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## Appointed Counsel and Jury Trial: The Rights that Undermine the Other Rights

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# Appointed Counsel and Jury Trial: The Rights that Undermine the Other Rights

Russell L. Christopher\*

## *Abstract*

*Do the Sixth Amendment rights to appointed counsel and jury trial unconstitutionally conflict with defendants' other constitutional rights? For indigents charged with felonies, Gideon v. Wainwright guarantees the right to appointed counsel; for misdemeanors, Scott v. Illinois limits the right to indigents receiving the most severe authorized punishment—imprisonment. Duncan v. Illinois limits the right to jury trial to defendants charged with serious offenses. Consequently, the greater the jeopardy faced by defendants, the greater the eligibility for appointed counsel and jury trial. But defendants' other constitutional rights generally facilitate just the opposite—minimizing jeopardy by reducing charges, lessening the likelihood of guilt, and lowering the likelihood and severity of punishment—thereby reducing eligibility for appointed counsel and jury trial. Therefore, defendants potentially face the following coercive dilemma: either exercise numerous constitutional rights, but at the cost of relinquishing the rights to appointed counsel and jury trial, or enjoy appointed counsel and jury trial, but at the cost of relinquishing numerous other constitutional rights. This Article*

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*argues that Gideon, Scott and Duncan unconstitutionally burden, penalize, chill, and deter defendants' exercise of ten constitutional rights afforded by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. Additionally, Gideon and Scott-based conflicts may independently violate the Equal Protection and Due Process Clauses: non-indigents retaining counsel enjoy all their rights while indigents enjoy only some. The simple remedy, resolving all of the conflicts, is extending the Sixth Amendment right to appointed counsel to all indigents and the right to jury trial to all defendants.*

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### I. Introduction

Though most constitutional rights of criminal defendants are apportioned equally,<sup>1</sup> some are not. For example, while the Sixth Amendment provides all criminal defendants with the right to assistance of counsel,<sup>2</sup> it provides only some—the indigent—with appointed counsel at State expense.<sup>3</sup> And while only indigents

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1. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 27–28 (1972) (noting that the rights to a public trial, to be informed of the accusation, to confront one's accusers, to compulsory process for obtaining favorable witnesses, to cross-examine adverse witnesses, and to a speedy trial apply in prosecutions regardless of whether the offense is a felony, misdemeanor, or petty offense).

2. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.”).

3. See Allison D. Kuhns, *If You Cannot Afford an Attorney, Will One be*

enjoy such counsel, not all do.<sup>4</sup> *Gideon v. Wainwright*<sup>5</sup> guarantees indigents charged with felonies the right to appointed counsel;<sup>6</sup> for indigents charged with mere misdemeanors, *Scott v. Illinois*<sup>7</sup> limits the right to those receiving imprisonment.<sup>8</sup> Similarly, *Duncan v. Louisiana*<sup>9</sup> limits the Sixth Amendment right to jury trial<sup>10</sup> to defendants charged with “serious crimes” (punishable by more than six months’ imprisonment).<sup>11</sup> Consequently, the distribution of these Sixth Amendment rights entails some inequities. But *if* these rights are to be distributed unequally, apportioning them in proportion to offense or punishment severity—serious charges and punishment trigger heightened procedural protections—is seemingly rational. The converse, or a disproportional distribution (the less jeopardy faced by defendants, the greater the procedural protections), rejected by the Supreme Court as “so outrageous and so obviously a perversion of all sense of proportion,”<sup>12</sup> would be seemingly irrational. This Article argues, however, that the proportional, seemingly rational

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*Appointed for You?: How (Some) States Force Criminal Defendants to Choose Between Posting Bond and Getting a Court-Appointed Attorney*, 97 IOWA L. REV. 1787, 1795 (2012) (“In the wake of *Gideon*, states were left with a mandate . . . to provide legal services to indigent defendants.”).

4. See *infra* notes 5–8 and accompanying text.

5. 372 U.S. 335 (1963).

6. See Kuhns, *supra* note 3, at 1793 (noting that *Gideon* overruled *Betts v. Brady*, which “declined to incorporate the Sixth Amendment right to counsel in all state felony proceedings” (citing *Betts v. Brady*, 316 U.S. 455, 471–73 (1942), overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963))).

7. 440 U.S. 367 (1979).

8. See *id.* at 373–74 (“We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.”).

9. 391 U.S. 145 (1968).

10. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .”).

11. See *Duncan*, 391 U.S. at 154 (finding that “the right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction”).

12. See *Powell v. Alabama*, 287 U.S. 45, 60 (1932) (referring to a disproportional distribution—decreased jeopardy increases right eligibility—of the right to counsel).

distribution of these Sixth Amendment rights causes unconstitutional conflicts with defendants' other constitutional rights that both equal and disproportional distributions avoid.<sup>13</sup>

Rather than rearguing what the Supreme Court continues to resist—that Sixth Amendment right inequities are unfair and illogical,<sup>14</sup> this Article indirectly supports an equal distribution by demonstrating an underlying and overlooked design flaw with the Court's proportional distribution.<sup>15</sup> It makes the novel argument that *Gideon*, *Scott*, and *Duncan*'s proportional distribution of the Sixth Amendment rights to appointed counsel and jury trial impairs defendants' exercise of their *other* constitutional rights.<sup>16</sup> Furthermore, by impinging on defendants' other rights, *Gideon* and *Scott* violate the rationales underpinning both the broader right to the assistance of counsel—ensuring “that all other rights of the accused are protected”<sup>17</sup>—and the narrower right to appointed counsel—ensuring that indigents “stand[] equal before the law.”<sup>18</sup> Similarly, *Duncan* violates the rationale undergirding the right to jury trial—“supporting” and “complement[ing]” defendants' other rights.<sup>19</sup> Rather than protecting and supporting

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13. See *infra* Part V.C.

14. See *infra* Part II.A–B.

15. See *infra* Part V.

16. See *infra* Part III.

17. *Penson v. Ohio*, 488 U.S. 75, 84 (1988). See also *id.* (“Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.” (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956))); Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1051 (2013) (referring to the Sixth Amendment right to the assistance of counsel “[a]s the right that ensures that ‘all other rights of the accused are protected’” (quoting *Penson*, 488 U.S. at 84)).

18. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”).

19. See *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968) (“[T]he structure and style of the criminal process—the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.”).

defendants' other rights, this Article argues that *Gideon*, *Scott*, and *Duncan* unconstitutionally undermine them.<sup>20</sup>

The argument advances by sequentially addressing the following four issues. First, does the proportional distribution of these Sixth Amendment rights create the potential for conflicts with defendants' other constitutional rights?<sup>21</sup> If so, second, are there procedural contexts in which these potentially conflicting constitutional rights actually conflict?<sup>22</sup> If so, third, are these actual conflicts unconstitutional?<sup>23</sup> If so, and finally, what is the resolution to or remedy for these unconstitutional conflicts?<sup>24</sup>

As to the first issue, the proportional distribution of the rights to appointed counsel and jury trial are in tension with the general function of defendants' other constitutional rights.<sup>25</sup> The *Gideon*, *Scott*, and *Duncan* rights attach or strengthen with increasing offense or punishment severity.<sup>26</sup> But the general function of defendants' other constitutional rights facilitates just the opposite—minimizing the seriousness of charge, minimizing the likelihood of guilt, and minimizing the likelihood and severity of punishment.<sup>27</sup> For example, the Fourth Amendment right against unreasonable searches and seizures,<sup>28</sup> the Fifth Amendment privilege against self-incrimination,<sup>29</sup> and the Sixth Amendment Confrontation Clause right to cross-examine adverse witnesses<sup>30</sup> facilitate a defendant's minimization of inculpatory evidence. Other constitutional rights—the Due Process Clause<sup>31</sup> rights to

20. See *infra* Part IV.

21. See *infra* Part II.

22. See *infra* Part III.

23. See *infra* Part IV.

24. See *infra* Part V.

25. See *infra* Part III.

26. See *infra* Part II.A–B.

27. See *infra* notes 28–33 and accompanying text.

28. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.”).

29. See U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

30. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

31. See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person

testify in one's own defense<sup>32</sup> and discover evidence in the prosecutor's possession<sup>33</sup>—facilitate the development of exculpatory evidence. Suppressing inculpatory evidence and raising exculpatory evidence minimize the severity of charge and punishment, and minimize the likelihood of guilt and punishment.<sup>34</sup> In turn, that diminishes the applicability of proportionally allocated rights, including the rights to appointed counsel and jury trial.

This tension between proportional allocations of the *Gideon*, *Scott*, and *Duncan* rights and the function of defendants' other constitutional rights creates the potential for conflicting constitutional rights.<sup>35</sup> It places defendants in a coercive dilemma. To enjoy the rights to appointed counsel or jury trial, defendants may have to forego exercise of other constitutional rights; exercise of these other rights may preclude enjoyment of the rights to appointed counsel and jury trial.

To illustrate how this potential for conflict could result in an actual conflict, suppose an indigent is charged with both a misdemeanor (ineligible for appointed counsel under *Scott* and jury trial under *Duncan*) and a felony (for which *Gideon* and *Duncan* guarantee those rights). Because the misdemeanor and felony arise out of the same act or transaction, the indigent receives a jury trial and appointed counsel for both charges.<sup>36</sup> The indigent has a possible Fifth Amendment double jeopardy<sup>37</sup> claim against only the felony.<sup>38</sup> Prevailing on the claim, resulting in

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of life, liberty, or property, without due process of law.”).

32. See *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961) (holding that a defendant has a Fourteenth Amendment Due Process Clause “right to have his counsel question him to elicit his statement”).

33. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (ruling that the prosecution's suppression of exculpatory evidence violated the Fourteenth Amendment's Due Process Clause).

34. Cf. *id.* at 87–88 (“A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant.”).

35. See *infra* Part III.

36. See *infra* notes 142–144 and accompanying text.

37. See U.S. CONST. amend. V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”).

38. See *Brown v. Ohio*, 432 U.S. 161, 169 (1977) (“[T]he Fifth Amendment



dismissal of the felony, would leave the sole charge of the misdemeanor (ineligible for appointed counsel and jury trial). The indigent has two options. First, assert her right against double jeopardy with the possible benefit of dismissal of the felony, but at the cost of loss of appointed counsel and jury trial for the remaining misdemeanor. Second, forego exercising her right against double jeopardy at the cost of still facing the felony, but with the benefit of maintaining appointed counsel and jury trial for both charges. She faces the dilemma of a forced choice between enjoying either her two Sixth Amendment rights, or her Fifth Amendment right. If she chooses her Sixth Amendment rights, *Gideon* and *Duncan* chilled and deterred exercise of the Fifth Amendment right; if she instead chooses her Fifth Amendment right, *Gideon* and *Duncan* burden and penalize exercising this right. Because enjoying her Sixth Amendment rights may require foregoing her Fifth Amendment right and vice-versa, the rights conflict.

This Article demonstrates that *Gideon*, *Scott*, and *Duncan*, under some circumstances, conflict with ten constitutional rights emanating from the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.<sup>39</sup> It argues that these conflicts are unconstitutional on four independent bases.<sup>40</sup> First, burdening, penalizing, chilling, or deterring the exercise of a constitutional right is generally unconstitutional.<sup>41</sup> For example, the Supreme Court in *United States v. Jackson*<sup>42</sup> invalidated a statute authorizing capital punishment through a jury (but not a bench) trial because it “impose[d] an impermissible burden upon the exercise of a

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[Double Jeopardy Clause] forbids successive prosecution and cumulative punishment for a greater and lesser included offense.”).

39. See *infra* Part III.

40. See *infra* Part IV.

41. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (noting that “penaliz[ing] a person’s reliance on his legal rights is ‘patently unconstitutional’” (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32–33, n.20 (1973)); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (“There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.”). This principle, however, is not uniformly applied. See, e.g., *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978) (“[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid.”).

42. 390 U.S. 570 (1968).

constitutional right”<sup>43</sup> by “deter[ring] exercise of the Sixth Amendment right to demand a jury trial.”<sup>44</sup> Just as the statute in *Jackson* required greater procedural protections (jury trial) for a more serious charge and punishment (a capital crime and punishment), so also *Gideon*, *Scott*, and *Duncan* provide greater procedural protections for more serious charges and punishment.<sup>45</sup> Just as the statute in *Jackson* unconstitutionally burdened and deterred exercise of the Sixth Amendment right to jury trial, so also *Gideon*, *Scott*, and *Duncan* unconstitutionally burden and deter defendants’ exercise of ten other constitutional rights.<sup>46</sup>

Related to the first basis, the second basis addresses multiple constitutional rights burdening or deterring each other.<sup>47</sup> Generally, “a defendant should not be forced to relinquish one constitutional right to obtain another.”<sup>48</sup> Of course, some constitutional rights—those that are “logical converses” to one another—do conflict, constitutionally.<sup>49</sup> For example, defendants have both the right to testify and to remain silent.<sup>50</sup> Defendants cannot possibly simultaneously exercise both rights—defendants must necessarily choose one or the other—“because the two activities are logically incompatible.”<sup>51</sup> But the appointed counsel and jury trial rights and the rights with which both conflict are not such logically opposed rights. As rights meant to protect and complement the other rights, the rights to appointed counsel and

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43. *Id.* at 572.

44. *Id.* at 581.

45. *See infra* Part II.

46. *See infra* Part IV.

47. *See infra* Part IV.B.

48. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 608 (5th ed. 2009).

49. *See* Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 743 n.7 (1981) (stating that “the assertion of [some rights] *can be* constitutionally conditioned on the forfeiture of [an]other, because the condition results—not from anything that the state could prevent—but from the very nature of the constitutional entitlements at issue”).

50. *See id.* (highlighting the fact that the right to take the witness stand in one’s defense and the right to not take the witness stand at one’s trial are logical converses of one another).

51. *Id.*

jury trial are to be enjoyed *in tandem* with the other rights.<sup>52</sup> Apart from this exception for logically opposed rights, the Supreme Court in *Simmons v. United States*<sup>53</sup> declared, “we find it intolerable that one constitutional right should have to be surrendered in order to assert another.”<sup>54</sup> The rationale for the *Simmons* principle is as follows: “When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted.”<sup>55</sup> Based on the *Simmons* principle, *Gideon* and *Duncan* (but not *Scott*) unconstitutionally place defendants in coercive dilemmas in which constitutional rights must be relinquished in order to ensure enjoyment of the Sixth Amendment rights to jury trial and appointed counsel, and vice-versa.

The third and fourth bases are the Fourteenth Amendment Due Process and Equal Protection Clauses.<sup>56</sup> While due process concerns fairness between the State and the individual, equal protection requires the State to treat equally classes of individuals who are equally situated.<sup>57</sup> While conceptually distinct, “[d]ue process and equal protection principles converge in the Court’s analysis [of indigents’ rights].”<sup>58</sup> For example, declaring that “[b]oth equal protection and due process emphasize [that all defendants] ‘stand on an equality before the bar of justice in every American court,’” the Court in *Griffin v. Illinois*<sup>59</sup> found that burdening indigents’ ability to appeal by refusing to supply a free trial transcript violated the Equal Protection and Due Process clauses.<sup>60</sup> Similarly, the deterring and coercing relinquishment of

52. See *supra* notes 17–19 and accompanying text.

53. 390 U.S. 377 (1968).

54. *Id.* at 394.

55. *United States v. Wilcox*, 555 F.2d 115, 120 (3d Cir. 1977).

56. See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

57. See, e.g., *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) (“‘Due process’ emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. ‘Equal protection,’ on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.”).

58. *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).

59. 351 U.S. 12 (1956).

60. See *id.* at 17, 19–20 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)).

numerous constitutional rights caused by *Gideon* and *Scott* befalls only indigents. Non-indigents retaining counsel need not relinquish other rights to ensure enjoying the assistance of counsel, as do indigents.<sup>61</sup> While non-indigents enjoy all their constitutional rights, indigents enjoy only some.<sup>62</sup> By making indigents stand unequally “before the bar of justice,”<sup>63</sup> *Gideon* and *Scott* (but not *Duncan*) may violate both due process and equal protection. While derived from the conflicts, the possible due process and equal protection violations are independent from the *unconstitutionality* of the conflicts; that is, even if deemed constitutional under the first two bases, the conflicts may independently violate equal protection and due process.<sup>64</sup>

The Article progresses in the following Parts. Part II situates the *Gideon*, *Scott*, and *Duncan* rights within a framework of competing approaches to allocating criminal defendants’ constitutional rights. It distinguishes among three different types of right distributions based on severity of offense or punishment.<sup>65</sup> After explaining how any proportionally distributed right has an enhanced potential for conflict with other constitutional rights, Part II supplies a brief overview of the two most prominent proportionally distributed constitutional rights—appointed counsel and jury trial.<sup>66</sup> Finally, it presents the Supreme Court’s rationales for the proportional distribution adopted by *Gideon*, *Scott*, and *Duncan* as well as the criticisms by judges and commentators favoring an equal allocation of these rights, regardless of offense or punishment severity.<sup>67</sup>

Part III demonstrates how this enhanced potential for conflict yields actual conflicts.<sup>68</sup> It presents specific instances where *Gideon*, *Scott*, or *Duncan* conflict with exercising the following rights: (i) Fifth Amendment right against double jeopardy, (ii) Sixth Amendment speedy trial right, (iii) Due Process Clause

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61. See *infra* Part IV.B.

62. See *infra* Part III.

63. See *Griffin*, 351 U.S. at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)).

64. See *infra* Part IV.C.

65. See *infra* Part II.

66. See *infra* Part II.A–B.

67. See *infra* Part II.

68. See *infra* Part III.A–J.

right against vindictive prosecution, (iv) Due Process Clause right to discovery, (v) Fifth Amendment privilege against self-incrimination, (vi) Sixth Amendment Confrontation Clause right, (vii) Eighth Amendment right against cruel and unusual punishment, (viii) Fourth Amendment right against unreasonable searches and seizures, (ix) Sixth Amendment right to effective assistance of counsel, and (x) Due Process Clause right to testify in one's own defense.

Part IV supplies four independent bases for the unconstitutionality of the ten conflicts.<sup>69</sup> First, *Gideon*, *Scott*, and *Duncan* unconstitutionally burden, penalize, chill, and deter defendants' exercise of other constitutional rights. Second, *Gideon* and *Duncan* unconstitutionally coerce indigents to relinquish some constitutional rights to obtain others. Third, the conflicts caused by *Gideon* and *Scott* yield unequal treatment of indigents and non-indigents. Because non-indigents retaining counsel enjoy all their rights while indigents enjoy only some, *Gideon* and *Scott* violate equal protection. Fourth, for similar reasons, *Gideon* and *Scott* violate the equality component of due process. Finally, Part IV rebuts five possible objections to the central argument that the conflicts are unconstitutional.

Part V considers resolutions to the unconstitutional conflicts.<sup>70</sup> It first discusses two existing remedies and two possible ad hoc remedies focusing on the procedural contexts in which the conflicts arise. Even collectively, however, these remedies fail to resolve more than a few of the conflicts.<sup>71</sup> Part IV next presents three remedies that do successfully resolve all ten conflicts. It argues that one is implausible, another is irrational, and that the only rational and plausible remedy is extending the Sixth Amendment right to appointed counsel to all indigents and jury trial to all defendants.

