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SIXTH AMENDMENT RIGHT TO COUNSEL: BROADEN THE SCOPE, DECRIMINALIZE, AND ENSURE INDIGENTS A FAIR CHANCE IN COURT AND IN LIFE

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INTRODUCTION

In the landmark case of *Gideon v. Wainwright*,[1] the United States Supreme Court stated that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[2] Since then, barely fifty years ago, the Court has added a surprising exception to *Gideon*'s finding: the right to counsel is not fundamental to a person too poor to hire a lawyer in cases where the prosecution does not seek a penal sanction, whether it is authorized or not. Amazingly, the Court has determined that the fundamental fairness of a trial depends on the post-trial sanction to be imposed. If this is the case, then it would have been easier for the Court in *Gideon* to state that the right to counsel is fundamental only in retrospect when a defendant is in a jail cell, rather than finding the right fundamental generally to the proceedings. Thus, the right to counsel is currently based on the possible result of trial, rather than focused on the fairness of the entire criminal process.

The Supreme Court cases founded upon *Gideon* have all discussed the fundamental nature of the right to counsel generally, whether the discussion was made in the text of the majority opinion, concurrence, or dissent. However, the Court has failed to push over the fence and lift the unnecessarily drawn line from *Scott*'s "actual imprisonment" standard, and has therefore refused to extend the right to counsel to its Sixth Amendment textual origin: "In *all* criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[3] Thus, the Supreme Court has erroneously hidden behind the dreary cloak of imprisonment to deny the right to counsel to indigents who do not face a prison sentence, but who are ultimately convicted.

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1. Gideon v. Wainwright, 372 U.S. 335 (1963).
2. *Id.* at 344.
3. U.S. CONST. amend. VI (emphasis added).

Part I of this comment explains the history of the Sixth Amendment and the right to counsel, beginning at English common law through the current status of the right. Part II discusses the collateral consequences and social stigma an individual is faced with after conviction of a crime, despite the fact that the accused was not sentenced to jail. Part III summarizes the current problem an ex-convict faces based on the initial denial of assistance of counsel and offers a solution to this problem by explaining that the right to counsel should be extended to all criminal prosecutions. In addition, the solution proposes that state legislatures should adopt a process of decriminalization to alleviate the potential administrative burden of broadening the right to counsel.

I. THE RIGHT TO COUNSEL: FROM ENGLAND TO THE PRESENT

A. HISTORY OF THE RIGHT TO COUNSEL

In England, the right to counsel in criminal cases was very different from what it is in the United States today. Originally, an individual accused of a misdemeanor was entitled to, and required to have, full assistance of counsel, whereas an individual accused of a felony or treason was not entitled to the same right.[4] It is difficult to grasp how a defendant facing a comparatively light punishment was permitted assistance of counsel, but one whose life was on the line for a felony charge was not.[5] The logic, arguably, stemmed from the notion that an assessment of guilt as to issues of fact in felony cases would be objectively obvious and thus the judge would be able to act as counsel for the defendant.[6] No matter what crime was charged, a defendant was always permitted counsel as to questions of law, rather than fact.[7] This rule, however, was considered outrageous and was greatly criticized by English statesmen and lawyers.[8] It was not until 1836 that the right to have the assistance of counsel was permitted to all defendants, whether civil, misdemeanor, felony, or treason.[9]

At the time of the establishment of the colonies, approximately twelve of the original colonies had rejected the rule of the English common law

4. Powell v. Alabama, 287 U.S. 45, 60 (1932); *see also* Betts v. Brady, 316 U.S. 455, 466 (1942).

5. Felix Rackow, *The Right to Counsel: English and American Precedents*, 11 WM. & MARY Q. 3, 6 (1954).

6. *Id.*

7. *Id.* at 5.

8. *Powell*, 287 U.S. at 60.

9. *See* Rackow, *supra* note 5, at 12; *Betts*, 316 U.S at 466.

and recognized the right to counsel in all criminal prosecutions, except in instances where the right to counsel was limited to capital offenses or what were considered to be serious crimes.[10] The right, however, was usually conveyed by statute rather than the constitution of the state.[11] In 1789, the Sixth Amendment right to counsel originally meant a court would not prevent assistance of counsel for a defendant if the defendant provided counsel for himself.[12] Thus, despite the long-held English common law practice of assigning counsel to an indigent defendant, there is no indication that the Sixth Amendment clause was intended for the court to assign counsel to an unrepresented defendant.[13] It has also been viewed that the provisions of the Sixth Amendment were intended to do away with the rules which wholly or partially denied counsel, rather than proposed to compel the state to provide counsel for a defendant.[14]

Over the years, the Sixth Amendment right to counsel has been expanded, diminished, and clarified by different justices, even though the text itself seems self-evident: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[15] In *Powell v. Alabama*,[16] the U.S Supreme Court squarely presented the importance of assistance of counsel in general, but the holding applied only to capital cases.[17] However, despite *Powell*'s narrow holding, the case presented a broad, general explanation as to the importance of the assistance of counsel and stated that the right is clearly of a "fundamental character."[18]

> 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 [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings

10. *Powell*, 287 U.S. at 64–65.
11. *Betts*, 316 U.S. at 467.
12. Rackow, *supra* note 5, at 27.
13. *Id.*; *see id.* at 4.
14. *See, e.g.*, *Betts*, 316 U.S. at 466.
15. U.S. CONST. amend. VI.
16. Powell v. Alabama, 287 U.S. 45 (1932).
17. *See id.* at 73.
18. *Id.* at 68.

> 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. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[19]

The Court, however, did not expand its holding and chose to refrain from deciding whether the right would be the same in other types of criminal prosecutions because the case at bar was a capital case.[20] Therefore, the Court held,

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .[21]

The particular facts of *Powell* involved defendants that were incapable of adequately representing themselves due to their social status, distance from home, and level of education.[22] However, the Court's motives or reasons for including the "ignorance and feeble-mindedness" qualifications are questionable. If the Court's holding was largely influenced by those particular characteristics then it was arguably unnecessary for the Court to engage in its lengthy, soap-box dicta about "intelligent and educated laymen" who also lack the requisite skills to adequately defend themselves.[23] Therefore, the weight given to the level of intelligence in the assessment of the right to counsel in *Powell* is contradictory. *Powell* advocated in broad, sweeping language the fundamental character of the right to counsel generally, for both the educated and feeble-minded, because of the layman's unfamiliarity with the complicated nature of the law. Yet, despite this, the *Powell* Court retained the intelligence qualifier in its holding and limited the future application of the right specifically to capital cases for indigents incapable of making their own defense.

In 1938, the U.S. Supreme Court reiterated the importance of counsel in *Johnson v. Zerbst*[24] as "one of the safeguards of the Sixth Amendment deemed necessary to [e]nsure fundamental human rights of life and

19. *Id.* at 68–69.

