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AN ANALYSIS OF THE DEVELOPMENT OF THE JURY'S ROLE IN A NEW YORK CRIMINAL TRIAL

*Matthew Tulchin**

INTRODUCTION

On February 19, 2003, the New York State legislature received a proposed amendment to the state constitution advocating the elimination of the unanimity requirement for juries in criminal cases.¹ The sponsors of the amendment believe eliminating the unanimity requirement “will produce more convictions and put

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¹ Assemb. 4469, 226th Leg. Sess. (N.Y. 2003). New York's right to a jury trial is protected in Article I, § 2 of the New York Constitution. Section 2 states in pertinent parts: “Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case.” N.Y. CONST. art. I, § 2. The resolution presented to the General Assembly proposes changing Section 2 to read: “The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case *or misdemeanor, and not less than three-fourths of the jury in any felony case.*” Assemb. 4469, 226th Leg. Sess. (N.Y. 2003) (emphasis added). As of September 2004, the bill had been sent to the Attorney General for comments and was under review by the Judiciary Committee. See NEW YORK STATE ASSEMBLY MEMORANDUM IN SUPPORT OF Assemb. 4469, 226th Leg. Sess. (2003).

more criminals behind bars.”² This is not the first time such a change has been proposed in New York.³ Currently, New York and several other states do not require unanimous verdicts in civil cases.⁴ Fortunately, most states have not taken this approach in criminal trials.⁵ If accepted by New York’s General Assembly, this move would be an alarming and dangerous step in the anti-jury movement sweeping the country.⁶

² NEW YORK STATE ASSEMBLY MEMORANDUM IN SUPPORT OF Assemb. 4469, 226th Leg. Sess. (2003) [hereinafter MEMORANDUM].

³ *Id.* A similar amendment was rejected in 1996, 1997, 1998, 1999 and 2001. *Id.* See also *People v. Sanabria*, 249 N.Y.S.2d 66, 69-70 (N.Y. App. Div. 1964) (reviewing the 1931 New York legislature’s debate over proposals to require less than unanimous verdict in jury trials).

⁴ N.Y. CONST. art. I, § 2 (2003); see also UTAH CONST. art. I, § 10 (2003) (three-fourths of jurors); NEB. CONST. art. I, § 6 (2003) (five-sixths of the jury); IDAHO CONST. art. I, § 7 (2003) (three-fourths); ARIZ. CONST. art. II, § 23 (2004) (“number required to render a verdict, shall be specified by law”); MONT. CONST. art. II, § 26 (2002) (two-thirds of the jury). In all, 34 states allow non-unanimous jury verdicts in civil trials. PAULA L. HANNAFORD ET AL., NAT’L CENTER FOR STATE COURTS, ARE HUNG JURIES A PROBLEM? (2002), available at http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesPub.pdf (citing STATE COURT ORGANIZATION, 1998, Table 42 (Trial Juries: Size and Verdict Rules)).

⁵ Only Oregon and Louisiana allow for majority verdicts in felony cases. HANNAFORD ET AL., *supra* note 4, at 1 (citing LA. CODE CRIM PROC. Art. 782 (2004) (stating that in “[c]ases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict”) and OR. REV. STAT. § 136.450 (2003) (providing “the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors [and] [e]xcept when the state requests a unanimous verdict, a verdict of guilty for murder or aggravated murder shall be by concurrence of at least 11 of 12 jurors.”). Oklahoma eliminated the unanimity requirement in misdemeanor trials. *Id.*

⁶ See, e.g., Charles W. Joiner, *From the Bench*, in THE JURY SYSTEM IN AMERICA 149-50 (Rita James Simon, ed., Sage Publications 1975) (suggesting that a verdict of ten out of twelve jurors would be sufficient); Robert Boatright & Elissa Krauss, *A Report on the First National Meeting of the Ever-Growing Community Concerned With Improving the Jury System*, 86 JUDICATURE 145 (Nov.-Dec. 2002); Tom M. Dees, III, *Juries: On the Verge of Extinction? A Discussion of Jury Reform*, 45 SMU L. REV. 1755, 1789-1804 (2001); Paula L. Hannaford & G. Thomas Munsterman, *Reshaping The Bedrock of Democracy: American Jury Reform During the Last 30 Years*, 36 NO. 4 JUDGES’ J. 5 (1997);

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In recent years, some state legislatures have discussed measures that would curtail the jury's power,⁷ while other states,

Jere W. Morehead, *A "Modest" Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 U. KAN. L. REV. 933, 933-34 (1998) ("[A]pparent failures of the citizen jury in recent years . . . has called into question the function of this important constitutional guarantee . . .").

⁷ See Sandra D. Jordan, *The Criminal Trial Jury: Erosion of Jury Power*, 5 HOW. SCROLL 1, 1-2 (2002). Tom Dees includes in his appendix jury reform recommendations from Arizona, California, Colorado, District of Columbia, New York, and Texas. California's jury reform included suggestions to amend the state constitution to allow juries of eight or less for misdemeanor cases and to allow nonunanimous verdicts in felony cases where the jury has deliberated more than six hours. Dees, *supra* note 6, at 1795. See also J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1442-45, 1488-1501 (1996); Jeremy Osher, Note & Comment, *Jury Unanimity in California: Should It Stay or Should It Go?*, 29 LOY. L.A. L. REV. 1319, 1323-25, 1336-38 (1996) (discussing California's attempt to eliminate the unanimity requirement). See generally The National Center for State Courts website, available at http://www.ncsconline.org/WC/Publications/KIS_JurInnStatesPub.pdf. It is interesting to note that in 1990 New York also considered a proposal to eliminate the constitutional protection of grand juries. NEW YORK STATE SENATE, ANNUAL REPORT OF THE SENATE STANDING COMMITTEE ON JUDICIARY (1990). Proponents of this measure argued that the grand jury was an outdated and antiquated institution, which no longer served a valuable purpose in society. MICHAEL COLODNER & MATTHEW T. CROSSON, DRAFT MEMORANDUM IN SUPPORT OF THE CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY PROPOSING AMENDMENTS TO ARTICLE I AND VI OF THE CONSTITUTION 1-2 (on file with author). In addition, they claimed that since the federal constitution did not protect the grand jury, New York should not protect it in its state constitution. *Id.* Testifying at the Joint Legislative Hearing of the Senate Committee on Codes and the Senate Committee on the Judiciary, Professor Susan N. Herman argued against this proposal and based her argument on an historical analysis of the grand jury in New York. *Proposals to Amend Provisions of the New York State Constitution and the New York Criminal Procedure Law Concerning Right to Indictment by Grand Jury Before the Senate Committee on Codes and the Senate Committee on the Judiciary*, 1990 Leg. (NY 1990) (statement of Professor Susan N. Herman, Brooklyn Law School) (on file with author). After months of hearings on the subject, the legislature decided against enacting the proposal and instead chose to focus on ways to make the grand jury process more efficient. ANNUAL REPORT OF THE SENATE STANDING COMMITTEE ON JUDICIARY, *supra* at 4-5. Although these debates focused on the grand jury and occurred over ten years ago, the same issues arise in today's debate regarding jury reform. Considering

including New York, have initiated jury reform programs aimed at improving the operation of the existing jury system.⁸ Fueling these initiatives are publicized jury nullification actions such as the O.J. Simpson case,⁹ instances of hung juries, such as the Dennis Kozlowski-Tyco trial,¹⁰ and the general perceptions of legislators, judicial officers, and prospective jurors that the jury system is ineffective in its present form.¹¹ Critics of the jury system question whether juries presently provide a vital service to our judicial

that the grand jury and the petit jury share similar characteristics and historical origins, Professor Herman's argument and her emphasis on the historical aspects of the right are informative and particularly relevant to the debate on jury reform.

⁸ Chief Judge Judith S. Kaye of the New York Court of Appeals appointed a commission in the Spring of 2002 to conduct a thorough review of the jury system and come up with ways to improve its operation. Press Release, New York State Court System, Court System Launches Second Phase of the Jury Reform in New York (June 17, 2004) (on file with author), available at <http://www.nycourts.gov/press>. The commission released an interim report in June 2004 and it is available at http://www.jurycommission.com/pr2004_11.pdf (last visited Feb. 21, 2005). See also Judith S. Kaye & Albert M. Rosenblatt, *Introduction to Special Edition on Juries*, 73 N.Y. ST. B.J. 8 (June 2001); Anthony Ramirez, *Courts Plan to Waste Less of Jurors' Time*, N.Y. TIMES, June 18, 2004 at B3; Susan Saulny, *Jury Duty? Prepare for Rejection*, N.Y. TIMES, Sept. 8, 2003, at B1, B5. For a discussion of other states' reform movements, see *supra* note 7. See also *Arizona Governor Signs 'Jury Patriotism Act'; ALEC Model Bill Becomes Law*, U.S. NEWSWIRE, May 14, 2003, available at 2003 WL 3731352; Robbi Hess, *Rochester Attorney Appointed to NY State Commission on the Jury*, DAILY RECORD (Rochester, NY), July 30, 2003, available at 2003 WL 16077082; Jane Spencer, *Courts Try to Make Jury Duty More Palatable*, WALL ST. J., Apr. 29, 2004, at D1.

⁹ See, e.g., Barbara Allen Babcock, Opinion, *Protect the Jury System, Judge Was the Problem*, L.A. TIMES, Oct. 8, 1995, at M6 (defending the O.J. Simpson jury).

¹⁰ See, e.g., Andrew Ross Sorkin, *The Tyco Mistrial: The Overview; Tyco Trial Ends as Juror Cites Outside Pressure*, N.Y. TIMES, Apr. 3, 2004, at A1 (discussing the result of the Tyco trial); Andrew Ross Sorkin & Jonathan D. Glater, *Criminal Intent Seems the Focus of Juror's Doubt*, N.Y. TIMES, Mar. 29, 2004 at C1, C6 (discussing the controversy surrounding the lone dissenting juror in the Tyco case)

¹¹ See, e.g., Spencer, *supra* note 8, at D1 (discussing "recent controversies involving jurors in the Tyco, Martha Stewart and World Trade Center cases" and initiatives states are taking to solve these problems).

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system and whether they even have the ability to provide this service.¹² These critics also debate whether the common law right to a jury should continue to receive constitutional protection at the state level.¹³

Many critics assert that the best way to address problems such as jury nullification and instances of hung juries would be to eliminate the unanimity requirement.¹⁴ Unfortunately, as evidenced by the proposed constitutional amendment, many New Yorkers

¹² See Jordan, *supra* note 7, at 1-2 (stating that “[t]he American jury is in serious trouble” and that “segments of society believe that twelve ordinary citizens are not equipped to make important decisions”); Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 53-54 (2001) (discussing some of the problems faced by juries in adapting to modern litigation); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377 (1997). See also THE JURY SYSTEM IN AMERICA (Rita James Simon ed., Sage Publications 1975); RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM (2003); WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE (2002); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 927 (1994) (providing a brief history of the criminal jury in the United States and concluding that “[o]nly a shadow of this communitarian institution has survived”); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169 (1995) (presenting several ideas for improving the jury system).

¹³ See *Johnson v. Louisiana*, 406 U.S. 356, 359 (1972) (holding that a conviction based on a 9-3 jury verdict did not violate defendant’s Fourteenth Amendment right to due process); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding a conviction based on an 11-1 jury verdict as it did not violate the defendant’s Sixth Amendment right to a jury trial); *Williams v. Florida*, 399 U.S. 78 (1970) (holding jury not required to consist of twelve people); *Duncan v. Louisiana*, 391 U.S. 145, 186-89 (1968) (Harlan J., dissenting) (arguing that trial by jury is not a requisite of due process and states should be allowed to experiment with other methods of adjudicating guilt); MEMORANDUM, *supra* note 2. See generally Amar, *supra* note 12; Jordan, *supra* note 7, at 1-2.

¹⁴ See e.g., Amar, *supra* note 12, at 1189-92 (1995) (presenting four arguments in support of eliminating the unanimity requirement); Richard H. Menard, Jr., Note, *Ten Reasonable Men*, 38 AM. CRIM. L. REV. 179 (2001) (suggesting eliminating the unanimity requirement would reduce incidents of hung juries); Morehead, *supra* note 6 (proposing the elimination of the unanimity requirement for jury verdicts); Osher, *supra* note 7 (discussing California’s attempts to eliminate the unanimity requirement).

share these sentiments.¹⁵ However, the elimination of the unanimity requirement in New York would be another step toward making New York's right to a jury trial conform to the right as protected in the U.S. Constitution.¹⁶ If achieved, this alignment would eliminate the important distinctions between the New York right and the federal right.

The New York right to a jury trial derives from the common law right and, thus, reflects the political and social development of New York State.¹⁷ The federal right, however, stems from a political compromise between the federalists and anti-federalists, and serves as a symbol of our federalist system of government. In fact, the right to a jury trial is a central feature of our federalist system.¹⁸ Therefore, in addition to eliminating the distinctive characteristics of the New York right, altering the right would upset the balance of our federalist system of government.¹⁹

Furthermore, eliminating the unanimity requirement and altering the right to a jury trial as it is protected in the New York Constitution would detract from the dual role the jury serves in our federalist system. New York's colonial history reflects the jury's function as both a political institution belonging to the people and as a protector of individual liberties. The proposed amendment threatens to reduce the jury's ability to fill both of these roles. Thus, before New York politicians respond to critics' frustrations and attacks on the jury system by eliminating the unanimity requirement or making other alterations to the right to a jury, they should first consider the origins of the right to a jury trial in this country and its particular significance in New York's history.

This note argues that, despite sharing a common historical origin, the federal right to a jury trial and the New York right are

¹⁵ See MEMORANDUM, *supra* note 2.

¹⁶ For a discussion of the right to a jury trial in the U.S. Constitution see *infra* Part I.

¹⁷ See *infra* Part II and Part III (reviewing the history of the right to a jury in New York).

¹⁸ See *infra* Part I (discussing the role of the jury and the drafting of the U.S. Constitution).

¹⁹ See *infra* Part.I.B. (describing the efforts to protect the right to a jury in the Constitution).

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fundamentally distinct with regard to the role each plays in government and society. Because of these differences and the unique role that the jury played in New York's political roots, New York should offer more protection to the right than is provided under the U.S. Constitution.²⁰ This note also argues that the consistent protection of the right to a jury trial in New York's constitution and the continued respect shown for it by New York courts and the state legislature suggest that the right to a jury trial in criminal cases is a fundamental right and, thus, should not be altered.²¹ Part I of this note provides a brief historical overview of the origin of the right to a jury trial in the United States. Part II discusses the origin of the right in New York, tracing the colonial development of the right from its first appearance in a code handed down in 1665 by New York's first colonial governor, to its incorporation into New York's constitution. Part III examines the various New York constitutions and their consistent protection of the right to a jury trial. Next, part IV analyzes how the right has changed on a national level through a historical review of amendments to the U.S. Constitution and seminal decisions by the U.S. Supreme Court that altered the federal right to a jury trial. Part V examines how these national changes influenced the right to a jury trial in New York and discusses other changes to the state right. Part VI explains why the proposed elimination of the unanimity requirement is an ineffective means of addressing some of the perceived problems with the jury system. In particular, this section argues that the proposed change threatens to alter the right to a jury trial in contravention of the right's historical protection. It further suggests that the amendment may pose serious consequences for the integrity of jury verdicts and the rights of criminal defendants. This note concludes with suggestions for how New York's legislature might improve the existing jury system without eliminating the unanimity requirement and, in turn, preserve the jury's dual role as both a political institution and a safeguard of individual liberty.

²⁰ See U.S. CONST. art. III; U.S. CONST. amend. VI.

²¹ See N.Y. CONST. of 1777, art. XLI; N.Y. CONST. of 1821, art. VII, § 2; N.Y. CONST. of 1846, art. I, § 2; N.Y. CONST. of 1896, art. I, § 2; N.Y. CONST. of 1938, art. I, § 2; N.Y. CONST. art. I, § 2 (McKinney's 2004).

I. RIGHT TO A JURY IN THE UNITED STATES

The right to a jury dramatically influenced the development and structure of the American political system. This should not surprise, given that Americans enjoyed the right to a jury trial from the beginning of colonial times.²² In fact, Thomas Jefferson listed the deprivation of the right to a trial by jury as one of the charges against King George III of Great Britain in the Declaration of Independence.²³ A review of America's early history provides insight into why the Founding Fathers perceived the right to a jury trial to be a vital component of the federalist system. Further, it highlights some of the colonial experiences that shaped and later influenced the Founding Fathers' incorporation of the right in the U.S. Constitution.

A. Coming to America and Finding a Home

The right to a jury trial fully emerged in England in the fourteenth century.²⁴ A typical criminal jury in England was composed of twelve men from the local community and required a unanimous verdict.²⁵ The colonists wanted to incorporate this right

²² See *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968) (discussing the colonial history of the jury trial and explaining that the “[j]ury trial came to America with English colonists, and received strong support from them”); LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE* (1990); Rita James Simon, *Introduction*, in *THE JURY SYSTEM IN AMERICA* 15 (Rita James Simon ed., 1975); Alschuler & Deiss, *supra* note 12, at 870; Smith, *supra* note 12, 421-23.

²³ DECLARATION OF INDEPENDENCE. Jefferson frames the violation in terms of the King having allowed others to enact legislation that “depriv[es] us in many cases of the benefits of trial by jury.” For a comprehensive history of the making of the Declaration, see PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1997).

²⁴ *Duncan*, 391 U.S. at 151-52; For a brief discussion on the historical origins of the right to a jury, see LEVY, *supra* note 22.

²⁵ LEVY, *supra* note 22, at 23, 46. These twelve men should be “persons of good character, neighbors where the fact was committed, apprised of the circumstances in question, and well acquainted with the lives and conversations of the witnesses.” *Id.* Thus, the vicinage and unanimity requirement were defining characteristics of the jury. Levy surmises that the requirement for a unanimous verdict increased the authority of the verdict and ensured that the

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in colonial society.²⁶ Accordingly, they sought to preserve the right in early colonial constitutions.²⁷ For example, the Virginia Charter of 1606 granted the settlers of the Virginia colony all of the rights held by an Englishman, including the right to a jury trial in both criminal and civil cases.²⁸ After 1641, the criminal system in Massachusetts granted accused individuals the right “to choose whether they will be tried by the Bensch or by a Jurie.”²⁹ Additionally, the Colonial Constitution of Carolina, the Charter of West New Jersey, and the Frame of Government of Pennsylvania contained similar provisions preserving the right to a trial by jury.³⁰

Colonists viewed the right to a jury as derived from the common law, that is, as one of the rights of civilized men to be enjoyed by them as a result of their being Englishmen.³¹ However,

verdict was a true representation of the “voice” of the community. *Id.*

²⁶ Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History*, in THE JURY SYSTEM IN AMERICA 24-25 (Rita James Simon ed., 1975).

²⁷ See, e.g., MASS. BODY OF LIBERTIES 29 (1641), reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENT HISTORY (1971); FUNDAMENTAL CONST. OF CAROLINA (1669), 1 S.C. STATUTES AT LARGE 53 (Thomas Cooper ed., 1836); CHARTER OR FUNDAMENTAL LAWS OF WEST NEW JERSEY AGREED UPON (1676), reprinted in 5 THE FEDERAL AND STATES CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3211 (F.N. Thorpe ed., 1906); FRAME OF GOVERNMENT OF PENNSYLVANIA (1682), reprinted in SOURCES OF OUR LIBERTIES 209-21 (Richard Perry ed., 1959).

²⁸ LEVY, *supra* note 22, at 70. The Plymouth Colony also recognized this right. *Id.*

²⁹ MASS. BODY OF LIBERTIES, *supra* note 27, at 29.

