Penalizing and Chilling an Indigent's Exercise of the Right to Appointed Counsel for Misdemeanors

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ABSTRACT: While Gideon v. Wainwright *is widely and justly celebrated for extending the right to the appointment of counsel to all indigent defendants charged with felonies,* Gideon*'s application to misdemeanors is less well-known and more limited. In* Scott v. Illinois*, the Supreme Court restricted* Gideon *to misdemeanants actually sentenced to imprisonment. That is, the* Scott *"actual imprisonment" standard declines to extend* Gideon *to indigents with trial outcomes of either acquittal or conviction with a non-imprisonment sentence. Because only a post-trial outcome governs whether the* Gideon *right to counsel applies prior to and during trial, the "actual imprisonment" standard illogically places the cart before the horse. Despite strong criticism from both judges and commentators, the Supreme Court has repeatedly declined to fully extend* Gideon*. Overlooked amidst the more obvious and glaring deficiencies is perhaps a more powerful argument against* Scott*'s "actual imprisonment" standard: It forces an indigent to choose between the assistance of appointed counsel (but at the price of eligibility for the harsher punishment of imprisonment) versus avoiding eligibility for harsher punishment (but at the price of lacking the assistance of counsel). Because an indigent may eliminate the prospect of harsher punishment by not exercising the right to appointed counsel, this Essay advances the novel claim that* Scott*'s "actual imprisonment" standard may unconstitutionally penalize and chill an indigent's exercise of the right to counsel.*

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INTRODUCTION

Gideon v. Wainwright is widely celebrated for extending the Sixth Amendment right to appointed counsel to all indigent state defendants charged with a felony.[1] "As the right that ensures that 'all other rights of the accused are protected,'"[2] *Gideon*'s importance cannot be overstated. But perhaps less well-known and certainly much less celebrated is the limited scope of *Gideon*'s application to misdemeanors. Because of "[t]he recent exponential growth in [misdemeanor] prosecutions" which led one commentator to declare that "[t]here is a misdemeanor crisis in the United States,"[3] and because "the world of misdemeanors looks to be about four or five times the size of the world of felonies,"[4] the limited scope of *Gideon*'s application to misdemeanors may be more important than *Gideon* itself.

As applied to indigents charged with a misdemeanor, the Supreme Court in *Argersinger v. Hamlin* limited the scope of the *Gideon* right against deprivations of liberty.[5] Those charged with misdemeanors in which imprisonment is not an authorized punishment do not enjoy the constitutional right to appointed counsel. And the scope of *Gideon*'s application to misdemeanors is even more limited. In *Scott v. Illinois*, the Supreme Court clarified that even those charged with misdemeanors in which imprisonment is an authorized punishment are not necessarily constitutionally entitled to appointed counsel.[6] Only indigents charged with a misdemeanor in which *both* imprisonment is authorized *and* actually imposed enjoy the *Gideon* right to appointed counsel.[7]

While *Gideon*'s application to misdemeanors has been criticized from all directions, much of the debate has centered on the preferability of an "authorized imprisonment" standard over an "actual imprisonment" standard. If *Gideon*'s application to misdemeanors is to be limited at all, the *Gideon* right should be limited to indigents charged with a misdemeanor in which imprisonment is authorized (the "authorized imprisonment" standard). But by limiting *Gideon*'s application to misdemeanors to indigent defendants actually receiving imprisonment (the "actual imprisonment"

1. Gideon v. Wainwright, 372 U.S. 335 (1963). As testament to *Gideon*'s enduring legacy, see, for example, the three recent symposiums celebrating the 50th anniversary of the decision: Symposium, *Fifty Years of* Gideon*: The Past, Present, and Future of the Right to Counsel*, 99 IOWA L. REV. 1875 (2014); Symposium, Gideon *at 50: Reassessing the Right to Counsel*, 70 WASH. & LEE L. REV. 835 (2013); Symposium, *The* Gideon *Effect: Rights, Justice, and Lawyers Fifty Years After* Gideon v. Wainwright, 122 YALE L.J. 2106 (2013).

2. Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1051 (2013) (quoting Penson v. Ohio, 488 U.S. 75, 84 (1988)).

3. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090 (2013).

4. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320–21 (2012).

5. Argersinger v. Hamlin, 407 U.S. 25, 37–38 (1972).

6. Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

7. *See id.*

standard), the Supreme Court has established a standard that is often criticized as illogical in principle and unworkable in practice.[8] In order to determine whether a defendant is entitled to appointed counsel, a judge must determine, prior to the verdict and before even hearing the evidence, whether she will impose a sentence of imprisonment. This puts the cart of punishment before the horses of trial, evidence, and guilt.[9] But, despite significant criticism from judges and commentators alike, the Supreme Court repeatedly has refused to extend *Gideon*'s application to misdemeanors any more broadly. The glaring and obvious problems of the "actual imprisonment" standard have perhaps obscured what may be an even more powerful argument against it. Overlooked is that *Scott*'s "actual imprisonment" standard may unconstitutionally penalize and chill an indigent's enjoyment of the right to appointed counsel.

After briefly tracing the Supreme Court's path to *Gideon* and the Court's limited application of *Gideon* to misdemeanors, Part I canvasses the debate among judges and commentators of the *Scott* "actual imprisonment" standard. It presents criticisms that the standard is too narrow, too broad, and, depending on the case, either too narrow or too broad.

Part II presents a different type of criticism of *Scott*. It raises the novel argument that the *Scott* "actual imprisonment" standard may unconstitutionally penalize and chill an indigent's exercise of the right to appointed counsel. The argument relies on the general principle of constitutional law that chilling or penalizing the exercise of a constitutional or even statutory right is itself unconstitutional. Attaching the prospect of greater punishment (imprisonment) as the price to be paid for enjoying the assistance of appointed counsel penalizes and chills the exercise of that right. Because an indigent can avoid the prospect of greater punishment by refraining from exercising the right to appointed counsel, the *Scott* "actual imprisonment" standard coerces an indigent from seeking the assistance of appointed counsel.

After Part III anticipates and attempts to rebut three possible objections, this Essay concludes that the *Scott* "actual imprisonment" standard penalizes and chills an indigent defendant's exercise of the Sixth Amendment right to the assistance of appointed counsel. Although not entirely clear, *Scott*'s coercive effect on the right to counsel is plausibly unconstitutional. If *Gideon* is not to apply to all indigents charged with misdemeanors, then the basis of any limitation should be the "authorized

8. *See, e.g.*, Adam D. Young, Comment, *An Analysis of the Sixth Amendment Right to Counsel as It Applies to Suspended Sentences and Probation: Do* Argersinger *and* Scott *Blow a Flat Note on* Gideon*'s Trumpet?*, 107 DICK. L. REV. 699, 707 (2003) ("In application, however, the 'actual imprisonment' standard has often proved illogical to the point of nullity given the workings of the American criminal justice system.").

9. JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 60 (2002).

imprisonment" standard. In addition to avoiding the numerous problems besetting the "actual imprisonment" standard noted by judges and commentators, the "authorized imprisonment" standard avoids unconstitutionally burdening the right to appointed counsel.

I. APPLYING *GIDEON* TO MISDEMEANORS

After briefly sketching the evolution of the Supreme Court's approach to the right of appointed counsel and its path to *Gideon*, this Part traces *Gideon*'s application to misdemeanors. It then presents the numerous criticisms that application has attracted: The scope of *Gideon*'s application to misdemeanors is too narrow, too broad, and, depending on the case, either too narrow or too broad.

A. A BRIEF HISTORY OF INDIGENTS' RIGHT TO APPOINTED COUNSEL

The literal language of the Sixth Amendment provides, in relevant part, only that a criminal defendant "shall enjoy the right to . . . have the Assistance of Counsel for his defence."[10] It says nothing about a right to appointed counsel at state expense and most scholars believe that it was not originally intended to supply such a right.[11] But "[t]he right to counsel has . . . been an evolving concept."[12] In 1932, the Supreme Court in *Powell v. Alabama* recognized for the first time that the right to counsel includes the right to appointed counsel at state expense for indigents, unable to adequately defend themselves, charged with capital offenses.[13] Six years later in 1938, the Supreme Court in *Johnson v. Zerbst* extended the *Powell* right to appointment of counsel for indigents charged in federal court with either capital or non-capital offenses.[14]

It was not until 1963, in *Gideon*, that the Supreme Court again extended the right to the appointment of counsel to all indigents charged with a felony.[15] In broad and sweeping language, the Court proclaimed that "*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."[16] In 1972, in *Argersinger*, the Court explicitly affirmed that *Gideon*'s "any person" standard for the right to appointed counsel included indigents charged with misdemeanors who received a sentence of imprisonment.[17] The Court held that "absent a

10. U.S. CONST. amend. VI.

11. *E.g.*, TOMKOVICZ, *supra* note 9, at 55; Paul Marcus, *Why the United States Supreme Court Got Some (But Not a Lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 162 (2009).

12. Argersinger v. Hamlin, 407 U.S. 25, 44 (1972) (Burger, C.J., concurring).

13. Powell v. Alabama, 287 U.S. 45, 69 (1932).

14. Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

15. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

16. *Id.* (emphasis added).

17. *See Argersinger*, 407 U.S. at 40.

knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial."[18] Because the defendant actually was sentenced to imprisonment,[19] *Argersinger* arguably left open the issue of whether an indigent charged with a misdemeanor in which imprisonment was authorized, but not necessarily imposed, also had a right to appointed counsel.[20] Most commentators and courts presumed that the Court would continue the expansion and evolution of the right to appointed counsel by extending the right to indigents charged with misdemeanors in which imprisonment was merely authorized (but not actually imposed).[21] But in 1979, the *Scott* Court surprised and disappointed many by foreclosing that evolution.[22] Finding that *Argersinger* was not "a point in a moving line" of ever-expanding rights to appointed counsel,[23] *Scott* ruled "that *Argersinger* did indeed delimit the constitutional right to appointed counsel" to those receiving actual imprisonment.[24]

Rather than reconsidering the scope of the right to counsel under *Scott*, "the Court appears firmly committed to utilizing the actual imprisonment standard as the sole Sixth Amendment dividing line for requiring appointed counsel in misdemeanor cases."[25] The Court has focused on construing what sentences of punishment constitute actual imprisonment sufficient to trigger a right to appointed counsel.[26] In *Nichols v. United States*, the Court ruled that an uncounseled misdemeanor conviction in which no imprisonment was imposed (thus valid under *Scott*) could be used to enhance the punishment level of a subsequently committed offense.[27] Thus, the increased term of imprisonment for the subsequent offense did not constitute actual imprisonment under *Scott* for the previous offense. However, in *Alabama v. Shelton*, the Court distinguished *Nichols* and held that a suspended sentence for an uncounseled misdemeanant, conditioned on satisfying terms of probation, did constitute actual imprisonment under *Scott*.[28]

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18. *Id.* at 37.

19. *Id.* at 26.

20. Scott v. Illinois, 440 U.S. 367, 379 (1979) (Brennan, J., dissenting).

21. *See, e.g.*, John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 13 (2013) ("After *Argersinger*, many thought it was only a matter of time before the Court explicitly declared a right to appointed counsel in all criminal cases.").

22. *See, e.g.*, *id.* at 15 (lamenting that "the decision in *Scott* essentially froze the evolution of the right to appointed counsel").

23. *Scott*, 440 U.S. at 369.

24. *Id.* at 373.

25. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 595 (5th ed. 2009).

26. 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: ADJUDICATION 53 (4th ed. 2006) (citing Alabama v. Shelton, 535 U.S. 654 (2002)).

27. Nichols v. United States, 511 U.S. 738, 738 (1994).

28. *Shelton*, 535 U.S. at 672.

B. CRITICISMS OF GIDEON'S APPLICATION TO MISDEMEANORS—THE "ACTUAL IMPRISONMENT" STANDARD

The *Scott* "actual imprisonment" standard has been heavily criticized. This Part presents arguments that the scope of the right to counsel under this standard is too narrow, too broad, and, depending on the particular case, either too narrow or too broad.

1. "Actual Imprisonment" Standard: Too Narrow

There are six principal criticisms of the "actual imprisonment" standard from those arguing that the standard should be broadened to provide all, or greater numbers of, indigent misdemeanants with appointed counsel. First, the literal text and plain meaning of both the Sixth Amendment and *Gideon* establish that *all* indigent defendants should have the right to appointed counsel.[29] Second, an indigent must have the right to counsel at least whenever there is a right to a jury trial.[30] Third, the "actual imprisonment" standard precludes the appointment of counsel in cases where the collateral consequences of a conviction may be as, or more, serious than imprisonment.[31] Fourth, the standard for appointment of counsel should be a function of factual/legal complexity, where need for counsel is greatest, rather than being based upon the grade of offense or type of punishment imposed.[32] Fifth, the fairness of a trial is not a function of the type of punishment—imprisonment or not—that the defendant receives.[33] Sixth, the actual imprisonment standard "puts the cart before the horse."[34] It requires trial judges to decide the type of punishment they will impose before determining guilt, before considering all of the evidence, and before the trial even starts.[35]

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29. *See, e.g.*, *Scott*, 440 U.S. at 375–79 (Brennan, J., dissenting); Marcus, *supra* note 11, at 189.

30. *See, e.g.*, *Scott*, 440 U.S. at 389–90 (Blackmun, J., dissenting); *id.* at 378–82, 389 (Brennan, J., dissenting); Argersinger v. Hamlin, 407 U.S. 25, 45–46 (Powell, J., concurring); Case Notes, *The Supreme Court 1978 Term*, 93 HARV. L. REV. 60, 86 (1979).

