The Embarrassing Sixth Amendment

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In his 1989 essay The Embarrassing Second Amendment, *Sanford Levinson suggested that left-leaning scholars avoid studying the Second Amendment because they are embarrassed that its text might mean what gun-rights proponents claim it means—an individual right to bear arms. Levinson urged such scholars to better engage the text, both to model intellectual integrity and to avoid unnecessarily ceding the terms of a critical constitutional debate.*

This Article makes a similar argument with respect to the right to counsel. The Sixth Amendment guarantees the "the assistance of counsel" in "all criminal prosecutions." To be sure, the Supreme Court held in Scott v. Illinois *(1979) that the right is not "fundamental" in state cases where a defendant is not sentenced to jail time, citing federalism and budget concerns. Relying on* Scott, *courts routinely subject defendants to criminal conviction, fines, pretrial detention, and significant collateral consequences like deportation, all without a lawyer. Yet* Scott *appears squarely at odds with the Sixth Amendment's text. To retain* Scott, *the Court would either have to concede that "all criminal prosecutions" should not be enforced as written or apply the text only in federal court, not state court. Either concession would be hard for the current Court to make, given its ostensible commitments to textualism and to "single-track incorporation."*

Why, then, have progressives not pushed harder to overturn Scott *on text-based grounds? This Article suggests they may be embarrassed by the argument's implications for three reasons. First, many scholars*

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assume that the Sixth Amendment, under a textualist or originalist lens, does not guarantee a right to appointed counsel for indigent defendants. It follows that progressives must avoid critiquing Scott *on textualist grounds to avoid jeopardizing the right to appointed counsel under* Gideon*. Second, progressives might be wary that the Court would embrace "dual-track incorporation," justifying the dilution of other rights in state court. Third, progressives appear to increasingly believe that an expanded right to counsel, like other procedural rights, is unimportant or even counterproductive. This Article rebuts each of these concerns in turn and ultimately argues—as did Professor Levinson in the Second Amendment context—that scholars and litigants should engage the text and follow it where it leads: a right to counsel in all criminal prosecutions.*

INTRODUCTION

In *The Embarrassing Second Amendment*, Sanford Levinson explored why civil libertarians who generally champion the Bill of Rights are silent on the Second Amendment. He suspected that many "card-carrying" ACLU members are held back by a "subconscious fear": that a "plausible," if not "winning," reading of the Second Amendment's text supports a robust individual right to bear arms and is thus at odds with their political support of gun regulation.[1] Levinson urged scholars to stop "treat[ing] the Second Amendment as the

1. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989).

equivalent of an embarrassing relative"[2] and instead to engage the text for two reasons. First, because the gun lobby's text-, history-, and structure-based arguments are plausible and need to be taken seriously if they are to be refuted.[3] Second, since civil libertarians conspicuously reject "prudentialist" arguments against full enforcement of other costly rights, it would be hypocritical to wield them as a justification for refusing to enforce the Second Amendment's text.[4] Over thirty years later, Levinson appears vindicated: after the triumph of both originalism and the individual-right-to-bear-arms argument at the Supreme Court, the legal academy is more fully engaging with the text and history of the Second Amendment.[5]

This Article explores a similar phenomenon and offers a similar admonition with respect to the constitutional right to counsel. That is, it explores how criminal justice reformers have ignored, consciously or not, an obvious and persuasive text-based argument for expansion of the right to counsel to include all crimes, even those in which the defendant is not sentenced to prison. The Article draws from sources that self-proclaimed textualists typically deem persuasive, including the text itself, other constitutional provisions, similar language in state constitutions and colonial charters, Founding-era dictionaries, and Founding-era and common law English practices. It then offers potential explanations for progressives' failure to engage the text more fully: the fear that a text-based approach to the right to counsel might jeopardize the right to appointed counsel established in *Gideon v. Wainwright*; the fear that the high cost of enforcing the right to counsel in state courts will lead the Court to embrace "dual-track incorporation," a doctrine allowing a watered-down version of the Bill of Rights in state court; and the concern that an expanded right to counsel is largely meaningless or even counterproductive.

The text-based argument for a Sixth Amendment right to counsel in all criminal prosecutions is surprisingly straightforward. The Sixth Amendment guarantees that, "in *all criminal prosecutions*, the accused shall enjoy the right . . . to the assistance of counsel for his defence."[6] That language seems clear and categorical. Not surprisingly, then, no prosecutor, commentator, or judge appears to have ever argued that the text or history of the Sixth Amendment can be squared with limiting the right only to *some* criminal prosecutions. After all,

2. *Id.* at 658.
3. *Id.* at 643–49.
4. *Id.* at 657–59.
5. *See, e.g.*, Mark Anthony Frassetto, *Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the Outcome of Post-*Heller *Second Amendment Cases*, 29 WM. & MARY BILL RTS. J. 413, 421–38 (2020) (analyzing different methodological decisions courts must make in analyzing the history of the Second Amendment, including the relevant time period, prevalence, regional variation, and alternative legal traditions); A.W. Geisel, *Bruen* Is Originalish 13–18 (Jan. 23, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335950 [https://perma.cc/S58H-XATJ] (situating Justice Thomas's "text-and-history" test in *Bruen* somewhere in between originalism and non-originalism and classifying the decision within the larger originalist project).
6. U.S. CONST. amend. VI (emphasis added).

other constitutional provisions using such categorical language have been interpreted to include all crimes; when the Founders wanted to limit a right to only some crimes, they did so explicitly. Moreover, Founding-era dictionaries, commentaries, and court cases do not appear to have limited their understanding of "criminal prosecutions" based on whether the prosecution was serious or resulted in jail time. While English language dictionaries have always recognized that "crime" is sometimes colloquially used to denote particularly grave or deplorable conduct, the best available evidence strongly indicates a public understanding of any formally charged crime, even petty offenses "summarily" tried (by a judge instead of jury), as criminal prosecutions. In addition, colonial and early state constitutions and English summary-conviction practices support a reading of "all criminal prosecutions" as including all crimes, regardless of whether the offender received a jail sentence. Indeed, the right to counsel in England was more robust in misdemeanors than in felonies; the right to counsel in state constitutions and the Sixth Amendment was in part an attempt to expand the right to include both misdemeanors and felonies.

To be sure, the Supreme Court held in *Scott v. Illinois* (1979) that, where a defendant does not receive a jail sentence, the right to counsel does not bind states through "selective incorporation" via the Fourteenth Amendment's Due Process Clause.[7] In so holding, the Court relied largely on federalism and budgetary concerns implicated by requiring states to provide lawyers for indigent defendants charged with state crimes. Even though *Scott* involved an indigent state defendant, later courts have assumed it also limits the right to retained counsel and the right to counsel in federal court, given longstanding precedent that the right to appointed and retained counsel are coterminous and the rights to counsel in federal and state court are equivalent.[8]

While *Scott* remains good law, it is flatly inconsistent with the current Supreme Court majority's commitments to textualism and so-called "single-track incorporation," the doctrine holding that constitutional rights deemed binding on the states through the Fourteenth Amendment should have the same meaning and scope as they do in federal court.[9] As for the text, the *Scott* majority did not even attempt to make the case that the phrase "all criminal prosecutions" in the Sixth Amendment somehow means only serious prosecutions or prosecutions that end in jail time. And, however persuasive one finds the pragmatism and federalism concerns the Court invoked in declining to fully enforce the right in *state court*, such concerns hold no sway in federal court, where the Sixth Amendment directly applies. In turn, the Court has repeatedly affirmed that the Sixth Amendment, like all incorporated rights, has the same meaning in federal and state court; there is no "dual-track incorporation" in

7. 440 U.S. 367, 373–74 (1979). "Selective incorporation" refers to the Court's practice of addressing piecemeal whether each right in the Bill of Rights is sufficiently fundamental to be binding on the states through the Fourteenth Amendment's Due Process Clause. *See* discussion *infra* Part III.B.

8. *See* discussion *infra* Part III.

9. *See infra* Part III.B.

which only a "watered-down" version of a right applies in state court.[10] Since *Scott* is inconsistent with the Sixth Amendment and the Sixth Amendment is an incorporated right, *Scott* must surely be wrong.

In one sense, overturning *Scott* and recognizing this broader right to appointed counsel in all criminal prosecutions would seem a criminal justice reformer's dream. Every year, the United States prosecutes over sixty thousand federal petty misdemeanors, including everything from political protests (on both sides of the aisle)[11] to DUIs in national parks to physical assaults on Tribal land.[12] And, by some estimates, well over half of federal defendants whose cases end in criminal charges are forced to proceed pro se.[13] Meanwhile, in state courts, thousands of low-income people plead guilty to criminal misdemeanors each year without ever meeting a lawyer, and some face trial without a lawyer.[14]

Surely few would choose to face such charges alone. Some cases, as in *Scott* itself, involve having to pick a jury, and many involve legally complex issues such as search-and-seizure law. And losing can be devastating: even absent a jail sentence, a prosecution may expose a person to pretrial detention, conviction, and collateral consequences, from deportation to loss of employment opportunities to sex offender registration. Indeed, a subfield of "misdemeanors studies" now exists to highlight the outsized effect of misdemeanors on the justice system and on those accused.[15]

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10. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1398 (2020) (rejecting notion of "dual-track" incorporation); *see also* discussion *infra* Part III.B.

11. *See, e.g.*, Ryan Lucas, *Review of Federal Charges in Portland Unrest Shows Most Are Misdemeanors*, NPR (Sept. 5, 2020), https://www.npr.org/2020/09/05/909245646/review-of-federal-charges-in-portland-unrest-show-most-are-misdemeanors [https://perma.cc/6LVP-Z29N]; Alanna Durkin Richer, *Court Tosses Jan. 6 Sentence in Ruling that Could Impact Other Low-Level Capitol Riot Cases*, AP NEWS (Aug. 18, 2023), https://apnews.com/article/capitol-riot-appeals-court-new-sentence-defendant-doj-32c57b7cfa26be9c477fba4c9cbfa301 [https://perma.cc/G6VQ-QZ7A] (noting petty offense charges in some January 6 cases).

12. *See generally* Mary C. Warner, Note, *The Trials and Tribulations of Petty Offenses in the Federal Courts*, 79 N.Y.U. L. REV. 2417, 2417–18 (2004) (noting sixty thousand to seventy thousand petty offenses annually in the federal system, and offering examples). While *Scott* did not limit its holding to misdemeanors, all state and federal courts generally ensure the appointment of counsel in felonies.

13. Erica Hashimoto has conducted the most comprehensive empirical examination of the right to counsel in federal petty misdemeanors. She notes huge gaps in available data but estimates that, from 2000 to 2005, 64 percent of federal misdemeanor defendants proceeded pro se. Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 489–90 & n.128 (2007). Because some federal misdemeanors are deemed by statute as non-petty (if they carry more than six months' maximum sentence), this statistic alone does not show how many petty misdemeanor cases are pro se.

14. *See* discussion *infra* Part I.A.

15. A handful of scholars have been theorizing misdemeanors for decades. *See generally* MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT (1979) (explaining how low-level courts typically achieve goals of the criminal process through the accusation and pretrial supervision process rather than through adjudication and sentencing). But more recently, scholars have focused on misdemeanors. *See generally* Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637 (2021) (explaining the high stakes of order-maintenance misdemeanor prosecutions for norm creation and enforcement); Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971 (2020) (presenting a comprehensive empirical portrait of American misdemeanor practice); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL

But as the second half of this Article explores, there may be reasons this argument's natural champions have not fully argued or litigated it.[16] First, some may fear there is a plausible, even highly persuasive, argument that the Sixth Amendment's text guarantees a right only to *retained* counsel and that the *Scott* majority was right in lamenting that the Court "ha[s] now, in our decided cases, departed from the literal meaning of the Sixth Amendment."[17] On that logic, some might fear that invoking the text and history of the Sixth Amendment to establish a right to counsel in "all" criminal prosecutions would lend ammunition to "textualist" or "originalist" judges who might well overturn *Gideon* itself if given the chance.[18] As I explain below, there are persuasive arguments to retain *Gideon*, even from a textualist perspective. Indeed, *Gideon* and its federal precursor, *Johnson v. Zerbst*, were authored by "textualist-originalist" Justice Hugo Black.[19] Others have advanced persuasive due process- and equal protection-based arguments for *Gideon*. But, as advocates of gun control have learned, avoiding text-based arguments for fear of what the current Court will do

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CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018) (arguing that low-level courts engage in deliberate practices that simply manage populations, rather than providing assembly-line justice); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018) (arguing that misdemeanors are over-prosecuted and come with few procedural protections); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953 (2018) (arguing that misdemeanors' high stakes stem largely from collateral consequences that, unlike formal penalties, do not lead to procedural protections); Irene Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738 (2017) (arguing that overburdened public defender offices should not put their most junior and inexperienced attorneys in misdemeanor court); John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1 (2013) (arguing that the stakes and complexity of misdemeanor cases are high enough that they should trigger the right to counsel); Erica J. Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019 (2013) (explaining how the alleged right to counsel in misdemeanor cases involving probation sentences, since *Alabama v. Shelton*, 535 U.S. 654 (2002), is not recognized in practice); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011) (explaining the high stakes of misdemeanor arrests and convictions, from deportation to sex offender registration to loss of public housing).

16. Many litigants arguing for an expanded right to counsel have stated that the Sixth Amendment's plain language says "all criminal prosecutions." But a full textualist claim (set forth here) does not appear to have been made, or addressed, yet. *See* discussion *infra* Part I.

17. Scott v. Illinois, 440 U.S. 367, 372 (1979).

18. *See, e.g.*, Garza v. Idaho, 139 S. Ct. 738, 757–58 (Thomas, J., dissenting, joined by Gorsuch, J.) (noting there was no right to appointed counsel at common law, and arguing that neither *Gideon* nor its immediate precedents "attempted to square the expansive rights they recognized with the original meaning" of the right to counsel); *Scott*, 440 U.S. at 370 ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense.").

19. Justice Hugo Black, who died in 1971, never actually used the modern term "textualist" to describe himself. Others, however, have described him as identifying as such and have described his judicial approach as textualist. *See, e.g.*, Akhil Reed Amar, *America's Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2008 n.33 (2006) (describing Justice Hugo Black as "a liberal lion and a confessed textualist-originalist"); Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 26 (1994) (describing Justices Black's and Scalia's "comparably intense and persistent proclamations of fidelity to the constitutional text").

will not stop the Court from addressing such issues on its own. Better to be ready to defend *Gideon* on grounds consistent with the Amendment's text and history than to hope the issue never arises.

Second, some civil libertarians might worry that challenging *Scott* as inconsistent with the Sixth Amendment's text might impel the Court to save *Scott* by embracing "dual-track incorporation," paving the way for a "watered-down" version of other rights in state court. Yet this concern, too, does not justify ignoring a text-based argument for a more expansive right. The Court's reaffirmance of single-track Sixth Amendment incorporation has been so enthusiastic and categorical, including most recently in *Ramos v. Louisiana*,[20] that a complete about-face seems unlikely, at least with respect to already-incorporated rights. Moreover, all other constitutional criminal procedure rights except the Fifth Amendment right to indictment have already been incorporated and enforced in state court. It is unlikely courts would revisit these rights, even under a dual-track approach. Admittedly, the *scope* of the rights to jury and counsel, in terms of the categories of cases to which they apply, is uniquely costly for state courts. But if the alternative is simply to deny the expanded right to all defendants, then a dual-track approach would at least still allow federal defendants to enjoy them.

Finally, some progressives might even question whether a right to counsel in all criminal prosecutions *should* be enforced. Several commentators argue that public defenders make matters worse by legitimating an overly punitive system;[21] others argue that procedural rights are largely useless.[22] But this concern, too, is not a reason to avoid engaging the Sixth Amendment's text more fully. Two things can be true: the presence of lawyers might have a legitimating effect on unjust outcomes, and denying someone a lawyer who is facing criminal charges is unfair. As explained below, lawyers unquestionably improve outcomes in individual criminal cases, and some jurisdictions have found ways to make the right automatic rather than allowing it to be waived as part of hallway plea deals. The answer to the legitimacy concern is not to ignore obvious legal arguments for expanding the right to counsel, but to make the system more just and to find ways for lawyers to help, rather than hurt, that cause.[23]

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20. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1398 (2020) (squarely rejecting a "'dual-track incorporation" approach that would apply a "watered-down" version of a right in state court).

21. Several articles in a recent symposium series of Harvard's online journal *Inquest* explore whether *Gideon* helps or impedes substantive justice for criminal defendants. *See, e.g.*, Premal Dharia, Gideon *Turns Sixty*, INQUEST (Mar. 8, 2023), https://inquest.org/gideon-turns-sixty/ [https://perma.cc/B76U-CKNL] (introductory symposium article); Paul Butler, *Poor People Lose*, INQUEST (Mar. 20, 2023), https://inquest.org/poor-people-lose/ [https://perma.cc/2CY9-8ZZJ].

22. *See, e.g.*, Renée Lettow Lerner, *The Resilience of Substantive Rights and the False Hope of Procedural Rights: The Case of the Second Amendment and the Seventh Amendment*, 116 NW. U. L. REV. 275, 278 (2021) (arguing that constitutional criminal procedure rights are weak and easily manipulable).

23. *See* discussion *infra* Part III.C.

Of course, a text-based argument for a right to counsel in "all" criminal prosecutions might also have been overlooked or shelved for practical or doctrinal reasons: those most likely to make it are unrepresented; some might assume *Scott* is bulletproof and applies in federal court; and some might incorrectly assume that the so-called "petty offense exception"[24] to the jury right—itself never fully and fairly litigated, and based on since-disavowed dictum and several glaring legal and historical misassumptions[25]—applies to the right to counsel. But these practical barriers do not explain the lack of engagement on this issue from scholars and impact litigation specialists.

