RECOGNIZING THE LIMITS OF THE RIGHT TO COUNSEL AS A GUARANTEE OF JUSTICE

RECONOCIENDO LOS LÍMITES DEL DERECHO A UN ABOGADO COMO GARANTÍA DE JUSTICIA

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ABSTRACT

This paper examines the role of the right to counsel in criminal cases as a structural, theoretical, and actual guarantee of justice. It compares the scope and history of the right to counsel in the United States and Chilean systems and suggests that Chile could benefit by adopting a more nuanced approach to its criminal adjudication system, retaining elements of inquisitorialism and rejecting extreme adversarialism for petty crimes. Unlike the United States, where potentially severe collateral consequences of even minor criminal convictions make necessary a broad right to counsel, the Chilean system could benefit from focusing defense resources on more serious crimes. By restricting the scope of the right to counsel to more serious crimes, and by redesigning the system of adjudication and punishment for petty crimes, Chile could not only achieve substantial financial savings but also avoid the problems of hyper-incarceration and punitivism that have come to characterize the criminal justice system in the United States.

Key words: right to counsel, adversarialism, inquisitorialism, criminal procedure reforms

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RESUMEN

Este artículo examina el papel del derecho a un abogado en las causas penales como garantía estructural, teórica y real de la justicia. Compara el alcance y la historia del derecho a un abogado en los sistemas norteamericano y chileno, y sugiere que Chile podría beneficiarse mediante la adopción de un enfoque más matizado de su sistema de adjudicación penal, preservando los elementos propios de un sistema inquisitivo, y a la vez rechazando un sistema adversarial extremo en los delitos menores. A diferencia de Estados Unidos, donde las consecuencias colaterales potencialmente graves de condenas penales menores hacen necesario un amplio derecho a un abogado, el sistema chileno podría beneficiarse al concentrar los recursos de defensa sobre los crímenes más graves. Al restringir el alcance del derecho a un abogado a los delitos más graves, y rediseñar el sistema de adjudicación y el castigo para los delitos menores, Chile no solo podría lograr ahorros financieros sustanciales, sino también evitar los problemas de hiperencarcelamiento y de punitivismo que han llegado a caracterizar el sistema de justicia penal en los Estados Unidos.

Palabras clave: Derecho a un abogado, sistema adversarial, sistema inquisitivo, reformas al proceso penal.

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INTRODUCTION

No country writes on a blank slate when revising its justice systems. But in designing and implementing its criminal procedure reforms in the 1990s and early 2000s, Chile had a unique opportunity to learn from the experiences of other Latin American countries that had already moved away from an inquisitorial system and toward adversarialism. In addition to being able to see the early results from its Latin American neighbors, Chile was able to take a fresh look at the various systems of criminal adjudication that competed for influence over the process of reform and to learn from their successes and their failures.

This essay examines one discrete but important decision made during the reform period –the scope of the right to counsel– and suggests that Chilean reformers may have missed an opportunity to create a criminal adjudication system that is more just, more effective and less expensive than the current model. At least in design, Chile has adopted a highly adversarial system that requires the appointment of counsel in every criminal case[1]. This essay suggests that Chile

[1] *Vid. Ley.* 19.718 art. 2, febrero 21, 2001 (Chile).

might benefit by adopting a more nuanced approach to its criminal adjudication system, retaining elements of inquisitorialism and rejecting extreme adversarialism for petty crimes. By restricting the scope of the right to counsel to more serious crimes, and redesigning the system of adjudication and punishment for petty crimes, Chile could not only achieve substantial financial savings but also avoid the problems of hyper-incarceration and unnecessary punitivism that have come to characterize the United States system, which is structurally very adversarial.

To be sure, such an approach is fraught with both risk and promise, primarily for those accused of crime. In the United States context, I have argued that justice and fundamental fairness require an expansion of the right to counsel beyond its current scope[2]. The difference, however, is in the severe indirect or collateral consequences that attend a minor criminal conviction in the United States. Because even petty crimes in the United States can result in harsh collateral consequences, I have argued that the only way to protect the rights of anyone criminally accused in the United States is to provide that person a lawyer[3]. Chile, however, does not have the same broad system of collateral consequences and, therefore, still has the ability to modify the way it treats petty criminal activity. Taking such conduct outside of the ambit of the criminal justice system altogether and relying on a less formal system like the German penal orders[4] or therapeutic courts used in the United States and other countries could benefit all involved.

This essay proceeds in four parts. Part I looks at the development of the right to counsel in the United States and examines the rationales given for restricting the right to court-appointed counsel to charges resulting in actual incarceration. Part II examines the scope of the right to counsel in the Chilean context and the reasons

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2 John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 Harv. C.R.-C.L. L. Rev. 1, 36-49 (2013) [hereinafter King, *Beyond "Life and Liberty"*].

3 *Ibid.,* p. 21.

4 *Vid.* Jörg-Martin Jehle, *Criminal Justice in Germany*, Fed. Ministry of Just., at 18-19 (5th ed. 2009), *available at* http://www.bmj.de/SharedDocs/Downloads/EN/StudienUntersuchungenFachbuecher/Criminal_Justice_in_Germany_Numbers_and_Facts.pdf?__blob=publicationFile (explaining penal orders and demonstrating that approximately 10.3% of German cases are dealt with by an application for a penal order) (on file with the author).

for extending the right to court-appointed counsel to every person accused of a crime. Part II also looks at the relevant international treaties that address the right to counsel and that affected the thinking of Chilean academics and legislators in their decision to adopt a broad and robust right to counsel in the redesigned criminal justice system. Part III discusses the different contexts of the American and Chilean criminal justice system and explains how different systems might have different requirements for how broadly the right to counsel applies. Finally, Part IV concludes by suggesting that, counter-intuitively, Chile's embrace of a very broad right to counsel and extremely adversarial structure of criminal adjudication might work to the detriment of those accused of petty crimes by subjecting them to a system that focuses too much on punishment and not enough on regulation and rehabilitation.