³⁰ See FUNDAMENTAL CONST. OF CAROLINA, *supra* note 27 (stating “no cause, whether civil or criminal . . . shall be tried in any court of judicature, without a jury of his peers”); CHARTER OR FUNDAMENTAL LAWS OF WEST NEW JERSEY AGREED UPON, *supra* note 27 (providing that all trials shall be decided by a jury of twelve men from the community); FRAME OF GOVERNMENT OF PENNSYLVANIA (1682) (drafted by William Penn), *supra* note 27, at 209-21 (stipulating that all trials be by a jury of twelve).

³¹ JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 605 (1970). See also MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 18

because of the colonies' unique political and economic situation, the right to a jury became the focus of the emerging power struggle between the colonies and Great Britain. As a result, even though the right to a jury trial was originally an individual right, it quickly became an integral part of the American conception of liberty and political independence.³² In fact, the colonists came to view the right to a jury trial as fundamental to both their political and judicial systems.³³ The colonists felt so strongly about the right to a jury trial that they included the denial of the right in the lists of grievances in the Declaration of Independence.³⁴

B. The Federalism Debate

Colonists and the Founding Fathers viewed the jury as both a guardian of individual rights and as a republican body representing self-government.³⁵ Indeed, the representatives to the Philadelphia

(1986).

³² LEVY, *supra* note 22, at 69-70 (discussing the development of the right to a jury in colonial Virginia, Massachusetts, Connecticut, Rhode Island and New York). *See also* AKHIL REED AMAR, THE BILL OF RIGHTS 109 (1998) [hereinafter AMAR, THE BILL OF RIGHTS] (explaining that colonists relied on the jury because they controlled it whereas they lacked "control over English Parliaments and royal judges").

³³ *See* THOMAS JEFFERSON, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 442 (Adrienne Koch & William Peden eds., Random House 1993) (describing the right to trial by jury as "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution").

³⁴ DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) ("... for depriving us in many cases of the benefits of trial by jury.").

³⁵ *See* AMAR, THE BILL OF RIGHTS, *supra* note 32, at 106 ("jury trial was not simply and always an individual right but also an institution of localism and popular sovereignty"); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 126-27 (Richard D. Hefner ed., Penguin Books 1984) (1835) (jury as a political institution); Amar, *supra* note 12, at 1170-72 (arguing that the right to jury symbolizes popular sovereignty); Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L. J. 641, 684 (1996). Amar believes that to the framers the jury was "a political institution, embodying popular sovereignty and republican self-government." *Id.* *See also* Alschuler & Deiss, *supra* note 12, at 876; Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative*

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Constitutional Congress all agreed on the importance of the right to a jury trial.³⁶ The difficulty faced by the representatives involved devising a way to protect the right in a manner that would be suitable for both federalists and anti-federalists.³⁷

Having fought a war for political independence, the former colonies needed to develop a system of government that would protect their hard-won freedoms while also preserving much of the existing local systems of government. The failure of the Articles of Confederation demonstrated the need for a federalist system of government. Nevertheless, many colonists were wary of having to forfeit their hard-won gains to a domineering federal government.³⁸ Cases such as that of John Peter Zenger also had a

Analysis and Proposals for Reform, 48 ALA. L. REV. 441, 470-75 (1997).

³⁶ According to Alexander Hamilton:

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

THE FEDERALIST NO. 83, at 467 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

³⁷ *Id.* The anti-federalists were wary of placing too much power in the federal government and wanted the states to have more control over individual liberties. See Essays by Cincinnatus (Nov. 1, 1787), reprinted in 6 THE COMPLETE ANTI-FEDERALIST 11-12 (Herbert J. Storing ed., 1981) [hereinafter Essays by Cincinnatus] (Cincinnatus is believed to have been Richard Henry Lee or his brother Arthur).

³⁸ This fear is apparent in the debate over a federal judiciary. Hamilton alludes to anti-federalists' concern over judicial review and their fear that giving appellate jurisdiction to the United States Supreme Court would allow federal courts to intrude and obstruct state juries. THE FEDERALIST NO. 82 (Alexander Hamilton). See also Luther Martin, The Genuine Information Delivered to the Legislature of the State of Maryland (1788), in 2 THE COMPLETE ANTI-FEDERALIST 70-71 (Herbert J. Storing ed., 1981). Martin believed that giving appellate jurisdiction to the federal courts would result in the elimination of the right to a jury trial in both civil and criminal cases. *Id.* at 70. He described the right to a jury trial as "the surest barrier against arbitrary power, and the palladium of liberty, —with the loss of which the loss of our freedom may be dated." *Id.* (emphasis in original). Many at the Constitutional Convention thought the representatives did not go far enough in preserving the right to a jury, in part because the Constitution also did not mention safeguarding the right

profound influence on the emerging political debates in the colonies.³⁹

Zenger was a colonial newspaper editor who was arrested and tried for seditious libel for publishing editorials that criticized the Royal Governor of New York.⁴⁰ In one of the first cases involving jury nullification, the jury refused to follow the judge's instructions and issued a general verdict in Zenger's favor.⁴¹ During the debate over ratification of the U.S. Constitution, anti-federalists opposed to ratification cited *Zenger* for fear that "under Article III of the Constitution, the federal appellate courts might overrule a jury verdict of not guilty."⁴² Anti-Federalists most feared that defendants like Zenger would be deprived of the right to a jury trial under the Constitution.⁴³ The concern over a potentially dominant and intrusive federal government and the desire to protect individual rights profoundly affected local political debate and influenced the move to fortify the right to a jury trial at the state

to a jury trial in civil cases. One of the main reasons federalists wanted the right to a jury in civil cases was because they viewed the jury as a deterrent for political and judicial corruption. See THE FEDERALIST NO. 83 (Alexander Hamilton); Essays by Cincinnatus, *supra* note 37, at 11-12; LEVY, *supra* note 22, at 92-96; Amar, *supra* note 12, at 1169-70.

³⁹ See *infra* Part.II.C.1.

⁴⁰ For an excellent source for information on the Zenger trial, see JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (1963). Seditious libel is libel made with the intent of inciting treason or other types of action against public authority and includes any acts to defame a member of the royal family or the government. BLACK'S LAW DICTIONARY 927, 1361 (7th ed. 1999). Seditious libel is no longer prosecuted. *Id.* at 927.

⁴¹ ALEXANDER, *supra* note 40, at 101.

⁴² Paul Finkelman, *John Peter Zenger, New York, and the Origin of the Bill of Rights*, in NEW YORK AND THE UNION 72, 75-76 (Stephen L. Schechter & Richard B. Bernstein eds., 1990).

⁴³ See Essays by Cincinnatus, *supra* note 37, at 5-10. In an essay that appeared in the New York Journal on November 1, 1787, the anti-federalist author Cincinnatus argued against ratifying the Constitution. *Id.* at 5-6. Cincinnatus believed the Constitution did not do enough to protect individual liberties because it was "admirably framed for tyranny, that, by clear construction, the judges might put the verdict of a jury out of the question." *Id.* at 9.

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level.⁴⁴

Federalists believed the Constitution would protect the basic rights of citizens and that it was an appropriate vehicle for listing both the principles of government and fundamental liberties.⁴⁵ The anti-federalists, on the other hand, feared that a strong federal government would threaten individual liberties, specifically the right to a jury.⁴⁶ They believed a political system based on popular

⁴⁴ *Id.* See also AMAR, BILL OF RIGHTS, *supra* note 32, at 104-10; Finkelman, *supra* note 42, at 76.

⁴⁵ See THE FEDERALIST NO. 1, at 4 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (promising to explain “[t]he additional security which its [the Constitution’s] adoption will afford to the preservation of that species of government, to liberty and to property”) (emphasis in original). Some of the federalists wanted to go further and include a bill of rights in the Constitution (The Bill of Rights were later added as amendments). See THOMAS JEFFERSON, *supra* note 33, at 404-5 (listing “the omission of a bill of rights” that would protect fundamental individual rights, including the right to a trial by jury, as one of the major flaws of the new Constitution); Jefferson believed that “a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.” CURTIS, *supra* note 31, at 20.

⁴⁶ Luther Martin, The Genuine Information Delivered to the Legislature of the State of Maryland (1788), in 2 THE COMPLETE ANTI-FEDERALIST, at 70-71 (Herbert J. Storing ed., 1981). See also Essays by Cincinnatus, *supra* note 37, at 9, 11-13. Cincinnatus believed the Constitution did not do enough to protect individual liberties because it was “admirably framed for tyranny, that, by clear construction, the judges might put the verdict of a jury out of the question.” *Id.* at 9. He worried that a strong central government would threaten individual liberties (like the right to a jury trial), which traditionally were protected by the states. *Id.* at 7-13.

Our state constitutions have held it [the right to a jury] sacred in all its parts. They have anxiously secured it. But that these may not shield it from the intended destruction in the new constitution . . . Thus this new system, with one sweeping clause [Supremacy Clause], bears down every constitution in the union, and establishes its arbitrary doctrines, supreme and paramount to all the bills and declarations of rights, in which we vainly put our trust, and on which we rested the security of our often declared, unalienable liberties.

Id. at 13. See also THOMAS JEFFERSON, *supra* note 33, at 404-5 (arguing that the passage of a Bill of Rights was necessary because otherwise “Congress will have the right to take away trials by jury”).

sovereignty should place power at the local level.⁴⁷ Moreover, popular sovereignty would ensure that the people would be involved in making the laws.⁴⁸ As compared to the federalist structure, the anti-federalist system offered more protection of, and security for, individual liberties because it limited the federal government's powers with regard to local issues.⁴⁹ For anti-federalists, therefore, the federal constitution needed to reflect a political system of government that would protect existing institutions and ensure that the federal government would not threaten individual liberties.⁵⁰

C. Protecting the Right in the Federal Constitution

The fear of a strong federal government and the belief that the right to a jury belonged to all citizens as a birthright helped to form the constitutional protection of the jury system.⁵¹ The Founding Fathers wanted to ensure that the jury remained both a political institution and a protector of individual rights. Thus, they included the right to a jury trial in criminal cases in the original drafts of the Constitution and the Bill of Rights.⁵² It is the only individual right

⁴⁷ See Essays by Cincinnatus, *supra* note 37, at 11-13. Cincinnatus did not believe the federal government should have power over the states. *Id.* at 13.

⁴⁸ See THE FEDERALIST NO. 39 at 208-14 (James Madison) (Clinton Rossiter, ed., 1961) (discussing how the proposed Constitution conforms to the republican principles of government).

⁴⁹ See Essays by Cincinnatus, *supra* note 37, at 11-13.

⁵⁰ See *Blakely v. Washington*, 124 S. Ct. 2531, 2540 (2004) (noting "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury"). Alexander Hamilton alludes to this dilemma in his response to federalist concerns regarding the lack of protection in the Constitution for civil juries. See THE FEDERALIST NO. 83 (Alexander Hamilton). Because the right to a jury varied from state to state, the representatives did not want to force the states to conform. *Id.* Thomas Jefferson did not want to leave it to the states and instead favored incorporating a bill of rights into the Constitution. CURTIS, *supra* note 31, at 18 ("Jefferson rejected the idea that trial by jury should not be guaranteed because some states have been so incautious as to abandon this mode of trial.") (internal quotations omitted).

⁵¹ See *Blakely*, 124 S. Ct. at 2540.

⁵² U.S. CONST. art. III, §2, cl. 3; U.S. CONST. amend. VI.

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to appear in both documents.⁵³ This scheme represents a compromise between the federalists and the anti-federalists.

The Constitution sets forth the general structure of our government and the republican system, while the Bill of Rights provides for the protection of individual liberties.⁵⁴ Article III of the Constitution provides that “[t]he trial of all [c]rimes, except in [c]ases of Impeachment, shall be by Jury.”⁵⁵ The Framers intended Article III to preserve the general idea of the jury as a political entity and not as a protector of an individual defendant’s right to a jury trial.⁵⁶ Article III thus represents the idea of the jury as a political institution.⁵⁷ The clause does not mention individual defendants, nor does it give any details concerning the characteristics of the jury.⁵⁸ In fact, the Framers included more detailed provisions of the right to a jury trial in a draft of the

⁵³ See Alschuler & Deiss, *supra* note 12, at 870; Amar, *supra* note 12, at 1169-73. Amar argues that the right to a jury lies at the very heart of the Bill of Rights. The right to a jury appears in Article III and the Fifth (grand jury), Sixth, and Seventh Amendments. However, Amar also makes a case that the concept of the right is found in the First, Second, Fourth and Ninth Amendments. *Id.* With regard to the First Amendment, the jury protects freedom of speech and individual liberties. See also *infra* Part III.C.1 (discussing the *Zenger* case). The concept of the jury also may be found in the Second Amendment’s protection of the right to bear arms. Amar, *supra* note 12, at 1170. The militia serves a similar function as the jury in that they are both “collective, republican institutions” and serving in the militia and on the jury were both rights of citizenship. *Id.*

⁵⁴ This is not to say that the Constitution exclusively deals with structure or that the Bill of Rights only contains provisions that deal with individual liberties. For, as Amar points out, “both the Constitution and the Bill intertwine rights and structure.” AMAR, THE BILL OF RIGHTS, *supra* note 32, at 180. However, viewed as a whole, it is fair to say that the Constitution *primarily* deals with structure while the Bill of Rights *for the most part* contains provisions pertaining to rights.

⁵⁵ U.S. CONST. art. III, § 2, cl. 3.

⁵⁶ This argument gains more weight when compared to the detailed rights listed in the Sixth Amendment. See AMAR, THE BILL OF RIGHTS, *supra* note 32, at 105.

⁵⁷ *Id.* at 104 (discussing the waiver of the right and arguing the right to a jury trial should not be viewed “as an issue of individual right rather than . . . a question of government structure”).

⁵⁸ *Id.*

Constitution, but these provisions did not appear in the final version.⁵⁹

Detailed provisions appear, however, in the Bill of Rights, specifically, in the Sixth Amendment to the Constitution.⁶⁰ The Framers drafted the Sixth Amendment to protect the individual liberty aspect of the jury.⁶¹ The 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation⁶²

The Sixth Amendment specifically mentions the “accused” and lists the fundamental characteristics of the jury, such as the requirement that it be “impartial” and that it be composed of individuals drawn from the neighboring community (the vicinage requirement).⁶³ The Framers of the Constitution intended for the Sixth Amendment to protect the local jury systems from the federal government by requiring that juries be composed of people from

⁵⁹ *Williams v. Florida*, 399 U.S. 78, 92-95 (1970). The *Williams* Court cites this as evidence the framers did not intend to preserve the common law right in its original form. *Id.* The Court used this argument as a basis for ruling that the Constitution did not require states to have twelve member juries. *Id.*

⁶⁰ See U.S. CONST. amend. VI.

⁶¹ AMAR, *THE BILL OF RIGHTS*, *supra* note 32, at 106-7, 275 (arguing that the Sixth Amendment guarantees specific attributes that benefit the accused that are not protected in Article III).

⁶² U.S. CONST. amend. VI.

⁶³ *Id.* Amar argues that the main reason the Sixth Amendment appeared in the Bill of Rights was for the vicinage requirement. AMAR, *THE BILL OF RIGHTS*, *supra* note 32, at 105. However, the Sixth Amendment also can be seen as a representative of the federalist ideal of broad separation of powers. See, e.g., Essays by Cincinnatus, *supra* note 37, at 11-13. The framers wanted to give states control over the jury because it was a local institution that already existed in the states. See THE FEDERALIST NO. 83 (Alexander Hamilton). Indeed, New York incorporated the common law form of the jury into its Constitution ensuring that the right would be protected in that form from government encroachment. See NY CONST. of 1777, art. XLI.

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the local community.⁶⁴

II. THE RIGHT TO A JURY IN NEW YORK

Even before the ratification of the U.S. Constitution, most states had firmly established the right to a jury trial in their judicial systems.⁶⁵ In fact, the development of the right in New York during colonial times greatly influenced the drafters' decision to protect the jury in the state's first Constitution.⁶⁶ Through a series of lively trials, the colonists in New York came to view the right to a jury trial as a symbol of political independence and freedom that served to protect them against an often hostile new government. These experiences ultimately influenced the structure of the state constitution and, thus, are helpful in understanding the origin of the constitutional right to a jury in New York.⁶⁷

A. Birth of the Right in Colonial New York

Henry Hudson, an employee of the Dutch East India Company, sailed into New York harbor in 1609 and claimed the territory for

⁶⁴ AMAR, *THE BILL OF RIGHTS*, *supra* note 32, at 105-6. Amar points out that the anti-federalists were strong advocates of the Sixth Amendment's vicinage provision in part because the amendment resolved "the issue of which moral community will sit in judgment over a crime." *Id.* at 106. Because of this, "[t]he Sixth Amendment thus operated as a federalism provision of sorts." *Id.* at 275.

⁶⁵ *See*, LEVY, *supra* note 22, at 90 (stating that the right to a jury trial was already present in twelve state constitutions making it the most commonly shared individual right, along with freedom of religion, among the states); *see also* Amar, *supra* note 12, at 1169 (pointing out that the right to a jury in criminal cases was the only right protected in all state constitutions written between 1776 and 1787).

⁶⁶ *See* 1 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* (1906). Although dated, Lincoln's five volume work remains the most thorough and complete analysis of the historical development of New York's Constitution.

⁶⁷ For information regarding the colonial history of New York, *see generally* STEPHEN C. HUTCHINS, *CIVIL LIST AND CONSTITUTIONAL HISTORY OF THE COLONY AND STATE OF NEW YORK* (Gaunt 2003) (1880); 1 LINCOLN, *supra* note 66.

the Dutch.⁶⁸ The British government disputed this claim, as King James I had previously granted the rights to this territory to two English companies.⁶⁹ Although the Dutch succeeded in establishing a colony in the territory, the British presence in the area continued to grow.⁷⁰ In 1664, under threat of attack from British troops, the Dutch surrendered the colony to the British.⁷¹ The British monarch, Charles II, then gave the territory to his brother, the Duke of York, and the British renamed the colony New York.⁷²

Upon taking control of New York in 1665, Governor Richard Nicolls called for a convention to discuss the state of the law and government in the territory.⁷³ At the convention, the governor handed down a code called the “Duke’s Laws,” which was generally compiled from existing laws and practices in the other colonies.⁷⁴ In addition to providing for a judicial system, these laws contained a provision granting the right to a jury trial for “all actions at law, and all criminal cases.”⁷⁵ Juries were typically composed of six or seven men, with the exception of capital cases, in which twelve jurors were required.⁷⁶ Through this code, in 1665, the right to a jury trial was officially introduced in New York.

B. Colonial Statutory Development of the Right

As New York prospered, growing public sentiment and

⁶⁸ HUTCHINS, *supra* note 67, at 3-4.

⁶⁹ *Id.* at 22; 1 LINCOLN, *supra* note 66, at 412.

⁷⁰ HUTCHINS, *supra* note 67, at 25-46. *See also* 1 LINCOLN, *supra* note 66, at 411-21.

⁷¹ 1 LINCOLN, *supra* note 66, at 421.

⁷² *Id.* at 421-22.

⁷³ *Id.* at 423; HUTCHINS, *supra* note 67, at 45.

⁷⁴ 1 LINCOLN, *supra* note 66, at 423; HUTCHINS, *supra* note 67, at 45.

⁷⁵ 1 LINCOLN, *supra* note 66, at 459.