The Article concludes that *Gideon*, *Scott*, and *Duncan*'s proportional and seemingly rational distribution of the rights to appointed counsel and jury trial—the greater the jeopardy, the greater the eligibility for the rights—leads to unconstitutional

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69. See *infra* Part IV.A–D.

70. See *infra* Part V.A–C.

71. See *infra* Part V.A–B.

conflicts with ten other constitutional rights.<sup>72</sup> The preferable resolution is extending *Gideon* and *Duncan* to all offenses.<sup>73</sup> Without a resolution, rather than the rights that support, protect, and complement defendants' other constitutional rights, the Sixth Amendment rights to appointed counsel and jury trial are the rights that undermine the other rights.

## *II. Allocating Rights Based on Severity of Offense and Punishment*

To understand how *Gideon*, *Scott*, and *Duncan* potentially conflict with other constitutional rights of criminal procedure, it is helpful to understand differing ways to allocate rights. There are three principal approaches: (i) right applicability increases as crime or punishment severity increases (“proportional” rights); (ii) right applicability remains the same regardless of crime or punishment severity (equal or “transsubstantive” rights<sup>74</sup>); and, (iii) right applicability decreases as crime or punishment severity increases (inversely proportional or, more simply, “disproportional” rights). Most rights are transsubstantive:<sup>75</sup> the rights to a public trial, to be informed of the nature and cause of the accusation, to confront one’s accusers, to compulsory process for obtaining favorable witnesses, to cross-examine adverse witnesses, to a speedy trial,<sup>76</sup> to have the prosecution provide proof of each element of the offense beyond a reasonable doubt,<sup>77</sup> to due

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72. See *infra* Part VI.

73. See *infra* Part V.C.

74. See William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 843 (2001) (coining the term for rights that “ignore[] substantive criminal law distinctions among crimes” and thus apply equally to all offenses).

75. See *id.* at 847 (“Like almost everything else in the law of criminal procedure, the Fourth Amendment [generally] treats one crime just like another.”).

76. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 27–28 (1972) (describing the requirement of a public trial as a standard for all criminal prosecutions).

77. See *In re Winship*, 397 U.S. 358, 361 (1970) (applying the requirement to all cases).

process,<sup>78</sup> and to equal protection of the laws.<sup>79</sup> While the European Court of Human Rights applies rights equally (or transsubstantively) “to all types of criminal offence, from the most straightforward to the most complex,”<sup>80</sup> “[e]very [American] jurisdiction provides for some procedural differences based upon a distinction between major and minor crimes.”<sup>81</sup>

Though “Fourth Amendment law is [generally] transsubstantive,”<sup>82</sup> in some instances it adopts a disproportional allocation. For example, in *Tennessee v. Garner*,<sup>83</sup> the Supreme Court ruled that police use of lethal force against a fleeing murderer was constitutional but against a fleeing burglar was a seizure violating the Fourth Amendment.<sup>84</sup> A fleeing criminal’s Fourth Amendment right against an unreasonable seizure thereby varies depending on the severity of the suspected crime. The strength of the right decreases—thus allowing lethal force—as the severity of the crime increases. Following Justice Jackson’s 1949 dissent that maintained “the government should have less power to engage in searches and seizures when it pursues petty criminals, such as alcohol smugglers, than when it pursues serious criminals, such as kidnappers,”<sup>85</sup> many commentators and judges have supported a disproportional allocation.<sup>86</sup> Commentators have

78. See *State v. Barnett*, 909 S.W.2d 423, 428 (Tenn. 1995) (“The due process principle of fundamental fairness applies to all criminal prosecutions, and does not rest upon the severity of the sanction sought or imposed.”).

79. See *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971) (“The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed [or the severity of the offense charged].”).

80. *Saunders v. United Kingdom* (1997) 23 EHRR 313, [68].

81. LAFAVE ET AL., *supra* note 48, at 23.

82. Stuntz, *supra* note 74, at 847.

83. 471 U.S. 1 (1985).

84. See *id.* at 11, 21 (“Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.”); see also Stuntz, *supra* note 74, at 847 n.16, 851–52 (providing other examples of disproportionately allocated Fourth Amendment rights).

85. See Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1959 (2004) (citing *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting)).

86. See *id.* (citing *Brinegar v. United States*, 338 U.S. 160, 183 (1949)).

conjectured that but for practical concerns a disproportional allocation of Fourth Amendment protections would supplant the predominant transsubstantive approach.<sup>87</sup>

In contrast to Fourth Amendment or police-limiting rights, what might be termed adjudicative rights—including the rights to appointed counsel and jury trial—are sometimes allocated proportionally to severity of crime or punishment. For example, “[f]elony defendants possess a bundle of heightened procedural entitlements—such as rights to a grand jury, a preliminary hearing, increased discovery . . . that misdemeanor defendants are often denied.”<sup>88</sup> The most serious type of punishment and felony offense—capital—triggers even greater procedural protections.<sup>89</sup> Proportional allocations are axiomatically assumed as a “basic . . . [and] important principle underlying the criminal justice system: serious sanctions require serious procedures.”<sup>90</sup> Despite being considered axiomatically self-evident, proportional allocations trigger a problem that transsubstantive and disproportional allocations avoid.

Proportional rights, by their very nature, have an enhanced potential to conflict with other rights that, by their very function, serve to reduce crime or punishment severity. Defendants

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(Jackson, J., dissenting); *id.* at 1957 n.1 (citing numerous sources).

87. See, e.g., Stuntz, *supra* note 74, at 850 (“If every crime carried its own search and seizure law, police would find it too costly to learn search and seizure law, and that law would cease to function.”); Volokh, *supra* note 88, at 1957–61 (citing “thorny” line-drawing difficulties).

88. Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 780 (2016).

89. See LAFAYE ET AL., *supra* note 48, at 24–25 (noting that capital offenses may require “special venue requirements . . . individualized and sequestered voir dire of jurors . . . a greater number of peremptory challenges . . . [and] special qualifications for counsel”).

90. Crane, *supra* note 88, at 782, 830; accord Antony Duff, *Presumptions of Innocence*, in THE NEW PHILOSOPHY OF CRIMINAL LAW 193, 195 (Chad Flanders & Zachary Hoskins eds., 2016) (asserting the “general principle that the greater the burden that state action imposes on those subjected to it, the more certain those who implement it should be that it is warranted”); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 809, 818 (2004) (noting that limited funds require that the right to appointed counsel should be “rationed” to those facing the most serious offenses).



generally exercise their rights in order to avoid or minimize liability and punishment. Some rights block or minimize inculpatory evidence; other rights foster the development or timely deployment of exculpatory evidence.<sup>91</sup> Successful exercise of these rights may reduce the severity of offense charged or punishment imposed. In turn, that reduction of offense or punishment severity reduces applicability of proportional rights—rights that attach or strengthen as the severity of the offense or punishment increases. Consequently, successful exercise of some rights may result in the loss of or failure to attain proportional rights. Maintaining or attaining proportional rights may require foregoing exercise of other rights that reduce offense or punishment severity. Proportional rights, by their very nature, potentially place right-holders in the dilemma of having to choose between rights. Because proportional rights attach as offense or punishment severity increases, but defendants generally exercise their rights to decrease offense and punishment severity, proportional rights have an enhanced potential to conflict with other rights.

In contrast to proportional rights, neither transsubstantive nor disproportional rights have the same enhanced capacity for conflict. A defendant reducing the severity of offense or punishment by the successful exercise of rights does not diminish applicability of transsubstantive rights because they apply equally regardless of offense or punishment severity. Similarly, defendants reducing the severity of offense or punishment by the successful exercise of rights only increase, not decrease, applicability of disproportional rights because those attach or strengthen as offense or punishment severity decreases. As a result, transsubstantive and disproportional rights, by their very nature, lack the same potential for conflict with other rights as proportional rights.

While any proportional right incurs this problem of potential conflict, this Article will limit its focus on perhaps the two most important proportional rights—appointed counsel and jury trial.<sup>92</sup> Their importance to defendants only makes the problem worse. The more valuable the proportional right, the more attractive foregoing other rights to maintain or attain the proportional right

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91. See *supra* notes 28–33 and accompanying text.

92. See *infra* Part II.A–B.

becomes. And that only increases the likelihood of conflict between the rights to appointed counsel and jury trial, and other rights. Before demonstrating specific, actual conflicts in Part III, this Part supplies some background on the rights to appointed counsel and jury trial.

### *A. Appointed Counsel*

As to the right to the assistance of retained counsel, the long-standing English common law rule in effect at the time of the adoption of the Sixth Amendment utilized a disproportional allocation: misdemeanor, but not felony, defendants enjoyed the right.<sup>93</sup> “[T]he rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers.”<sup>94</sup> William Blackstone skeptically questioned: “For upon what face of reason can that assistance [of counsel] be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?”<sup>95</sup> The English rule found little favor in colonial America as well.<sup>96</sup> Twelve of the original thirteen colonies granted a right to retained counsel for serious offenses and most also granted the right for all offenses.<sup>97</sup> Eliminating entirely differentiations of the right based on seriousness of charge, the Sixth Amendment

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93. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 60 (1932) (“Originally, in England, a person charged with treason or felony was denied the aid of counsel . . . [but] persons accused of misdemeanors were entitled to the full assistance of counsel.”); JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL* 3 (2002) (“For less serious crimes . . . a defendant could employ a lawyer to present his defense. . . . Until the middle of the eighteenth century, the British courts strictly adhered to a common law rule that prohibited those accused of serious offenses from employing lawyers to present their defense.”).

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

95. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*355.

96. See, e.g., *Powell*, 287 U.S. at 61 (“The rule was rejected by the colonies.”); TOMKOVICZ, *supra* note 93, at 9 (“[M]ost of the colonies departed dramatically from the restrictive approach to counsel of the British common law.”).

97. See, e.g., *Powell*, 287 U.S. at 64 (“[I]n at least twelve of the thirteen colonies the rule of the English common law . . . had been definitely rejected and the right to counsel fully recognized in [almost] all criminal prosecutions.”); TOMKOVICZ, *supra* note 93, at 9 (“[A]t least eleven of the thirteen states had enacted, either by constitution or statute, a general right to be represented by counsel and one accorded the right as a matter of common law.”).

provides: “In *all* criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.”<sup>98</sup>

When the Supreme Court recognized a right to appointed counsel for indigents, it did so by reinstating differentiations of the right based on crime severity that the Sixth Amendment rejected for retained counsel. In 1932, *Powell v. Alabama*<sup>99</sup> granted the right to appointed counsel for indigents charged with capital offenses.<sup>100</sup> *Johnson v. Zerbst*<sup>101</sup> extended the *Powell* right to federal indigent defendants charged with non-capital, felony offenses.<sup>102</sup> In 1963, *Gideon* extended the right to all indigent felony defendants.<sup>103</sup>

It was not until 1972 that the Court addressed the right’s application to misdemeanors.<sup>104</sup> *Argersinger v. Hamlin*<sup>105</sup> held that indigents receiving imprisonment enjoyed a right to appointed counsel at trial.<sup>106</sup> While *Scott* construed *Argersinger* as requiring the right “regardless of the cost to the States,” *Scott* defended its refusal to extend the *Argersinger* right to misdemeanors merely authorizing imprisonment because it would “impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.”<sup>107</sup> Under *Scott*’s “actual imprisonment” standard, in order for imprisonment to be imposed post-trial, the judge must appoint counsel pre-trial.<sup>108</sup> Thus in deciding whether to appoint

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

99. 287 U.S. 45 (1932).

100. *Id.* at 69.

101. 304 U.S. 458 (1938).

102. *See id.* at 463 (“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.”).

103. 372 U.S. 335, 344 (1963).

104. *See Argersinger v. Hamlin*, 407 U.S. 25, 25 (1972) (examining the extent to which the Sixth Amendment guarantees a defendant the right to counsel).

105. 407 U.S. 25 (1972).

106. *Id.* at 40.

107. *Scott v. Illinois*, 440 U.S. 367, 373 (1979); *see also id.* at 384 (Brennan, J., dissenting) (construing “[t]he apparent reason” for the majority’s not granting the right to appointed counsel to all defendants as a “concern for the economic burden” it would impose on the States).

108. *See, e.g., id.* at 374 (Powell, J., concurring) (noting that trial judges must decide whether or not to appoint counsel “in advance of hearing any evidence and

counsel, the judge must determine during pre-trial the likelihood of guilt and the imposition of imprisonment. By reversing the normal chronology of evidence first and judgment second, *Scott* places “the cart of punishment before the horses of trial, evidence, and guilt.”<sup>109</sup> Despite criticism of *Scott* as “illogical in principle and unworkable in practice,”<sup>110</sup> “the Court appears firmly committed to utilizing the actual imprisonment standard as the sole Sixth Amendment dividing line for requiring appointed counsel in misdemeanor cases.”<sup>111</sup>

### *B. Jury Trial*

While today the right to the assistance of counsel is considered the most valuable constitutional right of defendants,<sup>112</sup> the right to jury trial was “the most important to the Framers” of the Constitution.<sup>113</sup> Recognizing the importance of this right as early as 1215, the Magna Carta declared that “[n]o free man shall be taken or imprisoned [or dispossessed] or outlawed or exiled or in any way destroyed . . . except by the lawful judgment of his peers and the law of the land.”<sup>114</sup> The Declaration of Independence cited British breaches of this right in prosecutions of colonists as cause for separation: “depriving us, in many cases, of the benefits of Trial by Jury.”<sup>115</sup> So important was the right to jury trial that the

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before knowing anything about the case except the charge”).

109. Russell Christopher, *Penalizing and Chilling an Indigent’s Exercise of the Right to Appointed Counsel for Misdemeanors*, 99 IOWA L. REV. 1905, 1908 (2014).

110. *Id.*

111. LAFAVE ET AL., *supra* note 48, at 595.

112. *See* *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (“Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.” (quoting *Walter V. Schaefer, Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956))).

113. JOSHUA DRESSLER & GEORGE C. THOMAS, III, *CRIMINAL PROCEDURE* 1199 (6th ed. 2017).

114. MAGNA CARTA, ch. 29 (1215).

115. THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).

Constitution explicitly guarantees the right to jury trial—twice.<sup>116</sup> Article III states: “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”<sup>117</sup> And the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . . .”<sup>118</sup>

The Supreme Court, however, has long construed “all” crimes and “all” prosecutions to mean only some.<sup>119</sup> “It has long been settled that ‘there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.’”<sup>120</sup> Beginning in 1888 in *Callan v. Wilson*,<sup>121</sup> the Court has unwaveringly limited the right to only non-petty or serious offenses.<sup>122</sup> In 1968, *Duncan* held that the Sixth Amendment right to jury trial applied to the states through the Fourteenth Amendment, but reaffirmed its application to only serious offenses.<sup>123</sup> Refusing to articulate a bright-line test distinguishing between serious and petty offenses, the Court found an offense’s maximum authorized punishment “of major relevance.”<sup>124</sup> Terming it the “most relevant” factor, *Baldwin v. New York*<sup>125</sup> clarified that offenses authorizing imprisonment exceeding six months necessarily triggered the constitutional right to jury trial.<sup>126</sup>

116. See *infra* notes 117–118.

117. U.S. CONST. art. III, § 2, cl. 3.

118. U.S. CONST. amend. VI.

119. See *Baldwin v. New York*, 399 U.S. 66, 68 (1970) (noting “the long-established view that so-called ‘petty offenses’ may be tried without a jury”).

120. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968)).

121. 127 U.S. 540 (1888).

122. See *id.* at 557 (1888) (exempting from the constitutional right of trial by jury “that class or grade of offenses called ‘petty offenses’”).

123. See *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) (doubting “that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States” unless the crime carries possible penalties up to six months).

124. See *id.* (deciding that the severity of the maximum authorized penalty is most relevant in concluding whether an offense is petty and stating that a two-year maximum is sufficiently ‘serious’ to require an opportunity for jury trial).

125. 399 U.S. 66 (1970).

126. See *id.* at 68–69 (“[W]e have concluded that no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than

*Blanton v. City of North Las Vegas*<sup>127</sup> ruled that offenses authorizing maximum imprisonments of six months or less were presumptively petty, not triggering the right to jury trial.<sup>128</sup> On behalf of proportionally allocating the right, *Duncan*, *Baldwin*, and *Blanton* all offered the rationale of administrative efficiency outweighing harm to defendants.<sup>129</sup>

### III. Gideon, Scott, and Duncan Conflict with Other Constitutional Rights

While Part I explained how any proportionally allocated right has the enhanced potential to conflict with other constitutional rights, this Part illustrates how this potential for conflict yields actual conflicts. This Part demonstrates that *Gideon* conflicts with eight constitutional rights; *Scott* and *Duncan* conflict with ten. For reasons of economy, the scenarios depicting the conflicts combine the rights of appointed counsel and jury trial. But they need not be so combined; each right alone could cause the same conflicts. But because the scenarios combine both rights, the defendant in each example is indigent. While *Gideon*- and *Scott*-based conflicts apply only to indigents (because the *Gideon* and *Scott* rights apply only to indigents), *Duncan*-based conflicts could apply as well to non-indigent defendants.

The conflicts arise in a variety of procedural contexts. Defendants forego exercising constitutional rights to *maintain*, and in other contexts to *attain*, the Sixth Amendment rights to appointed counsel and jury trial. The conflicts arise when

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six months is authorized.”).

127. 489 U.S. 538 (1989).

128. See *id.* at 543 (“Although we did not hold in *Baldwin* that an offense carrying a maximum prison term of six months or less automatically qualifies as a ‘petty’ offense, and decline to do so today, we do find it appropriate to presume . . . society views such an offense as ‘petty.’”).

129. See *id.* at 542–43 (defending the disadvantages to defendants of nonjury trials for petty offenses because they “may be outweighed by the benefits [to the state] that result from speedy and inexpensive nonjury adjudications” (quoting *Baldwin*, 399 U.S. at 73)); *Duncan*, 391 U.S. at 160 (“[T]he possible consequences to defendants from convictions of petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.”).

defendants are charged with single felonies, single misdemeanors, multiple misdemeanors, and both felonies and misdemeanors. Eight of the ten conflicts arise in multiple procedural contexts, with most arising in four different procedural contexts. This wide variety, when considering resolutions to the conflicts (as Part V addresses), precludes the possibility of tailoring narrow, context-based remedies.

For simplicity, suppose that each indigent in the following scenarios depicting the conflicts, facing the dilemmatic choice of which constitutional rights to exercise, opts to forego various constitutional rights to ensure enjoyment of the rights to appointed counsel and jury trial. Although which dilemmatic choice the indigent makes and why is not necessarily relevant to whether the rights conflict,<sup>130</sup> it may nonetheless be helpful to understand the practical reasons making such a choice plausible. First, as the Supreme Court has stated, the assistance of counsel and jury trial are the more valuable rights because they ensure the protection of, support, and complement all the other rights.<sup>131</sup> Second, expert cross-examination by counsel will expose the shaky credibility of prosecution witnesses, resulting in acquittal. Third, a jury, but not a judge, will be sympathetic to the extenuating circumstances and thus a jury, but not a judge, will deliver an acquittal. Each indigent defendant concludes, for one or more of the above reasons, that she is better off (as a way to minimize liability) by foregoing her various constitutional rights to ensure enjoyment of her Sixth Amendment rights to appointed counsel and jury trial.