I. THE SCOPE OF THE RIGHT TO COUNSEL IN THE UNITED STATES

The direct source of the right to counsel in the United States is the Sixth Amendment to the United States Constitution, which reads: "In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense"[5]. Initially, the right was understood as solely a negative right[6], guaranteeing only the right of the accused to be free from governmental interference with the ability to hire a lawyer. The idea of the State being required by the Constitution to provide a lawyer for one accused of a crime did not exist at the time of the passage of the Sixth Amendment. In the twentieth century, however, the Sixth Amendment's guarantee evolved gradually from a negative right to a positive right, carrying with it the requirement not only that the State refrain from interfering with an individual's exercise of the right but also that the State provide counsel for those accused of certain crimes.

5 U.S. Const. amend. VI.

6 A "negative right" is defined as "[a] right entitling a person to have another refrain from doing an act that might harm the person entitled". Black's Law Dictionary 1437 (9th ed. 2009). A "positive right" is defined as "[a] right entitling a person to have another do some act for the benefit of the person entitled". *Id.*

The United States Supreme Court gradually mapped the precise contours of the American right to counsel[7] during the middle decades of the twentieth century. Capital cases from the southern United States first prompted the United States Supreme Court to address the State's constitutional obligation to provide a lawyer to a person accused of crime. In 1932, the Court decided *Powell v. Alabama*[8], in which nine young African-American men, labeled the "Scottsboro Boys," were charged with the rape of two white women[9]. In the highly charged racial atmosphere of the American South in the 1930s, such an allegation was highly likely to result in death sentences for the accused. The trial judge initially asked for "all the members of the bar" to represent the defendants and later, when no attorneys did so, appointed an out-of-state lawyer who expressly explained to the judge that he had no familiarity with the case or with Alabama procedure and had no intention of representing the defendants[10]. The defendants were not represented by counsel in any meaningful sense at trial or during the sentencing hearings[11]. Moving from accusation to trial at the breathtaking speed that characterized such cases in the American South during this period, the charges against the defendants resulted in death sentences within two weeks of the initial accusations[12]. In reversing the convictions, the United States Supreme Court recognized for the first time that the presence and advocacy of defense counsel is an essential part of a fundamentally fair adversarial criminal justice system. The Court limited its holding, however, to only those cases in which the defendant faces capital charges and is unable to pay a lawyer himself and is "incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like ..."[13].

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7 The cases discussed below deal with the minimum right to counsel required as a matter of federal constitutional law. Individual states are free to provide for a broader right to counsel in their state systems and many do. *Vid.* King, John, Beyond "Life and Liberty", pp. 40-41.

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

9 *Powell v.* Alabama, 287 U.S. at 49.

10 *Ibid.*, pp. 53-56.

11 *Ibid.*, p. 58.

12 *Ibid.*, pp. 49-50.

13 *Ibid* 71. For a more comprehensive discussion of the gradual development of the right to counsel during the mid-twentieth century, see King, John, *Beyond "Life and Liberty," supra* note 2, at 6-15.

Proceeding with the gradualism that marks much of American constitutionalism, the Court would not provide clear answers for many years about the exact scope of the right to counsel. Ten years after *Powell*, in *Betts v. Brady*[14], the Court rejected an argument that fundamental fairness required the active participation of defense counsel in all criminal prosecutions[15]. The defendant was indicted for robbery and was unable to afford a lawyer[16]. He requested court-appointed counsel, but the judge advised him that in their particular jurisdiction, the court only appointed counsel for indigent defendants prosecuted for murder and rape[17]. The United States Supreme Court affirmed that decision, holding that individual states were free to design criminal justice systems that required the appointment of counsel in all criminal cases, but also free to design systems that did not include this procedural safeguard[18]. Rejecting the categorical approach urged by the defendant, the Court approved the use of a case-by-case approach to decide whether or not to appoint counsel. Appointment depended on factors such as the complexity of the facts and law involved in the prosecution, and the education level and intelligence of the accused[19].

The Court reversed course in 1963 in *Gideon v. Wainwright*[20], adopting a categorical approach to the right to counsel and rejecting the piecemeal approach that it had approved in *Betts*[21]. The facts of *Gideon* were simple: somebody had robbed a pool hall and the defendant claimed that he was not the robber[22]. The defendant requested counsel and the court refused. The defendant represented himself at his trial and was convicted, after which the Court pointed out that the defendant defended himself "about as well as could be

14 Betts v. Brady, 316 U.S. 455 (1942).

15 *Ibid* 461-62. Between the Court's decisions in *Powell* and *Betts*, the Court held that federal criminal courts were required to provide counsel in all criminal prosecutions, but declined in *Betts* to make this rule applicable to state criminal prosecutions.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*, p. 474.

19 *Ibid.*

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

21 *Ibid.*, pp. 344-45.