⁷⁶ *Id.* at 459; *see also* LEVY, *supra* note 22, at 74. A majority verdict sufficed in all non-capital cases. *Id.* The provision regarding the size of the jury and the one stipulating a majority verdict differed from the English system, which required twelve men juries and unanimous verdicts. PETER J. GALIE, ORDERED LIBERTY 18 (1996).

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increased political pressure led the governor to form a General Assembly in 1683.⁷⁷ In its first act, the assembly passed a Charter of Liberties and Privileges.⁷⁸ Approved by the king in 1691, the charter provided that “[a]ll Tryalls shall be by the verdict of twelve men, and as neer as may be peers or Equalls. And of the neighbourhood and in the County Shire or Division where the fact Shall arise.”⁷⁹ The Judiciary Act of 1691 reaffirmed this right to a jury trial and stipulated that the jury was responsible for determining questions of fact.⁸⁰

Subsequent laws passed by the General Assembly maintained the right as established by the Charter of Liberties.⁸¹ However, in 1732, the assembly passed a law allowing courts to try individuals charged with petty offenses without a jury and, in 1768, a law was passed eliminating juries in cases involving the theft of property valued less than £5.⁸² Therefore, in 1776, when the Third Provincial Congress appointed a committee to draft a constitution for New York, the right to a jury trial already existed as a statutory right.⁸³

C. New York's Colonial Jury in Action

An examination of various trials that took place during colonial times provides valuable insight into how the colonial jury functioned in practice and how colonists utilized the right to a jury trial. Specific issues raised in these cases involved the role of the jury, its limitations, and its function in society. More importantly, these cases help to explain why the colonists in New York came to view the jury as both a protector of individual liberties and as a political body.

⁷⁷ 1 LINCOLN, *supra* note 66, at 460.

⁷⁸ 4 CHARLES Z. LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 39-40 (1906). *See also* HUTCHINS, *supra* note 67, at 49-50.

⁷⁹ CHARTER OF LIBERTIES AND PRIVILEGES of 1683 § 17 (1691), *in* 1 LINCOLN, *supra* note 66, at 101.

⁸⁰ 4 LINCOLN, *supra* note 78, at 40.

⁸¹ *Id.*

⁸² *Id.* at 40-41. This practice still can be seen today in New York.

⁸³ *Id.* at 41. *See also* 1 LINCOLN *supra* note 66, at 478-79.

1. The Zenger Trial

The well-publicized trial of printer John Peter Zenger demonstrates the jury's role as a bulwark against an oppressive government. No case shaped public opinion about the right to a jury more than Zenger's. In 1735, Zenger, editor of the *New York Weekly Journal*, published several articles criticizing the Royal Governor of New York, William Cosby.⁸⁴ The governor responded by directing the attorney general to charge Zenger with seditious libel.⁸⁵ The grand jury thwarted the governor's plan by refusing to indict Zenger.⁸⁶ The attorney general fired back, circumventing the grand jury by using a special procedure to bring the charges independently.⁸⁷ A judge then set Zenger's bail at an extremely high amount; consequently, Zenger remained in prison for nearly nine months before trial.⁸⁸

One of the main issues presented at trial was the identity of the publisher of the allegedly seditious articles.⁸⁹ Zenger's lawyer, Andrew Hamilton, admitted that Zenger had published articles criticizing the governor's rule.⁹⁰ By conceding this point, Hamilton hoped the jury would consider the substantive issue of whether the articles were also defamatory.⁹¹ Hamilton argued that the jury should decide Zenger's guilt based on its determination of the veracity of the published articles.⁹² Chief Justice James DeLancey refused to allow Hamilton to use this argument because, under New York colonial law, truth was not a defense to seditious libel.⁹³ Nevertheless, Hamilton directed his comments to the jury even

⁸⁴ Nancy J. King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41 (1999); see also LEVY, *supra* note 22, at 79.

⁸⁵ King, *supra* note 84, at 41. For a definition of seditious libel see *supra* note 40.

⁸⁶ King, *supra* note 84, at 41.

⁸⁷ *Id.* See also Alschuler & Deiss, *supra* note 12, at 872.

⁸⁸ Alschuler & Deiss, *supra* note 12, at 872.

⁸⁹ Finkelman, *supra* note 42, at 75.

⁹⁰ ALEXANDER, *supra* note 40, at 62.

⁹¹ Finkelman, *supra* note 42, at 75.

⁹² LEVY, *supra* note 22, at 80-81.

⁹³ *Id.* See also ALEXANDER, *supra* note 40, at 62.

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though his argument directly conflicted with the Chief Justice's instructions.⁹⁴ Hamilton hoped to play to the jury's sympathy and sought to portray his client as a victim of a vindictive and corrupt government official.⁹⁵ The judge, however, instructed the jury to consider only whether Zenger had published the articles.⁹⁶ Disregarding the judge's instructions, the jury issued a general verdict acquitting Zenger, prompting "three huzzahs" from the crowded courtroom.⁹⁷

By voting with their consciences, the jurors effectively nullified seditious libel in New York.⁹⁸ The judge had instructed the jury to apply the law of seditious libel as it was written, but the jury chose to ignore these instructions and returned a general verdict of not guilty.⁹⁹ By issuing a general verdict, the jury circumvented the colonial government's attempts to use seditious libel laws as a tool to repress free speech. In addition, the jury demonstrated its power to protect individual liberties from a hostile government through its refusal to apply a law it deemed unjust.¹⁰⁰

2. *Forsey v. Cunningham*

The case of *Forsey v. Cunningham* illustrates the role of the jury as a political institution and illustrates how the jury legitimizes the legal process.¹⁰¹ This case stems from a fight that occurred on July 28, 1763, between two New York merchants, Thomas Forsey and Waddel Cunningham.¹⁰² During the fight, Cunningham injured Forsey by stabbing him with a sword.¹⁰³ For his actions, officials

⁹⁴ LEVY, *supra* note 22, at 80.

⁹⁵ Hamilton knew that the jury had the power to determine the facts, interpret the law, and apply them in this case. ALEXANDER, *supra* note 40.

⁹⁶ *Id.*

⁹⁷ ALEXANDER, *supra* note 40, at 101.

⁹⁸ Alschuler & Deiss, *supra* note 12, at 874.

⁹⁹ LEVY, *supra* note 22, at 81.

¹⁰⁰ *Id.*

¹⁰¹ See Herbert A. Johnson, *George Harison's Protest: New Light on Forsey versus Cunningham*, 50 N.Y. Hist. 61, 64-65 (1969).

¹⁰² *Id.* at 64.

¹⁰³ *Id.*

charged Cunningham with assault and battery and fined him £50.¹⁰⁴ The fine did not put an end to the incident, as Forsey also filed a civil suit against Cunningham seeking damages.¹⁰⁵ A jury found Cunningham liable for the injuries and awarded Forsey damages.¹⁰⁶

Cunningham refused to accept the jury's verdict and demanded a new trial.¹⁰⁷ The court denied his motion and Cunningham appealed to the Supreme Court of the Judicature for the colony of New York.¹⁰⁸ The court rejected his appeal based on the absence of a writ of error.¹⁰⁹ The court noted that neither party had entered procedural objections during the trial and thus concluded that the trial was fair.¹¹⁰

After the court denied his motion for a new trial, Cunningham used his political connections and appealed for a rehearing by the Lieutenant Governor of New York, Cadwallader Colden, and his governing council.¹¹¹ The court, with the agreement of the attorney general, stated that the council's jurisdiction extended only to appeals in cases of error.¹¹² Thus, because Cunningham had appealed the verdict on the facts and not the law, neither Colden nor the council had jurisdiction over the case.¹¹³

The Lieutenant Governor, on the other hand, believed the court could overrule the jury if the verdict was against the weight of the evidence.¹¹⁴ Further, he believed that he could issue a writ of error

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* In addition to medical costs and treatment, Forsey alleged that his injuries forced him to miss work. Forsey estimated the total costs to be £5000. *Id.*

¹⁰⁶ HUTCHINS, *supra* note 67, at 101.

¹⁰⁷ *Id.* See also Johnson, *supra* note 101, at 64-66.

¹⁰⁸ Johnson, *supra* note 101, at 64-66.

¹⁰⁹ *Id.* at 65-66. At common law and in colonial New York, appeals were only permitted on a writ of error. *Id.* Defendants could not appeal a judgment on the facts of a case. *Id.* Colden ordered the Supreme Court to explain its ruling. HUTCHINS, *supra* note 67, at 101.

¹¹⁰ Johnson, *supra* note 101, at 68.

¹¹¹ *Id.* See also Johnson, *supra* note 101, at 64-66.

¹¹² HUTCHINS, *supra* note 67, at 101.

¹¹³ Johnson, *supra* note 101, at 68. See HUTCHINS, *supra* note 67, at 101.

¹¹⁴ William E. Nelson, *The Jury and Consensus Government in Mid-*

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and rehear the facts of the case.¹¹⁵ In Colden's view, justice and the law came from the king and as the "King's representative in the Province [he] should function as the guarantor of the liberties of all the King's people."¹¹⁶ When the council sided with the judges, Colden asked the king and his governing council to intervene.¹¹⁷

The king decided to intervene and issued a rule permitting appeals to the governor "from verdicts of juries on questions of fact."¹¹⁸ However, the court considered an appeal of that nature illegal and refused to comply with the king's command.¹¹⁹ The General Assembly shared the court's concerns and explained that "an appeal from the verdict of a jury is subversive of that right [to trial by jury]."¹²⁰ The assembly passed a resolution affirming the right to a jury trial and reinforced the idea that the governor lacks the power to interfere with or to overturn a jury's verdict.¹²¹

3. The Trial of Nicholas Bayard and John Hutchins

The understanding of a jury trial as delivering a verdict of one's peers formed the main point of controversy in the trial of Nicholas Bayard and John Hutchins.¹²² Bayard was a political activist who lived in New York during the early 1700s.¹²³ He disagreed with the colonial government on several issues involving taxation, freedom of the press, and governance, and sent critical

Eighteenth-Century America, at <http://www.constitution.org/jury/pj/nelson.htm> (last modified July 10, 2002) (citing Cadwallader Colden to the Earl of Halifax, in 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 682-84 (E. O'Callaghan ed., Albany: Weed Parsons and Co. 1856)).

¹¹⁵ Johnson, *supra* note 101, at 69-70.

¹¹⁶ *Id.* at 69.

¹¹⁷ *Id.* at 71-72.

¹¹⁸ HUTCHINS, *supra* note 67, at 101.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* See also Johnson, *supra* note 101, at 74-75. Johnson points out that political developments may have been the real reason behind Colden's defeat. *Id.*

¹²² LEVY, *supra* note 22, at 77.

¹²³ *Id.*

letters to the British Parliament and the king.¹²⁴ In his political debates, Bayard often enlisted the help of his friend John Hutchins, who owned a tavern that served as a gathering place for local debates and political discussions.¹²⁵ The Lieutenant Governor of New York, John Nanfan, attempted to stop the two men from holding their meetings by demanding that Hutchins hand over any political manifestos and other documents in his possession.¹²⁶ When Hutchins refused, Nanfan had both Hutchins and Bayard arrested for treason.¹²⁷

In 1702, a jury convicted the men of treason.¹²⁸ The judge subsequently denied the defendants' appeal on the grounds that an impartial jury had found them guilty.¹²⁹ Regardless, the men continued to protest their convictions and appealed to Queen Anne of England.¹³⁰ The men argued that their convictions should be overturned because the verdict was in error.¹³¹ They claimed that the error was due in part to the fact that foreigners had served on the jury.¹³² The men demanded to be retried by a jury of their peers.¹³³ The queen's ministers agreed to set aside the convictions.¹³⁴ Bayard then tried to have the judge "arrested for misconduct" for failing to prevent the error, but the judge argued that the jury was responsible because it had rendered the verdict.¹³⁵ The jury refused to discuss its verdict and the matter was dropped.¹³⁶

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ LEVY, *supra* note 22, at 77.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² LEVY, *supra* note 22, at 77. Apparently a couple of the jurors were Dutch and admitted that they were ignorant of English law. *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

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III. PROTECTING THE RIGHT: TRIAL BY JURY AND THE NEW YORK CONSTITUTION

As evidenced by practice, the colonial jury did not hesitate to demonstrate its independence when pressured by judges or politicians.¹³⁷ By refusing to convict fellow citizens believed to be wrongly accused or imprisoned, the jury acted as a bulwark against government tyranny.¹³⁸ However, relying on the jury to protect individual liberties and freedoms did not completely insulate citizens from wrongful prosecutions. As was the case in Britain, most significantly through the acts of government-appointed judges, the government continued to wield significant influence over juries.¹³⁹ Judges often exerted pressure on juries to ensure that the verdicts they rendered conformed to government policy.¹⁴⁰ In many cases, the government circumvented the jury entirely by creating new tribunals authorized to try cases without a jury.¹⁴¹

In light of these experiences, the drafters of the New York Constitution sought to ensure that the citizens of New York would enjoy the unfettered right to a jury trial.¹⁴² The drafters of the New York Constitution believed the right to a jury trial was a fundamental right and sought to codify the right within their political system.¹⁴³ When it came time for the citizens of New York to form their own government, representatives believed that a

¹³⁷ See *infra* Part II.C.1 (discussing the *Zenger* trial)

¹³⁸ LEVY, *supra* note 22, at 82, 85.

¹³⁹ See LEVY, *supra* note 22, at 61. During the trial of William Penn, the judge threatened jurors refusing to issue a guilty verdict with fines and imprisonment. *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 83-86. See also Alschuler & Deiss, *supra* note 12, at 875 (discussing British attempts to reduce the power of the colonial jury). Both the Stamp Act of 1765 and the Townshend Act of 1767 attempted to reduce the impact of colonial juries by expanding the jurisdiction of nonjury Admiralty Courts.

¹⁴² See *infra* Part III.B.

¹⁴³ LEVY, *supra* note 22, at 85. See also *People v. Cosmos*, 205 N.Y. 91, 95 (1912). “The sacredness and importance of the right to trial by jury is attested by the arrangement, no less than by the language, of our Constitution.” *Id.* at 95.

constitution would best preserve the right to a trial by jury.¹⁴⁴

A. Due Process and the Right to a Jury

In 1776, the drafters gathered in White Plains during the Revolutionary War to develop a written blueprint for the establishment of a government for the future state of New York.¹⁴⁵ In addition to designing a formal governmental structure, the representatives sought to ensure that the constitution would protect fundamental individual liberties.¹⁴⁶ As a starting point, the drafters guaranteed that citizens would enjoy the right to due process of law.¹⁴⁷ Borrowing from the Magna Carta, the New York Constitution protected citizens from the denial of their rights “unless in accord with the law of the land or judgment of peers.”¹⁴⁸

B. The First New York Constitution

The colonists’ concept of due process arose from a combination of their beliefs in “the natural rights of man and the historic rights of Englishmen.”¹⁴⁹ Although the right to a jury trial was a central characteristic of due process, the due process clause of the state constitution did not “necessarily import[] a jury trial as part of the process.”¹⁵⁰ For this reason, the colonists sought to

¹⁴⁴ *Blakely v. Washington*, 124 S. Ct. 2531, 2540 (2004) (noting “the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury”).

¹⁴⁵ 1 LINCOLN, *supra* note 66, at 471-98. The drafters first met in the summer of 1776. *Id.*

¹⁴⁶ 1 LINCOLN, *supra* note 66, at 471-98.

¹⁴⁷ N.Y. CONST. of 1777, §13. *See also* *Wynehamer v. The People*, 13 N.Y. 378, 432 (1856) (discussing the due process clause); *People v. Irizarry*, 53 N.Y.S.2d 630, 633 (N.Y. Sup. Ct. 1988) (discussing the due process clause in the New York Constitution and its significance to the right to a jury trial).

¹⁴⁸ N.Y. CONST. of 1777, §13. Section 13 reads, “no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by law of the land or *the judgment of his peers.*” *Id.* (emphasis added).

¹⁴⁹ CURTIS, *supra* note 31, at 18.

¹⁵⁰ *Wynehamer v. The People*, 13 N.Y. 378, 425 (1856).

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expressly protect the right within the state constitution.¹⁵¹ Their struggles with the British government had taught them that statutory protection was insufficient to preserve the right to a jury because the legislature could change the law and judges could exert pressure on juries.¹⁵² By specifically protecting the right to a jury trial in the New York Constitution, the framers hoped to protect the right from government circumvention and judicial interference.¹⁵³

Article 41 of the 1777 Constitution reflected the concerns of the drafters. It provides:

Trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established, and remain inviolate forever. And that no act of attainder shall be passed by the legislature of this state, for crimes other than those committed before the termination of the present war; and that such acts shall not work a corruption of blood. And further, that the legislature of this state, shall, at no time hereafter, institute any new court or courts, but such as shall proceed according to the course of common law.¹⁵⁴

The first sentence of Article 41 incorporates the right as it already existed in the colony at the time of independence.¹⁵⁵ Although Article 41 fails to specify the types of cases covered by the right, the drafters clarified the matter in Article 35, which guaranteed

¹⁵¹ See THE FEDERALIST NO. 1, at 4 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (promising to explain “[t]he additional security which its [the Constitution’s] adoption will afford to the preservation of that species of government, to liberty and to property”) (emphasis in original).

¹⁵² See, e.g., *infra* Part II.C (discussing instances in which politicians and judges tried to influence the outcome of jury trials). See also AMAR, THE BILL OF RIGHTS, *supra* note 32, at 109 (pointing out that “distrust of judges lingered on in America”).

¹⁵³ *People v. Dunn*, 157 N.Y. 528, 533 (1899) (stating that the constitutional right to a jury trial and due process “were imposed by the people as restraints upon the power of the legislature”).

¹⁵⁴ NY CONST. of 1777, art. XLI.

¹⁵⁵ 4 LINCOLN, *supra* note 78, at 39. See also *People v. Dunn*, 157 N.Y. 528, 533 (1899) (pointing out that the clause “simply preserved the right as it had been exercised before the adoption of the organic law of the state”).

that both the common law of Great Britain and New York colonial law in effect at the time of the revolution “shall be and continue the law of this state.”¹⁵⁶ Thus, cases arising under English common law and New York colonial law that previously required a jury trial continued to receive protection under the state constitution.¹⁵⁷ Importantly, the state legislature could not alter or modify this constitutional right.¹⁵⁸

The representatives also drafted Article 41 to prohibit the legislature from instituting new courts that did not conform to

¹⁵⁶ See N.Y. CONST. of 1777, art. XXXV. Article 35 provides in relevant parts:

That such parts of the common law of England, and of the statute law of England and great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony . . . shall be and continue the law of this state, subject to such alterations and provisions as the legislature of this state shall, from time to time, make concerning the same. . . . That all such parts of the said common law, and all such of the statutes and acts aforesaid, or parts thereof, as may be construed to establish or maintain any particular denomination of Christians or their ministers, or concern the allegiance heretofore yielded to, and the supremacy, sovereignty, government, or prerogatives claimed or exercised by, the King of Great Britain and his predecessors, over the colony of New York and its inhabitants, or are repugnant to this Constitution, be and they hereby are, abrogated and rejected.

Id.

¹⁵⁷ For example, all felonies would be tried with a jury because under common law defendants accused of a felony had the right to a jury trial. *See also* *People v. Justices of the Court of Special Sessions of New York*, 74 N.Y. 406 (1878). In this case the defendant had been tried before a Court of Special Sessions without a jury for assault and battery. *Id.* at 406. The judge found the defendant guilty and sentenced him to four months in jail. *Id.* The defendant appealed and argued that “he had the constitutional right of trial by jury which he did not and could not waive.” *Id.* The Court of Appeals determined that the defendant did not have a constitutional right to a jury in this case because jury trials were not “used at the time of the adoption of the present Constitution in trials by courts of special sessions for the offense charged against the relator [defendant] in this case.” *Id.* Thus, the constitutional right to a jury trial did not extend to these types of cases. *Id.* *See also* 4 LINCOLN, *supra* note 78, at 39.