In many of the scenarios, the indigent foregoes the chance at obtaining the dismissal of a more serious charge to ensure the rights to appointed counsel and jury trial for that charge as well as a less serious charge. One might object by claiming implausibility—no rational defendant would so choose. But as

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130. See, e.g., *United States v. Ryan*, 810 F.2d 650, 656 (7th Cir. 1987) (“If the government forces a defendant to choose between constitutional rights, which right the defendant surrenders does not alter the analysis.”); *Strange v. James*, 323 F. Supp. 1230, 1234 (D. Kan. 1971) (“[W]hether the accused in this case accepted or rejected [appointed] counsel does not remove the fact that the provision for recovering legal expenses is a burden and condition on the exercise of the right to counsel and thereby has some chilling effect.”); *Westen*, *supra* note 49, at 757 n.49 (noting that whether two rights unconstitutionally conflict does not “depend[] on *how* a defendant responds to the compelled election”).

131. See *supra* notes 17–19 and accompanying text.

explained above, the indigent has several reasons for doing just that. And there are three additional possible reasons rebutting implausibility. First, the more serious charge is weak and likely to result in acquittal even if the indigent declines to exercise a constitutional right that might obtain its dismissal. Second, without a jury trial and appointed counsel, conviction on the less serious charge is likely; with a jury trial and appointed counsel, acquittal of both charges is likely. Third, that a defendant seemingly chooses irrationally is neither implausible nor eliminates the conflict. For example, in *Green v. United States*,<sup>132</sup> a defendant made a similar, seemingly unwise decision.<sup>133</sup> Indicted on capital murder and second-degree murder, the jury found Green guilty of second-degree murder but was silent as to the capital murder.<sup>134</sup> Despite avoiding the death penalty and receiving a comparatively light sentence of five to twenty years' imprisonment,<sup>135</sup> Green appealed the conviction thereby risking relinquishing his right against double jeopardy and risking retrial on the capital murder.<sup>136</sup> After a successful appeal, Green was retried under the original indictment but this time the jury convicted on the capital murder and the defendant was sentenced to death.<sup>137</sup> Despite Green choosing seemingly unwisely by "tak[ing] a 'desperate chance' in securing the reversal of the erroneous [second degree murder] conviction," the Court held that the right to appeal and the right against double jeopardy unconstitutionally conflicted.<sup>138</sup> As to the defendant's dilemmatic choice between which right to exercise, the Court declared that "[t]he law should not, and in our judgment does not, place the defendant in such an incredible dilemma."<sup>139</sup>

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132. 355 U.S. 184 (1957).

133. *Id.* at 185.

134. *Id.* at 186.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 193.

139. *Id.*



*A. Fifth Amendment Right Against Double Jeopardy*

More expansively presenting an example briefly discussed above,<sup>140</sup> the following scenarios illustrate how *Gideon* and *Duncan* conflict with the Fifth Amendment right against double jeopardy.<sup>141</sup> Suppose an indigent is charged with both a misdemeanor (ineligible for appointed counsel and jury trial) and a felony (for which *Gideon* and *Duncan* guarantee those rights). Because the misdemeanor and felony arise out of the same act or transaction, the indigent will be tried jointly<sup>142</sup> before a jury,<sup>143</sup> and represented by appointed counsel, on both charges.<sup>144</sup> The indigent has a double jeopardy claim against only the felony.<sup>145</sup> But she

140. See *supra* Part I. For examples of different unconstitutional conflicts involving the Fifth Amendment right against double jeopardy, see *Green v. United States*, 355 U.S. 184, 186–93 (1957); *United States v. Bounos*, 693 F.2d 38, 39 (7th Cir. 1982) (“[D]efendants would not be waiving their Fifth Amendment rights if they confessed guilt for the purpose of making out their double jeopardy claim.” (citing decisions from the Third and Fifth Circuits)).

141. The double jeopardy clause prohibits subjecting a defendant “for the same offence to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V, § 2.

142. See, e.g., FED R. CRIM. P. 8(a) (authorizing joinder of offenses that are “based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan”); LAFAYETTE ET AL., *supra* note 48, at 856 (“It is commonly provided that offenses committed at the same time and place or otherwise related to one another may be joined together so that the defendant may be prosecuted for all of them in a single trial.”).

143. See, e.g., D.C. CODE § 16-705(b-1) (2014) (“If a defendant in a criminal case is charged with . . . at least one jury demandable offense and one non-jury demandable offense, the trial for all offenses charged against that defendant shall be by jury . . . .”); *State v. Huebner*, 505 A.2d 1331, 1335 (Md. 1986) (asserting that because right to jury trial attached to one offense it also attached to all “other offenses [that] arose out of the same circumstances”). *But see* LAFAYETTE ET AL., *supra* note 48, at 1072 (noting “the practice followed in some jurisdictions of sending only the nonpetty offense to the jury and leaving the petty offense charge to be determined by the judge”).

144. Though not a formal rule, it is common practice for reasons of economy for an indigent charged with both a felony (constitutionally entitled to appointed counsel) and a misdemeanor (unentitled to appointed counsel) to be represented by appointed counsel on both charges. Interview with Jill Webb, Cmty. Res. Coordinator, Tulsa Cty. Pub. Defender’s Office (Mar. 16, 2017); Interview with Anonymous, Fed. Criminal Defense Practitioner on Fed. Pub. Defender’s Panel (Mar. 3, 2017).

145. For example, the felony possibly constitutes the “same offense” for double jeopardy purposes as a lesser offense for which the indigent was previously found

realizes that by prevailing on the claim, the dismissal of the felony would leave the sole charge of the misdemeanor affording neither appointed counsel nor jury trial.<sup>146</sup> (Alternatively, the indigent is charged only with the felony. But she realizes that by prevailing on the double jeopardy claim and obtaining dismissal of the felony, the prosecutor will subsequently charge her with the misdemeanor affording neither appointed counsel nor jury trial).

The following scenarios depict *Scott* and *Duncan* causing a similar conflict. Suppose an indigent is charged with two misdemeanors (Misdemeanors *A* and *B*). Misdemeanor *A* is eligible for appointed counsel under *Scott* and guarantees a right to jury trial under *Duncan* but Misdemeanor *B* is eligible for neither. Based on Misdemeanor *A*, the indigent receives a jury trial and appointed counsel.<sup>147</sup> Because both misdemeanors arise out of the same act or transaction, the indigent will be jointly tried before a jury, and represented by appointed counsel, on both charges.<sup>148</sup> The indigent has a double jeopardy claim against only Misdemeanor *A*. But the indigent realizes that by prevailing on the double jeopardy claim, the dismissal of Misdemeanor *A* would leave the sole charge of Misdemeanor *B* affording neither appointed counsel nor jury trial.<sup>149</sup> (Alternatively, the indigent is charged only with Misdemeanor *A*. She realizes that by prevailing on the double jeopardy claim and obtaining dismissal of Misdemeanor *A*, the prosecutor will subsequently charge her with

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guilty and punished. *See United States v. Dixon*, 509 U.S. 688, 696 (1993) (“The same-elements test, sometimes referred to as the ‘*Blockburger*’ test, inquires whether each offense contains an element not contained in the other; if not, they are the ‘same offence’ and double jeopardy bars additional punishment and successive prosecution.”). Prosecution of a crime following the punishment of a lesser-included offense arising out of the same incident violates double jeopardy. *See Brown v. Ohio*, 432 U.S. 161, 169 (1977) (“[T]he Fifth Amendment [Double Jeopardy Clause] forbids successive prosecution and cumulative punishment for a greater and lesser included offense.”).

146. A double jeopardy claim may be applicable to one charge but not another because there is no mandatory “same transaction” joinder protection under the Fifth Amendment prohibition against double jeopardy. *See, e.g., LAFAVE ET AL., supra* note 48, at 884 (“[A] majority of the Court has refused to accept the ‘same transaction’ test as a constitutional imperative.” (citing *Brown*, 432 U.S. at 169)).

147. *See supra* notes 104–111, 119–128 and accompanying text.

148. *See supra* notes 142–144 and accompanying text.

149. *See supra* notes 145–146 and accompanying text.

Misdemeanor *B* affording neither appointed counsel nor jury trial.)<sup>150</sup>

In each of the above scenarios, the indigent faces the following dilemma. Exercising her Fifth Amendment right against double jeopardy risks loss of her Sixth Amendment rights to jury trial and appointed counsel.<sup>151</sup> Ensuring appointed counsel and jury trial requires foregoing her Fifth Amendment right.<sup>152</sup> *Gideon*, *Scott*, and *Duncan* compel the indigent to choose between her Sixth Amendment rights to appointed counsel and jury trial, and her Fifth Amendment right against double jeopardy.<sup>153</sup> Because enjoying her Sixth Amendment rights may require foregoing her Fifth Amendment right and vice-versa, the rights conflict.

### B. Sixth Amendment Speedy Trial Right

Rather than *maintain*, the following conflict involves a defendant seeking to *attain* appointed counsel and jury trial. The conflict is between *Gideon* and *Duncan*, and the Sixth Amendment speedy trial right.<sup>154</sup> Suppose a judge informs an indigent charged with a misdemeanor ineligible for jury trial but eligible for appointed counsel that she is initially inclined to not appoint counsel. But the judge offers to revisit the issue as the prosecution develops additional evidence. Hoping to obtain sufficient additional evidence to increase the charge to a felony,<sup>155</sup> the

150. See *supra* note 8 and accompanying text.

151. See U.S. CONST. amend. VI (providing the right to a trial “by an impartial jury” and the right to “Assistance of Counsel”).

152. See U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”).

153. See *supra* notes 141–150 and accompanying text.

154. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.”).

155. A prosecutor is generally free to increase (or decrease) the number and severity of charges against a defendant before trial begins. See, e.g., *United States v. Goodwin*, 457 U.S. 368, 382 (1982)

A prosecutor should remain free before trial to exercise . . . broad discretion . . . to determine the extent of . . . prosecution. An initial decision should not freeze future conduct . . . [T]he initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

prosecutor repeatedly requests continuances that delays commencement of the trial for years. The indigent would like to object to the continuances as violating his right to a speedy trial.<sup>156</sup> But he would also like to obtain a jury trial and appointed counsel (for which he would be constitutionally entitled if charged with the felony). He realizes that by prevailing on the objection, the judge will not grant the prosecution the continuances, the prosecution will not muster additional evidence to increase the charge, and thus he will not become entitled to appointed counsel and jury trial.<sup>157</sup> (A similar conflict could arise through *Scott* and *Duncan*.<sup>158</sup>) The indigent faces the dilemma of a forced choice between the Sixth Amendment rights to appointed counsel and jury trial, and the right to a speedy trial. Because enjoying the Sixth Amendment rights to appointed counsel and jury trial may require foregoing his Sixth Amendment right to a speedy trial and vice-versa, the rights conflict.

### *C. Due Process Clause Right Against Vindictive Prosecution*

In the following scenario, *Gideon* and *Duncan* conflict with the Due Process Clause right against vindictive prosecution.<sup>159</sup> Suppose an indigent is charged with a misdemeanor triggering neither appointed counsel nor jury trial. During the unsuccessful

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156. See *supra* note 154 and accompanying text.

157. See *supra* notes 5–6, 9–11 and accompanying text.

158. Suppose the prosecutor repeatedly requests continuances to develop additional evidence allowing an increase in the charge to a more serious misdemeanor (constitutionally entitled to jury trial and eligible for appointed counsel) from a less serious misdemeanor (affording neither). See *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (“[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”); *Scott v. Illinois*, 440 U.S. 367, 367 (1979) (“The Sixth and Fourteenth Amendments require that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense.”). The indigent realizes that prevailing on the Sixth Amendment speedy trial right claim precludes the prosecution from increasing the charge and thus prevents him from enjoying appointed counsel and a jury trial. See *supra* notes 5–6, 9–11 and accompanying text.

159. See U.S. CONST. amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).

plea negotiations, the prosecutor never mentions the possibility of an additional, increased charge if the indigent declines to plead guilty. Informing the indigent that “I’m sending a message to you and other defendants who refuse to plea bargain,” the prosecutor adds a felony charge (constitutionally entitling the indigent to appointed counsel and jury trial).<sup>160</sup> Being jointly tried on both charges, the indigent receives appointed counsel and jury trial for both.<sup>161</sup> Because the prosecutor never mentioned the additional, increased charge during the negotiations and the prosecutor’s statement arguably evidences a motive of vindictiveness, the indigent has a due process claim for prosecutorial vindictiveness.<sup>162</sup> But prevailing on the claim would result in dismissal of the felony and thus loss of the rights to appointed counsel and jury trial.<sup>163</sup> (A similar conflict could arise through *Scott* and *Duncan*.<sup>164</sup>) The indigent faces the dilemma of having to choose between the Sixth Amendment rights to appointed counsel and jury trial, and the due process right. Because enjoying her Sixth Amendment rights may require foregoing her Due Process right and vice-versa, the rights conflict.

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160. See *supra* notes 5–6, 9–11 and accompanying text.

161. See *supra* notes 142–144 and accompanying text.

162. Generally, a prosecutor carrying out a threat made during plea negotiations to increase charges if the defendant refuses to plead guilty does not constitute prosecutorial vindictiveness violating due process. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978) (describing such threats as “an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas”). However, *Bordenkircher* explicitly exempted from its ruling the situation, as here, “where the prosecutor without notice brought an additional and more serious charge after plea negotiations . . . had ended with the defendant’s insistence on not pleading guilty.” *Id.* at 360.

163. See *supra* notes 5–6, 9–11 and accompanying text.

164. Suppose the prosecutor, with the same arguably vindictive motive, adds an additional, more serious misdemeanor charge (constitutionally entitled to jury trial and eligible for appointed counsel). See *supra* notes 7–11 and accompanying text. The judge appoints counsel and schedules a jury trial. Being jointly tried on both charges, the indigent receives jury trial and representation by appointed counsel on both charges. See *supra* notes 142–144. Prevailing on the prosecutorial vindictiveness claim would result in dismissal of the more serious misdemeanor thereby triggering loss of the rights to appointed counsel and jury trial.

*D. Due Process Clause Right to Discovery*

*Gideon* and *Duncan* conflict with the Due Process Clause<sup>165</sup> right to discovery of exculpatory evidence in the prosecutor's possession.<sup>166</sup> Suppose an indigent is charged with a felony (constitutionally entitled to appointed counsel and jury trial).<sup>167</sup> He knows that the prosecutor possesses strong exculpatory evidence. However, "[t]he prosecutor's constitutional obligation is not violated, notwithstanding the nondisclosure of apparently exculpatory evidence, where the evidence was known to the defense and no request for disclosure was made."<sup>168</sup> The indigent realizes that asserting his discovery rights would cause the prosecutor to dismiss the felony but subsequently charge a misdemeanor (constitutionally eligible for neither appointed counsel nor jury trial) for which there is no exculpatory evidence. (Similar conflicts may arise in alternative procedural contexts<sup>169</sup> and through *Scott* and *Duncan*<sup>170</sup> as well as *Scott* alone.<sup>171</sup>) The

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165. See U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

166. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

167. See *supra* notes 5–6, 9–11 and accompanying text.

168. LAFAVE ET AL., *supra* note 48, at 1145.

169. Alternatively, suppose the indigent is charged with both a felony (constitutionally entitled to appointed counsel and jury trial) and a misdemeanor (affording neither). See *supra* notes 5–6, 9–11 and accompanying text. Being jointly tried on both charges, he receives appointed counsel and a jury trial on both charges. See *supra* notes 142–144 and accompanying text. He knows that there is strong exculpatory evidence in the prosecutor's possession only on the felony. He realizes that exercising his discovery rights risks both dismissal of the felony and loss of rights to appointed counsel and jury trial. See *supra* notes 5–11 and accompanying text.

170. Suppose the indigent is charged with a misdemeanor (constitutionally entitled to jury trial and eligible for appointed counsel). See *supra* notes 7–11 and accompanying text. He realizes that exercising his discovery rights would cause the prosecutor to dismiss the misdemeanor and subsequently charge a less serious misdemeanor (constitutionally ineligible for appointed counsel and jury trial) for which there is no exculpatory evidence. See *supra* notes 7–11 and accompanying text.

171. Suppose the indigent is charged with a misdemeanor eligible for appointed counsel. Thinking that imprisonment is unlikely, the judge declines to

indigent faces the dilemma of having to choose between his Sixth Amendment rights, and his Due Process Clause right. Because enjoying those Sixth Amendment rights may require foregoing his Due Process Clause right and vice-versa, those rights conflict.

*E. Fifth Amendment Privilege Against Self-Incrimination*

*Gideon* and *Duncan* conflict with the Fifth Amendment privilege against self-incrimination.<sup>172</sup> Suppose an indigent is charged with both a felony (constitutionally entitled to appointed counsel and jury trial) and a misdemeanor (affording neither).<sup>173</sup> Being jointly tried on both charges, she receives appointed counsel and a jury trial on both.<sup>174</sup> She has a possible Fifth Amendment claim against only the felony on the basis that her confession was coerced and involuntary.<sup>175</sup> But she realizes that prevailing on the claim would trigger dismissal of the felony and thus loss of the rights to appointed counsel and jury trial.<sup>176</sup> (Similar conflicts arise in alternative procedural contexts<sup>177</sup> and through *Scott* and

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appoint counsel but states that as more evidence comes to light she will revisit the issue. The indigent knows that there is some exculpatory evidence in the possession of the prosecution. But he also realizes that discovery and disclosure of this exculpatory information would dissuade the judge from appointing counsel.

172. See U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself.”).

173. See, e.g., *supra* notes 5–11 and accompanying text.

174. See *supra* notes 142–144 and accompanying text.

175. See, e.g., *Bram v. United States*, 168 U.S. 532, 542 (1897) (finding that admission into evidence of a confession not “free and voluntary” violated the Fifth Amendment privilege against self-incrimination).

176. See *supra* notes 5–6, 9–11 and accompanying text.

177. Alternatively, the indigent is only charged with the felony. She realizes that prevailing on the Fifth Amendment claim would cause the dismissal of the felony but that the prosecutor would subsequently charge a misdemeanor (constitutionally ineligible for appointed counsel and jury trial) not subject to a Fifth Amendment claim. See *supra* notes 7–11 and accompanying text.

*Duncan*<sup>178</sup> as well as *Scott* alone.<sup>179</sup>) The indigent faces the dilemma of having to choose between the Sixth Amendment rights to appointed counsel and jury trial, and the Fifth Amendment privilege. Because enjoying her Sixth Amendment rights may require foregoing her Fifth Amendment right and vice-versa, those rights conflict.

#### F. Sixth Amendment Confrontation Clause Right

*Gideon* and *Duncan* conflict with the Sixth Amendment Confrontation Clause right to confront adverse witnesses.<sup>180</sup> Suppose an indigent is charged with a felony (constitutionally entitled to appointed counsel and jury trial).<sup>181</sup> The prosecution's case rests largely on the admissibility of a co-defendant's out of court confession incriminating the indigent. Because the co-defendant will not be testifying at trial, there will be no

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178. Suppose an indigent is charged with both a serious misdemeanor (constitutionally entitled to jury trial and eligible for appointed counsel) and a less serious misdemeanor (eligible for neither). Being jointly tried on both charges, she receives appointed counsel and a jury trial on both charges. *See supra* notes 142–144 and accompanying text. She has a possible Fifth Amendment claim against only the more serious misdemeanor. But she realizes that prevailing on the claim would cause the dismissal of the more serious misdemeanor and the loss of the rights to appointed counsel and jury trial. *See supra* notes 7–11 and accompanying text. Alternatively, she is only charged with the more serious misdemeanor. She realizes that by prevailing on the Fifth Amendment claim, the prosecutor would subsequently charge the less serious misdemeanor (constitutionally ineligible for appointed counsel and jury trial) not subject to a Fifth Amendment claim. *See supra* notes 7–11 and accompanying text.