20. *Id.* at 71 ("Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine.").

21. *Id.*

22. *See Powell*, 287 U.S. at 52.

23. *See* Gideon v. Wainwright, 372 U.S. 335, 349–50 (1963) (Harlan, J., concurring) ("It is evident that these limiting facts were not added to the opinion as an after-thought; they were repeatedly emphasized, and were clearly regarded as important to the result." (citations omitted)).

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

liberty."[25] In addition, the Court further explained the constitutional right is meant to protect an accused from a conviction that results from a defendant's ignorance of legal and constitutional rights.[26]

Inexplicably, in 1942, the U.S. Supreme Court in *Betts v. Brady*[27] found the Sixth Amendment right to counsel not to be a fundamental right essential to a fair trial and, therefore, was not applicable to the states through the operation of the Due Process Clause of the Fourteenth Amendment.[28] In arriving at this decision, the Court first focused on three cases, *Powell v. Alabama*, *Avery v. Alabama*,[29] and *Smith v. O'Grady*,[30] in each of which the applicable state law required appointment of counsel for the particular case.[31] The Court then conducted its own research of the right to counsel under English common law, during the formation of the colonies, and through the present status of the states. Ultimately, the Court decided that the variations among the states demonstrated that the majority of states considered the right to be a "judgment of the people" left for the legislature to decide.[32] The majority opinion also emphasized that the defendant in the case was one of "ordinary intelligence" who had previously been involved in criminal proceedings and thus was not "wholly unfamiliar" with the system.[33] Therefore, the Court concluded the defendant had the "ability to take care of his own interests on the trial of [the] narrow issue."[34] While the finding in *Betts* resembled the intelligence qualifiers identified in *Powell*, the Court did not specifically articulate the connection.

The dissent in *Betts*, however, came to the opposite conclusion and found the Sixth Amendment applicable to the states, as many previous dissenters also urged.[35] The *Betts* dissent found the right to counsel in a criminal proceeding to be fundamental and cited *Powell* as its authority for that conclusion.[36] The dissent considered an indigent's denied request to counsel on charges of serious crimes to be shocking to the universal sense of justice in the United States and felt, more specifically, that there can be

25. *Id.* at 462.
26. *Id.* at 465.
27. Betts v. Brady, 316 U.S. 455 (1942).
28. *See id.* at 471, 473.
29. Avery v. Alabama, 308 U.S. 444 (1940).
30. Smith v. O'Grady, 312 U.S. 329 (1941).
31. *See Betts*, 316 U.S. at 463–64.
32. *See id.* at 471.
33. *Id.* at 472.
34. *Id.*
35. *See id.* at 475 (Black, J., dissenting).
36. *Id.* (citing Powell v. Alabama, 287 U.S. 45, 70 (1932)).

no fundamental fairness in a practice that subjects "innocent men to increased dangers of conviction merely because of their poverty."[37]

Luckily for the *Betts* dissent, and for all individuals incapable of hiring counsel, the Supreme Court in 1963 overruled *Betts* in its landmark decision *Gideon v. Wainwright*[38] and held the Sixth Amendment right to counsel to be a fundamental right applicable to the states.[39] However, the Court should have acted sooner than it did due to the "almost complete lack" of support for *Betts* and the "general approval" of decisions that reversed state convictions based on lack of assistance of counsel.[40] Nevertheless, the Court ultimately overruled *Betts* and primarily based its decision on *Powell* and its repeatedly quoted broad proclamations of the importance of counsel, finding that, even though the *Powell* Court limited its holding, "its conclusions about the fundamental nature of the right to counsel are unmistakable."[41] The Court also based its decision on reflections of the criminal justice system. Specifically, the Court considered that, if states and the federal government hire lawyers to prosecute, and if affluent defendants hire lawyers for their defense, then these facts indicate that lawyers are necessities, rather than luxuries, in criminal proceedings.[42]

Thanks to *Gideon*, the Sixth Amendment right to counsel officially became a fundamental right applicable to the states through the operation of the Due Process Clause of the Fourteenth Amendment. However, while the Court overruled *Betts* and found the right to be fundamental, it failed to provide any standards for the application of the right to the states in its decision because the Court did not textually limit its holding to felonies, as was the particular case in *Gideon*. In federal courts, the Sixth Amendment requires the court to provide counsel to a defendant, unless the right is properly waived.[43] Must the states apply the same standard? The question became, essentially, which defendants will be provided counsel in state court? Justice Clark's concurrence in *Gideon* seemingly foreshadowed the dilemma in concluding that due process of law is required for the

37. *Betts*, 316 U.S. at 475–76.
38. Gideon v. Wainwright, 372 U.S. 335, 339 (1963).
39. *See id.* at 339–42.
40. William M. Beaney, *The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150, 1154 (1963).
41. *Gideon*, 372 U.S. at 343.
42. *Id.* at 344.
43. *Id.* at 339–40.

deprivation of "liberty," not only for the deprivation of "life," and therefore, there cannot be a difference in the quality of due process based upon a difference in the sanction involved.[44]

The U.S. Supreme Court granted certiorari almost ten years later in *Argersinger v. Hamlin*[45] to answer that precise issue. In *Argersinger*, the Florida Supreme Court adhered to the U.S. Supreme Court's ruling in *Duncan v. Louisiana*[46] and held that the right to court-appointed counsel extended only to "trials for non-petty offenses punishable by more than six months imprisonment."[47] In *Duncan*, the U.S. Supreme Court found trial by jury in criminal cases to be fundamental and applicable to the states, and therefore guarantees a right to a jury trial in all criminal cases, which would come within the Sixth Amendment's guarantee if the case were tried in a federal court.[48] Therefore, that particular Sixth Amendment right functions in state courts the same way it applies in federal courts. However, the Court explained that there are certain petty offenses which are not subject to the trial provision and therefore should not be subjected to the states, ultimately finding that crimes carrying a possible maximum penalty of six months imprisonment do not require a jury trial if the offense is classified as petty.[49] Thus, while the Court in *Duncan* did not provide a bright line rule to determine whether a state considers an offense petty or serious, the Court held that a crime punishable by two years' imprisonment is considered a serious crime based on varying standards from different states.[50]

Therefore, the Florida Supreme Court in *Argersinger* held that the right to court-appointed counsel extended only to trials for non-petty offenses punishable by more than six months imprisonment, but the U.S. Supreme Court reversed.[51] The U.S. Supreme Court initially explained that there is no historical support for a limitation of the right to counsel to serious criminal cases and rejected mirroring the right to counsel with the right to a jury, particularly because history gives no indication of a retraction of the right to counsel in petty offenses where it was in fact required at common law.[52] Thus, the Court focused on the rationale of

44. *Id.* at 349 (Clark, J., concurring).
45. Argersinger v. Hamlin, 407 U.S. 25 (1972).
46. Duncan v. Louisiana, 391 U.S. 145 (1968).
47. *Argersinger*, 407 U.S at 26–27 (internal quotation marks omitted).
48. *Duncan*, 391 U.S. at 149.
49. *Id.* at 159.
50. *Id.* at 161–62.
51. *Argersinger*, 407 U.S. at 26–27, 40.
52. *Id.* at 30–31.