¹⁵⁸ 4 LINCOLN, *supra* note 78, at 39.

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common law rights.¹⁵⁹ Specifically, representatives sought to prevent the reestablishment of the admiralty courts, which historically were created by the King of England to circumvent the right to trial by jury.¹⁶⁰ This reflected the drafters' belief that common law rules should apply to the new court system, thus insulating these rights from "the reach of legislative subversion."¹⁶¹

Criminal trials in particular were to be "regulated and conducted . . . not by statutes, but by common law."¹⁶² During the convention, the representatives rejected two provisions that would have altered these qualities.¹⁶³ One provision would have eliminated the unanimity requirement for jury verdicts, while another provision would have allowed jury verdicts by a three-fourths majority.¹⁶⁴ To the framers, the common law right to a jury meant the right to a jury of twelve men and a unanimous verdict for conviction.¹⁶⁵ Since that time, New York courts have followed the intent of the framers by consistently protecting the right to a

¹⁵⁹ See N.Y. CONST. of 1777, art. XLI (providing that "the legislature of this state shall, at no time hereafter, institute any new court or courts, but such as shall proceed according to the course of the common law").

¹⁶⁰ Alschuler & Deiss, *supra* note 12, at 870-71; See also Smith, *supra* note 12, at 424 n.184.

¹⁶¹ *People v. Wynehamer*, 13 N.Y. 378, 446 (1856). See also *People v. Dunn*, 157 N.Y. 528, 533 (1899) (explaining that the constitutional provisions guaranteeing the right to a jury trial and due process "were imposed by the people as restraints upon the power of the legislature").

¹⁶² *Wynehamer*, 13 N.Y. at 446.

¹⁶³ 1 LINCOLN, *supra* note 66, at 547.

¹⁶⁴ *Id.* The representatives defeated the measure by a 28-3 vote.

¹⁶⁵ See *People v. Page*, 88 N.Y.2d 1, 5 (1996) (noting that "[a] legal jury according to the common law consisted of 12 persons"); *People v. Cosmos*, 205 N.Y. 91, 96 (1912) (stating that "[f]rom time immemorial, a common-law jury has consisted of 12 men."); *People v. Justices of the Court of Special Sessions of N.Y.*, 74 N.Y. 406, 407 (1878) (noting a "common law jury of twelve men"); *People v. Cancemi*, 18 N.Y. 128 (1858) (holding that "[a] legal jury, according to common law, consists of twelve persons"); *People v. Sanabria*, 249 N.Y.S.2d 66, 71-72 (N.Y. App. Div. 1964) (stating "this [right to jury] provision guaranteed, by implication, a unanimous verdict in a jury trial") (citations omitted).

jury trial from legislative and judicial actions.¹⁶⁶

C. Subsequent Constitutions and the Right to a Jury

New York has protected the right to a jury trial from the very beginning of its history. Representatives to the state constitutional convention made sure to include the right in New York's first constitution. An analysis of the state's subsequent constitutions reveals that New York's constitutional guarantee to the right to a jury remains relatively unchanged since its original drafting.¹⁶⁷

¹⁶⁶ See *Wynehamer*, 13 N.Y. at 427. In *Wynehamer*, the New York Court of Appeals struck down a statute prohibiting the sale of liquor without a license. *Id.* The Court held the statute violated the constitutional right to a jury trial because under the law violators would be tried either by magistrate judges without a jury or by a jury of six men. *Id.* See also *People v. Page*, 88 N.Y.2d 1, 3 (1996) (holding defendant's waiver of right to a jury trial was invalid because the defendant's consent did not "conform with the statutory mandate"); *People v. Davidson*, 525 N.Y.S.2d 855 (N.Y. App. Div. 1988) (holding defendant's waiver of his right to jury trial was improper as the defendant failed to comply with requirements set forth in the New York Constitution). In *People v. Cancemi*, the Court of Appeals overturned a murder conviction because it determined that the defendant had improperly waived his right to a jury trial. 18 N.Y. 128 (1858). A jury had convicted the defendant, Michael Cancemi, of murder. *Id.* at 130. During the trial one of the jurors had been excused. *Id.* at 130-31. As a result, only a jury of eleven entered a verdict. The State argued that because Cancemi consented to having his case heard by only eleven jurors there was no error. *Id.* at 135. The court held that an individual criminal defendant could not waive his right to a jury trial. *Id.* at 138. The court believed that because criminal cases "involve public wrongs," the State and the community have an interest in the proceedings. *Id.* at 136-37. It should be pointed out that Judge Strong believed the court should not allow for juries composed of less than twelve in criminal cases. *Id.* at 135.

¹⁶⁷ Compare N.Y. CONST. of 1777, art. XLI (providing "[t]rial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established, and remain inviolate forever") with N.Y. CONST. of 1821, art. VII, § 2 (providing "trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever"), N.Y. CONST. of 1846, art. I, § 2 (providing "trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever"), N.Y. CONST. of 1894, art. I, § 2 (providing that "[t]he trial by jury in all cases in which it has been heretofore used shall remain inviolate forever"), N.Y. CONST. of 1938, art. I, § 2 (stating "[t]rial by jury in all cases in which it has heretofore been guaranteed by constitutional provision

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This is especially significant, given the relative ease with which New York's constitution can be amended. Moreover, this consistency underscores the fundamental nature of the right and its perceived importance to New York's political and judicial system.

1. Amending the Constitution

The first constitution lacked an explicit clause or instructions regarding the amendment of the document.¹⁶⁸ Indeed, nearly fifty years passed before the New York State legislature succeeded in calling for a constitutional convention to amend the 1777 Constitution.¹⁶⁹ Later constitutions expressly provided for ways to amend the document.¹⁷⁰ As of 2003, the amendment process requires a majority vote by the legislature in two consecutive legislative sessions.¹⁷¹ After approving a proposed amendment, the legislature then submits it to the citizens of New York for a vote.¹⁷² The New York Constitution also requires voters to consider every twenty years whether to hold a constitutional convention.¹⁷³ Although more than 200 amendments have been made to the New York Constitution of 1894, the protection of the right to a jury trial in criminal cases has undergone few changes since the first constitution.¹⁷⁴

shall remain inviolate forever”), and N.Y. CONST. art. I, § 2 (McKinney’s 2004) (providing the right to “[t]rial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever”). See also *People v. Dunn*, 157 N.Y. 528, 533 (1899) (stating that “[t]he guaranty of the trial by jury is substantially the same as it stood in the original Constitution”).

¹⁶⁸ See N.Y. CONST. of 1777.

¹⁶⁹ 1 LINCOLN, *supra* note 66, at 613-29.

¹⁷⁰ GALIE, *supra* note 76, at 4.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ N.Y. CONST. art. XIX, § 2 (McKinney’s 2004).

¹⁷⁴ GALIE, *supra* note 76, at 4-5. Comparatively, the U.S. Constitution has twenty-seven amendments, ten of which were added in 1791 (our Bill of Rights) leaving only seventeen amendments in over 200 years.

2. Amendments to the Right to a Jury Trial

Although the basic formulation of the right to a jury trial has experienced few revisions since New York's first constitution, subsequent constitutions have incorporated various procedural changes to the right.¹⁷⁵ For example, delegates to the second convention in 1821 slightly altered the right by eliminating both the references to practices used in colonial New York and the prohibition against crimes of attainder.¹⁷⁶ However, the delegates retained the provision preventing the legislature from establishing new criminal courts.¹⁷⁷ The right as it appeared in Article VII, Section 2 states:

The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever; and no new court shall be instituted, but such as shall proceed according to the course of the common law; except such courts of equity as the legislation is herein authorized to establish.¹⁷⁸

Courts have interpreted the use of the word "heretofore" broadly to allow for jury trials in "such new and like cases as might afterwards arise."¹⁷⁹ These courts determined that the purpose of the law was to expand a private right rather than restrict it.¹⁸⁰ Thus, when New York adopted a new constitution in 1821, the right to a jury trial continued to receive the same protection as it did under

¹⁷⁵ Although the composition of the jury has changed dramatically since colonial times, these changes did not occur as a result of *constitutional* acts so I will not discuss those changes here.

¹⁷⁶ See e.g., N.Y. CONST. of 1821, art. VII, § 2.

¹⁷⁷ *Id.* This is due to the fundamental differences between civil suits and criminal prosecutions.

¹⁷⁸ *Id.*

¹⁷⁹ *Wynehamer*, 13 N.Y. at 426. For example, if the legislature passes a law creating a new felony, a person charged under that crime would have the right to a jury trial because under common law all felonies are tried by a jury. Conversely, an individual charged with a misdemeanor is not entitled to a jury because in colonial times misdemeanors could be tried without a jury.

¹⁸⁰ *Id.* at 426-27.

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previous constitutions.¹⁸¹

At the 1846 convention, the delegates made a single change to the Constitution of 1846 and removed the prohibition against the establishment of new courts.¹⁸² In 1894, New Yorkers amended the Constitution to permit parties in a civil case to waive the right to a jury trial.¹⁸³ In 1935, the New York State legislature passed and enacted an amendment that eliminated the unanimity requirement for juries in civil cases.¹⁸⁴ Building on this perceived move to reduce the power of the jury, the delegates introduced a provision that would allow defendants to waive a jury trial in all criminal cases “except those in which the crime charged may be punishable by death.”¹⁸⁵

This waiver provision represented the most significant change in the right to a jury trial in New York’s history. It also proved the most controversial because many believed that the right to a jury was so inherently fundamental that it could not be waived.¹⁸⁶ In fact, the citizens of New York were so concerned about limiting the use of the waiver that they passed a second amendment that same year imposing several procedural safeguards.¹⁸⁷ Following this amendment, the state constitution, various statutes, and courts required waivers to be in writing, signed by the defendant, in

¹⁸¹ *Id.* at 427.

¹⁸² Compare N.Y. CONST. of 1821, art. VII, § 2 with N.Y. CONST. of 1846, art. I, § 2.

¹⁸³ N.Y. CONST. of 1894, art. I, § 2. The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner prescribed by law. *Id.*

¹⁸⁴ GALIE, *supra* note 76, at 205.

¹⁸⁵ N.Y. CONST. of 1938, art. I, § 2. See also *Patton v. U.S.*, 281 U.S. 276 (1930) (waiver of the right to a trial by jury in criminal cases does not violate the U.S. Constitution).

¹⁸⁶ See *infra* Part V.A. (discussing New York’s waiver provision).

¹⁸⁷ *People v. Page*, 88 N.Y.2d 1, 5-6 (1996). The new amendment required that the defendant sign a written waiver “in person in open court before and with the approval of a court having jurisdiction to try the offense.” *Id.* at 6. This requirement was necessary because it helped to ensure the defendant had knowingly, intelligently, and voluntarily waived his or her right to a jury trial. *Id.*

person, in open court, before and with the approval of the court.¹⁸⁸

In 1938, New York also passed an amendment eliminating the reliance on the common law protection of the right to a jury trial as it relates to due process, bringing the right completely within the constitution.¹⁸⁹ More recent changes include the adoption of a unified court system and the provision of discretion to the legislature in regulating the size of juries in all cases except those involving indictment.¹⁹⁰

IV. THE CHANGING JURY

Colonists and the Founding Fathers believed the jury served dual roles in society: the jury was a political body capable of enforcing the principle of separation of powers, and it served as a protector of individual liberties.¹⁹¹ The Founding Fathers recognized the importance of the right to a jury trial and viewed the jury as a central part of the American federalist system of government.¹⁹² Drawing on this understanding of the right, the Founding Fathers structured the Constitution to incorporate the dual role of the jury in American society and to protect its place in

¹⁸⁸ These requirements still apply today. *See* N.Y. CONST. art. I, § 2 (providing the right “may be waived by the defendant in all criminal cases . . . by a written instrument signed by the defendant in person in open court before and with the approval of a judge.”); N.Y. CRIMINAL PROCEDURE LAW § 320.10 (McKinney 2003); *see also* *Page*, 88 N.Y.2d at 11 (reversing defendant’s conviction because the defendant’s waiver was invalid); *People v. Duchin*, 12 N.Y.2d 351, 353 (1963) (discussing the requirements for a waiver); *People v. Davidson*, 525 N.Y.S.2d 855, 858 (N.Y. App. Div. 1988) (holding the defendant’s waiver invalid as it did not conform to the constitutional and statutory requirements).

¹⁸⁹ N.Y. CONST. of 1938, art. I, § 2. Trial by jury in all cases in which it has heretofore been guaranteed by *constitutional provision* shall remain inviolate forever. *Id.* (emphasis added).

¹⁹⁰ Burton C. Agata, *Criminal Justice*, in DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK, 257 (Gerald Benjamin & Henrik Dullea eds., 1997).

¹⁹¹ THE FEDERALIST NO. 83, at 467 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (the jury was “a valuable safeguard to liberty” and “the very palladium of free government”).

¹⁹² *See* THOMAS JEFFERSON, *supra* note 33, at 442; THE FEDERALIST NO. 83, at 467 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

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the federalist system.¹⁹³

The Founding Fathers recognized that in order to be an effective political body, the jury would have to remain separate from the other parts of the government. Article III of the U.S. Constitution codified the notion of the jury as a political institution.¹⁹⁴ Specifically, Article III referred to the trial of “all crimes,” implying that the jury forms an integral part of the judicial system.¹⁹⁵ The Sixth Amendment assured the federal government’s protection of the right by securing the individual rights aspect of the jury; however, it left the specific definitions and actual implementation of the right to the states.¹⁹⁶ Implicit in the amendment is the anti-federalist view that the states were better positioned than the federal government to protect individual liberties.¹⁹⁷

¹⁹³ See *infra* Part I.C. (discussing the drafting of the Constitution to protect the right to a jury trial)

¹⁹⁴ *Id.* Article III states in part that “[t]he trial of all [c]rimes, except in [c]ases of Impeachment, shall be by Jury.” U.S. CONST. art. III. See also Alschuler & Deiss, *supra* note 12, at 927 (concluding that “[o]nly a shadow of this communitarian institution has survived”); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 48 (2003) (arguing “[t]he placement of the criminal jury in Article III highlights that the criminal jury is not a constitutional afterthought, but a central institution in the operation of the government”).

¹⁹⁵ AMAR, BILL OF RIGHTS, *supra* note 32, at 105 (stating that “[t]he words in the Article III jury clause were plainly understood during the ratification period as words of obligation”).

¹⁹⁶ See U.S. CONST. amend. VI. For this reason, juries differed from state to state and the right to a jury trial signified different things from state to state. King, *supra* note 84, at 43.

¹⁹⁷ *People v. Irizarry*, 536 N.Y.S.2d 630, 633 n.2 (N.Y. Sup. Ct. 1988). The anti-federalists believed “[s]tate Constitutions in general, and the New York Constitution in particular, have long safeguarded any threat to individual liberties, irrespective of from what quarter that peril arose.” *Id.* (quoting *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 159 (1978)). See also Essays by Cincinnatus, *supra* note 37, at 13 (arguing that “[o]ur state constitutions have held it [the right a jury trial] sacred in all its parts . . . [and] [t]hey have anxiously secured it.”). In fact, before *Duncan v. Louisiana*, the Sixth Amendment only applied to the federal government. 391 U.S. 145, 149 (1968). The Court in *Duncan* held the right to a jury trial is a fundamental right that falls within the Due Process Clause of the Fourteenth Amendment. *Id.*

Despite the fact that states were not required to protect the right,¹⁹⁸ juries remained a central part of the local political foundation of our country.¹⁹⁹ This is not the case today. The jury no longer wields such profound influence on our political and judicial systems.²⁰⁰ Indeed, an increasing number of individuals view the jury as an accessory rather than an integral part of the judicial system.²⁰¹ Furthermore, many people have come to view the right to a jury in one-dimensional terms as a defendant's right as opposed to a basic political right of all citizens.²⁰² This change has occurred gradually and is due to several different factors, including the development of the legal profession and professional judiciary, the passage of the Civil War Amendments, various U.S.

¹⁹⁸ See *Maxwell v. Dow*, 176 U.S. 581, 604-5 (1900). In *Maxwell*, the Court upheld a provision in Utah's Constitution providing for an eight-person jury. The Court felt the issue of juries should be left to the states to decide. *Id.* As long as states provided a means for which criminal and civil actions could be resolved fairly then the Court would not get involved. *Id.* at 604-5. See also *Patton v. United States*, 281 U.S. 276, 298 (1930) (holding that the right to a jury may be waived and that a state may decide to try a case without a jury).

¹⁹⁹ See *Blakely v. Washington*, 124 S. Ct. 2531, 2539 (2004) (stating the right to a jury trial is "a fundamental reservation of power in our constitutional structure" and it "is meant to ensure their control in the judiciary"); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (noting the jury acted as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge").

²⁰⁰ See AMAR, *THE BILL OF RIGHTS*, *supra* note 32, at 97, 109 (stating that once "[j]uries stood at the center of the original Bill of Rights, but sit on the periphery today" and "the present-day jury is only a shadow of its former self"); Barkow, *supra* note 194, at 34 (stating "[t]oday, however, the jury's role as a check on the government's power has become far more limited").

²⁰¹ WILLIAM T. PIZZI, *TRIAL WITHOUT TRUTH* 216 (1999) (criticizing the American justice system for not giving juries more help because "jurors are children who cannot be trusted to make . . . decisions for themselves").

²⁰² See *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972) (holding "the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served" by a less than unanimous jury verdict); *Williams v. Florida*, 399 U.S. 78, 100 (1970) (stating that the "essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen"); *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968) (stating the jury assures "that fair trials are provided for all defendants").

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Supreme Court decisions interpreting the right to a jury trial, and changes to state constitutional protections of the right. The result is that today's jury bears little resemblance to its common law predecessor.²⁰³

A. The Diminishing Power of the Jury

Apart from the overall composition and inclusiveness of the modern jury, the greatest change has been the decline of the jury's substantive powers.²⁰⁴ The colonial jury and its American successor played an active role in the justice system.²⁰⁵ Until the middle of the nineteenth century, juries in the United States

²⁰³ AMAR, *THE BILL OF RIGHTS*, *supra* note 32, at 108 (arguing that "even the core role of the jury in criminal trials has seriously eroded over the past two centuries").

²⁰⁴ For the purposes of this note, I am focusing solely on the substantive decision making power of the jury rather than on its composition. I do not mean to diminish the magnitude of allowing women and minorities to serve on the jury. In fact, a large body of Supreme Court cases deal with this issue. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that equal protection prevents a party from using peremptory challenges based on race); *Castaneda v. Partida*, 430 U.S. 482 (1977) (holding that Mexican-Americans composing nearly 80 percent of a county's population yet only making up 39 percent of persons summoned for grand jury duty was prima facie case of discrimination); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (striking down a Louisiana law excluding women from the jury); *Carter v. Jury Comm'n*, 396 U.S. 320 (1970) (holding exclusion of blacks from jury service violated the idea of a jury); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (striking down a West Virginia law that only allowed white men to serve on juries). For an overview of New York's progression and struggle with inclusion, see Frederick T. Kelsey, Note and Comment, *Gender Based Peremptory Challenges and the New York State Constitution*, 8 *TOURO L. REV.* 91, 93-98 (1991).