179. Suppose an indigent is charged with a misdemeanor eligible for appointed counsel but ineligible for jury trial. The indigent has a considerable interest in not self-incriminating before the judge deciding issues of both guilt and punishment. But the indigent realizes that by making self-incriminating statements she might be able to persuade the judge that imposition of imprisonment is sufficiently likely as to warrant appointment of counsel under *Scott*. *See Scott v. Illinois*, 440 U.S. 367, 367 (1979) (providing that an indigent defendant must have or waive appointed counsel in order to be incarcerated). Obtaining appointed counsel may require foregoing the privilege; exercising the privilege risks foregoing appointed counsel.

180. *See* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

181. *See supra* notes 5–6, 9–11 and accompanying text.



opportunity for cross-examination.<sup>182</sup> Introduction of a co-defendant's incriminating confession, without opportunity for cross-examination, violates the Confrontation Clause.<sup>183</sup> The indigent realizes that prevailing on his Confrontation Clause claim would cause the prosecutor to dismiss the felony but replace it with a misdemeanor neither subject to the claim nor constitutionally eligible for appointed counsel and jury trial.<sup>184</sup> (Similar conflicts arise in alternative procedural contexts<sup>185</sup> and through *Scott* and *Duncan*.<sup>186</sup>) The indigent faces the dilemma of having to choose between the Sixth Amendment rights to appointed counsel and jury trial, and the Sixth Amendment right of confrontation.

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182. See *Cross-examination*, BLACK'S LAW DICTIONARY (10th ed. 2014) (explaining that "cross-examination" is "[t]he questioning of a witness at a trial or hearing by the party opposed to the party in whose favor the witness has testified").

183. See *Cruz v. New York*, 481 U.S. 186, 193 (1987) ("[W]here a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial."); see also *Bruton v. United States*, 391 U.S. 123, 137 (1968) (finding a Confrontation Clause violation despite the judge issuing a limiting instruction that the jury not consider the confession as evidence of guilt of the non-confessing co-defendant).

184. See *supra* notes 7–11 and accompanying text.

185. Alternatively, the indigent is charged with both a felony (constitutionally entitled to appointed counsel and jury trial) and a misdemeanor (eligible for neither). See *supra* notes 5–11 and accompanying text. Being jointly tried on both charges, he receives appointed counsel and a jury trial on both charges. See *supra* notes 142–144 and accompanying text. He realizes that by prevailing on the Confrontation Clause claim, the dismissal of the felony would trigger loss of the rights to appointed counsel and jury trial.

186. Suppose the indigent is charged with both a serious misdemeanor (constitutionally entitled to jury trial and eligible for appointed counsel) and a less serious misdemeanor (eligible for neither). See *Duncan v. Louisiana*, 391 U.S. 145, 157–58 (1968) ("Our conclusion is that in the American States, as in the Federal Judicial System, a general grant of jury trial for serious offenses is a fundamental right . . ."). He realizes that prevailing on the Confrontation Clause claim would cause the dismissal of the more serious misdemeanor and the loss of rights to appointed counsel and jury trial. See *id.* at 159 (explaining that "[c]rimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses"). Alternatively, the indigent is only charged with the more serious misdemeanor. But he realizes that by prevailing on the Confrontation Clause claim, the prosecutor will subsequently charge a less serious misdemeanor (constitutionally ineligible for appointed counsel and jury trial) not subject to the claim. *Id.*

Because enjoying his former rights may require foregoing his latter right and vice-versa, those rights conflict.

*G. Eighth Amendment Right Against Cruel and Unusual Punishment*

*Gideon* and *Duncan* conflict with the Eighth Amendment right against cruel and unusual punishment.<sup>187</sup> Suppose that an indigent is being tried jointly for a felony (constitutionally guaranteeing appointed counsel and jury trial) and a misdemeanor (eligible for neither).<sup>188</sup> Based on the felony, the defendant receives appointed counsel for and a jury trial on both charges.<sup>189</sup> The felony (but not the misdemeanor) arguably unconstitutionally criminalizes her status as a drug addict based on the decision of *Robinson v. California*.<sup>190</sup> In *Robinson*, the Court held that an offense criminalizing the status of being addicted to drugs, without requiring some affirmative conduct, violated the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>191</sup> But the indigent realizes that prevailing on the Eighth Amendment claim and obtaining a dismissal of the felony would trigger loss of her rights to appointed counsel and jury trial.<sup>192</sup> (Similar conflicts arise in alternative procedural contexts<sup>193</sup> and through *Scott* and *Duncan*.<sup>194</sup>) She faces the

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187. See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

188. See *Duncan*, 391 U.S. at 157–58 (providing that the right to a jury trial is required for defendants charged with serious offenses).

189. See *supra* notes 142–144 and accompanying text.

190. *Robinson v. California*, 370 U.S. 660, 667 (1962).

191. See *id.* at 667 (holding that "a state law which imprisons a person thus afflicted as a criminal . . . inflicts cruel and unusual punishment in violation of the Fourteenth Amendment").

192. See *supra* notes 7–11 and accompanying text.

193. Alternatively, the indigent is charged with the felony alone. She realizes that by prevailing on the Eighth Amendment claim and obtaining dismissal of the felony, the prosecutor would subsequently file the misdemeanor charge not subject to the Eighth Amendment claim and ineligible for appointed counsel and jury trial. See *supra* notes 7–11 and accompanying text.

194. Suppose that the indigent is being tried jointly for a comparatively serious misdemeanor (constitutionally entitled to jury trial and eligible for

dilemma of having to choose between the Sixth Amendment rights to appointed counsel and jury trial, and the Eighth Amendment right. Because enjoying her Sixth Amendment rights may require foregoing her Eighth Amendment right and vice-versa, those rights conflict.

#### *H. Fourth Amendment Right Against Unreasonable Searches and Seizures*

*Gideon* and *Duncan* conflict with the Fourth Amendment right against unreasonable searches and seizures.<sup>195</sup> Suppose an indigent is charged with a felony (constitutionally entitled to appointed counsel and jury trial) supported by evidence obtained through an arguably illegal search and seizure. The indigent realizes that by raising a Fourth Amendment objection, the prosecution would dismiss the felony to avoid risking losing a suppression hearing but would replace it with a misdemeanor neither subject to a Fourth Amendment claim nor eligible for appointed counsel and jury trial. (Similar conflicts arise in alternative procedural contexts<sup>196</sup> and through *Scott* and

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appointed counsel) and a less serious misdemeanor (affording neither). *See supra* notes 7–11 and accompanying text. Being jointly tried, she receives appointed counsel and a jury trial on both charges. She has a possible Eighth Amendment claim against only the more serious misdemeanor. But she realizes that prevailing on the Eighth Amendment claim and obtaining a dismissal of the more serious misdemeanor would trigger loss of the rights to appointed counsel and jury trial. *See supra* notes 7–11 and accompanying text. Alternatively, the prosecutor charges only the more serious misdemeanor. The indigent realizes that by prevailing on the Eighth Amendment claim and obtaining dismissal of the misdemeanor, the prosecutor would subsequently charge a less serious misdemeanor neither subject to the claim nor constitutionally eligible for appointed counsel and jury trial. *See supra* notes 7–11 and accompanying text.

195. *See* U.S. CONST. amend. IV (“The right of the people to be secure in their persons, homes, papers and effects, against unreasonable searches and seizures, shall not be violated.”). For an example of a different unconstitutional conflict involving the Fourth Amendment, *see infra* note 247 and accompanying text.

196. Alternatively, the indigent is charged with the felony and the misdemeanor. Based on the felony, he receives appointed counsel and jury trial for both charges. *See supra* notes 5–6, 9–11 and accompanying text. He realizes that raising the Fourth Amendment objection might cause dismissal of the felony leaving the misdemeanor (constitutionally entitled to neither appointed counsel nor jury trial). *See Duncan v. Louisiana*, 391 U.S. 145, 157–58 (1968) (providing

*Duncan*.<sup>197</sup>) The indigent faces the dilemma of a forced choice between his Sixth Amendment rights and his Fourth Amendment right. Because enjoying his Sixth Amendment rights may require foregoing his Fourth Amendment right and vice-versa, those rights conflict.

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the right to jury trial for crimes with serious punishments).

Alternatively, the indigent is charged with only the misdemeanor. But he realizes that once the prosecution fully assesses all of the evidence (obtained through an arguably illegal search and seizure), the prosecution would add the felony. Because the indigent would be tried jointly on both charges, the indigent would receive appointed counsel and jury trial on both charges. The indigent also realizes that raising a Fourth Amendment objection might cause dismissal of the felony and the loss of appointed counsel and jury trial. *See supra* notes 7–11 and accompanying text.

197. Suppose the indigent has thus far only been charged with a misdemeanor constitutionally ineligible for appointed counsel and jury trial. But he realizes that after the prosecution fully assesses all of the evidence (obtained through an arguably illegal search and seizure), the prosecution will add a more serious misdemeanor charge constitutionally entitled to jury trial and eligible for appointed counsel. *See Duncan v. Louisiana*, 391 U.S. 145, 157–58 (1968) (stating that “a general grant of jury trial for serious offenses is a fundamental right”). Because the indigent would be jointly tried on both charges, he would receive appointed counsel and jury trial on both charges. *See supra* notes 142–144 and accompanying text. He also realizes that raising a Fourth Amendment objection would deter the prosecution from adding the more serious misdemeanor charge and preclude attainment of appointed counsel and jury trial. *See Duncan*, 391 U.S. at 158 (“Thus we hold no constitutional doubts about the practices . . . prosecuting petty crimes without extending a right to a jury trial.”). Alternatively, the indigent is charged with both misdemeanors. Based on the more serious misdemeanor, the indigent receives appointed counsel and a jury trial for both charges. *See supra* notes 142–144 and accompanying text. He realizes that raising a Fourth Amendment objection might cause dismissal of the more serious misdemeanor leaving the less serious misdemeanor that is constitutionally entitled to neither appointed counsel nor jury trial. *See Duncan*, 391 U.S. at 159 (explaining that crimes without severe punishments, including long periods of incarceration, are not automatically entitled to a trial by jury). Alternatively, the indigent is charged with only the more serious misdemeanor. He realizes that raising a Fourth Amendment objection might cause dismissal of the more serious misdemeanor but the prosecutor would subsequently charge the less serious misdemeanor neither subject to a Fourth Amendment objection nor constitutionally entitled to appointed counsel and jury trial. *Id.*

*I. Sixth Amendment Right to Effective Assistance of Counsel*

*Duncan* and *Scott* conflict with the Sixth Amendment right to the effective assistance of counsel.<sup>198</sup> Suppose indigent *A* and her five indigent co-defendants are charged with various misdemeanors rendering them all constitutionally eligible for appointed counsel and, except for *A*, entitled to a jury trial. Though the likelihood of imprisonment being imposed is not sufficient to warrant appointment of counsel under *Scott* for some of the six co-defendants, the judge appoints counsel to represent all six because of the cost savings.<sup>199</sup> For similar reasons of “administrative convenience[,]” all six co-defendants are to be jointly tried before a jury.<sup>200</sup> *A* is concerned that her co-defendants’ testimony will incriminate her and requests that her appointed counsel discredit their testimony on cross-examination. The appointed counsel explains that any cross-examination will be limited because he is their attorney as well and would have a conflict of interest.<sup>201</sup> The counsel offers to raise the conflict of interest to the judge, explaining that joint representation of multiple defendants where the counsel has a conflict of interest may constitute a violation of *A*’s Sixth Amendment right to effective assistance of counsel.<sup>202</sup> The Supreme Court ruled, in

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198. See *Strickland v. Washington*, 466 U.S. 668, 669 (1984) (“The Sixth Amendment ‘right to counsel is the right to the effective assistance of counsel . . . .’” (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970))). For an example of a different unconstitutional conflict involving the Sixth Amendment right to effective assistance of counsel, see *infra* note 205 and accompanying text.

199. See *supra* notes 105–111 and accompanying text.

200. *Baldwin v. New York*, 399 U.S. 66, 73 (1970).

201. See MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. (AM. BAR ASS’N 2017) (“A conflict may exist by reason of substantial discrepancy in the parties’ testimony, incompatibility in position in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.”).

202. See *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978) (“This Court held that ‘the Assistance of Counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests.’” (quoting *Glasser v. United States*, 315 U.S. 60, 70 (1942))).

*Holloway v. Arkansas*,<sup>203</sup> that if the judge fails to hold a hearing, upon being informed of the conflict, the defendant is entitled to an automatic reversal of any conviction.<sup>204</sup> But if the judge holds a hearing and finds a conflict, the judge might well sever *A* from her co-defendants and remove her to a bench trial without appointed counsel.<sup>205</sup> The indigent faces the dilemma of having to choose between enjoying appointed counsel and jury trial, and the full enjoyment of her Sixth Amendment right to conflict-free effective assistance of counsel.<sup>206</sup> Because enjoying appointed counsel and jury trial may require foregoing her right to conflict-free effective assistance of counsel and vice-versa, they conflict.

#### *J. Due Process Clause Right to Testify in Own Defense*

*Duncan* and *Scott* conflict with the Due Process Clause<sup>207</sup> right to testify in one's own defense.<sup>208</sup> Consider the situation above except that none of *A*'s five co-defendants plan on testifying. *A*, however, wishes to testify. Agreeing it would aid her individual defense, the appointed counsel representing all six co-defendants cautions that if only she testifies that will "undoubtedly highlight

203. 435 U.S. 475 (1978).

204. *See id.* at 488 ("[W]henver a trial court improperly requires joint representation over timely objection reversal is automatic.").

205. *See United States v. Bentvena*, 193 F. Supp. 485, 490 (S.D.N.Y. 1960) ("The question of severance must be decided in the discretion of the trial judge whose determination will not be upset in the absence of an abuse of such discretion.").

206. Though losing the right to an automatic reversal, the defendant would not entirely lose her right to effective assistance of counsel even if the conflict were not brought to the court's attention. *See Mickens v. Taylor*, 535 U.S. 162, 168 (2002) ("[A]bsent objection, a defendant must demonstrate that 'a conflict of interest actually affected the adequacy of this representation.'" (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348–49 (1980))).

207. *See* U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

208. *See Rock v. Arkansas*, 483 U.S. 44, 51–53 (1987) (basing the constitutional right to testify in one's own defense, in part, on the Due Process Clause); *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961) (ruling that denial of defendant's right to testify in his own defense violated due process). For an example of a different unconstitutional conflict involving the due process right to testify, see *infra* note 204 and accompanying text.

the lack of testimony from the other[s]” thereby undermining the defense of the five co-defendants.<sup>209</sup> On this basis, the appointed counsel is reluctant to let her testify. After *A* insists, the appointed counsel offers to raise the matter with the court but cautions that the remedy might be to sever her case and try her in a bench trial without appointed counsel.<sup>210</sup> The indigent faces the dilemma of having to choose between enjoying appointed counsel and jury trial, and the Due Process Clause right. Because enjoying appointed counsel and jury trial may require foregoing her right to testify and vice-versa, they conflict.

#### IV. Four Bases for the Conflicts’ Unconstitutionality

This Part argues that the conflicts between *Gideon*, *Scott*, and *Duncan* and ten other constitutional rights are unconstitutional on four independent bases. First, burdening, penalizing, chilling, or deterring a right is unconstitutional.<sup>211</sup> Second, coercing defendants to relinquish one constitutional right in order to exercise another is unconstitutional.<sup>212</sup> Sometimes conflated and sometimes distinguished, these two bases fall under a variety of terms, including a “Hobson’s choice,”<sup>213</sup> “incredible dilemma,”<sup>214</sup> “Catch-22,”<sup>215</sup> and a “compelled election.”<sup>216</sup> Some courts and

209. LAFAVE ET AL., *supra* note 48, at 646.

210. *See Bentvena*, 193 F. Supp. at 490 (explaining that the judge has the discretion to sever a defendant under these circumstances).

211. *See infra* note 217.

212. *See infra* notes 254–259 and accompanying text.

213. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 279 (1998); *United States v. Ashimi*, 932 F.2d 643, 647 (7th Cir. 1991); *United States v. Khan*, 309 F. Supp. 2d 789, 799 (E.D. Va. 2004). For the origin and meaning of the phrase, see *Wang v. Reno*, 81 F.3d 808, 813 n.5 (9th Cir. 1996) (“The phrase comes from Thomas Hobson, an English liveryman who required every customer to choose the horse nearest the door . . . . A Hobson’s choice is thus an apparently free choice when there is no real alternative.”).

214. *Green v. United States*, 355 U.S. 184, 193 (1957); *North Carolina v. Pearce*, 395 U.S. 711, 746 (1969) (Harlan, J., concurring in part and dissenting in part).

215. *Stuard v. Stewart*, 401 F.3d 1064, 1069 (9th Cir. 2005).

216. Peggy L. Hicks, Note, *Compelled Election Between Constitutional Rights in Capital Sentencing Proceedings*, 87 COLUM. L. REV. 327, 327 (1987); Note,

commentators refer to both bases as aspects of the unconstitutional conditions doctrine,<sup>217</sup> some only one,<sup>218</sup> and some distinguish the doctrine from both.<sup>219</sup> For clarity, the first basis will be referred to as the *Jackson* principle<sup>220</sup> and the second as the *Simmons* principle.<sup>221</sup> Third, disparities between the full enjoyment of constitutional rights by non-indigents and their compromised, or entirely nullified, enjoyment by indigents violates the Fourteenth Amendment's Equal Protection Clause. And fourth, such disparities violate the equality component of the Due Process Clause. Because courts often intertwine their analysis of equal protection and due process with respect to indigents' rights, these two will be analyzed together. All four bases apply to the conflicts triggered by *Gideon*; only the first, third, and fourth bases apply to conflicts caused by *Scott*; and, only the first two apply to

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United States v. Dohm and the Compelled Election Between the Right to Remain Silent and the Right to Reasonable Bail, 94 HARV. L. REV. 426, 426 (1980).

217. See United States v. Dent, 984 F.2d 1453, 1461 (7th Cir. 1993) (explaining that “[t]his doctrine . . . prohibits the government from forcing a defendant to choose between two constitutionally protected rights . . . . Additionally, a defendant may not be penalized for asserting a constitutional right”); United States v. Ryan, 810 F.2d 650, 656 (7th Cir. 1987) (stating the same); Westen, *supra* note 49, at 753 (“Instead of involving one constitutional condition, *Simmons* involved two constitutional conditions . . . .”); Melanie D. Wilson, *The Price of Pretrial Release: Can We Afford to Keep Our Fourth Amendment Rights?*, 92 IOWA L. REV. 159, 201–04 (2006) (explaining that the approach taken in *Simmons* remains valid). For an explanation of the doctrine, see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (“[It] holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly.”).