Powell and *Gideon* which, although involving felonies, was still relevant and applicable to any criminal trial where a defendant was deprived of liberty.[53] In support of this, the Court engaged in an extensive analysis of misdemeanors, indicating that the volume of misdemeanor cases is far greater than felonies and, therefore, results in prejudice to misdemeanants. More specifically, the Court explained the prejudice caused by "assembly-line justice," which creates a potential obsession for speedy dispositions without regard to fairness, and the fact that misdemeanants represented by counsel are five times more likely to have charges dismissed than a similarly situated defendant without the assistance of counsel.[54] Despite the in-depth analysis, the Court predictably refrained from considering the requirements of the Sixth Amendment in situations where imprisonment is not involved because the case at hand involved a defendant that was sentenced to jail.[55] Thus, the Court ultimately held that, absent a qualified waiver, no person may be imprisoned for any offense unless represented by counsel at trial, regardless of whether the offense is classified as petty, misdemeanor, or felony.[56]

The U.S. Supreme Court's decision in *Argersinger* is reminiscent of its opinion in *Gideon* because it also failed to provide a standard or mechanism for the states to apply its new, broad rule. The states were now prohibited from imposing a jail sentence if the defendant had not been represented by an attorney, but the Court neglected to acknowledge that sentencing is imposed after a verdict is returned, rather than at the beginning of the proceedings. Thus, as Justice Burger's concurrence explained in *Argersinger*, a case-by-case predictive evaluation must initially determine whether the judge will sentence the defendant to jail if there is a conviction, and the new procedure would add yet another burden on an already overburdened court system.[57] Furthermore, to respond to the issue of legal resources, Justice Burger illustrated an American Bar Association study that determined that society's goal should be towards a system where the facilities and counsel for the defense are up to par with the resources of the prosecution.[58] Justice Brennan also added that law students could be expected to contribute, quantitatively and qualitatively, to the representation of indigents.[59]

53. *Id.* at 32.
54. *See id.* at 34–36 (referring to a study by the American Civil Liberties Union).
55. *Id.* at 37.
56. *Id.*
57. *Argersinger*, 407 U.S. at 42 (Burger, J., concurring).
58. *See id.* at 43.
59. *See id.* at 44 (Brennan, J., concurring).

Justice Powell's concurrence, however, offered a different perspective by opining that the right should not be subject to rigid rules, but rather, should be granted when necessary to conduct a fair trial because, "[i]f there is no accompanying right to counsel, the right to trial by jury becomes meaningless."[60] Justice Powell further explained that some convictions should not be casually dismissed due to a "petty" label because of the consequences an individual faces when imprisoned, the effect of other consequences—such as social stigma—from convictions not punishable by imprisonment, and because of the effect of a criminal record on an individual's livelihood.[61] Thus, Justice Powell concluded by emphasizing that an adversarial system is fairest when all parties are represented by counsel, but also warned of the adverse impact such a broad prophylactic rule would have administratively on the court system.[62] Despite the holding's broad application and potential administrative consequences, the decision could be said to be generally favored, particularly because there were no dissenting justices.

As is to be expected, the *Argersinger* holding created yet another conundrum: Is court-appointed counsel to be provided where a defendant *may* face imprisonment or when a defendant is *actually* imprisoned? The U.S. Supreme Court answered this question in *Scott v. Illinois*[63] and ultimately held that the Sixth Amendment only requires that no indigent criminal defendant be sentenced to a term of imprisonment unless afforded counsel in his defense.[64] However, this "actual imprisonment" standard was not widely supported by the justices, as is evident by the resulting four-member plurality, one-member concurrence, and four dissenting justices. In fact, Justice Powell concurred in the opinion only to provide clear guidance to lower courts and to be mindful of stare decisis, but he ultimately hoped the majority would soon recognize a more flexible rule that would better serve the interests of justice.[65] The *Scott* dissent faithfully returned to *Gideon* and strongly asserted that *Gideon*'s logic and reasoning extended to all criminal prosecutions, as is plainly stated in the Sixth Amendment.[66] The dissent also considered the right to a jury trial and how *Scott*'s actual imprisonment standard created the possible outcome that, as

60. *See id.* at 45–46 (Powell, J., concurring).

61. *See id.* at 47–48.

62. *Id.* at 65; *see also id.* at 50–51.

63. Scott v. Illinois, 440 U.S. 367, 373 n.4 (1979) (noting the standard adopted in *Argersinger* was "actual imprisonment").

64. *Id.* at 373–74.

65. *Id.* at 374–75 (Powell, J., concurring).

66. *See id.* at 378 (Brennan, J., dissenting).

resulted in the case at bar, a defendant can be denied the right to appointed counsel where the defendant has a right to a jury trial.[67]

The "actual imprisonment" standard thus draws a bold, bright line for courts, but fails to have a logical basis. To illustrate, the defendant in *Scott* was facing a maximum penalty of a $500 fine or one year in jail, or both, but was ultimately fined only $50.[68] Thus, it was at the discretion of the judge whether to sentence the defendant to a fine, to jail, or to some combination of the two if convicted. Therefore, the judge had to decide whether to appoint counsel before a verdict was obtained.

As a result, it seems the right to counsel, which is supposed to be fundamental for a fair trial, can be determined after the trial has taken place. However, a trial is conducted according to the rules of evidence and, at its finality, the appropriate verdict is decided. Depending on the verdict and what has been produced at trial, a sentence is then imposed. Traditionally, a wide variety of factors are to be considered at sentencing, such as the evidence provided at trial concerning guilt.[69] It is quite a paradox to believe justice is served when the right to counsel is dependent upon a predictive evaluation of the case before any actual steps in litigation have taken place. Thus, for the same crime, one defendant may be appointed counsel and another may not, despite the fact that both defendants face a charge that authorizes imprisonment.

The *Scott* dissent presented this dilemma by explaining that the "authorized imprisonment" standard is fairer and better implements the principles of *Gideon*.[70] This standard, the dissent explained, is simpler procedurally in that whenever imprisonment is authorized, counsel could be automatically appointed, thus eliminating administrative problems caused by pre-trial predictions; the standard would be "a better predictor of the stigma and other collateral consequences" attached to the offense; the right would not be denied to defendants who suffer severe consequences other than imprisonment; and the authorized imprisonment standard would ensure that courts would "not abrogate legislative judgments concerning the appropriate range of penalties to be considered."[71] The dissent also indicated that the widely feared potential economic burden faced by the courts by extending the right to counsel was speculative and irrelevant.[72]

67. *Id.* at 382.