²⁰⁵ *See* Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 *BROOK. L. REV.* 1257, 1264-65 (2001) (stating that "jurors in this country played a more active role than they do today"); Smith, *supra* note 12, at 449-50 (noting that the "role of the jury during the course of a trial in America originally was much greater than that of the modern American jury"); Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 *S.C. L. REV.* 135, 145-47 (observing that "early American juries played a much greater role in determining the law than their modern counterparts").

determined both questions of law and questions of fact.²⁰⁶ The first Chief Justice of the U.S. Supreme Court, John Jay, alluded to this power when he instructed the jury in *Georgia v. Brailsford*, a civil case, that it had the right “to determine the law as well as the fact in controversy.”²⁰⁷ In determining questions of law, the jury acted as a check on the judiciary and the government and, consequently, wielded great power.²⁰⁸ This is best illustrated by the *Zenger* trial, in which the jury used this power to determine that Zenger’s actions did not constitute seditious libel.²⁰⁹

The power of the jury to determine questions of law derived, in

²⁰⁶ See Letters from the Federal Farmer (Jan. 18, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 319-20 (Herbert J. Storing ed., 1981) [hereinafter Letters from the Federal Farmer] (stating “it is the established right of the jury by the common law, and the fundamental laws of this country . . . to decide both as to law and fact.”); LEVY, *supra* note 22, at 87 (stating that “[w]hen juries sat, they controlled justice” and according to John Adams, “a jury could determine the law no matter how a court instructed it”); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 377, 386-88 (1999) (noting that until the early 1900’s “lawyers and judges believed that juries had the power to declare both law and fact”); Marder, *supra* note 205, at 1264-65 (stating that juries could “find the facts and decide the law”); Young, *supra* note 205, at 146 (noting that “juries generally operated as triers of both law and fact”). See also *United States v. Sparf*, 156 U.S. 51 (1894) (Gray, J., dissenting). Judge Gray believed that the jury had the power to determine the law.

It is our deep and settled conviction, confirmed by re-examination of the authorities under the responsibility of taking part in the consideration and decision of the capital case now before the court, that the jury, upon the general issue of guilty or not guilty in a criminal case, have [*sic*] the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue.

Id. at 114.

²⁰⁷ 3 U.S. 1, 4 (1794). John Jay was one of the principle drafters of the New York Constitution and was one of New York’s leading political figures.

²⁰⁸ See the discussion of the *Forsey* case, *supra* Part.II.C.2; see also Barkow, *supra* note 194, at 34, 49, 54. Barkow points out that “the criminal jury was designed to be a part of our elaborate system of checks and balances, placing a check on the legislature and executive to ensure that no one received criminal punishment unless a group of ordinary citizens agreed.” *Id.*

²⁰⁹ See *infra* Part II.C.1 (discussing the *Zenger* trial and jury nullification).

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part, from the fact that juries knew as much about the law as most judges and lawyers.²¹⁰ Early American lawyers did not receive the same type of training as their modern counterparts.²¹¹ However, this parity in knowledge started to change as judges and lawyers received better training and more extensive legal education.²¹² Although traditional law schools were all but nonexistent in the nineteenth century, dedicated law schools became a mainstay of legal training by the early twentieth century.²¹³ As the legal

²¹⁰ See Harrington, *supra* note 206, at 378-79 (noting the jury had this power in part because “few judges in the colonial period had formal legal training . . . as a result, the judge who presided at trial did not look all the much different from the jury”); Smith, *supra* note 12, at 449-50. Smith reasoned that juries were allowed to determine issues of law in part because of “the perceived or actual parity in the knowledge of law upon the part of ordinary citizens and the professional lawyers and judges.” *Id.*; Young, *supra* note 205, at 146 (arguing that “because the colonies lacked legally-trained judges, the American jury was considered on comparable footing with the judiciary when it came to determination of the applicable law”).

²¹¹ LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 304-5 (2d ed. 1985) (stating “[t]he American lawyer was never primarily a learned doctor of laws” and “[l]egal education was not very stringent”).

²¹² Harrington, *supra* note 206, at 380 (noting that “[a]s legal education became more sophisticated, judges became more convinced that the bench was the proper place in which to lodge the law-finding function”). See also Smith, *supra* note 12, at 450-51. Smith points out:

Often, judges themselves had little legal knowledge or possessed limited access to the law. Thus, authority of juries to pass judgment on issues of law may have been a peculiar feature of the American system that was a result of the ignorance of early American legal professionals, and which, therefore, disappeared as knowledge of law possessed by legal professionals increased over time relative to that possessed by the general public.

Id.

²¹³ FRIEDMAN, *supra* note 211, at 320, 606-7. Friedman tells us that “legal training at universities was slow to get started, and well into the 19th Century there were no ‘law schools’ as such at universities.” *Id.* at 320. For this reason, “[o]f the lawyers practicing in the United States in 1848, the overwhelming majority had been trained in a private law office, or had educated themselves by a course of reading.” *Id.* at 606. However, the rise of the law school put an end to that method of learning the law and “by 1900 it was quite clear that the law school would come to dominate legal education.” *Id.*

profession developed, lawyers and judges looked to control an increasing part of the litigation process.²¹⁴ Judges became more knowledgeable about the law and, thus, were better able to instruct the jury on the relevant legal issues. Furthermore, as the country developed economically and politically, legal issues became more intricate and harder for the average layperson to understand.²¹⁵ The result was that judges and lawyers no longer believed that juries could be trusted to decide these complex legal issues.²¹⁶ The

²¹⁴ See Harrington, *supra* note 206, at 422 (stating that “[t]he bench and bar thus affected a dramatic transformation in the relations between judge and jury”); Smith, *supra* note 12, at 445 (arguing that “judges and lawyers would fill the vacuum left by the erosion in the jury’s power” and that judges and lawyers “disproportionately influenced the development of legal principles in the United States”).

²¹⁵ See Harrington, *supra* note 206, at 379; Smith, *supra* note 12, at 445 (stating that “as legal principles (and society in general) grew increasingly complex, the role of the jury in adjudicating disputes decreased”).

²¹⁶ See *United States v. Sparf*, 156 U.S. 51, 102 (1894) (stating the jury should apply the law as instructed by the court). In *Sparf*, the Court upheld a lower court’s decision denying the defendants’ request to instruct the jury that it could find the defendants guilty of manslaughter rather than murder. The Court, after a lengthy historical discussion about the powers of the jury, concluded:

We must hold firmly to the doctrine that in the courts of the United States it is the duty of the juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their consciences, believe them to be.

Id. at 102; *Duffy v. The People*, 26 N.Y. 588 (1863). In *Duffy*, the defendant appealed his robbery conviction on the grounds that his confession was improperly admitted into evidence and the judge improperly gave the jury “peremptory instructions upon the legal questions arising on such trials.” *Id.* at 591. The court affirmed the conviction and ruled that “it is as much the duty of jurors to be governed by the instructions of the court upon legal questions in criminal as it is in civil cases.” *Id.* The court explained its ruling:

1. The selection of jurors from all classes of the people whose education and business cannot, as a general rule, have qualified them to decide legal questions, renders it unreasonable as well as apparently unsafe to require them to pass upon such questions.
2. If jurors were to determine the law, its stability would be subverted, and it would become as variable as the prejudices, the inclinations and

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development of the American legal profession and the emergence of the professional judiciary in the 1800s thus proved instrumental in ending the practice of criminal juries determining both questions of law and questions of fact.²¹⁷

The development of modern law and criminal procedure also has contributed to the reduction of the jury's power and its role in the U.S. justice system.²¹⁸ One example of these changes has been the emergence of the use of plea bargains in criminal trials. Although it is difficult to pinpoint exactly when plea bargaining started to be used in criminal cases, Albert Alschuler and other legal historians suggest that the practice fully emerged in the late 1800s.²¹⁹ The increased use of plea bargaining led to a dramatic

the passions of men. Every case would be governed, not by any known or established rule, but by a rule made for the occasion. Jurors would become not only judges, but legislators as well.³ All questions in regard to the admission or rejection of evidence, being questions of law, are required to be decided by the court. If jurors are to decide law and fact, their jurisdiction should extend to these questions, which often control the verdict.

Id. at 591-92 (internal quotations omitted); *see also* Harrington, *supra* note 206, at 379 (“members of the bench and bar gradually came to the conclusion that the jury’s power over law must be restrained”); Smith, *supra* note 12, at 450-51 (noting that “there was judicial pressure to curtail the power of the jury”).

²¹⁷ *See* Harrington, *supra* note 206, at 380, 436 (stating “[t]he drive to limit the [jury’s] law-finding function was entirely a judge-led exercise” and “[t]he professional judiciary’s desire for symmetry in the criminal law eventually diminished the jury’s role”); Young, *supra* note 205, at 146 (observing that “the role of the jury regarding issues of law began to diminish, due in part, to the emergence of a better-educated judiciary”).

²¹⁸ *See* Marder, *supra* note 205, at 1266 (“One concomitant of this enhanced role for both judge and lawyer was a diminished role for the juror.”). Jury nullification remains one of the only powers exclusively enjoyed by the jury. Although quite often viewed negatively, jury nullification exemplifies the true values and historic ideals of the jury system. *See* Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673 (1996); Todd Barnet, *New York Considers Jury Nullification: Informing the Jury of Its Common Law Right to Decide Both Facts and Law*, 65 N.Y. ST. B.J. 40 (Nov. 1993).

²¹⁹ FRIEDMAN, *supra* note 211, at 576-77 (stating that “[t]he beginnings of plea bargaining can be clearly traced to this period [post-Civil War]”); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5, 19

increase in the number of guilty pleas received in felony cases.²²⁰ As a direct result of the increase in plea bargaining, the number of jury trials has decreased dramatically.²²¹

The development of rules of evidence further contributed to the diminution of the jury's role in the American justice system. Through the development of evidentiary rules, judges and lawyers assumed greater control over trials.²²² Subsequently, juries have become increasingly dependent upon judges and lawyers to guide them in their efforts in resolving litigation.²²³ Today, judges serve as gatekeepers for the jury by screening testimony and determining the type of evidence the jury hears.²²⁴ Although legislatures and some courts, including the U.S. Supreme Court, have intervened in instances in which judges have overstepped their authority and

(1979) (concluding that "plea bargaining did not occur with any frequency until well into the nineteenth century").

²²⁰ Alschuler, *supra* note 219, at 18. Alschuler cites Raymond Moley's study of guilty pleas in New York during the 19th and early 20th centuries, which found that in 1839 only 15 percent of felony convictions were by guilty plea, but by 1926 the number had grown to 90 percent. *Id.*

²²¹ *Id.* at 33 (pointing out that "[i]n the early 1920's, the only alternative to a guilty plea in most states was a jury trial").

²²² See King *supra* note 84, at 48 (stating judges control the juries "through the rules of evidence"); Marder, *supra* note 205, at 1266 ("With the development of the rules of evidence, both lawyers and judges had larger roles to play: lawyers assumed responsibility for demonstrating their respective versions of the truth, and judges exercised control over the lawyers' presentations and over the verdicts that were supposed to be based on these presentations."); Smith, *supra* note 12, at 445 ("Thus, the judiciary was able to contain the decisionmaking power of the jury by determining what evidence could be heard by the jury, as well as by determining what were the issues of fact within the purview of the jury, as opposed to issues of law, which were within the province of the judge's decisionmaking authority.").

²²³ Marder, *supra* note 205, at 1266.

²²⁴ King, *supra* note 84, at 48-49 ("A judge may not be allowed to tell jurors what to deduce from the evidence they hear, but he can prevent them from hearing it at all."). Additionally, with the advancement in forensics and the increased use of DNA testing and other technology, judges control the testimony of expert witnesses. See, e.g., *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993) (holding "general acceptance" was not a precondition for admissibility of scientific evidence and that the trial judge is responsible for determining whether expert testimony is both relevant and reliable).

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intruded upon the powers of the jury, such intervention to protect the power of the jury is the exception rather than the norm.²²⁵

²²⁵ See *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (limiting judges' discretionary powers in sentencing). In *Apprendi*, the defendant was arrested for firing several shots into a home owned by an African-American family. *Id.* at 469. Prosecutors charged him with unlawful possession of a firearm, a charge that carried a maximum sentence of ten years. *Id.* at 470. A New Jersey hate-crime statute permitted the judge to exceed the statutory maximum sentence if the judge determined the defendant acted with racial bias. *Id.* at 468-69. Therefore, instead of a ten-year sentence, the defendant received twelve years. *Id.* at 474. In ruling the statute unconstitutional, the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury." *Id.* at 490. See also *United States v. Booker*, No. 04-104, 2005 WL 50108 (holding the federal sentencing guidelines were unconstitutional because they violated a defendant's Sixth Amendment right to a jury trial); *Blakely v. Washington*, 124 S.Ct. 2531 (2004) (applying *Apprendi* and holding the defendant's Sixth Amendment right to a jury trial was violated when the trial judge used evidence not presented to the jury to impose a sentence which exceeded the statutory minimum by more than three years). In *Blakely*, the defendant pleaded guilty to kidnapping and admitted facts in his plea that could bring a maximum sentence of more than four years. *Id.* at 2534. Instead of sentencing the defendant to the maximum 53 months, the judge made "a judicial determination that he [Blakely] had acted with 'deliberate cruelty'" and imposed a sentence of 90 months, nearly twice the maximum supported under the statute. *Id.* The Court applied the rule set forth in *Apprendi* that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2536 (quotations omitted). In explaining the basis for its ruling, the Court cited "the need to give intelligible content to the right of jury trial." *Id.* at 2539. See also *Ring v. Arizona*, 536 U.S. 584 (2002) (applying *Apprendi* to invalidate an Arizona law that allowed the judge to impose the death penalty if the judge found one of ten aggravating factors because the factors were not submitted to the jury); *People v. Errington*, 762 N.Y.S.2d 524 (N.Y. App. Div. 2003). In *Errington*, an appeals court overturned a judge's sentence because the judge "improperly considered crimes of which the defendant was acquitted as a basis for sentencing." *Id.* at 525. See also Katie Cornell Smith, *Punker Con Up for a Big Break*, N.Y. POST, Oct. 17, 2003, at 30. Smith's article covers the *Errington* case and reveals that the trial judge imposed the "harsh" sentence because he felt the jurors "disregarded the law in their effort to show Errington mercy." *Id.*

B. The Civil War Amendments and the Jury

The Founding Fathers structured the federalist system to ensure that the federal government did not encroach upon states' rights.²²⁶ However, the passage of the Civil War Amendments completely altered the structural relationship of the constitutional right to a jury.²²⁷ Before the Civil War, Americans viewed the Bill of Rights as protecting their freedoms from encroachment by the federal government.²²⁸ The Sixth Amendment provided assurance to the states that the federal government could not interfere with the right

²²⁶ See *infra* Part I.C. (discussing the drafting of the Constitution).

²²⁷ See AMAR, *THE BILL OF RIGHTS*, *supra* note 32, at 110. Amar argues that the Civil War brought about a fundamental change in how juries were viewed because as a "local body" the jury could no longer be entrusted to protect individual liberties. *Id.* at 110.

²²⁸ *Barron v. Baltimore*, 32 U.S. 243 (1833) (holding that the Fifth Amendment did not apply to the states). In explaining the Court's ruling, Marshall stated:

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

Id. at 247-48. See also *infra* Part.I.B.

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to a jury trial.²²⁹ The U.S. Supreme Court addressed the issue of whether the Bill of Rights applied to the states in the 1833 case of *Barron v. Baltimore*.²³⁰

In *Barron*, the plaintiff had sued the city of Baltimore under the Fifth Amendment seeking compensation for damage done to his wharf.²³¹ Chief Justice Marshall, writing for the Court, explained that the issue of whether the Fifth Amendment limited the states was “of great importance, but not of much difficulty.”²³² Marshall ruled that the Fifth Amendment “must be understood as restraining the power of the general government, not as applicable to the state.”²³³ The reason for this was because “[t]he constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.”²³⁴ The states had their own constitutions, which provided limitations on their respective governments.²³⁵

After the Civil War, Congress passed the Civil War Amendments abolishing slavery and granting the former slaves citizenship and the right to vote.²³⁶ However, the Northern politicians controlling Congress realized abolishing slavery was only the first step in the process of breaking down the shackles of slavery.²³⁷ Congress also wanted to protect the former slaves and their newfound freedom from encroachment by the southern states and believed the Bill of Rights was the key.²³⁸ Problematically,

²²⁹ See *infra* Part.I.B.

²³⁰ *Barron*, 32 U.S. at 247.

²³¹ *Id.* at 244-45.

²³² *Id.* at 247.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Barron*, 32 U.S. at 247 (“Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated.”).

²³⁶ See U.S. CONST. amends. XIII – XV.

²³⁷ CURTIS, *supra* note 31, at 35. Curtis explains that “Republicans had long been troubled by the South’s interference with rights guaranteed by the Bill of Rights” and “in the changed political climate of 1866 Republicans were unwilling to tolerate such deprivations.” *Id.*

²³⁸ *Id.* at 37-56. The Republicans in Congress saw Reconstruction as an opportunity to secure liberty and protect “the rights of citizens of the United

however, the U.S. Supreme Court, in *Barron*, had ruled that the Bill of Rights did not apply to the states.²³⁹ Therefore, in order to ensure that the situation in the South would not revert back to the way it was before the Civil War, the Republicans needed to alter the political dynamic.²⁴⁰ The Republicans needed to make sure that the principles represented in the Bill of Rights could be enforced against the states because the states no longer could be trusted to protect individual liberties.²⁴¹ Instead, the federal government needed to intervene to safeguard personal freedoms.²⁴² Congress thus intended for the Civil War Amendments to provide a means for the subsequent enforcement of the Bill of Rights with regard to the states.²⁴³

States.” *Id.* at 54. These politicians believed “the Bill of Rights secured the rights of citizens and protected these rights against interference from any quarter.” *Id.* at 37. In fact, they “interpreted the guaranties of the Bill of Rights to limit the states as well as the federal government.” *Id.* at 51.

²³⁹ See *Barron v. Baltimore*, 32 U.S. 243 (1833).

²⁴⁰ CURTIS, *supra* note 31, at 35.

²⁴¹ *Id.* at 41 (The Republicans especially wanted to protect fundamental liberties “against denial by the states.”).

²⁴² *Id.* at 55. Senator Richard Yates described the proper role of this “new” federal government as that of “a central Federal Government which, while it allows the States the exercise of all their appropriate functions as local State governments, can hold the States well poised in their appropriate spheres, can secure the enforcement of the constitutional guarantees of republican government, the rights and immunities of citizens in the several States, and carry out all the objects provided for in the preamble of the Constitution.” *Id.*

²⁴³ Arguably, the difficulty in determining the effect of the Civil War Amendments can be blamed on Justice Miller’s majority opinion in the *Slaughter House Cases*. See *Slaughter House Cases*, 83 U.S. 36 (1873). Justice Miller ruled that the Privileges and Immunities Clause of the Fourteenth Amendment did not apply to the States. For this reason the Supreme Court has struggled with how to apply the Amendments to the Bill of Rights and resulted in the much-maligned practice of selective incorporation based on “substantive due process”. For a more complete analysis on the incorporation of the Bill of Rights, see *Duncan v. Louisiana*, 391 U.S. 145,162-71 (1968) (Black, J., concurring) (discussing the selective incorporation of the Bill of Rights and arguing that all of the Bill of Rights should be applicable to the States); AMAR, THE BILL OF RIGHTS, *supra* note 32; Laurence H. Tribe, *Pursuing the Pursuit of Happiness*, N. Y. REVIEW, Sept. 24, 1998, (book review) (reviewing CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND

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The Thirteenth, Fourteenth, and Fifteenth Amendments granted the former slaves freedom and civil rights.²⁴⁴ Among these civil rights were the right to vote and the right to serve on a jury.²⁴⁵ Prior to the passage of the Civil War Amendments, only white property owners could serve on juries.²⁴⁶ Thus, for former slaves, the right to a jury trial and the right to serve on a jury symbolized their new status as free citizens of the United States.²⁴⁷ Republicans in Congress believed the Fourteenth Amendment, through its due process and equal protection provisions, would guarantee that former slaves enjoyed the right to serve on a jury and other basic civil liberties that were represented in the Constitution.²⁴⁸ However, to the southern states and many other Americans, former slaves serving on juries provided a clear reminder that states could no longer deny freedmen their political rights outright.²⁴⁹ In an attempt to curtail these newfound freedoms, states looked to de-emphasize the political aspect of the jury.²⁵⁰ States began to view the jury as a means of protecting individual rights, rather than as a political institution, so they

UNNAMED (1998)).