31. *See, e.g.*, *Scott*, 440 U.S. at 374 (Powell, J., concurring); *id.* at 383 (Brennan, J., dissenting); *Argersinger*, 407 U.S. at 48 (Powell, J., concurring); B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?*, 5 ROGER WILLIAMS U. L. REV. 417, 437–38 (2000).

32. *See, e.g.*, *Argersinger*, 407 U.S. at 47 (Powell, J., concurring); LAWRENCE HERMAN, THE RIGHT TO COUNSEL IN MISDEMEANOR COURT 84 (1973).

33. *See, e.g.*, *Argersinger*, 407 U.S. at 47, 52 (Powell, J., concurring); Simpson, *supra* note 31, at 424, 437.

34. TOMKOVICZ, *supra* note 9, at 60.

35. Simpson, *supra* note 31, at 435 ("The chief practical problem . . . of the *Scott* rule [is that it] . . . . binds a judge before all of the evidence has been presented. . . . The determination of a sentence should follow a trial, not precede it."). For discussion of administrative and constitutional problems this reverse ordering creates, see *Scott*, 440 U.S. at 374 (Powell, J., concurring); *id.* at 383–84 (Brennan, J., dissenting); *Argersinger*, 407 U.S. at 52–55 (Powell, J., concurring).

2. "Actual Imprisonment" Standard: Too Broad

Though perhaps no commentator argues that the "actual imprisonment" standard is too broad, Erica Hashimoto comes close.[36] Citing the enormous caseloads of appointed defense counsel caused in part by the Supreme Court's expansion of the right to counsel for misdemeanors, Hashimoto argues that states should attempt to minimize an indigent misdemeanant's eligibility for a right to counsel.[37] By channeling scarce appointed defense counsel resources into fewer but more deserving and serious cases, the quality of representation would be improved.[38]

3. "Actual Imprisonment" Standard: Either Too Narrow or Too Broad

Justice Powell argues that the preferable standard would be flexible and provide a right to counsel "whenever the assistance of counsel is necessary to assure a fair trial."[39] The "actual imprisonment" standard is too narrow by denying appointed counsel in cases where the collateral consequences of conviction may be more serious than imprisonment.[40] The standard is also too broad because to preserve the option of imprisonment, a trial judge must appoint counsel before the prosecution presents the relevant evidence as to whether imprisonment is even warranted. Therefore, counsel will often be appointed when unnecessary and will overburden the criminal justice system.[41]

II. UNCONSTITUTIONALLY BURDENING AN INDIGENT'S RIGHT TO APPOINTED COUNSEL FOR MISDEMEANORS

This Part advances a different type of argument against the *Scott* "actual imprisonment" standard from those canvassed above. The "actual imprisonment" standard chills and penalizes a defendant's exercise of the right to appointed counsel. Whether this burdening of the right to counsel is unconstitutional depends on the test that a particular court might employ. After surveying a variety of such tests, Part II argues that the "actual

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36. *See* Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 464–67 (2007).

37. *Id.* at 464–67.

38. *Id.* at 473–75.

39. *Argersinger*, 407 U.S. at 47, 49 (Powell, J., concurring).

40. *See, e.g.*, *Scott*, 440 U.S. at 374 (Powell, J., concurring); *Argersinger*, 407 U.S. at 48 (Powell, J., concurring) ("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." (footnote omitted)); *accord* Marcus, *supra* note 11, at 173 ("[T]he collateral consequences of such [misdemeanor] convictions can also lead to serious repercussions, often outweighing the severity of the crime and the formal criminal punishment imposed at the original sentencing."). Marcus cites four such consequences: lost opportunities in employment, education, housing, and U.S. residency for non-citizens. *Id.* at 173–87.

41. *Scott*, 440 U.S. at 374 (Powell, J., concurring).

imprisonment" standard's penalizing and chilling of the right to counsel is plausibly unconstitutional.

A. PENALIZING AND CHILLING THE RIGHT TO COUNSEL

The "actual imprisonment" standard of *Scott* penalizes an indigent defendant for enjoying her Sixth Amendment right to counsel. The standard coerces or discourages an indigent from requesting the assistance of counsel. It does this by establishing a sentencing differential between those who enjoy the assistance of counsel and those who do not. A counseled indigent is eligible for the presumptively greater type of punishment of imprisonment. An uncounseled indigent may avoid eligibility for a sentence of imprisonment. The only way for an indigent defendant to ensure avoidance of eligibility for the greater type of punishment, if convicted, is to not have the assistance of counsel. As a result, the "actual imprisonment" standard that entails this sentencing differential disincentivizes, discourages, coerces, or penalizes an indigent from requesting, or invoking the right to, the assistance of counsel.

One might object that if a defendant may escape eligibility for greater punishment by not requesting counsel, then being uncounseled only benefits the defendant and benefitting the defendant is surely not problematic. There are two responses to this objection. First, being uncounseled is not an unalloyed benefit. That an uncounseled defendant is disadvantaged is, as *Gideon* maintains, "an obvious truth."[42] Being uncounseled surely increases the probability of conviction; being counseled surely increases the probability of an acquittal.[43] The "actual imprisonment" standard places the indigent in the following coercive dilemma: request counsel to minimize the probability of conviction but at the cost of potentially greater punishment, versus refrain from requesting counsel to ensure lesser punishment but at the cost of increasing the probability of conviction. Second, even if being uncounseled is an unalloyed benefit, the next section demonstrates that whether a defendant benefits from her rights being burdened may be irrelevant to its constitutionality.

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42. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.").

43. *See, e.g.*, Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 596–97 (2011) ("[W]ithout counsel, innocent defendants are at greater risk of wrongful conviction. . . . Indeed, there is an even *greater* risk with respect to misdemeanors than more serious crimes."); *see also* TOMKOVICZ, *supra* note 9, at 128 (noting that absent counsel, "it is quite unlikely that an accused will be able to enjoy the advantages of the other enumerated rights"). *But see* Hashimoto, *supra* note 36, at 489–96.

B. CONSTITUTIONAL AND UNCONSTITUTIONAL RIGHT-BURDENING

A general principle of constitutional law is that burdening a defendant's invocation or enjoyment of a constitutional or statutory right is itself unconstitutional.[44] This general principle may be stated even more broadly: Not only is conduct that is affirmatively protected by a statutory or constitutional right not constitutionally subject to penalty or burden, but so also is conduct that is merely allowed or not prohibited.[45] More specifically, "a sentencing court cannot consider *against* a defendant any constitutionally protected conduct."[46] Or, as another court put it, "whether a defendant exercises his constitutional right . . . must have no bearing on the sentence imposed."[47] Making the prospect of harsher punishment (imprisonment) the price to pay for receiving appointed counsel seems to violate this general principle. Further, by conditioning eligibility for imprisonment on appointment of counsel, a judge would be impermissibly considering appointment of counsel against the defendant, and appointment of counsel would impermissibly affect the sentence imposed.