68. *Id.* at 368 (majority opinion).

69. Nichols v. United States, 511 U.S. 738, 747 (1994) (quoting Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993)).

70. *Scott*, 440 U.S. at 382 (Brennan, J., dissenting).

71. *Id.* at 382–83.

72. *See id.* at 384.

Indeed, constitutional guarantees for criminal defendants cannot depend on a state's budget.[73]

The problems created by *Scott* later led to a divided U.S. Supreme Court decision only one year later in *Baldasar v. Illinois*,[74] which dealt with the issue as to whether a prior uncounseled misdemeanor conviction may later be used for a subsequent offense under a sentence-enhancing statute. The Court held it could not be used, but stated so in a per curium opinion and supported its holding by the reasoning provided in the three concurrences of the opinion.[75] Justice Stewart's concurrence declared that a defendant sentenced to prison only because of a prior uncounseled conviction violates *Scott*.[76]

Justice Marshall's concurrence engaged in a self-proclaimed "logical" finding based on the *Gideon* lineage of cases. Justice Marshall first set forth *Gideon*'s rationale and its possible application to "all criminal prosecutions," then explained *Argersinger* and how imprisonment cannot be imposed unless an accused is assisted by counsel, regardless of the classification of the offense.[77] Lastly, Justice Marshall stated *Scott* was wrongly decided. However, despite the stance against *Scott*, Justice Marshall deduced that a prior uncounseled conviction cannot be used collaterally upon a subsequent conviction because, under *Scott* and *Argersinger*, an uncounseled conviction is invalid as to the deprivation of liberty.[78] Justice Marshall further explained how *Argersinger* was based on the conclusion that incarceration is an extremely severe sanction and therefore should not be imposed unless the accused is provided appointed counsel. In addition, Justice Marshall also reiterated *Argersinger*'s premise that an uncounseled conviction lacks reliability, thus the prior conviction cannot become more reliable due to a subsequent valid conviction. Therefore, Justice Marshall's concurrence concluded that "a conviction which is invalid for [the] purpose[] of imposing a sentence of imprisonment for [an] offense . . . remains invalid for purposes of increasing a term of imprisonment for a subsequent [valid] conviction."[79]

The final *Baldasar* concurrence by Justice Blackmun proclaimed his participation in the *Scott* dissent and his support for a bright line rule where counsel is appointed for non-petty offenses or whenever a defendant is

73. *Id.*
74. Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam).
75. *See id.* at 224.
76. *Id.* (Stewart, J., concurring).
77. *See id.* at 225–29 (Marshall, J., concurring).
78. *See id.*
79. *Id.* at 228.

actually imprisoned.[80]

Baldasar's three concurring opinions thus indicated that a prior uncounseled conviction could not be used to enhance a subsequent jail sentence, but failed to provide a workable holding because the opinions differed in their rationales. For this reason, the four dissenting justices in *Baldasar* found the plurality's decision illogical. Essentially, the dissent found the holding undermined *Scott* and *Argersinger* because an uncounseled misdemeanor conviction that does not impose a jail sentence is constitutionally valid, but is now invalid only as to enhancement statutes, thereby creating a "special class" of uncounseled misdemeanor convictions.[81] In addition, the dissent also found that the new hybrid classification would make things unclear to lower courts.[82]

Thus, *Baldasar* resulted in more unanswered questions for state application of the law, rather than providing answers. The concurring justices seemed to agree in their dislike of *Scott*, but as is apparent by the lack of a majority opinion in *Baldasar*, the denial of the use of uncounseled convictions as per enhancement statutes is difficult to defend. One of the dissent's strongest points was that the application of the *Baldasar* rule is almost completely unworkable: How can a valid conviction in one instance be invalid in another? Clearly, a conviction should be valid or invalid for all intents and purposes in order to provide a workable standard for courts to manage caseloads and sentencing guidelines accurately, efficiently, and with low disparities among similarly situated defendants.

The *Baldasar* dissent accurately predicted confusion among lower state and federal courts and revisited the same issue in *Nichols v. United States*, where the Court adhered to *Scott*.[83] Thus, the Court overruled *Baldasar* and held that "an uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence [of] a subsequent offense, even though the sentence [results in] imprisonment."[84] The Court supported its holding based on the nature of repeat-offender laws similar to enhancement and recidivist statutes which, as indicated in the *Baldasar* dissent, the Court has found penalizes only the last offense committed by a defendant, and therefore does not affect the first conviction's sentence.[85] The majority further denied the petitioner's argument that due process requires a misdemeanor defendant at least be warned of the possibility of the use of

80. *Baldasar*, 446 U.S. at 229–30 (Blackmun, J., concurring).
81. *See id.* at 230–32 (Powell, J., dissenting).
82. *See id.*
83. Nichols v. United States, 511 U.S. 738, 745–46 (1994).
84. *See id.* at 746–47, 748.
85. *Id.* at 747.

the conviction in the future for enhancement purposes because *Scott* was silent on that particular issue, and also because the extent and depth of the warning to be made is unclear.[86]

Justice Souter's concurring opinion in *Nichols* pointed to one potential problem presented by Justice Stewart's concurrence in *Baldasar*. More specifically, the issue before the Court in *Nichols* did not involve an automatic enhancement based on a prior uncounseled conviction, as was the case in *Baldasar*.[87] Thus, Justice Souter agreed that the use of a prior uncounseled misdemeanor conviction for possible sentence enhancement is constitutional, but hesitated to agree on the issue of "automatic enhancement," even though that specific issue was not directly before the Court, although the majority opinion seemed to address it.[88]

As expected, the dissenting opinion in *Nichols* reiterated the rationale of *Gideon* and proclaimed that its reasoning would support the guarantee of providing counsel in "all criminal prosecutions, petty or serious, whatever [the] consequences" of the conviction may be.[89] The dissent further explained that the Court's Sixth Amendment jurisprudence "has been to ensure that no indigent is deprived of his liberty as a result of a proceeding in which he lacked the guiding hand of counsel."[90]

B. PRESENT STATUS OF AN INDIGENT'S RIGHT TO COUNSEL

Since *Powell*, the battle over a court's duty to appoint counsel to a defendant has been incessant. *Gideon* set forth the official rationale as to the need of assistance of counsel and declared the right to be fundamental, but failed to actually apply the ruling beyond felony cases. Even so, *Gideon*'s logic and reasoning continue to be quoted in Sixth Amendment jurisprudence, particularly among dissenting opinions in cases where the right to counsel has been limited. Therefore, *Gideon*'s broad assertions have been the principal reasons justices differ on the issue, as is evident by the fact that every principal case mentioned herein returns to *Gideon*'s general premise of the fundamental nature of the right to counsel. *Gideon*'s broad language versus its narrow application to felonies thus arguably created the fork in the road that ultimately led to *Argersinger*, *Scott*, and *Nichols*.