²⁴⁴ U.S. CONST. amends. XIII – XV.

²⁴⁵ See U.S. CONST. art. III; U.S. CONST. amend. VI.

²⁴⁶ Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 909, 921 (2003) (“In the past, jury service was available only to White men with property.”).

²⁴⁷ *Id.* (stating “jury duty now takes on added meaning” because it “is a hard-won badge of citizenship; it is an indicia of belonging and of counting as a citizen”).

²⁴⁸ CURTIS, *supra* note 31, at 216-17.

²⁴⁹ AMAR, BILL OF RIGHTS, *supra* note 32, at 271.

²⁵⁰ *Id.* (“Whereas the Founders emphasized Americans’ rights to participate in government by serving in juries, Reconstructors at first emphasized the right to be *tried* by juries.”) (emphasis added). Amar argues that Congress attempted to solve this problem by passing a law that barred states from excluding black people from serving on juries. *Id.* at 273. By basing this law on the Fifteenth Amendment rather than the Fourteenth Amendment, Congress emphasized the political rights aspect of the jury. *Id.* (“[T]he Fifteenth Amendment, rightly read, affirms blacks’ political rights-to vote, serve on juries, and hold office-just as the Fourteenth Amendment had affirmed blacks’ civil rights to do virtually everything but.”). *Id.*

would not by law have to include blacks on juries.²⁵¹ This emphasis on the civil rights aspect of the jury signaled a gradual change in the perception of the jury as a political institution.

C. The Supreme Court and the Right to a Jury

Although the American Civil War and the Reconstruction initiated the evolution of the modern jury, a handful of Supreme Court decisions in the last fifty years have provided the real impetus for the changed perception of the jury's role in society. The first major change in the constitutional right to a jury trial occurred in *Patton v. United States*.²⁵² In *Patton*, a juror became sick during the trial and was excused.²⁵³ After consulting with the judge, the prosecution and the defense agreed to continue the trial with an eleven-person jury.²⁵⁴ The jury ultimately convicted the defendants and the defendants appealed.²⁵⁵ The defendants claimed that they did not have "[the] power to waive their constitutional right to a trial by a jury of twelve persons."²⁵⁶ The Court disagreed and ruled that a defendant could waive his constitutional right to a jury trial in criminal cases.²⁵⁷ The Court interpreted Article III of the Constitution and the Sixth Amendment to mean "substantially the same thing."²⁵⁸ Therefore, the Court determined that the

²⁵¹ See *Strauder v. West Virginia*, 100 U.S. 303, 304-5 (1880) (ruling that excluding blacks from serving on the jury violated the black defendant's civil rights). Excluding blacks from juries was a common practice in America, especially in the southern states. See also *Swain v. Alabama*, 380 U.S. 202 (1965) (holding that the Constitution does not entitle a criminal defendant to "demand a proportionate number of his race on the jury which tries him" nor does eliminating blacks from the jury constitute "a denial of equal protection of the laws"). It was not until 1986 that the Supreme Court ruled a state could not exclude people from serving on a jury solely on account of their race. See *Bastou v. Kentucky*, 476 U.S. 79 (1986).

²⁵² 281 U.S. 276 (1930).

²⁵³ *Id.* at 286.

²⁵⁴ *Id.* at 286-87.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 287.

²⁵⁷ *Patton v. U.S.*, 281 U.S. 276, 298 (1930)

²⁵⁸ *Id.* at 298.

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constitutional right to a jury trial did not establish the jury “as a part of the frame of government,” but rather as an individual right that could be waived.²⁵⁹ The Court’s decision in *Patton* had a dramatic influence on New York, as evidenced by the fact that shortly after the ruling was issued, New York amended its constitution to allow waiver of the right to a jury trial in criminal cases.²⁶⁰

The Court’s ruling in *Duncan v. Louisiana* further established the concept of the jury as an individual right.²⁶¹ In *Duncan*, the defendant had been convicted of battery, a misdemeanor under Louisiana law.²⁶² Although battery carried a maximum sentence of two years, the defendant was not entitled to a jury trial under Louisiana law because Louisiana did not provide for jury trials in misdemeanor cases.²⁶³ The Court ruled that the right to a jury trial in criminal cases is “fundamental to the American scheme of justice” and, therefore, falls within the Due Process Clause of the Fourteenth Amendment.²⁶⁴ The Court held that the right to a jury trial protects defendants “against arbitrary law enforcement” and that to deny the right in “serious criminal cases” would violate the Fourteenth Amendment.²⁶⁵

The Court reasoned that the right to a jury is “essential for . . . assuring that fair trials are provided for all defendants.”²⁶⁶ By applying the Sixth Amendment right to a jury trial to the states

²⁵⁹ *Id.* at 293-95. The Court believed that “it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused.” *Id.* at 297. The Court did note that the constitutional right to a trial by jury meant the right to a jury of twelve people requiring a unanimous verdict. *Id.* at 288-89 (stating that the “common law elements [of the right to a jury] are embedded in the constitutional provisions . . . and are beyond the authority of the legislative department to destroy or abridge”).

²⁶⁰ See *infra* Part III.C.2 (discussing the changes to the right to a jury trial in the New York Constitution).

²⁶¹ 391 U.S. 145 (1968).

²⁶² *Duncan*, 391 U.S. at 146.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 156.

²⁶⁶ *Duncan*, 391 U.S. at 158.

through the Fourteenth Amendment, the Court focused on the civil rights aspect of the right to a jury trial. In emphasizing concepts such as fairness and liberty, the Court discussed the right to a jury trial in terms of the defendant's right, rather than the *juror's* right. This characterization reinforces the perception that the right to a jury trial is an individual rather than a political right and, problematically, overlooks the significance of the jury as a political institution.²⁶⁷

Following *Duncan*, the Court ruled in *Williams v. Florida* that the Sixth Amendment did not mandate twelve person juries.²⁶⁸ The Court dismissed reliance on the number twelve as "a historical accident."²⁶⁹ It noted that the proper issue related to "the function

²⁶⁷ Furthermore, by emphasizing fairness and liberty, the Court introduced an interpretative element into the jury debate, which opened the door to eventually limiting the right. *See, e.g.*, *Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding a conviction based on an 11-1 jury verdict as it did not violate Sixth Amendment right to a jury trial); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (holding that a conviction based on a 9-3 verdict did not violate defendant's Fourteenth Amendment right of due process); *Williams v. Florida*, 399 U.S. 78, 86 (1970) (holding that the Constitution does not require twelve person juries).

²⁶⁸ 399 U.S. 78, 86 (1970).

²⁶⁹ *Id.* at 86-89. The Court argued that the framers of the U.S. Constitution did not intend to preserve the entire common law jury right in the Constitution. *Id.* at 92-93. The Court based its reasoning on the fact that a draft of the clause originally contained common law jury features, but that these requirements were ultimately taken out of the final version. *Id.* at 93-97. I have argued in this note that the reason for the streamlined language in Article III is because the Framers intended only to preserve the institutional aspect of the right to a jury in that clause. *See infra* Part I.C. It is the Sixth Amendment that protects the individual right to a jury trial and which contains references to jury specifications. I believe the Founders did not put more specific language in the Sixth Amendment because they did not want to encroach on what was traditionally a state issue. The jury was a local institution already established at the state level so including specifications in the *federal* constitution would be seen as limiting states' powers. The right to a jury was universally viewed as a fundamental right of a free and democratic society so I do not think any of the Framers would have envisioned that the states would act to limit it as it existed already in their respective political systems. Regardless of whether or not the Court's historical analysis is correct, the New York Constitution incorporated the common law right to a jury, therefore mandating a jury of twelve and requiring a unanimous verdict. *See infra* Part III.B. (discussing the drafting of the New York

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that the particular feature performs and its relation to the purposes of the jury trial.”²⁷⁰ Thus, because a six-person jury could protect the defendant against government oppression, a twelve-person jury was not required under the Sixth Amendment.²⁷¹

In the *Williams* decision, the Court refrained from ruling on the unanimity requirement, but implied that a unanimous verdict may be required.²⁷² This suggestion proved misleading, as a year later, in *Apodaca v. Oregon* and *Johnson v. Louisiana*, the Court held that the Sixth Amendment right to a jury trial did not require a unanimous verdict.²⁷³ In *Apodaca*, each of the petitioners had been convicted by less-than-unanimous jury verdicts in accordance with Oregon’s constitution.²⁷⁴ As in *Williams*, the Court believed that a

constitutional right to a jury trial).

²⁷⁰ *Williams*, 399 U.S. at 99-100. Admittedly, the Court does mention the communitarian nature of the jury and the virtue of deliberations. *Id.* at 100. However, the reference to the communitarian aspect was made in terms of the fair cross-section representation requirement, another aspect of the individual liberty function of the jury. Furthermore, it seems contrary to Tocqueville’s democratic institution to emphasize the importance of deliberation, but permit a reduction in the size of the jury.

²⁷¹ *Id.* at 100-2. Having dismissed the twelve person jury requirement as “an historical accident”, the Court seems to have replaced it with the equally arbitrary number of six. Why draw the line there? Why not a five person jury? The Court in *Ballew v. Georgia*, 435 U.S. 223, 245 (1977), considered that scenario and ruled that trying a defendant with a five-person jury violated the Sixth Amendment right to a jury trial. For a criticism of the *Ballew* and *Williams* ruling, see Daniel P. Collins, *Making Juries Better Factfinders*, 20 HARV. J. L. & PUBL. POL’Y 489 (1997).

²⁷² *Williams*, 399 U.S. at 101 n.46. The Court explained:

We intimate no view whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial. While much of the above historical discussion applies as well to the unanimity as to the 12-man requirement, the former, unlike the latter, may well serve an important role in the jury function, for example, as a device for insuring that the Government bear the heavier burden of proof.

Id.

²⁷³ 406 U.S. 404 (1972) (upholding a conviction based on an 11-1 jury verdict as it did not violate Sixth Amendment right to a jury trial); 406 U.S. 356 (1972) (holding that a conviction based on a 9-3 verdict did not violate defendant’s Fourteenth Amendment right of due process).

²⁷⁴ *Apodaca*, 406 U.S. at 406.

non-unanimous jury could adequately protect a defendant's rights. The Court rejected the argument that allowing non-unanimous jury verdicts would disenfranchise "minority elements within the community."²⁷⁵ In an opinion reminiscent of its decisions in *Patton* and *Duncan*, the Court in *Apodaca* and *Johnson* discussed the right to a jury trial with regard to its effects on an individual's civil rights. By focusing on the jury's role in protecting individual liberties, the Court further contributed to the perception of the right to a jury trial as solely an individual right.

Ironically, the decisions in *Johnson* and *Apodaca* upholding the constitutionality of non-unanimous jury verdicts bring the right to a jury trial back full circle to the Civil War Amendments. The Radical Republicans wanted to apply the principles espoused in the Bill of Rights to the states, but could not do so directly because of the Supreme Court's ruling in *Barron*.²⁷⁶ Therefore, they enacted the Civil War Amendments and intended for these new amendments to protect individual liberties from encroachment by the states.²⁷⁷ Nearly one hundred years later, in 1968, the Supreme Court used the Fourteenth Amendment as a basis for ruling that the Sixth Amendment applies to the states.²⁷⁸

Unfortunately, the Court's emphasis of the individual liberty protection role of the jury detracts from the understanding of the jury as a political institution and ignores the jury's rich heritage as a political institution that sits at the center of our federalist system. Furthermore, the Court's interpretation of this right differs from the common law right incorporated in New York's Constitution.²⁷⁹ It also differs from the jury that existed in early America. In part

²⁷⁵ *Id.* at 413. The Court did not think any group was entitled to block a conviction, only participate in the legal process.

²⁷⁶ See *Barron v. Baltimore*, 32 U.S. 243 (1833) (holding that the Fifth Amendment did not apply to the states).

²⁷⁷ See AMAR, BILL OF RIGHTS, *supra* note 32, at 181-215; CURTIS, *supra* note 31, at 57-91, 131-53.

²⁷⁸ See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding the Sixth Amendment applies to the states).

²⁷⁹ As discussed previously, the New York Constitution incorporated the common law right to a jury trial which means the right to a twelve person jury and a unanimous verdict. See *infra* Part.III.

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because of the Court's decisions, the jury is no longer viewed as a sacred political institution warranting constitutional or governmental protection. Instead, the concept of the jury as a political body is subjugated to and replaced by its other role—that of a protector of individual rights. Moreover, except in capital cases, the Court's decisions enable states to restrict the right to a jury trial as it existed in colonial times and in common law.²⁸⁰

Despite the diminution of the jury's role in the judicial process generally, juries still wield significant influence on capital sentencing and may, in that context, serve in their traditional role as both a defender of individual liberties and a political body.²⁸¹ Why distinguish capital cases from other criminal cases? Because death represents the ultimate deprivation of liberty and the state should protect its citizens from any attempts to deprive them of life, liberty or the pursuit of happiness.²⁸² For this reason, previous efforts to eliminate the unanimity requirement in New York have provided an exception for death penalty cases. Similarly, the New York Constitution's waiver provision, which permits defendants to waive their right to a jury trial, includes an exception for death penalty cases.²⁸³ Indeed, even the *Williams* Court seemed to

²⁸⁰ See, e.g., *Apodaca v. Oregon*, 406 U.S. 404 (1972) (no unanimity requirement in the Constitution); *Williams v. Florida*, 399 U.S. 78 (1970) (jury may be less than twelve persons); *Patton v. U.S.*, 281 U.S. 276 (1930) (right to a jury may be waived).

²⁸¹ For a discussion on the role of juries in capital cases see *Ring v. Arizona*, 536 U.S. 584 (2002) (invalidating trial judge's imposition of the death penalty as the judge factored in evidence that was not submitted to the jury). See also Joseph L. Hoffmann et al., *Plea Bargaining in the Shadow of Death*, 69 *FORDHAM L. REV.* 2313 (2001).

²⁸² See *People ex rel. Rohrlich v. Follette*, 20 N.Y.2d 297, 300 (1967) (discussing the waiver of the right to a jury trial and because the right "was so fundamental and so essential to the protection of the defendant's rights" it could not be waived in capital cases).

²⁸³ See N.Y. Leg. Documents no. 114 at p. 30-31 (1931) (proposing that "[a]n amendment should be made empowering the Legislature, by general law, to provide that verdicts in cases tried by juries may be rendered by five-sixths of the jurors constituting the jury in any civil or criminal action *except where the crime charges is or may be punishable by death*") (emphasis added); N.Y. CONST. art. I, § 2 (providing that the right to a jury trial "may be waived by the defendant in all criminal cases, *except for those in which the crime charged may*

recognize the fundamental difference between a capital case and other cases with regard to the right to a jury.²⁸⁴

A lot has changed in the United States since Jefferson and the other Framers gathered in Philadelphia to draft a constitution that would serve as a blueprint for the formation of a new government. One of these changes has been the marginalization of the jury's role in our federal system of government. Several different factors contributed to this change in the jury's substantive powers. Unfortunately, these factors also affected the right to a jury trial at the state level.

V. THE EROSION OF THE RIGHT TO A JURY IN NEW YORK

The *Zenger* case, the *Forsey* case, and the trial of Nicholas Bayard demonstrate the profound influence juries had on New York's colonial criminal and political systems.²⁸⁵ However, the right to a jury trial in New York was not impervious to the changes occurring at the federal level and in other states. Like juries in other states, the New York jury experienced an erosion of its substantive powers.²⁸⁶ Despite this erosion and the limited understanding of the jury's role advocated by the U.S. Supreme Court in *Williams* and *Apodaca*, New York has resisted making

be punishable by death") (emphasis added).

²⁸⁴ *Williams v. Florida*, 399 U.S. 78, 103 (1970) (stating the fact that "no State provides for less than 12 jurors [in capital cases] . . . suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty.").

²⁸⁵ See ALEXANDER, *supra* note 40 (providing a detailed account of the *Zenger* trial and the practice of jury nullification in colonial times); Johnson, *supra* note 101, at 61 (discussing *Forsey v. Cunningham* and the struggle between the colonial government, the legislature, and the court over the sanctity of a jury's verdict); LEVY, *supra* note 22, at 77 (describing the trials of Nicholas Bayard and John Hutchins and the importance of the vicinage requirement). These cases also demonstrate the fierce independence and political spirit of the jury that critics today find so troubling. Cf. PIZZI, *supra* note 201, at 200-20 (arguing that the jury system needs to be modified and "jury nullification makes a mockery of" the justice system).

²⁸⁶ See *Duffy v. The People*, 26 N.Y. 588 (1863) (rejecting the view that juries have the power to decide questions of law).

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drastic changes to its constitutional protection of the right to a jury trial in criminal cases. One major exception to this consistent protection of the right was the addition of the waiver provision to the New York Constitution in 1938. A more recent threat to the consistent protection of the right to a jury trial is the movement to eliminate the unanimity requirement in the New York Constitution.²⁸⁷

A. The Waiver of the Right to Trial by Jury

The drafters of the New York Constitution believed the right to a jury trial was a fundamental right and sought to protect it in the state's first constitution.²⁸⁸ For this reason, New York's constitution protects the right to a jury trial in all felony criminal cases.²⁸⁹ However, in 1938, New York amended the Constitution to allow citizens to waive this right.²⁹⁰ This proved extremely controversial because many believed that the right to a jury was so inherently fundamental that it could not be waived.²⁹¹ In fact, prior

²⁸⁷ See *supra* note 1.

²⁸⁸ See *infra* Part III; See also *People v. Cosmos*, 205 N.Y. 91, 95 (1912) (pointing to the constitutional protection of the right as evidence of its importance).

²⁸⁹ N.Y. CONST. art. I, § 2 (McKinney's 2004).

²⁹⁰ New York included several constitutional safeguards with this waiver. See *infra* Part III.C.2 (requiring a written waiver to be personally executed by the defendant in open court in front of a judge and judicial approval). The Constitution also provides for an important exception to the waiver provision, which prevents a defendant from waiving the right to a jury trial in capital cases. See N.Y. CONST. art. I, § 2 (McKinney's 2004) (providing that "[a] jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death.").

²⁹¹ See *People v. Page*, 88 N.Y.2d 1, 5-7 (1996) (discussing the controversy surrounding the waiver and stating that people considered the right "absolute and [one that] could never be waived by either party"); *People ex rel. Rohrlich v. Follette*, 20 N.Y.2d 297 (1967) (explaining that prior to the waiver provision it was thought that "the right to a trial by jury was so fundamental and so essential to the protection of the defendant's rights that it could not be waived"); *People v. Cosmos*, 205 N.Y. 91, 97 (1912). "Thus we see that the right of trial by jury, both in England and here, is imbedded in the Constitution; and with us it is a right which, in criminal cases cannot be waived." *Id.* at 97.

to the amendment, courts in New York had prohibited defendants from waiving the right to a jury trial.