22 *Ibid.*, pp. 336-37.

expected from a layman"[23]. In overturning the conviction, the Court stressed the relative sophistication of the defendant and the relative simplicity of the case to make its point that the need for defense counsel was categorical, and did not depend on the specific facts surrounding a particular case[24]. Emphasizing the important structural role of the defense attorney to a fair and just outcome, the Court declared that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him"[25].

The only limitation on the scope of the right to counsel after *Gideon v. Wainwright* was whether the newly-defined right to counsel applied to all criminal prosecutions or just a subset of more serious cases. The Court did not address this issue in *Gideon*, leaving the exact scope of the right to counsel unknown. In two subsequent cases from the 1970s, the Court resolved this ambiguity by requiring the appointment of counsel not in every criminal prosecution, but in all criminal prosecutions resulting in the actual incarceration of the accused[26]. In *Argersinger v. Hamlin*[27], the accused was charged with carrying a concealed weapon, a misdemeanor[28]. After being convicted at trial without a defense lawyer, the accused was sentenced to a 90-day term of incarceration and appealed[29]. In reversing his conviction, the Supreme Court extended its holding in *Gideon* and required states to appoint counsel even in non-felony cases resulting in the imprisonment of the defendant[30]. The Court listed the various procedural safeguards that are constitutionally compelled and stated:

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23 *Ibid.*, p. 337.

24 *Ibid.*, pp. 350-51.

25 *Ibid.,* p. 344.

26 *Vid.* Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (extending *Gideon* and requiring states appoint counsel for every charge that carries jail time); Scott v. Illinois, 440 U.S. 367, 369 (1979) (interpreting *Argersinger* and requiring states appoint counsel only for charges for which imprisonment is actually imposed).

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

28 *Ibid.*, pp. 26-27.

29 *Ibid.*

30 *Ibid.,* p. 32.

"We have never limited these rights to felonies or to lesser but serious offenses"[31].

The gradual evolution and growth of the right to counsel came to an end in 1979, when the Court finally decided a case involving a misdemeanor criminal offense that did not result in the defendant's incarceration. In *Scott v. Illinois*[32], the accused was charged with misdemeanor theft, a charge that carried a potential jail sentence of one year[33]. The defendant proceeded to trial without counsel. After his conviction, the defendant was not sentenced to any jail time but received only a $50 fine[34]. Reviewing these facts, the Court affirmed the conviction of the defendant, calling incarceration a uniquely severe sanction and fixing the outer limit on the constitutional requirement of providing counsel[35]. Although defense lawyers had been previously described by the Court as "necessities, not luxuries"[36] and "essential barriers against arbitrary or unjust deprivation of human rights,"[37] the appointment of counsel is now required only in cases resulting in "actual imprisonment" of the defendant[38].

II. THE SCOPE OF THE RIGHT TO COUNSEL IN CHILE

In Chile, the right to counsel has very different origins, sources of authority, and scope than in the United States. Prior to the recent reforms in its criminal procedure system, the role of the Chilean defense lawyer was extremely limited, both in theory and in practice. Chile now requires the participation of defense counsel in all criminal cases:

> La Defensoría tiene por finalidad proporcionar defensa penal a los imputados o acusados por un crimen, simple delito o falta que sea de competencia de un juzgado de garantía o de un tribunal de

31 *Ibid.,* p. 28.

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

33 *Ibid.,* p. 368.

34 *Ibid.*

35 *Ibid.*, p. 369.

36 *Ibid.,* p. 376.

37 Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

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

juicio oral en lo penal y de las respectivas Cortes, en su caso, y que carezcan de abogado[39].

The provision of state-appointed counsel in Chile is broad and absolute in two ways that distinguish it from the right to counsel in the United States. First, it applies without regard to the seriousness of the charge. Second, it applies without regard to the accused person's ability to pay for private counsel[40].

Surprisingly, there was virtually no debate in Chile during the 1990s and early 2000s regarding the appropriate scope of the right to counsel in the newly reformed criminal justice system[41]. Prior to the reforms, much of the work of criminal defense lawyers was done by recent law school graduates, who were required to work in the field for several months before being awarded a law license[42]. This led to a very low level of representation for those accused of crime and a system that was widely seen as lacking in real protections for criminal defendants. The architects of the criminal justice system reforms appear to have quickly adopted the broadest possible right to counsel in criminal cases, perhaps in response to the ineffective system of defense representation that characterized the system prior to the reforms. There was little or no debate, however, about whether the country and those accused of

39 Ley 19.718 artículo 2, Febrero 21, 2001, Chile.

40 Tavolari Oliveros, Raúl, *Instituciones del Nuevo Proceso Penal: Cuestiones y Casos*, Santiago, Editorial Jurídica de Chile, 2005. *Vid.* Ley 19.718, art. 2 Febrero 21, 2001, Chile (articulating the objectives of the new institution: to provide criminal defense to anyone accused of a criminal offense of any sort ("un crimen, simple delito, a falta") who does not have a lawyer). Although the law allows for partial payment for those defendants able to pay, this provision is very rarely used and, in practice, the Defensoría Penal Pública represents anyone accused of any type of crime, without regard to that person's ability to pay. *See* Katherine Kauffman, *Chile's Revamped Criminal Justice System*, 40 Geo. J. Intl. L. 621, 624 (2010) ("[I]n practice, only 3% of all defendants represented by the [Defensoría Penal Pública] make such co-payments").

41 *Vid. e.g.*, Historia de la Ley No. 19.718, Biblioteca del Congreso Nacional de Chile (Mar. 10, 2001). In roughly 800 pages of legislative history, there appears to be no discussion whatsoever of this issue. Interviews with those involved in the criminal justice reform process in Chile confirm that this issue was not the focus of any discussions during the reform period.

