACHUSETTS GOVERNMENTS, WITH A DISCUSSION OF DECRIMINALIZATION'S EFFECT ON MARIJUANA USE 5 n.7 (Nov. 1, 2003), available at [http://proxy.baremetal.com/www.drugsense.org/initiatives/ny/miron\\_novo3.pdf](http://proxy.baremetal.com/www.drugsense.org/initiatives/ny/miron_novo3.pdf) (citing Reuter, Hirschfield & Davies, *supra* note 114).

171. Reuter, Hirschfield & Davies, *supra* note 114, at 2, 7 (“[I]n Baltimore City . . . nearly four percent of all African-American males aged 12 to 17 were arrested for marijuana.”).

172. *Id.* at 10–11.

173. See Eric S. McCord & Jerry H. Ratcliffe, *A Micro-Spatial Analysis of the Demographic and Criminogenic Environment of Drug Markets in Philadelphia*, 40 THE AUSTR. & N.Z. J. CRIMINOLOGY 43, 44–45 (2007) (describing how “social disorganization” or areas with certain variables including high unemployment are correlated with having drug markets). “Given that many drug users are unemployed with low income levels, the public network enables drug users to access a wider variety of locations, including those that contain drug markets.” *Id.* at 46.

174. See LYNN LANGTON & DONALD FAROLE, BUREAU OF JUST. STAT. SPEC. REP., STATE PUBLIC DEFENDER PROGRAMS, 2007, at 6 tbl.4 (2010) (showing that many public defenders consider income level when deciding whether an individual qualifies for representation).

175. Ian Duncan, *Baltimore Prosecutors Lighten Up on Marijuana Possession*, THE BALTIMORE SUN (Apr. 20, 2013), [http://articles.baltimoresun.com/2013-04-20/news/bs-md-ci-marijuana-laws-20130420\\_1\\_marijuana-bernstein-bobby-zirkin](http://articles.baltimoresun.com/2013-04-20/news/bs-md-ci-marijuana-laws-20130420_1_marijuana-bernstein-bobby-zirkin) (1800 out of 3000).

176. S.B. 0279, 2013 Reg. Sess. (Md. 2013), available at <http://mgaleg.maryland.gov/webmg/frmMain.aspx?pid=billpage&stab=03&id=sbo297&tab=subject3&ys=2013RS>.

177. See LANGTON & FAROLE, *supra* note 175, at 1 (“Misdemeanor and ordinance violations accounted for the largest share (43%) of cases received by public defender programs.”); see also

decriminalizing marijuana possession, legislatures should consider the ramifications of a law that takes away a defendant's right to a jury trial including misallocated law enforcement and criminal justice resources.

## 2. Court's Role: Interpreting State Constitutions

The second line of defense for the jury trial right after the U.S. Constitution is the state constitution and its judicial interpretation. As the U.S. Supreme Court has begun to change defendants' rights, scholars, lobbyists, and interest groups have started to rediscover the state constitutional power.<sup>178</sup> According to former Supreme Court Justice William J. Brennan, this state constitutional renaissance is "the *most important* development in constitutional jurisprudence in our times."<sup>179</sup> Most scholarship has concentrated on state supreme court interpretation of criminal defendant rights such as search and seizure, *Miranda* rights, and right to counsel.<sup>180</sup> Scholars have examined state constitutional interpretation of the right to a jury trial generally or in the DUI context, but not in drug possession cases.<sup>181</sup> Drug possession cases are different from the DUI context because it concerns an illegal substance that may carry more social stigma than a DUI, the methods of deterrence are different, and evidence of a threat to public safety is dissimilar.<sup>182</sup> Because marijuana possession is different from other crimes that do not have a jury trial, this Note will focus on how some state constitutions have failed to adequately protect the right to a jury trial in marijuana-possession cases.

Over half of the states have constitutional provisions or judicial interpretations that protect a defendant's right to a jury trial in most criminal cases<sup>183</sup> or those with a penalty of imprisonment.<sup>184</sup> The other states

Benner, *supra* note 37, at 25 (citing NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED, AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 68 (2009)) ("In Florida . . . the [annual] average for misdemeanor cases rose to an astonishing 2,225. In Tennessee, six attorneys handled over 10,000 misdemeanors annually, spending on average less than one hour per client.").

178. LATZER, *supra* note 39, at 2-3; *see also* Lawrence M. Friedman, *State Constitutions and Criminal Justice in the Late Nineteenth Century*, in TOWARD A USABLE PAST LIBERTY UNDER STATE CONSTITUTIONS 271, 271-72 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

179. LATZER, *supra* note 39, at 1 (emphasis added) (internal quotation marks omitted) (citing NAT'L L.J., Sept. 29, 1986 (Special Supplement), at S-1).

