

## ARTICLES

### **KEEPING *GIDEON*'S PROMISE: USING EQUAL PROTECTION TO ADDRESS THE DENIAL OF COUNSEL IN MISDEMEANOR CASES**

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*The Sixth Amendment of the U.S. Constitution guarantees criminal defendants the right to counsel, and the U.S. Supreme Court has made clear that right is applicable to all defendants in felony cases, even those unable to afford a lawyer. Yet, for defendants facing misdemeanor charges, only those defendants whose convictions result in incarceration are entitled to the assistance of counsel.*

*The number of misdemeanor prosecutions has increased dramatically in recent years, as have the volume and severity of collateral consequences attached to such convictions; yet, the Court's right to counsel jurisprudence in this area has remained stagnant. Critics of the doctrinal and pragmatic problems created by the Court's actual incarceration standard have advocated for various reforms to better protect people accused of misdemeanors, including redefinition or expansion of the right to counsel and legislative changes that would cut back on incarceration and allow states to better apportion their limited resources among defendants.*

*This Article offers a novel perspective, grounded in due process and equal protection and a line of Supreme Court cases that guarantee equal access to the courts. Viewed in that light, indigent misdemeanor defendants denied counsel may not suffer from a Sixth Amendment violation under the law as it stands, but they are deprived of meaningful access to the courts on the basis of wealth. It suggests that reconceptualizing the plight of misdemeanor defendants through the lens of due process and equal protection may help to identify the most effective judicial and legislative solutions to the crisis of "assembly line justice."*

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#### INTRODUCTION

On January 31, 1972, Aubrey Scott walked into a Chicago criminal courthouse, alone and unrepresented by an attorney.<sup>1</sup> The purpose of the proceeding was to determine whether there was probable cause to charge Scott with petty theft for shoplifting eleven days earlier at an F.W. Woolworth Company store.<sup>2</sup> But there was a misunderstanding: when the court asked Scott if he thought that he was going to be ready for trial,<sup>3</sup> Scott took this to mean if he was ready for trial right then, and he replied that he was.<sup>4</sup> The prosecution answered in kind, and the court, seeing no need for delay, asked Scott to enter a plea.<sup>5</sup> Scott pleaded not guilty.<sup>6</sup> He then waived a jury trial.<sup>7</sup> No one bothered to inform Scott that he had a right to counsel, whether or not he could afford one.<sup>8</sup>

Things moved quickly from there. At trial, a Woolworth's security guard testified to what he believed was Scott's heist of an attaché case: a scheme that required having a salesperson unlock the attaché case for him, followed by Scott walking around the store for fifteen to twenty minutes with a ten-dollar bill in his hand, all while passing several other salespersons from whom he could have made the purchase.<sup>9</sup> The guard testified that after seeing this, he walked out of the store through the main entrance, and Scott, still holding the attaché case, walked out of the same door a few minutes later.<sup>10</sup> According to the guard's testimony, he then ordered Scott back into the store, at which point Scott claimed the case was his. A few of Scott's

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1. See *People v. Scott*, 343 N.E.2d 517, 518 (Ill. App. Ct. 1976), *aff'd*, 369 N.E.2d 881 (1977), *aff'd*, 440 U.S. 367 (1979).

2. *See id.*

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.* at 519.

10. *See id.*

personal belongings were in the case, which cost \$12.95.<sup>11</sup> Scott did not cross-examine the officer.

Scott testified next. He claimed that he placed his belongings in the case to see if they fit, which they did.<sup>12</sup> He explained that he walked around the store to find the salesperson that showed him the case, but she was no longer there because that was not her usual post.<sup>13</sup> Scott stated that he was partially blind and could not find the salesperson after she left.<sup>14</sup> According to Scott, the security guard then came into the store from the main entrance and accused him of shoplifting. Scott denied any wrongdoing and showed the officer the money in his hand.<sup>15</sup> A second officer arrived, grabbed Scott, and the guards called the police.<sup>16</sup>

After Scott's testimony, the prosecution rested.<sup>17</sup> The court then asked Scott how much money he had with him that day and whether he offered to pay anyone.<sup>18</sup> Scott replied that he had \$300 on him that day and reiterated that the \$10 was for the salesperson.<sup>19</sup> The court was unmoved. It flatly declared, "I don't believe you, sir. Finding of guilty."<sup>20</sup> During sentencing, the prosecutor informed the court that Scott's most recent offense was another petty theft conviction from fourteen or fifteen years prior.<sup>21</sup> Though Scott faced up to a year in jail,<sup>22</sup> the court instead fined him \$50, which was promptly paid from Scott's earlier bail of \$100.<sup>23</sup> Scott did not spend a day in jail.

These circumstances raise a critical question: Did Scott receive a fair trial? To answer that question, it is worth considering that, by the end of the trial, Scott had likely been deprived of (1) his constitutional right to a jury trial,<sup>24</sup> (2) his constitutional right to an attorney at a preliminary hearing,<sup>25</sup> (3) his constitutional right to cross-examine the state's witness,<sup>26</sup> (4) his constitutional right against self-incrimination in testifying on his own behalf,<sup>27</sup> and (5) his constitutional right to any exculpatory evidence.<sup>28</sup>

Despite these deprivations, for many, the stronger intuitive factor would be whether Scott had a viable defense. Things appear less promising for

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11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.* The prior offense could have exposed Scott to a sentence between one and five years. *Id.* at 520. But because the prosecution did not allege the prior conviction in the complaint, perhaps inadvertently, Scott did not face the enhancement. *Id.* at 520 n.1.

23. *See id.* at 519.

24. *See* *Duncan v. Louisiana*, 391 U.S. 145, 161–62 (1968).

25. *See* *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970).

26. *See* *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

27. *See* *Griffin v. California*, 380 U.S. 609, 615 (1965).

28. *See* *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Scott on this front. The security guard's account is straightforward and damning, and, by comparison, Scott's version is self-serving and implausible. That is, until one confronts an issue that the court (and Scott) neglected to examine: Why did the security guard leave the store? Scott's guilt or innocence arguably hinged on whether the guard confronted Scott in the store (as Scott claimed) or outside (as the guard claimed). To believe the guard's account, one has to accept that, after he observed Scott take an unlocked attaché case from a salesperson, walk around the store with the opened bag for up to twenty minutes, and pass by several salespersons, the guard concluded that, in a large department store likely to have multiple exits, the most appropriate security measure was to . . . turn around and go outside.

Once one begins to doubt the guard's decision to ignore an obvious potential shoplifter, other questions arise: Was the guard exaggerating the amount of time he observed Scott? Was the guard outside the whole time and either did not have as good a view of events as he claimed or simply testified to facts that he had been told by another employee? And if the guard was outside the whole time, how did he know that Scott did not pay for the case inside?

Now consider what a defense attorney may have done to develop Scott's case. She could have spoken with salespersons to see how their accounts squared with the guard's, obtained any security camera footage from the store (at least in modern times), verified whether Scott actually had a vision problem, and corroborated whether he had additional money on him, say, with a recent bank receipt. Using her familiarity with the Cook County jury pool, she then could have determined if a jury of Scott's peers might be persuaded to reject the state's case. She also could have advised Scott not to take the stand if he was not credible in describing events or if the state's case was too weak to take the risk.

Had the attorney concluded that Scott was likely to be convicted at trial, she could have sought a plea bargain. Using leverage like the guard's potential vulnerability on the stand, or appealing to the fact that the store got its bag back, she could have requested that the prosecution either dismiss the case outright or divert the case for later dismissal if Scott stayed out of trouble. Or she could have asked the prosecution to reduce or amend the charges to avoid Scott receiving another theft conviction. This would prevent him from receiving an enhanced sentence should something like this happen again. All told, much could have been done, or at least attempted, by defense counsel to change the outcome for Scott.

The U.S. Supreme Court eventually heard Scott's case in *Scott v. Illinois*.<sup>29</sup> The Court had previously held in the landmark decision *Gideon v. Wainwright*<sup>30</sup> that the Sixth Amendment's guarantee of the right to counsel "[i]n all criminal prosecutions" applied to the states in felony

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29. 440 U.S. 367 (1979).

30. 372 U.S. 335 (1963).

cases.<sup>31</sup> The Court later held in *Argersinger v. Hamlin*<sup>32</sup> that the right also applies against the state in misdemeanor cases where the defendant receives a jail sentence. That left cases such as *Scott*'s, where the defendant is convicted of a misdemeanor but receives only a fine.

However, while the Court had gradually expanded the right to counsel for decades, it abruptly halted that expansion with *Scott*. Without any mention of the underlying facts of *Scott*'s case, the Court concluded that counsel is only required for a misdemeanor offense when an individual is actually incarcerated.<sup>33</sup> *Scott*'s trial was, therefore, fundamentally fair because the result was sufficiently minor.

Mr. *Scott*'s plight is perhaps best characterized as the anti-*Gideon* in our national saga of the right to counsel. For many, *Gideon* promised a criminal justice system that would provide all accused with competent counsel.<sup>34</sup> But this was only one aspect of *Gideon*'s deeper promise "to assure fair trials before impartial tribunals in which every defendant stands equal before the law."<sup>35</sup> Fifty-four years later, these promises have gone unfulfilled, as states have chronically underfunded their public defender systems, leaving countless defendants either without counsel or with counsel in name only.<sup>36</sup> Yet those to whom *Gideon* grants a right to counsel may at least hope the country will eventually live up to its obligations under the Sixth Amendment. Those to whom *Scott* denies a right to counsel have no such hope; their ability to obtain a fair proceeding remains unequal. Thus, while *Gideon* represents a promise unfulfilled, *Scott* more accurately represents a promise denied, the promise of a truly equal justice system for all.

This Article seeks a new ending to the story of the anti-*Gideon*. It argues that the Supreme Court's decision in *Scott* is fundamentally flawed insofar as it misunderstands counsel's role in securing fair treatment of misdemeanor defendants in today's criminal justice system. The lawyer's role, whether in a case like *Scott* or *Gideon*, is much broader than ensuring the accuracy or reliability of the proceedings.<sup>37</sup> Providing a lawyer to a

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31. *Id.* at 339, 345.

32. 407 U.S. 25 (1972).

33. *Scott*, 440 U.S. at 373–74.

34. See, e.g., Michael Piccarreta, *President's Messag*, ARIZ. ATT'Y (Mar. 1997), <http://www.myazbar.org/AZAttorney/Archives/March97/3-97d1.htm> [<https://perma.cc/ZZA4-QSUR>].

35. *Gideon*, 372 U.S. at 344 ("This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

36. See generally Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150 (2013).

37. In *United States v. Gonzalez-Lopez*, 548 U.S. 140, (2006), the Court concluded that "erroneous deprivation of the right to counsel of choice [constituted] structural error." *Id.* at 150. In so holding, the Court reflected on the various ways that the assistance of counsel may affect a defendant's case:

Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of

defendant unable to afford one also fulfills the commands of fundamental fairness and equal justice embodied in the Due Process and Equal Protection Clauses.<sup>38</sup> But the Court's focus in right to counsel cases since *Gideon* has veered away from fundamental fairness and toward a more individual, rights-oriented approach under the Sixth Amendment that privileges the accuracy of criminal adjudications over concerns about fairness.<sup>39</sup> This focus on the individual's right to a lawyer and on the lawyer's role with respect to accuracy under the Sixth Amendment underemphasizes systemic inequality and breeds differential treatment based on wealth.<sup>40</sup>

The metastasis of our "assembly line" criminal justice system and the increase in penalties like fees and fines—as well as the myriad other ways that a prior conviction or arrest may affect later interactions with the system—in the years since *Scott* demonstrates that the actual incarceration standard is inherently unfair to indigent defendants. Yet the Court has shown little appetite for revisiting *Scott's* interpretation of the Sixth Amendment.

Thus, this Article's primary basis for abandoning the actual incarceration standard is not the Sixth Amendment right to counsel. Rather, it is the guarantee of equal access to the courts secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. This doctrine is interwoven throughout the Court's early right to counsel cases and establishes that states may not create dual systems of criminal justice, wherein meaningful access to the system is only granted to those who can afford it. The argument we set forth below is therefore not merely an alternative to arguments based purely on the Sixth Amendment but instead "a return to the roots of the fundamental right of access to justice."<sup>41</sup> Experiences like those of *Scott* are almost exclusively those of people who cannot afford an attorney. Only these people risk being forced into court

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these myriad aspects of representation, the erroneous denial of counsel bears directly on the framework within which the trial proceeds, or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

*Id.*

38. See Tracey L. Meares, *What's Wrong with Gideon*, 70 U. CHI. L. REV. 215, 215–16 (2003) ("Throughout the early due process cases comprising the infancy of constitutional criminal procedure, the Court demonstrated not only an interest in securing accurate determinations of guilt for state criminal defendants, but also an obvious concern about the relationship between the structure of criminal courts and the social and political legitimacy of American democracy.").

39. *Id.* at 216–17.

40. See Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1242–43 (2013) (contrasting the Sixth Amendment right to counsel with the right to meaningful review grounded in the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

41. *Id.* at 1201.

without a lawyer and branded as criminals, with all the consequences that stigma brings. By contrast, the wealthy are entirely insulated from such harms, as they are free to retain an attorney regardless of the Court's interpretation of what the Sixth Amendment requires. By virtue of that ability, they experience an entirely different system of justice.

Part I of this Article reviews the Supreme Court's decisions establishing the right to counsel and the actual incarceration standard. It also critiques the doctrinal and practical shortcomings of the Court's opinion in *Scott* and explains why the resulting actual incarceration standard is premised on a fundamental misunderstanding of today's criminal justice system. Next, Part II describes responses offered to address such critiques and the obstacles to replacing *Scott* with a new Sixth Amendment standard. Then, Part III provides an overview of the Court's access to courts jurisprudence, grounded in equal protection and due process, and examines why it requires abandoning the actual incarceration standard, as well as some of the alternative Sixth Amendment proposals that have been offered to replace *Scott*. This Article concludes by explaining why the right to meaningful access requires a right to counsel for most, if not all, criminal defendants but can also be satisfied by removing certain petty offenses from the criminal code altogether.