42 Tavolari, Raúl, *supra* note 40, at 43.

crime would be better served by an alternative method for protecting the rights of defendants and ensuring fair and effective outcomes[43].

While the right to counsel in the United States flows from the Sixth Amendment to the United States Constitution, the right to counsel in Chile is supported by the Continental European tradition as well as by guarantees from various international treaties, constitutional provisions, and statutes. Most directly, of course, the 2001 law creating the Defensoría Penal Pública leaves no doubt that court-appointed counsel is a prerequisite to a legitimate criminal conviction[44].

Before its recent reforms, Chile used the inquisitorial system that predominated among Latin American countries throughout the nineteenth and twentieth centuries and that had been inherited from the Europe of the late eighteenth century. One of the legacies of the French Revolution was the abolition of the right to counsel. In 1791, through the Chapelier Law, the right of an accused to defend himself through counsel was eliminated. The theory behind this revision was that lawyers were no longer necessary for this purpose because citizens had advanced to a point where they could defend themselves. In addition, the profession of lawyers had been discredited by the ideology of the Revolution. The law, in effect in France until 1864, "reasoned that no mediators between the law and the citizens were needed"[45]. The first years of the Revolution saw the abolition of the profession of law and an attempt to expand the role of the judge as protector of the citizens' access to justice, producing a more inquisitorial system[46]. Like other Latin American countries, Chile

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43 The Model Code of Criminal Procedure for Ibero-America provides, without elaboration, for a right to counsel for those accused of crime. The Model Code begins by establishing the right of the accused to elect counsel of his or her choice and goes on to provide that, if the accused does not do so, the court will appoint counsel for the accused. Código Procesal Penal Modelo para Iberoamerica, Título 1, párrafo 5.

44 Ley 19.718 art.2, Febrero 21, 2001. The 1980 Chilean Constitution also provides for some recognition of a right to counsel in criminal cases. *Vid.* Constitución de Chile, artículo 3, sección 19(3) (1980) ("Toda persona tiene derecho a defensa jurídica en la forma que la ley señale y ninguna autoridad o individuo podrá impedir, restringir o perturbar la debida intervención del letrado si hubiere sido requerida. . . . La ley arbitrará los medios para otorgar asesoramiento y defensa jurídica a quienes no puedan procurárselos por sí mismos")

45 Figueroa, Dante, *Twenty-One Theses on the Legal Legacy of the French Revolution in Latin America*, 39 Ga. J. Intl. & Comp. L. 39, 115 (2010).

46 *Ibid.*

adopted the strict inquisitorialism of this period and maintained it for almost the next two centuries, even as European countries steadily evolved away from strict inquisitorialism throughout the nineteenth and twentieth centuries to more of a hybrid system[47].

At the end of the twentieth century, many factors motivated Chile to change its criminal justice system. These factors were both domestic and international. As Chile emerged from years of dictatorship and began its transition back to democratic governance, it became increasingly important for the country to be seen as fully complying with various international treaties governing fairness and dignity in its criminal justice system[48]. Indeed, international compliance was one of the main motivations behind the reforms to the Chilean criminal justice system.

For example, Chile sought to comply with Article 8 of the American Convention on Human Rights. Article 8 lists the right to counsel among the rights guaranteed to criminal defendants[49]. In 1990, the Inter-American Court of Human Rights interpreted Article 8, which states that an accused has the "right to be assisted by counsel provided by the state, paid or not, as the domestic law provides," to guarantee a right to counsel of one's own choosing but not to categorically grant

47 *Vid.* Langer, Máximo, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 Am. J. Comp. L. 617 (2007) (discussing the transformation that Latin American criminal procedures have undergone).

48 In addition to Article 8 of the Inter-American Convention, other relevant international treaties include: the International Covenant on Civil and Political Rights, pt. III, art. 14(3)(b); the Convention for the Protection of Human Rights and Fundamental Freedoms, § 1, art. 6(3)(C); the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, princ. 17; the United Nations Standard Minimum Rules for the Treatment of Prisoners, pt. II, art. 93; the American Convention on Human Rights, pt. 1, ch. II, art. 8(2)(D). The Universal Declaration on Human Rights contains no explicit guarantee of a right to counsel but provides instead that "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". The Universal Declaration on Human Rights, art. 11(1).

49 Article 8(2) states: "During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ...(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; (e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law". American Convention on Human Rights.

a right to appointed counsel. The Inter-American Court, however, also concluded that if an accused could show that the state's failure to provide court-appointed counsel affected his or her right to a fair trial, then the denial of counsel due to inability of the accused to pay could violate the Inter-American Convention's right to a fair hearing[50].

Domestic factors also motivated Chile to change its criminal justice system. Calls for reform were both pragmatic and idealistic. Those on the left focused more on achieving a system that provided greater protections for individual rights. Those on the right focused on creating a more efficient system that could address what was widely perceived to be a rising tide of criminal behavior[51].

The abrupt shift in Chilean criminal procedure at the end of the twentieth century required a radical reconfiguration of all actors in the criminal justice system. Moving from a judge-centered inquisitorial system to a party-centered adversarial system, the Chilean reformers moved from one extreme to the other in including such an expansive right to counsel. Because much external criticism of the pre-reform Chilean criminal justice system (and those systems throughout Latin America) focused on the lack of rights afforded the accused, Chile responded by adopting the broadest possible right to state-appointed defense counsel as the ultimate formal procedural safeguard. As discussed below, however, such formal safeguards can be far less effective and constructive than initially intended.

