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# Why the United States Supreme Court Got Some [but not a lot] of the Sixth Amendment Right to Counsel Analysis Right

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# **WHY THE UNITED STATES SUPREME COURT GOT SOME (BUT NOT A LOT) OF THE SIXTH AMENDMENT RIGHT TO COUNSEL ANALYSIS RIGHT**

PAUL MARCUS<sup>1</sup>

*The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.... He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.*<sup>2</sup>

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1. Paul Marcus, Haynes Professor of Law and Kelly Chair for Teaching Excellence at The College of William and Mary School of Law. Portions of this article were delivered as part of the Distinguished Lecture Series at St. Thomas University in January 2008.

2. *Powell v. Alabama*, 287 U.S. 47, 68-9 (1932).

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## I. INTRODUCTION

In the past forty-five years, the United States Supreme Court has firmly established the right to lawyers for poor people in criminal cases. The right, arising under the Sixth Amendment to the United States Constitution, extends beyond trials, and includes assistance in addition to lawyers for indigent defendants. The right to a lawyer is seen as central to our system of criminal justice. At the same time, the Justices' rulings here have been subject to sharp criticism in a host of areas relating to the stages of the proceedings to which the right applies, the failure to define indigency, and the refusal to monitor seriously the competency of lawyers in such cases.

In this article, I will applaud the reach of some of the Court's decisions, but also second the critics who have questioned the limits of other decisions. In particular, I will look to the unfortunate determination that indigent criminal defendants are not entitled to the assistance of counsel in *all* prosecutions.<sup>3</sup> First, though, an overview of how far we have come with the right to counsel in criminal cases, in a relatively short period of time.

## II. AN OVERVIEW OF THE COURT'S COUNSEL DECISIONS

In its landmark 1963 decision of *Gideon v. Wainwright*,<sup>4</sup> the Supreme Court held that the 6th Amendment's right to appointed counsel extended to indigent criminal defendants in state courts.<sup>5</sup> Despite its justly celebrated sweeping language and the genuine revolution it created in the criminal justice system, *Gideon* left numerous vital questions unanswered.<sup>6</sup>

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

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

5. *Id.* at 344-45.

6. *See infra* Part IV.

Almost a half century later, the Supreme Court continues to grapple with defining the scope and application of the 6th Amendment right to counsel.<sup>7</sup>

#### A. GIDEON V. WAINWRIGHT

The Justices in *Gideon* unanimously incorporated against the states the 6th Amendment's right to counsel for indigent defendants.<sup>8</sup> Facing a felony charge, Gideon appeared in court without funds and without a lawyer, and requested that the judge appoint counsel on his behalf.<sup>9</sup> The judge denied the request, as Florida only allowed the appointment of counsel in capital cases.<sup>10</sup> While "Gideon conducted his defense about as well as could be expected from a layman,"<sup>11</sup> he was found guilty and sentenced to five years imprisonment.<sup>12</sup>

Upon review, the Supreme Court found that the 6th Amendment right to counsel constituted a fundamental right, and extended that right to Gideon and fellow indigent defendants in state criminal proceedings.<sup>13</sup> In its opinion, authored by Justice Hugo Black, the Court explicitly overruled *Betts v. Brady*,<sup>14</sup> a decision in which Justice Black had strongly dissented.<sup>15</sup> *Betts* had held that the 6th Amendment right to counsel applied only to federal trials, with the notion that "appointment of counsel is not a fundamental right, essential to a fair trial."<sup>16</sup> The *Betts* Court had concluded that neither due process nor the 14th Amendment required the states to provide the assistance of defense counsel to indigent defendants generally.<sup>17</sup> It was needed only in particular cases where *special circumstances* might be present.<sup>18</sup> In sharp contrast to this analysis, Justice Black, in dissent, embraced the earlier *Powell v. Alabama*,<sup>19</sup> which had declared that the right to the aid of counsel is of this *fundamental character*.<sup>20</sup> In *Powell*, a shockingly unfair capital case, the Court ruled that due process may require the appointment of counsel for certain

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7. See *infra* Part IV.

8. *Gideon*, 372 U.S. at 342-43, 352.

9. *Id.* at 336-37.

10. *Id.* at 337.

11. *Id.*

12. *Id.*

13. *Id.* at 345.

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

15. *Id.* at 474 (Black, J., dissenting).

16. *Id.* at 471.

17. *Id.*

18. See *Gideon*, 372 U.S. at 347.

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

20. *Gideon*, 372 U.S. at 342-43.



indigent defendants.<sup>21</sup> Emphasizing *Powell*, and rejecting *Betts* as precedent, the Court in *Gideon* found the right to counsel in state as well as federal cases to be “fundamental and essential to a fair trial.”<sup>22</sup>

Not only these precedents [*Powell v. Alabama*] but also 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. This seems to be an obvious truth.<sup>23</sup>

Despite the sweeping language of Justice Black to grant a fundamental right to counsel for indigent defendants, the *Gideon* holding is actually narrow; it left numerous questions unanswered. Indeed, it soon became evident that *Gideon* did not actually extend the right to counsel to any indigent criminal defendant “haled into court.”

#### B. THE ACTUAL IMPRISONMENT STANDARD

Because *Gideon v. Wainwright* failed to specify what types of prosecutions would qualify for appointed counsel, a decade later, the Supreme Court addressed the issue of whether the 6th Amendment right to counsel extended only to felony cases. In *Argersinger v. Hamlin*,<sup>24</sup> the indigent defendant was denied an appointed lawyer, convicted of carrying a concealed weapon, and sentenced to ninety days in jail.<sup>25</sup> He then brought a habeas corpus action alleging that he was unconstitutionally deprived of the right to counsel at his trial.<sup>26</sup> The Florida Supreme Court ruled that the right to counsel only extended to non-petty offenses imposing more than six months imprisonment.<sup>27</sup> The Supreme Court of the United States disagreed, deciding that absent a knowing and intelligent waiver, no defendant may be imprisoned for any offense, whether petty, misdemeanor,

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21. The case involved the so-called *Scottsboro Boys*. As discussed by the Sixth Circuit Court of Appeals:

In April 1931, nine black youths were accused of raping two young white women while riding a freight train between Chattanooga, Tennessee, and Huntsville, Alabama. The case was widely discussed in the local, national, and foreign press. The youths were quickly tried in Scottsboro, Alabama, and all were found guilty and sentenced to death.

*Street v. National Broadcasting Co.*, 645 F.2d 1227, 1229 (6th Cir. 1981). *Street* itself is a most interesting case, involving an unsuccessful defamation action brought years later by one of the alleged victims in the original rape trial. *Id.* The suit was against NBC for making a movie dramatizing the courage of one of the trial judges in the initial case. *Id.*

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

23. *Id.*

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

25. *Id.* at 26.

26. *Id.*

27. *Id.* at 26–27.

or felony, without representation by counsel at trial.<sup>28</sup> Justice Douglas, writing for the majority, distinguished the six-month minimum imprisonment standard governing the 6th Amendment right to a jury trial from the standard to be used with the 6th Amendment right to counsel.<sup>29</sup> Justice Douglas acknowledged that both *Gideon* and *Powell* involved felonies, but also that both cases "suggest that there are certain fundamental rights applicable to all such criminal prosecutions," in order to guarantee a fair trial "where an accused is deprived of his liberty."<sup>30</sup> By extending the right to counsel to all prosecutions resulting in imprisonment, the Court abandoned the traditional distinction between felonies and misdemeanors, in favor of a standard focusing on actual deprivation of liberty.<sup>31</sup>

Justice Powell, concurring in the result, agreed with the majority's rejection of the felony misdemeanor distinction, but argued that the Court's rule was too rigid.<sup>32</sup> He advocated a more flexible due process principle of fundamental fairness in determining the applicability of the right to counsel.<sup>33</sup> He asserted that many consequences of even minor misdemeanor convictions are not petty, and that collateral, non-punitive consequences may even be more serious for the defendant than "a brief stay in jail."<sup>34</sup> Accordingly, Justice Powell concluded that, "When the deprivation of property rights and interest is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process."<sup>35</sup>

Although it resolved the issue of whether the right to counsel applied only to felonies, *Argersinger* itself required further clarification as it declined to decide whether the right to counsel attaches if there is not actual imprisonment but only the possibility of it.<sup>36</sup> A divided Supreme Court in *Scott v. Illinois*,<sup>37</sup> narrowed the scope of *Argersinger*. It declared *Argersinger* meant no more than what it held: that no indigent defendant may be sentenced to imprisonment without the state granting the right to

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28. *Id.* at 37.