But this general principle is not absolute. As the Supreme Court stresses, "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid."[48] Courts and commentators, however, have struggled to articulate a coherent rationale that readily explains under what conditions and circumstances such burdens are constitutional and when they are unconstitutional.[49]

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44. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" (citation omitted)); Garrity v. New Jersey, 385 U.S. 493, 500 (1967) ("There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."); Howard E. Abrams, *Systemic Coercion: Unconstitutional Conditions in the Criminal Law*, 72 J. CRIM. L. & CRIMINOLOGY 128, 132 (1981) ("Any attempt to elicit a waiver of these fundamental rights by punishing those who assert them is antithetical to the premises of our criminal justice system.").

45. *See, e.g.*, United States v. Falcon, 347 F.3d 1000, 1004 (7th Cir. 2003) ("A prosecution is vindictive and a violation of due process if undertaken to punish a person because he has done what the law plainly allowed him to do." (quoting United States v. Bullis, 77 F.3d 1553, 1558 (7th Cir. 1996))); *see also Bordenkircher*, 434 U.S. at 363.

46. United States v. Watt, 910 F.2d 587, 592 (9th Cir. 1990).

47. Hess v. United States, 496 F.2d 936, 938 (8th Cir. 1974).

48. Corbitt v. New Jersey, 439 U.S. 212, 218 (1978).

49. *See, e.g.*, Abrams, *supra* note 44, at 132 ("To date, the Court has not formulated or consistently applied a coherent theory . . . . This inability . . . has left the lower courts to reconcile inconsistent holdings and produced myriad rationales and resolutions); Case Notes, *supra* note 30, at 81 (remarking on "the impossibility of . . . drawing lines distinguishing permissible and impermissible incentives to plead guilty on a reasoned basis"); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003) ("There is a paradox in constitutional law, revealed by a simple question: Can individuals give up constitutional rights in exchange for a benefit from the government? The answer is that *it depends* . . . ."); *id.* at 803 ("[O]ur answer

Because of the lack of clarity in this general area, the apparent lack of authority as to burdening the specific right to appointed counsel, and space limitations, the aim of this Essay is modest. It is merely to make plausible the claim that *Scott*'s "actual imprisonment" standard unconstitutionally penalizes and chills the exercise of the right to counsel.

Two clear areas where penalizing a constitutional right have been upheld to be constitutional are guilty pleas and plea bargains.[50] Guilty pleas and plea bargains similarly entail a sentencing (and/or charging) differential that might be said to penalize or coerce a defendant from invoking her Sixth Amendment right to a trial. The prospect of greater punishment arguably penalizes a defendant exercising the right to trial.[51] The Supreme Court, however, has repeatedly rejected the argument that the sentencing differential plea bargains entail unconstitutionally penalizes or burdens a defendant's constitutional right to trial.[52]

The sentencing differential entailed by the *Scott* "actual imprisonment" standard, however, does not fall within this plea bargaining exception to the general rule for a number of reasons. First, while the sentencing differential of plea bargains is created by the prosecutor, the sentencing differential of the "actual imprisonment" standard is judicially or legislatively created. Underpinning the Supreme Court's endorsement of plea bargains is the "mutuality of advantage"[53] stemming from the "'give-and-take' of . . . bargaining"[54] between an individual defendant and prosecutor. In contrast, the give-and-take bargaining giving rise to mutuality of advantage is lacking between an individual defendant and the distant court or legislature creating the "actual imprisonment" standard.[55] Second, the "actual

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to the question of whether individuals can exchange constitutional rights for government benefits remains quite arbitrary.").

50. *E.g.*, Town of Newton v. Rumery, 480 U.S. 386, 393 (1987) ("[I]t is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights."); Santobello v. New York, 404 U.S. 257, 261 (1971) ("[Plea bargains are] not only an essential part of the process but a highly desirable part . . . .").

51. *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196, 210 (1995) ("[C]onfronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights . . . ." (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)) (internal quotation marks omitted)).

52. *See, e.g.*, *id.* ("[W]e have repeatedly held that the government 'may encourage a guilty plea by offering substantial benefits in return for the plea.'" (quoting *Corbitt*, 439 U.S. at 219)).

53. Brady v. United States, 397 U.S. 742, 752 (1970); *accord Bordenkircher*, 434 U.S. at 363 ("Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial."). For an account of these mutual advantages, see *Brady*, 397 U.S. at 751–52.

54. *Bordenkircher*, 434 U.S. at 363 ("[I]n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.").

55. *See Newton*, 480 U.S. at 410 (Stevens, J., dissenting) (arguing that a release-dismissal deal is unconstitutionally coercive because it "has no connection with the give-and-take over the defendant's wrongdoing that is the essence of the plea-bargaining process, and thus cannot be

imprisonment" standard does not involve a guilty plea or plea bargain of any type. Third, each type of sentencing differential penalizes a separate and distinct constitutional right. While plea bargains arguably penalize invocation of the right to trial, the "actual imprisonment" standard penalizes the separate right to appointed counsel.

Outside the plea bargain context, the Supreme Court has often found penalizing a defendant's constitutional right to be unconstitutional.[56] A number of such cases involve burdening a defendant's Fifth Amendment right against self-incrimination. For example, in *Griffin v. California*, the Supreme Court reversed a murder conviction because the trial court commented negatively to the jury about the defendant's failure to testify on his own behalf.[57] In holding that the conviction violated the Self-Incrimination Clause of the Fifth Amendment, the Court explained that comment on the refusal to testify "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[58] Similarly, in *Mitchell v. United States*, the Supreme Court held that the *Griffin* right to an unburdened Fifth Amendment privilege against self-incrimination equally applies in the sentencing context.[59] A sentencing judge must not draw a negative inference from the defendant's silence during a sentencing hearing.[60] The Court has also held that it is impermissible to penalize exercise of the right against self-incrimination by termination of employment or disbarment.[61]

The Supreme Court has also often found sentencing differentials that penalize a defendant's constitutional or statutory rights to be unconstitutional. For example, in *North Carolina v. Pearce*, the Supreme Court set aside the more harsh punishments imposed on two defendants following their reconviction after they were granted a new trial.[62] In ruling that the increased punishment violated the Due Process Clause of the Fourteenth Amendment, the Court explained that it penalized the defendants for pursuing their statutory right to appeal:

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justified by reference to the principles of mutual advantage that support plea bargaining"); Mazzone, *supra* note 49, at 872 n.333 (noting "that courts and commentators (endorsing plea bargaining) have often emphasized that a *statute* providing for a lesser penalty for defendants who plead guilty may be unconstitutional").

56. Case Notes, *supra* note 30, at 73 ("While the Supreme Court has prohibited states from unduly encouraging defendants to forgo their constitutional rights in other contexts, it has tolerated plea bargaining." (footnote omitted)).