III. DIFFERENT SYSTEMS OF ADJUDICATION REQUIRE DIFFERENT RIGHTS TO COUNSEL

Although every modern system of criminal adjudication includes actors called "prosecutors," "judges," and "defense lawyers," these terms

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50 *Vid.* Exceptions to the Exhaustion of Domestic Remedies (Arts. 46.1, 46.2.a and 46.2.b), American Convention on Human Rights, Advisory Op. OC-11/90, Aug. 10, 1990, Inter-Am. Ct. H.R. (Ser. A) No. 11 (1990) ("Even in those cases in which the accused is forced to defend himself because he cannot afford legal counsel, a violation of Article 8 of the Convention could be said to exist if it can be proved that the lack of legal counsel affected the right to a fair hearing to which he is entitled under that Article").

51 Duce, Mauricio, *La Reforma Procesal Penal Chilena: Gestación y Estado de Avance de un Proceso de Transformación en Marcha*, en En busca de una justicia distinta: Experiencias de reforma en América Latina (Luis Pásara, ed. 2004), at 15-16.

are only empty signifiers that take on different meanings depending on what the system requires of them[52]. Even broad terms like "crime" and "punishment" mean very different things across cultural and legal boundaries, and it merits our close attention to be precise when discussing these terms.

In the United States context, "punishment" for petty crimes consists of several categories of consequence and in some contexts the least important to someone accused of crime can be the prospect of a brief period of incarceration or suspended time in jail. Alongside this system of formal and direct consequences imposed by the sentencing judge is a vast network of indirect or collateral consequences, which can affect a convicted person's ability to live where he or she wants to, remain in the country if not a United States citizen, and receive public assistance[53].

Some prominent examples of collateral consequences include immigration, sex offender registration and restrictions on living and working, and the loss of ability to receive various forms of public assistance. Modern immigration reforms passed by Congress have dramatically changed immigration consequences, making deportation more automatic[54]. Consequently, many more people today face deportation because of a criminal conviction[55]. Similarly, Congress expanded the scope and reach of sex offender registries, requiring even those convicted of very minor misdemeanor offenses to report information on national publicly accessible websites[56]. Even

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52 *Vid.* Langer, Máximo, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int'l L.J. 1, 18-19 (2004) (discussing how the words "adversarial" or inquisitorial" are "fraught with political and cultural connotations, which has led to a rhetorical struggle for the appropriation of these terms and as a consequence these terms are "floating signifiers" through which the Anglo-American system has their own identity from other traditions).

53 *Vid.* Colgate-Love, Margaret, Roberts, Jenny & Klingele, Cecelia, *Collateral Consequences of Criminal Convictions: Law, Policy and Practice*, 2013.

54 *Vid.* Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) ("While once there was only a narrow class of deportable offenses, ...immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation").

55 *Vid.* King, John, *Beyond "Life and Liberty"*, *supra* note 2, at 26 (discussing the increasing numbers of those facing deportation).

56 *Ibid.,* p. 26-28 (discussing changes in sex offender registries).

misdemeanor convictions that do not result in jail time may cause the loss of public housing or student financial aid[57].

I have argued elsewhere that the United States Supreme Court erred in deciding that fundamental fairness could be achieved in the American criminal justice system without requiring defense lawyers in every case[58]. The Court's reliance on "actual imprisonment" as the sole determinant in whether a case is considered "serious" and, therefore, requires the appointment of counsel overlooks the importance of other indirect or collateral consequences of a criminal conviction. As I described, the various state and federal legislatures set about designing webs of consequences that accompany many types of criminal convictions, large and small. And because of the multiplicity of sources of these collateral consequences, they have proven impossible to eliminate or roll back once created[59].

One aspect of the United States context that makes its system of collateral consequences so difficult to control is the federal system. While a particular state could decide not to impose any collateral consequences on a person convicted of a minor crime, it would have no control over the decisions of any other state or over the federal government. So even if a state were to experiment with decriminalizing possession of a small amount of narcotics, for example, any type of criminal adjudication for such conduct could result in the federal government suspending that person's public assistance, evicting that person from her public housing, and removing that person from the country if he or she was not a United States citizen. Because Chile does not have a federal system, this layer of complication is absent. Chile, therefore, would have the ability to meaningfully "decriminalize" certain categories of minor criminal conduct and to treat minor offenses in a more regulatory or therapeutic way, if it chose to do so. Furthermore, because the broad and severe system of collateral consequences found in the United States simply does not exist in Chile, the same rationale for providing counsel in minor criminal cases is absent in the Chilean context[60].

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57 *Ibid.,* p. 33 (discussing collateral consequences that result in loss of public assistance).

58 *Ibid.*

59 *Ibid.,* pp. 46-47.

60 Chilean law does allow for the expulsion of foreigners who are found to have committed crimes while in Chile. Ley No. 18.216. Although this consequence has not

Ironically, Chile adopted the broadest possible right to counsel in criminal cases as the limitations of the United States model of adversarialism were being increasingly recognized by academics and practitioners in the United States[61]. Chile's focus on providing counsel in all criminal cases may have caused reformers to overlook other, more meaningful approaches that would be more efficient and cost-effective and would avoid the unwanted byproducts of adversarialism, like a focus on punishment and incarceration. A broad right to counsel might be necessary in a system (like that of the United States) that has already come to be characterized by a multi-faceted and hard-to-control punitivism. But Chile may benefit by focusing on less adversarial alternatives, such as drug courts, diversionary programs, and non-criminal penal orders.