#### I. THE RIGHT TO COUNSEL IN MISDEMEANOR CASES

Part I.A provides an overview of the Court's right to counsel jurisprudence, including the limitations on the right as applied to misdemeanor defendants. Ultimately, only misdemeanor defendants who are subject to actual incarceration are entitled to counsel under the Sixth Amendment. Part I.B explains why that standard is problematic from both a doctrinal and a practical standpoint.

##### A. *The Right to Counsel as Currently Defined*

Although the Sixth Amendment guarantees the right to counsel, that right did not apply to those facing prosecution in state courts until the Supreme Court's decision in *Powell v. Alabama*.<sup>42</sup> In *Powell*, the Court held that in the context of state capital cases, due process required the assistance of counsel,<sup>43</sup> explaining:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>44</sup>

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42. 287 U.S. 45 (1932).

43. *Id.* at 71.

44. *Id.* at 68–69.

It was not until three decades later that the Court recognized a categorical right to counsel beyond the confines of capital litigation.<sup>45</sup> In *Gideon*, relying on the notion that appointment of counsel is a “fundamental right, essential to a fair trial” and necessary to safeguard liberty,<sup>46</sup> the Court extended the right to apply to defendants facing felony charges in state court.<sup>47</sup>

In *Argersinger*, the Court recognized that the right to counsel also applied to some misdemeanor prosecutions.<sup>48</sup> The Court did not apply the right to all misdemeanors; instead, the right applies only to those misdemeanor prosecutions that result in incarceration.<sup>49</sup> In a concurring opinion, Justice Lewis Powell took issue with the Court’s decision to draw the line at incarceration, recognizing that other consequences of conviction, such as losing one’s driver’s license, may be just as impactful for the individual.<sup>50</sup> In doing so, he acknowledged the equal protection implications of a rule that turns on incarceration, explaining:

There may well be an unfair and unequal treatment of individual defendants, depending on whether the individual judge has determined in advance to leave open the option of imprisonment. Thus, an accused indigent would be entitled in some courts to counsel while in other courts in the same jurisdiction an indigent accused of the same offense would have no counsel. Since the services of counsel may be essential to a fair trial even in cases in which no jail sentence is imposed, the results of this type of pretrial judgment could be arbitrary and discriminatory.<sup>51</sup>

Powell suggested that due process and principles of fundamental fairness demand a case-by-case evaluation of the complexity of the offense, the probable sentence if convicted, and any factors specific to the individual case suggesting the need for a lawyer.<sup>52</sup>

Despite Powell’s concerns, the Court confirmed in *Scott* that the right to counsel would be dependent on incarceration. At issue in *Scott* was

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45. The Court did, however, recognize a right to counsel for noncapital federal defendants in *Johnson v. Zerbst*, 304 U.S. 458 (1938).

46. *Gideon v. Wainwright*, 372 U.S. 335, 340–42 (1963).

47. *Id.* at 345.

48. See *Argersinger v. Hamlin*, 407 U.S. 25, 39–40 (1972).

49. *Id.* at 37 (“We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”).

50. *Id.* at 47–48 (Powell, J., concurring) (“The consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label ‘petty.’ Serious consequences also may result from convictions not punishable by imprisonment. Stigma may attach to a drunken-driving conviction or a hit-and-run escapade. Losing one’s driver’s license is more serious for some individuals than a brief stay in jail.”).

51. *Id.* at 54. Justice Powell also pointed out that the Court’s ruling would emphasize the line between those able to qualify as indigent and those who are barely self-sufficient economically: while the former would be entitled to counsel for even the simplest of petty offenses (when even nonindigents would decline to hire an attorney), the latter would be unable to afford counsel, even when essential to providing an effective defense. *Id.* at 49–50.

52. *Id.* at 47, 64.



whether a defendant charged with an offense for which imprisonment was authorized but not actually imposed had a right to counsel.<sup>53</sup> Affirming the state court's holding below, the Court refused to extend *Argersinger* to require the appointment of counsel in such cases.<sup>54</sup> In doing so, the Court reasoned that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment" and that any extension of *Argersinger*'s workable bright-line rule "would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States."<sup>55</sup>

The rule set forth in *Scott*—that a criminal defendant in state court is entitled to the appointment of counsel only if his conviction results in incarceration—remains the law today. This is true even though the text of the Sixth Amendment refers broadly to "all criminal prosecutions"<sup>56</sup> and, as Justice Powell argued in *Argersinger*, collateral consequences of conviction may be just as, if not more, severe than incarceration.<sup>57</sup> Just this past May, for example, a federal judge in New York sentenced a woman to probation rather than prison after she was convicted by a jury of importing cocaine and possession with intent to distribute, finding that the collateral consequences she would face as a convicted felon were a severe enough form of punishment.<sup>58</sup>

In *Alabama v. Shelton*,<sup>59</sup> an Alabama state court's application of *Argersinger* and *Scott* in the context of a suspended sentence added another layer to the Court's right to counsel jurisprudence. After representing himself in a bench trial, LeReed Shelton was convicted in an Alabama circuit court of misdemeanor assault and sentenced to thirty days in jail.<sup>60</sup> The trial court immediately suspended the sentence, placing Shelton on probation.<sup>61</sup> The Supreme Court held that the right to counsel did apply to a defendant in Shelton's situation and that a suspended sentence that may end in imprisonment also could not be imposed without the assistance of counsel under the Sixth Amendment.<sup>62</sup> Shelton's remedy, however,

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53. *Scott v. Illinois*, 440 U.S. 367, 369 (1979).

54. *Id.* at 373–74.

55. *Id.* at 373.

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

57. See Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1170 (2015); see also Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1325–26 (2012) (demonstrating that a misdemeanor conviction can bar eligibility for many professional licenses, render an individual ineligible for public housing, make the offender ineligible for health care programs, require enrollment in a sex offender registry, lead to deportation, and affect child custody, food stamp eligibility, and the right to vote).

58. See *United States v. Nesbeth*, No. 15-CR-18, 2016 WL 3022073 (E.D.N.Y. May 24, 2016); see also Benjamin Weiser, *U.S. Judge, in Striking Move, Sentences Felon to Probation, Not Prison*, N.Y. TIMES, May 26, 2016, at A21.

59. 535 U.S. 654 (2002).

60. See *id.* at 655–58.

61. *Id.* at 658.

62. *Id.* The rationale for this distinction is that "revocation of probation would trigger a prison term imposed for a misdemeanor of which Shelton was found guilty without the aid of counsel." *Id.* at 664.

provided only a partial victory. Though the Court's decision invalidated Shelton's suspended sentence, it left his conviction intact.<sup>63</sup> Shelton therefore remained vulnerable to any collateral consequences of his conviction.

*B. How Scott Misconceptualized the Role  
of Counsel in Misdemeanor Cases*

The Supreme Court's decision in *Scott*, to limit the right to counsel to those defendants who are actually incarcerated, suffers from numerous doctrinal and practical flaws. Doctrinally, *Scott* represents a dramatic overreach by the Court to halt the expansion of the right to counsel. More troubling, the Court's reasoning also reveals an unwillingness to grapple with questions of fundamental fairness in misdemeanor cases. Thus, this section aims to provide context for why the problems facilitated by *Scott* demand not simply a technical readjustment of the right to counsel but instead a reframing of why the right to counsel is so fundamental—to all defendants—and cannot turn solely on the question of incarceration.

In *Argersinger*, the Court held that no defendant could be incarcerated unless he had been represented by counsel.<sup>64</sup> Subsequently, in *Scott*, the Court's analysis turned on whether *Argersinger*'s focus on imprisonment represented “a point in a moving line or a holding that States are required to go only so far in furnishing counsel to indigent defendants.”<sup>65</sup> The *Scott* Court thus framed its central question as whether actual imprisonment was a necessary condition for counsel's appointment or whether the mere possibility of incarceration would suffice. A far more conservative view of *Argersinger* is available, however, based on the specific context in which it was decided.

At issue in *Argersinger* was the Florida Supreme Court's holding that the Sixth Amendment right to counsel, like the Sixth Amendment right to a jury trial, “extends only to trials ‘for non-petty offenses punishable by more than six months imprisonment.’”<sup>66</sup> The Court ultimately reversed the lower court's decision.<sup>67</sup> In doing so, it rejected the Florida court's equivalence of the right to counsel and the right to a jury trial, determining that the respective histories of the two rights revealed that the right to counsel was broader and more fundamental than the right to a jury.<sup>68</sup> Indeed, looking back to English common law, the Court emphasized that there has been a

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63. *Id.* at 659–60.

64. *Argersinger*, 407 U.S. at 40.

65. *Scott v. Illinois*, 440 U.S. 367, 369 (1979).

66. *Argersinger*, 407 U.S. at 27 (quoting *State ex rel. Argersinger v. Hamlin*, 236 So.2d 442, 443 (Fla. 1970), *rev'd*, 407 U.S. 25).

67. *Id.*

68. *Id.* at 30 (“While there is historical support for limiting the ‘deep commitment’ to trial by jury to ‘serious criminal cases,’ there is no such support for a similar limitation on the right to assistance of counsel.”); *see also id.* at 30–31 (“We reject, therefore, the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer.”).

longer tradition of guaranteeing the right to counsel for misdemeanor cases than for felonies.<sup>69</sup>

Given the Court's tendency to confine its decisions to the facts presented,<sup>70</sup> if *Argersinger* represented a limit on how far states had to go in providing counsel, that limit was to require actual incarceration for counsel's appointment only in petty offense cases, like *Argersinger*'s, where a defendant has no right to a jury. This would be consistent with the reasoning that, given the more fundamental nature of the right to counsel, where a defendant is entitled to a jury trial, he must necessarily have a right to an attorney. But, more importantly, it is unlikely that the *Argersinger* Court viewed itself as establishing an actual incarceration standard at all. Although the *Argersinger* Court declined to declare counsel necessary in all petty offense cases, it acknowledged that the penalty states attach to a particular charge is an inadequate proxy for the complexities of the defense:

The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.<sup>71</sup>

The Court went on to state explicitly that “the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial.”<sup>72</sup> Yet the Court never explained why actual incarceration is the proper measure of the need for counsel in a petty case. This omission most likely resulted from the Court's belief that “[it] need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail.”<sup>73</sup> Whatever the answer to the question of its propriety, nothing in *Argersinger* suggests that the Court intended for the actual incarceration standard to apply to *nonpetty* cases, and there is ample evidence that the Court did not intend actual incarceration as the final standard for all misdemeanors.<sup>74</sup>

This narrowed understanding of *Argersinger*—that, if it applies at all, the actual incarceration standard applies only to petty offenses—significantly recasts the question in *Scott*. Though he ultimately received only a fine, *Scott* faced a year in jail on a theft charge.<sup>75</sup> On this latter fact alone, *Scott*

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69. *Id.* at 30.

70. *See* *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (noting that, in *Powell v. Alabama*, 287 U.S. 45 (1932), the Court “did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case”).

71. *Argersinger*, 407 U.S. at 33.

72. *Id.* at 36–37.

73. *Id.* at 37. *Argersinger* was sentenced to ninety days in jail; he was charged with carrying a concealed weapon, an offense punishable by imprisonment up to six months, a \$1,000 fine, or both. *Id.* at 26.

74. *See, e.g., id.* at 52 (Powell, J., concurring) (“Thus, although the new rule is extended today only to the imprisonment category of cases, the Court's opinion foreshadows the adoption of a broad prophylactic rule applicable to all petty offenses.”).

75. And but for the prosecutor's omission of *Scott*'s prior theft conviction from the charging document, he would have faced felony charges. *People v. Scott*, 343 N.E.2d 517,

should have prevailed on the argument that he had a right to counsel for his “nonpetty” theft prosecution. Seven Justices on the *Scott* Court at some point supported this constitutional line: Chief Justice Warren Burger and Justices Lewis Powell and William Rehnquist in *Argersinger*, and Justices William Brennan, Thurgood Marshall, John Paul Stevens, and Harry Blackmun in *Scott*.<sup>76</sup> As Justice Powell forcefully declared in his *Argersinger* concurrence, while

[a]n unskilled layman may be able to defend himself in a nonjury trial before a judge experienced in piecing together unassembled facts[,] . . . before a jury the guiding hand of counsel is needed to marshal the evidence into a coherent whole consistent with the best case on behalf of the defendant.<sup>77</sup>

In fact, five Justices either expressly or impliedly supported this constitutional line in *Scott*.<sup>78</sup>

But *Scott* lost 5–4. Writing for the Court, Justice Rehnquist abandoned his stance with Justice Powell in *Argersinger*. He instead focused the analysis on *Scott*’s fine-only sentence, declaring: “[W]e believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.”<sup>79</sup>

However, only a plurality of the Court was convinced of *Argersinger*’s supposed central premise. The remaining five Justices deeply questioned it. Justice Powell, whose concurrence provided the decisive fifth vote, maintained that the actual incarceration standard was not constitutionally required and expressed “continuing reservations” about *Argersinger*.<sup>80</sup> He explained that “the drawing of a line based on whether there is

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519 (Ill. App. Ct. 1976), *aff’d*, 369 N.E.2d 881 (1977), *aff’d*, 440 U.S. 367 (1979). Had this occurred, he undoubtedly would have had a right to counsel.