180. *See generally id.* (explaining how states have interpreted Fourth, Fifth, and Sixth Amendment rights).

181. *See, e.g.*, T. Ward Frampton, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CAL. L. REV. 183, 198 (2011); Gershowitz, *supra* note 58, at 1006; Murphy, *supra* note 46, at 171-72.

182. *See* Gershowitz, *supra* note 58, 982-83 (arguing against a right to a jury trial in DUI cases because jury trials take too long and celerity is a deterrent in DUI cases).

183. *See* Murphy, *supra* note 46, at 171, n.177 (including Montana, Utah, Ohio, Alabama, Alaska, Arkansas, California, Colorado, Idaho, Indiana, Iowa, Kentucky, Maine, Michigan, Mississippi, North Dakota, Tennessee, Vermont, and Wisconsin).

set certain levels of imprisonment below the six-month threshold where the jury trial right is triggered, use other tests to determine the jury trial right, or use the federal interpretation.<sup>185</sup> States that interpret their state constitutions as guaranteeing a right to a jury trial for offenses that were crimes at common law fail to protect the right to a jury trial in drug possession cases. This Note will focus on two states, Arizona and Florida, as examples of this methodology.

*a. Arizona: Common Law Approach*

In Arizona, the Supreme Court has interpreted the right to a jury trial as only attaching to offenses that were crimes at common law. The relevant text of the Arizona Constitution states, “[t]he right of trial by jury shall remain inviolate [and i]n criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury.”<sup>186</sup> Originally, Arizona used a three-part test to determine whether an offense was jury eligible.<sup>187</sup> It made the judiciary responsible for determining when the right was triggered, not the legislature in its designation of the crime as a petty offense.<sup>188</sup> Using the *Rothweiler* test, the Arizona Supreme Court considered three prongs: the severity of the penalty (the “grave consequences” doctrine), the moral quality of the offense, and the common law classification of the crime.<sup>189</sup>

However, after the U.S. Supreme Court decision in *Blanton*,<sup>190</sup> and the subsequent assumption that an offense with imprisonment of less than six months is a petty offense, the Arizona Supreme Court revisited its decision in *Rothweiler*.<sup>191</sup> In *Derendal v. Griffith*, the court decided to retain only one prong of *Rothweiler*, the common-law test pertaining to the “shall remain inviolate” interpretation of the Constitution.<sup>192</sup> This test meant that if an offense received a jury trial at the time of the state constitution’s adoption then it would receive one today.<sup>193</sup>

184. See *id.* at 172, n.178.

185. See *id.* at 172–73.

186. ARIZ. CONST. art. II, §§ 23–24

187. *Rothweiler v. Super. Ct. of Pima Cnty.*, 410 P.2d 479, 483 (Ariz. 1966), *overruled by Derendal v. Griffith*, 104 P.3d 147 (Ariz. 2005).

188. *Rothweiler*, 410 P.2d at 483 (holding that the a DUI with a right to drive suspension, imprisonment up to six months and a fine of up to \$300 is not a trivial offense even though it was considered a petty offense according to the legislature).

189. *Id.*

190. *Blanton v. City of N. Las Vegas, Nev.*, 489 U.S. 538, 543 (1989).

191. *Rothweiler*, 410 P.2d at 479.

192. *Derendal v. Griffith*, 104 P.3d 147, 150 (Ariz. 2005).

193. *Id.* (“Article 2, Section 23 mandates that we retain the *Rothweiler* test’s first prong: the relationship of the offense to common law crimes.”). It also preserves the jury trial right for those crimes that have a common law antecedent, such as poker operations, because they are

If the offense does not have a common law antecedent, it falls under Article 2 § 24 of the Arizona Constitution. Under Article 2 § 24, the Arizona Supreme Court adopted a modified *Blanton* criteria<sup>194</sup> and presumes that an offense with a penalty of six months or less is petty, and ineligible for a jury trial. The defendant can rebut that presumption by showing that “the offense carries additional severe, direct, uniformly applied statutory consequences.”<sup>195</sup> Removing two prongs of their previous test left only the objective question of whether the crime was a crime at common law and the defense of showing a sufficiently severe penalty. Thus, Arizona’s current test follows the federal test by relying in part on the legislative definition of crime. The only difference is the common law rule, which fails to protect marijuana-possession cases.<sup>196</sup>