In restructuring its criminal justice system, Chile may have relied too heavily on the right to counsel as a procedural safeguard instead of assessing whether the country should limit the overall scope of its criminal law system. William Stuntz, an American criminal law scholar, has persuasively argued that, in the American context, focusing on formal procedural safeguards is not only unproductive but also counter-productive[62]. Stuntz argues that, instead, the American justice system should focus on local control over substantive criminal activity and how (and whether) such activity should be punished at all[63]. Stuntz argues that the Warren Court's criminal procedure revolution of the 1960s –adding numerous procedural safeguards– not only failed to achieve its objectives of protecting poor and innocent defendants but aggravated the unfairness of the criminal justice system and led to much harsher

been widely used, it is possible that it could be used more frequently as Chile continues to experience a surge in immigration. Between the years 2000 and 2009, Chile's immigrant population more than doubled. Salinero Echevarría, Sebastián, *La Expulsión de Extranjeros en el Derecho Penal. Una realidad en España, una posibilidad en Chile*, 6:11 Política Criminal 106, 107 (2011).

61 Stookey, John A., *A Cooperative Model for Preventing Wrongful Convictions*, 87 Judicature 159 (2004); Weinreb, Lloyd L. The Adversary Process is Not an End In Itself, 2 J. Inst. For Study Legal Ethics 59 (1999); Slobogin, Christopher, *Lessons from Inquisitorialism*, 87 S. Cal. L. Rev. 699 (2014).

62 *Vid.* Stuntz, William J., *The Collapse of American Criminal Justice*, 2011.

63 *Ibid.*

punishments, especially for already marginalized communities[64]. By endowing criminal defendants with procedural rights instead of focusing on limiting the scope of the substantive criminal law and its punishments, Stuntz argues, the Warren Court shifted the focus from substantive justice to procedural fairness[65]. Moreover, the increased cost of criminal prosecutions that occurred as a result of the increased procedural safeguards led to a sharp reduction in the rate of cases resolved by trial, and an even sharper decrease in the rate of cases resolved by juries[66]. As procedural rights proliferated, trials disappeared. As a result of this decreased focus on substantive guilt and moral culpability and an increased reliance on guilty pleas to resolve criminal cases, Stuntz argues, the American criminal justice system became more bureaucratic, more opaque, less fair, and far more punitive than in the past.

Because the American system and its adversarial structure is so massive and so long evolved, however, it is difficult to see a way for the United States to change course easily. For this reason, a broader right to counsel in the United States remains the best way to provide some protections for the criminally accused. Chile, however, has a much newer, smaller, and more nimble system of criminal adjudication, and has the opportunity to avoid some of the mistakes of the United States.

IV. AVOIDING THE UNWANTED EFFECTS OF ADVERSARIALISM

Chile's adoption of a very broad structural right to counsel is consistent with its embrace of a highly adversarial structure of criminal adjudication. What Chile risks, however, is importing into its criminal adjudication system a needless formalism that could lead to an unnecessary and counter-productive emphasis on punishment and incarceration. A reliance on defense lawyers as a procedural safeguard can tend to crowd out other, more meaningful protections that focus on the substance of law and punishment

64 *Ibid.,* pp. 216-43 (discussing the Warren Court's "errors").

65 *Ibid.*

66 *Ibid.* These empirical claims have been challenged as exaggerated. Schulhofer, Stephen J., *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 Mich. L. Rev. 1045, 1063-65 (2013).

rather than solely on procedure. A focus on the right to counsel to achieve a procedurally fair system of adjudication invites recourse to a more formal and punitive system of sanctions and makes alternative rehabilitative approaches more difficult[67]. Reliance on the right to counsel and its attendant adversarialism also necessarily minimizes the role of the judge as a guarantor of substantive fairness and, in the case of petty crimes, as a creative problem-solver invested in rehabilitation and remediation. Roscoe Pound referred to the American adversarial system as embodying "a sporting theory of justice"[68]. The idea of judge as referee only works if one assumes that the parties are of relatively equal skill and ability and that there is a level playing field. And of course the reality of the United States criminal justice system is not one of equally-funded and -resourced adversaries but instead one characterized in the majority of instances by woefully underfunded public defenders without the ability to meaningfully challenge the prosecution[69].

Defenders of a robust adversarial system argue that adversarialism protects autonomy and dignity interests of the accused and incentivizes each party to present its arguments as forcefully and convincingly as possible. Critics, however, argue that such an approach can elevate procedure over substance and can privilege the wealthy over the poor[70]. Adversarial systems become lawyer-centric in both theory and practice, which leads to a focus on procedural

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67 In his article on wrongful convictions in Chile, Mauricio Duce discusses prosecutors and defense lawyers in the new system. Duce, Mauricio, ¿Debiéramos Preocuparnos de la Condena de Inocentes en Chile? Antecedentes Comparados y Locales para el Debate, 19:1 Ius et Praxis 77, 122-23, 2013. Duce argues that ten years of adversarialism may have converted prosecutors into more punitive actors. *Ibid.*

68 Pound, Roscoe, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 Am. L. Rev. 729, 742 (1906). This century-old maxim was echoed more recently in Chief Justice John Roberts' description of the role of a judge as simply calling balls and strikes. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005).

69 *Vid.* Bach, Amy, Ordinary Injustice: *How America Holds Court*, 28 (2010) (discussing the "poor quality of defense representation throughout the nation").