76. See *Argersinger*, 407 U.S. at 40–42 (Burger, C.J., concurring) (“Were I able to confine my focus solely to the burden that States will have to bear in providing counsel, I would be inclined, at this stage of the development of the constitutional right to counsel, to conclude that there is much to commend drawing the line at penalties in excess of six months’ confinement.”); *id.* at 45–46 (Powell, J., concurring in the result, joined by Justice Rehnquist) (“It is clear that whenever the right-to-counsel line is to be drawn, it must be drawn so that an indigent has a right to appointed counsel in all cases in which there is a due process right to a jury trial. . . . Moreover, the interest protected by the right to have guilt or innocence determined by a jury . . . while important, is not as fundamental to the guarantee of a fair trial as is the right to counsel.”); see also *Scott*, 440 U.S. at 380 (Brennan, J., dissenting, joined by Justices Marshall and Stevens) (endorsing Justice Powell’s concurrence in *Argersinger*); *id.* at 389 (Blackmun, J., dissenting) (“For substantially the reasons stated by Mr. Justice Brennan . . . I would hold that the right to counsel secured by the Sixth and Fourteenth Amendments extends at least as far as the right to jury trial secured by those Amendments.”).

77. *Argersinger*, 407 U.S. at 46 (Powell, J., concurring).

78. See *Scott*, 440 U.S. at 374 (Powell, J., concurring) (adhering to his concurrence in *Argersinger*, and noting that only “four Justices have reaffirmed [*Argersinger*] today”); *id.* at 380 (Brennan, J., dissenting, joined by Justices Marshall and Stevens); *id.* at 389 (Blackmun, J., dissenting).

79. *Id.* at 373 (majority opinion).

80. *Id.* at 374 (Powell, J., concurring).

imprisonment (even for overnight) can have the practical effect of precluding provision of counsel in other types of cases in which conviction can have more serious consequences.”<sup>81</sup> Nonetheless persuaded to join the majority by the need to provide lower courts clear guidance and the dictates of stare decisis, Powell expressed hope that the Court would one day revisit *Argersinger*.<sup>82</sup>

*Scott*'s actual incarceration standard cannot be reconciled with several of the Court's decisions addressing the rights of defendants to a fair criminal process. For one, *Scott* upends the Justices' apparent conviction in *Argersinger* that the right to counsel should sweep more broadly than the right to a jury trial. That is now only true for petty offenses, insofar as *Argersinger* grants the right to counsel to some misdemeanor defendants facing incarceration, none of whom would have a right to a jury trial. But *Scott* reverses matters for nonpetty offenses, in that it denies the right to counsel to misdemeanor defendants not facing incarceration, but who would have a right to a jury trial. The *Scott* majority made no attempt to reconcile this result with the history of the Sixth Amendment or the practical relationship between the two rights.

*Scott* also creates a curious tension with the right to counsel on appeal. Sixteen years before *Scott*, the Court held in *Douglas v. California*<sup>83</sup> that, if a state chooses to grant criminal defendants an appeal as a matter of right from their convictions, the state must also provide counsel on appeal to those unable to afford it.<sup>84</sup> *Douglas* derives from the Court's access to courts line of decisions under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, discussed further in Part III.<sup>85</sup> Those cases forbid states from creating invidious barriers in the criminal justice system based on wealth. The *Douglas* Court deemed the right to counsel necessary to prevent an appeal from becoming a “meaningless ritual” for those unable to afford an attorney.<sup>86</sup>

The Court has never suggested that the right to counsel on appeal turns on whether the defendant was incarcerated for the conviction, and none of the states or the federal government condition the right to appeal on incarceration. *Scott* thus creates the odd possibility that a defendant may be denied the right to counsel at trial, yet that defendant would still be entitled to appellate counsel to challenge the uncounseled conviction. This is precisely what happened to Aubrey Scott, who successfully petitioned Illinois for appointed appellate counsel and a free transcript.<sup>87</sup> It is unsurprising and perhaps ironic that Scott, unable to mount an effective pro se defense in the trial court, could raise only one viable claim on appeal: the fact that he was forced to proceed pro se in the trial court. *Scott*

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81. *Id.*

82. *Id.* at 375.

83. 372 U.S. 353 (1963).

84. *Id.* at 357–58.

85. *See infra* Part III.A.

86. *Douglas*, 372 U.S. at 358.

87. *People v. Scott*, 343 N.E.2d 517, 520 (Ill. App. Ct. 1976), *aff'd*, 369 N.E.2d 881 (1977), *aff'd*, 440 U.S. 367.

subsequently eliminated the one challenge an uncounseled defendant could reliably mount against his conviction. As Justice Burger explained in his *Argersinger* concurrence: “Appeal from a conviction after an uncounseled trial is not likely to be of much help to a defendant since the die is usually cast when judgment is entered on an uncounseled trial record.”<sup>88</sup> Despite this warning, no justice on the *Scott* Court addressed the fact that its decision might render an appeal of an uncounseled conviction the same sort of meaningless ritual that *Douglas* was intended to prevent.

Although decided in a different context, *Scott* also seems inconsistent with Supreme Court precedent guaranteeing the right to pursue postappeal remedies in federal court based on the presumption that convictions carry collateral consequences.<sup>89</sup> Specifically, the Court has long allowed a criminal defendant who has been released on his sentence to maintain a federal habeas corpus action challenging his conviction.<sup>90</sup> This is allowed even though the primary purpose of the Great Writ is to remedy unlawful detention.<sup>91</sup> Eleven years prior to *Scott*, the Court in *Carafas v. LaVallee*<sup>92</sup> rejected a mootness challenge to the federal habeas petition of a released New York defendant because

[i]n consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these “disabilities or burdens [which] may flow from” petitioner’s conviction, he has “a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.”<sup>93</sup>

Those denied counsel under *Scott* likely never had the chance to initiate a habeas action and could not directly rely on *Carafas*. Yet, their interests in avoiding a conviction rival those of noncustodial habeas petitioners seeking to undo their convictions. So while not directly relevant, *Carafas* creates additional tension with the *Scott* plurality’s conclusion that actual incarceration is the only definitive factor in defining the right to counsel.

Beyond these doctrinal failings, *Scott* has aged poorly in light of changed realities. The extent to which noncarceral penalties have multiplied and grown since *Scott* cannot be overstated. Much of the recent criminal justice reform movement has focused on the growth of the nation’s incarcerated population. Nationally, however, probation is the leading form of correctional control, covering 56 percent of people in the criminal justice

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88. *Argersinger v. Hamlin*, 407 U.S. 25, 41 (1972) (Burger, C.J., concurring).

89. See *infra* text accompanying notes 92–93.

90. See *Carafas v. LaVallee*, 391 U.S. 234, 237–38 (1968) (finding a federal habeas claim not moot upon the petitioner’s release, given the collateral consequences of conviction).

91. See *Spencer v. Kemna*, 523 U.S. 1, 8 (1998) (“In recent decades, we have been willing to presume that a wrongful criminal conviction has continuing collateral consequences . . .”).

92. 391 U.S. 234 (1968).

93. *Id.* at 237.

system.<sup>94</sup> The use of fines and fees has expanded dramatically as well<sup>95</sup> and has become particularly pervasive among low-level offenses, including misdemeanors.<sup>96</sup>

John P. Gross asserts that “[t]he Court’s reasoning in *Argersinger* and *Scott* needs to be viewed against the backdrop of a criminal justice system which, at the time, imposed three distinct penalties: incarceration, fines, or probation.”<sup>97</sup> That framework does not adequately account for the extent to which the web of collateral consequences stemming from conviction has grown. While a misdemeanor conviction already carried significant consequences when the Court decided *Argersinger*,<sup>98</sup> those consequences are nothing like what they are today. Critics calling for the Court to abandon the actual incarceration standard frequently cite the exponential increase in the number and severity of collateral consequences that states and the federal government now attach to misdemeanors.<sup>99</sup> These civil penalties include immigration consequences like detention and deportation; loss of employment; loss of public benefits, including housing; loss of child custody; revocation of professional licenses; and ineligibility for student financial aid.<sup>100</sup> Many of these consequences have a far broader reach and impact on individuals’ lives than one or two days behind bars. States are also increasingly attaching various supervision or treatment requirements to minor offenses through diversion and specialized courts to increase state control over defendants with chronic behavioral issues, such as drug

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94. See Bernadette Rabuy & Peter Wagner, *Correctional Control: Incarceration and Supervision by State*, PRISON POL’Y INITIATIVE (June 1, 2016), <http://www.prisonpolicy.org/reports/50statepie.html> [<https://perma.cc/HXJ4-AREZ>].

95. See COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 3 (2015), [http://nacmconference.org/wp-content/uploads/2014/01/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](http://nacmconference.org/wp-content/uploads/2014/01/1215_cea_fine_fee_bail_issue_brief.pdf) (“A recent study estimates that tens of millions of individuals in the United States have been assessed fines or fees as part of the punishment for a criminal offense. The use of these practices has increased substantially over time; in 1986, 12 percent of those incarcerated were also fined, while in 2004 this number had increased to 37 percent. When including fees as well, the total rises to 66 percent of all prison inmates. In 2014, 44 States charged offenders for probation and parole supervision, up from 26 in 1990.”) [<https://perma.cc/TP3F-2B69>].

96. *Id.* (“While the use of fines and fees has grown for all sentencing groups, they remain more common in cases of misdemeanors, infractions, and other relatively less serious crimes than in cases of felonies.”).

97. John P. Gross, *What Matters More: A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55, 80 (2013) (noting that “our modern criminal justice system has a wide range of enmeshed penalties that result from a criminal conviction”).

98. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 36–37 (1972) (acknowledging Justice Powell’s critique that some collateral consequences may be worse than a brief jailing).

99. Since the 1990s, the federal government and state legislatures have significantly increased the volume of collateral consequences that attach to misdemeanor convictions, such as sex offender registration, firearms prohibitions, and deportation. See Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 790–93 (2016); see also Gross, *supra* note 97, at 55; John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. REV. 1, 22 (2013).

100. See Gross, *supra* note 97, at 82–84; King, *supra* note 99, at 24–34.

addiction.<sup>101</sup> Consequently, some have deemed the combined effects of the penalties that follow a conviction a “civil death.”<sup>102</sup>

Most prominent in these attacks on *Scott*'s continued viability is the degree to which Congress has authorized immigration detention and deportation for minor offenses.<sup>103</sup> These critics root their argument in the Supreme Court's 2010 decision in *Padilla v. Kentucky*,<sup>104</sup> which held that the Sixth Amendment right to effective assistance of counsel places an obligation on defense counsel to inform defendants of certain immigration consequences of a criminal conviction.<sup>105</sup> Echoing Justice Powell's critique of actual incarceration as the proper proxy for the need for counsel, the *Padilla* Court recognized that civil immigration consequences are “an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”<sup>106</sup> The Court had earlier acknowledged this dynamic in *INS v. St. Cyr*,<sup>107</sup> where it observed that “[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.”<sup>108</sup> Though the Court most likely did not intend that by expanding the right to effective assistance in *Padilla* it was also expanding the antecedent right to counsel, the decision nonetheless creates an untenable paradox in light of *Scott*: while a defendant may have the right to an attorney's advice about immigration consequences, an indigent defendant may not be entitled to counsel to provide that advice.

Another major practical consequence of *Scott*'s actual incarceration standard is that it risks effectively giving the prosecution control over a defendant's right to counsel. One of the principal critiques of *Scott* is that it requires judges to decide prior to trial, and without a full understanding of the evidence, whether jail would be appropriate upon conviction.<sup>109</sup> Justice

101. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1086 (2015).

102. See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012); see also Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1112 n.72 (2013).

103. See, e.g., Note, “A Prison Is a Prison Is a Prison”: *Mandatory Immigration Detention and the Sixth Amendment Right to Counsel*, 129 HARV. L. REV. 522, 522 (2015) (arguing for a right to counsel for those facing mandatory immigration detention); see also Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 598 (2011).

104. 559 U.S. 356 (2010).

105. *Id.* at 374.

106. *Id.* at 364.

107. 533 U.S. 289 (2001).

108. *Id.* at 323 (quoting 3 MATTHEW BENDER, CRIMINAL DEFENSE TECHNIQUES § 60A.01 (1999)).

109. *Scott v. Illinois*, 440 U.S. 369, 383 (1979) (Brennan, J., dissenting) (“Under the ‘actual imprisonment’ standard, ‘[t]he judge will . . . be forced to decide in advance of trial—and without hearing the evidence—whether he will forego entirely his judicial discretion to impose some sentence of imprisonment and abandon his responsibility to consider the full range of punishments established by the legislature.’” (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 53 (1972) (Powell, J., concurring))); see also *id.* at 374 (Powell, J., concurring) (noting that in lieu of the unrealistic possibility of providing counsel in all cases,



Powell argued in his *Argersinger* concurrence that this would directly undermine the legislature's sentencing prerogatives, as judges would inevitably "divide petty offenses into two categories—those for which sentences of imprisonment may be imposed and those in which no such sentence will be given regardless of the statutory authorization."<sup>110</sup>

Experience suggests the problem is worse than feared. The more common scenario is that judges, overwhelmed by swelling misdemeanor dockets, simply defer to prosecutors' representations about the propriety of jail time, rather than conduct their own independent inquiry.<sup>111</sup> In places like Miami, prosecutors can wield jail time as a tactical weapon to eliminate a defendant's right to counsel on the eve of trial.<sup>112</sup> This happens because most judges make no inquiry into whether a defendant may be severely prejudiced by removing an attorney who has devoted significant resources to defending a client.