In *People v. Cancemi*, the New York Court of Appeals overturned the defendant's conviction and ordered a new trial because it determined that the defendant had improperly waived his right to a jury trial.²⁹² In *Cancemi*, a juror became sick during the trial and the defendant agreed to let the trial continue even though there were only eleven jurors.²⁹³ The court ruled that allowing a defendant to waive the right to a jury trial "would be a highly dangerous innovation."²⁹⁴ Furthermore, based on of the history of the right and "the constitution and laws establishing and securing [it]," the court determined that "any number short of a full panel of twelve jurors" would not be tolerated.²⁹⁵

The court based its ruling on the fact that there is a fundamental difference between civil and criminal trials.²⁹⁶ Providing for a waiver in civil trials does not raise the troubling issues involved with criminal cases because in a civil trial both parties represent their own interests.²⁹⁷ As Judge Strong wrote, "[c]ivil suits relate to . . . only individual rights which are within their individual control, and which they may part with at their

²⁹² 18 N.Y. 128 (1858).

²⁹³ *Id.* at 134-35.

²⁹⁴ *Id.* at 138.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 135-39.

²⁹⁷ *See People v. Cancemi*, 18 N.Y. 128, 135-36 (1858). The court, in discussing the waiver of the right to a jury trial and the distinction between criminal and civil trials, stated:

There is, obviously, a wide and important distinction between civil suits and criminal prosecutions, as to the legal right of a defendant to waive a strict substantial adherence to the established constitutional, statutory, and common-law mode and rules of judicial proceedings. This distinction arises from the great difference in the nature of such cases, in respect to the interests involved and the objects to be accomplished.

Id. This different treatment of the jury based on the whether the case is criminal or civil continues today. *See* N.Y. CONST. art. I, § 2 (McKinney's 2004) ("The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case.").

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pleasure.”²⁹⁸ Therefore, because of this difference, the court ruled that “the right of a defendant in a criminal prosecution to affect, by consent, the conduct of the case, should be much more limited than in civil actions.”²⁹⁹

More than fifty years later, the Court of Appeals, in *People v. Cosmos*, reiterated that the right to a jury trial could not be waived.³⁰⁰ In *Cosmos*, the defendant was convicted of first-degree murder after a jury trial and filed a motion asking the court to set aside the verdict.³⁰¹ The trial court denied the motion and the defendant appealed.³⁰² The defendant argued that the verdict should be set aside because one of the jurors lacked the statutory property qualifications required for jury service.³⁰³ The court affirmed the lower court’s decision because the issue did not “affect the merits” of the case.³⁰⁴ The court also determined that the defendant should have raised the issue during his trial.³⁰⁵ In reaching this decision, the court discussed the “sacredness and importance of the right to trial by jury” and concluded that the right could not be waived.³⁰⁶

The adoption of the waiver provision signaled a fundamental shift in the perception of the jury and its role in New York’s judicial system. The citizens of New York were sufficiently concerned about this shift that they added another amendment shortly after the waiver provision that imposed several restrictions on the waiver.³⁰⁷ Regardless, the waiver amendment proved to be a

²⁹⁸ *Id.* at 136.

²⁹⁹ *Cancemi*, 18 N.Y. at 137.

³⁰⁰ 205 N.Y. 91 (1912)

³⁰¹ *Cosmos*, 205 N.Y. at 93.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 104.

³⁰⁶ *Id.* at 95-96. The court stated that “the citizen is not only entitled to the trial by jury . . . but that in criminal cases in which it has been heretofore used it cannot be waived by either party [government or defendant].” *Id.* at 96. The court later reiterated this point: “Thus we see that the right of trial by jury, both in England and here, is imbedded in the Constitution; and with us it is a right which, in criminal cases, *cannot be waived.*” *Id.* at 97 (emphasis added).

³⁰⁷ See *People v. Page*, 88 N.Y.2d 1, 5-6 (1996) (stating that the

significant change to the right to a jury trial in New York. The availability of the waiver suggested that justice could be administered without a jury. Furthermore, by allowing defendants to waive the right, the amendment diminished not only the jury's ability to protect individual liberties, but also the jury's role as a political institution.

B. The Proposed Amendment

Although the passage of the waiver amendment proved to be a major change to the right to a jury trial in New York, New Yorkers still enjoyed the full protections of the common law right as it existed under the first constitution.³⁰⁸ This meant that New Yorkers had the right to be tried by a twelve-person jury and the right to a unanimous verdict. However, some New Yorkers worried that the passage of the waiver provision would lead to other changes to the right.³⁰⁹ Recently, several representatives in the New York Assembly suggested that New York should amend the New York Constitution to eliminate the unanimity requirement for juries in criminal trials.³¹⁰ In 2003, New York State Assemblyman Tom

amendment was needed because it helped to ensure the defendant had knowingly, intelligently, and voluntarily waived his right to a jury trial).

³⁰⁸ That is the right to a twelve person jury and a unanimous verdict. *See infra* Part III.

³⁰⁹ *See* *People v. Page*, 88 N.Y.2d 1, 5 (1996) (citing 2d Ann. Report of N.Y. Jud. Council, 1936 N.Y. Legis. Doc. No. 48, at 100). "Members of the former Judicial Council even questioned whether the proposed constitutional amendment providing for waiver of jury trial by a criminal defendant would suffice to legalize trial by jury of less than twelve men, as well as a complete waiver of the jury." *Id.* (internal quotations omitted); *People v. Cancemi*, 18 N.Y. 128, 138 (1858). "If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone." *Id.*; *People v. Sanabria*, 249 N.Y.S.2d 66, 69-70 (N.Y. App. Div. 1964) (discussing the 1931 New York legislature's debate over a proposal to eliminate the unanimity requirement).

³¹⁰ *See* Assemb. 4469, 226th Leg. Sess. (N.Y. 2003). This was not the first time such an idea has been proposed. A similar amendment was introduced in 1996, 1997, 1998, 1999, and 2001. *See* MEMORANDUM, *supra* note 2.

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Kirwan, along with Assemblypersons David Townsend, Jr., Joel Miller, and Sandra Lee Wirth, proposed altering the “long-standing” right to a jury provision in the New York Constitution.³¹¹ They introduced bill A04469, which provided for the amendment of the New York Constitution to allow for “a less than unanimous verdict in misdemeanor and felony prosecutions.”³¹² Under the proposed amendment, the New York Constitution would allow for a “five-sixths jury verdict in a misdemeanor case and a three-fourths jury verdict in a felony case.”³¹³

The proponents of the amendment characterize the bill as an anti-crime initiative.³¹⁴ They argue that the unanimity requirement has resulted in a “higher crime rate” and has fomented “disrespect for the law.”³¹⁵ Advocates of the amendment maintain that changing the constitution and eliminating the unanimity requirement would lead to “more convictions” and, therefore, would help to “put more criminals behind bars.”³¹⁶ To further support their argument, the sponsors of the bill point out that the federal Constitution “does not require a unanimous jury verdict in criminal cases.”³¹⁷ Thus, they argue, New York does not have to guarantee that right.

VI. A CRITICISM OF THE PROPOSAL TO ALTER THE RIGHT TO A JURY IN THE NEW YORK CONSTITUTION

The jury’s role in American society represents the fundamental values upon which this country was founded: democratic self-government and liberty.³¹⁸ The Framers considered the jury an

³¹¹ Assemb. 4469, 226th Leg. Sess. (N.Y. 2003); *see also* MEMORANDUM, *supra* note 2.

³¹² MEMORANDUM, *supra* note 2.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* *See also* *Apodaca v. Oregon*, 406 U.S. 404 (1972) (holding that there is no constitutional right to a unanimous verdict).

³¹⁸ THOMAS JEFFERSON, *supra* note 33, at 442 (describing the jury “as the only anchor ever yet imagined by man, by which a government can be held to

important part of both our political and judicial systems.³¹⁹ They viewed the jury as an independent political institution that would act to ensure that politicians and judges followed the law.³²⁰ Furthermore, the Founding Fathers believed the right to a jury trial served to protect citizens from government coercion and oppression.³²¹ The right also ensured that a defendant would be judged by his peers and would receive the benefits of our judicial system.³²² Indeed, the very structure of the U.S. Constitution reflects the jury's central place in our federalist system and its dual role as both a political institution offering citizens an opportunity to govern and to learn about the laws of this country, and a protector of individual liberties.³²³

In light of the jury's position at the center of our federalist system, it would seem that changing the right would alter the careful balance of the federalist structure. Furthermore, the elimination of the unanimity requirement would interfere with the jury's ability to function as both an independent political

the principles of its constitution”).

³¹⁹ Article III of the U.S. Constitution refers to trials of “all crimes,” implying that the jury forms an integral and required part of the judicial system. AMAR, BILL OF RIGHTS, *supra* note 32, at 105 (stating that “[t]he words in the Article III jury clause were plainly understood during the ratification period as words of obligation”).

³²⁰ See Letters from the Federal Farmer (Jan. 18, 1788), *supra* note 206, at 320. The Federal Farmer believed the jury, as representative of the people, should uphold the law against wrongful politicians and judges. “If the conduct of judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government, the jury may check them, by deciding against their opinions and determinations, in similar cases.” *Id.*

³²¹ See *infra* Part I; See also *Blakely v. Washington*, 124 S. Ct. 2531, 2539 (2004). “Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.” *Id.* at 2539; *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (stating that the jury protects the defendant against an abusive government); Barkow, *supra* note 194 (discussing the jury’s role in our constitutional framework).

³²² In fact, Article I, Section 1 of the New York Constitution states that “[n]o member of this state shall be . . . deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the *judgment of his or her peers*.” N.Y. CONST. art. I, § 1 (McKinney’s 2004) (emphasis added).

³²³ See *infra* Part.I.B.

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institution and a protector of individual rights. In addition, the proposed changes would discount the significance of the history of the right to a jury trial in New York.

1. The Jury as a Symbol of Federalism

As support for their argument for eliminating the unanimity requirement in the New York Constitution, sponsors of the proposed amendment point out that the federal Constitution “does not require a unanimous jury verdict in criminal cases.”³²⁴ However, comparing New York’s constitutional protection of the right to a jury trial to that of the federal Constitution completely disregards the fundamental characteristics of the jury and ignores the underlying basis for our federalist system.³²⁵

At its core, the jury is a local institution whose judgment represents the judgment of the community.³²⁶ Given its local character, the right to a jury trial should reflect the customs, values, and history of the local community.³²⁷ In fact, the U.S. Supreme

³²⁴ MEMORANDUM, *supra* note 2. *See, e.g.*, *Apodaca v. Oregon*, 406 U.S. 404 (1972) (holding that there is no constitutional right to a unanimous verdict).

³²⁵ *See infra* Part I.B (discussing the federalists’ concerns over a strong federal government). Even if the jury no longer serves a significant political function, it still represents a fundamental right of individual liberty. The anti-federalists believed that the states were better equipped to protect individual liberties than the federal government. Therefore, it does not follow that states are fulfilling their mandate to protect individual rights if they provide less protections to the right to a jury than federal courts provide.

³²⁶ *See* U.S. CONST. amend. VI (requiring that members of the jury come from “the State and district wherein the crime shall have been committed”). *See also* Barkow, *supra* note 194, at 77 (arguing that “[t]he jury adds a unique perspective to the criminal justice system: the views of the community”); Smith, *supra* note 12, at 472. Interestingly enough, Smith argues that it is the communitarian aspect of the jury that makes it a source of protection from abuses of government. *Id.* at 473.

³²⁷ *See* *People v. Dunn*, 157 N.Y. 528, 536 (1899). In *Dunn*, the New York Court of Appeals upheld a law providing for special juries in certain criminal cases. Judge Gray, writing for a unanimous court, provided a brief history of the right to a jury trial and the origin of the right to a jury of one’s peers:

The system of trial by jury, as it grew up at common law, had its root in the endeavor to secure to a defendant a trial of his cause by a fairly

Court, in *Taylor v. Louisiana*, remarked that “[c]ommunity participation in the administration of the criminal law . . . is . . . consistent with our democratic heritage.”³²⁸ In *Taylor*, the Court struck down a provision in the Louisiana Constitution that operated to exclude women from serving on a jury as a violation of the Sixth Amendment.³²⁹ The Court ruled that having a jury that represented a “fair-cross-section” of the community was a fundamental right because it ensured that the whole community would participate in the judicial process.³³⁰

The desire to preserve this local and communitarian aspect of the jury influenced the drafting of the Constitution.³³¹ This was the reason the right to a jury trial appears in both Article III and the Bill of Rights.³³² However, even though the right to a jury trial appears in different parts of the Constitution,³³³ the actual protection of the common law right is fairly limited.³³⁴ Considering, therefore, that both the United States’ political and judicial systems are based on a federalist model, it makes sense that New York’s constitutional right to a jury trial affords greater

selected body of his equals, rather than by his rulers, or by magistrates, or by persons designated by them, and usage finally obtained of taking twelve jurymen from the vicinage to judge upon the facts developed by the evidence of witnesses. The right was conceded to the citizen of having the judgment of an impartial committee, or body, of his fellow-citizens, upon charges involving his life, or his liberty, or his property

Id.

³²⁸ 419 U.S. 522, 530 (1975).

³²⁹ *Taylor*, 419 U.S. at 530.

³³⁰ *Id.*

³³¹ In order to mollify anti-federalists’ concern that the federal government would encroach upon the states, the framers developed the federalist system of government and incorporated the right to a jury trial into the Constitution. *See infra* Part I.C (discussing the framing of the Constitution).

³³² *Id.*

³³³ *See* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amends. VI-VII.

³³⁴ *See, e.g., Apodaca v. Oregon*, 406 U.S. 404 (1972) (no unanimity requirement in the Constitution); *Williams v. Florida*, 399 U.S. 78 (1970) (jury may be less than twelve persons); *Patton v. U.S.*, 281 U.S. 276 (1930) (right to a jury may be waived).

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protection of individual liberties than the federal right.

The maintenance of a right to a jury trial in New York that is more protective than its federal counterpart is also counseled by the state's history. The unanimity requirement has existed as a principal component of the right in New York since colonial times. By changing New York's constitutional protection of the right to better align it with the federal right, the state would forsake its political heritage and turn its back on more than three hundred years of history. In addition, eliminating the unanimity requirement ignores the underlying reasons for the historical development of the right in New York.

Some critics argue that states and courts should not be slaves to history.³³⁵ However, New York based its constitutional protection of the right to a jury trial on the laws and customs that had developed during colonial times.³³⁶ The Founding Fathers recognized that the states had developed their own political systems, so they established a federalist system of government that allowed the colonies to incorporate many of their existing laws and customs into the new system of government.³³⁷ As a result, New York's constitutional right to a jury differs from the federal right because it was founded upon the common law requirements of unanimity.³³⁸ Therefore, the basis for New York's right to a jury trial is fundamentally and structurally different from that of the federal right. Consequently, the alteration of the right would destroy the unique characteristics of New York's right to a jury.

2. Protecting the Jury's Role As a Political Institution

Although the jury's substantive powers have declined in modern times, the jury still has the potential to serve as both a

³³⁵ See *Williams v. Florida*, 399 U.S. 78 (1970) (holding that there is no constitutional right to a jury of twelve because "that particular feature of the jury system appears to have been a historical accident").

³³⁶ See *infra* Part III (discussing the drafting of the first New York constitution).

³³⁷ See *infra* Part III.B (discussing incorporating the right to a jury trial as it existed during colonial times in the first New York constitution).

³³⁸ See *Id.*

protector of individual rights and a political institution in our society. Alexis de Tocqueville viewed the American jury system as providing a means for people to participate in government.³³⁹ He referred to the jury as “the most energetic means of making the people rule.”³⁴⁰ In this regard, early American juries played an active role in governance by administering and adjudicating the laws of the community.³⁴¹ The jury served a fundamental and integral part of our political system analogous to the militia³⁴² or a governmental administrative body.³⁴³ Indeed, the American political and judicial systems are not complete without the jury.³⁴⁴

³³⁹ TOCQUEVILLE, *supra* note 35, at 127. Serving on a jury “invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in its government.” *Id.*

³⁴⁰ *Id.* at 128.

³⁴¹ *Id.* at 127. *See also* Amar, *supra* note 12, at 1174 (arguing juries involve people in the administration of justice and they represent “democratic self-government.”); George C. Harris, *The Communitarian Function of the Criminal Jury Trial and The Rights of the Accused*, 74 Neb. L. Rev. 804, 806-10 (1995).

³⁴² *See e.g.*, AMAR, BILL OF RIGHTS, *supra* note 32, at 84; Amar, *Reinventing Juries*, *supra* note 12, at 1170. Amar argues that the jury and the militia are “cousins” in that they both were local in nature, born of the right of citizenship and represented checks on an overreaching government. *Id.*

³⁴³ *See* Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1422-23 (1997). Primus argues that juries aren’t self-governing institutions like “legislatures or town meetings.” Instead, he argues that juries function more like an administrative agency that performs “other-government” functions. He bases this belief on the fact that juries do not decide issues affecting their own interests and are not bound by their decisions. *Id.* Although I ultimately agree with Primus’ conclusions, I disagree with his characterization of the jury. I believe that juries are an integral part of the process and play an active role in adjudicating cases. Furthermore, I think serving on a jury has a direct impact on a person’s life and that juries are bound by their decisions. To argue that the impact of their decision is disproportionate with the impact on the defendant and therefore less tangible ignores the overall significance of the jury’s role in the judicial process. I think the relationship between the jury, the defendant, and the adjudication process represents the fundamental nature of the jury and explains why it is such a sacred institution.

³⁴⁴ *See* *Blakely v. Washington*, 124 S. Ct. 2531, 2538 (2004) (noting the right to a jury trial more than a procedural formality, “but a fundamental

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New York's history, in particular, demonstrates how citizens, through the practice of the right to a jury trial, played a large role in both the political and adjudicative processes.³⁴⁵ In this capacity, the jury functions as a political institution and, for this reason, serving on a jury should be considered a valued political right.³⁴⁶

Ironically, by advocating the elimination of the unanimity requirement, many critics emphasize the democratic nature of the jury.³⁴⁷ They believe allowing non-unanimous rule would conform

reservation of power in our constitutional structure”).

³⁴⁵ See *infra* Part II.C (citing examples of the New York colonial jury in action). *Zenger* showed how the jury could protect an individual defendant from an overzealous prosecutor and how the jury can act as a political institution and nullify laws it considers unjust. The *Forsey* case demonstrates the role the jury played in the emerging political struggle and debate in New York and it reinforces the importance and weight given to jury verdicts by members of the judiciary and the legislature. See Letters of Centinel (Oct. 1787–Apr. 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 149 (Herbert J. Storing ed., 1981). The Centinel, an anti-federalist, cited Governor Colden's actions in the *Forsey* case as a reason the Constitution needed stronger protections for the right to a jury. *Id.* Furthermore, the case proves that citizens, especially politicians, believed the jury to be an integral part of the judicial process. The trial of Nicholas Bayard and John Hutchins shows the value citizens placed on the right to a trial by a jury of their peers. The defendants in that case believed their right to a jury trial had been violated because the jury was not composed of their peers. This case also demonstrates the independence of the jury as it refused to disclose its deliberations or to discuss its verdict.