70 *Vid.* Buhai, Sande, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 Loy. L.A. L. Rev. 979, 982 (2009) ("[T]he adversarial system expects parties to be selfish in their arguments, creates incentives to hide evidence, and rewards parties whose attorneys are the most skilled and well-funded").

formalism that can displace substantive fairness or justice as ideals of the system[71].

There are two critiques of Chile's broad right to counsel. The financial or logistical critique argues that such a broad procedural guarantee will lead to a financially unsustainable system and a related deterioration in the quality of defense representation[72]. Whatever its many virtues over the old inquisitorial system, the new adversarial system is significantly more expensive[73]. But a more fundamental critique is that reformers may have overlooked the opportunity to create a dual system combining the strengths of both the inquisitorial system and the adversarial system. The two critiques, of course, are inter-related: a hybrid system would result in cost savings that could then be channeled into improving the quality of representation for those accused of more serious offenses.

Such a system could retain an adversarial structure of adjudication for serious criminal conduct, while approaching minor criminal activity in a way that is therapeutic rather than punitive and through adjudicative means that are more inquisitorial than adversarial. The system would essentially create a non-criminal method of handling minor criminal activity. In turn, the right to counsel would only apply to those accused of more serious criminal conduct.

Some would argue that a bifurcated system of adjudication already exists in practice, and has for many decades and that truly adversarial adjudication of low-level crimes in practice is rare[74]. The punishment

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71 *Ibid.,* pp. 984-85 ("Arcane procedural rules, perhaps defensible if both parties are represented by advocates experienced in such rules, often augment this disadvantage. Indeed, in the classic adversarial model, it sometimes seems more important for a judge to enforce procedural rules than to enforce the substantive law").

72 *Vid. e.g.*, Tavolari Oliveros, Raúl, *Instituciones del Nuevo Proceso Penal: Cuestiones y Casos,* Santiago, Editorial Jurídica de Chile, 2005, p. 69 (arguing that Chile should follow the lead of most developed countries and restrict the availability of court-appointed counsel to serious cases, in order to save money and to maintain a high level of representation).

73 (noting that the annual operating costs of the criminal adjudication system had risen from USD $50 million under the old system (or roughly 0.8% of the national budget) to USD $212 million under the reformed system (or roughly 2.0% of the national budget).

74 *Vid.* Packer, Herbert L., *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1 (1964) (comparing the "due process" model and the "crime control" model of criminal adjudication).

for such minor criminal conduct, both direct and collateral, is very real. The United States has in many ways ceased to be an adversarial system at all and has become an inquisitorial system in all but name, especially in low-level cases. In some ways, though, this is the worst of possible worlds because the United States retains the theory of adversarialism which prevents judges from being protectors of justice and fairness and leaves power in the hands of the prosecutors[75]. Rather than allow such alternative models of adjudication to evolve in practice sub rosa, a system in the process of re-inventing itself could make this division explicit. Chile's current emphasis on the formal procedural right to counsel may disguise broader substantive problems with the fairness and scope of its criminal justice system. Paul Butler has argued that the right to counsel recognized in *Gideon v. Wainwright* has not helped poor people as a group but rather "invests the criminal justice system with a veneer of impartiality and respectability that it does not deserve"[76]. The broad school of thought known as the "critique of rights" argues that, at least within the United States context, a narrow focus on constitutional rights tends to obscure the more meaningful struggle for substantive social justice and to normalize the subordination of powerless groups by redirecting critical focus from social wrongs to individual rights[77]. The critique of rights school argues that legal rights are "indeterminate and incoherent" and lack any meaning apart from the social context within which they exist and are interpreted[78]. The critique of rights approach often goes beyond arguing that a focus on rights is unproductive and asserts that such

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75 Patton, David E., *Federal Public Defense in an Age of Inquisition*, 122 Yale L.J. 2578, 2580 (2013).

76 Butler, Paul D., *Poor People Lose:* Gideon *and the Critique of Rights*, 122 Yale L.J. 2176, 2178-79 (2013).

77 *Vid., e.g.*, West, Robin L., *Tragic Rights: The Rights Critique in the Age of Obama*, 53 Wm. & Mary L. Rev. 713 (2011).

78 *Vid.* Butler, Paul D., *Poor People Lose*, *supra* note 79, at 2188-89. Butler lists five elements of the "critique of rights" including: (1) The discourse of rights is less useful in securing progressive social change than liberal theorist and politicians assume; (2) Legal rights are in fact indeterminate and incoherent; (3) The use of rights discourse stunts human imagination and mystifies people about how law really works; (4) At least as prevailing in American law, the discourse of rights reflects and produces a kind of isolated individualism that hinders social solidarity and genuine human connection; and (5) Rights discourse can actually impede progressive movement for genuine democracy and justice. *Ibid.p.* 2188 (citation omitted).

an approach is indeed counter-productive because of its tendency to thwart political change. A discourse that focuses on rights without a broader political context and critique provides "a narrative of legitimation, a language for concluding that particular social practices are fair because they are objective and unbiased"[79].

Chile's criminal justice system could be well-served by accepting that the adversarial system does not work well in situations where one party has resource dominance over the other. A system explicitly designed to deal with petty criminal conduct could retain elements of a more judge-centric inquisitorial system while preserving resources (and punishment) for a more adversarial felony adjudication system. Such a bifurcated system could only work in a system that did not have a wide net of indirect and collateral consequences, and that recognized the importance of dealing with petty criminal conduct in a regulatory or therapeutic way instead of a solely punitive way.