29. *Id.* at 26, 29.

30. *Argersinger*, 407 U.S. at 32-34.

31. *Id.* at 37-38.

32. *Id.* at 47. (Powell, J., concurring).

33. *Id.*

34. *Id.* at 48. On this point, he was correct. See discussion *infra* Part V.B.4.

35. *Argersinger*, 407 U.S. at 48 (Powell, J., concurring). Powell's view was that, on a case-by-case basis, judges must decide whether the matter was one of "sufficient consequence." *Id.* He suggested that three factors be weighed in determining whether appointed counsel is required for a fair trial: the complexity of the charged offense, the probable sentence if convicted, and case-specific factual circumstances. *Id.* at 64.

36. *Id.* at 51.

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

assistance of appointed counsel.<sup>38</sup> The Court clarified *Argersinger*'s application by ruling that the 6th Amendment right to counsel applies only if the defendant is *actually* sentenced to imprisonment, and not merely facing possible imprisonment.<sup>39</sup> The defendant in *Scott* could have received a sentence of up to one year in jail, but he was ultimately only fined \$50.<sup>40</sup> Because he was not ordered to be imprisoned, the Court found that the defendant was not constitutionally entitled to appointed counsel.<sup>41</sup> The opinion stressed the *Argersinger* finding that incarceration is a uniquely severe sanction warranting appointed counsel.<sup>42</sup> It discussed the frequent references to cases involving deprivation of liberty and to prosecutions that "actually lead to imprisonment even for a brief period."<sup>43</sup>

In his concurring opinion, Justice Powell reiterated the concerns he first expressed in his *Argersinger* concurrence, including his misgivings about conviction consequences beyond imprisonment and his preference for a more flexible due process standard.<sup>44</sup> Justice Brennan, writing for the dissent, decried the plurality's *actual* imprisonment standard that deprived many defendants of the right to appointed counsel.<sup>45</sup> Justice Brennan emphasized the language of the 6th Amendment itself, which appears to apply the right to counsel "in all criminal prosecutions."<sup>46</sup> He advocated the adoption of the broader *authorized* imprisonment standard.<sup>47</sup>

### C. TYPE OF PROCEEDING

In addition to defining the types of crimes and punishments triggering the 6th Amendment right to counsel, the Supreme Court addressed the types of proceedings that require an appointed lawyer. Despite the *Gideon*-

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38. *Id.* at 373–74.

39. *Id.* at 373.

40. *Id.* at 375.

41. *Id.* at 373–74.

42. *Id.* at 372–73.

43. *Scott*, 440 U.S. at 373 ("[T]he central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel."); see also *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (extending the *Argersinger-Scott* actual imprisonment standard to an activated suspended sentence). Because a suspended sentence may result in imprisonment (i.e., an actual deprivation of liberty that may be triggered in the future if certain conditions are not met), such a sentence cannot be imposed if the indigent defendant was not offered counsel at trial. *Id.*

44. *Scott*, 440 U.S. at 375 (Powell, J., concurring).

45. *Id.* at 382 (Brennan, J., dissenting).

46. *Id.*

47. *Id.*



era trend toward broadening the 6th Amendment right to counsel, the Court later restricted the type of proceedings covered by the right.<sup>48</sup> In one principal case, a divided Supreme Court held that there is no right to counsel during a pre-indictment police lineup.<sup>49</sup> According to Justice Stewart's plurality opinion, the right attaches only when adversary judicial proceedings have been formally initiated against the defendant.<sup>50</sup> He wrote that the Court's seminal right to counsel cases had all addressed cases where such proceedings had already commenced, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."<sup>51</sup> Justice Stewart believed that attaching the right to counsel upon the commencement of adversary judicial proceedings was consistent with, and required by, the "criminal prosecutions" language of the Sixth Amendment itself.<sup>52</sup>

The following year, in *United States v. Ash*,<sup>53</sup> the Supreme Court determined that the 6th Amendment right to counsel did not attach during a witness' post-indictment photo identification of the defendant.<sup>54</sup> The Court found that although such a photo identification may occur after adversary judicial proceedings had commenced, it is neither a critical stage of the prosecution nor confrontational, since the defendant is not even present.<sup>55</sup> The right is limited to critical, trial-like confrontations, and witness photo identifications in the defendant's absence fail to meet that threshold.<sup>56</sup>

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48. See *Kirby v. Illinois*, 406 U.S. 682, 686 (1972).

49. *Id.* at 690. But see *United States v. Wade*, 388 U.S. 218, 236-37 (1967) (holding the opposite for such proceedings post-indictment). The Supreme Court interpreted the holding of *United States v. Wade* by explaining that:

We . . . [in *United States v. Wade*] held that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup.

*Gilbert v. California*, 388 U.S. 263, 272 (1967).

50. *Kirby*, 406 U.S. at 688.

51. *Id.* at 689 (seemingly breaking with earlier cases which had emphasized the nature of the identification procedure rather than the stage of the proceeding); see *Wade*, 388 U.S. at 229-32; see also *Kirby*, 406 U.S. at 699 (Brennan, J., dissenting) (discussing post-arrest identifications as a crucial stage of the proceedings for which counsel is necessary for a fair prosecution).

52. *Kirby*, 406 U.S. at 690; see also *Massiah v. United States*, 377 U.S. 201, 206 (1964) (demonstrating the consistency of this view, where Justice Stewart found the defendant's right to counsel was violated when, after indictment, defendant who was not in custody was informally questioned by undercover agent).

53. *United States v. Ash*, 413 U.S. 300 (1973).

54. *Id.* at 300-01.

55. *Id.* at 325 (citing *United States ex rel. Reed v. Anderson*, 461 F.2d 739, 745 (1972)).

56. *Id.* at 321. Justice Brennan again dissented, contending that pretrial lineups and photographic displays alike are critical stages of the prosecution demanding the assistance of



#### D. EXPERTS

While the *Argersinger-Scott* and *Kirby-Ash* line of cases is notable for restricting the scope of the 6th Amendment right to counsel, in one important area, the Court significantly expanded protections given to the accused. *Ake v. Oklahoma*<sup>57</sup> utilized the Court's right to counsel analysis to find a parallel right to the appointment of experts for indigent defendants.<sup>58</sup> The Court found there that in a capital case, an indigent defendant holds a constitutional right to a state-provided psychiatric evaluation and assistance when essential to prepare an effective defense based on his mental condition.<sup>59</sup> Focusing on the 14th Amendment's due process guarantee of fundamental fairness, Justice Marshall's opinion is reminiscent of the Court's earlier seminal right to counsel cases.<sup>60</sup> The due process analysis in *Ake* provides a basis for extending rights to assistance besides counsel, when an indigent defendant has made an adequate showing that such state-provided assistance is needed for an effective defense.<sup>61</sup>

#### E. MORE PROTECTION GIVEN IN SOME PLACES

While the United States Supreme Court has not been overly generous in granting counsel in cases in which imprisonment is not ultimately ordered,<sup>62</sup> many states go beyond the federal constitutional requirement. Instead of looking to actual imprisonment [or suspended sentences],<sup>63</sup> they

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counsel. *Id.* at 344. Reiterating his differing interpretation of *Wade* and objections to the Court's distinctions, Justice Brennan argued that the dangers of an uncounseled photo identification are equal to—or even greater than—the dangers of an uncounseled lineup. *Id.* at 332–33.