Whatever the reason for not advancing the text-based argument for a right to counsel in "all" criminal prosecutions, the choice by litigants and courts to avoid this straightforward issue has resulted in an interpretation of the Sixth Amendment that is not readily defensible under any theory of constitutional interpretation. This interpretation of the Sixth Amendment denies thousands of defendants a lawyer in cases where they face serious consequences. It may be a truce to allow this interpretation to prevail, but, if so, it is an incoherent and cynical one.

This Article proceeds as follows. Part I explains how the Court has interpreted the Sixth Amendment's text over time, culminating in *Scott*, which holds there is no right to counsel in cases—even jury-demandable cases—where the defendant is not sentenced to "actual incarceration."[26] Part II sets forth a text-based argument for a right to counsel in "all criminal prosecutions." Part III explores, and refutes, reasons that progressives might have for not engaging more fully with such an obvious text-based argument.

I.
THE EVOLUTION AND EXISTING CRITIQUES OF *SCOTT*'S "ACTUAL INCARCERATION" RULE

This Part briefly describes how courts have come to interpret the Sixth Amendment right to counsel to apply only in prosecutions where the defendant actually receives jail time, even as the Amendment says "all criminal prosecutions." It then explains how critics of *Scott v. Illinois*—the case establishing this actual-incarceration standard in state court—ignored text-based arguments against *Scott*. Instead, critics have argued that modern misdemeanor

24. *See generally* Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 DUKE L.J. 599 (2022) (arguing against the "petty offense exception" to the jury trial, i.e., the doctrine that the Sixth Amendment right to jury does not apply in petty misdemeanors carrying a potential sentence of six months or less).

25. *See* discussion *infra* Part II.B.2; *see generally* Roth, *supra* note 24 (arguing that the "petty offense exception" has no basis in text, history, or logic).

26. While the *Scott* majority does not use the term "actual incarceration," I use the term to describe the *Scott* standard, as others have. *See, e.g.*, Justin Marceau & Nathan Rudolph, *The Colorado Counsel Conundrum: Plea Bargaining, Misdemeanors, and the Right to Counsel*, 89 DENV. U. L. REV. 327, 328 (2012).

convictions carry collateral consequences just as grave as incarceration or that courts should more fully enforce *Scott*.

The question of whether the Sixth Amendment right to counsel applies only to certain serious criminal prosecutions, rather than "all criminal prosecutions," was not present for most of the nation's history. Before 1938, the only person who could have challenged a limit on counsel would have been a federal defendant denied a retained lawyer. Yet even before the Sixth Amendment's ratification, Congress had guaranteed a statutory right of federal defendants to retained counsel in all criminal cases and to appointed counsel in capital cases.[27] Numerous states followed suit by guaranteeing a right to retained counsel in their state constitutions or statutes.[28] Thus, there would have been no occasion for a federal defendant to bring a constitutional claim for the right to retained counsel. Meanwhile, the Supreme Court did not recognize a constitutional right to appointed counsel until the infamous "Scottsboro Boys" case (*Powell v. Alabama*) in 1932. Even then, the right was based on due process, not the Sixth Amendment.[29] The Court did not recognize any criminal procedure rights as binding on states through incorporation until 1948.[30] Moreover, outside of high-profile cases with pro bono counsel on appeal, there was little opportunity for pro se defendants to challenge the denial of counsel.[31]

The Supreme Court appeared, for a short while, to have championed a federal right to appointed counsel in all criminal prosecutions, even petty crimes. In *Johnson v. Zerbst* (1938), the Supreme Court held that the Sixth Amendment guarantees a right to *appointed* counsel for federal defendants who cannot afford a lawyer.[32] The *Zerbst* opinion, penned by Justice Hugo Black, was short and

27. *See* Judiciary Act of 1789, § 35, 1 Stat. 73, 92 ("[I]n all courts of the United States, the parties may plead and manage their own causes personally or by assistance of such counsel . . . ."); An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112, 118 (1790) (providing that those accused of "treason or other capital offence" have a "full defence by counsel learned in the law" and that the judge assign the defendant, upon request, the counsel of his choice and ensure "free access" to the defendant).

28. *See* WILLIAM BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 28–29 (1955).

29. *See* Powell v. Alabama, 287 U.S. 45, 72 (1932) (recognizing a due process right to appointed counsel under the special circumstances of the Scottsboro case).

30. The Court had recognized the potential for applying criminal procedure rights to states through "incorporation" into the Fourteenth Amendment in *Palko v. Connecticut*, 302 U.S. 319, 327–28 (1937) (declining to incorporate double jeopardy), but did not deem a criminal procedure right binding until 1948. *See In re* Oliver, 333 U.S. 257, 277–78 (1948) (involving Sixth Amendment rights to public trial and notice of nature and cause of accusation).

31. Several organizations, including the NAACP and the International Labor Defense (the American Communist Party's legal defense arm), were involved in the representation of the Scottsboro defendants on appeal, retrials, and post-conviction hearings. Moreover, as Shaun Ossei-Owusu has documented, legal aid societies that existed before *Powell* were mostly available only to European immigrants. *See* Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1183–87 (2019) (describing how Chinese and African-American communities were forced to engage in self-help during this period). Ossei-Owusu also explores why the Court chose the case of Clarence Gideon—a White defendant in a non-capital case—to revisit the special circumstances doctrine and posits that the history of the right to counsel is largely one of wealthy, White establishment advocates crafting the narrative. *Id.* at 1206–08.

32. 304 U.S. 458, 467–68 (1938).

categorical, describing the lack of counsel (or of a valid waiver) as no less than a jurisdictional bar: *"*The Sixth Amendment withholds from federal courts, *in all criminal proceedings*, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[33] While *Zerbst* involved a waiver of counsel in a *felony* case, the Court later cited it in dictum for the proposition that "counsel must be furnished to an indigent defendant prosecuted in a federal court *in every case, whatever the circumstances*."[34] At least some lower courts later held that *Zerbst* applied to misdemeanors.[35] Moreover, the United States's brief in *Zerbst* not only conceded but strategically relied on the assumption that the right to appointed counsel extended to jury-demandable misdemeanors and non-jury petty offenses.[36]

Yet when Congress finally unveiled new rules of procedure for federal petty offenses in the 1940s, the rules appeared to exempt petty cases from the right to appointed counsel. Petty federal misdemeanors were rare before 1930, when Congress first formally labeled some offenses as "petty" and allowed prosecutors to charge these offenses by information rather than indictment.[37] Congress further streamlined the trial of petty offenses in 1940 by allowing commissioners rather than district court judges to try these offenses.[38] The rules of procedure for commissioners, adopted in 1940, did not mention a right to counsel other than to say that the trial should be scheduled to allow "for representation by counsel if desired."[39] The 1946 Federal Rules of Criminal Procedure included an explicit right to appointed counsel.[40] However, they explicitly exempted petty offenses, where a commissioner need only tell the defendant of their "right to retain

33. *Id.* at 463 (emphasis added); *see also id.* at 467 ("Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.").

34. Foster v. People, 332 U.S. 134, 136–37 (1947) (emphasis added) (distinguishing the broad federal right from the special-circumstances right to appointed counsel in state courts).

35. *See, e.g.*, Evans v. Rives, 126 F.2d 633, 641 (D.C. Cir. 1942) (applying *Zerbst* to one-year sentence misdemeanor for failure to pay child support).

36. The United States's brief in *Zerbst* argued that Johnson had waived his right to counsel (in a felony) and cited *Schick v. United States* (involving a federal misdemeanor deemed "petty" for jury trial purposes) for the proposition that the "constitutional privilege" of the right to counsel can be waived in either a petty or felony case. Brief for the United States at 11, Johnson v. Zerbst, 394 U.S. 458 (1938) (No. 699), 1938 WL 63891, at *11. The premise underlying the government's waiver argument—that the right to counsel applies in petty cases like *Schick*—was not treated as controversial in *Zerbst*.

37. *See* Pub. L. No. 71-548, 46 Stat. 1029 (1930) (adding category of "petty" offenses to Title 18's "Criminal Code" and allowing charge by information or complaint). The Court upheld the constitutionality of this statute—essentially holding that petty misdemeanors were not "infamous" for purposes of the Fifth Amendment's Indictment Clause—in *Duke v. United States*, 301 U.S. 492 (1937).

38. *See* Act of October 9, 1940, ch. 785, 54 Stat. 1058.

39. Rules of Procedure and Practice for the Trial of Cases Before Commissioners, R. II, 311 U.S. 733, 734 (1940).

40. *See* FED. R. CRIM. P. 44 (1946) (requiring judges to appoint counsel for those who cannot afford a lawyer and do not waive); *id.* at advisory committee's notes (noting that Rule 44 was intended to comply with *Zerbst*).

counsel."[41] The advisory committee notes do not explain how the drafters reconciled this exemption with *Zerbst* or with the text of the Sixth Amendment. But the exemption is likely explained by the drafters' knowledge of the "petty offense exception" to the jury right and an assumption that budgetary concerns would justify the limit.

Before federal courts had a chance to recognize a constitutional right to appointed counsel in petty federal prosecutions, the Supreme Court decided a series of state court cases, ending in *Scott*, that limited the right to appointed counsel in state court. First, the Court unanimously held in *Gideon v. Wainwright* (1963) (again, in a Justice Black opinion) that the right to appointed counsel applied to states as well, through incorporation.[42] While *Gideon*, like *Zerbst*, involved a felony, its language was broad enough to apply to misdemeanors;[43] Gideon's lawyer, Abe Fortas, even insisted at argument that the right extended to the lowliest traffic case:

> I see no real difficulty, Mr. Justice [Stewart], in saying to . . . people . . . when they're arrested for [a] traffic violation, if you want to see the public defender, he's in Room 102, and to assign a public defend[er], anybody who wants it. It really works. It will work. It sounds crazy, perhaps, but it work[s]. It'll work, I'm sure it will.[44]

Still, the opinion did not explicitly mention petty offenses nor jury-demandable misdemeanors, and *Gideon*'s application to such cases was left unclear.

As *Gideon* was pending, Congress considered a new law, the Criminal Justice Act (CJA), that would not only codify *Zerbst* but also federally fund public defenders in federal court. President Kennedy mentioned the CJA in his

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41. FED. R. CRIM. P. 5(b); *see also* 6 FEDERAL RULES OF CIVIL PROCEDURE: WITH NOTES AND INSTITUTE PROCEEDINGS 129 (Alexander Holtzoff ed., 1946) (noting that the rules were intended to guarantee appointed counsel only in proceedings before district court judges and not commissioners, thus exempting petty offenses).

42. 372 U.S. 335, 341 (1963).

43. *See, e.g.*, *id.* at 342, 344 ("[T]he Court in *Betts* was wrong . . . in concluding that the Sixth Amendment's guarantee of counsel is not . . . fundamental . . . ."; "[I]n deciding . . . that 'appointment of counsel is not a fundamental right . . .' the [*Betts*] Court . . . made an abrupt break with . . . precedents."; "[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. This seems . . . an obvious truth."; "The right of one charged with crime to counsel may not be deemed fundamental . . . in some countries, but it is in ours."). The *Powell* Court's sweeping rhetoric about the need for counsel in every criminal case also appeared to encompass misdemeanors, a point the *Argersinger* Court later made. *See* Argersinger v. Hamlin, 407 U.S. 25, 32–33 (1972) (noting that while *Powell* involved a felony, its "rationale has relevance to any criminal trial" and that *Powell* "suggest[s]" the importance of counsel in all cases, "even those" with short sentences).

44. *See* Oral Argument at 50:57–51:21, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155), https://www.oyez.org/cases/1962/155 [https://perma.cc/KAU6-T53L]; *see also id.* at 52:16–52:56 ("Justice Clark: I just wonder if the legal aid would want to take on a traffic . . . They have so many felons already, I'm just wondering. Abe Fortas: Again, Mr. Justice Clark, I think that most people involved in traffic offense really be just sort of the—if I may use, vulgarism, the 'oddball' who's involved in a minor traffic offense who will say that he wants a lawyer. But if he's got a real problem—if a person involved in traffic offense has a real problem and a real defense and really need—thinks he should have a lawyer, why not.").

1963 State of the Union address, declaring to the nation in apparently categorical terms that "[t]he right to competent counsel must be assured *every man accused of crime* in a Federal court regardless of his means."[45] Yet the final version of the law, passed in 1964, explicitly exempted from its protections those "petty" offenses punishable by six months or less in prison, or fines of $500 or less.[46]

Notably, the conference report on the CJA conceded both that petty offenses are "criminal cases" and that they are within the scope of the Sixth Amendment:

> The bill as passed by the Senate is restricted in scope to felonies and misdemeanors other than petty offenses. The House version of the bill would cover *all criminal cases, including petty offenses*. Because of the unavailability of adequate statistics to determine the volume of petty offense cases in the Federal courts, and because these cases are of a relatively minor nature, the committee recommends that petty offenses not be covered. *The constitutional mandate of the sixth amendment is without doubt applicable to petty offenses, but it is the view of the conferees that adequate representation may be afforded defendants in such cases without the need for providing for compensation for counsel*. In this way, money appropriated under the act will not be dissipated from the areas of greatest need, cases involving representation for crimes punishable by more than 6 months' imprisonment.[47]

Even as the occasional commentator questioned the constitutionality of the Act's exemption for petty offenses,[48] and Justice Black rejected 1971 magistrate rules

45. *See* H.R. REP. NO. 88-864, at 2 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2990, 2991 (emphasis added).

46. Criminal Justice Act of 1964, Pub. L. No. 88-455, 578 Stat. 552 (1964) (codified as amended at 18 U.S.C. § 3006A).

47. H. REP. NO. 88-1709 (1964) (Conf. Rep.), *reprinted in* 1964 U.S.C.C.A.N. 3000, 3002 (emphasis added); *cf.* H.R. REP. NO. 88-864 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2990, 2992 ("Subsection (a) of this new section of title 18 provides that *in every criminal case arising under the laws of the United States*, the U.S. commissioner or the court must advise the defendant . . . that counsel will be appointed . . . if he is financially unable to retain counsel." (emphasis added)); *see also Amendments to the Criminal Justice Act of 1964: Hearings on S. 1461 Before the Subcomm. on Const. Rts. of the Comm. on the Judiciary*, 91st Cong. 328 (1969) (excerpts from DALLIN H. OAKS, THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS (1967)) ("The framers of the [CJA] did not doubt—although prominent courts do—that the Sixth Amendment right to counsel guarantees applied to misdemeanors and petty offenses as well as felonies. Rather, they excluded petty offenses as a matter of priority of expenditures.").

48. Carl W. McKinzie, *The Indigent Defendant's Right to Counsel in Misdemeanor Cases*, 19 SW. L.J. 593, 601 (1965) (noting a Fifth Circuit case upholding a *state* right to counsel in a ninety-day misdemeanor and arguing that, "[i]f this is to become the standard for state courts under the fourteenth amendment, surely the federal courts must be held to at least as demanding a standard under the sixth amendment. If this be true, the portion of the Criminal Justice Act relating to petty offenses would appear to be unconstitutional if literally applied.").

for not providing for counsel in such cases,[49] federal courts had not addressed the issue when it came before the Supreme Court in 1972.[50]

The closest the Supreme Court came to affirming a right to counsel in "all criminal prosecutions" was in *Argersinger v. Hamlin* (1972).[51] There, a unanimous Court held that the right to appointed counsel applied in state court, even in non-jury petty misdemeanors, where the defendant receives a jail sentence.[52] Like the drafters of the CJA, the State of Florida (the respondent in *Argersinger*) did not argue that petty crimes are not "criminal prosecutions." Rather, it argued against a textualist approach, insisting that the "'absolute right' to counsel in all criminal prosecutions must be qualified by practical exigencies"[53] and noting that the Court had already abandoned a literal approach with respect to the jury right and could do the same here.[54] The Court agreed with Argersinger to a point. The majority opinion broadly declared that "there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided."[55] In this respect, the majority conflated the common law right of barristers to advocate for defendants in jury-demandable misdemeanors (which was well established and surprisingly denied to felons outside treason cases) with the right of a defendant in a summary non-jury proceeding to counsel (which was not established statutorily until 1836, along with the right in felony cases). The concurring justices agreed that there was no free-floating "petty offense

49. *See* Federal Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107 (giving the newly created category of "magistrates" the power to try petty offenses); Rules of Procedure for the Trials of Minor Offenses Before United States Magistrates, Rule 3(b), 51 F.R.D. 197, 201 (1971) (noting that in all petty offense cases, the magistrate shall "inform the defendant of his right to counsel" even though rules for other cases said appointed counsel as well); *id.* at 209 (Black, J., dissenting) (opining that the Rules are unconstitutional because "[b]y its own terms, the [Sixth] Amendment makes no exception for so-called 'petty offenses'").

50. Several state courts did, however, interpret *Gideon* as applying to misdemeanors, even before *Argersinger*. *See* State v. Young, 863 N.W.2d 249, 262–63 (Iowa 2015) (collecting cases); *see also In re* Johnson, 398 P.2d 420, 422 (Cal. 1965) (noting the California Constitution provides right to counsel "in criminal prosecutions, in any court whatever," which includes misdemeanors); Bolkovac v. State, 98 N.E.2d 250, 252–53 (1951) (observing the Indiana Constitution provides for the right to counsel in "all criminal prosecutions" and makes no distinction between felonies and misdemeanors); Decker v. State, 150 N.E. 74, 76 (Ohio 1925) (noting the Ohio Constitution provides for counsel to appear "in any trial, in any court" includes misdemeanor prosecutions); Hunter v. State, 288 P.2d 425, 428 (Okla. Crim. App. 1955) (noting the "all criminal prosecutions" language under the Oklahoma Constitution and finding that "[n]o distinction is drawn between a felony or misdemeanor"); Brown v. Dist. Ct., 570 P.2d 52, 55 (Or. 1977) (en banc) (observing that "all criminal prosecutions" in the Oregon Constitution includes all conduct that the legislature has defined as a criminal offense).