57. Griffin v. California, 380 U.S. 609, 615 (1965).

58. *Id.* at 614.

59. Mitchell v. United States, 526 U.S. 314, 330 (1999).

60. *Id.*

61. *See* Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (employment); Spevack v. Klein, 385 U.S. 511, 516 (1967) (plurality opinion) (disbarment).

62. North Carolina v. Pearce, 395 U.S. 711, 724–26 (1969).

> A court is "without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice."[63]

The Court stated that due process requires that a defendant considering an appeal be free of the fear of a vindictively imposed harsher sentence upon reconviction because it would "unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction. . . ."[64]

For another example of an unconstitutional sentencing differential outside the plea bargain context, consider *United States v. Jackson*.[65] The defendant was charged under a federal statute that authorized capital punishment if the defendant opted for a jury trial but only non-capital punishment if the defendant did not receive a jury trial.[66] The district court found the statute "unconstitutional because it makes 'the risk of death' the price for asserting the right to jury trial, and thereby 'impairs . . . free exercise' of that constitutional right."[67] Agreeing with the district court that the statute "impose[d] an impermissible burden upon the exercise of a constitutional right,"[68] the Supreme Court explained that the death penalty provision's "inevitable effect . . . [was], of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial."[69] While the Court acknowledged that the legitimacy of the statute's motive or objective was a factor in determining the constitutionality of its coercive effect, in this case the Court found that its effect "could not be justified by its ostensible purpose."[70]

Jackson's analysis of the legitimacy of the objective is particularly helpful. *Jackson* explains that if the statute or practice does not have some "other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."[71] The government, in *Jackson*, claimed that limiting capital punishment to jury trials has another, legitimate purpose: "It avoids the more drastic alternative of mandatory capital punishment in every

63. *Id.* at 724 (quoting Worcester v. Comm'r, 370 F.2d 713, 718 (1st Cir. 1966).
64. *Id.* at 725.
65. United States v. Jackson, 390 U.S. 570 (1968).
66. *Id.* at 571.
67. *Id.* (quoting United States v. Jackson, 262 F. Supp. 716, 718 (D. Conn. 1967)).
68. *Id.* at 572.
69. *Id.* at 581 (footnote omitted).
70. *Id.* at 582–83.
71. *Id.* at 581.

case."[72] By successfully decreasing the incidence of capital punishment, the government argued, its "incidental effect" of discouraging the assertion of the right to a jury trial is irrelevant.[73] The Court in *Jackson* replied that "[t]he question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive."[74] The Court decided that the government's goal of limiting capital punishment to when a jury recommends it can equally be achieved without penalizing defendants who invoke their right to a jury trial.[75] Because of the availability of other alternatives that attain the legitimate goal without penalizing or chilling constitutional rights, the chilling or coercive effect is unnecessary. Since it is unnecessary, it is unconstitutional: "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights."[76]

The necessary/unnecessary approach of *Jackson* has also been affirmed where the Court upheld the constitutionality of the burdening of a constitutional right. In *Chaffin v. Stynchcombe*, the Court distinguished *Pearce* and upheld the constitutionality of a higher sentence, when imposed not by a judge but by a jury, following reconviction after a new trial was granted.[77] In denying the defendant's argument that it penalized his right to appeal and his right to a jury trial on retrial, the Court explained that the coercive "effect cannot be said to be 'needless.'"[78] As support for its view that the coercive effect on defendants was necessary, the Court considered two alternatives.[79] It concluded that "[e]ither alternative would interfere with concededly legitimate state interests, and thus the burden imposed on the right to trial by jury is no less necessary."[80] The Court noted that the *Jackson* necessary/unnecessary approach may also explain the constitutionality of plea-bargaining.[81] While penalization of constitutional rights is "inevitable" in plea-bargaining,[82] plea-bargaining is "an 'essential' . . . 'component of the

72. *Id.* at 581–82.

73. *Id.* at 582 (citing McDowell v. United States, 274 F. Supp. 426, 431 (E.D. Tenn. 1967)).

74. *Id.*

75. *Id.* ("In some States, for example, the choice between life imprisonment and capital punishment is left to a jury in *every* case—regardless of how the defendant's guilt has been determined.").

76. *Id.*; *see also id.* at 583 ("Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.").

77. Chaffin v. Stynchcombe, 412 U.S. 17, 25–28 (1973).

78. *Id.* at 33–34 n.21 (quoting *Jackson*, 390 U.S. at 583).

79. *Id.* ("The parameters of judge- and jury-sentencing power, given the binding nature of *Pearce*, can only be made coterminous by either (1) restricting the jury's power of independent assessment, or (2) requiring jury sentencing in every felony case irrespective whether guilt is determined by a bench trial or a guilty plea after reversal of the conviction.").

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

81. *Id.* at 30–31.

82. *Id.* at 31.

administration of justice.'"[83] Because it is essential, its penalization of constitutional rights is necessary and thus constitutional under *Jackson*.[84]

The necessary/unnecessary distinction of *Jackson* and *Chaffin* is also featured in Howard Abrams' helpful framework.[85] His account distinguishes between three different types of cases in which a statute or State practice penalizes or chills the assertion of a constitutional or statutory right.[86] The first type, exemplified by *Pearce*, involves the government's subjective improper motivation to penalize or chill a defendant's assertion of a right.[87] When a court does find improper motivation the outcome is clear: "Any systemic coercion subjectively intended to discourage the assertion of a constitutional right is invalid since dissuading the exercise of constitutional rights is not a permissible goal of legislation."[88]

Neither Abrams's second nor third type involves subjective improper motivation.[89] Both combine a permissible purpose with a coercive effect.[90] Abrams distinguishes the second and third types by the *Jackson/Chaffin* criterion—whether the coercive effect is necessary or unnecessary to achieve the permissible purpose.[91] In the third type, exemplified by plea bargaining, the coercive effect is necessary to achieve the permissible goal.[92] In order to achieve what the Supreme Court has labeled as the "highly desirable" and "essential" goal of plea bargaining, inducing (by the threat of greater punishment if the defendant goes to trial) the defendant into waiving the Sixth Amendment right to trial and pleading guilty is necessary.[93]

Abrams' second type, exemplified by *Jackson*, imposes a coercive effect that is unnecessary to achieve the permissible purpose.[94] In *Jackson*, the permissible goal of limiting the imposition of capital punishment was attained by means that penalized and chilled the defendant's exercise of the Sixth Amendment right to a jury trial.[95] Because the Court found that the permissible goal could be achieved through alternate means that avoided

83. *Id.* at 31 n.18 (quoting Santobello v. New York, 404 U.S. 257, 260–61 (1971)).

84. *See id.* at 30–31, 33–34 n.21 (drawing the conclusion after examining prior case law).