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

58. *Id.* at 86–87.

59. *Id.* at 83.

60. *Id.* at 76.

61. *Id.* at 83. The cases are somewhat mixed across the nation as to the showing defendants must make in order to receive expert assistance at trial in such cases. Compare *State v. Bridges*, 385 S.E.2d 337, 339 (N.C. 1989), with *Yohey v. Collins*, 985 F.2d 222, 227 (5th Cir. 1993). In the former, the court reversed the conviction after the trial judge would not give a fingerprint expert when fingerprints were important in a murder prosecution. *Bridges*, 385 S.E.2d at 339. In the latter, the appeals court held that an expert should only be appointed "if the evidence is both 'critical to the conviction and subject to varying expert opinion.'" *Collins*, 985 F.2d at 227.

62. See *supra* notes 37–47 and accompanying text. Few issues surrounding the start of the process remain, as both preliminary hearings and the issuance of indictments have been held to be adversary judicial proceedings. See, e.g., *Rothgery v. Gillespie*, 491 U.S. 293, 296 (2008); *Moore v. Illinois*, 434 U.S. 220, 231 (1977). The one remaining area of dispute is whether the issuance of an arrest warrant begins the criminal prosecution. The most recent case is *Lattimore v. State*, where the court found that an arrest pursuant to warrant initiates such proceedings. 958 So. 2d 192, 198 (Miss. 2007).

63. See *supra* note 43 and accompanying text.

either provide counsel to poor people in all criminal cases, or in all cases other than the most minor infractions.<sup>64</sup> A few states illustrate the point:

(1) Some states have lawyers for poor people in essentially all criminal cases. For instance, California gives appointed counsel in every case in which the defendant is charged with a misdemeanor or felony, no regard is given as to actual imprisonment as a possible or likely penalty.<sup>65</sup> The rule in New York is similar, with the high court there noting that the state statutory guarantee is more expansive than that required by the United States Constitution: "[The statute provides] protection to all defendants accused of felonies and misdemeanors without reference to the potential sentence attached to the crime."<sup>66</sup>

(2) Other states have broad grants, emphasizing the nature of the punishment [whether imprisonment or not], asking how serious the prosecution actually is. North Carolina assigns a lawyer to indigent defendants in cases in which there will either be imprisonment, or a fine of more than \$500.<sup>67</sup> The rules in Vermont and Idaho are similar, looking to the nature of the possible fine rather than only imprisonment as the sole basis for the appointment of counsel.<sup>68</sup>

(3) In the Federal courts, the judges are guided by the inclusive language of the Criminal Justice Act,<sup>69</sup> which calls attention to the need for counsel. It provides, in part:

(a) Choice of plan.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:

- (1) Representation shall be provided for any financially eligible person who—
  - (A) is charged with a felony or a Class A misdemeanor; . . .

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64. See *infra* notes 65–68 and accompanying text.

65. See *Tracy v. Municipal Court*, 587 P. 2d 227, 230 (Cal. 1978); *Mills v. Municipal Court*, 515 P. 2d 273, 301 (Cal. 1973).

66. *People v. Ross*, 493 N.E.2d 917, 920 (N.Y. 1986).

67. See N.C. GEN. STAT. § 7A-451(a)(1) (2007).

68. In Vermont, a \$1000 potential fine is the dividing line as to whether the defendant has been charged with a *serious crime* mandating the appointment of counsel, VT. STAT. tit. 13 §§ 5231, 5201 (4)(B); in Idaho, that line is drawn at \$300, *State v. Hardman*, 818 P. 2d 782, 785 (Idaho App. 1991).

69. 18 U.S.C. § 3006A (2008).



(2) Whenever the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who—

(A) is charged with a Class B or C misdemeanor, or an infraction for which a sentence to confinement is authorized.<sup>70</sup>

(4) Some states follow the federal view by relying on the dictates of fairness or due process. In Delaware, the trial judge is to look at the totality of circumstances.<sup>71</sup> “If after weighing these factors a court determines that, as a matter of due process and fundamental fairness, the defendant should be represented, then counsel should be appointed even if a loss of physical liberty is not threatened.”<sup>72</sup>

### III. THE PRAISE

The response to the Court’s decision in *Gideon* was overwhelmingly positive. Savvy criminal justice observers such as Anthony Lewis<sup>73</sup> viewed “the dream of *Gideon v. Wainwright* . . . [as one] in which every man charged with a crime will be capably defended”—“*Gideon* was the start of the right to counsel revolution in the United States.”<sup>74</sup> And, the Court’s decision truly was revolutionary. Prior to *Gideon*, many criminal defendants—even in quite serious cases—had to represent themselves at trial; after *Gideon*, in most criminal cases, counsel was to be assigned to assist them.<sup>75</sup> Moreover, this assignment was not to be made on any sort of case by case basis in which a judge or magistrate decided if unusual conditions were present to justify the outlay of public funds.<sup>76</sup> No, the appointment of counsel was to be made routinely in most criminal matters.<sup>77</sup> To be sure, it was not just the most serious crimes which would form the basis for the right to an attorney.<sup>78</sup> Almost all consequential

70. *Id.* (emphasis deleted).

71. *Black v. Div. of Child Support Enforcement*, 686 A. 2d 164, 169 (Del. Super. 1996).

72. *Id.*; see *supra* notes 69–70 and accompanying text for a detailed look at the federal approaches here.

73. Author of the highly acclaimed book, *GIDEON’S TRUMPET*.

74. AMERICAN BAR ASSOCIATION, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE*, i, iv (2004), <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

75. *Id.*

76. See *supra* notes 14–18 and accompanying text. The so-called special circumstances rule was announced in *Betts v. Brady*, 315 U.S. 791 (1942). The Justices there were not willing to apply the Sixth Amendment to state cases. *Id.* Instead, the criminal defendant only had a claim under the U.S. Constitution, if he could show that his due process rights were violated because of the trying circumstances in his particular case necessitating the assistance of counsel. *Id.*

77. See *Gideon v. Wainwright*, 372 U.S. 335, 348 (1963).

78. *Id.*

criminal charges would give rise to the automatic appointment of a lawyer.<sup>79</sup> Even the most minor of cases in which some imprisonment—truly any imprisonment—was going to be imposed upon conviction would mandate the presence of counsel.<sup>80</sup>

#### IV. THE CRITIQUES

*Gideon* and later cases were quite properly praised highly for, finally, bringing a sense of basic fairness to criminal proceedings. After all, the notion of a criminal defendant having insufficient assistance was condemned more than 75 years ago in the *Scottsboro* case.<sup>81</sup> Few observers in recent times, however, have spoken quite so positively about developments in the field. In a host of areas, sadly, the Court's broad and ringing language seems no longer to be heard. I will address briefly just a few of these, as I will be focusing attention principally in Section V on an analysis of the decisions limiting application of the doctrine to trials not involving sentences of actual imprisonment upon conviction.