51. 407 U.S. 25 (1972).

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

53. Brief of Respondent at 10, Argersinger v. Hamlin, 407 U.S. 25 (1971) (No. 70-5015), 1971 WL 126422, at *10.

54. *Id.* at *13 (arguing that "criminal prosecutions" should have the same meaning for jury and counsel rights).

55. *Argersinger*, 407 U.S. at 30.

exception" to the right to counsel but insisted that the dispositive fact in Argersinger's favor was *actual incarceration*, and that the right should not extend further.[56] While the Court's opinion was written to appease all nine justices, the rift over the relevance of actual incarceration would arise again in *Scott*.

Predictably, seven years (and a few changes in the Court's makeup) later, a thin majority of the Court held in *Scott v. Illinois* (1979) that the right to appointed counsel does not apply where a state defendant does *not* receive a jail sentence, even if the crime is not "petty," meaning that it is a jury-demandable offense carrying more than six months' potential imprisonment.[57] Scott did argue that the Sixth Amendment's language covers "all criminal prosecutions" and cannot be trumped by policy or efficiency concerns.[58] However, Scott did not offer a full briefing of the meaning of "criminal prosecution."[59] In response, the State of Illinois (like Florida in *Argersinger*) focused on the impracticability of an "absolut[i]st position" toward the Sixth Amendment's text. The State pointed out that the Court had already deviated from the text in establishing a "petty offense exception" to the jury right. Furthermore, the State argued that the jury right and right to counsel had one thing in common that justified limiting them to serious cases—cost.[60]

The *Scott* Court skirted Scott's text-based argument, disposing of it on grounds that the common law preference for counsel in misdemeanors over felonies was "perverse[]," and that the Court in its previous opinions had already strayed so far from the Framers' understanding that it need not bother with fealty to the categorical language "all criminal prosecutions":

> The range of human conduct regulated by state criminal laws is much broader than that of the federal criminal laws, particularly on the "petty" offense part of the spectrum. As a matter of constitutional adjudication, we are, therefore, less willing to extrapolate an already extended line when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so. We have now in our decided cases departed from the literal meaning of the

56. *Id.* at 50–52 (Powell, J., joined by Rehnquist, J., concurring in result).

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

58. *See, e.g.*, Brief for the Petitioner at 8, *Scott*, 440 U.S. 367 (No. 77-1177), 1978 WL 206716, at *8 ("[W]hatever the Court eventually may determine to be the outer reaches of the definition of a "criminal prosecution" for the purposes of the Sixth Amendment, petitioner's prosecution clearly fits that definition since misdemeanor-theft has all of the many indicia of a traditional criminal offense.").

59. Scott did argue that his theft was *malum in se* but did not otherwise engage the types of evidence an avowed textualist or originalist in 2024 might consult, such as dictionaries, use of similar language in other constitutional provisions, constitutional debates, or publications shedding light on contemporaneous public understanding of terms. *See generally* John Manning, *What Divides Textualists from Purposivists*?, 106 COLUM. L. REV. 70 (2006) (noting the types of extratextual evidence of meaning that textualists consider objective and legitimate, focusing on evidence of "semantic usage" rather than policy goals).

60. Brief for the Respondent at 10–13, *Scott*, 440 U.S. 367 (No. 77-1177), 1978 WL 206719, at *10–13 (arguing against an "absolute right" and that the jury right and right to counsel have "their cost" in common).

> Sixth Amendment. And we cannot fall back on the common law as it existed prior to the enactment of that Amendment, since it perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors.[61]

The remainder of the *Scott* opinion focused on the many reasons a full right to appointed counsel in state court would be costly and impracticable.[62]

At first, the *Scott* dissenters placed the text of the Sixth Amendment front and center, emphasizing the "all" in "*all* criminal prosecutions" and arguing that the Court's opinion ignored the "plain wording of the Sixth Amendment."[63] But these statements were largely rhetorical flourish. These same Justices had arguably set the stage for *Scott* by agreeing to write *Argersinger* in a way that emphasized the injustice of Argersinger being denied a lawyer because he received a jail sentence. The dissenters' avoidance of a more extensive text-based argument might also have stemmed from their assumption that the majority was right: the Framers did not foresee a right to appointed counsel for the indigent in all cases.

Scott is still good law;[64] state defendants have no right to counsel if they are not sentenced to jail. And while *Scott* involved the right to appointed counsel, some state courts have cited *Scott* in denying the right to *retained* counsel as well.[65] Meanwhile, although some states offer a statutory right to appointed counsel in petty crimes, appointment of counsel in misdemeanors is often not automatic. Defendants in large numbers are not appointed counsel in cases where the state agrees not to pursue jail time.[66] In California, for example, my colleagues and I have witnessed out-of-custody arraignment courtrooms full of people facing misdemeanor charges without a lawyer.[67]

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61. *Scott*, 440 U.S. at 372. The Court explicitly noted that the Framers likely did not anticipate a right to appointed counsel in drafting the Sixth Amendment. *Id.* at 370.

62. *Id.* at 372–74.

63. *Id.* at 375 (Brennan, J., dissenting) ("In *all* criminal prosecutions, the accused . . . .") (emphasis in original); *id.* at 376 (noting the "plain wording of the Sixth Amendment").

64. The Court has limited *Scott* in an important way, holding in *Alabama v. Shelton*, 535 U.S. 654, 654 (2002), that a defendant cannot be sentenced to jail time from execution of a suspended sentence after a probation revocation unless he was represented by counsel in the underlying case. But *Shelton* did not disturb *Scott*'s actual incarceration standard.

65. *See, e.g.*, United States v. Ashurst, No. 2:11-po-124-MEF, 2012 WL 1344824, at *1 (M.D. Ala. Apr. 18, 2012) (unpublished) (holding that because the rights to retained and appointed counsel are coextensive, defendant had no right to retained counsel in cases not involving a jail sentence); People v. MacArthur, 731 N.E.2d 883, 887–88 (Ill. App. Ct. 2000) (same); Layton City v. Longcrier, 943 P.2d 655, 658–59 (Utah Ct. App. 1997) (same).

66. *See* Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 987 (2020) (noting that "[n]one of the [eight] jurisdictions" they studied "provide counsel for offenses not punishable by time in jail").

67. Meanwhile, when California's Santa Clara County experimented with offering lawyers in misdemeanor arraignment court, it was novel enough to make headlines. *See* Editorial, *Santa Clara County Explores How to Provide Legal Counsel at Misdemeanor Arraignments*, MERCURY NEWS (Jan. 16, 2010) [hereinafter *Santa Clara County*], https://www.mercurynews.com/2010/01/16/santa-clara-county-explores-how-to-provide-legal-counsel-at-misdemeanor-arraignments/ [https://perma.cc/E7S8-NMZX] (noting that the change occurred only after a Mercury News story about how many defendants were pleading guilty without a lawyer).

Even federal courts have followed *Scott*.[68] In fact, the Federal Rules of Criminal Procedure were amended after *Scott* to allow federal judges to deny appointed counsel in petty cases where the government declines to seek a jail sentence.[69] Yet federal courts following *Scott* have not grappled with the plain text of the Sixth Amendment. They simply reason that because the Sixth Amendment has the same meaning in federal and state court, *Scott* must apply in federal court as well. Litigants appear to have never raised the right to *retained* counsel in federal misdemeanors with no jail sentence, presumably because the Federal Rules of Criminal Procedure guarantee defendants a statutory right to retained counsel in such cases.[70]

While legal academics have roundly criticized *Scott*, the critiques have largely argued that many non-carceral consequences of convictions are as significant as a day in jail. For example, pro se misdemeanor defendants can be subject to pretrial detention and onerous pretrial conditions; significant fines; and collateral consequences like deportation, sex offender registration, loss of employment opportunities, and other sanctions.[71] Other critiques have focused on how courts have failed even to abide by the requirements of *Scott*.[72] These critiques take as a given that the Sixth Amendment applies only to those criminal

68. *See, e.g.*, United States v. Bryant, 136 S. Ct. 1954, 1958 (2016) (Ginsburg, J., concurring) (assuming, in passing, that *Scott* applies to both state and federal cases); United States v. Reilley, 948 F.2d 648, 652 (10th Cir. 1991) (affirming fine-only sentence of indigent pro se defendant charged with leaving property unattended in a national park, citing *Scott*); United States v. Doe, 743 F.2d 1033, 1038 (4th Cir. 1984) (citing *Scott* in stating that "only offenses where a sentence of imprisonment is imposed give the defendant a right to appointed counsel"); *cf.* United States v. Downin, 884 F. Supp. 1474, 1479 (E.D. Cal. 1995) (assuming the applicability of *Scott* but determining on statutory grounds that the judge did not make proper record that the government was forgoing a jail sentence). *But cf.* United States v. Ramirez, 555 F. Supp. 736, 741 (E.D. Cal. 1983) (assuming that *Scott* does not necessarily apply in federal court, and reversing conviction because magistrate did not make clear pretrial record that they would not impose a jail sentence); Brief for Petitioner at 34–35 n.12, Lewis v. United States, 518 U.S. 322 (1996) (No. 05-1631), 1996 WL 88783, at *34–35 n.12 ("[The U.S. Supreme] Court has never held that *Scott* applies in federal court, and there is considerable doubt that it does. *Scott* itself indicates that its rule is a concession to the difficulties of incorporation and describes its own holding as relating to the constitutional right to appointed counsel in state criminal proceedings.").

69. *See* FED. R. CRIM. P. 58(b)(2)(C) (requiring judges to apprise defendants of "the right to request the appointment of counsel if the defendant is unable to retain counsel—unless the charge is a petty offense for which the appointment of counsel is not required"); *id.* at 58(a)(2) ("In a case involving a petty offense for which no sentence of imprisonment will be imposed, the court may follow any provision of these rules that is not inconsistent with this rule and that the court considers appropriate.").

70. *See id.* at 58(b)(2)(B) (requiring judges in petty misdemeanor cases where the defendant does not receive a jail sentence to inform the defendant of their "right to retain counsel").

71. *See, e.g.*, sources cited *supra* note 15 (Professors Joe, King, Hashimoto, and Roberts all critiquing *Scott* on these grounds); B. Mitchell Simpson II, *A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?*, 5 ROGER WILLIAMS U. L. REV. 417, 425 (2000) (arguing that *Scott* undervalued the importance of counsel to a fair trial).

72. *See, e.g.*, Hashimoto, *supra* note 15, at 1026–31. Hashimoto has also argued that states have failed to enforce the subsequent holding of *Alabama v. Shelton*, 535 U.S. 654 (2002), that a defendant given probation and a suspended prison sentence cannot be later sentenced to back-up prison time if they were denied counsel at trial. *See Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Erica J. Hashimoto, Allen Post Professor of Law, University of Georgia Law School) (arguing that the *Shelton* right is not sufficiently enforced).

prosecutions where the consequences are as serious as jail. Only one scholar, Sanjay Chhablani, has pointed out that *Scott* is inconsistent with the Sixth Amendment's text and based on budgetary concerns that should hold no sway in federal court.[73] Chhablani does not outline a textual argument for abandoning *Scott*, focusing instead on changing the doctrine of *Strickland v. Washington* related to effective assistance of counsel.[74]

In sum, courts and litigants have never meaningfully engaged with the text of the Sixth Amendment's right to counsel. Nor have they attempted to justify on textualist or originalist grounds the denial of the right to counsel in criminal prosecutions that do not end in a jail sentence. Indeed, courts and Congress appear to have assumed that a literal application of the text would guarantee lawyers in all criminal prosecutions. Nonetheless, the *Scott* Court—citing cost and efficiency concerns—limited the right to cases involving "actual incarceration." In the decades since *Scott*, litigants, scholars, and lower courts have largely accepted this conclusion and tried to work around it. But, as the next two Sections show, there is a clear text-based argument against *Scott* and no compelling reason to ignore it.

II.
A TEXT-BASED ARGUMENT FOR A RIGHT TO RETAINED COUNSEL IN "ALL CRIMINAL PROSECUTIONS," EVEN THOSE WITHOUT A JAIL SENTENCE

This section makes the straightforward case that the meaning of the phrase "all criminal prosecutions" for right-to-counsel purposes includes all formally charged violations of criminal law, regardless of whether the defendant is sentenced to jail time. I focus on available contextual evidence that would be persuasive to various strands of textualists,[75] including Founding-era dictionaries

73. Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 518–23 (2009). With the exception of Chhablani, the authors who note in passing that some aspect of right-to-counsel doctrine violates the plain text do not further analyze the issue. *See, e.g.*, Russell L. Christopher, *Penalizing and Chilling an Indigent's Exercise of the Right to Appointed Counsel for Misdemeanors*, 99 IOWA L. REV. 1905, 1911 (2014) (noting in passing that one possible critique of *Scott* is that it is inconsistent with the "literal text" of the Sixth Amendment); 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, 163 (2009) (critiquing *Scott* on policy grounds and noting in passing that "moreover, one might have thought that . . . the language in the Constitution, *In all criminal prosecutions*, would actually be taken to mean that appointment was required in *all* cases rather than simply in *some* cases."); Note, *The Trial of Petty Offenses by Federal Magistrates: Collision with Amendment VI*, 1 U. BALT. L. REV. 59, 64, 67 (1971) (noting that the Criminal Justice Act of 1964's allowance of bench trials and denial of appointed counsel in federal petty misdemeanors contradicts the Sixth Amendment, but arguing for the *Scott* standard rather than making a text-based argument for such a right in all prosecutions).

74. Chhablani, *supra* note 73, at 541–48; *see also* Sanjay Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 35 (2009) (arguing that the Supreme Court's erroneous conflation of the Sixth Amendment and Due Process Clause led to *Strickland*'s prejudice prong).

75. *See, e.g.*, Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1460 (2022) ("Traditional textualists appeal to a wide range of interpretive sources and criteria, including text, language canons, substantive canons, dictionaries, other statues, common law

and commentaries that evince public understanding of the terms "crime" and "criminal prosecution" at the time of ratification; references to "crimes" in other constitutional provisions; constitutional debates; and Founding-era rules and practices related to petty crimes. As explained below, these sources indicate that cases involving petty crimes formally charged by the government and subject to punishment would have been understood as "criminal prosecutions" in 1791, just as they are today. In short, the text-based case for a Sixth Amendment right to retained counsel in all criminal cases, even where the judge imposes no jail sentence or the legislature deems the case "petty," is persuasive.

As a caveat, I do not mean to argue that a particular brand of so-called "textualism" or "originalism" is the best lens for interpreting the Sixth Amendment.[76] Nor do I mean to suggest that the case for a right to counsel "in all criminal prosecutions" is unpersuasive under other theories of constitutional interpretation. Indeed, many self-described non-textualists would have joined the four dissenters in *Scott* for reasons the *Argersinger* majority gave: the grave consequences of misdemeanor convictions, the disadvantages of being denied a lawyer in any criminal case, and the questionable legitimacy of forcing poor people to defend themselves pro se at trial against a prosecutor. Still, the current Supreme Court routinely engages in, or at least purports to engage in, "textualist" or "originalist" analyses when interpreting the Sixth Amendment. For example, the Court's current Confrontation Clause jurisprudence stems from *Crawford v. Washington* (2004), an opinion written by Justice Scalia that focused on determining the "original meaning" of the right of an accused to "be confronted with the witnesses against him."[77] Even non-textualists have acknowledged that

and Supreme Court precedent, and even consequences, purpose, intent, and legislative history."). Tobia, Slocum, and Nourse criticize some textualists for consulting sources that focus more on "technical" meaning than "ordinary" meaning, even while purporting to advance democratic principles through fealty to public understanding of law. *Id.* at 1459–61.

76. The definition of these terms, their desirability as theories of constitutional interpretation, and the extent to which they can be reconciled with other theories are all the subject of volumes of academic debate. *See generally, e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020) (distinguishing between "formalistic textualism" and "flexible textualism" and arguing for the former); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006) (noting the debate over the meaning and desirability of "originalism," including in the Sixth Amendment context, and urging a "common law originalism" that recognizes the Framers' knowledge of the indeterminacy of, and controversy surrounding, various common law approaches).

77. 541 U.S. 36, 42 (2004); *see also id.* at 43–55 (consulting dictionaries, Founding-era sources, and English practices known to have motivated the Framers to determine the meaning of "confronted with" and "witnesses against" and what modern analogous practices the Framers would have condemned); Apprendi v. New Jersey, 530 U.S. 466, 497 (2000) (jury trial right); *cf.* Timbs v. Indiana, 139 S. Ct. 682, 688 (2018) (citing Founding-era English and colonial prohibitions, and abusive seventeenth-century Stuart practices, as inspiring the Excessive Fines Clause).

the "text, where clear, governs,"[78] or have advanced originalist arguments for a broad interpretation of criminal defendants' rights.[79]

Instead, my goal is simply to point out that a text-based argument is obvious and persuasive enough that its absence from legal scholarship and litigation is conspicuous and worth exploring.

A. The Ordinary Meaning of "All Criminal Prosecutions"

The Sixth Amendment's categorical language guaranteeing "in all criminal prosecutions . . . the right to . . . the assistance of counsel" does not on its face hinge on the seriousness of the case or whether the accused is sentenced to jail.[80] If interpreted literally, the right extends to all "criminal prosecutions," period. The question becomes what constitutes a "criminal prosecution."