³⁴⁶ AMAR, THE BILL OF RIGHTS, *supra* note 32, at 106 (stating that a “jury trial was not simply and always an individual right but also an institution of localism and popular sovereignty”). In his concurring opinion in *Duncan v. Louisiana*, Justice Fortas argued that a “[j]ury trial is more than a principle of justice applicable to individual cases. It is a system of administration of the business of the State.” 391 U.S. 145, 171 (1968) (Fortas, J., concurring). See also *People v. Irizarry*, 536 N.Y.S.2d 630, 635 (N.Y. Sup. Ct. 1988) (pointing out that the Committee of the Constitutional Convention of 1938 “expressed the view that the jury was a significant political institution”). It is important to note that the requirements for serving on the jury have changed significantly in the last two centuries to the point where now most citizens may serve on a jury. This change helps to understand why much of our society no longer considers the political aspect of the jury nor sees it as a political institution.

³⁴⁷ See Jason L. Riley, *Rule of Law: Should a Jury Verdict Be Unanimous?*, WALL ST. J., Nov. 22, 1995, at A11. In his article Riley quotes Professor Warren Schwartz, an advocate of abolishing the unanimity requirement. Schwartz says,

with the democratic principles of our society.³⁴⁸ However, eliminating the unanimity requirement and amending the constitution to allow for a conviction by a 9-3 verdict would effectively diminish the jury's ability to function as a democratic institution. This becomes increasingly evident when one considers the functions of the jury in the judicial system.

A criminal jury is more than a finder of fact; it is a microcosm of democratic government.³⁴⁹ Early Americans believed serving on a criminal jury represented not only a civic duty, but also a civic right similar to voting.³⁵⁰ In order to convict the accused of a felony, the government must convince twelve individuals, beyond a reasonable doubt, that the defendant committed the crime. To reach a verdict, jurors must deliberate and vote. The deliberation process and voting are both foundations of a democratic society.³⁵¹

The elimination of the unanimity requirement would detract from this deliberation process.³⁵² This is because requiring a majority verdict instead of a unanimous one would reduce the need

“[I]f one conceives of jury decision-making as a fundamentally democratic enterprise . . . it makes sense to inquire as to whether the rule employed in all other democratic institutions might be appropriate for this one.” *Id.* See also Amar, *supra* note 12, at 1189-90 (arguing that “most of our analogies tug toward majority rule—legislatures generally use it; voters abide by it”).

³⁴⁸ Riley, *supra* note 347.

³⁴⁹ See *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Fortas, J., concurring) (stating that the jury administers the business of the state).

³⁵⁰ Amar, *Sixth Amendment First Principles*, *supra* note 35, at 684 (citing Vikram D. Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995)). This view arises not only out of the functional aspect of the jury, but also the procedural responsibilities as well.

³⁵¹ AMAR, *THE BILL OF RIGHTS*, *supra* note 32, at 274 (pointing out that voting is central to what jurors do and that “in America, ordinary voters had always served as jurors”). Amar illustrates these core values of the jury system by discussing the significance importance of the Fifteenth Amendment and its impact on former slaves. *Id.* (stating “the Fifteenth Amendment helped restore much of the original political vision underlying juries that the Fourteenth Amendment had warped”).

³⁵² See Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1272-73 (2000) (pointing out that studies have shown implementing majority rule “appears to alter both the quality of the deliberative process and the accuracy of the jury’s judgment”); Osher, *supra* note 7, at 1361.

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for juries to reach a consensus.³⁵³ A recent study undertaken by the National Center for State Courts (NCSC) reported that nearly “twenty percent of jurors” do not “begin to form an opinion about the evidence until jury deliberations had commenced” and that nearly 25 percent of jurors change their minds during deliberations.³⁵⁴ Studies have also shown that once a jury discovers it has reached a majority, deliberations come to an end.³⁵⁵ This aborted deliberation process indicates that allowing for a majority verdict prevents juries from engaging in thorough consideration of the evidence and legal issues presented at trial.³⁵⁶ In turn, eliminating the unanimity requirement potentially threatens the accuracy of the verdicts rendered by juries.³⁵⁷

Majority verdicts in jury trials also prove problematic in that they dilute the voting power of the minority. Providing defendants with the right to a unanimous verdict by a jury of their peers legitimizes the judicial process and increases the public’s faith in the judicial system.³⁵⁸ Furthermore, serving on a jury allows the community to be involved in the political and judicial system. Allowing for a three-fourths majority verdict in criminal cases, however, stifles debate and renders some juror’s votes meaningless.³⁵⁹ In addition, studies have also shown that jurors in trials requiring a majority verdict do not listen to or respect each

³⁵³ See Taylor-Thompson, *supra* note 352, at 1272-73; Osher, *supra* note 7, at 1361-62.

³⁵⁴ PAULA L. HANNAFORD ET AL., NAT’L CENTER FOR STATE COURTS, *Executive Summary to ARE HUNG JURIES A PROBLEM?* 5 (2002), available at http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesExecSumPub.pdf. See also HANNAFORD ET AL., *supra* note 4, at 63-67.

³⁵⁵ Osher, *supra* note 7, at 1361.

³⁵⁶ *Id.*; see also Taylor-Thompson, *supra* note 352, at 1272-73.

³⁵⁷ *Primus*, *supra* note 343, at 1432 (pointing out that requiring a unanimous verdict “minimizes the potential for incorrect verdicts” because “[t]welve jurors are less likely to be mistaken than ten or nine or seven”).

³⁵⁸ See Letters from the Federal Farmer (Jan. 18, 1788), *supra* note 206, at 320 (arguing that “the jury trial brings with it an open and public discussion of all causes, and excludes secret and arbitrary proceedings”). *Id.*

³⁵⁹ See Taylor-Thompson, *supra* note 352, at 1272-74; Osher, *supra* note 7, at 1361-62.

other's views as much as in cases requiring unanimous verdicts.³⁶⁰ This is a particularly serious issue when the votes that are diluted belong to African-American jurors or other people of color who are serving on the jury.³⁶¹ By reducing the fairness aspect of the right to a jury trial³⁶² the elimination of the unanimity requirement would curtail New Yorkers' political rights and greatly diminish the jury's ability to act as a political institution.

3. *Preserving the Jury's Power to Protect Individual Liberties*

Of course, the right to a jury trial also serves as a safeguard of individual liberties.³⁶³ Thomas Jefferson, in a letter to Thomas Paine, described the right as "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."³⁶⁴ Similarly, the Court in *Duncan v. Louisiana* viewed the jury as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."³⁶⁵ In this manner, the American jury system places the jury in a position to intervene against the government to protect a defendant's liberty.³⁶⁶

³⁶⁰ HANNAFORD ET AL., *supra* note 4, at 14; Taylor-Thompson, *supra* note 352, at 1273.

³⁶¹ Taylor-Thompson, *supra* note 352, at 1276-79 (discussing the effect of majority rule on people of color and women).

³⁶² See *Johnson v. Louisiana*, 406 U.S. 356, 398-99 (1972) (Stewart, J., dissenting) (arguing that the unanimity and fair-cross section requirements complement each other).

³⁶³ *Blakely*, 124 S. Ct. at 2539 (stating a "jury trial is meant to ensure their [the people's] control in the judiciary"); *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (holding the right to a jury trial is a fundamental right within the due process clause of the Fourteenth Amendment).

³⁶⁴ THOMAS JEFFERSON, *supra* note 33, at 442.

³⁶⁵ 391 U.S. 145 (1968) at 156.

³⁶⁶ See *Johnson*, 406 U.S. at 399 (Stewart, J., dissenting). Justice Stewart points out that the unanimity requirement "preserves the jury's function in linking law with contemporary society. It provides the simple and effective method endorsed by centuries of experience and history to combat the injuries to the fair administration of justice that can be inflicted by community passion and prejudice." *Id.* See also Part III.C.1 *infra* (discussing the jury nullification in the

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In a criminal case, the defendant's liberty is at stake; therefore, the defendant should be provided with all of the protections our judicial system has to offer. Unfortunately, under the proposed amendment, it would be easier to reach a verdict in criminal cases than in civil or even misdemeanor cases.³⁶⁷ The elimination of the unanimity requirement in a criminal case is, in itself, troubling, but the requirement of a lower majority in criminal cases than in civil cases is not only corrosive of justice, but also counterintuitive.³⁶⁸ Indeed, such a rule ignores the fundamentally different dynamics of civil and criminal cases.³⁶⁹

Currently, forty-eight out of fifty states require unanimous verdicts in criminal felony cases.³⁷⁰ It is surprising that two states do not provide for unanimous verdicts, given that requiring unanimity is the surest way to safeguard a defendant's liberty. With a unanimous verdict, in order to get a conviction, the government must convince twelve individuals beyond a reasonable doubt that the defendant committed the crime. This helps to reinforce the fairness of the verdict and ensures that the verdict truly represents the judgment of the community. For these reasons, New York should reject the proposed amendment, as its adoption would undermine one of the fundamental purposes of the jury system and hinder the jury's ability to protect individual liberties.

Supporters of the proposed amendment to the New York Constitution argue that eliminating the unanimity requirement would "produce more convictions and put more criminals behind bars."³⁷¹ Although most people support cracking down on crime,

Zenger trial).

³⁶⁷ Assemb. 4469, 226th Leg. Sess. (NY 2003) (providing for a verdict of only three-fourths in criminal cases and five-sixths in civil cases).

³⁶⁸ Nor for that matter does requiring a lower majority for felony cases than misdemeanor cases considering the potential threat to the defendant's liberty is greater in felony cases.

³⁶⁹ See *People v. Cancemi*, 18 N.Y. 128, 135-36 (1858) (discussing the fundamental difference between civil cases and criminal cases).

³⁷⁰ See *supra* note 5 (noting that only Oregon and Louisiana allow for majority verdicts in felony cases).

³⁷¹ MEMORANDUM, *supra* note 2. This argument is quite similar to the one presented by the New York Crime Commission in 1931. In its report to the New York Legislature, the Commission argued:

the provision advocates an improper means of achieving the desired result. The amendment assumes that criminals are not being convicted because juries are unable to reach unanimous verdicts.³⁷² However, studies show that these so called “hung” juries account for no more than 5 percent of all jury verdicts.³⁷³ Furthermore, these numbers fail to distinguish between juries that hang on conviction and those that hang on acquittal. Therefore, there is no guarantee that majority verdicts will reduce the crime rate because eliminating the unanimity requirement will also make it easier to acquit criminals.

The sponsors of the amendment provision suggest that offering expanded constitutional protections produces higher crime rates and “disrespect for the law.”³⁷⁴ If politicians want to reduce crime

Unanimous jury verdicts originated with the jury system when juries were empanelled from the defendants' most intimate neighbors and acquaintances. The necessity and wisdom of the unanimous verdict at that time could not be questioned. In these days jurymen are selected more often because of their lack of acquaintanship [sic] with any of the parties to the action or the attorneys. Under such circumstances it would seem that the application of majority rule would be proper. If there were provision for less than unanimous verdicts it would reduce the number of “hung” juries and retrials and mistrials, especially in criminal cases. It would place beyond control of a single individual who might be actuated by improper motives of determining in a capricious manner the guilt or innocence of the person charge with crime. An amendment should be made empowering the Legislation, by general law, to provide that verdicts in cases tried by juries may be rendered by five-sixths of the jurors constituting the jury in any civil or criminal action except where the crime charges is or may be punishable by death.

N.Y. Leg. Documents no. 114 at p. 30-31 (1931).

³⁷² See Hannaford & Munsterman, *supra* note 6, at 8 (noting that other factors may prevent juries from reaching a verdict); Riley, *supra* note 347, at A11 (pointing out that a reason the jury hangs is because the facts do not warrant a conviction).

³⁷³ See HANNAFORD, ET AL., *supra* note 4, at 6 (citing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 461 (1966)). Although these results are subject to debate as the methodology used in the study may have been flawed. *Id.*

³⁷⁴ MEMORANDUM, *supra* note 2.

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and increase respect for the law, there are other, more suitable, ways of achieving this goal. For example, the legislature could invest more resources in crime prevention and deterrence. Regardless, even if the proponents' supposition were correct, eliminating the unanimity requirement represents the wrong way to go about addressing these issues. Adopting the amendment and making it easier for juries to convict defendants will surely come at the high cost of putting innocent people in jail. Furthermore, higher crime rates and "disrespect for the law" have nothing to do with the substantive power of the jury. It is not the jury's responsibility or duty to further law enforcement goals. Rather, the jury serves as a finder of fact and a defender of liberty.³⁷⁵ In this regard, the jury acts as an arbiter between the government and the defense.³⁷⁶

4. Alternatives to Eliminating the Unanimity Requirement

Amending the New York Constitution to eliminate the unanimity requirement is an ineffective means of addressing the perceived failings of the jury system. The jury is an institution that belongs to the people; thus, instead of altering the right to a jury trial, courts and the New York State legislature should do more to protect it. In fact, considering what the right to a jury means to our society, politicians and the public should work to strengthen the right rather than diminish it. For this reason, jury reform initiatives, such as the one initiated by Chief Judge Judith S. Kaye of New York's Court of Appeals, represent a more appropriate response to the perceived problems with the jury system.³⁷⁷ These reform movements primarily focus on improving the efficiency of the jury system and on making it easier for citizens to serve on juries.³⁷⁸

³⁷⁵ See *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (stating that the defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State").

³⁷⁶ See *Johnson v. Louisiana*, 406 U.S. 356, 399 (1972) (Stewart, J., dissenting); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

³⁷⁷ See Press Release, *supra* note 8.

³⁷⁸ *Id.* The Commission's initial proposals focus on ways in which the state

Thus, instead of reducing the jury's substantive powers, these initiatives focus on "increasing the level of juror satisfaction" and look at ways in which courts and state legislatures can improve the jury process.³⁷⁹

If the supporters of the proposed amendment are intent on eliminating the unanimity requirement, they might also consider requiring verdicts from 11-1 votes. This could help to reduce the number of hung juries because it would prevent one person from holding up a jury verdict.³⁸⁰ It also would minimize the dilution of

can "help reduce juror downtime and enhance the experience of service." *Id.* The Commission would like the court system to institute the following:

- Increase the length of time between successive calls to jury service, including additional time off for person who serve on longer trials
 - Implement a stand-by call-in system for jurors who agree to be available within 2 hours to be contacted via beeper or cell phone
 - Sanction lawyers who have multiple unexcused latenesses to help ensure that cases are heard on schedule
 - Require that mandatory settlement conferences takes place before parties are permitted to pick a jury, in order to prevent jurors from being used as bargaining tools in negotiations
 - Develop new guidelines to help jury commissioners and judges better estimate the number of jurors to call
-
- Offer free Internet access for jurors in every facility where possible, for use during waiting periods
 - Work to provide parking and public transportation passes for jurors

Id. See also Mark Curriden, *Jury Reform. No One Agrees on Whether The System is Broken, But Everyone is Trying to Change It*, 81 A.B.A. J. 72, 75 (1995) (discussing reforms adopted by Arizona that provide jurors with "notebooks that include the indictment, jury instructions, witness list, photographs of all witnesses, and a section for note taking."); Dean Narciso, *Jurors' Service Painful, Empowering; Some Court Officials are Trying to Make Civic Duty Palatable*, THE COLUMBUS DISPATCH, Oct. 12, 2003, at A1, available at 2003 WL 63161040 (detailing the fact that an Ohio court offers jurors amenities such as a pool table, internet access, pizza and flavored coffee).

³⁷⁹ The Commission on the Jury, Interim Report of the Commission on the Jury to the Chief Judge of the State of New York 1-2 (2004) available at http://www.jurycommission.com/pr2004_11.pdf.

³⁸⁰ HANNAFORD ET AL., *supra* note 4, at 11 (pointing out that 42 percent of

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voting, as eleven jurors' votes ultimately will determine the outcome. Furthermore, requiring eleven votes for a conviction would serve to better safeguard the defendant's liberty than would requiring only majority verdicts.

Another option for states considering the elimination of the unanimity requirement is to increase the size of the jury at the same time they effect this change.³⁸¹ This would allow more citizens to serve on juries, thus providing them with valuable exposure to and experience with the principles and virtues of self-government.³⁸² Moreover, a three-fourths majority verdict from a twenty-four-person jury might be more palatable in terms of the fair cross-section requirement because larger juries would give people of color a better chance to serve.³⁸³ Having larger juries would also increase the quality of deliberations because it would allow for a greater exchange of ideas. As these alternatives suggest, amending the state constitution is not the only way to institute jury reforms. Indeed, efforts that focus on procedural rather than substantive changes to the jury system may prove more effective at addressing the jury system's problems than the elimination of the unanimity requirement.

CONCLUSION

The right to a jury trial represents a fundamental right in our society. It forms one of the foundations of our political system and aids in the protection of individual liberties.³⁸⁴ Serving on a jury and taking part in the deliberation and voting process teaches

hung juries were the result of one or two holdouts).

³⁸¹ See Amar, *supra* note 12, at 1188-89 (suggesting that those interested in jury reform "should consider increasing the size of juries").

³⁸² *Id.* (stating that the size of the jury should actually be increased because "jury service is a positive good" and having bigger juries will allow for more people to serve).

³⁸³ *Id.* ("And so the deep inclusionary and cross-sectional spirit of later amendments . . . confirms our founding vision of safety in large numbers.").

³⁸⁴ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149, 156 (1968) (stating the right to a jury trial in criminal cases is "fundamental to the American scheme of justice" and protects the defendant "against arbitrary law enforcement.").

jurors the moral values of civic republicanism.³⁸⁵ For this reason, Tocqueville believed that “[t]he jury cannot fail to exercise a powerful influence upon the national character.”³⁸⁶ Jury service also provides citizens exposure to the principles and virtues of self-governance and offers them an opportunity to learn about the laws of their locality.³⁸⁷

Although the jury no longer serves the same dual role in society that it did at the time of the country’s founding, serving on a jury remains a cherished American right. Instead of eliminating the right to a jury or dramatically altering the right protected in the New York Constitution, critics of the jury system should focus on improving the existing jury system. Judge Judith Kaye’s formation of a commission to study the jury in New York is a step in the right direction.³⁸⁸ Before the New York State legislature engages in a rash move to change the constitution, it should review the commission’s findings and consider other, less drastic jury reform efforts taking place around the country.³⁸⁹

³⁸⁵ AMAR, THE BILL OF RIGHTS, *supra* note 32, at 97. Amar believes “[t]he jury summed up – indeed embodied – the ideals of populism, federalism, and *civic virtue* that were the essence of the original Bill of Rights.” *Id.* (emphasis added).

³⁸⁶ TOCQUEVILLE, *supra* note 35, at 127.

³⁸⁷ *Id.* at 127 (describing the jury as “a gratuitous public school” where jurors learn about their rights and become “practically acquainted with the laws”).

³⁸⁸ *See supra* note 8.

³⁸⁹ *See, e.g.*, Amar, *supra* note 12, at 1185-86 (arguing that more of an effort should be made to raise the awareness of citizens and teach them about the historical origins of the jury); Collins, *supra* note 271, at 499 (shorter instructions and simpler language will make it easier for jurors to comprehend the nature of the proceedings); Curriden, *supra* note 378, at 75; Kelso, *supra* note 7, at 1442-45, 1488-1501 (reviewing various suggestions for reforming the California jury); *Arizona Governor Sings ‘Jury Patriotism Act,’ supra* note 8 (discussing Arizona’s “Jury Patriotism Act”, which is intended to make “it easier for citizens to serve as jurors”); Narciso, *supra* note 378; VERA INSTITUTE OF JUSTICE, FIVE YEARS OF JURY REFORM: WHAT JURORS ARE SAYING (Executive Summary), available at <http://www.vera.org/publications> (revealing that the “pretrial period of summoning and orientation is inefficient and wasteful of juror time”).