##### A. THE BREAKDOWN OF THE SYSTEM

Study after study, review upon review, report after report, make certain—with virtually no dissent—that the hope of providing capable lawyers to all poor defendants in criminal cases is not being realized. In spite of enormous sums of money being spent throughout the United States on tremendous numbers of cases,<sup>82</sup> the system of providing counsel across much of our nation is, in a word, broken.<sup>83</sup>

This writer is co-author of a large national study in which just that conclusion was reached.<sup>84</sup> Many states and counties around the country fail to provide adequate funds, training, and staffing for public defender offices.<sup>85</sup> Other areas do not have public defender offices, and instead contract with the lowest law firm bidder to provide representation for indigent defendants.<sup>86</sup> In all of these situations, the result is too often unmanageable caseloads and representation that is so perfunctory or

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79. *Id.*

80. *Id.*

81. See *supra* note 21 and accompanying text.

82. See Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2046 (2006).

83. See generally AMERICAN BAR ASSOCIATION *supra* note 74, for a comprehensive look.

84. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031 (2006).

85. *Id.* at 1034-37.

86. *Id.* at 1117-18.



deficient as to amount to no representation at all.<sup>87</sup> One commentator stated the matter forcefully:

*Gideon* is a great story, with a great lesson, and for that reason taught in American high schools, colleges, and law schools. What isn't taught, however, is our utter failure to realize the promise represented by *Gideon's* case. Lewis's book, *Gideon's Trumpet*, published in 1964, one year after the *Gideon* decision was handed down, bears the mark of optimistic faith in progress that so characterized the period. But even Lewis predicted that it would be an enormous task to bring to life the dream of *Gideon v. Wainwright*, the dream in which every man charged with a crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense. Much like Dr. Martin Luther King, Jr.'s dream of the same year, the dream of *Gideon* has not been realized. The most troubling lesson of the more than thirty-five years since *Gideon v. Wainwright* is that neither the Supreme Court nor the public appears to have any interest in making the constitutional right announced in *Gideon* a reality.<sup>88</sup>

#### B. DEFINING INDIGENCY, OR NOT

Without doubt, Clarence Earl Gideon was poor, he had no money.<sup>89</sup> Many other indigent individuals similarly situated are obviously entitled to benefit under the various Supreme Court decisions.<sup>90</sup> However, other people—even those struggling seriously with financial concerns—may not be so fortunate as to be entitled to government support for a legal defense, depending upon which state is prosecuting.

The difficulty here is that the United States Supreme Court through its many 6th Amendment decisions has never chosen to define the term *indigency*; it has never explained the reach of its decisions. The states hardly have adopted uniform rules. In some states, the defendant will have to show that she is truly destitute, without any funds at all.<sup>91</sup> Other states

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87. Backus & Marcus, *supra* note 84, at 1056; see also Erica Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 464 (2007); Lawrence C. Marshall, *Gideon's Paradox*, 73 FORDHAM L. REV. 955, 960 (2004).

88. David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System*, 98 MICH. L. REV. 1941, 1947–48, 1964–65 (1999).

89. See generally ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

90. The numbers are laid out well in Hashimoto, *supra* note 87, at 481–83.

91. *State v. Hoffman*, 190 S.E. 2d 842, 850 (N.C. 1972), where the defendant had a total of \$160.00: “we take judicial notice that for a fee of less than \$160.00, defendant could have obtained counsel.” *Id.* at 739. According to inflation charts, \$160.00 in 1972 would be worth about \$822.00 today. Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited May 13, 2008).

have statutes which are far more defendant friendly.<sup>92</sup> Some state courts take a broad view in judicial decisions and conclude that "it is not necessary . . . to establish total destitution."<sup>93</sup> Other statutes give essentially no direction at all, speaking in terms of the accused "demonstrating [his/her] financial inability to obtain legal counsel,"<sup>94</sup> or being "financially unable to secure legal representation."<sup>95</sup>

Unfortunately, we are left with similarly situated individuals being treated quite dissimilarly throughout the nation. That can hardly be the result contemplated by Justice Black and his colleagues almost 50 years ago.<sup>96</sup>

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92. OR. REV. STAT. §135.050 (2008), which indicates that appointment should occur if: "the defendant is financially unable to retain adequate representation without substantial hardship in providing basic economic necessities to the defendant or the defendant's dependent family." *Id.*

93. *March v. Municipal Court*, 498 P. 2d 437, 441 (Cal. 1972).

94. HAW. REV. STAT. 802-4 (2008).

95. N.C. GEN. STAT. §7A-450(a) (2008).

96. *United States v. Parker*, 439 F.3d 81, 93-94 (2d Cir. 2006). *Parker* is one of the very few cases in recent years to discuss indigence in any detail:

Courts have utilized a broad range of considerations in conducting an appropriate inquiry into financial eligibility . . . . The task necessarily varies with the circumstances presented, and no one method or combination of methods is required. In many cases, the court's inquiry may properly be limited to review of financial information supplied on the standard form financial affidavit. Investigation of the applicant's assets, liabilities, income and obligations alone may constitute sufficient inquiry.

We have examined a variety of factors relevant to the financial eligibility determination. . . . [W]e [have] highlighted the economic realities of the situation including the costs of a criminal defense. . . . [W]e focused on the business investments of the defendant. . . . [W]e considered whether the defendant owned or controlled substantial assets and whether the defendant had concealed those assets. We also indicated that a defendant's own funds must be weighed against the anticipated cost of trial.

We have also considered the defendant's necessities and the cost of providing for himself and dependents.

*Id.* at 93 (internal quotations marks and citations omitted). *Parker* also recognized that the Federal Act "may not be construed in a way that would ignore the realities of a defendant's duties with respect to his family." *Id.*

In making similar determinations . . . , the United States Supreme Court and other Courts of Appeals have also considered such factors as the availability of income to the defendant from other sources, the possibility of reimbursement of legal fees, the liquidity of assets for purposes of paying counsel, the applicant's ability to pay a portion of his counsel's fees, . . . the defendant's credibility (or lack thereof) in portraying his financial eligibility . . . . Overall . . . a district court should not restrict itself to a particular method of assessing a criminal defendant's eligibility for appointed counsel.

*Id.* at 93-94 n. 13 (internal quotation marks and citations omitted).



## C. INEFFECTIVE ASSISTANCE OF COUNSEL

For decades, the Supreme Court struggled with the legal standard to be applied to the many ineffective assistance claims which are brought. Finally, in *Strickland v. Washington*,<sup>97</sup> the Justices laid out the basic principles. The decision began well enough for the indigent defendant, as the Justices acknowledged that the right to counsel contemplates the work of a capable lawyer.<sup>98</sup> The difficulty arose, however, with the definition of just what that is to be.<sup>99</sup> It is a two part test.<sup>100</sup> The defendant to prevail on an ineffective assistance assertion must show that the lawyer at trial was not reasonably competent.<sup>101</sup> Here, though, the lower courts are to give great deference to that lawyer, for the goal of the Constitution, perhaps surprisingly to many, is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.<sup>102</sup>

The hurdle for the defendant is very high here, as the ruling made clear that excellence is not the standard, simply reasonable competence.<sup>103</sup> If, though, this showing can be made, the second part of the *Strickland* standard imposes an even greater hardship on the indigent defendant. To prevail, she must also demonstrate that the outcome at the trial would have been different had the lawyer been capable.<sup>104</sup> This is exceedingly difficult to show, for the charge against many appointed counsel is not that they affirmatively did something wrong, but rather that they did virtually nothing at all. Numerous critics have asserted that lawyers have failed to investigate a case thoroughly, have not thoughtfully prepared defense witnesses or cross examined government witnesses, have not conducted careful research, and have not been seriously engaged in the trial.<sup>105</sup>

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97. *Strickland v. Washington*, 466 U.S. 668 (1984).

98. *See id.* at 685-86.

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel."

*Id.* at 685-86.

99. *Id.* at 686.

100. *See id.* at 687.

101. *Id.*

102. *Id.* at 689.