The meaning of a term like "criminal prosecution" is clearer than more amorphous phrases in constitutional criminal procedural provisions, such as the right of an accused to be "confronted with the witnesses against him."[81] Still, even the most apparently clear terms require some contextual clues as to their meaning. One common starting point for textualists is the ordinary public understanding of a term.[82] Of course, those inquiring into ordinary meaning might debate about whether to look at the understanding of a term at the time of *enactment* (which might better reflect the intended meaning of the term to the

78. Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 5 (2018); *see also* James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 79 VA. L. REV. 1523, 1525 (2011) ("Progressive academics, for their part, have largely accepted the importance of text and history in constitutional interpretation."); *cf.* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009) (arguing that "we can all care about framers' intentions, ratifiers' understandings, and original public meaning without being originalists"); Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639 (2016) (arguing that judges are justifiably originalist in interpreting rules and non-originalist in interpreting standards).

79. *See, e.g.*, Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 STAN. L. REV. 603, 619–21 (2022) (making an originalist argument for a personal-knowledge warrant oath requirement and dismissing non-originalist critiques by noting that this argument restores, rather than limits, personal liberties and relates to a clear guarantee rather than an interpretation of a vague standard); Erica J. Hashimoto, *An Originalist Argument for a Sixth Amendment Right to Competent Counsel*, 99 IOWA L. REV. 1999, 2001 (2014) (arguing, based on Treason Act of 1696, that Framers intended to require a basic level of competence in defense attorneys, which would call *Strickland*'s prejudice prong into doubt); *cf.* Beth Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 277 (2014) ("taking" the Court "at its word" that Founding-era historical practices are relevant to interpretation of the Eighth Amendment and noting other evidence showing the Court's fines doctrine is ahistorical).

80. U.S. CONST. amend. VI.

81. *See, e.g.*, Stephanos Bibas, *The Limits of Textualism in Interpreting the Confrontation Clause*, 37 HARV. J.L. & PUB. POL'Y 737, 737–38 (2014) (arguing the importance of a text-centered approach to constitutional criminal procedure but acknowledging that textualism and originalism do not offer bright-line answers to the question of what is a "witness" for Confrontation Clause purposes).

82. *See* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 35 (2016) ("There are excellent reasons for the primacy of the ordinary meaning rule.").

drafters) versus at the time of *interpretation* (which might better reflect how the term is understood by those who depend on its interpretation the most).[83]

Here, the ordinary meaning at the time of enactment and interpretation appears to be the same: criminal prosecutions were understood to include formally charged crimes, whether or not the crime was "petty" or the defendant ultimately received a non-jail sentence.[84] In a related article, I offer an extensive exploration of Founding-era sources indicating that the terms "criminal prosecutions" and "crimes" included formally charged petty offenses.[85] I explain that Blackstone explicitly described petty offenses as crimes and criminal prosecutions,[86] and that pre-Founding or Founding-era English and American dictionaries defining "crime," "criminal," and "prosecution" did the same.[87] I also cite numerous pre-Founding commentators describing the adjudication of petty crimes by justices of the peace in England as criminal prosecutions.[88] For example, English barrister Matthew Bacon noted in 1768 that even a minor offense could not be charged by information unless the facts set forth a "reasonable cause for the *prosecution*," given that the case was still a "public *prosecution*."[89] I also cite several early and late nineteenth-century treatises[90] and numerous English and American court decisions and congressional statements describing summarily tried petty offenses as criminal prosecutions.[91] Even Justice Frankfurter, in the influential 1926 law review article that encouraged the Court to continue reaffirming the "petty offense exception" to the jury right after it emerged in dictum in the 1880s, freely acknowledged that

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83. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 825 (2018) (noting why both time frames might offer important interpretive insights); Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1140 ("Unlike the textualists, however, those adopting a contemporary meaning approach should not consider the ordinary public meaning at the time of statutory enactment, but rather at the time of interpretation."); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1524 (1989) (arguing that constitutional terms "should be interpreted as they are now understood, or as they have been understood, by the American political community"); Bertrall L. Ross II, *Paths of Resistance to Our Imperial First Amendment*, 113 MICH. L. REV. 917, 924–25 (2015) ("Originalists have increasingly coalesced around an approach to constitutional-meaning elaboration that focuses on the public meaning of words or phrases at the time the constitutional provision in question was written.").

84. As Beth Colgan has pointed out, even the states in *Gideon* argued that there is no distinction, for right-to-counsel purposes, between incarcerative and non-incarcerative punishments. Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 118 (2019). Indeed, a conviction alone is a deprivation of "liberty." *See, e.g.*, Evitts v. Lucey, 469 U.S. 387, 410 (1985) (Rehnquist, J., dissenting) (distinguishing the right to effective assistance of appellate counsel with the opportunity to be heard in the denial of public assistance benefits, because in the former, the appellant's "'liberty' was deprived by his lawful state criminal conviction," not his unsuccessful appeal).

85. *See* Roth, *supra* note 24, at 636–46.

86. *See id.* at 637 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *269, *281 (1825)).

87. *Id.* at 638 (citing 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 515 (1755); *id.* at 639 n.234 (citing numerous other pre-1791 dictionaries).

88. *Id.* at 641–43.

89. 5 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 180 (Henry Gwyllim, Bird Wilson & John Bouvier eds., 3d ed. 1852) (1768) (emphasis added).

90. Roth, *supra* note 24, at 642 n.251 (citing numerous sources).

91. *Id.* at 642 nn. 252–54.

charges brought by the United States ending in punishment are "formal criminal prosecutions."[92]

Based on common usage of these words today, it is even more obvious that formally charged offenses should be treated as criminal prosecutions regardless of the severity or the ultimate punishment of the offense. For example, in determining whether contempt is a crime in *Bloom v. Illinois* (1968),[93] the Court concluded that a crime is, "in the ordinary sense, a violation of the law, a public wrong which is punishable by fine or imprisonment or both."[94] More recently, in *Rothgery v. Gillespie County* (2008),[95] in which the Court held that the right to counsel "[i]n all criminal prosecutions"[96] attaches at a pretrial bail hearing whether or not a prosecutor is present, all nine Justices agreed that the filing of a criminal charge (such as an information, indictment, or presentment) commences a "criminal prosecution."[97] As Justice Thomas noted, numerous common law sources supported the interpretation that "the term 'criminal prosecutio[n]' in the Sixth Amendment *refers to the commencement of a criminal suit by filing formal charges in a court with jurisdiction to try and punish the defendant*."[98]

Applying this understanding, defendants should have a right to a lawyer in all cases in which a prosecutor formally files criminal charges in criminal court, however "minor" the crime. All federal crimes, for starters, should qualify as criminal prosecutions. Even federal petty misdemeanors are all offenses formally charged either by information or violation notice, prosecuted by the United

92. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 937 (1926).

93. Bloom v. Illinois, 391 U.S. 194, 201 (1968).

94. *Id.* at 202 (holding that "serious" non-summary contempt charges in state court required a jury trial because they were crimes, and according to precedent, serious state crimes are jury demandable). While the *Bloom* Court suggested in dictum that petty contempt charges carrying at most six months imprisonment would not be jury demandable, it was merely following the petty/non-petty line set by previous cases. *Id.* at 198 ("We accept the judgment of *Barnett* and *Cheff* that criminal contempt is a petty offense unless the punishment makes it a serious one."). It did not purport to analyze whether summary contempt is or is not a "crime." *See id.* More broadly, direct criminal contempt in the presence of a judge has been treated as a sui generis proceeding different from a typical criminal "trial" or "case." This has justified the prosecution of even the most serious contempt by information rather than indictment, which would otherwise run afoul of the Fifth Amendment right to indictment in cases involving a capital "or otherwise infamous crime." *See* Green v. United States, 356 U.S. 165, 183–85 (1958). The correctness of this line of cases is beyond the scope of this Article.

95. 554 U.S. 191, 194–95 (2008).

96. U.S. CONST. amend VI.

97. *Rothgery*, 554 U.S. at 213 (Thomas, J., dissenting). Justice Thomas opined that the hearing was not the commencement of a prosecution absent a prosecutor or formal charge, but that the filing of an information or other formal charge would have sufficed. *See id.* at 223–24; *see also id.* at 198 (majority opinion) (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984), and *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)) ("We have, for purposes of the right to counsel, pegged commencement to 'the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'").

98. *Id.* at 223 (Thomas, J., dissenting) (alteration in original) (emphasis added).

States Attorney's Office (USAO),[99] punished under Title 18 (on "Crimes and Criminal Procedure") of the U.S. Code by possible fine and imprisonment,[100] and described by the government as "criminal offense[s]" for which defendants will have "criminal record[s]."[101] Take, for example, a defendant charged under 36 C.F.R. § 1004.10(a) for the crime of "operating a motor vehicle" in the Presidio (a federal enclave in San Francisco)[102] in an unauthorized parking area.[103] A person who is convicted of violating Section 1004.10(a) "shall be punished by a fine" and up to six months' incarceration.[104] True, Congress has labeled such six-month-sentence crimes "petty,"[105] bringing them within Criminal Rule 58, for "Petty Offenses and Other Misdemeanors," and allowing judges to deny defendants appointed counsel and a jury.[106] But these defendants are formally accused either by an information filed directly by the USAO, or by a violation ticket filed by a law enforcement agency and prosecuted by the USAO.[107] The person must appear on a "petty offense calendar" and engage in plea negotiations with an Assistant United States Attorney (AUSA).[108] If they decide to fight the charge, they must undergo a criminal trial against an AUSA and before a magistrate.[109] If the person is convicted after trial or admits guilt, they will not only face punishment but will also have a criminal record.[110] In

99. *See, e.g.*, Warner, *supra* note 12, at 2431 (noting that federal petty offenses are prosecuted by the U.S. Attorney's Office); *Petty Offenses*, OFF. OF THE FED. PUB. DEF., https://www.ndcalfpd.org/petty-offenses [https://perma.cc/7XCB-8FDZ] (providing instructions to those accused of petty federal offenses and noting that the U.S. Attorney's Office prosecutes the cases).

100. *See* 18 U.S.C. § 3559 (classifying criminal offenses into Class A, B, and C misdemeanors and infractions, all subject to both imprisonment and fines).

101. *See, e.g.*, *My Options*, CENT. VIOLATIONS BUREAU, https://www.cvb.uscourts.gov/pay-ticket/my-options [https://perma.cc/LB9C-XQNB] (explaining that by paying a fine "you may be admitting to a criminal offense and a conviction may appear in a public record with adverse consequences to you"); *Central Violations Bureau—Federal Ticket*, U.S. DIST. CT. CENT. DIST. OF CAL., https://www.cacd.uscourts.gov/clerk-services/cvb [https://perma.cc/84SU-ENMV] (same). I am not aware of any federal petty offense that the United States takes to be non-criminal for purposes of reporting criminal records.

102. *See* Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, §§ 101–103, 110 Stat. 4093, 4097–101 (defining and establishing the Presidio Trust).

103. 36 C.F.R. § 1004.10(a) (2021).

104. *Id.* § 1001.3.

105. *See* 18 U.S.C. § 3559(a)(7) (defining six-month misdemeanor as a "Class B misdemeanor"); *id.* § 19 (defining Class B misdemeanors as "petty offenses"). Again, "petty" is a term of art typically used in the right-to-jury-trial context. *See* Baldwin v. New York, 399 U.S. 66, 69 (1970) (requiring a jury for non-"petty" offenses carrying a maximum sentence of more than six months).

106. FED. R. CRIM. P. 58.

107. *See Petty Offenses*, OFF. OF THE FED. PUB. DEF., https://www.ndcalfpd.org/petty-offenses [https://perma.cc/WU8C-9J34] (explaining how defendants come to be charged with petty offenses); E-mail from Heather Angove, Assistant Fed. Pub. Def., to Author (May 10, 2021) (on file with author) (explaining that AUSAs prosecute petty cases and cases are charged by ticket or information).

108. *See Petty Offense Docket/Traffic Tickets*, U.S. DIST. CT. N. DIST. OF CAL., https://www.cand.uscourts.gov/about/court-programs/petty-offense-docket-traffic-tickets [https://perma.cc/YD7X-3TTS] (explaining that even for petty offenses not requiring a court appearance, the person will negotiate with an AUSA).

109. *See Petty Offenses*, *supra* note 107.

110. *Id.* (noting that the person will have a criminal conviction if they lose). Of course, not all wrongful acts or state sanctions of behavior are crimes. *See, e.g.*, Turner v. Rogers, 564 U.S. 431, 441,

short, someone facing a charge like this is subject to the formal criminal adjudicative processes, professional adversaries, stigma, and moral condemnation that make criminal cases different even from high-stakes civil cases.

While the categorization of state offenses varies greatly by jurisdiction, state "criminal prosecutions" fitting this original public understanding would at least include any formally charged offense prosecuted by a criminal prosecutor in criminal court and ending in a finding of "guilt" and a criminal conviction. For example, California Penal Code Section 647(b) makes a person engaged in prostitution "guilty of disorderly conduct, a misdemeanor," and Section 19 makes such misdemeanors "punishable by imprisonment in the county jail not exceeding six months." Although there may be violations of state law that are harder to categorize, such as violations brought in "traffic" court, those questions at the margins should not preclude courts from recognizing as criminal prosecutions charges brought by a state public prosecutor.

This Section has argued that formally charged petty crimes are "criminal prosecutions" as that term was understood at the Framing and as it is still understood now. It bears repeating, however, that the *Scott* "actual incarceration" standard for right to counsel presents a larger problem. The *Scott* holding is not limited to petty misdemeanors; Scott was charged with a jury-demandable offense, meaning a non-petty offense carrying a potential sentence of over six months.[111] Presumably, the *Scott* majority would hold that a person accused of a *felony* in state court also has no right to counsel unless they receive jail time. Thus, someone trying to justify *Scott* on originalist grounds would have to argue that the ordinary meaning of "criminal prosecution" in 1791 did not include felonies and jury-demandable non-petty misdemeanors if the defendant received a sentence of corporal punishment or fine instead of incarceration. That argument seems a heavy lift, given that no judge that I know of has ever advanced such reasoning.[112] Moreover, "[i]n the Founding era, felonies 'were typically punishable by death and imprisonment for such offenses was rare,'" while jury-demandable misdemeanors included serious crimes like kidnapping and assault

448 (2011) (holding that person incarcerated on civil infraction for failure to pay child support was not entitled to counsel, and noting that the Sixth Amendment applies only to "criminal" cases); *see also* Gagnon v. Scarpelli, 411 U.S. 778, 788–89 (1973) (holding that a person might have a due process right to counsel in probation revocation hearings, but noting that such hearings are not part of the criminal prosecution and thus do not fall under the Sixth Amendment); *In re* Gault, 387 U.S. 1, 57, 59 (1967) (holding that juveniles have a due process, but not Sixth Amendment, right to counsel because such proceedings are not criminal); Salerno v. United States, 481 U.S. 739, 748 (1987) (upholding constitutionality of dangerousness-based pretrial detention and noting several other non-criminal contexts in which people are lawfully incarcerated, such as for material witness warrants, disease quarantine, and deportation proceedings).

111. *See* Baldwin v. New York, 399 U.S. 66, 73–74 (1970) (requiring a jury for non-"petty" offenses with more than six months' potential imprisonment).

112. The only category of cases that judges have argued is excepted from "criminal prosecutions" in the Sixth Amendment is petty offenses in the jury context. *See* Roth, *supra* note 24, at 603.

with intent to murder or rape.[113] In short, the *Scott* "actual incarceration" standard is even less defensible on textualist or originalist grounds than a standard that would deny counsel only in petty cases in line with the "petty offense exception" to the jury right.

B. Other Contextual Evidence of Meaning

1. Other Constitutional Provisions Mentioning "Crimes"

The common understanding of "criminal prosecutions" as including all formally charged criminal offenses is also reflected in the Framers' choice of language throughout the Constitution, in two respects. First, courts and commentators have recognized that other provisions that speak broadly or categorically of "crimes" or "criminal" include even minor petty offenses prosecuted in criminal court. Second, the Framers conspicuously limited other rights or restrictions only to certain crimes, suggesting that when they wanted to impose such limits, they did so explicitly.

First, courts and commentators have recognized other provisions applying categorically to all crimes as including petty cases. Even when looking only at the other trial rights guaranteed in the Sixth Amendment, no authority in the history of the nation, as far as I have been able to discern, has suggested that a criminal defendant could be denied the rights to confrontation, to know the nature and cause of the accusation, to the correct vicinage, to public trial, to speedy trial, or to compulsory process simply because the offense is petty or the punishment is not incarceration. Indeed, in *Argersinger*, the United States as amicus conceded as much.[114] These rights have all been deemed applicable to petty offenses.[115] The one glaring exception is the so-called "petty offense

113. Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 751 & n.309 (2012) (quoting United States v. Walker, 709 F. Supp. 2d 460, 466 (E.D. Va. 2010)).

114. Brief for the United States as Amicus Curiae at 9, Argersinger v. Hamlin, 407 U.S. 25 (1971) (No. 70-5015), 1971 WL 126425, at *9 .

115. *See, e.g.*, *Argersinger*, 407 U.S. at 28 (1972) ("It is simply not arguable, nor has any court ever held, that the trial of a petty offense may be held in secret, or without notice to the accused of the charges, or that in such cases the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf." (quoting John M. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 705 (1968))); Brief for the United States as Amicus Curiae, *supra* note 114, at 9 (conceding this point). It is true that none of these trial rights applies to summary *contempt* proceedings, in which a judge personally witnesses a contemptuous act and immediately punishes the actor, without a trial. *See* Cook v. United States, 267 U.S. 517, 534 (1925) ("Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law, and the punishment imposed is due process of law."). But contempt proceedings are unusual precisely because they are not prosecuted by the government; they are immediate punishments imposed by the trial court itself, through a power that is "incidental to [its] general power to exercise judicial functions." *In re* Terry, 128 U.S. 289, 304 (1888); *see also* Middendorf v. Henry, 425 U.S. 25, 40–42 (1976) (concluding that military tribunals are nonadversarial and thus not "prosecutions" by the state).

exception" to the Sixth Amendment jury right, which I discuss in a separate Section below.