Ironically, the *Argersinger* Court foreshadowed this development. In helping to popularize the term "assembly-line justice," now used to describe much of what happens in criminal, but especially misdemeanor, courts, the Court warned that "the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result."<sup>113</sup> The volume of misdemeanor prosecutions has dramatically increased in the decades since *Argersinger*.<sup>114</sup> The National Association of Criminal Defense Lawyers's seminal report on the dysfunctions of misdemeanor courts estimates that the number of misdemeanor cases in the United States doubled from 5 million in 1972 to 10.5 million in 2006.<sup>115</sup> This flood of cases creates toxic judicial ecosystems where 70 percent of criminal defendants plead guilty without counsel in proceedings that often last under three minutes.<sup>116</sup>

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particularly in jurisdictions with crowded dockets or without many lawyers, judges will be forced to forgo the option to impose a sentence of imprisonment after conviction); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.2(a), at 712 (6th ed. 2017) ("A major objection advanced against an actual imprisonment standard was that it would require the magistrate . . . to 'prejudge' the case in determining whether appointed counsel was necessary."); King, *supra* note 99, at 15 ("Like the Queen of Hearts in *Alice in Wonderland*, judges in low-level cases are invited to decide in some respect the sentence before the trial.").

110. *Argersinger*, 407 U.S. at 53 (Powell, J., concurring).

111. See, e.g., Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 311 (2011).

112. See *infra* notes 252–55 and accompanying text. Even though Florida is a jurisdiction in which counsel is required if imprisonment is possible and not only when it is actually imposed, its continued reliance on incarceration makes such a tactic possible. See *State v. Kelly*, 999 So.2d 1029 (2009); see also FLA. R. CRIM. P. 3.111(b)(1).

113. *Argersinger*, 407 U.S. at 34.

114. See, e.g., King, *supra* note 99, at 22.

115. ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf) [<https://perma.cc/HB6U-F7BC>].

116. ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 15 (2011), <https://>

Due process becomes an afterthought under such conditions.<sup>117</sup> First sacrificed in today's misdemeanor assembly lines is our criminal justice system's commitment to the adversarial system.<sup>118</sup> Prosecutors, undisputedly the most powerful courtroom actor under normal conditions, acquire new sources of authority in overburdened misdemeanor courts. Merely by removing the possibility of jail, a prosecutor can literally render a misdemeanor arrestee defenseless. And forgoing the possibility of jail has become an increasingly minor sacrifice for prosecutors, a reality driven by two key developments in the criminal system: (1) the rise in the number and severity of collateral consequences for misdemeanors and (2) the criminal system's overwhelming reliance on plea bargaining.

Paul T. Crane explains that "prosecutors will often be attuned to certain collateral consequences that further the goals of criminal prosecution, especially those aimed at reducing threats to public safety. When it comes to low-level offenses, those collateral consequences are often the most important goal of a criminal prosecution."<sup>119</sup> More broadly, as Issa Kohler-Hausmann has noted, the misdemeanor justice system has shifted away from adjudicating guilt to a system increasingly used to "mark, classify, and supervise people" even without securing an immediate conviction or jail sentence.<sup>120</sup> The result is that prosecutors now enjoy increased power to secure many types of dispositions beyond jail that mark defendants for later encounters with the justice system.<sup>121</sup> If a defendant is convicted, for example, after failing to satisfy the requirements of a diversion program, the consequences of such marking become dire, because a misdemeanor conviction, even one that is uncounseled, may be used to increase the penalty for a subsequent offense.<sup>122</sup> This possibility may incentivize a prosecutor to offer no jail time on something like an individual's first driving while under the influence (DUI) charge, knowing that she will be able to pursue stiffer penalties the next go around.

Also, collateral consequences—which often apply for years and frequently for life—typically outlast the often minimal periods of

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[www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20794&libID=20764](http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20794&libID=20764) [https://perma.cc/A2YR-KF2Y].

117. See BORUCHOWITZ ET AL., *supra* note 115, at 7.

118. While some courts may participate in "assembly line justice," in which cases are handled quickly and indiscriminately, other misdemeanor courts engage in what Issa Kohler-Hausmann has termed "managerial justice," which is "rapid and informal, but . . . not random or mechanical." See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 622–24 (2014) (explaining that the managerial model of processing mass misdemeanors, unlike the adjudicative model, is not triggered by a finding of guilt but is instead concerned with managing the engagement of individuals with the criminal justice system—in terms of both degree and extent—over time).

119. Crane, *supra* note 99, at 795.

120. Kohler-Hausmann, *supra* note 118, at 643.

121. See *id.* at 645–48.

122. See *Nichols v. United States*, 511 U.S. 738, 748 (1994); see also Kohler-Hausmann, *supra* note 118, at 644 ("Marks are used inside the system to signify what level of response is warranted and what other sorts of testing or punishments will be imposed in the context of later encounters.").

incarceration for misdemeanors.<sup>123</sup> Returning to the first-time DUI example, a prosecutor may prioritize suspending the defendant's license for a year over seeking jail time, especially if she knows the judge is unlikely to impose jail on a first-time offender. Finally, where the collateral consequence takes the form of a prohibition or obligation—such as abstaining from carrying a gun or registering as a sex offender—violating the collateral consequence often results in a separate, and more easily proven, offense that may result in jail time.<sup>124</sup>

With collateral consequences creating such severe civil disabilities for misdemeanants compared to jail time, prosecutors are free to prioritize efficiency in their decisions about whether to seek incarceration.<sup>125</sup> As with most assembly lines, efficiency nearly always trumps quality. The United States's broken system for providing counsel to those unable to afford it, particularly the unconscionable caseloads that budget restraints force public defenders to triage, has been extensively documented.<sup>126</sup> But these caseloads also affect—and are ultimately driven by—district attorney offices. These offices must manage the explosion of arrests for petty crimes in the “broken windows” era of policing, which targets ever more minor offenses in the hopes of curtailing serious crime.<sup>127</sup> In this context, doing away with jail time and avoiding opposition may relieve significant pressure on prosecutor offices to reduce their caseloads while bolstering conviction rates.<sup>128</sup> However, allowing prosecutors to leverage a defendant's right to counsel to manage their own caseloads perversely places innocent defendants at grave risk of wrongful conviction. Indeed, the Supreme Court recognized in *Alabama v. Shelton*<sup>129</sup> that, having shattered “the crucible of meaningful adversarial testing,” uncounseled convictions are inherently less reliable.<sup>130</sup>

This dynamic tips even more decisively in favor of the prosecution given, as the Supreme Court recognized five years ago in *Missouri v. Frye*<sup>131</sup> and *Lafler v. Cooper*,<sup>132</sup> that our criminal justice system “is for the most part a system of pleas, not a system of trials”;<sup>133</sup> thus, “the negotiation of a plea

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123. *See* Crane, *supra* note 99, at 794.

124. *See id.*

125. *See id.* at 800.

126. *See, e.g.,* BORUCHOWITZ ET AL., *supra* note 115, at 20–24; *see also* STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR. ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 17–18 (2004), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_scl\\_aid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_scl_aid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) [<https://perma.cc/FE4U-DMDQ>]; THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 50–52, 65–70 (2009), <http://www.constitutionproject.org/manage/file/139.pdf> [<https://perma.cc/S6GN-RF3C>].

127. King, *supra* note 99, at 17–20.

128. *See id.* at 20.

129. 535 U.S. 654 (2002).

130. *Id.* at 666–67 (quoting *United States v. Cronin*, 466 U.S. 648, 656 (1984)).

131. 566 U.S. 133 (2012).

132. 566 U.S. 156 (2012).

133. *Id.* at 169.

bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”<sup>134</sup> The Court estimated that guilty pleas account for 97 percent of federal and 94 percent of state convictions.<sup>135</sup> Yet the defendants in both *Argersinger* and *Scott* were convicted after trials before a judge, and the Court clearly framed the actual incarceration standard as addressing the rights of a defendant at trial, stating: “Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel.”<sup>136</sup>

In all likelihood, the trial in most misdemeanor cases today will never start, making the Court’s logic decidedly archaic. Instead of a court at least retaining the potential to protect an uncounseled defendant from the worst damage he might inflict on himself at trial, prosecutors are free to plea bargain with the uncounseled without intervention.<sup>137</sup> Left alone to negotiate with the prosecutor, the defendant has no way of knowing that the prosecutor’s seemingly generous offer of no jail time may prove ruinous. Facing the prospect of pretrial detention, losing their jobs, or heavier penalties after trial, innocent defendants may perceive they have no choice except to take the plea.<sup>138</sup> As with trials conducted without “the guiding hand of counsel,” the plea-bargaining process becomes an additional source of wrongful outcomes.<sup>139</sup>

Even if a defendant would have been willing to plead guilty with counsel, the power imbalance created by *Scott* is troubling. As with *Scott*’s hypothetical public defender, competent defense counsel could negotiate more effectively with the prosecutor, including reaching a plea to an alternative offense that might minimize or eliminate potential collateral consequences.<sup>140</sup> If the most damaging collateral consequences cannot be avoided, counsel could also help the defendant evaluate whether the harm of the collateral consequence, like deportation or the loss of public housing, may be so severe that the defendant is better off simply taking his chances at trial. For nonpetty offenses, counsel can help the defendant decide whether to invoke the right to a jury trial. Thus, a defendant denied the “guiding hand” of counsel at trial also suffers at other critical phases of his

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134. *Frye*, 566 U.S. at 144.

135. *Id.* at 143.

136. *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

137. See THE CONSTITUTION PROJECT, *supra* note 126, at 89 (“In several courts, the Committee’s investigators found that defendants were encouraged to negotiate with prosecutors without the assistance of counsel, and in one court they were required to do so. These negotiations frequently involved a discussion of the charged offenses and led to guilty pleas.”).

138. See Clapman, *supra* note 103, at 598.

139. *Id.*

140. See *id.* at 596 (noting that “prosecutors generally are more willing in [deportation] cases to work out a plea that avoids deportation and the law affords more opportunities for the parties to do so”).

defense, including plea negotiations, that could protect him from crippling collateral consequences.<sup>141</sup>

*Scott* also creates an imbalance between the uncounseled defendant and the courts, in that the decision undervalues the direct consequences of a criminal conviction. The Supreme Court justified the actual incarceration standard in part on the premise that actual imprisonment was categorically different from a mere fine.<sup>142</sup> Though many commentators have argued that the impact of collateral consequences warrants rethinking *Scott*, few have examined how the extensive array of fines, fees, and costs that courts may now impose upon conviction should affect that decision's validity.

Alexandra Natapoff has observed that, “[a]s government budgets shrink around the country, lower criminal courts are being reconceptualized and repurposed as revenue sources.”<sup>143</sup> States and localities are increasingly imposing “user fees” on criminal defendants to generate this needed revenue. For instance, the Louisiana Supreme Court recently ruled that prosecutors could petition the court to impose a prosecution fee on a convicted defendant.<sup>144</sup> Perhaps the most extreme example of this phenomenon in recent memory comes from the city of Ferguson, Missouri. Thrust into the national spotlight by the police shooting of unarmed black teenager Michael Brown, the subsequent investigation by the Department of Justice into the city's municipal court system revealed that local judges collected \$2.46 million in fines and fees in 2013, or over 20 percent of the town's revenue.<sup>145</sup> Around the country, a defendant convicted of a minor offense may find himself charged for the costs of the police investigation, probation supervision, jail stays, and court overhead.<sup>146</sup>

The amount of debt generated by a “legal financial obligation” (LFO) can quickly overwhelm an indigent defendant. Failure to pay these LFOs exacerbates the debt spiral by leading to additional fees and interest charges,<sup>147</sup> as well as ruining a debtor's credit<sup>148</sup> or leading to the revocation of a driver's license.<sup>149</sup> And to collect this revenue, courts are

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141. The absence of counsel may also disadvantage a defendant when it comes to making arguments for release on bond or ensuring the record is properly preserved for appeal.

142. *Scott v. Illinois*, 440 U.S. 367, 373 (1979).

143. Natapoff, *supra* note 101, at 1099; *see also* Henry Ordower et al., *Out of Ferguson: Misdemeanors, Municipal Courts, Tax Distribution and Constitutional Limitations* 16 (St. Louis Univ. Sch. of Law, Legal Studies Research Paper No. 14, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2854372](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2854372) (“Fines and related fees may provide a better source of revenue than do property, sales and income taxes since the amount of revenue from fines remains substantially within the municipality's control.”) [<https://perma.cc/86H9-9NC5>].

144. *State v. Griffin*, 180 So.3d 1262, 1273 (La. 2015).

145. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9 (2015), <https://www.courts.mo.gov/file.jsp?id=95274> [<https://perma.cc/92CY-5Z3F>].

146. *See* ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4 (2010).

147. *See* Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 505, 517 (2011).

148. *See* BANNON ET AL., *supra* note 146, at 4.

149. *See* Beckett & Harris, *supra* note 147, at 517–18.

growing increasingly aggressive,<sup>150</sup> resorting to jailing debtors without regard to clear Supreme Court precedent limiting these practices.<sup>151</sup> The result is that a supposedly minor “fine only” offense like Scott’s may still ultimately result in incarceration for the unwitting defendant.<sup>152</sup>

Of course, LFOs may also ensnare a represented defendant. But the inevitable result of denying counsel to defendants who do not face jail time is to make it easier for jurisdictions to secure convictions.<sup>153</sup> Indeed, the *Argersinger* Court pointedly observed that, by one estimate, represented defendants in certain courts were five times more likely to have their charges dismissed than the unrepresented.<sup>154</sup> *Scott* thus perversely allows jurisdictions to maintain inflated conviction rates for minor offenses while saving on the overhead costs of jail and defense counsel. They are then free to focus on extracting money from defendants processed through this system, often using the threat of jail. Understanding the pitfalls—whether labeled direct or collateral—that unrepresented defendants face once the state tags them as criminals reveals the central irony in *Scott*: despite the *Argersinger* Court’s overriding concern with counsel’s role in preventing assembly line justice, *Scott* allows states to operate their assembly lines at a more brutal pace than ever.