Rather than rely on a one-size-fits-all criminal adjudicatory model, Chile could carve out low-level courts that are not dependent on procedural rules and counsel but instead are explicitly focused on rehabilitation and not a punitive model. There are successes of the American criminal justice system that run directly counter to the adversarial tradition. Various states have experimented with "problem-solving courts" that take the focus off of the formal requirements of due process and instead focus on the rehabilitation and social re-integration of the defendant. Examples of these include drug courts, mental health courts, and domestic violence courts. In each of these examples, however, the role of the defense lawyer fits uneasily within the system of adjudication[80]. A defense lawyer in an adversarial system is trained and ethically compelled to use all legal and ethical means to challenge the government and extract her client from the system where possible. Problem-solving courts, however, are

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79 *Ibid.* ("Rights impede progressive change because they divert attention and resources away from material deprivations...") (quoting Peller, Gary, *Race Consciousness*, 1990 Duke L.J. 758, 775 (1990)).

80 Vid. e.g., Quinn, Mae C., *Whose Team Am I On Anyway? Musings of a Public Defender about Drug Treatment Court Practice*, 26 N.Y.U. Rev. L. Soc. Change 37 (2000-2001), Spinak, Jane M., *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 Am. Crim. L. Rev. 1617 (2003).

premised on a "team approach" in which all players work together for the benefit of the defendant[81].

If such alternative systems of adjudication are socially desirable and helpful in individual cases, requiring the appointment of defense lawyers in all cases might be counter-productive. Beyond simply being ineffective, a reliance on fair process rather than just outcomes risks avoidance of the very discussion of whether an existing criminal justice system serves the goals of social justice that it purports to advance[82].

V. CONCLUSION

The United States experience over the last several decades provides a cautionary tale for Chile as its criminal justice system enters its adolescence. In spite of a formal right to counsel in the United States that expanded greatly throughout the 1960s and 1970s, the criminal justice system in the United States became bigger, more pervasive, and more punitive than at any other point in its history. Although the rights of defendants in serious criminal cases have been formally safeguarded by the federal constitutional right to counsel, the actual experience of criminal defendants –primarily poor people and racial minorities– has grown steadily worse[83]. In Chile, rates of incarceration have increased since the move to an adversarial system and the creation of a formal right to counsel in all criminal cases[84].

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81 *Vid.* America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform, National Association of Criminal Defense Lawyers, p. 12 (2009) ("Drug courts seek to impose a team concept on defense lawyers, creating difficult ethical dilemmas and virtually no role for private counsel").

82 *Vid.* Butler, Paul D., *Poor People Lose*, *supra* note 79, at 2201 ("(P)rocedural rights may be especially prone to legitimate the status quo, because 'fair' process masks unjust substantive outcomes and makes those outcomes seem more legitimate").

83 *Ibid.,* p. 2191 ("*Gideon* did protect the 'rights' of defendants; it turns out, however, that protecting defendants' rights is quite different from protecting defendants. Fifty years after *Gideon*, poor people have both the right to counsel and the most massive level of incarceration in the world"). *Vid.* Patton, David E, *Federal Public Defense in an Age of Inquisition*, 122 Yale L.J. 2578, 2580 (2013) (lamenting that, "in far too many scenarios, the rational defendant would choose" the federal adjudicative system of 1963 over that of 2013).

84 According to the International Centre for Prison Studies, the prison population rate in Chile (per 100,000 of national population) rose from 179 in 1998 to 216 in 2001 (the year that the Defensoría Penal Pública was created) to 313 in 2010.

The formal right to counsel does not necessarily provide a meaningful check on the power of the State and does not alone make a criminal justice system fair or just.

There can be no doubt that the Chilean criminal justice system of today provides far more fairness and justice for those accused of crimes than before the recent reforms. As the system exits its infancy and moves into its adolescence, however, those involved in criminal justice in Chile should not assume that the formal and physical presence of defense lawyers in each case solves the substantive problems of justice, either on an individual or a social scale. Indeed, the formal right to counsel can impede more meaningful substantive measures that would improve outcomes for both individuals accused of crime and society. In the United States, "underfunding, overcriminalization, and oversentencing... increased as criminal procedure... expanded"[85]. Chilean reformers should continue to define the values that they hope to achieve through the criminal justice system and focus on those values directly, rather than rely on the blunter instrument of a broad formal right to counsel.

For this system of adjudication to be defensible, however, and for it to comply with notions of fundamental fairness, it must be explicitly different and apart from the adversarial adjudication system, and perhaps even from the criminal system altogether. To simply eliminate the right to counsel for minor crimes while leaving unchanged the adversarial system in which they are processed could would replicate the problems of the American system, would run afoul of international human rights obligations, and would fail to provide fundamental fairness for those accused of crimes. By relying on substantive changes in how it treats minor criminal conduct through the use of diversionary programs, therapeutic courts, and other informal means, the Chilean criminal justice system could

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International Centre for Prison Studies, *World Prison Brief*, available at: http:prisonstudies.org/country/chile (last visited November 14, 2014) (on file with the author). This steady growth appears to have moderated in the last few years, as the most recent numbers show a rate of 249. *Id. Vid.* Morales, Ana María, *La política criminal contemporánea: Influencia en Chile del discurso de la ley y el orden*, 7:13 Política Criminal 94 (2012).

85 Stuntz, William J., *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 3 (1997).

again learn from the experiences of other countries and avoid some of the pitfalls that accompany adversarialism in criminal adjudication.

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