85. Abrams, *supra* note 44, at 143–55.

86. *Id.*

87. *Id.* at 143–46.

88. *Id.* at 144.

89. *Id.* at 147.

90. *Id.*

91. *See id.* at 147–51.

92. *Id.* at 147, 149, 160–64. For another commentator explaining the Supreme Court's upholding of the constitutionality of plea-bargaining on the basis of necessity, despite its penalization of constitutional rights, see Mazzone, *supra* note 49, at 837–38.

93. Santobello v. New York, 404 U.S. 257, 261 (1971).

94. Abrams, *supra* note 44, at 147–49.

95. United States v. Jackson, 390 U.S. 570, 581–82 (1968).

the coercive effect on the defendant, the coercive effect was unnecessary and thus unconstitutional.[96]

C. THE UNCONSTITUTIONALITY OF SCOTT*'S "ACTUAL IMPRISONMENT" STANDARD*

Because there is little direct authority on burdening the right to appointed counsel, let us apply the *Jackson*/*Chaffin*/Abrams approach to *Scott*'s "actual imprisonment" standard. This approach is well-suited because it reconciles some of the Supreme Court's seemingly disparate rulings, including plea bargaining, and is susceptible to neutral application, having found some right-burdening practices constitutional and others unconstitutional.

In applying this approach, the first step is to determine whether the "actual imprisonment" standard has a legitimate purpose. If it lacks a legitimate purpose, then, as in *Pearce*, the coercive effect would be presumed vindictive or retaliatory and thus unconstitutional.[97] But presumably it does have a legitimate purpose: It ensures that no defendant receives the most severe punishment authorized for a misdemeanor—imprisonment—without the safeguard of counsel.

The next step is to determine whether the specific means employed (and the coercive effect entailed by those means) is necessary or unnecessary to attain that legitimate purpose. To determine whether it is necessary or unnecessary, we must consider whether alternate means that lack a coercive effect could equally attain the legitimate purpose. If there are no such alternate means, then the coercive effect is necessary and presumably constitutional. If there is such an alternate means, then the coercive effect is unnecessary and presumably unconstitutional. Here, there are two obvious alternatives. First, extend *Gideon* to *all* indigent defendants charged with misdemeanors. Second, extend *Gideon* to only those indigent defendants charged with misdemeanors in which imprisonment is authorized—i.e., the "authorized imprisonment" standard. Either of these alternatives would equally achieve the goal of ensuring that no indigent defendant charged with a misdemeanor receives the punishment of imprisonment without the assistance of counsel. And neither of these alternatives would coerce an indigent defendant to refrain from requesting, or penalize for obtaining, the assistance of counsel. As a result, the "actual imprisonment" standard's penalization of the assistance of counsel and/or chilling effect on invoking the right to counsel is unnecessary. And because it is unnecessary, it is presumably unconstitutional.

Perhaps the permissible or legitimate objective or purpose might be reframed. Rather than ensuring that no defendant receives imprisonment without the assistance of counsel, it might be recast as providing counsel to

96. *Id.* at 582–83.

97. North Carolina v. Pearce, 395 U.S. 711, 724–25 (1969).

indigent misdemeanants receiving imprisonment *at a reasonable cost*;[98] by limiting the right of counsel to those actually imprisoned, the cost would be reasonable. Are the means to attain this reframed objective necessary? Or are there alternate means that might equally attain the objective without the coercive effect?[99]

Let us consider the two alternate means discussed above that lack the coercive effect. First, would providing counsel to all indigents equally attain the objective? Writing in 1972, Justice Powell, in his concurrence in *Argersinger*, suggests "no." He stated that "the price of pursuing this easy course could be high indeed in terms of its adverse impact on the administration of the criminal justice systems of 50 States."[100] Thus, from this perspective, the alternate means would not attain the objective at a reasonable cost. But as of 2009, Paul Marcus reports that as many as "forty-six states provide counsel in all, or virtually all, criminal cases."[101] Since they do so not because of a constitutional obligation, we might infer that these states are able to provide counsel to indigents in virtually all criminal cases at a reasonable cost. Thus, even if the "actual imprisonment" standard was economically necessary in 1972, it is now no longer economically necessary.[102]

As to the second possible alternate means discussed above, would adoption of the "authorized imprisonment" standard equally attain the objective? Writing in 1979, Chief Justice Rehnquist, in the majority opinion in *Scott*, suggests "no." He stated that "any extension [of the right to counsel beyond the "actual imprisonment" standard] would . . . impose unpredictable, but necessarily substantial, costs on 50 quite diverse States."[103] Thus, from this perspective, the alternate means would not attain the objective at a reasonable cost. But in a dissenting opinion, Justice

98. *See* Scott v. Illinois, 440 U.S. 367, 384 (1979) (Brennan, J., dissenting) ("The apparent reason for the Court's adoption of the 'actual imprisonment' standard for all misdemeanors is concern for the economic burden that an 'authorized imprisonment' standard might place on the States."); Marcus, *supra* note 11, at 163 ("Clearly of great pause for the Justices in possibly extending counsel rights in all criminal cases was the financial impact it would have on the states.").

99. For discussion of whether financial cost considerations may constitute a permissible or legitimate objective or purpose, see Abrams, *supra* note 44, at 148–49. Abrams argues that if economic considerations are included, *Jackson*'s analysis (that the means used to obtain the government's goal was unnecessary and thus unconstitutional) may be mistaken. *Id.* at 148. "The Court's proposed alternative was considerably more expensive than the voided alternative." *Id.* But Abrams argues that "[m]ore plausibly, the Court might have meant that administrative efficiency and cost effectiveness should play no role in determining what is necessary to further state aims . . . ." *Id.*

100. Argersinger v. Hamlin, 407 U.S. 25, 50–51 (1972) (Powell, J., concurring).

101. Marcus, *supra* note 11, at 164.

102. *See id.* at 164–65 (contending that because almost all states provide counsel in almost all criminal cases "it is hard to believe that the costs would be so overbearing so as to weigh too heavily on the constitutional analysis").

103. *Scott*, 440 U.S. at 373.

Brennan argued that an "authorized imprisonment" standard would not impose unreasonable costs on the states.[104] In support, he notes that "Scott would be entitled to appointed counsel under the current laws of at least 33 States."[105] Moreover, as Paul Marcus notes, as of 2009, only "[f]ive states require a sentence of actual imprisonment for a defendant to be entitled to court-appointed counsel."[106] Again, this suggests that even if the "actual imprisonment" standard was economically necessary in 1979, it is now no longer economically necessary.[107] As a result, there are arguably two different alternate means that equally attain the legitimate objective and do so at a reasonable cost. Thus, the means—the "actual imprisonment" standard—is unnecessary and its coercive effect is unconstitutional even if the objective is reframed to include financial cost.