Prior to *Derendal*, marijuana possession was considered severe enough to warrant a jury trial in Arizona.<sup>197</sup> Using the “grave consequences” doctrine described in *Rothweiler*, the courts looked at both the penalty and the “grave consequences flowing from the conviction,” including stigma and other penalties such as losing a driver’s license.<sup>198</sup> Using the grave consequences doctrine, prior to *Derendal*, the Arizona Supreme Court found that marijuana possession deserved a jury trial.<sup>199</sup> Once the court stopped using the “grave consequences” doctrine, in addition to the legislature decreasing the penalty for marijuana, the court found the severity argument unpersuasive.<sup>200</sup>

Prior to statehood, marijuana possession was not a crime in Arizona.<sup>201</sup> Like most states, Arizona did not make marijuana possession illegal until the 1930s, approximately twenty years after it achieved statehood.<sup>202</sup> In *Stoudamire v. Simon*, when trying to get a jury trial, Stoudamire argued that

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similar to gaming houses at common law. *Id.* (citing *Bowden v. Nugent*, 226 P. 549, 550 (Ariz. 1924)).

194. *Id.* (“[W]e leave to the legislature the primary responsibility for determining, through its decision as to the penalty that accompanies a misdemeanor offense, whether the offense qualifies as a ‘serious offense.’”).

195. *Id.* at 156.

196. *Stoudamire v. Simon*, 141 P.3d 776, 778 (Ariz. Ct. App. 2007).

197. *Arizona ex rel. Dean v. Dolny*, 778 P.2d 1193, 1196 (Ariz. 1989), *overruled by Derendal*, 104 P.3d 147.

198. *See id.* (citing *Rothweiler v. Super. Ct. of Pima Cnty.*, 410 P.2d 479, 484–85 (Ariz. 1966)).

199. *See id.* (“We conclude that a conviction for possession of marijuana results in consequences sufficiently grave to warrant a jury trial. Not only could one convicted . . . expect decreased employment opportunities, one could also reasonably expect the imposition of conditions to be placed on employment . . . such as drug counselling, treatment, or testing.”). The court also discusses that certain professional licenses would be unavailable to the convicted. *Id.*

200. *Stoudamire*, 141 P.3d at 779–80.

201. *Id.*

202. *Id.*

possession of marijuana was similar to opium possession, which was illegal prior to statehood.<sup>203</sup> The Court of Appeals rejected this argument because it concluded that these crimes did not have “substantially similar elements.”<sup>204</sup> Stoudamire also tried to argue that marijuana possession was a serious offense, but the court took a narrow view of “seriousness,” looking only at the penalty affixed to the crime.<sup>205</sup> Because the penalty was six-months imprisonment, the court said that it was not a serious offense according to the legislature and did not merit a jury trial.<sup>206</sup> This situation exemplifies the pitfalls of the common law approach to marijuana possession: other than Hawaii and Alaska, all states achieved statehood prior to marijuana becoming an illegal substance. If courts adopt a similar interpretation as Arizona, other drugs that were legal at common law will have little persuasive value, and defendants will be denied their jury trial right.

*b. Florida: Malum in Se vs. Malum Prohibitum*

The Florida Supreme Court has taken a similar approach to classifying whether a crime triggers a jury trial right. It has a two-category test: if the offense was a crime at common law or if the crime is *malum in se*, then the defendant will have a jury trial right.<sup>207</sup> This section will focus on the second part of the test: *malum in se* versus *malum prohibitum*. The difference between *malum in se*<sup>208</sup> and *malum prohibitum*<sup>209</sup> is not necessarily clear.<sup>210</sup> It is often referred to as the difference between a felony and a misdemeanor.<sup>211</sup> Historically, *malum in se* was not based on the seriousness of the crime, but on whether it was a crime against nature or God.<sup>212</sup> As legislatures classify crimes based on seriousness of the penalty, a crime could shift from being *malum in se* to *malum prohibitum* as the penalty declines.<sup>213</sup> If this were the case, then the jury right would not be afforded any more protection than

203. *Id.*

204. *Id.* (internal quotation marks omitted).

205. *Id.*

206. *Id.* at 779.

207. *Reed v. State*, 470 So. 2d 1382, 1384 (Fla. 1985).

208. BLACK'S LAW DICTIONARY, *supra* note 104, at 1045 (“A crime or an act that is inherently immoral, such as murder, arson, or rape.”).

209. *Id.* (“An act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.”).

210. LINDQUIST, *supra* note 74, at 16.

211. *Id.* at 15 (“This distinction between felony and misdemeanor crime is sometimes translated as dividing crime into two types: mala in se, those things that are wrong in themselves, and mala prohibita, those that are wrong because they are prohibited.”) (citation omitted).

212. *Id.* at 16.

213. *Id.*

under the federal Constitution because it leaves the decision up to the state legislature to classify the crime.