Another mention in the Bill of Rights of all "crimes" or "criminal" cases is in the Fifth Amendment's Self-Incrimination Clause, which provides that no person "shall be compelled in any criminal case to be a witness against himself."[116] The phrase "any criminal case" contains no modifiers or exceptions for petty crimes. In fact, to my knowledge, no scholar or litigant has even suggested that the right against self-incrimination applies only to serious crimes. On the contrary, while the Supreme Court has not addressed that precise issue, it has held that *Miranda v. Arizona* (1966)[117] applies to custodial interrogations even in traffic misdemeanors.[118]

An additional mention of "crime" is in the Thirteenth Amendment, which allows involuntary servitude as "punishment for crime whereof the party shall have been duly convicted."[119] This Amendment was not passed until after the Civil War and is thus not contemporaneous with the Sixth Amendment's ratification.[120] It has notoriously been used to punish people—historically overwhelmingly, though not exclusively, Black people in the South—for petty as well as serious crimes.[121] The history of using involuntary servitude to punish Black people for vagrancy, theft, and other petty crimes is horrifying, and this Article is not suggesting that an interpretation of the Thirteenth Amendment as allowing such practices is the correct one. But this history is also stark evidence that courts have been willing to treat petty offenses as crimes when determining the constitutionality of a punishment as odious as slavery, even while they have failed to do so for purposes of guaranteeing the fundamental right to counsel. Courts' willingness to do the former but not the latter is conspicuous.

Second, the Framers' express restriction of other rights or powers to particular crimes indicates that when they wanted to limit a provision only to certain crimes, they did so explicitly. For example, the Seventh Amendment right to jury trial in civil legal cases extends only to "suits at common law, where the

116. U.S. CONST. amend. V.

117. Miranda v. Arizona, 384 U.S. 436 (1966).

118. *See* Berkemer v. McCarty, 468 U.S. 420, 434 (1984) ("We hold therefore that a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." (footnote omitted)).

119. U.S. CONST. amend. XIII, § 1.

120. *Thirteenth Amendment*, ENCYC. BRITANNICA (2022), https://www.britannica.com/topic/Thirteenth-Amendment [https://perma.cc/QD7B-DBW6].

121. *See, e.g.*, Meagan Flynn, *Kanye West's Baffling 13th Amendment Twitter Outburst: Maybe Not So Baffling After All*, WASH. POST (Oct. 1, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/10/01/kanye-wests-baffling-13th-amendment-twitter-outburst-maybe-not-so-baffling-after-all [https://perma.cc/ZZN8-QCDQ] (noting the history of punishing Black people for vagrancy, theft, and other "petty" crimes through convict-leasing); *see also* Howerton v. Mississippi Cnty., 361 F. Supp. 356, 364 (E.D. Ark. 1973) ("Courts have long held that reasonable work requirements may be imposed on one convicted of a crime, whether misdemeanor or felony, without running afoul of the Thirteenth or Eighth Amendments."); Stone v. City of Paducah, 86 S.W. 531, 534 (Ky. 1905) (holding that misdemeanors are included in "crime" under the Thirteenth Amendment).

value in controversy shall exceed twenty dollars."[122] The Fifth Amendment right to indictment applies only to "capital, or otherwise infamous crime[s]."[123] And Article I grants Congress power "[t]o define and punish Piracies and Felonies," not other crimes, "committed on the high Seas."[124] It seems that when the Framers wanted to specify that a provision applies only to certain offenses and not others, they so specified. And when they wished to categorically include all offenses ("any" and "all"), they did.

To be sure, there are two instances of the Framers' use of "crime" that are more ambiguous because they apply a power both to certain enumerated crimes or categories of crime as well as more broadly to "other crimes". For instance, the Framers provided in Article IV's Interstate Extradition Clause that "A Person charged in any State with *Treason, Felony, or other Crime*, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."[125] In 1860, the Supreme Court in *Kentucky v. Dennison* declared that this language was intended to broadly cover "every offence known to the law of the State from which the party charged had fled,"[126] "without any reference to the character of the crime charged."[127] The Court rejected the State of Ohio's argument that the defendant's crime, helping a person escape slavery in Kentucky, was not covered by the clause because it was a local misdemeanor that not only had never been a traditional "*malum in se*" (immoral in itself) crime but criminalized acts that other "civilized nations" refused to punish.[128] Instead, the Court insisted that the Framers intended to "embrace every act forbidden and made punishable to a law of the State. The word 'crime' of itself includes every offence, from the highest to the lowest in the grade of offences."[129] While Kentucky's desire to extradite someone in 1860 for aiding an enslaved person is deeply troubling, it is also troubling to interpret the word "crime" broadly in this context but narrowly in the context of procedural safeguards for the accused.

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122. U.S. CONST. amend. VII.
123. *Id.* amend. V.
124. *Id.* art. I, § 8, cl. 10.
125. *Id.* art. IV, § 2, cl. 2 (emphasis added).
126. Kentucky v. Dennison, 65 U.S. 66, 102 (1860).
127. *Id.* at 103.
128. *Id.* at 84.
129. *Id.* at 99. These statements are arguably dicta, given that the defendant's crime was an indictable misdemeanor and the Court earlier in its opinion described "crime" as "includ[ing] every offence below felony punished *by indictment* as an offence against the public." *Id.* at 76 (emphasis added). But the Court's later statements made clear its reasoning did not rest on the nature of the charging document. Moreover, if the Court is right that that Framers intended the Clause to broadly apply to crimes beyond felonies, then applying it only to indictable misdemeanors would frustrate that intent in the modern era given that many states and the federal government have statutorily eliminated the indictment requirement from all misdemeanors. *See, e.g.*, Siercke v. Siercke, 476 P.3d 376, 386 (Idaho 2020) (noting that all misdemeanors are now charged by information rather than indictment in Idaho); FED. R. CRIM. P. 7(a) (requiring indictments only for felonies).

The second example of the Framers' more ambiguous use of "crime" is their allowance of disenfranchisement for "rebellion, or other crime" under the Fourteenth Amendment.[130] Richard Re and Christopher Re have argued, primarily citing dictionary definitions and the "petty offense exception" to the jury right, that Reconstruction-era sources are inconclusive as to whether "rebellion, or other crime" included minor offenses.[131] One way to interpret this clause, according to Re and Re, is as applying to "other crimes" of comparable seriousness to "rebellion," the only named crime in the clause.[132] Another possible way to distinguish the disenfranchisement clause from the jury right in Article III and the Sixth Amendment is that the disenfranchisement clause purports to inflict punishment for the crimes within its scope, whereas the jury clauses purport to guarantee a critical right for the crimes within their scope. Given the traditional rule of lenity and due process concerns about fair notice of what is criminal, perhaps the definition of "crime" should be more narrowly construed when it is used to inflict punishment.[133] To interpret "other crimes" narrowly in comparison to "rebellion" in the same clause seems less problematic, from a textualist perspective, than interpreting a phrase with the term "all"—"all crimes" and "all criminal prosecutions"—as excluding a large swath of federal crimes. After all, cases involving formally charged petty offenses are treated as criminal prosecutions for all other trial rights besides jury and counsel and are routinely described (and punished) as criminal.

2. Constitutional Debates and Colonial and State Right-to-Counsel Provisions

Another contextual clue that the Sixth Amendment right to counsel extends to "all criminal prosecutions" regardless of punishment or seriousness is the language in colonial constitutions and right-to-counsel statutes at the time of the Sixth Amendment's ratification. The language in post-Founding state constitutions and the (sparse) debates over the federal constitutional language offer similar support. By the time of the revolution, all colonies employed public

130. U.S. CONST. amend. XIV, § 2.

131. *See* Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1652–53 (2012); *see also* Harvey v. Brewer, 605 F.3d 1067, 1077 (9th Cir. 2010) (holding that the term "crime" in the disenfranchisement clause was not limited to common-law felonies, reasoning that "when the 39th Congress meant to specify felonies at common law, it was quite capable of using that phrase"). As a side note, the phrase "high crimes and misdemeanors" in the Impeachment Clause appears to be a term of art borrowed from earlier English impeachment law, which described non-criminal as well as criminal conduct. *See, e.g.*, Frank O. Bowman III, *The Common Misconception About "High Crimes and Misdemeanors,"* ATLANTIC (Oct. 22, 2019), https://www.theatlantic.com/ideas/archive/2019/10/what-does-high-crimes-and-misdemeanors-actually-mean/600343 [https://perma.cc/7V3A-QLX3] (referring to "that sturdy old English term of art 'high Crimes and Misdemeanors'").

132. *See* Re & Re, *supra* note 131, at 1654 (noting that "other crime" presumably means a crime comparable to rebellion in seriousness).

133. *See, e.g.*, David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 524–25 (2018) (explaining the rule as requiring courts to strictly construe penal statutes against the state and in favor of defendants subject to their punishment).

prosecutors in criminal cases, a shift that increased interest in the right to counsel.[134] Even before the Sixth Amendment's ratification, at least eleven of the thirteen original colonies had recognized a right to counsel.[135]

Most colonies used categorical language nearly identical to the Sixth Amendment, guaranteeing counsel in "all criminal prosecutions" or "all prosecutions for criminal offences" or even, in North Carolina's case, "any crime or misdemeanor whatsoever."[136] Others connected the accused's right to counsel with the prosecutors' right, requiring the former whenever the latter was recognized. For example, Pennsylvania included in its 1701 Charter of Privileges that "all Criminals shall have the *same Privileges of Witnesses and Council as their Prosecutors*,"[137] suggesting that a defendant would have a right to counsel at least in summary proceedings involving a public prosecutor or represented private party. Delaware's 1701 charter[138] and New Jersey's 1776 constitution[139] each contained a similar right. After 1791, other new states soon followed suit, with similarly categorical language.[140]

In fact, if the right to counsel were in doubt in any category of cases at the time of the Founding, it was in serious cases, not petty ones. Ironically, the

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134. *See* JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL 9 (2002) (noting that "by the time of the American Revolution all of the colonies employed professionally trained and state-funded lawyers to pursue criminal charges").

135. *Id.* at 11 (noting that seven colonies had a constitutional right to counsel and four more had a statutory but not constitutional right); *see also* Powell v. Alabama, 287 U.S. 45, 64–65 (1932) (claiming that twelve of thirteen colonies had a right to counsel). Virginia had no constitutional right to counsel, but its courts eventually held the right was incorporated in other provisions. *See* David Fellman, *The Right to Counsel Under State Law*, 1955 WIS. L. REV. 281, 281 & n.2 (1955).

136. *See* Felix Rackow, *The Right to Counsel: English and American Precedents*, 11 WM. & MARY Q. 3, 13–27 (1954) (listing each colony's language, including "all criminal prosecutions" (New Hampshire, Rhode Island, Connecticut, Maryland); "any criminal charges" (Massachusetts); "all prosecutions for criminal offences" (Pennsylvania and Delaware); "all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors" (New Jersey); "any crime or misdemeanor whatsoever" (North Carolina); "any court or tribunal" (Georgia); and "every trial on impeachment, or indictment for crimes or misdemeanor" (New York)).

137. *Id.* at 17 (emphasis added).

138. The Delaware Charter of 1701 granted "all Criminals . . . the same Privileges of Witnesses and Council as their Prosecutors." TOMKOVICZ, *supra* note 134, at 10 (quoting Del. Charter of 1701, § V).

139. N.J. CONST. of 1776, art. XVI (guaranteeing that "all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to").

140. *See, e.g.*, VT. CONST. ch. 1, § 10 (1777) ("That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his counsel . . . ."); *accord* KY. CONST. art. XII, § 10 (1792); TENN. CONST. art. XI, § 9 (1792); OHIO CONST. art. VIII, § 11 (1803); LA. CONST. art. VI, § 18 (1812); IND. CONST. art. I, § 13 (1816); MISS. CONST. art. I, § 10 (1817); CONN. CONST. art. I, § 9 (1818); ILL. CONST. art. VIII, § 9 (1818); ALA. CONST. art. I, § 10 (1819); ME. CONST. art. I, § 6 (1820); MO. CONST. art. XIII, § 9 (1820). All state constitutions ratified after 1820 also have nearly identical language (including the phrase "all criminal prosecutions), other than California, *see* CAL. CONST. art. I, § 8 (1849) ("[I]n any trial in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions."); Nevada, *see* NEV. CONST. art. I, § 8 (1864) (same); West Virginia, *see* W. VA. CONST. art. II, § 8 (1861) ("The trial of crimes and misdemeanors . . . shall be by jury. . . . In all such trials the accused shall . . . have the assistance of counsel for his defense . . . ."); and North Dakota, *see* N.D. CONST. art. I, § 12 (1889) ("In criminal prosecutions in any court whatever, the party accused shall have the right . . . to appear and defend in person and with counsel.").

primary motivation for the categorical language in colonial and state constitutions seems to have been to reject the English rule allowing a full right to the assistance of counsel in "petty offenses" but denying such a right in felonies.[141] Put differently, the reason for the categorical term "all" was likely to ensure that those accused of *felonies* had a right to counsel,[142] rather than to extend Sixth Amendment trial rights beyond felonies to lesser offenses. The right to counsel was more, not less, controversial when applied to the former.

At least one colony, New York, limited its colonial right to counsel only to certain criminal cases—namely, impeachment and any "indictment for crimes or misdemeanors."[143] But the absence of such a limitation in other state constitutions and the Sixth Amendment suggests that their use of "all" criminal prosecutions truly means "all." Likewise, in the jury context, while many colonial and state constitutions guaranteed a right to jury "in all criminal prosecutions" from the very start, others conspicuously limited the jury right only to indictable crimes, to crimes that had "heretofore" been granted a jury, or to capital or other "infamous" crimes.[144] In short, when the framers of these constitutional provisions wanted to limit the right to counsel or jury to only certain crimes, they did so explicitly.

The text-based argument set forth above has been somewhat preemptive by nature, envisioning what an opponent of a plain-text argument might say and exploring where a text- and history-based argument would lead. That is because no commentator, court, or litigant to my knowledge has ever suggested that the public understanding of the phrase "all criminal prosecutions," for right-to-counsel purposes, excludes petty cases or cases with a non-incarcerative sentence like a fine or corporal punishment. Even in *Scott* and *Argersinger*, the prosecution and its amici did not advance such an argument. Instead, they argued

141. Powell v. Alabama, 287 U.S. 45, 60 (1932) (explaining the full right to counsel in "petty offenses" but not felonies); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *349 ("For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?").

142. *See* TOMKOVICZ, *supra* note 134, at 14 ("[T]he states had dramatically departed from the restrictive English common law rule regarding retention of counsel in serious criminal prosecutions."). Apparently, the Crown was more threatened by acquittals in treason and other serious felony cases than in minor offenses. *Id.* at 3–4.

143. N.Y. CONST. of 1777, art. XXXIV ("[I]n every trial on impeachment, or indictment for crimes or misdemeanors, the party impeached or indicted shall be allowed counsel, as in civil actions.").

144. Roth, *supra* note 24, at 652–53.

against a "literal reading" of the Amendment on cost grounds[145] and argued that a literal reading, if enforced, should apply only in federal court.[146]

In fact, the only court to have squarely addressed the textual issue of whether the phrase "all criminal prosecutions" includes cases in which a defendant receives no jail time is the Iowa Supreme Court. That court addressed the issue sua sponte and agreed with the conclusion here. The court held that the phrase "all criminal prosecutions" in its *state* constitution includes petty cases without a jail sentence and suggested in dictum that the Sixth Amendment's identical language seems to read the same way.[147]

3. Reconciling These Sources with Historical Practices Denying a Jury in "Summary" Proceedings of Petty Offenses

If the phrase "all criminal prosecutions" in the Sixth Amendment includes petty offenses for purposes of the right to counsel, one would expect the same to be true for other Sixth Amendment rights, including the right to jury. Indeed, the jury right is also guaranteed by Article III's requirement that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." Nonetheless, the Supreme Court has declared that there is no right to jury in "petty" cases carrying jail time of six months or less. The Court has justified this exception in part by reference to Parliament's practice near the time of the Founding of allowing offenses it deemed "petty" to be tried summarily by a magistrate rather than a jury. If there is a "petty offense exception" to the jury trial, a similar exception to the right to counsel might seem equally plausible.

But nothing about these summary practices suggests a "petty offense exception" to the right to counsel.[148] First of all, as I explain in a companion

145. For example, in its brief in *Scott v. Illinois*, the State acknowledged the "all criminal prosecutions" language but argued against a "literal" interpretation of that phrase, noting that the jury trial right also has not been construed as applying literally to all criminal prosecutions. *See* Brief for the Respondent at 10–13, Scott v. Illinois, 568 U.S. 1097 (1978) (No. 77-1177), 1978 WL 206719, at *10–13. It acknowledged that no other Sixth Amendment right had been construed this way but noted that the jury right and right to counsel were the most expensive of the listed rights. *Id.* at 13; *see also* Brief for the United States as Amicus Curiae at 9, Argersinger v. Hamlin, 407 U.S. 25 (1972) (No. 70-5015), 1971 WL 126425, at *9 (arguing against an "unduly literalistic" interpretation of "all criminal prosecutions" as meaning the same for the jury right as for the right to counsel, in support of the argument that every person accused of an imprisonable misdemeanor has the right to counsel).

146. *See* Brief as Amicus Curiae the Att'y Gen. of the State of Utah Respectfully Moves the Court for Permission to File This Brief as Amicus Curiae at 3, Argersinger v. Hamlin, 407 U.S. 25 (1972) (No. 70-5015), 1971 WL 126422, at *3 ("The 'Due Process Clause' of the Fourteenth Amendment should not be used as a tool to enforce a federally dictated code of criminal procedure upon the states.").