103. *Strickland*, 466 U.S. at 688.

104. *Id.* at 694.

105. *See, e.g.,* Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of*

Moreover, the lax application of the Sixth Amendment to these cases does not impact solely on the defendants, though it surely does that. It has dire consequences for the lawyers as well:

Constitutional decisions interpreting the Sixth Amendment have established a standard for effective assistance of counsel that has been universally criticized as far less demanding than the ethical and professional standards governing defense attorneys. The result is that, rather than requiring defenders of the indigent to meet professional standards, the constitutional test for ineffective assistance sets the standard far lower and permits, and some argue encourages, deficient lawyering.<sup>106</sup>

While recently the Supreme Court, at times, has been willing to more actively apply the *Strickland* standard in some capital cases, few such applications can be cited.<sup>107</sup> Not many cases can be seen which rebut the hard criticism given two decades ago by Justice Marshall that “all manner of negligence, ineptitude, and even callous disregard for the client pass muster under the *Strickland* standard.”<sup>108</sup>

#### D. THE STAGE AND TYPE OF PROCEEDINGS

After a few decades of decisions regarding the 6th Amendment we are left, as discussed above, with a rather peculiar situation as to the stage and type of proceeding to which the counsel right applies. The defendant will be allowed the appointment of counsel only if she has been formally charged, and only if she is personally confronted by witnesses against her.<sup>109</sup> The situation truly is peculiar, for it results in quite unfair conditions for some criminal defendants.<sup>110</sup>

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*Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849, 858–59 (1992); Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 912 (2005); William S. Geimer, *A Decade in Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91, 100 (1995); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1169–70 (2003).

106. Backus & Marcus, *supra* note 84, at 1087.

107. Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 348–49 (2008); see Robert R. Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 86–87 (2007). Even those authors would seemingly concede, however, that the broader view of *Strickland* occurs almost always, when it happens, in capital cases.

108. Bright, *supra* note 105, at 860 (citing remarks of Justice Marshall to the Second Circuit Judicial Conference in 1988).

109. Backus & Marcus, *supra* note 84, at 1041–42.

110. See William Pena Wells & Brian L. Cutler, *The Right to Counsel at Videotaped Lineups: An Emerging Dilemma*, 22 CONN. L. REV. 373 (1990).



### 1. The Identification

The *Wade* and *Kirby* cases make clear the problem at issue. All are in agreement as to the difficulties of eyewitness identification.<sup>111</sup> In many cases, identifications have been shown to be untrustworthy, yet juries appear to rely heavily upon the statements made by witnesses indicating that this person was the one who committed the crime.<sup>112</sup> Still, even with this reality—and the strong language in *Wade* as to the role to be played by defense counsel here—we can see two defendants who will be treated quite differently in terms of the assignment of counsel, because of the requirement that there be a formal charge before the presence of counsel is needed.

**Defendant #1** was arrested on the street, taken to the police station and immediately placed in a lineup over her objection that she was not given the right to have a lawyer observe. She was there identified by the victim of the crime, and soon thereafter formally charged with the crime. Without much doubt, the witness's statement of identification will be admissible at the trial, even though a defense lawyer was not present at the identification.

**Defendant #2** was also arrested on the street, also taken to the police station, and then formally charged with the crime. Immediately thereafter, he was placed in a lineup over his objection that he was not given the right to have a lawyer observe. He was there identified by the victim of the crime. Without much doubt, the witness's statement of identification will not be admissible at the trial, precisely because defense counsel for him was not present at the identification.<sup>113</sup> Indeed, the witness's in-court identification might also not be admissible if it is viewed as tainted by the earlier identification.<sup>114</sup>

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111. The Innocence Project indicates that eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing. Innocence Project, *Eyewitness Misidentification*, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>.

112. Marc Green, *Errors in Eyewitness Identification Procedures*, <http://www.visualexpert.com/Resources/mistakenid.html>. "Jurors treat eyewitness identification as compelling evidence in both civil and criminal trials." *Id.*

113. This was very much the situation in *Moore v. Illinois*, 434 U.S. 220 (1977). There, the defendant was identified at a hearing, but the Court would not allow evidence of that identification, on Sixth Amendment grounds. *Id.* This, in spite of the fact that the identification was made in open court, and in front of a judge and the states' attorney. *Id.* If, however, the identification had been made twenty minutes earlier, en route to the charging procedure, it seems clear that the identification would not have raised right to counsel concerns.

114. See *Dunnigan v. Keane*, 137 F.3d 117 (2d Cir. 1998), *cert. denied*, 525 U.S. 840; *State v. McMorris*, 570 N.W. 2d 384 (Wis. 1997); *United States v. Williams*, 999 S. Supp. 412 (W.D.N.Y. 1998).

This result is peculiar because the defendant is in the same situation in both cases, as is the witness and also the identification procedure. The only difference is whether that lineup took place just before, or just after, the formal charge. This concern, surely, is at the base of the decisions in some states to give appointed counsel even before a formal charge is brought.<sup>115</sup>

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115. Under § 13 of the Indiana Constitution, Indiana's right to counsel may attach before the filing of formal charges. See *Ajabu v. State*, 693 N.E.2d 921, 928 n.4 (Ind. 1998); see also *Taylor v. State*, 689 N.E.2d 699, 702-04 (Ind. 1997). Article I, section 6 of the New York Constitution applies the right to counsel upon the initiation of formal proceedings, or where an uncharged person has actually retained a lawyer, or while in custody, has requested a lawyer. See N.Y. CONST. art. I, § 6; *People v. Lyons*, 4 A.D.3d 549, 551 (N.Y. A.D. 3 Dept. 2004). Mississippi extends the right to counsel to the "accusatory stage" instead of adopting the formal charge and critical stage standards required by *Kirby*. See *Porter v. State*, 732 So. 2d 899, 904 (Miss. 1999) (noting that the 6th Amendment right to counsel and the Mississippi constitution's right to counsel "are identical and differ only as to the time when each attaches"). Mississippi's right to counsel attaches "once the proceedings against the defendant reach the accusatory stage." *Page v. State*, 495 So. 2d 436, 439 (Miss. 1986). The "accusatory stage" is defined by Mississippi law to occur when a warrant is issued or, "by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit." *Id.* This right to counsel "attaches at the point in time when 'the initial appearance under Rule 1.04 . . . ought to have been held . . .'" *Porter*, 732 So. 2d at 904. Oregon posits an even broader interpretation of "criminal prosecution" in order to extend the state constitution's right to counsel, OR. CONST. art. I, § 11, prior to the filing of formal charges. See *State v. Spencer*, 750 P.2d 147, 155-56 (Or. 1988). The Oregon Supreme Court held that an arrested driver has a limited right to counsel prior to deciding whether to acquiesce to a breath test. *Id.* at 156. In attaching the right to counsel after arrest, but before charging, the court found that:

A person taken into formal custody by the police on a potentially criminal charge is confronted with the full legal power of the state, regardless of whether a formal charge has been filed. Where such custody is complete, neither the lack of a selected charge nor the possibility that the police will think better of the entire matter changes the fact that the arrested person is, at that moment, ensnared in a "criminal prosecution." The evanescent nature of the evidence the police seek to obtain may justify substantially limiting the time in which the person may exercise his or her Article I, section 11, right, but it does not justify doing away with it.

*Id.* at 155-56.