Florida has taken a different although somewhat analogous approach to a strict *malum in se* approach. According to the Florida Supreme Court, criminal mischief, such as breaking a glass door, is “malicious” and therefore *malum in se* and will receive a jury trial.<sup>214</sup> This is the case even though the legislature classified the crime as a misdemeanor and attached a penalty of imprisonment less than sixty days.<sup>215</sup> Therefore, the court substitutes the use of *malum in se* to determine the communal perspective of the crime at common law.<sup>216</sup>

However, the voice of the jury may be more important in *malum prohibitum* cases.<sup>217</sup> So-called “victimless crimes,” classified as *malum prohibitum* crimes such as marijuana possession, are a chance for the jury to say “no” to the current criminal process through acquittal or nullification.<sup>218</sup> In *malum in se* cases, the jury is important to the fact-finding process, but its role as a reflection of community values is less important.<sup>219</sup> It would be unjust for the jury to assert their power in violent crime cases where others may have been harmed.<sup>220</sup> By relying on the *malum in se* classification, the Florida court is removing power from the jury.

Currently, marijuana possession in Florida has a severe enough penalty to trigger a jury trial right, but that does not safeguard it from future legislative action reducing the penalty.<sup>221</sup> The Florida courts are applying this complicated *malum in se* analysis that may produce disparate results for offenses that did not exist during common law, such as marijuana possession, and have restricted the jury’s ability to weigh in on whether they believe a crime is evil or not.

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214. Reed v. State, 470 So. 2d 1382, 1384 (Fla. 1985).

215. *Id.* at 1383.

216. *Id.*

217. Butler, *supra* note 107, at 715.

218. *Id.*

219. *Id.* Juries may be more important in *malum prohibitum* cases because a defendant is strictly liable and the crime is societally defined. Because the jury can be a reflection of societal views, it will safeguard a defendant from being strictly liable for a crime that society may no longer statutorily classify as *malum prohibitum*. See Richard L. Gray, Note, *Eliminating the (Absurd) Distinction Between Malum In Se and Malum Prohibitum Crimes*, 73 WASH. U. L. REV. 1369, 1369–70 (1995).

220. Butler, *supra* note 107, at 715.

221. *Florida Penalties*, NORML, <http://norml.org/laws/item/florida-penalties> (last visited Nov. 17, 2013) (stating that marijuana possession of twenty grams or less is a misdemeanor with a penalty of a year imprisonment).

## C. DECRIMINALIZATION

In January 2009, a large majority of Massachusetts voters voted to decriminalize small amounts of marijuana possession.<sup>222</sup> It is now a civil offense with a \$100 ticket.<sup>223</sup> Because possession is no longer a criminal offense with imprisonment or a record, small-amounts-of-marijuana-possession offenders no longer require a jury trial.<sup>224</sup> This section will discuss how Massachusetts may serve as a model for other states that want to decriminalize marijuana.

The debate about whether or not to decriminalize marijuana has recurred throughout American history.<sup>225</sup> The first wave of discussion surrounding decriminalization began in the 1960s, resulting in eleven states decriminalizing marijuana.<sup>226</sup> However, the tide favoring drug prohibition began to rise in the 1990s.<sup>227</sup> Now there is a renewed focus on marijuana decriminalization<sup>228</sup> and legalization.<sup>229</sup> Within the context of criminal procedure and financial expenditures, there is a strong argument in favor of decriminalization. This section will briefly outline the arguments that support decriminalization over a bench trial

First, in the case of small amounts of marijuana possession, one national study showed decriminalization did not significantly affect marijuana use.<sup>230</sup> The study also found marijuana decriminalization may moderate the use of

222. MASS GEN. LAWS ch. 94C, § 32L (2009), available at <http://www.lawlib.state.ma.us/subject/about/marijuana.html>.

223. *Id.*

224. *Op-Ed: Pot Wins in a Landslide: A Thundering Rejection of America's Longest War*, MARIJUANA POLICY PROJECT, <http://www.mpp.org/media/op-eds/op-ed-pot-wins-in-a.html> (last visited Nov. 17, 2013) (stating that 65% of voters approved marijuana decriminalization).

225. See, e.g., EARLEYWINE, *supra* note 121, at 223–31 (discussing different rationales for marijuana decriminalization as well as opposition to it); Rosalie Liccardo Pacula et al., *Marijuana Decriminalization: What Does It Mean in the United States?* (Nat'l Bureau of Econ. Research, Working Paper No. 9690), available at [http://www.nber.org/papers/w9690.pdf?new\\_window=1](http://www.nber.org/papers/w9690.pdf?new_window=1) (describing the debate in the 1970s over decriminalization); Thies & Register, *supra* note 9 (providing a historical account of decriminalization).