147. *See* State v. Young, 863 N.W.2d 249, 278 (Iowa 2015) ("A plain reading of the constitutional text causes us to question the reasoning of *Scott* . . . . We are not dealing with an open-textured phrase . . . . [I]f this choice of language means anything, it is difficult to avoid the conclusion that the phrase 'all criminal prosecutions' was expressly designed to avoid judicially imposed slicing and dicing of criminal prosecutions into two or more categories." (citations omitted)).

148. As a reminder, even the *Scott* majority recognized that the right to counsel should not rise or fall on whether a case is "petty," i.e., punishable by six months or less in jail. Instead, it deemed the relevant factor to be actual incarceration, thus denying lawyers in non-petty cases involving actual

piece, the "petty offense exception" to the jury right—which originated in 1800s dicta and has never been meaningfully litigated—is itself baseless.[149] In fact, summary proceedings were controversial precisely because they operated in derogation of the common law right to jury, leading Blackstone and other commentators to denounce them.[150] The denial of the jury right in English practices might have been the inspiration for, rather than a limitation on, the Sixth Amendment. After all, several other rights guaranteed by the Framers go above and beyond what was guaranteed in England at the time (such as the right to compulsory process).[151] The right to counsel itself was an example of this; by including felonies, the American right to counsel "in all criminal prosecutions" already went far beyond the English common law rule of denying lawyers in felony (but not misdemeanor) cases.[152]

Second, there is no clear evidence that accused persons in summary non-jury proceedings were denied the right to counsel, either categorically or based on whether the accused's punishment involved incarceration. "[O]ne impetus" for summary jurisdiction in the early 1800s appears to have been "Parliament's desire to establish convictions which barristers could not challenge using rules of evidence governing trials for felony."[153] Yet defendants in summary trials still routinely "actively resisted" their lack of procedural rights by "hiring lawyers,"[154] and English courts both before and after the Founding appear to have agreed that defendants in summary trials should be able to speak through counsel.[155] This was especially the case where the prosecutor was also

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incarceration (like Scott's) but reaffirming *Argersinger*'s guarantee of a lawyer even in petty cases so long as the defendant was sentenced to jail time. *See Scott*, 440 U.S. at 370–72.

149. Roth, *supra* note 24, at 651–61.

150. *Id.* at 637.

151. *See id.* at 634, 655–56.

152. *See id.* at 655 n.311 (quoting TOMKOVICZ, *supra* note 134, at 14).

153. Norma Landau, *Summary Conviction and the Development of the Penal Law*, 23 LAW & HIST. REV. 173, 189 (2005).

154. Bruce P. Smith, *Did the Presumption of Innocence Exist in Summary Proceedings?*, 23 LAW & HIST. REV. 191, 199 (2005) (emphasis omitted); *see also* GREGORY J. DURSTON, WHORES AND HIGHWAYMEN: CRIME AND JUSTICE IN THE EIGHTEENTH-CENTURY METROPOLIS 377 (2012) (noting a defendant in a 1790 summary criminal case who, "[u]nfortunately for the justice, . . . had the wit to bring along counsel, who swiftly found serious legal flaws in the process"); *id.* at 140 (noting the "constant demand for legal services at affordable prices" occasioned by summary proceedings, leading to a wave of "hedge solicitors"). While solicitors (unlike barristers) did not always have the right to speak in court, this appeared to change with time. *See, e.g.*, John H. Langbein, *The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors*, 58 CAMBRIDGE L.J. 314, 330 (1999) (explaining the difference between solicitors and barristers and noting that judges gradually circumvented the rule against defense counsel in felony cases by allowing solicitors to speak). Barristers, who presented the case in court upon being briefed by a solicitor, were freely allowed at common law in misdemeanors but not felonies. Landau, *supra* note 153, at 176–77.

155. *See, e.g.*, R v. Simpson (1717) 1 Strange 44, 46 (KB) (Eng.) ("As for the other order of conviction, whereby it appears the defendant made an attorney to defend for him; we think that is certainly good, for the offender may intrust his defence with another."); *cf.* Cox v. Coleridge (1822) 1 B. & C. 37, 49 (Eng.) ("[I]n practice, magistrates do permit, on many occasions, the presence of advocates for the parties accused."). I have so far been unable to find pre-ratification colonial sources related to the right to counsel in summary proceedings in the colonies but am actively looking.

represented.[156] Likewise, an 1825 manual related to summary proceedings explicitly mentions a right of attorneys to appear before justices of the peace.[157]

King's Bench reporter Joseph Chitty explained the need for counsel in summary proceedings in 1819:

> In courts of justice in general, a defendant upon a charge of any offence not amounting to felony, has a right to appear and defend by attorney, . . . and the proceedings of justices of the peace by summary conviction being matter of record, . . . why should a party be deprived of the same means of defence on such a proceeding, as in other courts? Suppose a defendant illiterate or uninformed, and exposed to a prosecution on the Game Laws, involving many complicated points of law, and especially title, it would frequently happen, in prosecutions before a magistrate, that the expense of counsel would be greater than the defendant could afford, or it might happen in a distant part of the country that no counsel nor any advice whatever, except that of an attorney, could be procured in time; it would then be rather anomalous to maintain, that on the trial of a cause in a superior Court the defendant may have the benefit of his legal advisers, and that they are to be excluded on a summary proceeding before a magistrate acting *judicially*.[158]

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156. *See, e.g.*, Collier v. Hicks (1831) 109 Eng. Rep. 1290, 1290–92 (KB) (Eng.) ("If the informer may, as a matter of right, demand that a professional advocate shall be heard for him, though he himself be present, the accused must have the same right."); *Coleridge*, 1 B. & C. at 49 ("Besides, it must follow, that, if the party accused has this right, it cannot be denied to the accuser. The effect of that would be, that great expence and inconvenience would follow, and great prejudice to the prisoner in the majority of cases."). The fact that Parliament later statutorily recognized a right to counsel in summary cases in 1836 might suggest that the right was not universally guaranteed by courts before that, but it alternatively suggests a codification of a routinely granted and important right. *See* 6 & 7 Wm. IV, c. 114, § 1 ("All Persons tried for Felonies shall be admitted, after the Close of the Case for the Prosecution, to make full Answer and Defence thereto by Counsel learned in the Law, or by Attorney in Courts where Attornies practise as Counsel."); *id.* § 2 ("And be it further declared and enacted, That in all Cases of summary Conviction Persons accused shall be admitted to make their full Answer and Defence, and to have all Witnesses examined and cross-examined by Counsel or Attorney.").

157. ROBERT MAUGHAM, A TREATISE ON THE LAW OF ATTORNIES, SOLICITORS AND AGENTS: WITH NOTES AND DISQUISITIONS ix, 133 (1825) (noting that attorneys could appear on behalf of clients before justices of the peace in cases of "Summary Jurisdiction" and that attorneys licensed to practice in superior courts could practice in "inferior court[s]" before justices of the peace); *see also* Langbein, *supra* note 154, at 316 (noting that defense counsel was allowed in cases involving minor regulatory or property offenses, citing Michael Dalton's *The Countrey Justice* (1618), and speculating this was because such offenses were within local attorneys' particular expertise); WILLIAM PALEY, THE LAW AND PRACTICE OF SUMMARY CONVICTIONS ON PENAL STATUTES BY JUSTICES OF THE PEACE 107 (1814) (citing *Rex v. Simpson* for the proposition that the defendant's appearance in summary proceedings "may be either in person or by attorney"); *cf.* 1 RICHARD BURN, JUSTICE OF THE PEACE, AND PARISH OFFICER 554 (1810) (arguing that "nothing shall be presumed in favour of this branch of the office of a justice of the peace" given that it denies the traditional jury right, and that because the jury is "dispensed withal," the justice "must proceed nevertheless according to the course of the common law" including allowing the defendant "an opportunity to make his defence").

158. R v. Justs. of Staffordshire (1819) 1 Chitty 217, 217–18 & n.(a) (KB) (Eng.) (citations omitted). Chitty made these observations in a case in which the King's Bench declined to find criminal bad faith on the part of magistrates. The magistrates had denied a defendant in a summary trial "the advantage of legal assistance, by ordering their attorney out of" the room "during the hearing of the

While summary practices were also known to the American colonies, after ratification, several state courts doubted the constitutional viability of summary convictions.[159] In New York, courts upheld summary convictions, notwithstanding withering criticism from at least one jurist. This was solely because New York's state constitution, like several others discussed above, extended the right to counsel only to those cases that were previously jury demandable.[160] In 1860, the Alabama Supreme Court even recognized a right to counsel in municipal summary proceedings brought in a "mayor's court."[161] The court noted the city's (erroneous) argument that there was no right to counsel at common law in summary proceedings involving petty offenses.[162] Additionally, the court observed that Alabama's constitutional and statutory rights to counsel all related to "criminal prosecutions," which the court took to mean "prosecutions for violations of the public laws of the *State*," not cities.[163] Nonetheless, because such proceedings had "all the characteristics of a court," including "to punish offenders," they required "the right of a party to the aid of counsel."[164]

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information." *Id.* at 218. But the court's conclusion was simply that the magistrates were not acting in bad faith in denying counsel, not that they did not act "erroneously." *Id.* at 219. One of the justices in the same case later appeared to highlight the importance of counsel in summary trials relative even to bail hearings in felony cases. *See Coleridge*, 1 B. & C. at 50 (Bayley, J.) ("This is not the case of a summary conviction, but of an accusation of felony, and the decision of the magistrate is not conclusive."). The other justices in *Coleridge* appeared to agree that the matter would be different if the magistrate were determining guilt or innocence. *Id.* (Abbott, C.J.) ("This being only a preliminary enquiry, and not a trial, makes, in my mind, all the difference."); *id.* at 51–52 (Holroyd, J.) ("A magistrate, in cases like the present, does not act as a Court of Justice; he is only an officer deputed by the law to enter into a preliminary enquiry . . . ."); *id.* at 53–54 (Best, J.) (concluding that because the examination was not a "judicial enquiry, which means an enquiry in order to decide on the guilt or innocence of the prisoner," the defendant had no right to an advocate present).

159. *See, e.g.*, Geter v. Comm'rs for Tobacco Inspection, 1 S.C.L. (1 Bay) 354, 351 (S.C. 1794) ("[T]hese kind of summary jurisdictions, without the intervention of a jury, are in restraint of the common law: that nothing shall be construed in favour of them; but the intendme[n]t of law is always against them."); Slaughter v. People, 2 Doug. 334, 337 (Mich. 1842) (reversing summary conviction for keeping a house of ill-repute and reversing a fine because the offense was clearly "criminal" and thus had to be indicted under state law); Barter v. Commonwealth, 3 Pen. & W. 253, 253 (Pa. 1831) ("If the charter did give the right to confer a power to imprison on summary conviction, and without appeal to a jury, it would be so far unconstitutional and void."). *But see* PITTSBURGH, PA., ORDINANCE NO. XIII, *reprinted in* BY-LAWS AND ORDINANCES OF THE CITY OF PITTSBURGH, AND THE ACTS OF ASSEMBLY RELATING THERETO; WITH NOTES AND REFERENCES TO JUDICIAL DECISIONS THEREON, AND AN APPENDIX, RELATING TO SEVERAL SUBJECTS CONNECTED WITH THE LAWS AND POLICE OF THE CITY CORPORATION 296 (Pittsburgh, Johnson & Stockton 1828) (continuing the practice of summary convictions but acknowledging that they were "introduced in derogation of the common law" right to jury in "criminal prosecutions").

160. *See In re* Morris, 2 Edm. Sel. Cas. 381, 384–85 (N.Y. Sup. Ct. 1853) (upholding nonjury conviction because New York's constitution states that the jury right "in all cases in which it has been heretofore used shall remain inviolate forever," while lamenting the high rate of false convictions in summary trials); *see also* Roth, *supra* note 24, at 652–53 (discussing other state constitutions that only extended the right to jury trials to cases that were previously jury demandable).

161. Withers v. State *ex rel.* Posey, 36 Ala. 252, 261, 263–64 (1860).

162. *Id.* at 258.

163. *Id.* at 261 (emphasis added).

164. *Id.* at 263.

Given how obvious and persuasive the argument would be for a right to counsel in "all criminal prosecutions," the question remains why progressive reformers have not invoked it to expand the right to counsel. I take up that question in Part III.

III.
CRITIQUING PROGRESSIVES' AVOIDANCE OF THE TEXT-BASED ARGUMENT

Assuming there is a strong text-based argument that the Sixth Amendment guarantees a right to counsel even in cases carrying no jail time, why has such an argument not been more forcefully made? Three likely explanations come to mind. The first may be a fear among progressive reformers that the Sixth Amendment, viewed through a textualist or originalist lens, only guarantees a right to *retained*, not appointed, counsel. If so, any challenge to *Scott* on textualist grounds might invite unwanted scrutiny of *Gideon*. Second, progressives might fear that an insistence on full enforcement of the text, a potentially costly proposition for states in particular, would lead the Court to abandon its commitment to "single-track incorporation," a doctrine guaranteeing that rights will have the same robustness in state court as in federal court. Finally, progressives might increasingly think that any expansion of the right to counsel, like other procedural rights, is likely to be meaningless or counterproductive. I address these potential concerns in turn.

A. Jettisoning Scott, *Jeopardizing* Gideon*?*

The first reason progressives might be fearful of the argument advanced here is their belief that the text of the Sixth Amendment does not guarantee a right of appointed counsel and thus should not be enforced as written. As explained earlier, the Supreme Court held in *Zerbst* that the Sixth Amendment includes a right to appointed counsel and held in *Gideon* that this right is binding on the states.[165] So far, the Supreme Court has consistently held that the right to counsel, whatever its scope, is a right to retained counsel as well as, in equal measure, a right to appointed counsel for those who cannot afford a lawyer. As a leading treatise puts it:

> Supreme Court precedent also indicate[s] that the proceedings . . . subject to the Sixth Amendment right to counsel are precisely the same whether the issue is being represented by retained counsel or requiring the state to appoint counsel for the indigent. Indeed, it appears that, as to all basic issues of interpretation (e.g., what constitutes a "criminal prosecution," when is a person an "accused," and what "assistance" is required of counsel), there is but a single Sixth Amendment right to counsel, encompassing both retained and appointed counsel.[166]

165. *See supra* Part I.

166. WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 11.1, at 694 (6th ed. 2017); *see also* State v. Young, 863 N.W.2d 249, 261 (Iowa 2015)

Accordingly, some lower courts have even limited the right to retained counsel in line with *Scott*, citing the coterminous nature of the two rights.[167]

If the Sixth Amendment right to appointed counsel is in fact coterminous with the right to retained counsel, and if the text-based argument in Part II is persuasive, there should be a right to *appointed* counsel in all criminal prosecutions that encompasses petty misdemeanors without a jail sentence. In turn, if there is a right to appointed counsel in all criminal prosecutions, Federal Rule of Criminal Procedure 58 is unconstitutional because it provides for denying appointed counsel in petty criminal cases where the United States agrees not to pursue a jail sentence. Similar state practices would likewise be unconstitutional.

But if the Supreme Court were to entertain such a text-based argument, would it also necessarily revisit other aspects of right-to-counsel doctrine that do not comply with, or that arguably go beyond, the plain meaning of the Sixth Amendment? At least two of the current Justices on the Court—Justices Gorsuch and Thomas—have explicitly stated their view that *Gideon*'s holding establishing a right to appointed counsel in state court is untenable from an originalist perspective.[168] Perhaps a text-based argument against *Scott* would open the door to a more persuasive argument against *Gideon*. Indeed, that has been a frequent concern raised by fellow legal scholars when hearing of this Article's premise.

Ultimately, this concern should not discourage scholars from exploring a text-based argument for overturning *Scott*. First, overturning *Gideon* would not necessarily leave large numbers of defendants newly unrepresented. Most states have a statutory right, like in the federal system, or state constitutional right to appointed counsel, at least in felony cases.[169] It is only in so-called "petty" cases or cases without a jail sentence that the right to appointed counsel has been routinely denied to low-income people over the past sixty years. For that same reason, a case involving the denial of counsel to a felony defendant—which would be the necessary vehicle for revisiting *Gideon*—is not likely to come before the Court any time soon.

Second, there are ways to save *Gideon* even under a text- and history-based approach to interpreting the Sixth Amendment. For one thing, there is a plausible argument that the text of the Counsel Clause guarantees appointed counsel. After

("[I]f there is a due process right to retained counsel, there is also a due process right to appointed counsel when a defendant cannot pay for retained counsel."); *cf.* Powell v. Alabama, 287 U.S. 45, 65 (1932) ("In a case such as this . . . the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.").

167. *See* cases cited *supra* note 65.

168. *See* sources cited *supra* note 18.

169. *See, e.g.*, CAL. PENAL CODE § 987; discussion *supra* note 40 (federal statutory right); discussion *supra* note 147 (Iowa state constitutional right). Indeed, thirty-five states already guaranteed the right to appointed counsel at the time of *Gideon*, and twenty-two states actually filed a brief in support of Mr. Gideon. *See* Brief for State Government Amici Curiae at 2, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155), 1962 WL 75209, at *2.

all, the Sixth Amendment states that the accused "shall enjoy the right to . . . the assistance of counsel,"[170] and without the right to appointed counsel, indigent defendants would not enjoy the right to the assistance of counsel.[171] Moreover, Justice Hugo Black, recognized as a "textualist-originalist"[172] and the author of both *Zerbst* and *Gideon*, appeared to view the constitutional case for a right to appointed counsel as a no-brainer in *Zerbst*.