86. *See id.* at 748.
87. *Id.* at 751 (Souter, J., concurring).
88. *See id.* at 753–54.
89. *Nichols*, 511 U.S. at 755 (Blackmun, J., dissenting) (internal quotation marks omitted).
90. *Id.* at 757.

Currently, the U.S. Supreme Court's position that an uncounseled conviction is invalid for purposes of sentencing a defendant to jail regardless of the particular criminal classification has been adamantly upheld and stands tall against much precedential debate. However, that premise is one of the few positions justices have agreed upon over time. The sharply divided Courts in *Scott*, *Baldasar*, and *Nichols* are telltale signs foreshadowing that the debate is far from over and may, in the near future, bring about another substantial change in the line of cases since *Gideon*. Perhaps the Court will soon overturn *Scott* and apply an "authorized imprisonment" standard because that decision is the principal cause for division among the justices. However, since *Nichols*, the Court has not decided any cases further articulating the precise scope of the Sixth Amendment right to counsel as applicable to the states. Therefore, the current status of the right to court-appointed counsel remains that, no matter what classification, be it petty, misdemeanor, or felony, a defendant that is not appointed counsel cannot be sentenced to jail, but the sentence is constitutionally valid, including for use in enhancement and recidivist statutes.

II. POST-CONVICTION CONSEQUENCES

A. COLLATERAL CONSEQUENCES

The *Gideon* Sixth Amendment jurisprudence has repeatedly articulated that incarceration is a particularly severe type of sanction, and the U.S. Supreme Court has used this rationale to support its decision of drawing the line for the right to court-appointed counsel at that specific point. However, the Court fails to articulate any other reason for its focus on the penalty rather than the criminal conviction itself. *Argersinger* and *Scott* both held a person cannot be imprisoned unless afforded counsel, regardless of the nature of the classification of the crime that is charged. Therefore, the ignored issue in these cases is the criminal conviction itself—which is what actually initiates consequences for an accused, regardless of the particular sanction imposed.

Even before an accused is officially convicted of a crime, a criminal record is created at multiple agencies from the point of arrest.[91] Furthermore, police and court records are usually public documents

91. J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, CRIM. JUST., Fall 2009, at 45.

available upon request,[92] which can collaterally affect individuals in terms of public housing, medical attention, immigration proceedings, and employment, among other areas.[93] Since *Gideon*, the focus of the Court's majority opinions initially reflected the need of assistance of counsel for felonies because of the potential consequences following these types of convictions. However, felony convictions are not the only convictions that bring about potential imprisonment and collateral consequences. While felony charges may bring about the most intense consequences, many of the harshest civil punishments result from misdemeanor and petty offenses.[94] As Justice Powell's concurrence in *Argersinger* indicated, the serious consequences that follow a misdemeanor conviction, whether as jail-time or as the actual effect of the criminal record on the individual's livelihood, are very severe and cannot be casually dismissed as "petty."[95]

Thus, *Gideon*'s lineage clearly concedes the particularly grave consequences of a felony conviction, and also strongly emphasizes the severity of imprisonment regardless of the classification of the crime. However, the collateral consequences faced by misdemeanor convictions cannot be ignored. The current broad scope of collateral consequences that exists today burdens many individuals after the court-imposed sanction has been paid to society because these individuals have much difficulty advancing due to their criminal record.[96] Even the American Bar Association has found that collateral consequences of a conviction have steadily increased in amount and severity over the past two decades and have therefore become increasingly difficult to circumvent.[97]

With regard to immigration consequences, the U.S. Supreme Court has explained how the class of deportable offenses has dramatically increased over the years and that the power of judges to alleviate these types of consequences has diminished, thereby resulting in deportation as a practically inevitable result for many noncitizens convicted of crimes.[98]

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92. John P. Reed & Dale Nance, *Society Perpetuates the Stigma of a Conviction*, 36 FED. PROBATION 27, 27 (1972).

93. Smyth, *supra* note 91, at 43.

94. *Id.* at 44.

95. Argersinger v. Hamlin, 407 U.S. 25, 48 (1972).

96. Michael Pinard, *Centennial Symposium: A Century of Criminal Justice: IV. Freedom in Decline: Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1214–15 (2010).

97. John D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE (Erik Luna & Marianne Wade eds., 2011) (manuscript at 8), *available at* http://ssrn.com/abstract=1953880.

98. Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) ("While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and

For example, a conviction under any state or federal law or regulation related to a controlled substance, and most convictions related to firearms, can result in the deportation of an alien under federal law.[99] Immigration proceedings, however, only affect noncitizens, so these consequences may seem trivial to individuals that do not come within this category.

Conversely, issues regarding employment, housing, and health care affect citizens and noncitizens alike. For example, one of the most severe consequences of a criminal conviction is the effect it has upon employment. Individuals may lose their current employment or be denied future job applications because most employers perform criminal background checks on all new employees.[100] Many public employers and licensing agencies even receive automatic notifications of new arrests, thus affecting employees and applicants regardless of the final disposition of the case.[101] Perhaps the biggest problem with criminal background checks is that they are many times inaccurate or incomplete, particularly in that many criminal history reports fail to report dispositional information.[102]

Thus, it can be assumed that when employment possibilities are low, one may need financial assistance with necessities, such as housing and healthcare. However, criminal convictions affect these areas as well. Federally assisted housing programs have standards enacted that enable the agency to deny housing, or evict individuals, based on any criminal activity that may "affect the health, safety, or right to peaceful enjoyment of the premises."[103] Clearly, the inability to acquire employment and housing contributes to the cycle of poverty and crime, and can ultimately produce a reversion to a life of crime for many individuals in this situation.[104] In addition to the exclusion from housing, ex-convicts can also be excluded from federal and state health care programs for many crimes, one in particular being a misdemeanor conviction related to a controlled substance.[105]

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limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal, *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes." (parallel citations omitted)).

99. *See* 8 U.S.C. § 1227 (2006).

100. Smyth, *supra* note 91, at 48.

101. *Id.*

102. *Id.* at 45; *see also* Gary T. Lowenthal, *The Disclosure of Arrest Records to the Public Under the Uniform Criminal History Records Act*, 28 JURIMETRICS J. 9, 14–15 (1987).

103. *See* 42 U.S.C. § 13661(c) (2006).

104. Smyth, *supra* note 91, at 43–44 (citation omitted).

105. 42 U.S.C. § 1320a-7(b)(3) (2006).

Finally, as held by the U.S. Supreme Court in *Nichols*, a valid uncounseled misdemeanor conviction can be constitutionally used in enhancement and recidivist statutes for a subsequent conviction.[106] Thus, an individual convicted of something arguably considered "petty" might not immediately deal with any of these types of collateral consequences. However, thanks to *Nichols*, the conviction may come back to haunt him or her in the future if ever subsequently charged with a crime.