226. Pacula et al., *supra* note 225, at 30, tbl.1.

227. Thies & Register, *supra* note 9.

228. See Greg Rosalsky, *New Jersey Assembly Approves Marijuana Decriminalization Bill*, HUFFINGTON POST (June 26, 2012 4:54 PM), [http://www.huffingtonpost.com/2012/06/26/new-jersey-assembly-appro-n\\_1626147.html](http://www.huffingtonpost.com/2012/06/26/new-jersey-assembly-appro-n_1626147.html) (discussing New Jersey's struggle to pass marijuana decriminalization legislation); Annie-Rose Strasser, *Marijuana Decriminalization Makes It onto Texas Democratic Platform*, THINK PROGRESS (June 18, 2012 3:38 PM), <http://thinkprogress.org/culture/2012/06/18/501639/marijuana-decriminalization-makes-it-onto-texas-democratic-platform/> (discussing the Texas Democratic Party platform supporting decriminalization).

229. See Matt Sledge, *Marijuana Legalization May Pass in at Least 1 State This Year*, HUFFINGTON POST (Oct. 15, 2012 5:37 PM), [http://www.huffingtonpost.com/2012/10/15/marijuana-legalization-ma\\_n\\_1968195.html](http://www.huffingtonpost.com/2012/10/15/marijuana-legalization-ma_n_1968195.html) (discussing marijuana legalization on the ballot in Washington, Colorado, and Oregon during the 2012 election).

230. Thies & Register, *supra* note 9.

other substances, such as cocaine and alcohol.<sup>231</sup> Second, in Massachusetts, another study found that after decriminalization, 90% of users did not increase their use or try more illicit drugs.<sup>232</sup>

Decriminalization of marijuana may decrease law enforcement costs and shift focus to other more violent crimes. Prior to the passage of Massachusetts' decriminalization proposal, a study projected that marijuana decriminalization would save Massachusetts \$24.3 million annually in arrest and prosecution expenses.<sup>233</sup>

#### IV. IMPLICATIONS OF JURY TRIAL REMOVAL

Many states are in the process of re-evaluating their approach to marijuana possession. As John McCarthy, County State's Attorney in Maryland, said, "[Marijuana possession] is part of the public conversation about what is intelligent criminal justice policy in terms of making us a safer community [and] what makes the most sense for us as a community[.]"<sup>234</sup> Yet, one communal voice within the criminal justice system, the jury, is being silenced. Thus, the fate of defendants charged with marijuana possession is in the hands of the judge, the prosecutor, and the legislature. This tips the balance against the criminal defendant.

##### A. STATE LEGISLATURE: SETTING A THRESHOLD

By setting a threshold for triggering a jury trial right, such as ninety-days imprisonment, the judicial branch shifts the power to the legislature and the prosecutor. Once the legislature decides that a certain crime such as possession of a small amount of marijuana should be classified at this level, those defendants no longer have a right to a jury trial. Then, the prosecutor can decide to charge an individual with the lower-penalty crime because she believes that she will get a more favorable verdict in a bench trial.<sup>235</sup> Furthermore, by reducing the penalty below the threshold and removing the jury, the legislature may be making it easier for prosecutors to get a conviction in marijuana-possession cases.<sup>236</sup> When the prosecutor forecloses

231. *Id.* (finding that marijuana decriminalization correlated with a higher number of cocaine users, but using a smaller amount and fewer binge drinkers).

232. Keriann Speranza, *The Effects of Massachusetts' Decriminalization of Marijuana Law on Use Patterns*, 7 UNDERGRADUATE REV. 101, 106 (2011).

233. MIRON, *supra* note 170, at 2–3 (noting that this might be an under-estimation because it does not include pre-trial, trial expenses or imprisonment, but it also assumed that any personal use amount would be decriminalized).

234. Arias, *supra* note 83.

235. See Brandon K. Crase, *When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475, 482–83 (2007) (describing prosecutorial discretion when faced with a decision between charging an individual with a crime that attaches a jury trial right and one that does not).

236. This is assuming a judge will have a more stringent view toward marijuana use and enforcement than a jury. See generally KALVEN & ZEISEL, *supra* note 65, at 86 (exploring why

the jury trial right by charging the defendant with a lower penalty crime, the defense counsel and the defendant have no say in the process except indirectly as voters for their legislative representatives.<sup>237</sup> As a particularly vulnerable population without much financial influence, criminal defendants are unlikely to persuade the legislature to make laws in their favor. This is one reason the courts should be particularly attentive to preserving the jury trial right.