218. See Woodard v. Ohio Adult Parole Auth., 107 F.3d 1178, 1189 (6th Cir. 1997), *rev'd on other grounds*, 523 U.S. 272 (1998) (distinguishing *Simmons* from both unconstitutional conditions and difficult choices involving only one constitutional right); United States v. Ashimi, 932 F.2d 643, 647 (7th Cir. 1991) (distinguishing both *Simmons* and unconstitutional conditions doctrine from difficult choices involving only one constitutional right).

219. See *Simmons v. United States*, 390 U.S. 377, 393–94 (1968) (distinguishing between forgoing a constitutional right to obtain another constitutional right and merely to obtain a benefit); *Tomai-Minogue v. State Farm Mut. Auto. Ins. Co.*, 770 F.2d 1228, 1232 n.6 (4th Cir. 1985) (same).

220. See *infra* notes 222–227 and accompanying text.

221. See *infra* notes 251–259 and accompanying text.



*Duncan*-based conflicts. While no basis is dispositive, this Part argues that each basis persuasively establishes the unconstitutionality of the conflicts. Furthermore, each of these four bases is independent. That is, even if the conflicts are deemed constitutional under one basis, nonetheless they might qualify as unconstitutional under one or more of the other bases. Finally, this Part anticipates, presents, and rebuts five possible objections to the central claim that *Gideon*, *Scott*, and *Duncan* unconstitutionally conflict with ten other constitutional rights.

#### *A. Burdening, Penalizing, Chilling, and Deterring Rights*

A general principle of constitutional law is that burdening, penalizing, chilling, or deterring exercise of a constitutional right is unconstitutional.<sup>222</sup> “[I]t is well settled that a statutory provision that conditions and thereby deters the exercise of constitutional rights may for that reason be unconstitutional.”<sup>223</sup> As the Supreme Court explained, “[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.”<sup>224</sup> In perhaps the leading decision employing the principle, the Court in *United States v. Jackson* invalidated a statute that authorized capital punishment only through a jury trial (but not a bench trial) because it “impose[d] an impermissible burden upon the exercise of a constitutional right”<sup>225</sup> by “deter[ring] exercise of the Sixth Amendment right to demand a jury trial.”<sup>226</sup> The statute was “unconstitutional because it makes ‘the risk of death’ the price for asserting the right to jury trial, and thereby ‘impairs . . . free exercise’ of that constitutional right.”<sup>227</sup>

Addressing how proportional rights—the greater the jeopardy, the greater the procedural protections—may burden or deter constitutional rights, *Jackson* is particularly instructive as applied

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222. See *supra* note 217.

223. *Strange v. James*, 323 F. Supp. 1230, 1232 (D. Kan. 1971).

224. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

225. *United States v. Jackson*, 390 U.S. 570, 572 (1968).

226. *Id.* at 581.

227. *Id.* at 571 (quoting *United States v. Jackson*, 262 F. Supp. 716, 718 (D. Conn. 1967)).

to the conflicts caused by *Gideon*, *Scott*, and *Duncan*. Just as the statute invalidated by *Jackson* required greater procedural protections (a jury trial) for a more severe punishment (capital punishment),<sup>228</sup> so also *Gideon*, *Scott*, and *Duncan* afford greater procedural protections (appointed counsel and jury trial) for more serious charges and punishment (felonies, misdemeanors resulting in imprisonment, and serious offenses, respectively).<sup>229</sup> Just as the statute in *Jackson* unconstitutionally burdened and deterred exercise of the Sixth Amendment right to jury trial, so also *Gideon*, *Scott*, and *Duncan* unconstitutionally burden and deter defendants' exercise of ten constitutional rights (as seen in Part III).<sup>230</sup> Note that both the invalidated statute in *Jackson* and the holdings of *Gideon*, *Scott*, and *Duncan* all share the arguably laudable purpose of providing heightened procedural protections as offense and punishment severity increase. Nonetheless, *Jackson* explained that the coercive effect "cannot be justified by its ostensible purpose," however legitimate or laudable.<sup>231</sup> Therefore, *Gideon*, *Scott*, and *Duncan*'s arguably laudable purpose—heightened procedural protections for more serious consequences—also fails to justify its pernicious effect of burdening and deterring the exercise of other constitutional rights.

The *Jackson* principle, however, is inconsistently applied.<sup>232</sup> Despite finding the burdening or deterring of constitutional rights to be "inevitable" in plea-bargaining,<sup>233</sup> the Court has repeatedly upheld its constitutionality.<sup>234</sup> Attempting to defend

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228. *Id.* at 572.

229. *See supra* Part II.

230. *See supra* Part III.

231. *Jackson*, 390 U.S. at 582–83.

232. *Compare* *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969) (ruling that greater punishment following reconviction of defendants after receiving a new trial following a successful appeal violated due process by "unconstitutionally deter[ring] a defendant's exercise of the right to appeal"), *with* *Chaffin v. Stynchcombe*, 412 U.S. 17, 33–34 n.21 (1978) (conceding that such greater punishment did burden and penalize the right to appeal but was nonetheless constitutional because the coercive "effect cannot be said to be 'needless'" (quoting *Jackson*, 390 U.S. at 583)).

233. *Chaffin*, 412 U.S. at 31.

234. *See, e.g.,* *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987) ("[I]t is well settled that plea bargaining does not violate the Constitution even though a

plea-bargaining, the Court emphasized that “not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid.”<sup>235</sup> Apart from plea-bargaining, “the Supreme Court has prohibited states from unduly encouraging defendants to forego their constitutional rights in other contexts.”<sup>236</sup> One such context is the Fifth Amendment privilege against self-incrimination; the Court has repeatedly found burdening that right unconstitutional.<sup>237</sup> For example, in *Griffin v. California*,<sup>238</sup> the Court found that a trial court’s negative comment to the jury about the defendant’s failure to testify unconstitutionally burdened the Fifth Amendment privilege.<sup>239</sup> The trial court’s negative comment “is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.”<sup>240</sup>

Despite some inconsistency,<sup>241</sup> the “[l]ower courts continue to apply *Jackson*” to find unconstitutional the burdening, chilling,

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guilty plea waives important constitutional rights.”).

235. *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978); accord LAFAYETTE ET AL., *supra* note 48, at 1009 (“It appears that the Court was influenced to some degree by a perceived need to reach a result not casting doubts upon the plea negotiation process.”).

236. Case Notes, *The Supreme Court 1978 Term*, 93 HARV. L. REV. 60, 73 (1979).

237. See, e.g., *Mitchell v. United States*, 526 U.S. 314, 330 (1999) (finding that adverse inferences drawn by the judge from defendant’s silence during sentencing hearings unconstitutionally chilled the defendant’s Fifth Amendment privilege against self-incrimination); *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (plurality opinion) (holding that threat of disbarment unconstitutionally burdened Fifth Amendment privilege); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (ruling that termination of employment unconstitutionally penalized exercise of Fifth Amendment privilege).

238. 380 U.S. 609, 615 (1965).

239. See *id.* at 615 (holding “that the Fifth Amendment, in its direct application to the Federal Government and its bearing on the states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt”).

240. *Id.* at 614.

241. See, e.g., Howard E. Abrams, *Systemic Coercion: Unconstitutional Conditions in the Criminal Law*, 72 J. CRIM. L. & CRIMINOLOGY 128, 132 (1981) (“[T]he Court has not formulated or consistently applied a coherent theory . . . . This inability . . . has left the lower courts to reconcile inconsistent holdings and produced myriad rationales and resolutions.”); Jason Mazzone, *The*

detering and penalizing of a wide variety of rights.<sup>242</sup> Citing *Jackson*, a federal court ruled that requiring indigents to repay the state for the cost of appointed counsel unconstitutionally burdened and deterred indigents' exercise of their Sixth Amendment right to appointed counsel.<sup>243</sup> The First and Second Circuits held that conditioning receipt of an acceptance of responsibility reduction in sentence on defendants making incriminating statements as to offenses outside their plea agreement unconstitutionally penalized the free exercise of the Fifth Amendment privilege against self-incrimination.<sup>244</sup> In 1994, the Fifth Circuit invalidated a burden imposed on the Sixth Amendment right to jury trial: "As *Jackson* ruled that a defendant cannot trade his right to a jury trial to safeguard his life, neither can he barter away his rights to protect his liberty. We conclude that a jury waiver based on an impermissible agreement to remain free on bail must be held invalid."<sup>245</sup> In 2001, the Eighth Circuit found the prosecution's negative comments to the jury unconstitutionally burdened and penalized the defendant's exercise of his Sixth Amendment rights to jury trial and to confront witnesses.<sup>246</sup> In 2006, the Ninth Circuit invalidated a warrantless search based on the defendant's consent where pretrial release was conditioned on waiver of the

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*Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003) ("[O]ur answer to the question of whether individuals can exchange constitutional rights for government benefits [or other constitutional rights] remains quite arbitrary.").

242. LAFAVE ET AL., *supra* note 48, at 1010.

243. See *Strange v. James*, 323 F. Supp. 1230, 1232–34 (D. Kan. 1971) (noting that the burden was particularly unconstitutional given that it was "financial and applie[d] unevenly to indigents").

244. See *United States v. Oliveras*, 905 F.2d 623, 626 (2d Cir. 1990) (explaining that "[j]ust because the government has agreed to dismiss counts does not remove the risk of self-incrimination posed by admissions made by a defendant . . . concerning crimes for which he is not pleading guilty"); *United States v. Perez-Franco*, 873 F.2d 455, 463 (1st Cir. 1989) ("[T]he Supreme Court repeatedly has made it quite clear that the government cannot impose penalties because a person elects to exercise his Fifth Amendment right not to give incriminating testimony against himself.").

245. *United States v. Mitchell*, No. 06-40335, 1994 U.S. App. LEXIS 43410, at \*16 (5th Cir. 1994).

246. See *Burns v. Gammon*, 260 F.3d 892, 896 (8th Cir. 2001) ("The prosecution cannot use the defendant's exercise of specific fundamental constitutional guarantees against him at trial.").

defendant's Fourth Amendment rights.<sup>247</sup> Finally, in 2010, citing *Jackson*, the Second Circuit held the prosecutor's argument to the jury—that by opting for trial the defendant was not entitled to an acceptance of responsibility reduction in sentence—“unconstitutionally burdened his Sixth Amendment right to a jury trial.”<sup>248</sup> Based on *Jackson* and the above cases applying the *Jackson* principle, the conflicts between *Gideon*, *Scott*, and *Duncan* and ten other constitutional rights, as depicted in Part III, are unconstitutional.

### *B. Coercing Relinquishment of Some Rights to Exercise Others*

A second basis for the unconstitutionality of the conflicts, applying to all eight *Gideon*<sup>249</sup> and all ten *Duncan*-based conflicts,<sup>250</sup> is the general principle that coercing defendants to forego one constitutional right in order to exercise another is unconstitutional.<sup>251</sup> As a leading treatise articulates it, a “defendant should not be forced to relinquish one constitutional right to obtain another.”<sup>252</sup> The rationale is as follows: “A defendant . . . is entitled to certain rights and protections. . . . He is entitled to all of them; he cannot be forced to barter one for

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247. See *United States v. Scott*, 450 F.3d 863, 865 n.4, 866–68, 875 (9th Cir. 2006) (holding “as matter of first impression, warrantless searches . . . imposed as a condition of pretrial release, required showing of probable cause, despite defendant’s pre-release consent”).

248. *United States v. Whitten*, 610 F.3d 168, 194 (2d Cir. 2010).

249. See *supra* Part III.A–H.

250. Because this basis requires two conflicting constitutional rights, it may not apply to the *Scott*-based conflicts. In some sense, the *Scott* right to appointed counsel is only a conditional (conditioned on imprisonment being imposed) constitutional right. See *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (explaining the analysis used to determine whether a defendant is entitled to the right to receive counsel).

251. See, e.g., *Ryan v. Montana*, 580 F.2d 988, 992 (9th Cir. 1978) (“As a general proposition, the courts do not favor procedural rules which require an individual to sacrifice one constitutional right as the price of preserving another.”). The origin of the principle may stem from *Green v. United States*. See *Green v. United States*, 355 U.S. 184, 193 (1957) (“The law should not, and in our judgment does not, place the defendant in such an incredible dilemma [of choosing between constitutional rights].”).

252. LAFAVE ET AL., *supra* note 48, at 608.

another. When the exercise of one right is made contingent on the forbearance of another, both rights are corrupted.”<sup>253</sup> The leading case applying this principle is *Simmons v. United States*, involving conflicting Fourth and Fifth Amendment rights.<sup>254</sup> Establishing eligibility for the defendant’s Fourth Amendment unreasonable search and seizure claim required establishing standing.<sup>255</sup> Establishing standing required the defendant to testify that the incriminating seized items were his possessions.<sup>256</sup> Because his self-incriminating testimony could be admissible against him at trial,<sup>257</sup> the defendant faced the following dilemma: exercise his Fourth Amendment right at the possible cost of relinquishing his Fifth Amendment privilege against self-incrimination or preserve his Fifth Amendment privilege at the cost of relinquishing his Fourth Amendment right.<sup>258</sup> Ruling the conflict unconstitutional, the Supreme Court declared, “we find it intolerable that one constitutional right should have to be surrendered in order to assert another.”<sup>259</sup>

Based on the *Simmons* principle, the conflicts between the *Gideon* and *Duncan* rights and defendants’ other constitutional rights are similarly intolerable and unconstitutional. As seen in

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253. *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120 (3d Cir. 1977).

254. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (noting “an undeniable tension” between the defendant’s Fourth and Fifth Amendment rights). For discussion of *Simmons*’ significance, see Westin, *supra* note 49, at 741–44.

255. *See Simmons*, 390 U.S. at 392–93 (referring to the “proof of standing necessary to assert a Fourth Amendment claim”).

256. The Court explained as follows:

[H]is testimony [admitting ownership of the seized item] is to be regarded as an integral part of his Fourth Amendment exclusion claim. Under the rule laid down by the courts below, he could give that [incriminating] testimony only by assuming the risk that the testimony would later be admitted against him at trial [to prove his guilt].

*See id.* at 391.

257. *See id.* at 393 (“[A] defendant who wishes to establish standing must do so at the risk that the words which he utters may later be used to incriminate him.”).

258. *See id.* at 394 (“[The defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination.”).

259. *Id.*

Part III, *Gideon* and *Duncan* coerce defendants to relinquish eight<sup>260</sup> and ten<sup>261</sup> constitutional rights, respectively, in order to exercise their Sixth Amendment rights to appointed counsel and jury trial. Just as the *Simmons* defendant faced a situation where exercise of his Fourth Amendment right risked relinquishing his Fifth Amendment right, so also the defendants in the examples in Part III faced situations where exercise of various constitutional rights risked relinquishing Sixth Amendment rights to appointed counsel and jury trial. Just as the *Simmons* defendant faced the dilemma of being forced to choose between Fourth and Fifth Amendment rights, so also the Part III defendants faced the dilemma of being forced to choose between various constitutional rights and the Sixth Amendment rights to appointed counsel and jury trial. Just as the *Simmons* defendant risked relinquishing his Fifth Amendment right in order to meet the eligibility requirements for enjoying his Fourth Amendment right, so also the Part III defendants had to relinquish various constitutional rights to satisfy the eligibility requirements for enjoying their Sixth Amendment rights to appointed counsel and jury trial.<sup>262</sup> Just as *Simmons* ruled it unconstitutional and “intolerable that one constitutional right should have to be surrendered in order to assert another,”<sup>263</sup> so also the Part II defendants surrendering constitutional rights in order to enjoy the rights to appointed counsel and jury trial is intolerable and unconstitutional.

While courts and commentators often cite the *Simmons* principle as dispositively establishing a constitutional violation<sup>264</sup>—many consider it the “*ne plus ultra* of effective argumentation”<sup>265</sup>—the principle is not uniformly followed.<sup>266</sup> Noting the unpredictability of the Court’s analysis, Peter Westen

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260. See *supra* Part III.A–H.

261. See *supra* Part III.A–J.

262. See *supra* Part III.

263. *Simmons v. United States*, 390 U.S. 377, 394 (1968).

264. See Westen, *supra* note 49, at 744 n.14 (“Courts and commentators alike invoke *Simmons* as a per se rule that prohibits the state from requiring defendants to choose between any two constitutional entitlements.”).

265. *Id.* at 744.

266. See *id.* at 743 (“The subsequent success of the *Simmons* argument has been mixed.”)

explained that “[w]hen the Court is unwilling to allow one constitutional right to be conditioned on the surrender of another, it invokes *Simmons* for the proposition that such choices are ‘constitutionally impermissible.’”<sup>267</sup> But “[w]hen the Court is willing to allow [that], it dismisses *Simmons* with the observation that the ‘legal system is replete with situations requiring the making of difficult [choices].’”<sup>268</sup>

The leading alternative approach to *Simmons* is *Crampton v. Ohio*.<sup>269</sup> The *Crampton* defendant wished to exercise both his Fifth Amendment right against self-incrimination as to the issue of guilt and his Fourteenth Amendment Due Process right to be heard as to the issue of punishment.<sup>270</sup> But under Ohio’s single-trial procedure, exercising the right to be heard as to punishment forfeited his right to remain silent as to guilt; and, exercising his right to remain silent as to guilt forfeited his right to be heard as to punishment.<sup>271</sup> The defendant argued that the state’s non-bifurcated procedure for determining both guilt and imposition of the death penalty violated *Simmons* by forcing him to choose between his Fifth and Fourteenth Amendment rights.<sup>272</sup> Disagreeing that such a coerced choice is necessarily unconstitutional as under the per se approach of *Simmons*, the Court formulated the test as “whether compelling the election [between constitutional rights] impairs to an appreciable extent any of the policies behind the rights involved.”<sup>273</sup> Applying that standard, the Court found that if the defendant opted to exercise his due process right to be heard on punishment (thereby forfeiting the right to remain silent as to guilt), the policies of the Fifth Amendment were impaired no more than analogous, clearly constitutional practices such as requiring a defendant who has chosen to testify to submit to cross-examination.<sup>274</sup> If the defendant

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267. *Id.* (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 807–08 (1977); *United States v. Anderson*, 567 F.2d 839, 840–41 (8th Cir. 1977)).

268. *Id.* (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)).

269. 402 U.S. 183 (1971), *vacated on other grounds*, 408 U.S. 941 (1972).

270. *Id.* at 210–11.

271. *Id.* at 211.

272. *Id.* at 210–11.

273. *Id.* at 213.

274. *See id.* at 215–16 (providing analogous situations, such as submitting to



instead opted to exercise his Fifth Amendment right to remain silent (thereby forfeiting the right to be heard on punishment), the Court ruled that due process is unimpaired by the defendant lacking an “opportunity . . . to speak to the jury free from any adverse consequences on the issue of guilt.”<sup>275</sup> Concluding that the policies of neither right were impaired, regardless of what the defendant chose, the Court held the conflict constitutional.<sup>276</sup>

Even under the more stringent *Crampton* approach, the conflicts between the *Gideon* and *Duncan* rights and various other constitutional rights are unconstitutional. As to the Sixth Amendment right to appointed counsel, the conflicts undermine its policies or rationales in two ways. First, the right to the assistance of counsel is “the most fundamental of all rights”<sup>277</sup> because it is “the right that ensures that ‘all other rights of the accused are protected.’”<sup>278</sup> The conflicts undermine that rationale by coercing indigents to forego other rights. Rather than protecting, *Gideon* undermines the other rights by coercing their surrender. Second, the right to appointed counsel is designed to allow indigents to “stand[] equal before the law” with non-indigents.<sup>279</sup> But the conflicts, by coercing relinquishment of rights of indigents that non-indigents with private counsel fully retain, only serve to make indigents even less equal before the law. Rather than allowing indigents to stand equal, the conflicts cause them to stand even further behind. The conflicts also undermine the policy and

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cross-examination when deciding to testify, standing on a motion for acquittal versus putting on a defense, and the conflict of the “notice-of-alibi” rule).