In *Padilla v. Kentucky*,[107] the concurrence explained that "criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses."[108] The concurrence further explained the seriousness of a criminal conviction's ability to severely damage an individual's reputation and ability to obtain employment or business opportunities, but stated that the Court has not found an attorney is required to extend advice to a defendant on these matters.[109]

Therefore, it is imperative to realize that the sentence imposed by a court is not what may potentially ruin a person's life because, outside of the courthouse, it is the actual conviction rather than the penalty that matters. Furthermore, if an attorney is not required to inform a defendant on these matters due to their complexity, it is almost guaranteed that an uncounseled defendant is even less informed on any of these issues.

B. SOCIAL STIGMA

The U.S. Supreme Court has sometimes referred to the stigma attributable to a conviction in its opinions. In one case, Justice Stevens, writing for the majority of the Court, articulated that loss of liberty is not the only consequence an individual faces upon conviction, but it is also certain that the accused will be stigmatized as a result of the conviction.[110] Stigma is essentially an external incentive, as it is determined by others

106. *See* Nichols v. United States, 511 U.S. 738, 748 (1994).

107. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

108. *Id.* at 1488 (Alito, J., concurring).

109. *Id.*

110. W. David Ball, *The Civil Case at the Heart of Criminal Procedure:* In Re Winship, *Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 143 (2011) ("In his *Apprendi* opinion, Justice Stevens incorporated *Winship*'s analysis of the liberty interests at stake, identifying not just restraints on liberty, but the imposition of stigma. 'Prosecution subjects the criminal defendant both to the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction.'").

based on people's reluctance to interact with those who violate social norms.[111] In regards to crime, stigma usually follows a criminal conviction, particularly when criminal records are made public.[112] Because there are such a vast amount of laws, rules, and regulations on both the federal and state level, violating one of these laws will only cause social condemnation if the relevant group or community has accepted the particular law as being legitimate.[113] Therefore, criminal prosecutions tend to inform the public about what is blameworthy or shameful because public disapproval influences what is ultimately labeled as a crime.[114] Stigmatized individuals, "ex-cons" in this case, are thus identified and are ultimately socially and professionally alienated from the law-abiding community.[115]

In discussing criminals and convictions, it is appropriate to use labeling theory analysis when considering stigma because a label is socially constructed and is something others attach to a person.[116] According to this theory, stigma has the following five factors:

> The first, labeling, refers to the ways in which salient differences are identified (e.g., "that person is a sex offender"). . . . The second factor describes how these labels are associated with negative stereotypes (e.g., "sex offenders are incorrigible"). Stereotypes need not fit the label exactly, nor need they be empirically valid. Invoking a negative set of characteristics is enough. Third, the stigmatized person is separated, becoming a "them" distinct from "us," and, in extreme cases, "the stigmatized person is thought to be so different from 'us' as to be not really human" (e.g., "sex offenders are so incorrigible that they cannot be reintegrated into society"). Fourth, the now-isolated person suffers status loss, which refers to changes in life outcomes "like income, education, psychological well-being, housing status, medical treatment, and health" (e.g., "sex offenders are so incorrigible and incapable of reentry that they cannot live near parks and schools").
>
> The final component is discrimination, where "successful negative labeling and stereotyping [results in] a general downward placement of a person in a status hierarchy" (e.g., "sex offenders living under freeway overpasses").[117]

111. Alon Harel & Alon Klement, *The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization*, 36 J. LEGAL STUD. 355, 355 (2007).

112. *See id.* at 355–56.

113. *See* Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 36 (1995).

114. *Id.*

115. *See* Harel & Klement, *supra* note 111, at 357.

116. Ball, *supra* note 110, at 147.

117. *Id.* at 146–47 (second alteration in original) (footnotes omitted).

The word "ex-con" generally arouses extremely negative thoughts among members of the public, probably due to what is seen on television, movies, and in the media. Thus, the words "criminal" and "ex-con" generally bring to mind labels such as murderer, rapist, and child molester. However, only about four percent of annual arrests nationwide are associated with violent crimes.[118] Even more interesting is the fact that approximately one of every four Americans currently has a criminal record, and the vast majority of these crimes are dealt with in misdemeanor courts.[119] Therefore, while some members of the public may not have any qualms labeling and stigmatizing individuals such as sex-offenders, it is difficult to rationalize this type of societal alienation for crimes that do not merit even one day of prison. It is not easy to comprehend how society is capable of separating "us" from "them" when the amount of people with a criminal record continues to grow and "they" is no longer a small, isolated group easily isolated from "us."

Despite these statistics, stigma is a method of social control used to punish "bad" criminals and exclude them from society. An example of this can be seen by the increased use of shaming punishments currently used in the United States, particularly because the effectiveness of these penalties depend on the particular stigma attached to the sanction.[120] These punishments, used in the alternative to fines and imprisonment, essentially force convicts to broadcast their crimes to the public as a "mea culpa message to the community."[121] Shaming penalties were developed in the 1980s and 1990s in hopes of implementing more cost-effective punishments by publicizing the offender's conduct, reinforcing the social disapproval of the behavior, and causing a shameful, unpleasant experience in the accused.[122] However, these types of sanctions are most commonly used for minor first-time offenses,[123] as they do not merit imprisonment.

Examples of shaming penalties include bumper stickers placed on vehicles of individuals convicted of driving under the influence stating something such as "Convicted D.U.I.," billboard-type signs literally placed on the individual in public areas declaring the crime charged, declarations

118. Smyth, *supra* note 91, at 44 (citing FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2007 (2008), *available at* http://www2.fbi.gov/ucr/cius2007/about/index.html).

119. King, *supra* note 97, at 3.

120. Harel & Klement, *supra* note 111, at 356.

121. Brian Netter, *Avoiding the Shameful Backlash: Social Repercussions for the Increased Use of Alternative Sanctions*, 96 J. CRIM. L. & CRIMINOLOGY 187, 187 (2005).

122. Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2186–87 (2003).

123. *Id.* at 2188.

by the offender on local television stations, and advertisements by the offenders in newspapers.[124] Individuals on parole or probation are supposedly better off because they are not imprisoned, but in some jurisdictions these individuals must register their criminal status in the community, which ultimately broadcasts the conviction and therefore preserves the stigma.[125] In essence, stigma is generally discussed in passing by the U.S. Supreme Court because it is not something directly imposed by a lower court's punishment upon conviction for a crime. Rather, stigma is a creature of the future and its magnitude is ultimately determined by the acts of others.[126]

III. THE PROBLEM AND SOLUTION

A. THE PROBLEM

Currently, the federal standard of the Sixth Amendment right to counsel draws the line at actual imprisonment, holding that an accused cannot be sentenced to a term of imprisonment unless assisted by counsel, regardless of the classification of the crime as felony, misdemeanor, or petty.[127] However, an uncounseled conviction valid under *Scott* can nevertheless be applied in an enhancement or recidivist statute in a subsequent conviction.[128] The rationale behind these decisions rests on the U.S. Supreme Court's focus on the deprival of liberty and the notion that imprisonment is an extremely severe type of punishment.[129] Thus, the focus remains on the immediate punishment given by a lower court, rather than the actual conviction of the defendant. Therefore, individuals accused of a crime that does not allow for a sentence of imprisonment, or defendants in cases where prison is permitted but not sought in the particular situation, do not constitutionally have the right to court-appointed counsel.