In addition to giving the legislature and prosecutor greater discretionary authority, when a crime does not trigger a jury trial right, the crime is removed from the community's scrutiny and insulated within the courtroom. Within the criminal justice system, the counter-balance to the tyranny of the majority is the community's view represented by the jury. This is particularly salient when society's view towards a crime is evolving. If a community believes that a crime is non-violent or should have a lower penalty, it can use the jury as a vehicle to acquit a defendant.

In the case of marijuana, the same underlying shifts are occurring in people's perception of marijuana possession as occurred toward DUIs, and juries may acquit more small marijuana-possession cases either because they disagree with the law or the penalty.<sup>238</sup> Therefore, the jury trial right should not be taken away from a defendant. Perhaps the reasoning behind the denial of a jury trial right is that the legislature, as a representative of the greater communal voice, is afraid obstinate juries will ignore the current laws. Admittedly, the jury system is not without its flaws, and there have been occasions when juries in the past have appeared biased. However, this possibility is not a valid reason for removing the right to a jury trial altogether, and is in fact a signal that either the system needs to be evaluated or more safeguards need to be put in place.

As in the case of marijuana possession, the legislature is reticent to update laws, and the community's view may out-pace legislative change. In this interim period, without a jury trial, many criminal defendants may be convicted of a crime that the community no longer thinks should be criminal. Since the jury is made up of one's peers from the community, and they are the ones that have to live with the offender, it makes sense that their input should be part of the process. During this tumultuous time of reform,

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juries tend to be more lenient than judges). *But cf.* Leipold, *supra* note 62, at 208, n.211 (finding that federal judges may be more likely to acquit drug offenses when the penalty is too harsh).

237. See Crase, *supra* note 235, at 483 (arguing that the defense cannot "rebut" a prosecutor's decision to charge a defendant with a crime without an attached right to a jury trial).

238. It is difficult to determine why jurors acquit, but one reason may be that a juror has done the same thing, such as driving while drunk. See Bromley, *supra* note 101, at 32 (citing JAMES B. JACOBS, DRUNK DRIVING: AN AMERICAN DILEMMA 46, 194 (1979)) (discussing how jurors may have different attitudes toward DUIs).

jury duty is a second chance for citizens to have a voice on whether they agree with the legislature's classification of marijuana possession as a crime.

### B. MARIJUANA AS A POSSESSION CRIME

State lawmakers are admittedly in a difficult situation when deciding how to manage a cost-efficient criminal justice system while still maintaining its legitimacy and not sacrificing public safety.<sup>239</sup> Marijuana possession is a particularly unique crime because some consider it a "victimless crime,"<sup>240</sup> and Americans' perspectives towards it as an illegal substance are evolving.<sup>241</sup> According to Markus Dirk Dubber, the crime of possession, whether possession of drugs or another item, is a crime against the state because there are no victims.<sup>242</sup> And when the victim is the state, the right to a jury trial becomes even more important because among other things it gives the defendant some leverage and control over her proceedings.<sup>243</sup> Furthermore, as an easily detected and provable crime with few defenses, a criminal defendant in a possession of small amount of marijuana case needs to have at her disposal the option of being able to choose between a judge and a jury.<sup>244</sup>

In addition to needing more defenses, possession cases also necessitate a jury trial right because in general, they have often called into question constitutional rights.<sup>245</sup> Because a jury can serve as an extra layer to safeguard against constitutional abuses by law enforcement and the state, it is especially necessary to have a right to a jury trial in drug possession cases.<sup>246</sup>

### C. HOW STATES CAN PRESERVE THE JURY TRIAL RIGHT

According to social contract theory, government controls violence and people control the government.<sup>247</sup> The checks on government power are out of balance because marijuana possession is not a violent crime, and the

239. See Dubber, *supra* note 70, at 833 (describing the policing system as a means of minimizing threats to public safety).

240. Cf. *id.* at 831, 936–66 ("[P]ossession emerges as the new and improved vagrancy, a modern policing tool for a modern police regime, the war on victimless crime.").

241. See RASMUSSEN REPORTS, *supra* note 2.

242. Dubber, *supra* note 70, at 965–66.

243. *Id.* at 964. Although this author notes that delaying punishment by using a trial by jury may be annoying and increase punishment, without this mechanism the defendant would have restricted ways of negotiating or saying, for example, "I am going to forego my right to a jury trial in the interest of a better deal." *Id.*

244. *Id.* at 858 (describing how the current legal landscape has made it easy to try possession cases).