Not only is the "actual imprisonment" standard unnecessary to achieve the reasonable-cost objective, the cost-based objective itself is arguably not permissible.[108] Justice Brennan argues that *Scott*'s concern with not providing any more Sixth Amendment right to counsel than states can reasonably afford is "irrelevant."[109] Brennan states that the "Court's role in enforcing constitutional guarantees for criminal defendants cannot be made dependent on the budgetary decisions of state governments."[110] Brennan cites *Mayer v. City of Chicago*, where the Court "reject[ed] a proposed fiscal justification for providing free transcripts for appeals only when the appellant was subject to imprisonment."[111]According to *Mayer*, "'[t]he 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.'"[112] As a result, the cost-based objective may not even be permissible in the sense that it is "irrelevant."[113] Thus, reframing the purpose of the "actual imprisonment" standard to include financial cost

104. *Id.* at 385–88 (Brennan, J., dissenting).

105. *Id.* at 388.

106. Marcus, *supra* note 11, at 165.

107. *See supra* notes 101–02 and accompanying text.

108. *See* Abrams, *supra* note 44, at 148 (attributing to the Court in *Jackson* the view that "cost considerations are not sufficiently important to justify interference with the exercise of constitutional rights"); *cf. id.* at 149 (acknowledging difficulties with that view).

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

110. *Id.*

111. *Id.* (citing Mayer v. City of Chicago, 404 U.S. 189, 196–97 (1971)).

112. *Id.* (quoting *Mayer*, 404 U.S. at 197).

113. Note that the conception of impermissible government goal or objective is somewhat different here than as previously developed. In contrast to the impermissible governmental objective of affirmatively attempting to penalize or chill the exercise of constitutional or statutory rights as in *Pearce*, see text accompanying notes 64–66, here the conception of impermissibility of the governmental objective emphasizes the irrelevance of the objective. At least with respect to some rights of a defendant, the cost to the state of implementing that right is irrelevant to its constitutional scope and/or is insufficient to justify or outweigh the coercive effect.

does not make the coercive effect necessary (and thus constitutional), and may even compound its constitutional infirmities.

III. OBJECTIONS

This Part anticipates and attempts to rebut the following three possible objections. First, as only a conditional right, the *Scott* right to counsel cannot be unconstitutionally burdened. Second, because *Scott* burdens both the exercise of the right to counsel and the waiver of that right, it is not a paradigmatic instance of unconstitutionally burdening a right. Third, and related to the second objection, the burdening of the right cannot arise as a practical matter.

A. ONLY A CONDITIONAL CONSTITUTIONAL RIGHT

One might object that the *Scott* right to counsel is not a full constitutional right but only a conditional constitutional right. It is conditioned on the indigent defendant being sentenced to a punishment that includes imprisonment. As only a conditional right, it is a non-existent right until the condition—a judge imposing a prison sentence—arises. And as only a conditional right, it may be penalized or chilled without running afoul of the general constitutional principle that penalizing or chilling a defendant's right is unconstitutional.

There are a number of responses to this objection. First, if it is a conditional right that is non-existent until the condition arises (and that condition arises only after the guilt phase of a trial), what exactly is it that the indigent defendant is sometimes asked to waive before a trial even begins?[114] Some courts will ask whether the indigent is waiving, or even request that the indigent waive, her right to counsel.[115] *Argersinger* and *Shelton* both anticipate that some defendants will waive their right to counsel.[116] But if the right is non-existent at the time of the waiver, as the objection maintains, how can one waive a non-existent right? Jason Mazzone's account of waiver suggests that one must actually possess a right and be able to exercise it in order to waive it: "A person waives a right when he or she voluntarily relinquishes it. Thus, waiver occurs when a person *possesses a right she could exercise* but she purposely decides to relinquish it and

114. A legally binding waiver of a right is generally defined as the "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Some additional requirements for the waiver to be legally binding are that it must be "knowing and intelligent," Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), and "informed and voluntary," United States v. Mezzanatto, 513 U.S. 196, 210 (1995).

115. *See, e.g.*, Natapoff, *supra* note 4, at 1342 (citing an account of a judge informing the defendant of the right to counsel, subsequently refusing to appoint counsel, and then demanding that the defendant waive counsel).

116. Alabama v. Shelton, 535 U.S. 654, 662 (2002) ("It is thus the controlling rule that 'absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial.'" (quoting *Argersinger*, 407 U.S. at 37)).

does not exercise it."[117] Mazzone's account seems to preclude the possibility of waiving a non-existent right. Because courts *ask* indigent defendants to waive their right to counsel, many defendants *do* waive the right, courts *accept* the waiver, and *Argersinger* and *Shelton* anticipate that defendants *may* waive the right, there is ample support to conclude that the *Scott* right to counsel is not merely a conditional right.

Second, even if the right to counsel under *Scott* is not quite a full constitutional right, the general principle that penalizing or chilling a right is unconstitutional may still apply. This general principle does not necessarily require that the penalized or chilled right be a constitutional right.[118] For example, consider *Pearce*, where the defendant received a greater punishment following reconviction after an appeal. Despite the right to appeal being a statutory right instead of a constitutional right,[119] the Court found that penalizing or chilling the non-constitutional right to appeal was nonetheless unconstitutional. If penalizing or chilling a non-constitutional right is unconstitutional, then *a fortiori* penalizing or chilling a not-quite-full constitutional right to counsel may also be unconstitutional.

Third, even if the right to counsel is merely a conditional right, *Scott*'s "actual imprisonment" standard may still violate broad articulations of the principle. There is some authority that penalizing or chilling conduct that is merely "what the law plainly allows" is also unconstitutional.[120] The law plainly allows, in the sense that it does not prohibit, an indigent to request the assistance of appointed counsel—even if she is not unconditionally entitled to that right. But the *Scott* "actual imprisonment" standard, attaching the prospect of greater punishment for a counseled indigent, penalizes and chills what the law plainly allows.

B. LACK OF A TRUE COERCIVE EFFECT

The penalizing and chilling effect of the "actual imprisonment" standard is curiously unlike the other paradigmatic instances of penalizing or chilling a constitutional right. In the paradigmatic instances, the burden on exercising the right creates a chilling effect such that the defendant may be coerced into foregoing or waiving that right. For example, as discussed above, to avoid greater punishment following a reconviction, a defendant may waive the right to appeal. To avoid the prospect of capital punishment,

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117. Mazzone, *supra* note 49, at 804 (emphasis added) (citation omitted).

118. *See, e.g.*, United States v. Falcon, 347 F.3d 1000, 1004 (7th Cir. 2003) ("A vindictive prosecution claim arises when the government pursues prosecution in retaliation for the exercise of a protected *statutory or* constitutional right." (emphasis added)).

119. *See* Douglas v. California, 372 U.S. 353, 365 (1963) (Harlan, J., dissenting) ("[A]ppellate review is in itself not required by the Fourteenth Amendment . . . .").

120. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . ."); *see supra* note 44 and accompanying text.

a defendant may waive the right to a jury trial. Even practices upheld as constitutional satisfy the paradigm. To avoid greater punishment, a defendant may waive the right to a trial and plead guilty or enter into a plea bargain. But the "actual imprisonment" standard differs. It penalizes a defendant for either *exercising* the right to counsel or *waiving* the right to counsel.[121] As such, one might object that the "actual imprisonment" standard does not in some sense truly penalize or chill the enjoyment of the right to counsel because it equally penalizes and chills the waiver of that right.

There are a number of responses to this objection. First, that it also penalizes or chills the waiver of the right to counsel in no way minimizes that it penalizes and chills the enjoyment of the right to counsel. The defendant is still eligible for greater punishment if the defendant has the assistance of counsel. And this prospect of greater punishment penalizes and chills the enjoyment of the assistance of counsel.

Second, not only does the "actual imprisonment" standard simultaneously penalize and chill both the exercise and waiver of the right to counsel, but it may also exacerbate the coercive effect. The Sixth Amendment right to counsel includes two separate rights for an indigent: the right to the assistance of appointed counsel and the right to waive the assistance of counsel.[122] By making eligibility for greater punishment—imprisonment—conditional on foregoing exercise of either of the two separate Sixth Amendment counsel rights, the "actual imprisonment" standard penalizes and chills both aspects of the defendant's Sixth Amendment rights. It discourages a defendant from laying *any* claim to her Sixth Amendment counsel rights. The penalizing and chilling effect is thereby greater than if just one right—to the assistance of appointed counsel—was penalized and chilled.

C. COERCIVE EFFECT CANNOT ARISE AS A PRACTICAL MATTER

As discussed above, the only way to avoid eligibility for the greater punishment of imprisonment is to neither enjoy nor waive counsel. Thus, for there to be a coercive effect there must be a procedurally cognizable position in which the defendant neither enjoys nor waives counsel. But generally, a defendant must either have or waive counsel. Because there appears to be no middle ground between assistance of counsel and waiver of counsel, a defendant does not seem to have a procedurally cognizable position from which she could be coerced into avoiding both. Lacking such

121. *See supra* note 117 and accompanying text. Curiously, *Scott*, unlike *Argersinger* and *Shelton*, never explicitly states that a defendant is eligible for a punishment of imprisonment if the right to counsel is waived.

122. Faretta v. California, 422 U.S. 806, 807 (1975) (holding that a defendant has the separate right to waive the assistance of counsel and that this right is one aspect of a defendant's Sixth Amendment right to counsel).

a position, the coercive effect of the "actual imprisonment" standard cannot arise as a practical matter.

But there is such a middle position. In what might be termed the "don't tell and hope not to be asked" approach, a defendant neither volunteers that she is indigent, nor requests counsel, nor formally waives the right to counsel, and simply hopes the court fails to inquire. If the court does fail to affirmatively inquire into these matters, the defendant will have neither waived counsel nor received counsel. And thus such a defendant would preclude eligibility for the greater type of punishment. However, this approach would not work in all jurisdictions and with all courts. Those courts or jurisdictions that either require the defendant to affirmatively request counsel or require that the court affirmatively inquire into these matters might preclude this approach. But not all jurisdictions or courts have such requirements.[123] And even in those that do have such formal requirements, in the chaos and crushing dockets of misdemeanor courts, such procedural formalities are often not followed.[124] For an example we need look no further than *Scott*. The defendant was not given "notice of entitlement to retain counsel or, if indigent, to have counsel provided."[125] Scott neither claimed to be indigent nor was there any determination of indigency undertaken by the trial court.[126] No determination of indigency occurred until "the time of his initial appeal."[127] For another example, consider *Alabama v. Shelton*. While the trial "court repeatedly warned Shelton [the defendant] about the problems self-representation entailed," the court

123. *See, e.g.*, Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2163 (2013) (citing a study of Florida misdemeanor cases that showed "[s]ome defendants were not advised of their right to counsel and others were handed forms encouraging them to waive counsel"); *see also id.* (noting that numerous Michigan courts in misdemeanor cases routinely both decline to offer counsel and accept uninformed (and thus invalid) waivers).

124. *See, e.g.*, Hashimoto, *supra* note 36, at 481 n.92 (citing "evidence that many misdemeanor defendants are not informed of their right to counsel"); Natapoff, *supra* note 4, at 1315 ("Massive, underfunded, informal, and careless, the misdemeanor system propels defendants through in bulk with scant attention to individualized cases and often without counsel."); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 312 (2011) ("Unfortunately, recent studies describe how some jurisdictions fail—or even purposely refuse—to comply with either the *Argersinger* line of cases or their own more rigorous state rule [for appointing counsel].").

125. Scott v. Illinois, 440 U.S. 367, 375 (1979) (Brennan, J., dissenting).

126. *Id.* at 375 n.1 (Brennan, J., dissenting) ("The Illinois [appellate] courts and the parties have assumed his indigency at the time of trial for purposes of this case."); Case Notes, *supra* note 30, at 82 n.9 ("The reviewing courts at all levels assumed Scott to be indigent, even though he made no such claim at trial.").

127. *Scott*, 440 U.S. at 375 n.1 (Brennan, J., dissenting).

neither offered to appoint counsel[128] nor ensured that Shelton had legally waived his right to counsel.[129]

As seen in the examples of *Scott* and *Shelton*, a defendant may well be in the "middle position" of being indigent and neither having nor legally waiving counsel. As a result, the "actual imprisonment" standard does not merely have a theoretical penalizing or chilling effect. It can, as a practical matter, actually arise.

CONCLUSION

By attaching the prospect of greater punishment for enjoying the assistance of appointed counsel, *Scott*'s "actual imprisonment" standard penalizes an indigent's exercise of the right to counsel and coerces a defendant into avoiding the assistance of appointed counsel. As a general principle of constitutional law, such burdening of a constitutional or statutory right may itself be unconstitutional. Because of the general lack of consistency in applications of this principle to individual cases, and because of the lack of specific authority as to the application of this principle to burdening the right to appointed counsel, it is not entirely clear whether the penalizing and chilling effect of *Scott*'s "actual imprisonment" standard is unconstitutional. This Essay argues, however, that the *Scott* "actual imprisonment" standard is plausibly unconstitutional.

128. Alabama v. Shelton, 535 U.S. 654, 658 (2002).

129. On Shelton's appeal of his conviction and suspended sentence on Sixth Amendment grounds, the Alabama Court of Criminal Appeals "initially held that an indigent defendant who receives a suspended prison sentence has a constitutional right to state-appointed counsel and remanded for a determination whether Shelton had" waived his right. *Id.* at 658–59. On remand, the trial court determined that Shelton had not effected a legal waiver of his right to counsel. Shelton v. State, 851 So.2d 83, 90 (Ala. Crim. App. 1998).