An alternative way to reconcile *Gideon* with a textualist approach to the Sixth Amendment would be to justify *Gideon* on equal protection or due process grounds. *Gideon*'s precursor, *Powell v. Alabama*, was a due process case, not a Sixth Amendment case. And reformers before *Gideon* litigated the appointed-counsel issue in lower courts on several different grounds, including equal protection and due process.[173] The Sixth Amendment happened to win the day in *Gideon*, largely due to Abe Fortas's strategy of speaking directly to Justice Hugo Black in the language of automatic incorporation. But it need not have been so.

An equal protection argument in favor of *Gideon* is not hard to make given existing case law. The line of cases upholding a right to appointed counsel on direct appeal is still good law, even as it has been limited in subsequent decisions.[174] While there is no constitutional right to a direct appeal, the Court in *Griffin v. Illinois* (1956) held that an indigent defendant must be given a free transcript where access to a transcript is necessary to a meaningful appeal.[175] Justice Black, writing for a plurality, declared that "[i]n criminal trials, a State can no more discriminate on account of poverty than on account of religion, race, or color."[176] The plurality also set up a future equal protection argument for the *Gideon* rule:

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a *trial court* and one which

170. U.S. CONST. amend. VI.

171. *See, e.g.*, Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 707 (1996) (stating, without elaboration, on whether indigent defendants are entitled to counsel at the expense of the government that "[t]he text of the Counsel Clause can be read either way"). *But cf.* William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1276 (2011) (arguing that *Gideon* cannot be squared with originalism because originalism is flawed, not *Gideon*).

172. *See* Amar, *supra* note 19, at 2008 n.33.

173. Argersinger and Scott also made explicit equal protection arguments. *See* Brief for Petitioner at 5–6, Argersinger v. Hamlin, 407 U.S. 25 (1971) (No. 70-5015), 1971 WL 126423, at *5–6 ("The failure to provide counsel for indigent persons charged with 'minor offenses,' while allowing counsel to those who can afford a lawyer constitutes an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment."). The *Scott* Court did not address Scott's argument. Ironically, it was Justices Powell and Rehnquist, in their *Argersinger* concurrence, who raised equal protection concerns that the Court's holding would advantage indigent defendants over low-income non-indigent defendants in cases involving fines. 407 U.S. at 55.

174. *See* Ross v. Moffitt, 417 U.S. 600, 601 (1974) (holding that there is no right to appointed counsel on a discretionary appeal after the defendant has been represented in their first appeal as of right).

175. 351 U.S. 12, 19 (1956).

176. *Id.* at 17.

> effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. . . . *There can be no equal justice where the kind of trial a man gets depends on the amount of money he has*.[177]

Justice Frankfurter, supplying the fifth vote but only concurring in the judgment, agreed with the dissenters that "a State need not equalize economic conditions" in the provision of counsel.[178] However, he voted to reverse in this case because "when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such a review."[179]

The Court doubled down on this approach in a companion case to *Gideon*, *Douglas v. California* (1963), establishing a right to appointed counsel on direct appeal.[180] The Court acknowledged that "[a]bsolute equality is not required; lines can be and are drawn and we often sustain them."[181] But it concluded that "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."[182] Without a right to appointed counsel on appeal, "[t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal."[183] Notably, Justice Harlan's dissent in *Douglas* questioned why *Gideon* was not decided on equal protection grounds:

> [I]f the present problem may be viewed as one of equal protection, so may the question of the right to appointed counsel at trial, and the Court's analysis of that right in *Gideon v. Wainwright* is wholly unnecessary. The short way to dispose of *Gideon v. Wainwright*, in other words, would be simply to say that the State deprives the indigent of equal protection whenever it fails to furnish him with legal services, and perhaps with other services as well, equivalent to those that the affluent defendant can obtain.[184]

177. *Id.* at 18–19 (emphasis added).
178. *Id.* at 23 (Frankfurter, J., concurring in the judgment).
179. *Id.*
180. 372 U.S. 353, 355 (1963).
181. *Id.* at 357.
182. *Id.*
183. *Id.* at 358; *see also* Anders v. California, 386 U.S. 738, 745 (1967) ("This procedure will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel."); Swenson v. Bosler, 386 U.S. 258, 259 (1967) (per curiam) (holding that assistance of counsel on appeal as of right "may not be denied to a criminal defendant, solely because of his indigency"); Entsminger v. Iowa, 386 U.S. 748, 751–52 (1967) (relying on the *Griffin-Douglas* line of cases and *Anders*); Williams v. Okla. City, 395 U.S. 458, 459 (1969) (rejecting on equal protection grounds the State's position that an indigent could be denied a free transcript of his conviction for violation of a municipal ordinance to appeal because it was a "petty offense"); Jones v. Barnes, 463 U.S. 745, 750–54 (1983) (interpreting *Douglas* and *Anders*).
184. 372 U.S. at 363 (Harlan, J., dissenting) (citations omitted).

Of course, equal protection doctrine has changed significantly since 1963 in ways that might be seen as precluding *Gideon*'s holding on such grounds. But *Griffin* and *Douglas* are still good law. Given that there is a right to trial, but not a right to appeal, and one's chances of winning pro se at trial are equally as daunting as the chances of winning pro se on appeal, *Griffin* and *Douglas* do not seem easily squared with a rule that would deny counsel to an indigent defendant at trial.[185]

Alternatively, other scholars have suggested that *Gideon* could be justified on due process, rather than Sixth Amendment, grounds. As Akhil Amar has posited:

> [T]he indigent's right to appointed counsel could also be derived from the innocence-protecting spirit of the Due Process Clause. The flexibility of the clause, focusing explicitly on how much process is due, can easily accommodate evolving historical developments. Twentieth-century America is considerably wealthier than was eighteenth-century America; and this in turn bears on whether additional procedural safeguards, though costly, are nonetheless due—reasonable, apt, fair. In today's world, an indigent defendant without counsel runs an undue risk of being convicted, even if wholly innocent.[186]

Tracey Meares and others have similarly called for grounding *Gideon* in fundamental fairness rather than Sixth Amendment incorporation.[187]

A final reason that progressives should pursue a text-based argument for expanding the right to counsel notwithstanding any collateral damage to *Gideon* is that textualism is here, whether progressives like it or not. Better to be ready to defend *Gideon* on grounds consistent with the Amendment's text and history than to cede the terms of the debate to opponents of expanding the right. And *Gideon* can be defended; it is a widely cherished opinion and rule of law. Legal scholars even speak of a "*Gideon* paradox"—the widely held belief that *Gideon*

185. Several scholars have called for grounding *Gideon* in equal protection. *See, e.g.*, Brandon Buskey & Lauren Sudeall Lucas, *Keeping* Gideon*'s Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299, 2299 (2017) (asserting that indigent misdemeanor defendants suffer from a Fourteenth Amendment violation because "they are deprived of meaningful access to the courts on the basis of wealth"); Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1201 (2013) (arguing for a "return to the roots" of *Griffin* and progeny and arguing that "[t]he fact that this strain of equality has survived other cutbacks on equal protection doctrine allows indigent defense advocates to reclaim it as a basis for reform").

186. Amar, *supra* note 171, at 707–08 (footnote omitted).

187. *See* Tracey Maclin, *A Criminal Procedure Regime Based on Instrumental Values*, 22 CONST. COMMENT. 197, 213 (2005) (reviewing DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE (2003)) (arguing that *Gideon*'s holding "is not supported by the text of the Sixth Amendment" and "is better supported by an instrumental due process model rather than a formalistic focus on the textually referenced assistance of counsel" (internal quotation marks omitted)); *see generally* Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215 (2003).

is both inconsistent with the plain text of the Sixth Amendment but also widely regarded as correctly decided.[188]

B. Dual-Track Incorporation?

The next reason progressives might be reluctant to push a text-based right-to-counsel argument too far is an assumption that the Court, even if persuaded by the argument, would be wary of the cost of enforcement in state court and thus find a way to enforce it only in federal court. In turn, the fear would be that such "dual-track incorporation" of a fundamental right would jeopardize other longstanding rights in state court.

The expansion of the right to counsel to federal misdemeanors in which defendants do not receive jail time would be significant in itself, before considering any effect on state practice. Over half of federal defendants whose cases end in criminal misdemeanor charges proceed pro se, including those accused of traffic offenses, drug crimes, fraud, impaired driving, and immigration offenses.[189] Federal court is where the government is represented, both in plea negotiations and then, if the case goes to trial, by a federal prosecutor employed by the Department of Justice (DOJ). To deny someone a lawyer in a criminal case where their adversary is the DOJ seems particularly jarring in a country priding itself on procedural justice.

But the effect of extending the right to federal petty misdemeanors would ultimately be much more dramatic if the right applied equally in state court under the doctrine of "single-track incorporation." Until the Civil War, the Supreme Court applied the Bill of Rights only to the federal government.[190] But the Court would later interpret the Fourteenth Amendment, ratified in 1868, as incorporating parts of the Bill of Rights, thereby rendering these parts applicable to the states as well as the federal government.[191] The Court has since settled on a "selective incorporation" approach that determines, on a piecemeal basis, "whether a particular Bill of Rights guarantee is fundamental to *our* scheme of

188. *See, e.g.*, Donald A. Dripps, *Up from* Gideon, 45 TEX. TECH L. REV. 113, 115 (2012).

189. Hashimoto, *supra* note 13, at 489–90, 489 n.128, 492 n.133 (noting distribution of offenses in federal misdemeanor sample and estimating that 64 percent of federal misdemeanor defendants are pro se).

190. *See, e.g.*, Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) (holding that the Fifth Amendment's Takings Clause does not apply to states).

191. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). There has been some debate as to what part of the Fourteenth Amendment incorporates the Bill of Rights, and to what extent. Justice Hugo Black and others believed that the architect of the Fourteenth Amendment, John Bingham, intended to automatically incorporate the entire Bill of Rights into the Amendment and render the rights therein binding on state governments. *See* Adamson v. California, 332 U.S. 46, 74, 76 n.7 (1947) (Black, J., dissenting), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964). Justice Clarence Thomas, in contrast, has insisted that the Privileges or Immunities Clause renders the entire Bill of Rights binding on states, at least with respect to citizens. *See* McDonald v. City of Chicago, 561 U.S. 742, 835, 837–38 (2010) (Thomas, J., concurring).

ordered liberty and system of justice."[192] If so, it is binding on the states through the Due Process Clause.[193]

In turn, under existing doctrine, once the Court deems a right sufficiently fundamental to bind states, that right has the same meaning and scope in state and federal court. A majority of the Court declared as early as 1964 that incorporated constitutional rights do not have a different meaning in state and federal court.[194] While Justice Lewis F. Powell suggested otherwise in a concurring opinion in *Johnson v. Louisiana* (1972), arguing that the right to jury unanimity was part of the federal jury right but should not apply to states,[195] the Court has three times since explicitly rejected Justice Powell's would-be "dual-track incorporation" approach. First, the Court in *Timbs v. Indiana* (2019) rejected dual-track incorporation in the context of the Eighth Amendment's Excessive Fines Clause, reasoning that "if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires."[196] Second, the Court in *Ramos v. Louisiana* (2020) held that the jury unanimity requirement applies in state court and that the Fourteenth Amendment does not contemplate a "watered-down" version of a right in state court.[197] Most recently, the Court in *New York State Rifle and Pistol Association v. Bruen* (2022) struck down a New York law prohibiting carrying a firearm outside the home except with a license based on a showing of "proper cause."[198] This decision reaffirmed that the "individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government."[199] Thus, the Court's recognition of a right to appointed counsel in federal court would, under current doctrine, require recognition of the same right in state court.

Requiring appointed counsel in all state criminal prosecutions would be a much more dramatic result than recognizing the right in federal court. While the annual number of federal petty misdemeanor prosecutions is large, it is dwarfed by the millions of state court misdemeanors prosecuted each year.[200] The reality is that the right to counsel, like the right to jury, is unusual among criminal

192. *McDonald*, 561 U.S. at 764 (citing Duncan v. Louisiana, 391 U.S. 145, 149 & n.14 (1968)) (emphasis in original).

193. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 325 (1937) (applying selective incorporation doctrine via the Due Process Clause and holding that the right against double jeopardy is not sufficiently fundamental), *overruled by* Benton v. Maryland, 395 U.S. 784, 794 (1969) (deeming the double jeopardy guarantee fundamental).

194. *See Malloy*, 378 U.S. at 10–11 (interpreting federal and state rights against self-incrimination as coterminous after incorporation and noting that the same is true for other constitutional contexts, such as the First Amendment, Fourth Amendment, and right to counsel).

195. *See* Johnson v. Louisiana, 406 U.S. 356, 371, 373–74, 380 (1972) (Powell, J., concurring), *abrogated by* Ramos v. Louisiana, 140 S. Ct. 1390, 1397–99 (2020).

196. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

197. 140 S. Ct. at 1397–98.

198. 142 S. Ct. 2111, 2126 (2022).

199. *Id.* at 2137.

200. *See, e.g.*, Jain, *supra* note 15, at 957 & n.12 (noting "an estimated thirteen million [misdemeanor] cases filed each year" (citation omitted)).

procedure rights. Full enforcement in modern state courts would be significantly more difficult than in modern federal courts given the vast number of cases and variety of local practices.[201]

On the other hand, the effect on state courts of guaranteeing a constitutional right to appointed counsel in all criminal cases would depend on whether, and how, states modify their charging practices in response. States might, for example, bring fewer low-level charges, decriminalize certain offenses,[202] or more aggressively attempt to resolve charges without trial. Our bloated misdemeanor system might well exist partly because of a lack of appropriate procedural safeguards, which allow prosecutors to cheaply bring an artificially high number of cases.

The alternative to this potentially dramatic change to state court practices would be for the Court to backtrack on its condemnation of dual-track incorporation and apply a watered-down version of the right to appointed counsel in state court that would apply only to, say, offenses that lead to jail time. But that path would be radical in its own way, given the certainty with which the Court rejected dual-track incorporation in *Timbs*, *Ramos*, and *Bruen*. Dual-track incorporation also seems an awkward fit with the view of Justice Thomas, and perhaps others on the Court, who maintains that the Fourteenth Amendment automatically incorporates the entire Bill of Rights.[203]

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201. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 158 n.30 (1968) (acknowledging that uniformity in the enforcement of the Sixth Amendment "is a more obvious and immediate consideration" in federal court than in state court); *id.* at 212 (Fortas, J., concurring) (noting reasons to apply the jury trial right differently in state than federal court, including "the practice of forum States, of the States generally, and of the history and office of jury trials"); Baldwin v. New York, 399 U.S. 66, 76–77 (1970) (Burger, J., dissenting) (same); Brief for Respondent at 9–14, Scott v. Illinois, 440 U.S. 367 (1979) (No. 77-1177), 1978 WL 206719, at *9–14 (arguing against an "absolute right" and that the jury right and right to counsel have "their cost" in common).

202. Administrative infractions and civil suits are non-criminal and not subject to the procedural protections of the Fifth and Sixth Amendments. *See, e.g.*, Turner v. Rogers, 564 U.S. 431, 435, 441 (2011) (holding that a person incarcerated on civil infraction for failure to pay child support was not entitled to counsel and noting that the Sixth Amendment applies only to criminal cases); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167–69 (1963) (listing factors to determine whether a sanction for conduct is regulatory or punitive, the latter of which is subject to criminal procedural rights of the Fifth and Sixth Amendments). Even traffic violations are treated as criminal offenses in some states, a practice that itself is being reconsidered precisely because the criminal designation leads to criminal sanctions arguably inappropriate for such minor offenses. *See, e.g.*, Merrill Balassone, *Taking Minor Traffic Tickets Out of Criminal Court*, CAL. CTS. NEWSROOM (July 5, 2017), https://newsroom.courts.ca.gov/news/taking-minor-traffic-tickets-out-criminal-court [https://perma.cc/VR4P-SJ3E] (describing a proposal of the Commission on the Future of California's Court System to move certain traffic offenses from criminal court to civil court to reduce the criminal caseload and overly punitive outcomes).

203. *See supra* note 191 and accompanying text. A "dual-track" approach would involve a case-by-case determination that particular rights or aspects of rights (such as the unanimity requirement for criminal juries) are less critical as applied to state than federal court, an inherently selective approach. *Cf.* Will Baude, *Originalism and Dual-Track Incorporation*, VOLOKH CONSPIRACY (Apr. 24, 2020), https://reason.com/volokh/2020/04/24/originalism-and-dual-track-incorporation [https://perma.cc/B2VV-6BQ6] (noting that a selective, fundamental-rights view of incorporation may allow for "daylight" between the fundamental rights protected by the Fourteenth Amendment and the "positive . . . constitutional rights codified in 1791").

Yet there are ways for the Court to distinguish *Timbs*, *Ramos*, and *Bruen* and justify a dual-track approach to the right to counsel in particular. First, the Court could try to distinguish the nature of the right. The immediate costs to states of prohibiting excessive fines (*Timbs*), requiring juries to be unanimous (*Ramos*), or legalizing the carrying of firearms (*Bruen*) are surely small compared to the cost to states of requiring a lawyer or jury[204] in all criminal prosecutions. At least one scholar has already suggested that dual-track incorporation might be a sensible and appropriate approach toward the right to appointed counsel, arguing that although the *Scott* "actual incarceration" standard is blatantly violative of the Sixth Amendment's text (and thus makes little sense when applied to federal court), preserving it for states might save them significant money.[205] More broadly, others have argued that it is perfectly natural for different levels of government to have different versions of a right.[206]

The second way the Court could justify a dual-track incorporation approach to the right to counsel would be in its approach to incorporation under the Fourteenth Amendment. Constitutional law scholar Will Baude has argued that originalists should consider dual-track incorporation a valid option because the selective-incorporation approach to rights (for those who believe in it) inherently offers a justification, consistent with a right's original meaning, for less-than-full enforcement in state courts.[207]

Champions of defendants' rights might be concerned about opening the door to dual-track incorporation in this way given their hard-fought victories in cases like *Ramos* and *Timbs*. But the remote chance of the Court taking a dual-track approach here should not discourage those inclined to make the argument for a broader right to counsel. First, even if the Court took a dual-track approach

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204. Others have argued that the right to jury is different from other fully incorporated rights because it limits states' ability to determine their own structure of government and thus should not be binding against the states. They do not, however, make this argument with respect to the right to counsel. *See generally* F. Andrew Hessick & Elizabeth Fisher, *Structural Rights and Incorporation*, 71 ALA. L. REV. 163 (2019) (arguing that the Fifth Amendment right to a grand jury, the Sixth Amendment right to a criminal jury, and the Seventh Amendment right to a civil jury should not be incorporated because they infringe on state sovereignty).