While states commonly extend the right to counsel prior to formal charging by a confirmation of constitutional provisions and case law, some states also explicitly extend the right with specific statutory rights. This approach is often adopted to extend the right to counsel when the accused is requested to submit to a pre-charge chemical test that may produce incriminating evidence. For example, in *State v. Sadek*, the North Dakota Supreme Court wrote that the "right [of an arrested person] to consult with an attorney before taking a chemical test is not derived from the state or federal constitutions, but from section 29-05-20, N.D.C.C." 552 N.W.2d 71, 72-73 (N.D. 1996). The Vermont Supreme Court in *State v. Welch*, interpreted 23 V.S.A. § 1205(a), a statute governing implied consent for blood alcohol testing, to recognize a limited right to counsel. 376 A.2d 351, 355 (1977). As submission to such a chemical test may constitute a critical stage of the criminal proceedings against the accused, this implied consent law places "the suspect operator in a situation where counsel could be of aid." *Id.* The decision was then codified in 23 V.S.A. § 1202(c) (2008), stating in part: "A person who is requested by a law enforcement officer to submit to an evidentiary test or tests has a right as herein limited to consult an attorney before deciding whether or not to submit to such a test or tests . . ." The Washington State Supreme Court recognized a right to counsel based not on the 6th Amendment, the state constitution, state



## 2. The Confrontation

It is only if the defendant is personally confronted by others that the right to counsel issue arises, even if the identification proceeding occurs after an indictment.<sup>116</sup> So, full and partial lineups may require counsel, but photo displays and sampling of voice, blood, hair, and fingerprints do not.<sup>117</sup> Here, too, one can label the result as peculiar, for the empirical evidence strongly advises against non-live photo identifications; these identifications raise grave concerns about misidentifications.<sup>118</sup> The response of the Justices, in the *Ash* case, was dismissive.<sup>119</sup> “We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required.”<sup>120</sup>

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statutes, or even other case law, but instead on a state judicial rule, pursuant to the court’s procedural authority. *See generally* State v. Templeton, 59 P.3d 632 (Wa. 2002) (discussing state judicial rule and procedural authority). The Washington court focused on its procedural rule-making authority over matters of evidence, and explained that in the absence of its intervention, the 6th Amendment right to counsel would generally only attach upon the initiation of adversary judicial proceedings. *Id.*

116. *See* U.S. v. Ash, 413 U.S. 300, 316 (1973).

117. *Id.* at 315–16.

118. These concerns are reflected in the many studies calling for sweeping changes to the processes used for such identification. *See, e.g.*, JOHN K. VAN DE KAMP, CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE: REPORT AND RECOMMENDATIONS REGARDING EYEWITNESS IDENTIFICATION PROCEDURES *passim* (2006), <http://www.ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf>; *see also* Karin Bruilliard, *Revamping Virginia’s Police Lineups*, WASH. POST, Mar. 6, 2005, at C01, available at <http://www.psychology.iastate.edu/~glwells/washingtonpostVirginiastory.pdf>; STATE OF WISCONSIN OFFICE OF THE ATTORNEY GENERAL, MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION (2005), <http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf>. *See* Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487 (2008), for fine discussion of the broad legal problems here. *See also* State v. Dubose, 699 N.W.2d 582 (Wis. 2005). These sources explore the empirical evidence: Heather D. Flow & Ebbe B. Ebbeson, *The Effect of Lineup Member Similarity on Recognition Accuracy in Simultaneous and Sequential Lineups*, 31 LAW & HUM. BEHAV. 33 (2007); Beth Schuster, *Police Lineups: Making Eyewitness Identification More Reliable*, NAT’L INST. OF JUST. 258 (Oct. 2007), available at <http://www.ojp.usdoj.gov/nij/journals/258/police-lineups.html#back10>; Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. IN THE PUB. INT. 2, 45 (2006), available at [http://www.psychology.iastate.edu/faculty/gwells/Wells\\_articles\\_pdf/pspi\\_7\\_2\\_article\[1\].pdf](http://www.psychology.iastate.edu/faculty/gwells/Wells_articles_pdf/pspi_7_2_article[1].pdf); James M. Doyle, *No Confidence: A Step Toward Accuracy in Eyewitness Trials*, THE CHAMPION (Jan./Feb. 1998), <http://www.criminaljustice.org/CHAMPION/ARTICLES/98jan01.htm>.

119. *Ash*, 413 U.S. at 321.

120. *Id.*

## E. THE TYPE OF CASE

The Supreme Court in *Gideon* had before it the ideal case in which to state the 6th Amendment doctrine.<sup>121</sup> After all, the defendant there specifically requested a lawyer at the trial in a serious criminal case.<sup>122</sup> At Gideon's trial, he was sentenced to a term of five years in the state penitentiary.<sup>123</sup> What would happen if this had not been such a serious case, if he had not been sentenced to any term of imprisonment? One might be excused if, after viewing the glorious *Gideon's Trumpet*,<sup>124</sup> he or she thought that the defendant would have been entitled to a lawyer even though no imprisonment had been ordered.<sup>125</sup> To be sure, it is a common misconception that all criminal defendants in the United States are entitled to assisted counsel if they cannot afford to hire a lawyer.<sup>126</sup>

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121. *Gideon v. Wainwright*, 372 U.S. 335, 336–38 (1963).

122. *Id.* at 336–37.

123. *Id.* at 337.

124. *GIDEON'S TRUMPET* (Hallmark Hall of Fame Productions 1980) is a 1980 film starring Henry Fonda, with a short cameo appearance at the very end of the movie by Anthony Lewis, author of the book *GIDEON'S TRUMPET* (1964).

125. *GIDEON'S TRUMPET*, *supra* note 124.

126. See generally WALTER DEAN MYERS, *SHOOTER 164* (2004) (including a fictitious "Statement of Waiver of Privilege and Miranda Warning," which reads, in part, "I further understand that I have a right to an attorney. If I cannot, on my own, avail myself of legal help, I will be furnished with an attorney by the State."); *Everyone Is Entitled to an Attorney*, <http://homesweethome.wordpress.com/2008/2/11/everyone-is-entitled-to-an-attorney/> (Feb. 11, 2008 06:00 EST) (commenting on an article describing the investigation of accused murderer Andrew Boisvert); *Gideon's Trumpet Stilled*, N.Y. TIMES.COM, Mar. 21, 2003, <http://query.nytimes.com/gst/fullpage.html?res=9A02E4DE1E31F932A15750C0A9659C8B63&sc=2sq=poor+right+to+lawyer&st=nyt> (suggesting that all poor criminal defendants have a constitutional right to a lawyer, regardless of whether confinement is possible, and going on to note that "[t]hat principle is now ingrained in our culture"); *Preserving the Right to a Lawyer*, N.Y. TIMES.COM, Apr. 25, 2005, <http://www.nytimes.com/2005/04/25/opinion/25mon2.html?scp=1&sq=poor+right+to+lawyer&st=nyt> (stating that "Criminal defendants who cannot afford a lawyer have the right to have one appointed to represent them" and "[t]he Supreme Court ruled in the landmark case of *Gideon v. Wainwright* that poor defendants have a constitutional right to appointed counsel"); *Promise of Right to Counsel for Poor Remains an Illusion in Michigan [Especially in Berrien]*, BANCO (BLACK AUTONOMY NETWORK COMMUNITY ORGANIZATION), Mar. 18, 2008, <http://bhbanco.blogspot.com/2008/04/promise-of-right-to-counsel-for-poor.html> ("[t]he landmark 1963 [*Gideon*] decision held that the Constitution guarantees every person . . . the right to an attorney even if he or she cannot afford one); Joyce Purnick, *Metro Matters; Another Frill: Giving the Poor Good Lawyers*, N.Y. TIMES.COM, Mar. 11, 1996, <http://query.nytimes.com/gst/fullpage.html?res=9B03EEDC1039F932A25750C0A960958260&sc=&spn=&pagewanted=2> (addressing the inability of indigent individuals to obtain adequate legal representation: "[p]oor defendants, by law, have a right to a lawyer, but the courts are swamped"); *The Right to Counsel*, N.Y. TIMES.COM, Jan. 24, 2003, <http://query.nytimes.com/gst/fullpage.html?res=9C02E0D71F30F937A15752C0A9659C8B63> (quoting *Gideon v. Wainwright*, 372 U.S. 335, 347 (1963), but failing to mention that the doctrine