## II. POTENTIAL FIXES—AND THEIR FLAWS

Various authors have urged rejection of the actual incarceration standard for appointing counsel under the Sixth Amendment.<sup>155</sup> Like the Justices who declined to join the main opinions in *Argersinger* and *Scott*, these critics have emphasized that the standard bears no connection to the seriousness of the offense, the complexity of the legal issues involved, or the severity of the collateral consequences that may stem from such a conviction.<sup>156</sup>

The most common proposal for a new Sixth Amendment standard is to provide counsel for any individual facing a conviction.<sup>157</sup> The position relies primarily on the severity of collateral consequences for misdemeanors. Second most common among the *Scott* fixes is to guarantee

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150. See MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 36 (2015).

151. See Natapoff, *supra* note 101, at 1081–86.

152. Indeed, the Department of Justice recently admonished local court leaders around the country that the spread of unlawful efforts by courts to collect criminal fees threatened to “cast doubt on the impartiality of the tribunal and erode trust between local governments and their constituents.” OFFICE FOR ACCESS TO JUSTICE, U.S. DEP’T OF JUSTICE, DEAR COLLEAGUE LETTER 2 (2016), <https://www.justice.gov/crt/file/832461/download> [https://perma.cc/D46M-SKGL].

153. See Natapoff, *supra* note 101, at 1078.

154. *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972).

155. See, e.g., King, *supra* note 99, at 15; Murray, *supra* note 57, at 1170;

156. See, e.g., Gross, *supra* note 97, at 73.

157. See Gross, *supra* note 97. See generally King, *supra* note 99.

the right to counsel for those facing deportation, arguably the most severe collateral consequence.<sup>158</sup>

All of these critiques rely, at least implicitly, on the premise that it is fundamentally unfair for an uncounseled conviction to authorize a debilitating collateral consequence. Under this view, not only are uncounseled convictions less reliable by their very nature, but providing counsel to the indigent defendant facing misdemeanor convictions is also necessary to preserve the integrity of the criminal justice system.<sup>159</sup>

The major impediment for these proponents is that the Supreme Court has largely abandoned the principles of fundamental fairness animating *Gideon*. Post-*Gideon*, the Court's Sixth Amendment jurisprudence has focused heavily on the reliability of convictions, arguably to the exclusion of other goals, and on the role of counsel in ensuring such reliability.<sup>160</sup> In that vein, the Court has narrowed the right to counsel inquiry for misdemeanors to the question of whether uncounseled convictions are adequately reliable for certain criminal justice outcomes. In the process, it has endorsed the view that, because uncounseled convictions are not inherently unreliable—even if they are categorically *less* reliable than counseled convictions—they may support incarceration in subsequent criminal proceedings.

To explain, in *Nichols v. United States*,<sup>161</sup> the Court held that uncounseled convictions obtained in accordance with *Scott* can be used to enhance the sentence for a subsequent conviction.<sup>162</sup> In an opinion by Chief Justice Rehnquist—the author of *Scott*—the Court framed *Nichols* as overturning its prior decision in *Baldasar v. Illinois*.<sup>163</sup> There, the Court issued a per curiam opinion holding that an uncounseled misdemeanor conviction, even if valid under *Scott*, could not be used to elevate the level of, and minimum sentence for, a subsequent offense.<sup>164</sup> But the *Baldasar* majority could not settle on a rationale for the opinion, with two separate concurrences joined by five Justices. Justice Powell dissented with three other Justices and argued that a valid conviction could be used to enhance a subsequent sentence.<sup>165</sup>

*Nichols* involved a defendant whose uncounseled prior conviction contributed three criminal history points to raise his offense level one category under the Federal Sentencing Guidelines for a drug charge.<sup>166</sup>

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158. See, e.g., Clapman, *supra* note 103, at 598.

159. Cf. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (explaining that the Sixth Amendment right to counsel of choice requires “not that a trial be fair, but that a particular guarantee of fairness be provided”).

160. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (requiring, to prove that counsel's conduct was ineffective, a “showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable”).

161. 511 U.S. 738 (1994).

162. *Id.* at 746–47.

163. 446 U.S. 222 (1980).

164. *Id.*

165. *Id.* at 233 (Powell, J., dissenting).

166. *Nichols*, 511 U.S. at 740.

Subsequently, the judge sentenced Nichols to a maximum term of 235 months, 25 more months than the prescribed maximum term had the prior conviction been excluded.<sup>167</sup> The Court, invoking Justice Powell's dissent in *Baldasar*, determined that, although Nichols's uncounseled conviction resulted in a higher sentence for the subsequent offense, Nichols was only punished for the subsequent offense.<sup>168</sup> Relying on the "less exacting" nature of the sentencing process, the Court additionally noted that the sentencing court could have considered Nichols's alleged criminal conduct as a sentencing factor even if there had been no conviction.<sup>169</sup> Because the state only had to prove such conduct by a preponderance of the evidence, "it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct where that conduct must be proved beyond a reasonable doubt."<sup>170</sup> The Court went on to reject the notion that the defendant should at least be warned that an uncounseled conviction might enhance a later sentence because the local courts responsible for most uncounseled convictions do not keep records of the proceedings to memorialize the warning.<sup>171</sup>

Concurring with the judgment, Justice David Souter revealed the majority's sleight of hand in "overruling" *Baldasar*.<sup>172</sup> Deeming that decision too splintered to overrule, Justice Souter instead began with *Argersinger*'s sustaining premise "that the concern over reliability raised by the absence of counsel is tolerable when a defendant does not face the deprivation of his liberty."<sup>173</sup> For Justice Souter, *Argersinger* raised serious doubts about whether a defendant could permissibly receive an enhanced sentence based solely on an uncounseled and unreliable prior conviction.<sup>174</sup> But, as Justice Souter noted, *Nichols* did not raise that issue. Under the Federal Sentencing Guidelines, Nichols's sentencing judge could have departed from the recommended sentencing range if she had concerns about the reliability of Nichols's prior conviction.<sup>175</sup> Justice Souter concluded that "[w]here concern for reliability is accommodated, as it is under the Guidelines, nothing in the Sixth Amendment or our cases requires a sentencing court to ignore the fact of a valid uncounseled conviction, even if that conviction is a less confident indicator of guilt than a counseled one would be."<sup>176</sup> By contrast, where an uncounseled conviction *automatically* enhances the statutory penalty for a subsequent charge—and thus must be considered a substantive element of that new offense under the Sixth Amendment rather than a mere sentencing factor<sup>177</sup>—a sentencing judge is

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167. *See id.* at 741.

168. *Id.* at 747.

169. *Id.* at 746–47. This is no longer true for facts that raise the mandatory minimum sentence. *Alleyne v. United States*, 133 S. Ct. 2151, 2163–64 (2013).

170. *Nichols*, 511 U.S. at 748.

171. *Id.*

172. *Id.* at 749.

173. *Id.* at 750 (Souter, J., concurring).

174. *Id.* at 750–51.

175. *Id.* at 751–52.

176. *Id.* at 753.

177. *Alleyne v. United States*, 133 S. Ct. 2151, 2158 (2013).



powerless to mitigate the sentencing range based on concerns about the reliability of the prior uncounseled conviction.

Despite Justice Souter's protestations, the Court has not abandoned *Nichols*. Nor has it abandoned its myopic insistence on reliability as the touchstone of the Sixth Amendment right to counsel in misdemeanor cases. This past Term, a unanimous Court in *United States v. Bryant*<sup>178</sup> reaffirmed that valid convictions under *Scott* can serve as the basis for any sentencing enhancement.<sup>179</sup> *Bryant* adds a twist to *Nichols* because the defendant in Bryant received jail time on the uncounseled convictions that automatically enhanced, and, indeed, provided the entire basis for, his subsequent federal conviction. Specifically, Bryant was convicted in federal court of "domestic assault in Indian country by a habitual offender" under 18 U.S.C. § 117(a).<sup>180</sup> The statute imposes a maximum five-year sentence on anyone with at least two prior domestic violence convictions in state, federal, or Indian tribal courts. Bryant's predicate convictions were all in tribal court, and they were all uncounseled.<sup>181</sup> For most of those uncounseled convictions, Bryant served jail terms of less than a year.<sup>182</sup> Had Bryant's prior convictions been in federal court, they would have violated the Sixth Amendment and could not have supported conviction under a recidivist statute.<sup>183</sup> "But," the Court pointedly noted, "the Sixth Amendment does not apply to tribal-court proceedings," and, under the Indian Civil Rights Act of 1968, only those sentenced to more than a year's imprisonment are entitled to counsel.<sup>184</sup>

Bryant nonetheless argued that his uncounseled convictions, though technically not in violation of the Sixth Amendment, still implicated the reliability concerns supporting the right to counsel in criminal cases.<sup>185</sup> The Court was unpersuaded. Seemingly conceding that the Sixth Amendment right to counsel hinges on concerns about reliability, the Court asserted that *Scott* and *Nichols* still preclude any notion that uncounseled convictions are "categorically unreliable."<sup>186</sup> The Court bolstered this position by pointing out that Bryant had admitted he would have no claim for relief had he received only fines in the prior proceedings because those convictions would certainly be valid under *Scott* in any U.S. court.<sup>187</sup> The Court went on to emphasize that the reliability of tribal proceedings do not turn on "the sanction—fine only or a year in prison—ultimately imposed."<sup>188</sup>

Of course the reliability of the proceedings cannot be gauged solely by the result of those proceedings. But herein lies the means by which the

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178. 135 S. Ct. 1954 (2016).

179. *Id.* at 1966.

180. *Id.* at 1956.

181. *See id.* at 1957.

182. *See id.* at 1962.

183. *Burgett v. Texas*, 389 U.S. 109, 111 (1967).

184. *Bryant*, 136 S. Ct. at 1958.

185. *See id.* at 1966.

186. *Id.* (emphasis added).

187. *Id.*

188. *Id.*

Court has both enlarged and distorted the role of reliability under the Sixth Amendment. While the Court has acknowledged counsel's role in ensuring reliability and that reliability cannot be assessed based on the sanction imposed, the sanction imposed remains the metric by which counsel is deemed necessary. Indeed, the *Argersinger* Court recognized the incoherence of such logic when it determined that counsel may be necessary in some petty offense cases because it doubted that the "legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more."<sup>189</sup> It is easy enough to say that the potential consequences of a proceeding indicate little about the proceeding itself. What is left unclear is how one can make a principled decision that the proceeding is reliable enough to impose collateral consequences but not time in prison. Nonetheless, this is the distinction not only endorsed in *Nichols* and *Bryant* but that arguably has its roots in *Argersinger* and *Scott*. Although reliability is not explicitly discussed in *Scott*, and the Court's stated rationale is sparse, notions of reliability likely explain the Court's willingness to allow uncounseled convictions so long as they do not result in "so severe a sanction" as incarceration.<sup>190</sup>

The *Nichols* and *Bryant* Courts' endorsement of the idea that uncounseled convictions are sufficiently reliable for use in subsequent criminal proceedings creates a conundrum for those advancing a new Sixth Amendment standard based on the collateral consequences of criminal convictions. *Bryant* deems an uncounseled misdemeanor valid enough to serve as an element of a subsequent offense that results in incarceration. Moreover, the Court has held the line for nearly four decades on the notion that incarceration is a penalty different in kind from any other. Without a fundamental reexamination of these positions, or of the foundational values underpinning the Sixth Amendment right to counsel, it is difficult to imagine the Court holding that the same conviction, which might later serve as a predicate to actual incarceration, could not provide the basis for a collateral consequence.

Even if such a reexamination occurred and the Court expanded the right to counsel, concerns regarding its implementation would remain. Many indigent defendants already do not receive counsel even when they are legally entitled to it under current Sixth Amendment doctrine.<sup>191</sup> A 2004 report by the American Bar Association revealed that many indigent defendants are never provided counsel and that the problem is exacerbated

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189. *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972).

190. *Scott v. Illinois*, 440 U.S. 367, 372 (1979); see also *Nichols v. United States*, 511 U.S. 738, 750 (1994) (Souter, J., concurring) (explaining the line drawn in *Scott* between "imprisonment and lesser criminal penalties" as based "on the theory, as I understand it, that the concern over reliability raised by the absence of counsel is tolerable when a defendant does not face the deprivation of his liberty").

191. See Natapoff, *supra* note 57, at 1328–29; see also THE CONSTITUTION PROJECT, *supra* note 126, at 84–86.

in misdemeanor cases.<sup>192</sup> A report by the National Right to Counsel Committee in 2009 stated that in “misdemeanor courts across the country . . . counsel is oftentimes either not provided, or provided late, to those who are lawfully eligible to be represented.”<sup>193</sup> Whether caused by limited resources, apathy toward the accused, or ignorance of constitutional requirements, the failure of misdemeanor courts to meet current indigent defense needs suggests that expanding the right will confront myriad difficulties. However, rather than approach the problem as a zero-sum game,<sup>194</sup> where meaningful expansion of the right to counsel is contingent upon jurisdictions increasing their fiscal or ideological commitments, we suggest in Part III that reducing the number of criminal cases requiring counsel may avoid more difficult questions about how to provide more public defenders for misdemeanor defendants.

In considering the feasibility of an expanded right to counsel, it is worth noting that most states have rejected *Scott* and extended the right to court-appointed counsel beyond *Scott*'s requirements. As of 2013, five states (California,<sup>195</sup> Delaware,<sup>196</sup> Indiana,<sup>197</sup> New York,<sup>198</sup> and Oklahoma<sup>199</sup>)

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192. See Natapoff, *supra* note 57, at 1328–29; see also STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 126, at 22–23 (2004); THE CONSTITUTION PROJECT, *supra* note 126, at 84–86.