275. *Id.* at 220.

276. *See id.* at 217, 220 (rejecting the petitioner’s argument regardless of which choice the petitioner made).

277. TOMKOVICZ, *supra* note 93, at 32; *accord* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1279 (2002) (“No criminal procedure right, perhaps, is more fundamental than the Sixth Amendment right to counsel.”).

278. Natapoff, *supra* note 17, at 1051 (quoting *Penson v. Ohio*, 488 U.S. 75, 84 (1988)); *accord* Sklansky, *supra* note 283, at 1279–80 (“A criminal defendant needs a lawyer . . . to ensure that all of the defendant’s other rights are honored . . . . The less criminal defense [counsel] we have, the less enforcement we have of constitutional criminal procedure.”).

279. *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (noting that not every defendant can be equal if the “poor man charged with crime has to face his accusers without a lawyer to assist him”).

rationale of the Sixth Amendment right to jury trial by coercing defendants to forego those other rights to which a jury trial, “fundamental to the American scheme of justice,”<sup>280</sup> is meant to “complement.”<sup>281</sup> The very “structure and style of the criminal process—the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.”<sup>282</sup> Coercing defendants to choose between rights that are designed to complement each other crosses the *Crampton* threshold by “impair[ing] . . . the policies behind the rights involved.”<sup>283</sup> As a result, even under *Crampton*’s stricter approach, the conflicts are persuasively unconstitutional.

Despite *Crampton*, the *Simmons* principle remains vital.<sup>284</sup> While “*Crampton* is sometimes taken as a repudiation of *Simmons*,” that view is a “mistake.”<sup>285</sup> The Court arguably overruled *Crampton* and “continues to adhere to *Simmons* without reference to its intervening decision in *Crampton*.”<sup>286</sup> Furthermore, the “Court has repeatedly reaffirmed *Simmons*”<sup>287</sup> and “maintained its adherence to this concept.”<sup>288</sup> Some “[l]ater cases have distinguished *Simmons* on factual or other grounds without dispelling its notion that a criminal defendant must not be forced to surrender one constitutional right in order to exercise another.”<sup>289</sup> While the Court has not yet extended *Simmons* beyond

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280. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

281. *See id.* at 149 n.14 (discussing how the criminal process and its procedures rely upon the jury trial).

282. *Id.*

283. *McGautha v. California*, 402 U.S. 183, 213 (1971).

284. *See, e.g., Wilson, supra* note 217, at 207 (“[T]he Supreme Court . . . certainly has never expressly rejected its application. The federal government has . . . conceded the doctrine’s applicability . . . and some circuit courts have expressly applied the doctrine.”).

285. *Westen, supra* note 49, at 743 n.10.

286. *Id.*

287. *United States v. Khan*, 309 F. Supp. 2d 789, 799 (E.D. Va. 2004) (citing *United States v. Salvucci*, 448 U.S. 83, 89 (1980)), *aff’d*, 461 F.3d 477 (4th Cir. 2006).

288. *Wilson, supra* note 217, at 203.

289. *Miller v. Smith*, 99 F.3d 120, 127 n.9 (4th Cir. 1996), *vacated on other grounds*, 115 F.3d 1136 (4th Cir. 1996). For examples of cases distinguishing, but

conflicts involving the Fourth and Fifth Amendments, it also has not foreclosed that possibility.<sup>290</sup>

Realizing that Sixth Amendment and other rights are “no less important” than Fourth and Fifth Amendment rights,<sup>291</sup> state and federal courts have broadly applied *Simmons*. Relying on the *Simmons* principle, state courts have found unconstitutional conflicts between the Sixth Amendment rights to counsel and to testify in one’s own defense,<sup>292</sup> the Sixth Amendment right to effective assistance of counsel and the Fifth Amendment privilege against self-incrimination,<sup>293</sup> as well as between the latter and the Fourteenth Amendment right to due process.<sup>294</sup> Concluding that “[t]he reasoning in *Simmons* is compelling”<sup>295</sup> and “controlling” beyond its facts,<sup>296</sup> federal circuit courts have “followed”<sup>297</sup> and

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not rejecting, *Simmons* because the defendant did not have two constitutional rights in conflict, see *United States v. Kahan*, 415 U.S. 239, 243 (1974) (recognizing no conflict between Fifth Amendment privilege against self-incrimination and Sixth Amendment right to appointed counsel because defendant lied as to indigency and thus lacked the latter right); *Stuard v. Stewart*, 401 F.3d 1064, 1069 (9th Cir. 2005) (“*Simmons* is not violated when a defendant is forced to choose between a statutory right and a constitutional right.”).

290. See *State v. Samuels*, 965 S.W.2d 913, 917 (Mo. Ct. App. 1998) (“The United States Supreme Court has not extended this same protection to the Sixth Amendment, but neither have they precluded that possibility.”).

291. See *United States v. Branker*, 418 F.2d 378, 381 (2d Cir. 1969) (“The constitutional rights to counsel and to equal protection . . . are no less important [than Fourth and Fifth Amendment rights].”); *Samuels*, 965 S.W.2d at 920 (“The Sixth Amendment . . . is no less important than the Fourth . . . and the Fifth Amendment . . .”); accord *Kahan*, 415 U.S. at 245 (Douglas, J., dissenting) (“The principle of *Simmons* and *Jackson* is applicable, if reason is to prevail . . . [to] the Sixth Amendment.”).

292. See *State v. Colson*, 650 S.E.2d 656, 659 (N.C. Ct. App. 2007) (“Forcing defendant to choose between testifying or relinquishing his right to be represented by counsel constitutes constitutional error.”).

293. See *Samuels*, 965 S.W.2d at 919 (“Extending Fifth Amendment protection to Samuels’ statements made to secure his Sixth Amendment rights [to effective assistance of counsel] is consistent with *Simmons*.”).

294. See *People v. Coleman*, 533 P.2d 1024, 1028 (Cal. 1975) (“[T]he choice forced upon [probationer] at his revocation hearing was unnecessarily inconsistent with constitutional values.”).

295. *United States v. Inmon*, 568 F.2d 326, 333 (3d Cir. 1977).

296. *United States v. Stricklin*, 591 F.2d 1112, 1118 (5th Cir. 1979).

297. *United States v. Hardwell*, 80 F.3d 1471, 1483 (10th Cir. 1996).

“extended” *Simmons*<sup>298</sup> in holding a wide variety of conflicts unconstitutional. The Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits ruled conflicts between the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to appointed counsel unconstitutional.<sup>299</sup> The Third, Fifth, and Seventh Circuits found conflicts between the Fifth Amendment prohibition against double jeopardy and the Fifth Amendment privilege against self-incrimination unconstitutional.<sup>300</sup> Addressing a conflict between the latter right and the Sixth Amendment right to testify, the First Circuit determined it would be unconstitutional as violating *Simmons*.<sup>301</sup> The Second Circuit ruled conflicts between the Sixth Amendment right to retain counsel of choice and the Fourteenth Amendment rights to both due process and equal protection unconstitutional.<sup>302</sup> The Third Circuit determined a conflict between the Due Process Clause right to testify and the Sixth Amendment right to the assistance of counsel was unconstitutional.<sup>303</sup> The Fifth Circuit

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298. *United States v. Anderson*, 567 F.2d 839, 841 n.4 (8th Cir. 1977); *see also State v. Samuels*, 965 S.W.2d 913, 918 (Mo. Ct. App. 1998) (concluding that forcing Anderson to choose between the Sixth and Fifth Amendment rights is not permissible).

299. *See Hardwell*, 80 F.3d at 1483–84 (“Several circuits have followed the reasoning of *Simmons* and held that a defendant is entitled to some sort of protection against the use of financial disclosures made to establish eligibility for appointed counsel.” (citing decisions from the Second, Third, Seventh, and Ninth Circuits)); *Anderson*, 567 F.2d at 840–41 (“[F]orc[ing] Anderson to choose between his Sixth Amendment right to counsel and his Fifth Amendment right against self-incrimination . . . is constitutionally impermissible.”).

300. *See United States v. Bounos*, 693 F.2d 38, 39 (7th Cir. 1982) (“[D]efendants would not be waiving their Fifth Amendment rights if they confessed guilt for the purpose of making out their double jeopardy claim.” (citing decisions from the Third and Fifth Circuits)).

301. *See United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991) (stating that the defendant would not waive his Fifth Amendment right not to testify at trial if he testified at the preliminary hearing).

302. *See Fullan v. Comm’r of Corr.*, 891 F.2d 1007, 10011–12 (2d Cir. 1989) (“[T]he state . . . has no right to require that defendant choose between foregoing retained counsel and foregoing [indigents’ due process and equal protection rights to a free transcript necessary for] an appeal.”).

303. *See United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120 (3d Cir. 1977) (“[B]eing forced to choose between his right to testify and his right to counsel . . . was an impermissible infringement upon [each].”).

affirmed the *Simmons* principle in conflicts between various rights under the Fifth Amendment privilege against self-incrimination<sup>304</sup> as well as between that right and the Due Process Clause right not to be tried if incompetent.<sup>305</sup> And finally, the Ninth Circuit declared as unconstitutional a conflict between the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to effective assistance of counsel.<sup>306</sup>

Whether analyzed under *Simmons* or *Crampton*, the *Gideon* and *Duncan*-based conflicts are likely unconstitutional. Under *Simmons*' per se approach, simply that there are conflicts between non-logically converse constitutional rights dispositively establishes their unconstitutionality.<sup>307</sup> Under *Crampton*'s policy impairment standard,<sup>308</sup> by undermining the protecting and complementing of other rights rationale of appointed counsel and jury trial, the conflicts are persuasively unconstitutional.

### C. Equal Protection and Due Process

The third and fourth independent bases for the unconstitutionality of the conflicts, applying to all eight *Gideon* and all ten *Scott*-based conflicts, are the Fourteenth Amendment Equal Protection and Due Process Clauses.<sup>309</sup> Due process may be

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304. See *United States v. Harrison*, 461 F.2d 1127, 1132 (5th Cir. 1972) (noting that barring defendant's testimony, supporting a motion to suppress a coerced confession, from being used to establish his guilt at trial safeguarded defendant's Fifth Amendment rights "in light of *Simmons*").

305. See *Pedrero v. Wainwright*, 590 F.2d 1383, 1388 n.3 (5th Cir. 1979) (citing *Simmons* and noting that defendant's testimony at arraignment in support of his incompetency claim would be inadmissible at trial to establish guilt).

306. See *Bittaker v. Woodford*, 331 F.3d 715, 723 (9th Cir. 2003) (holding that forcing the defendant to "the painful choice of . . . asserting his ineffective assistance of counsel claim" but risking self-incrimination or "retaining the privilege but giving up his ineffective assistance claim . . . would violate the spirit, and perhaps the letter, of *Simmons*").

307. See *supra* notes 251–259 and accompanying text.

308. See *supra* notes 269–276 and accompanying text.

309. See *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (finding that the Fourteenth Amendment's Equal Protection Clause, formally applicable only to the States, applies to the federal government as well through the Fifth Amendment Due Process Clause).

contrasted with equal protection: “‘Due process’ emphasizes fairness between the State and the individual . . . regardless of how other individuals in the same situation may be treated. ‘Equal protection,’ on the other hand, emphasizes disparity in the treatment by the State between classes of individuals whose situations are arguably indistinguishable.”<sup>310</sup> The Supreme Court has offered various, somewhat vague standards for due process: “what is fundamental to the American scheme of justice,”<sup>311</sup> “principle[s] so rooted in the traditions and conscience of our people as to be ranked as fundamental,”<sup>312</sup> and what is “fundamental to the protection of life and liberty.”<sup>313</sup> Essentially, it requires “fundamental fairness”;<sup>314</sup> the “denial of fundamental fairness” violates due process.<sup>315</sup> In contrast, equal protection violations are largely a function of the level of review or scrutiny employed.<sup>316</sup> Under rational review, a classification is presumptively constitutional unless the State fails to demonstrate a mere rational basis for it.<sup>317</sup> Under strict or heightened scrutiny, the classification is presumptively unconstitutional unless the State demonstrates a “compelling” reason.<sup>318</sup> Commentators describe

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310. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974).

311. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

312. *Medina v. California*, 505 U.S. 437, 445 (1992).

313. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring).

314. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

315. *Betts v. Brady*, 316 U.S. 455, 462 (1942).

316. See, e.g., Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755–56 (2011) (“Heightened scrutiny generally results in the invalidation of state action. In contrast, rational basis review generally results in the validation of state action.”).

317. See, e.g., *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“[E]ven . . . for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (explaining rational review as assessing whether the classification “rationally furthers some legitimate, articulated state purpose”); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-2, at 1443 (1st ed. 1978) (noting that rational review is largely “the equivalent of a strong presumption of constitutionality”).

318. See *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (stating that any penalty for exercising a constitutional right is unconstitutional unless “necessary to promote a compelling governmental interest”); accord *Rodriguez*, 411 U.S. at 16 (“[S]trict scrutiny means that the State’s system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry

strict scrutiny as “strict in theory, fatal in fact”<sup>319</sup> or a “virtual death-blow.”<sup>320</sup> Strict or “searching judicial scrutiny [is] reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.”<sup>321</sup> While indigency or poverty is generally not a suspect class,<sup>322</sup> *Gideon* and *Scott*’s impingement on indigents’ constitutional rights would trigger strict scrutiny.<sup>323</sup> In applying the constitutional rights branch of strict scrutiny, the Court explained, “any classification which serves to penalize the exercise of that [constitutional] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.”<sup>324</sup> *Gideon* and *Scott*’s burdening and deterring only indigents’ constitutional rights qualifies as a likely violation of the fundamental fairness guaranteed by the Due Process Clause and, with strict scrutiny a “virtual death-blow,”<sup>325</sup> a very likely violation of the Equal Protection Clause.

While due process and equal protection are conceptually distinct, courts often intertwine their analysis and find violations

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a ‘heavy burden of justification . . . .’ (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972))).

319. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

320. TRIBE, *supra* note 317, § 16-30, at 1089.

321. *Rodriguez*, 411 U.S. at 40; *accord Romer*, 517 U.S. at 631 (explaining that unless a law burdens a fundamental right or targets a suspect class, the Court will review it under rational basis).

322. *See, e.g.*, *Maher v. Roe*, 432 U.S. 464, 471 (1977) (“[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.”). *But see Rodriguez*, 411 U.S. at 61 (Stewart, J., concurring) (including indigency as among “other classifications that, at least in some settings, are also ‘suspect’”).

323. *See, e.g.*, *Johnson v. Bredesen*, 624 F.3d 742, 749 (6th Cir. 2010) (“[*Griffin* and its progeny] concerned fundamental interests subject to heightened scrutiny.”).

324. *Shapiro*, 394 U.S. at 634. Note that this test is somewhat similar to the *Jackson* principle: “[Q]uite apart from the Equal Protection clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law’s purpose or effect is to create any classifications.” *Rodriguez*, 411 U.S. at 61 (Stewart, J., concurring).

325. TRIBE, *supra* note 317, § 16-30.

resting on both grounds.<sup>326</sup> As *Griffin v. Illinois*,<sup>327</sup> the “seminal ruling on the state’s general obligation to provide ‘equal justice’ in the criminal justice process,”<sup>328</sup> declared, both “due process and equal protection call for procedures in criminal trials which allow no invidious discriminations . . . . Both . . . emphasize the central aim of our entire judicial system—all [defendants] . . . must . . . ‘stand on an equality before the bar of justice in every American court.’”<sup>329</sup>

*Griffin* held that burdening indigents’ right to appeal by not furnishing free trial transcripts violated equal protection and due process.<sup>330</sup> The Court reasoned, “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.”<sup>331</sup> In *Roberts v. LaVallee*,<sup>332</sup> the Court extended the *Griffin* right to preliminary hearing transcripts.<sup>333</sup> The Court explained, “Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.”<sup>334</sup> Relying on *Griffin* and *Roberts*, in 2004 the Ninth Circuit extended the *Griffin* right by recognizing an equal protection violation in the State’s failure to provide a complete transcript of all prior proceedings to

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326. See, e.g., *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (explaining that *Griffin* and its progeny “reflect ‘both equal protection and due process concerns’” (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996))); *Bearden v. Georgia*, 461 U.S. 660, 665 (1983) (“Due process and equal protection principles converge in the Court’s analysis in these cases.”).

327. 351 U.S. 12 (1956).

328. LAFAVE ET AL., *supra* note 48, at 590.

329. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)).

330. See *id.* at 19–20 (“Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none.”).

331. *Id.* at 19.

332. 389 U.S. 40 (1967).

333. See *id.* at 42–43 (“[T]he New York statute . . . as applied to deny a free transcript to an indigent, could not meet the test of our prior decisions.”).

334. *Id.* at 42.



an indigent.<sup>335</sup> Similarly, when indigents must relinquish ten constitutional rights in order to ensure enjoyment of the right to appointed counsel, but non-indigents retaining counsel need not relinquish any, indigents are not receiving equal justice.

The Court's application of the *Griffin* analysis to appointed counsel for indigents on appeal, however, is mixed. Relying on *Griffin, Douglas v. California*<sup>336</sup> held that denying indigent felons appointed counsel on their first appeal as of right violated the Fourteenth Amendment.<sup>337</sup> Such denial is "a discrimination at least as invidious as that condemned in *Griffin*."<sup>338</sup> By denying indigents appointed counsel on appeal when non-indigents retain private counsel, the Court "think[s] an unconstitutional line has been drawn between rich and poor."<sup>339</sup> That the indigent, lacking counsel, "has only the right to a meaningless ritual, while the rich man has a meaningful appeal" is unconstitutional.<sup>340</sup> *Ross v. Moffitt*,<sup>341</sup> however, declined to extend the *Douglas* right to subsequent, discretionary appeals.<sup>342</sup> The Court declared that equal protection and due process requires the State not to "duplicate the legal arsenal that may be privately retained [by a non-indigent] . . . but only to assure the indigent defendant an adequate opportunity to present his claims fairly."<sup>343</sup> That is, while *Griffin* and *Douglas* demand equal justice and opportunity for indigents, *Ross* only requires adequate opportunity.

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335. See *Kennedy v. Lockyer*, 379 F.3d 1041, 1046–51 (9th Cir. 2004) ("We conclude that the Court's cases clearly establish that an indigent defendant must be provided with a transcript of prior proceedings . . .").

336. 372 U.S. 353 (1963).

337. See *id.* at 357–58 ("There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel . . . while the indigent . . . is forced to shift for himself.").

338. *Id.* at 355 (quoting *People v. Brown*, 357 P.2d 1072, 1076 (Cal. 1960) (Traynor, J., concurring)).

339. *Id.* at 357.

340. *Id.* at 358.

341. 417 U.S. 600 (1974).

342. See *id.* at 609–12 ("[W]e do not believe that the Equal Protection Clause . . . requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals.").