Ironically, only about four percent of arrests are for violent crimes, whereas the vast majority of crimes involve misdemeanors.[130] In addition,

124. *Id.* at 2187–88; *see also* Netter, *supra* note 121, at 187–88.

125. Reed & Nance, *supra* note 92, at 27.

126. LAWRENCE BLUME, STIGMA AND SOCIAL CONTROL: THE DYNAMICS OF SOCIAL NORMS 31 (2001).

127. *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

128. *See* Nichols v. United States, 511 U.S. 738, 743, 746–47 (1994).

129. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); *Scott*, 440 U.S. at 370, 372–73.

130. Smyth, *supra* note 91, at 44 (citing FED. BUREAU OF INVESTIGATION, *supra* note 118, at 2007).

one in four Americans currently has a criminal record.[131] Therefore, these statistics imply that imprisonment is not what is usually at stake for a large number of defendants. Furthermore, the courts are currently over-burdened by the increasing volume of low-level criminal cases and rely heavily on the "efficiency" of plea bargaining to quickly process claims, rather than focusing on justice or fairness.[132] In fact, in state courts, only about five percent of criminal convictions are obtained at trial, and the number is even lower in federal court.[133] As the U.S. Supreme Court explained in *Argersinger*, the volume of misdemeanor cases is far greater than the number of felony prosecutions, and this creates an obsession for quick dispositions.[134] Indeed, "assembly-line justice" results in a prejudice to misdemeanor defendants.[135] In actuality, assembly-line justice results in prejudice for any defendant that is not assisted by competent counsel because the lower the level of the charge, the "less important" the case becomes, and therefore the less attention the case receives.

The court-imposed sanction itself for low-level crimes, at the end of the day, is not the real punishment these defendants receive. Plea bargaining enables courts to do away with cases by eliminating the possibility of prison in exchange for a guilty plea which, without assistance of an attorney, is not much of a bargain.[136] In fact, the U.S. Supreme Court in *North Carolina v. Alford*[137] acknowledged that even an innocent defendant may nonetheless prefer to plead guilty based on the particular circumstances.

While the immediate result may be quick and painless, potential post-conviction consequences are not immediately apparent to an accused. Thus, defendants who are convicted of a crime and were not assisted by counsel do not realize the scope of collateral consequences attached to criminal convictions. As explained, these defendants will leave the courtroom momentarily satisfied by the disposition of their case because

131. King, *supra* note 97, at 3.

132. *Id.* at 2–3.

133. *Id.* at 2 (citing SEAN ROSENMERKEL, MATTHEW R. DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 25 tbl. 4.1 (2009); MATTHEW R. DUROSE, DAVID J. LEVIN & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 1998, at 8–9 (2001)).

134. *Argersinger*, 407 U.S. at 34–35.

135. *Id.* at 36.

136. *See* King, *supra* note 97, at 7.

137. North Carolina v. Alford, 400 U.S. 25, 37 (1970) ("Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.").

jail-time will not be imposed, only to later become aware of the potential effects the conviction has upon current and future employment, federally assisted housing, healthcare, and immigration. In addition, these defendants will encounter varying levels of social stigma by the "ex-con" label. Every time an employer requests information on the individual's criminal history, the scarlet letter "C" for "convicted" will rear its ugly head, particularly in jurisdictions where criminal records are made public record. A combination of burdens created by collateral consequences and the self-fulfilling prophecy of being labeled a criminal may even result in the individual reverting to a life of crime.

B. THE SOLUTION

The foundation of the Sixth Amendment right to counsel rests on *Gideon* and its establishment of the right as a fundamental right. As *Gideon*'s lineage has evolved, however, the U.S. Supreme Court has had difficulty arriving at a consensus as to where to draw the line for court-appointed counsel. This problem originates from the fact that the amendment was intended to ensure assistance of counsel for felonies, which was denied at English common law, and to allow an accused to freely elect counsel. However, there is little indication that the Sixth Amendment was intended to force the court to appoint counsel for indigent defendants. Thus, the Court has consistently broadened the scope of the right by first finding the right to be fundamental in *Gideon*, then extending the right to all crimes regardless of classification in *Argersinger*, and finally by denying the possibility of imprisonment if an accused is unrepresented in *Scott*.

The next step would be, therefore, to follow the text of the Sixth Amendment and the rationale of *Gideon* and allow for court-appointed counsel in "all criminal prosecutions." As Justice Brennan stated in *Scott*, *Gideon*'s reasoning extends to the words of the Sixth Amendment. *Gideon* specifically stated,

> [I]n our adversary system of criminal justice, *any* person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . That government hires lawyers to prosecute and defendants who have money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries.[138]

138. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (emphasis added).

Therefore, the right to court-appointed counsel can, to a certain extent, be paralleled to a need of "equal protection" for the poor because assistance of counsel is imperative to ensure a fair trial. Lawyers are necessities because the law is not black and white and rarely contains clearly delineated rules. Clearly, lawyers greatly affect dispositions when misdemeanants represented by counsel are five times more likely to have charges dismissed.[139]

Gideon also stated that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[140] However, other countries allow appointment of counsel in all criminal prosecutions. In the United States, lawyers serve a much broader function than in other countries by behaving as the functional equivalent of an alter ego for the defendant.[141] Thus, lawyers in the United States are essential because they do almost everything for the defendant, yet are not permitted in all criminal prosecutions. In France, Russia, and Argentina, lawyers are appointed for all crimes and misdemeanors even though lawyers play passive roles in trial.[142] However, the rule is difficult to comply with on every occasion in those countries. In other countries, such as England, Spain, and South Africa, the rule for court-appointed counsel is similar to the American pre-*Gideon* rule, where counsel is appointed "in the interest of justice."[143] However, to reiterate, in comparison to other countries, an attorney in the United States serves the broadest function in assisting a defendant. Therefore, it is understandable for a country to have lower standards for appointment of counsel where attorneys serve more passive roles, but it is paradoxical that some countries have formal rules that require counsel in all criminal cases, and the United States does not.

Many dissenting opinions discussed refer to the possibility of extending *Gideon*'s rationale to all criminal prosecutions, but have yet to succeed, particularly because of the counter-argument that such a broad extension of the right would be too costly and burdensome on an already overloaded court system. Justice Powell specifically discussed the issue of cost and application in *Argersinger*, stating that requiring appointment of counsel to indigents in all criminal cases would be the easiest solution due to its simple application, but discouraged the idea based on the "price of

139. *See Argersinger*, 407 U.S. at 35–36.