245. See *id.* at 835 (noting the recent Supreme Court cases that involved possession).

246. See *supra* notes 136–142 and accompanying text.

247. TASLITZ, *supra* note 89, at 79. Social contract theory is not the entire basis of the U.S. governance model, but the more complicated theories are outside the scope of this Note.

government and the courts are taking away the direct check of the jury. The balance weighs heavily in favor of the government at the cost of society's rights and trust in the criminal justice system. Either a state should give a defendant the right to a jury trial if it believes that marijuana possession is a public safety threat, or the state should decriminalize it. It is unsatisfactory for the government to keep its power while failing to maintain transparency and a check on its authority.

### 1. States That Want to Preserve the Jury Trial Right

To avoid taking away the jury trial right in marijuana-possession cases, states should either guarantee a right to jury trials in all criminal cases or make a statutory revision that guarantees a jury trial for marijuana-possession cases.<sup>248</sup> For example, under Kentucky Rules of Criminal Procedure, there are certain cases that are required to be tried by a jury.<sup>249</sup> States could also amend their constitution to guarantee a right to a jury trial in marijuana-possession cases.<sup>250</sup> If the legislature is unwilling to change the law, the state supreme courts should read the right to a jury trial in drug possession cases as broadly as possible since they are not safeguarded by the common law exception or the *malum in se* classification. The Arizona court could have concluded that marijuana possession is “substantially similar” to opium, and in the future, the Florida court could interpret the common law exception or *malum in se* definition to include marijuana possession.

Another option is to follow Iowa's model and restore a criminal defendant's right to a jury trial in all criminal cases. Then, the penalty that the legislature affixes to the crime is not determinative of whether or not a person can ask for a jury trial. This also detaches the right to a jury trial from the type of crime. If a future crime goes through a similar evolution where society begins to look favorably upon a prohibited act, a defendant can decide to invoke their jury trial right. Similarly, if a defendant feels that the community would not look favorably upon her, her case, or a certain crime she can go before a judge.

### 2. States That Want to Use a Balancing Test

Requiring a threshold determinative test, such as a jury trial, for crimes with a penalty of 100 days is beneficial because it will make clear which crimes will receive a jury trial. This gives the judicial branch less power to determine whether a jury trial would be beneficial, but instead leaves that

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248. See *Commonwealth v. Green*, 194 S.W.3d 277, 285 (Ky. 2006) (guaranteeing a right to a jury trial in DWI cases).

249. KY. R. CRIM P. 9.26.

250. 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: POLITICS OF STATE CONSTITUTIONAL REFORM 197–203 (G. Alan Tarr & Robert F. Williams eds., 2006) (listing four ways to change a state constitution: constitutional convention, legislative proposals, constitutional commissions, and constitutional initiatives).

decision to the legislature.<sup>251</sup> Rather than using a bright-line distinction based on penalty, a state could implement a system where the judge used a certain set of factors to determine whether a type of crime or a specific case would have a jury trial option.

In *Mathews v. Eldridge*, an individual brought a Due Process claim under the Fifth Amendment and argued that he should receive an evidentiary hearing prior to termination of his social security disability benefits.<sup>252</sup> Although this is an administrative law case dealing with the U.S. Constitution, it is similar to a defendant asking for a jury trial in a case that does not invoke the Sixth Amendment because it involves asking for an additional procedural safeguard. In determining what process was due in *Mathews*, the Supreme Court looked at three factors: “the private interest of that will be affected by the official action,”<sup>253</sup> “the risk of an erroneous deprivation of such interest through the procedures used,”<sup>254</sup> and “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>255</sup> State courts could take a similar approach to determining whether a certain crime, such as possession of small amounts of marijuana, should receive a jury trial right.

State courts could start with a presumption against granting jury trials for misdemeanor cases because the legislature determined that the crime was not serious enough to meet the threshold penalty for a jury trial right.<sup>256</sup> It could then consider various factors such as the additional benefits of a jury trial weighed against the cost,<sup>257</sup> society’s prevailing views toward the crime, potential consequences to the defendant,<sup>258</sup> possible impact on the criminal justice system, the community,<sup>259</sup> and public safety. By incorporating a balancing test, state courts could move away from a classification-based outcome and begin to value the process of having the option for a jury trial.

The downside of the balancing test approach is that it is more subjective and may be more time-consuming. At the same time, flexibility can be

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251. See *supra* Part II.C.

252. *Mathews v. Eldridge*, 424 U.S. 319, 323 (1976).

253. *Id.* at 335.

254. *Id.*

255. *Id.*

256. See *supra* notes 62–65 and accompanying text.

257. Costs can include the actual cost of a jury trial as well as efficiency and costs to other defendants awaiting a criminal trial.

258. This can include costs such as stigma related to a certain conviction, speed of the trial, access to a community opinion, ability to plea bargain with the prosecutor, and the number of defenses available for a specific crime.