205. Chhablani, *supra* note 73, at 522–23.

206. *See, e.g.*, Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1528 (2005) (arguing that a constitutional principle may be applied differently to different levels of government); *see also* Kristina M. Campbell, *Can Rights Be Different? Justice Stevens' Dissent in* McDonald v. City of Chicago, 19 TEX. WESLEYAN L. REV. 733, 748–59 (2013) (discussing the implications of Justice Stevens's dissent in *McDonald*, which argued that state and federal rights "need not be identical in shape or scope").

207. Baude, *supra* note 203 (noting that selective incorporation suggests the possibility of "daylight," or a difference, between a right's original meaning and its enforcement in state court). Baude also suggests that originalists should be fine with dual-track incorporation where the public's understanding of a right has shifted from 1791 to 1868. *Id.* The *Bruen* Court also hinted at such an approach. 142 S. Ct. 2111, 2138 (2022) (noting the "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right . . . in 1868" but declining to further address the issue because of its conclusion that the Second Amendment's meaning in 1791 and 1868 was similar). Here, like in *Bruen*, the public understanding of "all criminal prosecutions" was presumably similar in 1791 and 1868.

to the right to counsel, it would not necessarily upset precedent by retroactively applying that approach to already-established rights like juror unanimity.

Second, there are persuasive reasons for enforcing the full right in state court, and there are successful experiments in automatically assigning counsel in misdemeanor arraignment courts without bankrupting counties.[208] Assuming the Court limited a dual-track approach to the right to counsel and jury trial, such a result would arguably be better than the status quo, in which even federal defendants are denied juries and lawyers in most petty misdemeanors. If the choice were between enforcing *Scott* in both federal and state court and enforcing *Scott* only in state court, the latter would be more defensible.

C. Is the Right Meaningless or Even Counterproductive?

Another possible reason progressives have left alone obvious constitutional arguments for an expanded right to counsel is a concern that a broader right to counsel would not change anything on the ground or could possibly make matters worse. This argument might come in a few forms. First, lawyers might have a legitimating effect on overly punitive processes or results that would not otherwise be tolerated. Second, people might routinely waive the right as part of plea bargaining, rendering the right's expansion meaningless. Third, the right might not be worth its considerable cost, risking tradeoffs with other worthy state initiatives. Fourth, and relatedly, the right might be so onerous to enforce as to require dismissal or abandonment of righteous prosecutions. These are important critiques but, as I argue below, they should not ultimately dissuade scholars and advocates from engaging the text.

Several critics have argued that an expanded right to counsel might be counterproductive by offering an overly punitive system a veneer of legitimacy.[209] This critique is not new. For example, in Justice Potter Stewart's dissent from the Court's opinion in *In re Gault*, which granted juveniles a panoply of procedural rights including counsel, he warned that such formalities

208. *See Santa Clara County*, *supra* note 67.

209. *See generally, e.g.*, Paul Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176 (2013) (citing critical legal theory as support for the argument that public defenders and other procedural rights legitimate the system by making it look fair, even as the outcomes are overly punitive); Dharia, *supra* note 21 (celebrating *Gideon* but warning that it "may even facilitate a collective turning away, a widespread diminution of our imaginations about what is possible. *As long as we provide lawyers, it will all be fair.*"); Angélica Cházaro, *Court-Assisted Expulsions*, INQUEST (Aug. 9, 2022), https://inquest.org/court-assisted-expulsions/ [https://perma.cc/2KKR-SAYA] (arguing that federal funding of counsel in immigration proceedings should not be a movement goal due to its legitimating effects); Matthew Caldwell, *The End of Public Defenders*, INQUEST (Feb. 25, 2022), https://inquest.org/the-end-of-public-defenders/ [https://perma.cc/LC4T-Z6TD] (explaining how public defenders have, in some ways, acted as "collaborators" in mass incarceration); SARA MAYEUX, FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA (2020) (exposing the motivations of some establishment advocates of *Gideon* to largely maintain the status quo by providing lawyers); *cf.* Shaun Ossei-Owusu, *The New Penal Bureaucrats*, 170 U. PA. L. REV. 1389, 1400–01, 1436–37 (2022) (noting that existing legal education and implicit biases among public defenders may entrench biases and maintain a harmful status quo).

would lead to harsher treatment of kids in court.[210] More recently, Paul Butler has gone so far as to suggest, drawing on insights from critical theory, that a focus on the right to counsel "stands in the way of the political mobilization that will be required to transform criminal justice."[211]

Even so, these critics generally do not advocate denying lawyers to poor people in any given category of cases. Instead, they caution that a rights-based framework alone, without public defenders making meaningful attempts to combat their own biases, collaborate more closely with justice-affected communities, and actively contribute to dismantling mass incarceration, is counterproductive.[212] Some recent commentators have noted new, creative ways attorneys might act more systemically to improve outcomes, such as unionized collective action;[213] organizing, collecting, and disseminating data as they observe injustices;[214] and working with participatory defense organizations to improve collaboration between public defenders and communities on reform efforts.[215]

A second concern might be that a broader right to counsel would be meaningless because defendants would simply waive the right. For example, in California, there is ostensibly a statutory right to counsel in all misdemeanor offenses, but defendants in misdemeanor arraignment court routinely appear without counsel.[216] Unrepresented people are approached by prosecutors to engage in plea negotiations or dismissal deals. While they are told they can stop the process and get a lawyer if they want one, they might not realize the reasons for doing so.[217] Not surprisingly, people plead guilty at arraignment in much

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210. 387 U.S. 1, 78–79 (1967) (Stewart, J., dissenting). He invoked the case of a twelve-year-old who, in the nineteenth century, was tried in adult court and hanged; "[i]t was all very constitutional." *Id.* at 80.

211. Butler, *supra* note 21.

212. *See, e.g.*, Butler, *supra* note 209, at 2202 (arguing that "[p]eople should still become criminal defense attorneys" and noting how public defenders can help achieve substantive justice by reducing sentences, increasing "the cost of prosecution, and, in theory, this has the potential to reduce mass incarceration on a macro level," and engaging in "aggressive litigation" challenging abuses by law enforcement).

213. *See* Kiyomi Bolick, *Harnessing Union Power for Public Defense*, INQUEST (Mar. 16, 2023), https://inquest.org/harnessing-union-power-for-public-defense/ [https://perma.cc/AQ74-JLW9] ("[T]he future of public defense lies in unionized collective action, and the leverage it will afford us to demand true systemic change.").

214. *See* Caldwell, *supra* note 209 ("There *is* something that public defenders can do to effect structural change, despite our role as collaborators: We should release the trove of information that our offices have been hoarding for almost 60 years, thereby equipping anyone in this country with the materials they need to change our criminal legal system.").

215. *See Trainings for Defense Attorneys*, ALBERT COBARRUBIAS JUST. PROJECT https://acjusticeproject.org/trainings/trainings-for-defense-attorneys/ [https://perma.cc/G8VH-A7YP] (discussing the Albert Cobarrubias Justice Project).

216. *See, e.g.*, Andrea Roth, *Spit and Acquit: Prosecutors as Surveillance Entrepreneurs*, 107 CALIF. L. REV. 405, 418 & nn. 66–67 (2019) (noting that most defendants in Orange County arraignment court are unrepresented).

217. *See, e.g.*, *id.* at 416–18 (explaining how prosecutors approach defendants, many if not most unrepresented, with plea or dismissal deals involving trading leniency for a DNA sample).

higher numbers when they are unrepresented.[218] But if this right were constitutional rather than statutory, the stakes involved in a less-than-knowing and -voluntary waiver might be higher.[219] Consequently, the argument for automatic appointment of counsel at arraignment in such cases would be stronger.[220]

Third, some might argue that the right to counsel in low-level offenses is too expensive and will cut into funding for more important representation in more serious cases.[221] Erica Hashimoto, for example, studied a sample of federal misdemeanors from 2000 to 2005 and concluded that the 64 percent of misdemeanor defendants who proceed pro se "appear both to have lower conviction rates and to receive more favorable sentencing outcomes than represented misdemeanor defendants."[222] On the other hand, Beth Colgan has argued that Hashimoto's study is of limited utility:

> While Hashimoto used the best available data, the study had serious limitations. The federal court administrators failed to code whether defendants were pro se or represented in one-third of the cases in the data set—over 19,000 cases—which may have had a significant effect on the study's results. Further, as Hashimoto notes, the data cannot convey whether the pro se defendants' cases were significantly weaker. The study also does not control for race, gender, criminal history, and the like, all of which have been tied to sentencing outcomes. Therefore, while Hashimoto's study raises critical questions regarding why federal misdemeanants appear to be better off without representation, it cannot say whether the presence or absence of counsel is a causal factor driving those results.[223]

Similarly, J.D. King has argued that Hashimoto's study might undervalue the role of counsel in *state* misdemeanors, where the bulk of prosecutions happen.

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218. *See* ALISA SMITH & SEAN MADDEN, NAT'L ASS'N OF CRIM. DEF. LAWS., THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 23 tbl.9 (2011), https://www.nacdl.org/getattachment/eb3f8d52-d844-487c-bbf2-5090f5ca4be3/three-minute-justice-haste-and-waste-in-florida-s-misdemeanor-courts.pdf [https://perma.cc/EU47-CHDX] (finding that 27.9 percent of unrepresented defendants in Florida misdemeanor cases pled guilty compared to 19.8 percent who pled not guilty); King, *supra* note 15, at 43–44 (noting the importance of counsel in plea negotiations).

219. Waiver of the constitutional right to counsel must be knowing and voluntary. *See* Brady v. United States, 397 U.S. 742, 748 (1970).

220. If the right were constitutional, the state's concern with jeopardizing a conviction by failing to provide a lawyer might be greater, making the cost savings of automatic appointment more obvious. At least one California county has experimented with automatic appointment in misdemeanor arraignments. *See Santa Clary County*, *supra* note 67 (noting that, until the new experiment, "poor defendants have faced misdemeanor criminal charges for decades alone," even though there is a statutory right to counsel).

221. *See generally, e.g.*, Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004) (noting that the Sixth Amendment's enforcement relies on funding realities and that limited funding should be rationed in a way that privileges the factually innocent and serious cases).

222. Hashimoto, *supra* note 13, at 489–90.

223. Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1180 n.31 (2017) (citations omitted).

King has maintained that the study "fails to account for the advice-giving function of counsel" with respect to strategic decisions related to pleas.[224] These decisions encompass considerations such as what the charge should be or what the factual proffer should contain so as not to trigger certain collateral consequences.[225] Hashimoto herself a decade later suggested that counsel should, in fact, be provided in misdemeanor cases. She argued that the presence of counsel "requires that prosecutors engage in the time-consuming project of at least assuring themselves that a crime was committed," and that eliminating the right would therefore "vastly increase the number of people with misdemeanor convictions. That is wrong."[226]

Lawyers matter in petty cases for other reasons, too, that might not be captured in conviction and sentencing data alone. Even where a jail sentence is ultimately off the table, a lawyer might lessen the likelihood of pretrial detention. As the *Rothgery* Court recognized, the assistance of counsel can be critical in combatting illegitimate or unnecessary pretrial detention.[227] But in a case where the defendant ultimately receives a non-jail sentence like a fine or shaming condition in addition to a criminal record, the defendant has no right to counsel under *Scott*. In turn, the question of whether the defendant will receive a jail sentence is—awkwardly—not answered until the judge decides, or the prosecutor agrees, that jail time is off the table.[228] Thus, an unrepresented defendant could lawfully be detained pretrial so long as they are later acquitted or subject only to a non-jail sentence.

In fact, lawyers might make more of a difference in some petty misdemeanors than in some felonies.[229] As the *Argersinger* Court noted, petty cases are sometimes quite legally complex; for instance, vagrancy or loitering cases can raise serious issues of vagueness or free speech.[230] The chance of an acquittal in such cases, or a successful legal challenge to the law, is much greater with a lawyer. Moreover, the "obsession for speedy dispositions" leading to

224. King, *supra* note 15, at 44.

225. *Id.*

226. Erica Hashimoto, *Misdemeanor Cases Need Lawyers Too*, REGUL. REV. (Dec. 5, 2018), https://www.theregreview.org/2018/12/05/hashimoto-misdemeanor-cases-need-lawyers/ [https://perma.cc/4RYK-J97S]; *see also* Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 755–56 (2017) (arguing that more experienced public defenders should not necessarily be diverted away from misdemeanor cases toward felonies).

227. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 196–97 (2008) (noting that Rothgery "was finally assigned a lawyer," who "promptly" filed a bail motion and obtained a dismissal by relaying paperwork showing Rothgery's innocence to the prosecutor).

228. *See* Scott v. Illinois, 440 U.S. 367, 383–84 (1979) (Brennan, J., dissenting) (lamenting the unworkability of the "actual incarceration" standard and noting that Justice Powell had foreseen these administrative issues in his concurrence in *Argersinger*). Anecdotally, in federal misdemeanors in which I have consulted with counsel, prosecutors did not decide until after the information was filed, but before trial, whether to pursue a jail sentence. Consequently, the public defenders did not know whether they would be taken off the case until the prosecutor made this decision.

229. *See* Argersinger v. Hamlin, 407 U.S. 25, 32–35 (1972) (explaining why lawyers are critical in petty cases, sometimes even more so than in some felony cases).

230. *Id.* at 33.

potential injustices might actually be heightened in petty cases.[231] And while misdemeanors carry less prison time than felonies, they can lead to significant collateral consequences—such as deportation or sex offender registration—greater than some felonies.[232]

One final concern might be that the cost of having lawyers in misdemeanor court will force states to abandon or dismiss prosecutions as the court backlog increases. But that argument assumes that the existing number of petty misdemeanor prosecutions is the right number. Perhaps the addition of lawyers might better realign the number of misdemeanors with traditional principles of limited government and criminal liability. To be sure, the DOJ argued against a recent proposal to statutorily expand the jury right in misdemeanors in Washington, D.C., on grounds that there are too many misdemeanors to make such a right practicable, and the Department would presumably make the same argument against a broader right to counsel.[233] But the answer to that sort of "too much justice" concern could be to restore charging practices to what they were before misdemeanor court was so expansive. Alternatively, as criminologists Norval Morris and Gordon Hawkins argued to the White House over forty years ago, the solution might involve developing "an administrative law of crime" to deal with minor offenses through regulatory sanctions and civil fines rather than criminal court.[234] Even if these changes are not fully realized, a broader right to counsel can be part of the systemic change that criminal justice reformers seek.

CONCLUSION

Although this Article has hopefully shown that a straightforward text- and history-based argument for a right to counsel in all criminal prosecutions clearly exists, some scholars and litigants might be wary of exploring such arguments, lest they jeopardize *Gideon*, encourage dual-track incorporation, or make substantive outcomes even worse. While these anticipated concerns merit attention, none offers a compelling reason to abandon a strong text-based argument for a broader Sixth Amendment right to counsel.

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231. *Id.* at 34.

232. *See* Jain, *supra* note 15, at 957–58 (noting deportation and other misdemeanor consequences); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1207 (2016) (noting that some misdemeanors can require sex offender registration). Not all felonies are deportable offenses. *See, e.g.*, Carachuri-Rosendo v. Holder, 560 U.S. 563, 569–70 (2010) (affirming that state felonies that would not be felonies under federal law are not "aggravated" for immigration law purposes).

233. *See* Press Release, U.S. Att'y's Off. for the Dist. of Columbia, U.S. Attorney's Office Testifies at Hearing on D.C. Revised Criminal Code Act of 2021 (Dec. 16, 2021), https://www.justice.gov/usao-dc/pr/us-attorneys-office-testifies-hearing-revised-criminal-code-act-2021 [https://perma.cc/64JD-5F66] (statement of Elana Suttenberg, Special Counsel to the U.S. Attorney).

234. See James B. Jacobs, *In Memoriam: Norval Morris (1923–2004)*, 72 U. CHI. L. REV. 455, 459 (2005) (attributing the concept of "an administrative law of crime" to Morris and Hawkins in their 1977 *Letter to the President on Crime Control*).

Ultimately, this Article suggests—akin to Professor Levinson's arguments in the Second Amendment context—that the Sixth Amendment's text merits more exploration. The truth is that whether left-leaning scholars embrace "progressive originalism"[235] or not, they should be armed with a better understanding of the text and history of the Sixth Amendment. That means understanding what "all criminal prosecutions" meant to people in 1791, exploring alternative grounds for defending *Gideon*, being ready to distinguish the right to counsel from other rights that could be jeopardized by dual-track incorporation, and finding ways to make lawyers more instrumental in the fight for systemic change.

235. *See, e.g.*, Damon Root, *Ketanji Brown Jackson and the Future of Progressive Originalism*, REASON (Dec. 15, 2022), https://reason.com/2022/12/15/ketanji-brown-jackson-and-the-future-of-progressive-originalism/ [https://perma.cc/L3P3-AFNK] (explaining the term and noting that Justice Jackson has wielded it as a tactic).