343. *Id.*

Even under standards similar to *Ross*' narrower approach, courts have found numerous equal protection and due process violations concerning indigent criminal defendants. Citing *Ross*, the Court in *Bounds v. Smith*<sup>344</sup> ruled that the State must provide indigent prisoners with "law libraries or other forms of legal assistance . . . to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."<sup>345</sup> Relying on the Court's admonition in *Britt v. North Carolina*<sup>346</sup> that equal protection requires the State to provide indigents "with the basic tools of an adequate defense,"<sup>347</sup> the Court in *Ake v. Oklahoma*<sup>348</sup> determined that due process requires a state to provide an indigent capital offender with the expert assistance of a psychiatrist for his insanity defense.<sup>349</sup> The Court reasoned that an indigent "must have a fair opportunity to present his defense . . . [and] that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."<sup>350</sup> Indigents must have "[m]eaningful access to justice . . . and access to the raw materials integral to the building of an effective defense."<sup>351</sup> The Court found that the State's interest in avoiding the financial burden of supplying expert assistance to indigents was "not substantial, in light of the compelling interest of both the State and the individual [indigent] in accurate dispositions."<sup>352</sup> Under both due process and equal protection, most courts addressing the extension of *Ake* have concluded<sup>353</sup> that the *Ake* right extends to noncapital offenders,

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344. 430 U.S. 817 (1977).

345. *Id.* at 825.

346. 404 U.S. 226 (1971).

347. *Id.* at 227.

348. 470 U.S. 68 (1985).

349. *See id.* at 83 (holding that the State must assure access to a psychiatrist if the defendant demonstrates that his sanity will be a "significant factor at trial").

350. *Id.* at 76.

351. *Id.* at 77.

352. *Id.* at 79.

353. *See Huske v. Commonwealth*, 476 S.E.2d 920, 925 (Va. 1996) (noting that "most courts" addressing the issue "have held that the Due Process and Equal Protection clauses require the appointment of non-psychiatric experts to assist

defenses other than insanity, and non-psychiatric experts including “toxicologists, pathologists, fingerprint experts, hypnotists, DNA analysts, serologists, ballistics experts, handwriting examiners, blood spatter specialists, forensic dentists for bite-mark comparisons, psychologists for battered wife syndrome, as well as other types of experts.”<sup>354</sup>

Similarly, the rights afforded criminal defendants emanating from the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments (those rights subject to the conflicts in Part III)<sup>355</sup> are necessary to provide, under *Ross*’ standard, an “adequate opportunity to present his claims fairly.”<sup>356</sup> No less than law libraries, hypnotists, and forensic dentists, an indigent’s constitutional rights are part of *Britt*’s “basic tools of an adequate defense”<sup>357</sup> and *Ake*’s “raw materials integral to the building of an effective defense.”<sup>358</sup> Coercing the relinquishment of and burdening such constitutional rights denies the indigent, in *Ake*’s terms, “the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake” and denies indigents “[m]eaningful access to justice.”<sup>359</sup> If newly minted constitutional rights (such as expert assistance from hypnotists and forensic dentists) are recognized by being necessary for, in *Ake*’s terms, “meaningful participation,” “meaningful access to justice,” and among the requisite tools of an adequate defense,<sup>360</sup> then *a fortiori* so also are the long-standing constitutional rights expressly guaranteed by or emanating from the Fourth, Fifth, Sixth, Eighth,

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indigent defendants”); *see also* Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1369 (2004) (“Most courts assume that *Ake* applies to noncapital cases.”); *cf.* Lauren Sudeall Lucas, *Reclaiming Inequality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1226 (2013) (noting courts’ extension of *Ake*’s rationale to other types of expert and non-expert assistance to indigents).

354. Giannelli, *supra* note 353, at 1367–68; *accord* LAFAVE ET AL., *supra* note 48, at 605 (discussing other types of experts to which *Ake* has been extended).

355. *See supra* Part III.

356. *Ross v. Moffit*, 417 U.S. 600, 612 (1974).

357. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971).

358. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

359. *Id.* at 76–77.

360. *Id.*

and Fourteenth Amendments (discussed in Part III).<sup>361</sup> For example, the Fourth Circuit found that the long-established, explicitly guaranteed Sixth Amendment right to “the assistance of an attorney is one of the ‘raw materials integral to the building of an effective defense.’”<sup>362</sup> Similarly, *Gideon* and *Scott*’s coerced relinquishment and penalization of indigents’ constitutional rights constitute a denial of or impingement on *Britt*’s “basic tools of an adequate defense”<sup>363</sup> and *Ake*’s “meaningful access to justice.”<sup>364</sup> Furthermore, the State’s financial interest in not supplying appointed counsel to all indigent criminal defendants<sup>365</sup> is, applying *Ake*’s balancing, “not substantial, in light of the compelling interest of both the State and the individual [indigent] in accurate dispositions.”<sup>366</sup> Therefore, *Gideon* and *Scott*’s coerced relinquishment and penalization of indigents’ constitutional rights violate equal protection and due process.

The case most on point—perhaps the only decision addressing whether unconstitutionally conflicting constitutional rights afflicting only indigents independently violates equal protection or due process—is the Fourth Circuit’s *Miller v. Smith*.<sup>367</sup> The state court denied the indigent, represented by a private attorney pro bono, his *Griffin* right to a free transcript under a state rule limiting the right to indigents represented by state public

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361. See *supra* Part III.

362. *Miller v. Smith (Miller I)*, 99 F.3d 120, 126 (4th Cir. 1996) (quoting *Ake*, 470 U.S. at 77), *vacated on other grounds*, 115 F.3d 1136 (4th Cir. 1997) (en banc). For other examples, see *Evitts v. Lucey*, 469 U.S. 387, 404 (1985) (describing the State’s denial of a transcript in *Griffin* as “violating equal protection principles because it distinguished between poor and rich with respect to such a vital *right*” (emphasis added)); *Anders v. California*, 386 U.S. 738, 745 (1967) (holding that indigents’ court-appointed counsel must advocate their clients’ interests as zealously as retained counsel to “assure penniless defendants the same *rights* . . . as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel” (emphasis added)).

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

364. *Ake*, 470 U.S. at 77.

365. See *supra* note 352 and accompanying text.

366. *Ake*, 470 U.S. at 79.

367. See *Miller I*, 99 F.3d 120, 126–27 (4th Cir. 1996) (addressing whether an indigent should be afforded the same right to a free transcript if he obtained his own attorney).

defenders.<sup>368</sup> On appeal, the defendant argued that the state rule unconstitutionally created a “Hobson’s choice”: either obtain his Sixth Amendment right to counsel of choice only by foregoing his *Griffin* right to a free transcript or obtain his *Griffin* right only by foregoing his right to counsel of choice and accepting representation from a state public defender.<sup>369</sup> Citing *Simmons* that such Hobson’s choices are “intolerable,”<sup>370</sup> the Fourth Circuit declared that “[f]orcing an indigent to choose between two rights guaranteed by the Constitution results in the denial of one right or the other. Imposition of that dilemma upon [the defendant] thus affronts our notions of basic fairness.”<sup>371</sup> Applying strict scrutiny and determining the state lacked a compelling reason, the court additionally ruled that the unconstitutional dilemma violated “equal protection principles.”<sup>372</sup> The court explained that the indigent was “forced to choose between his constitutional rights in a way that a wealthier defendant is not. That outcome cannot be judged consistent with the guarantee of meaningful access to justice.”<sup>373</sup> While vacated on other grounds,<sup>374</sup> nonetheless a total of four Fourth Circuit judges agreed (and only one disagreed) that unconstitutionally conflicting constitutional rights afflicting only indigents does violate equal protection or due process.<sup>375</sup> Similarly,

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368. *See id.* at 122–23 (discussing Miller’s refusal to obtain a public defender, and his subsequent inability to obtain a transcript for appeal).

369. *See id.* at 127 (“Although he had an attorney at no cost to the State, Miller was told he must give up that attorney in order to receive a free transcript.”).

370. *Id.* (quoting *Simmons v. United States*, 390 U.S. 377, 394 (1968)).

371. *Id.* at 128.

372. *See id.* at 128–30 (“It violates equal protection principles because it distinguishes[s] between poor and rich with respect to such a vital right.” (internal quotations omitted)).

373. *Id.* at 130.

374. *See Miller v. Smith (Miller II)*, 115 F.3d 1136, 1139 (4th Cir. 1997) (en banc) (affirming the District Court). The en banc panel avoided the issue by strangely ruling that because indigents lack the right to counsel of choice among state public defenders, the defendant also lacked the right to counsel of choice despite having retained private pro bono counsel. *Id.* at 1143–44.

375. The four judges agreeing consisted of the two judges who were in the majority of the original panel, *see Miller I*, 99 F.3d 120, 122 (4th Cir. 1996), as well as two different dissenting judges in the en banc decision. *See Miller II*, 115 F.3d at 1144 (Murnaghan, J., dissenting). The one judge disagreeing was the

the *Gideon* and *Scott*-based conflicts force only indigents, but not non-indigents retaining counsel, to choose between constitutional rights.<sup>376</sup> Such a denial of “[m]eaningful access to justice”<sup>377</sup> for indigents violates equal protection and due process.

#### D. Objections

This section anticipates and addresses five possible objections. First, *Scott*, not *Gideon*, causes the conflicts involving the right to appointed counsel.<sup>378</sup> Second, the conflicts are constitutional as inevitable and unavoidable consequences of any defendant’s litigation strategy.<sup>379</sup> Third, the conflicts occur because defendants lack eligibility for constitutional rights rather than being forced to relinquish them.<sup>380</sup> Fourth, the conflicts only arise because defendants receive appointed counsel and jury trial despite being constitutionally ineligible for them.<sup>381</sup> Fifth, no rational defendant would forego the chance at obtaining a dismissal of a more serious charge.<sup>382</sup> None of these objections, however, is persuasive.

##### 1. *Scott, Not Gideon, Causes the Conflicts*

With respect *only* to the *Gideon*-based conflicts, one might object that the unconstitutional conflicts stem from *Scott* (and not *Gideon*). Furthermore, as to the *Scott*-based conflicts, with *Scott* not qualifying as a full constitutional right but only a conditional one (conditioned on the indigent receiving imprisonment),<sup>383</sup> the claimed conflicts are either false conflicts or constitutional.

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dissenter in the original panel. *Miller I*, 99 F.3d at 130 (Hamilton, J., dissenting).

376. See *supra* Part III.

377. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

378. See *infra* Part IV.D.1.

379. See *infra* Part IV.D.2.

380. See *infra* Part IV.D.3.

381. See *infra* Part IV.D.4.

382. See *infra* Part IV.D.5.

383. See *supra* note 108 and accompanying text.

The objection fails for three reasons. First, eight of the ten conflicts depict scenarios of the *Gideon* right conflicting with other constitutional rights. In those scenarios, the only right to appointed counsel the indigent has is under *Gideon*;<sup>384</sup> the indigent simply has no *Scott* right to appointed counsel. That those same conflicts, in alternative scenarios, also arise under *Scott*, does not make *Scott* the cause of the conflicts in the scenarios exclusively involving *Gideon*.

Second, to see the irrelevance of *Scott* to those eight *Gideon*-based conflicts in another way, suppose *Scott* is overturned and there is simply and absolutely no constitutional right to appointed counsel for misdemeanors. Nothing in the analysis of the *Gideon*-based conflicts would change as a result. The conflicts would still arise and be unconstitutional under the same bases. It is still the *Gideon* right that burdens, penalizes, chills, deters, and coerces relinquishment of other constitutional rights.<sup>385</sup> It is still the *Gideon* right that results in inequities between indigents and non-indigents that violate equal protection and due process.<sup>386</sup>

Third, that *Scott* only supplies a conditional constitutional right precludes only the second basis of unconstitutionality—one constitutional right coercing the relinquishment of another.<sup>387</sup> But the Article makes no claim that this basis of unconstitutionality—the *Simmons* principle—applies to *Scott*-based conflicts.<sup>388</sup> The other three bases do not require a constitutional right to be the cause of the burdening, penalizing, chilling, or deterring of constitutional rights or the inequities affecting only indigents that violate due process and equal protection.<sup>389</sup> For example, in *Griffin v. California*, what unconstitutionally burdened the defendant's Fifth Amendment privilege was not another constitutional right but merely a trial court's comment to the jury.<sup>390</sup> Similarly, in

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384. See *supra* Part III.A–H.

385. See *supra* Part III.A–H.

386. See *supra* Part IV.C.

387. See *supra* Part IV.B.

388. See *supra* Part IV.B.

389. See *supra* Part IV.A, C–D.

390. See 380 U.S. 609, 610 (1965) (describing the trial courts comment to the jury that they might consider the defendant's failure to deny facts by refusing to testify as evidence that they may be more probable).

*Douglas v. California*, what violated the indigent felon's due process and equal protection rights was not another constitutional right but a state rule denying appointed counsel on an appeal.<sup>391</sup>

## 2. Conflicts Constitutional as Consequence of Strategic Choices

One might object that the conflicts stemming from *Gideon*, *Scott*, and *Duncan* are nothing more than the result of litigation strategies or tactics. Inevitably, all defendants must make difficult decisions that accrue some benefits and incur some costs. For example, should a defendant testify in her own defense or remain silent? Should a defendant choose representation by counsel or elect to self-represent? These are strategic decisions involving conflicting constitutional rights that may result in advantaging or disadvantaging the defendant. Yet these are clearly considered constitutionally permissible.<sup>392</sup> The conflicts caused by *Gideon*, *Scott*, and *Duncan*, the objection maintains, are no different and no less constitutional.

True, conflicts between mutually opposed constitutional rights—as featured in the objection's examples—are constitutionally acceptable.<sup>393</sup> Because of their mutual or logical opposition they cannot be enjoyed simultaneously; one must necessarily choose one right or the other. Such rights have an X and not-X relationship, precluding simultaneous exercise “because the two activities are logically incompatible.”<sup>394</sup> They are “logical converses” to one another.<sup>395</sup> But the conflicts between the rights to appointed counsel and jury trial, and the ten other constitutional rights are not such logical converses. The rights to appointed counsel and jury trial are not merely susceptible to

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391. See 372 U.S. 353, 357–58 (1963) (“In California . . . once the court has ‘gone through’ the record and denied counsel, the indigent has no recourse but to prosecute his appeal on his own . . .”).

392. See, e.g., *State v. Chappelle*, 667 S.E.2d 327, 338 (N.C. Ct. App. 2008) (determining that a choice between “mutually exclusive” rights is constitutional).

393. See, e.g., *id.* (distinguishing a *Simmons* violation from situations where defendant “chose between mutually exclusive constitutional rights”).

394. Westen, *supra* note 49, at 743 n.7.

395. See *id.* (discussing rights that by their nature cannot both be given effect simultaneously).



simultaneous enjoyment with other rights, their very rationales require simultaneous enjoyment with other rights: to protect, support, and complement other rights.<sup>396</sup> In addition, the *Gideon* and *Scott*-based coercive dilemmas cannot be dismissed as an inevitable aspect of the difficult strategic choices inherent in criminal prosecutions that *any* defendant must make because *only* indigents face them.<sup>397</sup>

### 3. *Relinquishing Rights v. Ineligibility for Rights*

One might object that in some scenarios of some of the conflicts the defendants are seeking to satisfy the eligibility requirements for the rights to appointed counsel and jury trial—sufficiently serious charged offenses or punishment—by foregoing other constitutional rights. Because the defendants in those scenarios have not yet met those eligibility requirements, they do not possess these rights, and thus these rights cannot unconstitutionally conflict with other rights.

There are a number of responses to this objection. First, that conditions or eligibility requirements must be satisfied before a right may be enjoyed is not unique to the rights to appointed counsel and jury trial. For example, both the Fourth and Fifth Amendment rights involved in *Simmons* had conditions that had to be satisfied and that did not preclude the Court from finding an unconstitutional conflict.<sup>398</sup> In order to become eligible to assert his Fourth Amendment right that the seizure was unreasonable, the *Simmons* defendant had to satisfy a standing requirement and

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396. See *supra* notes 17–19 and accompanying text.

397. See *supra* Part III.

398. See *Simmons v. United States*, 390 U.S. 377, 389 (1968) (noting that the Fourth Amendment requires proof that the person asserting the right is the one whose protection was infringed). Though *Simmons* only discussed conditions for the Fourth Amendment, the Fifth Amendment privilege against self-incrimination has conditions that must be satisfied in order for the right to be enjoyed. See, e.g., *United States v. Oliveras*, 905 F.2d 623, 626 n.5 (2d Cir. 1990) (“It is true that the fifth amendment privilege is not ‘self-executing.’”); LAFAVE ET AL., *supra* note 48, at 482 (noting that witnesses generally “bear the obligation . . . to assert the [Fifth Amendment] on their own initiative”).

establish that the seized property was his.<sup>399</sup> And to do so, the defendant would have to self-incriminate.<sup>400</sup> Despite conditions to be satisfied or eligibility requirements for both rights, the Court ruled that the defendant was coerced to relinquish his Fifth Amendment right in order to exercise his Fourth Amendment right; and, in order to exercise his Fifth Amendment right, he would be coerced into relinquishing his Fourth Amendment right.<sup>401</sup> In ruling the conflict unconstitutional, that there were conditions or eligibility requirements was irrelevant.<sup>402</sup> What was unconstitutional according to the Court was placing the defendant in a coercive dilemma in which he had to choose between constitutional rights.<sup>403</sup> And this dilemma arises and the defendant's choice occurs *prior* to satisfying the conditions or eligibility requirements for each right. It was only *after* the *Simmons* defendant made his dilemmatic choice to assert his Fourth Amendment claim, and waive his Fifth Amendment right, that the defendant satisfied the conditions (the standing requirements) for the Fourth Amendment claim.<sup>404</sup> As a result, under the *Simmons* principle, there can be an unconstitutional conflict between constitutional rights even when, at least in a technical sense, the defendant has not satisfied all of the conditions for enjoying the rights. Arguably, the eligibility requirements for appointed counsel and jury trial—sufficiently serious charged offenses or punishment—are similarly irrelevant.

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399. See *Simmons*, 390 U.S. at 390–91 (“At one time a defendant who wished to assert a Fourth Amendment objection was required to show that he was the owner or possessor of the seized property.”).

400. See *id.* at 393 (discussing how the testimony of the defendant to establish Fourth Amendment standing would then be self-incriminating if used against him at trial).

401. See *id.* at 394 (“We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt.”).

402. See *id.* (ruling that the conflict was unconstitutional in spite of the eligibility requirement).

403. See *id.* (“[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.”).

404. See *id.* at 393 (showing that the ability to use the testimony against the defendant at trial only occurs if the testimony occurs).

Just as the *Simmons* defendant had to satisfy an eligibility requirement for the Fourth Amendment by foregoing the Fifth Amendment, the defendants in some scenarios in Part III had to satisfy eligibility requirements for the rights to appointed counsel and jury trial by foregoing other constitutional rights.<sup>405</sup> Second, even if the objection is correct, it only pertains to one of the four bases for constitutionality. Only the second basis—the *Simmons* principle—requires two constitutional rights to be in conflict; the other three only require the presence of one constitutional right.<sup>406</sup> Third, only four of the conflicts include scenarios of defendants trying to attain (rather than maintain) rights to appointed counsel and jury trial.<sup>407</sup> Furthermore, three of these four conflicts arise in alternative procedural contexts where the defendants are seeking to maintain existing appointed counsel and jury trial.<sup>408</sup> As a result, the objection only challenges one of the conflicts.<sup>409</sup> The most successful the objection can be is to eliminate one of the four bases for unconstitutionality of only one of the conflicts. Because the objection does not establish that any of the conflicts are constitutional, the objection fails.