193. THE CONSTITUTION PROJECT, *supra* note 126, at 85.

194. Erica Hashimoto suggests based on empirical evidence in federal court that “the value added by counsel in less serious misdemeanor cases is far lower than the value added in more serious cases.” Erica Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 466 (2007). Hashimoto contends that counsel is sometimes unnecessarily appointed in low-level misdemeanor cases as an alternative to determining the sentence at the beginning of the case (as demanded under Sixth Amendment doctrine). *Id.* Working from the assumption that attorneys often add less value in the context of misdemeanor representation than in the context of more serious criminal cases, Hashimoto suggests a multipronged approach that would curtail the appointment of counsel in such cases, thus freeing up resources for more effective representation in felony cases. *See id.* at 461. She suggests that states should (1) amend overbroad appointment statutes to align with the federal constitutional standard, (2) amend probation statutes so that probation is not enforced through imprisonment, (3) reduce penalties for minor offenses, and (4) require a determination of the sentence at the outset of the proceeding in misdemeanor cases. *Id.* While her solution is a pragmatic one, it is constructed based on the assumption that the number of cases within the system is fixed; here, we suggest that assumption is one that should be challenged.

195. CAL. PENAL CODE § 987 (West 2013); see also *Mills v. Mun. Court*, 515 P.2d 273, 287 (Cal. 1973) (requiring counsel or an adequate record of waiver for all misdemeanors).

196. DEL. CODE ANN. tit. 29, § 4602 (2003) (providing a right to counsel to any “indigent person who is under arrest or charged with a crime”).

197. *Brunson v. State*, 394 N.E.2d 229, 231 (Ind. Ct. App. 1979) (interpreting the Indiana constitution to guarantee “right to counsel for all persons charged with a criminal misdemeanor, regardless of whether the charge ultimately results in . . . imprisonment”); *Frazier v. State*, 391 N.E.2d 1192, 1194 (Ind. Ct. App. 1979) (“[T]he Indiana Constitution makes no distinction between misdemeanors and felonies, the right to counsel must and does exist in misdemeanor cases to the same extent and under the same rules as it exists in felony cases.”).

198. *People v. Ross*, 493 N.E.2d 917, 920 (N.Y. 1986) (“[T]he [New York] Criminal Procedure Law clearly provides broad statutory protection to all defendants accused of felonies and misdemeanors without reference to the potential sentence attached to the crime.”).

recognized the right to counsel in all misdemeanor cases, four states (Alaska,<sup>200</sup> Minnesota,<sup>201</sup> North Carolina,<sup>202</sup> and Vermont<sup>203</sup>) recognized the right to counsel if the potential fine is sufficiently high, twenty-seven states and the District of Columbia recognized the right to counsel in misdemeanor cases if incarceration is possible,<sup>204</sup> three states (Missouri,<sup>205</sup> North Carolina,<sup>206</sup> and Pennsylvania<sup>207</sup>) recognized the right to counsel in misdemeanor cases if incarceration is probable, and two states (Nevada<sup>208</sup>

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199. *Swanegan v. State*, 743 P.2d 131, 132 (Okla. Crim. App. 1987) (“An accused has the unconditional and absolute right to counsel in any felony or misdemeanor proceeding.”). *But see id.* (“We require the full panoply of constitutional rights when liberty interests are threatened.”).

200. *Alexander v. City of Anchorage*, 490 P.2d 910, 915 (Alaska 1971) (“[W]e here define the term ‘criminal prosecution,’ as it relates to the right to have the assistance of counsel, as including any offense a direct penalty for which may be incarceration in a jail or penal institution, which may result in the loss of a valuable license, or which may result in a heavy enough fine to indicate criminality.”).

201. *City of Minneapolis v. Wentworth*, 269 N.W.2d 882, 884 (Minn. 1978) (holding, in deciding whether defendant should have been advised of his right to counsel, “defendants should be advised of their right to seek legal assistance where, as here, the potential penalty for municipal ordinance violations, though non-incarcerative, involves serious economic hardship”).

202. N.C. GEN. STAT. § 7A-451(a)(1) (2005) (providing a right to counsel in any case in which a fine of \$500 or more is “likely to be adjudged”).

203. *See* VT. STAT. ANN. tit. 13, § 5201(4)(B) (2016) (defining “serious crime” to include misdemeanors with a fine of \$1,000 or more); *State v. Duval*, 589 A.2d 321 (Vt. 1991) (applying VT. STAT. ANN. tit. 13, § 5201(4)(B)). *But see* *State v. Porter*, 671 A.2d 1280, 1282 (Vt. 1996) (“[W]e have consistently held that the right to representation by counsel found in Chapter I, Article 10 of the Vermont Constitution confers a right similar to the federal Sixth Amendment right.”).

204. This includes Alaska, Arizona, Colorado, Connecticut, the District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, North Dakota, Ohio, Tennessee, Texas, Virginia, Utah, Washington, West Virginia, Wisconsin, and Wyoming. *See* Memorandum from Susan David Demaine & Jessica K. Dickinson to Professor Norman Lefstein, 50-State Survey: Right of Counsel for Misdemeanants (Dec. 17, 2013) (on file with the *Fordham Law Review*).

205. *State ex rel. Missouri Pub. Def. Comm’n v. Waters*, 370 S.W.3d 592, 606 (Mo. 2012) (“Upon a showing of indigency, it shall be the duty of the court to appoint counsel to represent a person charged with an offense likely to result in imprisonment.” (quoting MO. SUPP. CT. R. 31.02(a))).

206. N.C. GEN. STAT. § 7A-451 (“An indigent person is entitled to services of counsel in the following actions and proceedings: (1) Any case in which imprisonment, or a fine of five hundred dollars (\$500.00), or more, is likely to be adjudged . . . .”; *State v. Neeley*, 297 S.E.2d 389, 393 (N.C. 1982) (“If a trial judge is prepared to impose an active prison sentence on an indigent defendant he must be sure that defendant is afforded appointed counsel. If an indigent defendant is not afforded appointed counsel he may not be given an active prison sentence.”).

207. 18 PA. STAT. AND CONS. STAT. ANN. § 106 (c) (West 2013) (“An offense defined by this title constitutes a summary offense if . . . (2) if a person convicted thereof may be sentenced to a term of imprisonment, the maximum of which is not more than 90 days.”); PA. R. CRIM. P. 122(a) (“Counsel shall be appointed: (1) in all summary cases, for all defendants who are without financial resources or who are otherwise unable to employ counsel when there is a *likelihood that imprisonment will be imposed*; (2) in all court cases, prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel.” (emphasis added)).

208. NEV. REV. STAT. ANN. § 178.397 (West 2011) (“Every defendant accused of a gross misdemeanor or felony who is financially unable to obtain counsel is entitled to have counsel

and South Dakota<sup>209</sup>) recognized a right to counsel in misdemeanor cases where incarceration for more than six months is possible (i.e., where a defendant also has a federal right to a jury).

While these exceptions demonstrate that extending the right to counsel beyond *Scott* is not per se impractical, they also suggest that it will be difficult to identify a uniform replacement for the actual incarceration standard that is fully satisfying. For example, North Carolina law provides for the appointment of counsel when imprisonment or a fine of \$500 or more is “likely to be adjudged.”<sup>210</sup> In Vermont, indigent criminal defendants are entitled to a court-appointed lawyer for offenses with a sentence of imprisonment upon conviction or carrying a fine in excess of \$1,000.<sup>211</sup> And Alaska has interpreted its own state constitution to provide for a right to the assistance of counsel for offenses that may result in incarceration or “the loss of a valuable license, or which may result in a heavy enough fine to indicate criminality.”<sup>212</sup> These state laws are arguably an improvement upon the *Argersinger-Scott* rule from the standpoint of defendants who benefit. Yet they still exclude many defendants also greatly in need of counsel who may be denied a lawyer based on their financial status. Further, they remain based on the potential punishments attached to a criminal conviction, which *Argersinger* and *Bryant* confirm bears little relationship to the complexity of the underlying case. Though some amount of arbitrariness is a natural consequence of line drawing, the issue is whether that line drawing comports with the ideals of fundamental fairness and equal access championed in *Gideon*, especially where the conviction itself, rather than the fine or potential sentence authorized by the conviction, is often the most damaging outcome of a criminal prosecution.

### III. EQUAL PROTECTION: AN ALTERNATIVE PATH

In this part, we contend that viewing the right to counsel in misdemeanor cases not from a Sixth Amendment perspective but instead from the vantage point of the Fourteenth Amendment's Equal Protection and Due Process Clauses and the right of meaningful access to the courts provides a superior

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assigned.”); *id.* § 193.140 (“Every person convicted of a gross misdemeanor shall be punished by imprisonment in the county jail for not more than 364 days, or by a fine of not more than \$2,000, or by both fine and imprisonment.”).

209. *In re Wright*, 189 N.W.2d 447, 449–50 (S.D. 1971) (“The petty-offense rule now has Congressional approval. 18 U.S.C.A. 3006A. That provision denies to defendants in federal prosecutions the right to appointed counsel if their offense is petty, which is defined therein as any misdemeanor, the penalty for which does not exceed imprisonment of six months or a fine of not more than \$500 or both. Until the United States Supreme Court decides the issue presented otherwise, we hold that the applicant was not entitled to court-appointed counsel by virtue of the Sixth Amendment to the Constitution of the United States. That provision, in our view, does not extend the right to offenses of this type. . . . The provision of the South Dakota Constitution on which [defendant] relies is Art. VI, § 7. It is substantially like the Sixth Amendment to the United States Constitution.”).

210. N.C. GEN. STAT. § 7A-451(a)(1).

211. *State v. Duval*, 589 A.2d 321, 323 (Vt. 1991).

212. *Alexander v. City of Anchorage*, 490 P.2d 910, 915 (Alaska 1971) (interpreting article I, section 11 of the Alaska Constitution).

framework to resolve the dilemmas described above. While the Supreme Court has made clear the limitations of the Sixth Amendment as applied to misdemeanor defendants, those defendants are still entitled to meaningful access to the courts by cases like *Gideon* and *Griffin v. Illinois*,<sup>213</sup> described in Part III.A below. That right suggests that the denial of counsel to misdemeanor defendants—particularly those facing a host of severe collateral consequences—may not raise any Sixth Amendment issues yet may still run counter to the right of meaningful access.

The primary difference between these two areas of constitutional law lies in the type of line drawing that is permissible under each approach. Unless the Sixth Amendment requires counsel for all criminal defendants, some line drawing between those entitled to counsel and those who are not is inevitable. Erica Hashimoto asserts that the actual incarceration line drawn in *Argersinger*, *Scott*, and *Shelton* is defensible because it provides states with “distinct options for complying with the constitutional requirement” and permits jurisdictions to focus on providing, rather than denying, representation.<sup>214</sup> While many have critiqued the standard’s reliance on incarceration, she emphasizes that, by doing so, it offers states “a low-cost way to comply with the Constitution: eliminate incarceration and probated sentences for low-level offenders.”<sup>215</sup> But, even framed as an economic matter, we must still ask: What costs does the Constitution require states to pay and, consequently, which defendants does it allow states to leave behind?<sup>216</sup>

Hashimoto presents the two possible routes for avoiding a Sixth Amendment violation under the *Argersinger-Scott-Shelton* line of cases as equal: a risk-averse legislature can either appoint counsel in all misdemeanor cases where there is a possibility of incarceration or it can remove the possibility of incarceration altogether (meaning that the defendants in such cases are not entitled to counsel). Both solutions are equally effective in avoiding a Sixth Amendment violation. However, neither adequately accounts for the range of consequences that result from conviction, or even the charge, because those factors are irrelevant to the Sixth Amendment analysis. As explained below, from the perspective of ensuring meaningful access to the courts, both solutions are deeply flawed.

Moreover, in those jurisdictions that have chosen neither one of those two extremes, but instead leave discretion to the judge or the prosecutor to determine whether a defendant’s sentence will involve incarceration, the equal protection problems are even more troubling. In such a jurisdiction, two defendants may be deemed indigent and charged with the same offense,

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213. 351 U.S. 12 (1956).

214. Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1041 (2013).

215. *Id.* at 1042.

216. *Cf. Argersinger v. Hamlin*, 407 U.S. 25, 62 (1972) (Powell, J., concurring) (“If I were satisfied that the guarantee of due process required the assistance of counsel in every case in which a jail sentence is imposed or that the only workable method of insuring justice is to adopt the majority’s rule, I would not hesitate to join the Court’s opinion despite my misgivings as to its effect upon the administration of justice.”).

yet only one will be denied counsel because of a discretionary decision in that defendant's case. Still another defendant, who has not been deemed indigent and thus can afford to retain counsel regardless of the determination made with regard to incarceration, is almost never subject to revocation of his Sixth Amendment right.

The Court's focus on reliability under its Sixth Amendment jurisprudence and its adherence to the view that uncounseled convictions are reliable enough to support certain direct and collateral criminal penalties allow constitutional compliance to turn on the cost the state is willing to bear to seek certain ends. While *Scott* held that uncounseled convictions cannot result in incarceration, those convictions can be used to impose fines and other collateral consequences.<sup>217</sup> As a result, states are free to pursue convictions in all cases and can accommodate the level of representation they are able or willing to provide simply by deciding not to seek jail time in certain cases.

Framed instead as a question of equal access to the courts under the Fourteenth Amendment, the relevant inquiry shifts from "what costs we are willing to impose to secure certain convictions" to "whether those accused of crimes have access to a meaningful defense." With a focus on process first and outcomes second, states could no longer rely on actual incarceration as a valve to relieve pressure on their indigent defense systems. Imposing this higher constitutional floor would require states to provide effective counsel to all defendants instead of drawing a line between groups of defendants. The resulting costs would likely require that states take some cases out of the criminal system altogether to ensure that those cases that remain do not run afoul of equal protection. In other words, even if we maintain a pragmatic understanding of limited resources, we need not lessen the state's obligation to provide effective counsel to all defendants if we can reduce the number of cases in which that obligation applies.