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

141. George C. Thomas III, *Improving American Justice by Looking at the World*, 91 J. CRIM. L. & CRIMINOLOGY 791, 807 (2001).

142. *See id.* at 808–10, 812.

143. *See id.* at 810–12.

pursuing this easy course" due to its potential adverse impact on the administration of the rule in lower courts.[144] However, this argument is irrelevant. The Constitution and the rights it guarantees do not depend on a state's budget; rather, the legislature's expenditure and administration of the budget must be based on the execution of legislation that upholds the constitutional rights the states are required to guarantee the people.

In addition to extending the right to court-appointed counsel to indigents in all criminal prosecutions, decriminalization would also greatly improve the problem at hand. The Sixth Amendment right to counsel is meant to be a procedural safeguard to ensure a fair trial, but there is little sense in protecting criminal prosecutions where anything can be made a crime. Since an accused cannot be sentenced to even one day of jail unless assisted by counsel, the crimes for which these defendants are being charged clearly are not considered serious if the crime does not merit jail-time. Traditional categories differentiating between crimes that are *malum in se*[145] and *malum prohibitum*[146] came into existence in criminal law to differentiate between crimes that are inherently wrong and those that are wrong merely because they are prohibited.[147] Thus, crimes are constantly placed into different categories depending on the level of "wrongfulness," such as petty, misdemeanor, felony, and their respective degree differentiations. The U.S. Supreme Court has repeatedly explained how imprisonment is an extremely severe sanction. Consequently, it is logical to assume that penal sanctions should be applied only to those who are truly blameworthy. Therefore, because these defendants are not in the penal sanction category, it can be deduced that they are not as blameworthy.[148]

The overcriminalization movement represents slightly different topics among different people. In this case, the term overcriminalization is being used to refer to "the improper criminalization of 'relatively trivial conduct' or conduct better made 'a matter of individual morality.'"[149] To illustrate, a conviction whose punishment merits no more than a few hundred dollars arguably should not be considered a criminal offense, especially when non-

144. *Argersinger*, 407 U.S. at 50–51 (Powell, J., concurring).

145. BLACK'S LAW DICTIONARY 444 (3d pocket ed. 2006). *Malum in se*: "A crime or an act that is inherently immoral, such as murder, arson, or rape." *Id.*

146. *Id. Malum prohibitum:* "An act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." *Id.*

147. *See* Richard L. Gray, *Eliminating the (Absurd) Distinction Between* Malum in Se *and* Malum Prohibitum *Crimes*, 73 WASH. U. L.Q. 1369, 1378 (1995).

148. *See* Joseph J. Darby, *Discussion of Petty Offenses*, 24 AM. J. COMP. L. 768, 769 (1976).

149. Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform–Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597, 609 (2011).

criminal traffic violations may have equal or higher fines. In fact, the Court in *Argersinger* referred to this specific issue, stating that crime classification is "largely a state matter," followed by a footnote stating that "[o]ne partial solution to the problem of minor offenses may well be to remove them from the court system."[150] The drafters of the Model Penal Code also recommended the same idea, suggesting the removal of certain low-level misdemeanors to a non-criminal category and resolving them administratively in order to achieve greater efficiency without the consequences of a criminal conviction.[151] Scholars also agree that the line between civil and criminal penalties is rapidly collapsing, as it is difficult to draw the line between areas thought to be traditionally civil and the traditional criminal law area.[152]

The problem of high crime and low budgets, combined with the overcriminalization debate, has created a new movement from "tough on crime" to "smart on crime." This new approach to criminal justice reform emphasizes "fairness and accuracy in the administration of criminal justice; recidivism-reducing alternatives to incarceration and traditional sanctions; effective pre-emptive mechanisms for preventing criminal behavior; the transition of formerly incarcerated individuals to law-abiding and productive lives; and evidence-based assessments of the costliness, efficiency, and effectiveness of criminal justice policies."[153] In 2009, Attorney General Eric Holder endorsed the philosophy in his address to the American Bar Association Convention stating,

> There is no doubt that we must be "tough on crime.["] But we must also commit ourselves to being "smart on crime." Getting smart on crime requires talking openly which policies have worked and which have not. And we have to do so without worrying about being labeled as too soft or too hard on crime. Getting smart on crime means moving beyond useless labels and catch-phrases, and instead relying on science and data to shape policy. And getting smart on crime means thinking about crime in context—not just reacting to the criminal act, but developing the government's ability to enhance public safety before the crime is committed and after the former offender is returned to society.[154]

Indeed, political campaigns unnecessarily emphasize catch-phrases about crime, but rarely address the real issues like collateral consequences,

150. Argersinger v. Hamlin, 407 U.S. 25, 38 & n.9 (1972).

151. King, *supra* note 97, at 15 (citing MODEL PENAL CODE § 1.04(5) (1962)).

152. *See* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—and What Can Be Done About It*, 101 YALE L.J. 1875, 1875 (1992).

153. Fairfax, *supra* note 149, at 610 (internal numeration omitted).

154. *Id.* at 611.

social stigma, and reversion to criminal activity. However, influential promoters of the "smart on crime" philosophy, such as the Attorney General, can help facilitate a politician's promotion of this philosophy without committing political suicide.

Decriminalization may seem drastic, but it does not have to be. For example, the state of Florida decriminalized many traffic violations in the 1970s, whereby the actual violation remained unchanged, but the penalty and classification changed from criminal to a civil fine. In Germany, the 1975 reform of the penal code practically eliminated petty misdemeanors and transferred them to a noncriminal administrative code concerned with violations of public order.[155] However, some petty misdemeanors were actually raised to misdemeanors.[156] Therefore, a similar process can be gradually performed in each state, as was done in Florida with the decriminalization of traffic violations, in order to re-evaluate and reorganize low-level crimes. This process would ultimately free the courts of low-level caseloads and allow more efficient adjudication of "more important" crimes.

CONCLUSION

The U.S. Supreme Court's application of the Sixth Amendment right to counsel is disappointing. The powerful words of *Powell* and *Gideon* have been lost and retain little meaning thanks to the Court's focus on punishment rather than fairness. The Court has declared that "[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled" and ironically supported this commanding statement by citing *Powell*.[157] Unfortunately, it seems the Court does not find this statement applicable to indigent defendants that are not facing imprisonment because state budgets overrule fairness. Ultimately, as Justice Clark stated in *Gideon*, there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved.[158]

155. Darby, *supra* note 148, at 772–73.
156. *Id.*
157. Strickland v. Washington, 466 U.S. 668, 685 (1984).
158. Gideon v. Wainwright, 372 U.S. 335, 349 (1963) (Clark, J., concurring).