#### *4. Defendants Receiving Appointed Counsel and Jury Trial Despite Constitutional Ineligibility*

One might object that in some scenarios of some of the conflicts defendants receive appointed counsel and jury trial despite not being constitutionally entitled to them. As a result, the claimed conflicts are not actual conflicts between constitutional rights held by the particular defendant and only arise by luck. As a result, the conflicts are constitutional.

The objection is inapplicable to seven of the ten conflicts.<sup>410</sup> In those seven, either no scenario involves a defendant receiving constitutionally unentitled appointed counsel and jury trial or

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405. See *supra* Part III.

406. See *supra* notes 387–391 and accompanying text.

407. See *supra* Part III.B, D–E, H.

408. See *supra* Part III.D–E, H.

409. See *supra* Part III.B.

410. See *supra* Part III.A–B, D–H.

there are alternative scenarios of the same conflict where the defendant does not receive constitutionally unentitled appointed counsel and jury trial.<sup>411</sup> Only three of the ten conflicts arise solely in contexts where defendants receive constitutionally unentitled appointed counsel and/or jury trial on at least one of their charges.<sup>412</sup> As to those three, the objection is only possibly applicable to one of the four bases for unconstitutionality: only the *Simmons* principle—coercing the relinquishment of one constitutional right in order to exercise another—requires that the defendant have a constitutional right to appointed counsel or jury trial.<sup>413</sup> Neither that which burdens, penalizes, chills, or deters a constitutional right nor that which produces inequities in constitutional rights violating equal protection and due process need be a constitutional right itself.<sup>414</sup> By only being applicable to one of the four bases for unconstitutionality of only three of the ten conflicts, the objection fails to establish that any of the ten conflicts are constitutional.

### 5. Conflicts Caused by Irrational Defendants

One might object that no rational defendant would forego constitutional rights and a possible dismissal of a more serious charge in order to exercise other rights and maximize the chance for an acquittal on all charges. Conflicts based on a defendant acting so irrationally are implausible and thus the resulting unconstitutional conflicts fail to raise a serious concern.

The objection fails for four reasons. First, the seeming irrationality of defendants fails to make the conflicts implausible. As discussed above, defendants often make seemingly unwise or irrational choices; their lack of wisdom or rationality does not prevent conflicting rights from being held unconstitutional by the Supreme Court.<sup>415</sup> Second, also discussed above, defendants faced

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411. See *supra* Part III.A–B, D–H.

412. See *supra* Part III.C, I–J.

413. See *supra* Part IV.B. For discussion of whether the objection is applicable at all, see *supra* Part IV.D.3.

414. See *supra* notes 387–391 and accompanying text.

415. See *supra* notes 132–139 and accompanying text.

with multiple charges might well have numerous rational reasons, specific to their situation, for choosing to forego exercising a constitutional right and a chance at obtaining the dismissal of a more serious charge.<sup>416</sup> Third, empirical evidence of prosecutorial charging decisions supports the rationality of defendants foregoing constitutional rights. Prosecutors sometimes forego filing more serious charges to preclude defendants' eligibility for appointed counsel and jury trial,<sup>417</sup> thereby minimizing the chances of an acquittal.<sup>418</sup> That is, prosecutors sometimes engage in strategic undercharging because less is more: a lesser charge of a misdemeanor may entail a more likely conviction.<sup>419</sup> Similarly, defendants may rationally forego the chance to dismiss a felony count because more is less: a more serious felony charge may entail a less likely conviction. Because of the enhanced procedural safeguards and lower probability of conviction for felony charges, "the defendant who is charged with a misdemeanor may be left at a greater disadvantage than if he had been charged with a felony."<sup>420</sup> Fourth, there are two notable contexts in which defendants assuming the risk of facing greater jeopardy in order to maximize their chance at a complete acquittal is quite commonplace. Under the "All-or-Nothing Doctrine,"<sup>421</sup> defendants

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416. See *supra* text preceding and following note 131.

417. See *Duncan v. Louisiana*, 391 U.S. 145, 192 n.51 (1968) (Harlan, J., dissenting) (noting "that the 'huge proportion' of criminal charges for which jury trial has not been available in America is increased by the judicious action of weary prosecutors" (quoting ERNST W. PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 87–88 (1953))).

418. See *Crane*, *supra* note 88, at 811–18 (explaining that because prosecutors are "conviction maximizers," they engage in "strategic undercharging" to deny defendants the procedural advantages, such as jury trial and able counsel, that attach to more serious charges so as to increase the likelihood of conviction); see also Issa Kohler-Huasmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 659 n.133, 662 n.142 (2014) (characterizing charge reductions "to ensure a bench trial" as "standard practice" among New York City prosecutors).

419. See *Crane*, *supra* note 88, at 795–96 ("In some cases, the likelihood of conviction is also increased by filing a misdemeanor . . .").

420. *Id.* at 781.

421. See, e.g., Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?* 26 AM. J. CRIM. L. 257, 258 (1999) (explaining the doctrine as "a strategy that permits parties in a criminal trial to forego instructions on provable lesser-included

often decline their right to have the jury instructed on lesser-included offenses to enhance their likelihood of acquittal.<sup>422</sup> Similarly, defendants quite routinely decline plea bargains and choose to go to trial, thereby facing more serious charges and/or punishment, to obtain a complete acquittal.<sup>423</sup>

### *E. Summary*

This Part discussed the four bases for the unconstitutionality of the conflicts. First, *Gideon*, *Scott*, and *Duncan* burden, penalize, chill, and deter the exercise of eight or more constitutional rights.<sup>424</sup> Because this principle—the *Jackson* principle—is widely ignored in the plea bargaining context, it is understood as inconsistently followed.<sup>425</sup> Outside of the plea bargain context, however, the *Jackson* principle remains vital<sup>426</sup> and persuasively establishes the unconstitutionality of the conflicts.<sup>427</sup> Second, *Gideon* and *Duncan* coerce defendants to relinquish eight and ten constitutional rights, respectively, in order to exercise others—the Sixth Amendment rights to appointed counsel and jury trial.<sup>428</sup> Under *Simmons*' per se approach, the conflicts are clearly unconstitutional.<sup>429</sup> Under *Crampton*'s policy impairment

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offenses, thereby forcing the jury to choose between conviction and acquittal on the greater charge”).

422. See, e.g., *United States v. Bastidas*, 658 F. App'x 878, 879 (9th Cir. 2016) (“A defendant’s failure to request a lesser included offense instruction may be considered a strategic choice to seek a complete acquittal.”); *Moore v. Tennessee*, 485 S.W.3d 411, 419 (Tenn. 2016) (“Choosing not to request lesser-included offense instructions appears to be consistent with an all or nothing defense.”).

423. See, e.g., Robert E. Scott & William J. Stuntz, *Plea Bargaining as a Contract*, 101 Yale L.J. 1909, 1914 (1992) (discussing plea bargaining as a defendant exchanging the risk of a maximum penalty by accepting the risk that he missed out on a lesser punishment or an acquittal).

424. See *supra* Part IV.A.

425. See *supra* notes 232–248 and accompanying text.

426. See LAFAVE ET AL., *supra* note 48, 1010 (noting that the “lower courts continue to apply the *Jackson* principle even where the death penalty is involved”).

427. See *supra* Part IV.A.

428. See *supra* Part III.A–J.

429. See *supra* Part IV.B.

approach, the conflicts are likely unconstitutional because they violate the underlying rationales of the Sixth Amendment rights to appointed counsel and jury trial. Rather than serving to protect, support, and complement defendants' other rights, *Gideon* and *Duncan* undermine them by coercing their relinquishment. Third, *Gideon* and *Scott* violate equal protection by causing disparities between indigents and non-indigents in the enjoyment of eight and ten constitutional rights, respectively.<sup>430</sup> With the nearly fatal strict scrutiny standard of review applicable because of the impingement on constitutional rights,<sup>431</sup> the conflicts between *Gideon* and *Scott* and the other constitutional rights are very likely unconstitutional. Fourth, *Gideon* and *Scott* violate due process.<sup>432</sup> The denial to indigents of comparatively exotic expert assistance—hypnotists and forensic dentists—has been held to violate due process because such assistance qualifies as a basic tool and raw material of an adequate defense and necessary for meaningful participation in and access to justice.<sup>433</sup> *A fortiori*, coercing indigents' relinquishment of long-standing, fundamental constitutional rights violates due process.

Each of these four bases is independent. That the conflicts may be deemed constitutional under one basis does not preclude them from being unconstitutional under another. For example, even if *Gideon*, *Scott*, and *Duncan*'s burdening, penalizing, chilling, and deterring of other constitutional rights and *Gideon* and *Duncan*'s coercing relinquishment of some constitutional rights in order to enjoy others is deemed constitutional, the inequities between indigents and non-indigents' enjoyment of their other constitutional rights caused by *Gideon* and *Scott* may violate equal protection and due process.

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430. See *supra* Part IV.C.

431. See *supra* notes 321–324 and accompanying text.

432. See *supra* Part IV.C.

433. See *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (stating that “meaningful access to justice” requires an indigent defendant is afforded similar tools to mount a defense as his non-indigent counterparts).

*V. Resolving the Unconstitutional Conflicts*

If Part IV established that the conflicts presented in Part III are plausibly unconstitutional, what is the remedy? This Part first considers two existing remedies<sup>434</sup> and then proposes two ad hoc remedies,<sup>435</sup> none of which resolves all of the conflicts. It next presents three remedies resolving all of the conflicts.<sup>436</sup> Rejecting one as implausible and another as irrational, Part V concludes that the preferable remedy is extending the right to appointed counsel to all indigents and the right to jury trial to all defendants.

*A. Existing, Partial Remedies*

Two existing remedies address some of the conflicts. First, as to only one scenario of the conflict between appointed counsel and the Fifth Amendment,<sup>437</sup> indigents' self-incriminating statements made to establish appointed counsel as warranted under *Scott* might be inadmissible at trial.<sup>438</sup> But this remedy resolves neither four alternative scenarios of the conflict<sup>439</sup> nor the other nine conflicts.

Second, as to scenarios of seven *Duncan*-based conflicts arising because defendants charged with both serious and petty offenses receive jury trial for both,<sup>440</sup> some jurisdictions send the petty offense to the judge and only the serious offense to the jury.<sup>441</sup> While providing a remedy in those jurisdictions, other jurisdictions provide jury trials for both offenses.<sup>442</sup> Furthermore, the remedy is

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434. See *infra* Part V.A.

435. See *infra* Part V.B.

436. See *infra* Part V.C.

437. See *supra* note 179.

438. Cf. LAFAVE ET AL., *supra* note 48, at 608 (“The indigency determination statutes in several states provide that the [financial] information furnished by the defendant will not be admissible in the subsequent criminal prosecution.”).

439. See *supra* Part III.E.

440. See *supra* Part III.A, C–H.

441. See LAFAVE ET AL., *supra* note 48, at 1072 (noting “the practice followed in some jurisdictions of sending only the nonpetty offense to the jury and leaving the petty offense charge to be determined by the judge”).

442. See, e.g., D.C. CODE § 16-705(b-1) (2014) (providing that a defendant who



inapplicable to alternative scenarios of six of those seven conflicts.<sup>443</sup> Consequently, it resolves only one *Duncan*-based conflict<sup>444</sup> and none of the others.

### *B. Ad Hoc, Partial Remedies*

While lacking a principled basis, two possible ad hoc remedies avoid some of the conflicts. First, as to scenarios of six *Gideon* and *Duncan*-based conflicts arising because defendants charged with both felonies and misdemeanors (eligible for neither appointed counsel nor jury trial) receive jury trial and appointed counsel for both,<sup>445</sup> such defendants could neither be tried jointly on nor receive appointed counsel for both offenses. The remedy, however, entails separate trials that are more expensive for the State than a combined trial. Given that the presumptive reason for limiting the rights to appointed counsel and jury trial in the first place is financial cost,<sup>446</sup> the remedy is self-defeating. More importantly, it fails to resolve alternative scenarios and other conflicts featuring defendants with no felony charge<sup>447</sup> or only one charge at a time.<sup>448</sup> Furthermore, the ad hoc remedy avoids none of the ten *Duncan* and *Scott*-based conflicts all involving defendants lacking felony charges.<sup>449</sup> By avoiding only one of the eight *Gideon* and *Duncan*-based conflicts,<sup>450</sup> the remedy fails.

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faces one jury demandable offense may invoke a jury trial for all charged offenses).

443. See *supra* Part III.A, D–H.

444. See *supra* Part III.C.

445. See *supra* Part III.A, C, E–H.

446. See Christopher, *supra* note 109, at 1921 and accompanying text (quoting Justice Powell that “the price of pursuing this easy course could be high indeed in terms of its adverse impact on the administration of the criminal justice systems of [fifty s]tates”); *Blanton v. North Las Vegas*, 489 U.S. 538, 542–43 (1989) (explaining the state’s interest in a speedy trial); *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968) (noting that efficient law enforcement outweighs the defendant’s interest in not being convicted of a petty offense).

447. See *supra* Part III.B, D–E, H.

448. See *supra* Part III.A, D–H.

449. See *supra* Part III.A–J.

450. See *supra* Part III.A–F.

Second, once counsel is appointed and jury trial is scheduled for a particular charge, the defendant cannot lose the appointed counsel and jury trial for that charge even if otherwise no longer constitutionally entitled to them. Though remedying some scenarios of nine of the ten conflicts,<sup>451</sup> the remedy entails the State paying for appointed counsel and jury trials when not otherwise constitutionally required. Again, given that financial cost is the rationale for limiting distribution of the rights, the remedy is self-defeating. More importantly, the remedy fails to avoid one of the *Gideon* and *Duncan*-based conflicts<sup>452</sup> and three of the *Scott* and *Duncan*-based conflicts<sup>453</sup> where defendants seek to attain (not maintain existing) appointed counsel or jury trial. (A remedy barring loss of appointed counsel and jury trial fails to aid defendants already lacking both.) In addition, the remedy fails to avoid six conflicts arising because defendants forego constitutional rights fearing prosecutors' substitution of charges warranting appointed counsel and jury trial with charges entitled to neither.<sup>454</sup> While completely avoiding three of the conflicts,<sup>455</sup> the remedy fails to avoid seven others.<sup>456</sup>

Individually, none of the two existing and two proposed ad hoc remedies is satisfactory. Even the combined effect of implementing all four resolves completely only three of the conflicts,<sup>457</sup> leaving seven unresolved.<sup>458</sup>

### C. Resolving All Ten Conflicts

There are three remedies that resolve or avoid all ten conflicts. First, eliminate entirely the Sixth Amendment rights to appointed counsel and jury trial. Without such rights, defendants would have no incentive to relinquish existing constitutional rights to secure non-existent ones. Though successfully resolving all of the

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451. See *supra* Part III.A, C–J.

452. See *supra* Part III.B.

453. See *supra* Part III.B, D–E.

454. See *supra* Part III.A, D–H.

455. See *supra* Part III.C, I–J.

456. See *supra* Part III.A–B, D–H.

457. See *supra* Part III.C, I–J.

458. See *supra* Part III.A–B, D–H.

conflicts, invalidating a landmark decision as celebrated as *Gideon* and a right as fundamental as the Sixth Amendment right to jury trial marks the remedy as surely implausible.

Second, replace *Gideon*, *Scott*, and *Duncan*'s proportional allocation with a disproportional allocation. That is, rather than heightened procedural protections, diminished procedural protections would accompany more severe crimes or punishments. Indigents charged with misdemeanors would be guaranteed appointed counsel. Indigents charged with felonies would only receive appointed counsel if not sentenced with imprisonment. Defendants charged with petty offenses would have the right to jury trial, but defendants charged with serious offenses would not. Such a disproportional allocation avoids all ten conflicts by aligning with what defendants' other constitutional rights facilitate. Both appointed counsel and jury trial eligibility and the exercise of other constitutional rights would align toward minimizing inculpatory evidence, maximizing exculpatory evidence, avoiding more serious charges, and avoiding more severe punishment. Rather than undermining, defendants' exercising their other constitutional rights would aid obtaining appointed counsel and jury trial. Despite resolving all of the conflicts such a remedy would be considered as "outrageous . . . a perversion,"<sup>459</sup> and irrational.

Third, replace the proportional allocation with a transsubstantive allocation. That is, extend *Gideon* to all indigents and *Duncan* to all defendants. Making those two rights applicable regardless of the severity of crime or punishment eliminates any incentive to forego exercising other constitutional rights to obtain appointed counsel and jury trial. A transsubstantive allocation thereby avoids all the conflicts. As the only remedy resolving all ten conflicts that is plausible and rational, extending the Sixth Amendment right to appointed counsel to *all* indigents and the right to jury trial to *all* defendants is the preferable resolution.

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459. *Powell v. Alabama*, 287 U.S. 45, 60 (1932).

*VI. Conclusion*

Allocating constitutional rights of criminal defendants proportionally—rights attach or strengthen as offense or punishment severity increases—creates a tension with the general function of defendants’ other rights that facilitate decreasing offense or punishment severity. That tension potentially triggers conflicts between proportionally allocated rights and other constitutional rights. Defendants face a coercive dilemma in which exercise of the latter rights risks relinquishing the former rights, and vice-versa. That this potential for conflict yields actual conflicts is illustrated by perhaps the two most important and prominent proportionally allocated rights. The Sixth Amendment rights to appointed counsel under *Gideon* and *Scott* and jury trial under *Duncan* conflict, under some circumstances, with ten constitutional rights emanating from the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.<sup>460</sup> These conflicts are unconstitutional under four independent bases.<sup>461</sup> First, *Gideon*, *Scott* and *Duncan* burden, penalize, chill, and deter the exercise of constitutional rights.<sup>462</sup> Second, *Gideon* and *Duncan* coerce indigents to relinquish some constitutional rights in order to enjoy others.<sup>463</sup> Third, the *Gideon* and *Scott*-based conflicts yield unequal treatment of indigents and non-indigents in violation of the Equal Protection Clause.<sup>464</sup> While non-indigents retaining counsel enjoy all their constitutional rights, indigents enjoy only some. Fourth, such disparities violate the equality component of the Due Process Clause.<sup>465</sup> While there are a variety of remedies that resolve some of the unconstitutional conflicts,<sup>466</sup> the preferable remedy that resolves all ten conflicts is replacing the existing proportional allocation with a transsubstantive allocation.<sup>467</sup> That is, extend the Sixth Amendment right to jury trial to *all* criminal defendants and the right to appointed counsel to *all* indigent criminal defendants.

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460. See *supra* Part III.

461. See *supra* Part IV.

462. See *supra* Part IV.A.

463. See *supra* Part IV.B.

464. See *supra* Part IV.C.

465. See *supra* Part IV.C.

466. See *supra* Part V.A–B.

467. *Supra* Part V.C.

Without a resolution to these ten conflicts, rather than being the rights that protect, support and complement, the Sixth Amendment rights to appointed counsel and jury trial are the rights that undermine the other rights.