Therefore, rather than focus on the likelihood or feasibility of a Sixth Amendment-driven remedy, we recommend that—in the spirit of Justice Brennan's and Justice Powell's opinions in *Argersinger* and *Scott*<sup>218</sup>—those seeking reform look instead to equal protection and the right of meaningful access to the courts.

#### A. *Equal Protection and Access to the Courts*

While not recently deployed by the Court in its right to counsel cases,<sup>219</sup> there is a robust body of jurisprudence historically linking access to the

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217. See *supra* Part I.B.

218. See *Argersinger*, 407 U.S. at 63 n.31 (Powell, J., concurring) ("It seems to me that such an individualized rule, unlike a six-month rule and the majority's rule, does not present equal protection problems under this Court's decisions in *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); and *Mayer v. City of Chicago*, 404 U.S. 189 (1971).").

219. See *Lucas*, *supra* note 40, at 1220 (noting that the Court's recent right to effective counsel jurisprudence has relied exclusively on the Sixth Amendment).

courts and equal protection. The Court first expressed concern about indigent defendants' ability to access the courts in *Powell v. Alabama*.<sup>220</sup> Holding that the Constitution requires the appointment of counsel in capital cases, the *Powell* Court relied primarily on the Due Process Clause of the Fourteenth Amendment.<sup>221</sup> While it did not rely explicitly on the Equal Protection Clause, the opinion did emphasize "the inequitable treatment of indigents in criminal proceedings" and a "general concern about indigents' ability to participate in the judicial process."<sup>222</sup> Animating the *Powell* Court (and, subsequently, the *Gideon* Court) was the understanding that a layperson, without legal training, would be unable to effectively navigate the judicial system:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>223</sup>

*Gideon* is well known as the case establishing that indigent defendants have a right to court-appointed counsel in state criminal cases.<sup>224</sup> Primarily recognized as a Sixth Amendment case, *Gideon* also relied on equal protection principles, noting safeguards must be in place to ensure that "every defendant stands equal before the law."<sup>225</sup> As originally understood, the Sixth Amendment protected only the right to retain or employ volunteer counsel.<sup>226</sup> The transition from that negative interpretation to a more affirmative understanding of the right, made complete by *Gideon*, was necessarily driven by the desire to equalize access.

Less than a decade before *Gideon*, the Court relied more explicitly on equal protection in *Griffin*, holding that because of its importance to meaningful appellate review, a trial transcript could not be withheld from a criminal defendant based on his inability to pay the cost of such a transcript.<sup>227</sup> Similarly, in *Douglas v. California*,<sup>228</sup> decided the same day

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220. 287 U.S. 45 (1932).

221. *Id.* at 71–72.

222. Lucas, *supra* note 40, at 1221.

223. *Powell*, 287 U.S. at 68–69. This is also quoted in *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

224. *Gideon*, 372 U.S. at 344.

225. *Id.*

226. *See* *United States v. Van Duzee*, 140 U.S. 169, 173 (1891).

227. *Griffin v. Illinois*, 351 U.S. 12, 13–14, 16, 19 (1956) ("Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.").



as *Gideon*, the Court held that the government must provide indigent defendants with counsel on appeal.<sup>229</sup> Treading outside of the Sixth Amendment's guarantees, the *Douglas* Court relied on equal protection principles, stating:

There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.<sup>230</sup>

*Griffin*, *Gideon*, *Douglas*, and the cases that followed might therefore be viewed as establishing two key principles in access to courts jurisprudence: (1) a defendant's relative (or lack of) wealth should not determine his or her treatment by the court and (2) indigent defendants are entitled to as meaningful a review as defendants of financial means.<sup>231</sup> In subsequent cases, like *Entsminger v. Iowa*,<sup>232</sup> *Mayer v. Chicago*,<sup>233</sup> and *Britt v. North Carolina*,<sup>234</sup> the Court continued to emphasize this point, holding that "the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale"<sup>235</sup> and that indigent prisoners must be provided "with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners."<sup>236</sup> As one commentator has noted, the primary rationale for the Court's decision in *Mayer*, holding that indigent defendants cannot be required to pay costs to appeal a misdemeanor conviction (even when the defendant has not been sentenced to a term of incarceration), was that "imposing costs upon indigents as a condition of appeal constitutes invidious discrimination, regardless of the interest at stake's gravity."<sup>237</sup>

In *Mayer*, the state attempted to distinguish the case at hand from those in which the defendant was imprisoned, an argument the Court soundly rejected:

Where the accused, as here, is not subject to imprisonment, but only a fine, the city suggests that his interest in a transcript is outweighed by the State's fiscal and other interests in not burdening the appellate process. This argument misconceives the principle of *Griffin* no less than does the

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228. 372 U.S. 353 (1983).

229. *Id.* at 357–58.

230. *Id.*

231. See Lucas, *supra* note 40, at 1224.

232. 386 U.S. 748 (1967).

233. 404 U.S. 189 (1971).

234. 404 U.S. 226 (1971).

235. *Entsminger*, 386 U.S. at 752.

236. *Britt*, 404 U.S. at 227.

237. Lloyd C. Anderson, *The Constitutional Right of Poor People to Appeal Without Payment of Fees: Convergence of Due Process and Equal Protection in M.L.B. v. S.L.J.*, 32 U. MICH. J.L. REFORM 441, 450 (1999); see also *Mayer*, 404 U.S. at 196 ("The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case. The distinction drawn by Rule 607(b) is, therefore, an 'unreasoned distinction' proscribed by the Fourteenth Amendment." (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966))).

line that Rule 607(b) expressly draws. *Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of an effective appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant.<sup>238</sup>

The *Mayer* Court went on to observe:

The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an indigent accused as forced confinement. The collateral consequences of conviction may be even more serious, as when (as was apparently a possibility in this case) the impecunious medical student finds himself barred from the practice of medicine because of a conviction he is unable to appeal for lack of funds. Moreover, the State's long-term interest would not appear to lie in making access to appellate processes from even its most inferior courts depend upon the defendant's ability to pay.<sup>239</sup>

It would seem anomalous or inconsistent, then, to conclude that even though equal protection precludes a state court from denying an indigent misdemeanor access to the record necessary for an adequate appeal<sup>240</sup>—even when that defendant is not facing incarceration—the same court would be free to deny that defendant (before he is deemed guilty) access to a lawyer to provide her with a meaningful adjudication.

The access to courts line of cases makes clear that, in the context of this fundamental right, individuals cannot be treated differently on the basis of wealth. From that perspective, the problem with the *Argersinger-Scott* formulation of the Sixth Amendment right to counsel is that indigent defendants may not have access to counsel in cases where a meaningful defense is important or needed. It exacerbates this inequality by empowering the prosecutor and the judge to divest the defendant of the right to meaningful access. It is telling that five Justices on the *Scott* Court at some point recognized or foreshadowed the equal protection problems posed by the actual incarceration standard: Justices Powell and Rehnquist in *Argersinger*<sup>241</sup> and Justices Brennan, Marshall, and Stevens in *Scott*.<sup>242</sup>

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238. *Mayer*, 404 U.S. at 196–97.

239. *Id.* at 197.

240. *See id.* at 198 (“We conclude that appellant cannot be denied a ‘record of sufficient completeness’ to permit proper consideration of his claims.”).

241. Although the problems identified in some opinions related to the distinction based on incarceration rather than the one based on wealth, the two are related. Those who can afford to hire private counsel are not subject to the variances in protection that come about as a result of the Court's incarceration-based standard. *See Argersinger v. Hamlin*, 407 U.S. 25, 54 (1972) (Powell, J., concurring) (“The new rule announced today also could result in equal protection problems. There may well be an unfair and unequal treatment of individual defendants, depending on whether the individual judge has determined in advance to leave open the option of imprisonment. Thus, an accused indigent would be entitled in some courts to counsel while in other courts in the same jurisdiction an indigent accused of the same offense would have no counsel. Since the services of counsel may be essential to a fair

As predicted, indigent defendants facing misdemeanor charges today experience a different criminal justice system than their wealthier cohorts.

*B. Equal Protection and the Right to a Lawyer  
in Misdemeanor Cases*

As described above, there are two lines of Supreme Court jurisprudence applicable to indigent misdemeanor defendants seeking representation in state court. The first, from the *Argersinger-Scott* line of cases under the Sixth Amendment, offers them only selective protection—if they cannot afford a lawyer, they are only entitled to one if they are incarcerated upon conviction. The second, from *Griffin, Douglas*, and the subsequent cases discussed, suggests due process and equal protection require that, regardless of what is at stake, defendants without financial means cannot be deprived of elements of an adequate or meaningful defense to which those with means would have access.<sup>243</sup> Interwoven among the latter group of cases is the recognition that while the consequences of such deprivation may range in severity—from a fine or loss of a license to incarceration—even the least severe of consequences should not turn on the ability to pay. Together, these cases suggest that states cannot operate a dual criminal justice system for which the assignment to one track or the other turns on a defendant's wealth. If the concern about such inequality is not limited to the individual's entitlement to a lawyer but also extends to the fact that poor and wealthier defendants are being treated differently with respect to basic procedural protections, the equal access to justice framework may provide a better metric for evaluating indigent defense systems than the Sixth Amendment.

The Supreme Court has generally tolerated discrimination based on wealth, applying only rational basis review.<sup>244</sup> Even so, it has specifically recognized an exception—encompassing cases like *Griffin* and *Douglas*—where defendants are “completely unable to pay for some desired benefit, and as a consequence, they sustain[] an absolute deprivation of a meaningful opportunity to enjoy that benefit.”<sup>245</sup> In *Bearden v. Georgia*,<sup>246</sup>

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trial even in cases in which no jail sentence is imposed, the results of this type of pretrial judgment could be arbitrary and discriminatory.”).

242. *Scott v. Illinois*, 440 U.S. 367, 383 (1979) (Brennan, J., dissenting) (“[T]he ‘authorized imprisonment’ test presents no problems of administration. It avoids the necessity for time-consuming consideration of the likely sentence in each individual case before trial and the attendant problems of inaccurate predictions, unequal treatment, and apparent and actual bias. These problems with the ‘actual imprisonment’ standard were suggested in my Brother Powell’s concurrence in *Argersinger*, which was echoed in scholarly criticism of that decision.” (citation omitted)).

243. See Lucas, *supra* note 40, at 1229–30 (describing right to a meaningful defense).

244. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

245. *Rodriguez*, 411 U.S. at 20 (discussing *Griffin* and *Douglas* as examples). The *Rodriguez* Court also took note of *Williams v. Illinois*, 399 U.S. 235 (1970), and *Tate v. Short*, 401 U.S. 395 (1971), in which the Court struck down criminal penalties subjecting defendants to incarceration based solely on their inability to pay a fine. *Rodriguez*, 411 U.S. at 21–22.

relying on previous precedents such as *Williams v. Illinois*<sup>247</sup> and *Tate v. Short*,<sup>248</sup> the Court held that indigent defendants may not be incarcerated based solely on the inability to pay a fine.<sup>249</sup> Thus, there is a compelling and deep line of precedent standing for the principle that poor defendants cannot be deprived of a meaningful defense simply because they cannot afford to hire an attorney.

Although not as apparent among more recent right to counsel cases, equal protection—and, more specifically, the notion that treatment of those in the criminal justice system should not be dependent on the ability to pay—is resurging. Money bail practices have come under fire from the courts for their ability to incarcerate only those who are unable to post bond.<sup>250</sup> Similarly, some have successfully attacked the overuse of fines and fees as a means for incarcerating the poor.<sup>251</sup>

A stark example of equal protection's value in this context can be found in state court in Miami, Florida. Under Florida law, indigent defendants charged with an offense punishable by incarceration are entitled to counsel unless the court enters an Order of No Incarceration (ONI) at least fifteen

246. 461 U.S. 660 (1983).

247. 399 U.S. 235 (1970); *see also id.* at 241–42 (“[O]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.”).

248. 401 U.S. 395 (1971); *see also id.* at 398 (“[T]he same constitutional defect condemned in *Williams* also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine.” (quoting *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970))).

249. *Bearden*, 461 U.S. at 672–73 (holding that “[s]uch a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment”).

250. *See Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc); *Thompson v. Moss Point*, No. 1:15cv182LG-RHW, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015); *Jones v. City of Clanton*, No. 2:15-cv-34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); *Cooper v. City of Dothan*, No. 1:15-cv-425-WKW, 2015 WL 10013003 (M.D. Ala. June 18, 2015); *Pierce v. City of Velda City*, No. 4:15-CV-570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015); *State v. Blake*, 642 So. 2d 959, 968 (Ala. 1994); *Lee v. Lawson*, 375 So. 2d 1019, 1023 (Miss. 1979); *see also Stack v. Boyle*, 342 U.S. 1, 4 (1951) (recognizing the right to an individualized bail determination); Order Granting Preliminary Injunction at 48, *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM (N.D. Ga. Jan. 28, 2016) (“[K]eeping individuals in jail solely because they cannot pay for their release, whether via fines, fees, or a cash bond, is impermissible.”); Statement of Interest of the United States at 1, *Jones v. City of Clanton*, No. 2:15-CV-00034-MHT-WC, 2015 WL 5387219 (Feb. 13, 2015), ECF No. 26 (stating that the use of secured bail to detain the indigent “not only violates the Fourteenth Amendment’s Equal Protection Clause, but also constitutes bad public policy”).