259. Community impacts can include viewing the justice system as legitimate and not one-sided. Other factors include consideration of other constitutional rights and law enforcement behavior. See *supra* notes 135–48 and accompanying text.

positive because it allows adaptation of the judicial process to the evolving nature of the crime. Furthermore, it would increase interaction between the legislature and the judiciary, as the legislature could set the penalty and the judiciary could take into account more criteria to determine whether a certain crime should require a right to a jury trial.

### 3. States That Want to Decriminalize Marijuana

If the “war on drugs” is the main reason the criminal justice system is overloaded,<sup>260</sup> then it does not make financial sense to continue to prosecute marijuana possession. Furthermore, if a legislature such as Maryland’s labels marijuana possession as *de minimis*, and truly believes that possession of small amounts of marijuana is trivial, then it should decriminalize it.

States that think the costs of a jury trial are too expensive should allow their citizens to vote on a measure for marijuana decriminalization. If the legislature would rather take matters into its own hands, then it should propose a bill decriminalizing marijuana. Another alternative, if passing a decriminalization measure is too difficult, is to make marijuana possession a summary offense with a fine, but no criminal record.<sup>261</sup> Law enforcement could continue to bolster the deterrent effect by giving citations and enforcing the law, but it would not have to use the extra resources necessary to arrest someone. As can be seen by the example in Massachusetts, decriminalization would serve the legislature’s goals of decreasing costs and unburdening the already strained criminal justice system.

### 4. State Research in the Future

States could also invest in a systematic procedural and outcome evaluation of its criminal justice process. Although expensive, it could be a long-term cost-saving measure because it would help identify what parts of the system are inefficient, ineffective, or over-priced. Without data, it is difficult to determine whether certain elements, including the right to a jury trial or decriminalizing certain crimes, are the best approach for achieving goals such as reducing recidivism, deterring future crime, and maintaining individuals’ rights.

One example of how research has helped certain states reform their criminal justice system is probation and parole. Prior to the 1970s, little research had been conducted, but with the increasing number of crimes and

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260. Cf. DWYER, *supra* note 33, at 126 (“[C]hief cause of overloading the criminal courts has been the war against drugs.”).

261. Craig R. McCoy, Nancy Phillips & Dylan Purcell, *Philadelphia to Ease Marijuana Penalty*, *Inquirer* (Apr. 5, 2010), available at [http://articles.philly.com/2010-04-05/news/24956838\\_1\\_marijuana-court-system-possession-of-small-amounts](http://articles.philly.com/2010-04-05/news/24956838_1_marijuana-court-system-possession-of-small-amounts) (describing how the District Attorney in Philadelphia looks to charge small possessions of marijuana as a summary offense including a fine, but no criminal record or charge).

high incarceration rates, states began to listen to the calls for reform and researched ways to make parole and probation better.<sup>262</sup> Using this research, states have begun to experiment with different models and theories.<sup>263</sup>

The right to a jury trial is likewise in need of a comprehensive evaluation. The last major research project examining the right to a jury trial was conducted in 1966.<sup>264</sup> Almost fifty years later, an assessment is needed. Drawing from other disciplines such as healthcare and business, criminal justice researchers can build a model looking at process and outcome measures.<sup>265</sup> By building an evaluation metric, state legislatures, the judiciary, and ultimately voters can make an informed decision on the best way to conduct their criminal justice system.

## VI. CONCLUSION

The harms of taking away the right to a jury trial in marijuana-possession cases are the defendant's individual procedural safeguard and society's trust in the criminal justice system. By limiting the citizen's voice for reform, legislatures are walking on shaky territory. The only way to maintain contact with the community perspective is through the jury trial and direct elections. By foreclosing one of these options, legislatures are silencing the public and creating a microcosm within the walls of the courthouse. States should take any measure possible to shore up the right to a jury trial in marijuana-possession cases and prevent this from happening to other crimes that may undergo reform in the future.

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262. Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 492 (1999).

263. See ALISON LAWRENCE, PROBATION AND PAROLE VIOLATIONS: STATE RESPONSES (Nov. 2008) (describing how different states approach parole and probation).

264. KALVEN & ZEISEL, *supra* note 65, at viii. The University of Chicago conducted the study with a grant from the Ford Foundation. *Id.* at 5.

265. For example, Avedis Donabedian designed a model to assess whether practitioners were providing quality healthcare. See AVEDIS DONABEDIAN, AN INTRODUCTION TO QUALITY ASSURANCE IN HEALTH CARE (Rashid Bashshur ed., Oxford 2003); Similarly, there should be a mechanism to evaluate whether the jury trial and the court system are providing effective services.