251. *See, e.g.*, Declaratory Judgment, *Bell v. City of Jackson*, No. 3:15-cv-00732-TSL-RHW, 2016 WL 6405833 (S.D. Miss. June 20, 2016); *Fant v. City of Ferguson*, No. 4:15-cv-253, 2015 WL 510270 (E.D. Mo. Feb. 8, 2015); *Cleveland v. City of Montgomery*, No. 2:13CV732-MHT, 2014 WL 6461900 (M.D. Ala. Nov. 17, 2014); *Mitchell v. City of Montgomery*, No. 2:14CV186-MHT, 2014 WL 11099432 (M.D. Ala. Nov. 17, 2014); *see also Settlement Agreement*, *Kennedy v. City of Biloxi*, No. 1:15-cv-348-HSO-JCG (S.D. Miss. Mar. 7, 2016); Complaint, *Edwards v. Red Hills Cmty. Prob.*, No. 1:15-cv-67 (M.D. Ga. Apr. 10, 2015).

days before trial.<sup>252</sup> This system, consistent with the *Argersinger-Scott* line of cases, effectively grants Miami prosecutors control over the right to counsel for indigent misdemeanor defendants. Prosecutors routinely seek and obtain ONIs from the courts to remove the public defender. And when the judge enters such an order, the defendant is no longer entitled to the appointment of counsel under the Sixth Amendment. Many judges grant ONIs without any independent review of the case or review of whether removing counsel would substantially disadvantage the defendant, as required under Florida law.<sup>253</sup> In this way, defendants are frequently stripped of public defenders that have spent weeks, even months, preparing a case.<sup>254</sup> This tactic provides prosecutors an enormous advantage over a defendant, who, having proclaimed his innocence throughout the proceedings, must now confront the State alone. Unlike Scott, whose decision to challenge his fate resulted in a Supreme Court decision, many defendants simply give up and take a plea bargain.<sup>255</sup>

The defendants convicted under this system often face fates worse than jail. They may be deported. They may lose their homes. They may lose their jobs. And they may suffer all of these hardships without any warning that accepting a seemingly generous plea offer could ruin their lives or livelihoods. Yet, under the Court's Sixth Amendment jurisprudence, they have all been treated fairly. After all, their convictions are "reliable" enough to justify the devastation that follows. By contrast, this practice could not stand under an equal protection or due process analysis. The Miami system essentially prices people out of their right to a fair adjudication. Whatever one thinks about the reliability of convictions resulting from this system, it offends the notions of equal dignity and due process that we seek to elevate.

To be clear about the equal protection concern animating this Article, we are concerned primarily with distinctions based on wealth given the Court's recognition that a criminal defendant's access to the courts cannot turn on his or her relative means. While there is another potential equal protection distinction to be made between those defendants sentenced to incarceration and those who are not—a concern animating positions like Justice Powell's concurrence in *Argersinger*—that is not our focus. We acknowledge that

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252. See FLA. R. CRIM. P § 3.111(b).

253. See *id.*

254. The public defenders challenging this practice in state court have alleged that Florida has created, in effect, two rights to counsel—one for indigent defendants, which is revocable, and one for nonindigent defendants, which is more permanent. While the Supreme Court has never deemed wealth to be a suspect classification demanding heightened scrutiny, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), when a fundamental right—such as the right to counsel—is involved, strict scrutiny applies. Thus, the burden would be on the state to put forth a compelling purpose for which such unequal treatment could be deemed necessary; fiscal savings and administrative convenience would not meet this threshold.

255. Public defenders have challenged this practice, relying on the equal protection provisions of both the federal and Florida Constitutions. See *Template for Motion Filed by Public Defenders Office of the Eleventh Judicial Circuit in Miami, Florida* (on file with the *Fordham Law Review*).

whether a defendant has meaningful access to the courts is not wholly divorced from consequences: what is necessary to provide meaningful access may look quite different for a defendant facing the death penalty than for a defendant facing a light fine. The difference is that meaningful access is not principally about outcomes. It is more fundamentally about the fairness of the process by which those outcomes are determined and whether that process is fair for all.<sup>256</sup> It is unlikely that these fairness and equality concerns can be accommodated by a distinction based strictly on the sentence ultimately imposed.

Also, as described immediately above, these two equal protection arguments—based on wealth and incarceration—are often connected. It is only those defendants who cannot afford to hire an attorney whose access to counsel (and thus meaningful access to the courts) is subject to control by the prosecutor or the judge—should one of those parties choose to eliminate incarceration as an option, a defendant will no longer be entitled to counsel. This is why we argue that under the existing system, the most effective way to satisfy equal protection is to ensure that all defendants charged with criminal offenses are afforded meaningful access, which includes the assistance of counsel. As described in Part III.C, this approach does not necessarily require the appointment of counsel in every criminal case—at least not in all cases currently defined as criminal. A better approach would be to assess which offenses truly warrant the appointment of counsel to guarantee meaningful access. We ultimately conclude that the full decriminalization of certain lower-level offenses where counsel is required by the access to courts line of cases but economically prohibitive is both the most pragmatic and constitutionally sound solution to the pernicious problem of assembly line justice in misdemeanor courts.

### C. *Toward an Equal-Protection-Driven Solution*

As described above, from the perspective of equal access to courts, the right to counsel analysis shifts from whether the criminal trial results in incarceration to whether counsel is necessary for the individual to mount a meaningful defense to the conviction itself. Understood this way, guaranteeing meaningful access in practice would require a two-step process. The first step would be to recognize that, for the reasons described above, counsel is constitutionally required in all misdemeanor cases, or at least for those defendants for whom significant consequences beyond incarceration are at stake. As noted above, however, most indigent defense systems are already delinquent in providing effective assistance of counsel; expanding the number of cases in which counsel must be provided would likely exacerbate these deficiencies.<sup>257</sup> As John King has explained, the

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256. See Lucas, *supra* note 40, at 1221 (noting the *Gideon* Court's emphasis on both substantive and procedural fairness).

257. See Hashimoto, *supra* note 194, at 513 (noting that, in a world of limited resources, states that choose to provide representation to all indigent defendants will provide only "minimal" representation); Natapoff, *supra* note 57, at 160 ("[T]he legal system already

“mere presence of defense counsel . . . will not . . . solve the problem.”<sup>258</sup> In misdemeanor courts across the county, even where counsel is provided, the attorneys assigned to such cases are “overworked, under-experienced, and often incompetent”; they often lack adequate time to see their clients or prepare their cases and fail to conduct adequate investigations, undertake required research, or file appropriate motions.<sup>259</sup> These deficiencies are overwhelmingly the result of systemic failures, such as underfunding, rather than the fault of individual attorneys.<sup>260</sup>

To mitigate these difficulties, the second step would require decriminalization of “petty” or low-level offenses<sup>261</sup>: once certain offenses are no longer criminal, the need for counsel disappears.<sup>262</sup> Though drawing any line will always demarcate the haves from the have-nots, setting the line between those who are charged with criminal offenses and those who are not is more defensible than one based on incarceration, given the significant direct and collateral costs of conviction. More importantly, such a line guarantees equal treatment for all criminal defendants, and decriminalization offers a way for states to meet the capacity demands generated by that line.<sup>263</sup> Rather than focusing strictly on the “supply side” of the representation equation (i.e., the number of lawyers necessary to defend those without means), states should also consider the “demand side,” lessening the number of cases for which a lawyer is required to

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underenforces existing protections; in light of limited resources, ramping up existing procedures may have little practical effect.”).

258. King, *supra* note 99, at 42.

259. *Id.*

260. See, e.g., *id.* at 43 (“Even in that universe of cases requiring court-appointed counsel, the system has utterly failed to provide a robust and zealous defense for those accused of crimes.”).

261. We acknowledge the concern that redefining crimes as civil violations may leave people facing significant financial penalties without the right to counsel typically available in criminal prosecutions. While that is a valid concern, it is less relevant here, as the misdemeanor defendants who are the main focus of this Article are already not entitled to counsel in spite of the fact that they are facing criminal charges.

As Charlie Gerstein and J.J. Prescott have argued, substituting civil enforcement tools for criminal prosecution of “public order” crimes would eliminate other process costs and unnecessary harm to defendants as well. Charlie Gerstein & J.J. Prescott, *Process Costs and Police Discretion*, 128 HARV. L. REV. F. 268 (2015).

262. This Article does not address civil cases in which counsel may also be critical. The Court’s most recent guidance with respect to the right to counsel in civil cases is *Turner v. Rogers*, 564 U.S. 431 (2011), in which the Court held that “the Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened.” *Id.* at 446. Instead, the Court concluded, it “must take account of opposing interests, as well as consider the probable value of ‘additional or substitute procedural safeguards.’” *Id.* (quoting *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)).

263. Decriminalization of some low-level offenses would also address, indirectly, the fact that many municipal courts, often the site of misdemeanor adjudication, serve as revenue collection centers. The Department of Justice’s report on law enforcement practices in Ferguson, Missouri, for example, demonstrates the extent to which municipal courts use “judicial authority as [a] means to compel the payment of fines and fees” in violation of due process and equal protection requirements. CIVIL RIGHTS DIV., *supra* note 145, at 3. The issue of fines imposed for civil violations is, as mentioned above, also an important one. However, it is outside the scope of this Article.

achieve meaningful access.<sup>264</sup> A demand-side approach can be accomplished through the full decriminalization of specific offenses.<sup>265</sup> This framework emphasizes a broader point: before discussing right to counsel reform at any level, either with regard to improving enforcement of the existing right or expanding the right, it is worth exploring why the demand for counsel is so high.

One last note on the interplay between courts and legislatures is worth keeping in mind. While decriminalization is ultimately a legislative task, the legal standards implemented by the Court often force legislative change. Thus, the first step of our proposal is directed to the judicial branch as well as the legislative branch, while the second step would clearly be a task for legislatures. As Justice Brennan noted in his *Scott* dissent:

It may well be that adoption by this Court of an “authorized imprisonment” standard would lead state and local governments to re-examine their criminal statutes. A state legislature or local government might determine that it no longer desired to authorize incarceration for certain minor offenses in light of the expense of meeting the requirements of the Constitution. In my view this re-examination is long overdue. In any event, the Court’s “actual imprisonment” standard must inevitably lead the courts to make this re-examination, which plainly should more properly be a legislative responsibility.<sup>266</sup>

Of course, the Court may be hesitant to reach the conclusion described herein, in part because of the fiscal ramifications for the state in providing

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264. One issue often raised with solutions based in equal protection is whether equality is best achieved by “leveling up” and providing more benefits to those previously excluded or “leveling down” to remove benefits from those previously favored. This concern is a nonissue here, as forbidding a defendant from retaining counsel would be plainly unconstitutional under the Sixth Amendment. Moreover, and perhaps more importantly, although equal protection has been emphasized throughout, the right of meaningful access to courts described in Part III.A is not based solely in equal protection but also in due process. See Lucas, *supra* note 40, at 1221–27 (describing the basis of the access to courts line of jurisprudence in both equal protection and due process); see also Griffin v. Illinois, 351 U.S. 12, 17 (1956) (“Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’” (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940))). The due process component of the access to courts line of cases guarantees a floor and makes clear that the equal protection dilemma can only be resolved in one direction.

265. Another possible alternative is statutorily eliminating incarceration and probated or suspended sentences for certain classes of misdemeanor defendants. See, e.g., Hashimoto, *supra* note 214, at 1042 (“*Shelton*, dependent as it is on the defendant’s sentence, offers states a low-cost way to comply with the Constitution: eliminate incarceration and probated sentences for low-level offenders.”). This option would at least eliminate manipulation of the right to counsel at the whim of the judge and prosecutor. However, while satisfactory under the Sixth Amendment, this alternative would do nothing to address the fact that in cases either where the complexities of the required legal defense were beyond the layman or severe consequences were still at stake from a conviction (including the stigma of the conviction itself), most defendants would benefit significantly from legal representation. In such cases, a defendant who was able would certainly hire private counsel. Thus, this option would continue to condition meaningful access on wealth.

266. *Scott v. Illinois*, 440 U.S. 367, 388–89 (1979) (Brennan, J., dissenting); see also *supra* note 216.



all defendants with meaningful access. As Justice Brennan also noted, however, the “Court’s role in enforcing constitutional guarantees for criminal defendants cannot be made dependent on the budgetary decisions of state governments.”<sup>267</sup> Thus, while pragmatic considerations may influence the Court, it must remain focused on what is right from the perspective of law and justice, not fiscal limitations.

#### CONCLUSION

The Sixth Amendment has largely occupied the field in defining the states’ obligation to provide appointed counsel.<sup>268</sup> Given that the Sixth Amendment is the only constitutional provision that explicitly references the right to counsel, this might appear logical. There are, however, practical and conceptual advantages to invoking equal protection as a means to challenge a state’s failure to provide counsel to those accused of crimes. On a conceptual level, equal protection demands a different focus: rather than emphasizing the presence of a lawyer and debating the relative effectiveness of counsel, as the Sixth Amendment does, equal protection centers attention on the fact that people are being denied meaningful access to the criminal justice system because of their relative wealth. It thus prompts us to think not about redrawing the line between groups of defendants but about what can be done to avoid drawing a line among them at all. For this reason, challenges rooted in equal protection often call for systemic reform rather than the vindication of individual rights.<sup>269</sup> States faced with an equal protection challenge must either justify their choice to engage in such systemic deprivation or alter the nature of how their system provides benefits to indigents.

While *Gideon* promised equal treatment of defendants too poor to hire their own attorney, that promise has been—and continues to be—denied to many defendants, including Aubrey Scott. By reclaiming the potential of the access to courts line of jurisprudence, we are hopeful that those who have been left behind can find a new means for challenging systemic indigent defense failures and bring *Gideon*’s promise from theory to reality.

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267. *Scott*, 440 U.S. at 384 (Brennan, J., dissenting).

268. *See Lucas, supra* note 40, at 1204 (describing how the Sixth Amendment has served as the primary vehicle for indigent defendants to vindicate their right to an adequate defense).

269. *See id.* at 1242–44 (contrasting equal protection’s focus on systemic deprivation and structural change with the Sixth Amendment’s individual rights approach).