That, of course, is not the law. As noted above, the Justices in *Scott* and *Shelton* decided that an attorney is not required in all criminal cases. It is just that the sentencing judge cannot order any term of imprisonment [either on an immediate or suspended basis] unless counsel had been offered to the defendant.<sup>127</sup> Many have disagreed with the Court's holding on basic fairness grounds. One commentator stated the matter cogently:

Therefore, if we accept the *Gideon* premise that a defendant may suffer damage from the lack of counsel, the necessary conclusion is that every criminal defendant is entitled to be represented by counsel if she so wishes. There is no reason to allow a defendant to be convicted after an unfair trial when the potentially unfair result is known from

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only applies to defendants facing potential incarceration); Jill Smolowe, *The Trials of the Public Defender*, TIME.COM, Mar. 29, 1993, <http://www.time.com/time/magazine/article/0,9171,978105-1,00.html> ("The Sixth Amendment established, and the landmark *Gideon* Supreme Court case affirmed, the right of poor people to legal counsel," without regard to severity of potential criminal penalty or incarceration); The Law Firm of Solomon M. Musyimi, A Professional Corporation Homepage, [http://www.solomonthelawyer.com/houston\\_lawfirm/houston\\_criminal\\_law.htm](http://www.solomonthelawyer.com/houston_lawfirm/houston_criminal_law.htm) (stating that "[e]very person accused of a crime has the right to an attorney [and if you cannot afford an attorney, the state must provide one] (last visited June 12, 2008); Posting of J. Raichasa, Justaquestioner, Mild Irritant, & Rich K to Yahoo! Answers, <http://answers.yahoo.com/question/index?qid=20080212184536AAkqJA3> (Feb. 12, 2008 18:45:46 EST) (concluding that J is entitled to a court appointed lawyer for two unspecified misdemeanor charges); Posting of William A. Saunders to AllExperts Crime & Law Enforcement Issues & Death Penalty, <http://en.allexperts.com/q/Crime-Law-Enforcement-341/2008/4/Misdemeanor-Shoplifting-2.htm> (answering a question about shoplifting consequences, poster advises that, based on the information he had been provided, she will be assigned a public defender if she cannot afford an attorney) (Apr. 14, 2008).

Indeed, in my Criminal Procedure class each year, I ask a group of second and third year law students—bright, thoughtful, well educated people—the following questions:

An important area for discussion is the right to counsel in criminal cases in the United States. Before coming to law school, which of these positions did you think was correct: (1) A person who is too poor to afford to hire a lawyer is entitled to appointed counsel if, upon conviction, she could receive a sentence in excess of 6 months in jail; (2) A person who is too poor to afford to hire a lawyer is entitled to appointed counsel if, upon conviction, she could receive a sentence of actual imprisonment; (3) A person who is too poor to afford to hire a lawyer is entitled to appointed counsel in all criminal cases; (4) person who is too poor to afford to hire a lawyer is never entitled to appointed counsel in criminal cases.

In February 2008, the result in votes was: 0 votes for (1); 14 votes for (2); 52 votes for (3); 1 vote for (4). This was a fairly typical tally for the annual exercise. Most people I encounter think poor people will get appointed counsel in all criminal cases. Indeed, one student in the class wrote a personal note: "This is embarrassing, but in the spirit of helping your survey, I feel that I must tell you that my original understanding of the 'right of counsel' wasn't listed on your survey. I didn't think that 'being poor' was a part of it—I just thought you had a right to an attorney, no matter who you are. And sadly, I didn't make the connection until this semester that income is an essential component."

127. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979); *Alabama v. Shelton*, 535 U.S. 654, 674 (2002).

the outset of trial, however minor the offense committed. As long as petty offenses are considered criminal and are not adjudicated through non-judicial avenues, such as administrative bodies, a person is entitled to a fair trial before being labeled an offender.<sup>128</sup>

And, certainly, there are a number of states which do indeed require counsel in all criminal cases, by statute or by state constitutional provision.<sup>129</sup> Still, many defendants are forced to proceed without a lawyer in criminal cases, as we shall see. In the next section, I will set out the concerns as to this state of affairs and argue why—for several reasons—the common perception should become the reality.

#### V. WHY LIMIT THE RIGHT TO CASES WITH AN IMPRISONMENT CONNECTION?

It is fair to say that the issues being raised in this article have not been among the most hotly debated within the criminal justice system in recent times. Some states, and there are quite a number of them—as indicated below—rejected the imprisonment connection entirely. They passed statutes, or interpreted their own constitutions, so as to require counsel in all or virtually all criminal cases. However, other states, many facing intense budget concerns, simply did not move on the matter. There has been little discussion as to the several broad policy issues raised by the Supreme Court's restriction. Only two issues have garnered much attention.

##### A. THE CONCERNS

###### 1. The Intent, Language in the 6th Amendment

The 6th Amendment provides, in part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."<sup>130</sup> Obviously, there is nothing in this language about the appointment of lawyers for those who cannot afford to retain counsel. On this point, the legislative history seems pretty clear, the founders were not contemplating such appointments. Instead, the Amendment was offered to ensure that a hearing would "include[] the right to the aid of counsel when desired and provided by the party asserting the right."<sup>131</sup> "Regardless of whether

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128. Rinat Kitai, *What Remains Necessary Following Alabama v. Shelton to Fulfill the Right of a Criminal Defendant to Counsel at the Expense of the State?*, 30 OHIO N.U. L. REV. 35, 46 (2004).

129. See *supra* notes 65–72 and accompanying text.

130. U.S. CONST. amend. VI.

131. *Powell v. Alabama*, 287 U.S. 45, 68 (1932).



petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."<sup>132</sup>

Still, this was also the argument made by Florida in *Gideon* and, of course, that view did not prevail, because the assistance of a lawyer was said to be fundamental and essential to a fair trial.<sup>133</sup> Moreover, one might have thought that once the Court ruled that criminal defendants such as Clarence Gideon were entitled to appointed counsel and not simply because of special circumstances,<sup>134</sup> the language in the Constitution, *In all criminal prosecutions*, would actually be taken to mean that appointment was required in *all* cases rather than simply in *some* cases.

## 2. The Costs Would Be Too High

Clearly of great pause for the Justices in possibly extending counsel rights in all criminal cases was the financial impact it would have on the states. The former Chief Justice stated the matter succinctly in *Scott*: "*Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States."<sup>135</sup> Justice Powell, concurring in *Argersinger*, was considerably more thoughtful as to the types of costs that a blanket rule would create:

Despite its overbreadth, the easiest solution would be a prophylactic rule that would require the appointment of counsel to indigents in all criminal cases. The simplicity of such a rule is appealing because it could be applied automatically in every case, but the price of pursuing this easy course could be high indeed in terms of its adverse impact on the administration of the criminal justice systems of 50 States. This is apparent when one reflects on the wide variety of petty or misdemeanor offenses, the varying definitions thereof, and the diversity of penalties prescribed. The potential impact on state court systems is also apparent in view of the variations in types of courts and their jurisdictions, ranging from justices of the peace and part-time judges in the small communities to the elaborately staffed police courts which operate 24 hours a day in the great metropolitan centers.<sup>136</sup>

While no one would suggest that these costs are insubstantial,<sup>137</sup> the fact is that when *Scott* was decided, most states actually did then provide

132. *Chandler v. Fretag*, 348 U.S. 3, 9 (1954).

133. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

134. After all, *Gideon* overruled the special circumstances requirement earlier set out in *Betts v. Brady*. *Id.* at 350 (Douglas, J., concurring). It did so with ringing language, noting "that *Betts* was an anachronism when handed down." *Id.* at 345.

135. *Scott v. Illinois*, 440 U.S. 367, 373 (1979).

136. *Id.* at 50–51 (Powell, J., concurring).

137. These costs are well laid out in Hashimoto, *supra* note 87, at 485–86.



lawyers in almost all criminal cases.<sup>138</sup> And, they still do. Thus, it is hard to believe that the costs would be so overbearing so as to weigh too heavily on the constitutional analysis. In 1979, when the *Scott* decision was handed down, as stated by dissenting Justice Brennan:

[A] substantial number of States . . . already provide counsel in all cases where imprisonment is authorized – States that include a large majority of the country's population and a great diversity of urban and rural environments. Moreover, of those States that do not yet provide counsel in all cases where *any* imprisonment is authorized, many provide counsel when periods of imprisonment longer than 30 days, 3 months, or 6 months are authorized. In fact, *Scott* would be entitled to appointed counsel under the current laws of at least 33 States.<sup>139</sup>

In 2009, the numbers are even more stark as to states which give counsel in criminal cases. Forty-six states provide counsel in all, or virtually all, criminal cases.<sup>140</sup> The statutory language varies from state to

138. See *Scott*, 440 U.S. at 385–86 (Brennan, J., dissenting).

139. *Id.* at 385–87 (Brennan, J., dissenting). Of course, as noted by Justice Brennan, one of the reasons that the costs have not proved insurmountable has been the development of public defender offices throughout the country:

Furthermore, public defender systems have proved economically feasible, and the establishment of such systems to replace appointment of private attorneys can keep costs at acceptable levels even when the number of cases requiring appointment of counsel increases dramatically. The public defender system alternative also answers the argument that an “authorized imprisonment” standard would clog the courts with inexperienced appointed counsel.

*Id.* at 385.

140. States that provide counsel in criminal cases are as follows: Alaska: ALASKA CONST. art. I, § 11, ALASKA STAT. § 18.85.100 (2008), *Alexander v. City of Anchorage*, 490 P.2d 910 (Alaska 1971); Arizona: ARIZ. R. CRIM. P. 6.1(b); Arkansas: ARK. R. CRIM. P. 8.2(b); California: CAL. PENAL CODE § 987 (2008); Colorado: COLO. REV. STAT. §§ 21-1-103(1,2), 16-5-501 (2008); Connecticut: CONN. GEN. STAT. §§ 51-296(a), -297(f) (2008); Delaware: DEL. CODE tit. 29, § 4602 (2003); Florida: FLA. R. CRIM. P. 3.111(b); Georgia: GA. UNIF. SUP. CT. R. 29.2; Hawaii: HAW. CONST. art. I, § 14; Idaho: IDAHO CODE §§ 19-851, 852 (2008); Illinois: 725 ILL. COMP. STAT. 5/113-3(b) (2008); Indiana: IND. CONST. art. I, § 13, *Bolkovac v. State*, 98 N.E.2d 250 (Ind. 1951); Iowa: IOWA R. CRIM. P. 2.28, 2.61; Kentucky: KY. R. CRIM. P. 3.05; Louisiana: LA. CODE CRIM. PROC. art. 513 (2003); Maine: ME. R. CRIM. P. 44; Maryland: MD. CODE CRIM. PROC. § 16-204 (2008); Massachusetts: MASS. SUP. JUD. CT. R. 3:10, MASS. R. CRIM. P. 8; Minnesota: MINN. STAT. §§ 609.02, 611.14 (2008); Mississippi: MISS. CODE §§ 25-32-9, 99-15-15 (2008); Missouri: MO. SUP. CT. R. 31.02; Montana: MONT. CODE § 46-8-101 (2008); Nebraska: NEB. REV. STAT. 29-3902, -3906 (2008); Nevada: NEV. REV. STAT. §§ 178.397, 193.120 (2008); New Hampshire: N.H. REV. STAT. §§ 604-A:2, 625:9 (2008); New Jersey: N.J. STAT. § 2A:158A-5.2 (2008); New Mexico: N.M. Stat. § 31-15-12 (2008); New York: N.Y. CRIM. P. LAW §§ 170.10(3), 180.10(3) (2008), N.Y. COUNTY LAW §§ 717, 722-a (2008), *People v. Weinstock*, 363 N.Y.S.2d 878 (1974); North Carolina: N.C. GEN. STAT. § 7A-451(a) (2008); North Dakota: N.D. R. CRIM. P. 44; Ohio: OHIO R. CRIM. P. 2, 44; Oklahoma: OKLA. STAT. tit. 22, § 1355.6 (2008); Oregon: OR. REV. STAT. §§ 135.045, 135.050(6) (2008); Pennsylvania: PA. R. CRIM. P. 122(A); Rhode Island: R.I. SUP. CT. R. CRIM. P. 44, R.I. DIST. CT. R. CRIM. P. 44; South Dakota: S.D. CODIFIED LAWS § 23A-40-6 (2008); Tennessee: TENN. CODE §§ 40-14-102, 103 (2008); Texas: TEX. CODE CRIM. PROC. art. 26.04 (2007); Utah: UTAH CODE CRIM. P. § 77-

state, however, there are essentially five ways in which to group states and their right to counsel statutes—only one grouping consists of states which do not grant counsel in all, or virtually, all criminal cases.<sup>141</sup> Nine states provide counsel in all criminal cases.<sup>142</sup> Fifteen states offer counsel for any offense punishable by imprisonment.<sup>143</sup> Eight states give counsel for any offense punishable by incarceration or a fine of more than a specified amount, or for any offense with a minimum incarceration period or fine.<sup>144</sup> Fourteen states provide counsel for any criminal offense except when imprisonment is not authorized as a sentence.<sup>145</sup> Five states require a sentence of actual imprisonment for a defendant to be entitled to court-appointed counsel.<sup>146</sup>

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32-302 (2008); Vermont: VT. STAT. tit. 13, §§ 5201, 5231 (2008); Virginia: VA. CODE §§ 19.2-159, 160 (2008); Washington: WASH. SUPER. CT. R. § 3.1; West Virginia: W.VA. CODE § 62-3-1 (2008); Wisconsin: WIS. STAT. § 967.06 (2008); and Wyoming: WYO. STAT. §§ 7-6-102, 104 (2008).

141. See ALA. CRIM. P. §§ 15-12-1, -20 (2008); KAN. STAT. §§ 12-4405, 22-4503; MICH. COMP. LAWS § 775.16 (2008); S.C. CODE § 17-3-10 (2008); ALA. R. CRIM. P. 6.1; *State v. Delacruz*, 899 P.2d 1042 (Kan. 1995); *People v. Studaker*, 199 N.W.2d 177 (Mich. 1972).

142. See IND. CONST. art. I, § 13; CAL. PENAL CODE § 987 (2008); DEL. CODE tit. 29, § 4602 (2003); OR. REV. STAT. §§ 135.045, 135.050(6) (2007); S.D. CODIFIED LAWS § 23A-40-6 (2007); TENN. CODE §§ 40-14-102, -103 (2007); W. VA. CODE § 62-3-1 (2005); GA UNIF. SUPER. CT. R. 29.2; R.I. SUPER. CT. R. CRIM. P. 44; R.I. DIST. CT. R. CRIM. P. 44; *Bolkovac v. State*, 98 N.E.2d 250 (Ind. 1951);

143. See HAW. CONST. art. I, § 14; IDAHO CODE §§ 19-851, -852 (2007); NEB. REV. STAT. 29-3902, -3906 (2007); N.H. REV. STAT. §§ 604-A:2, 625:9 (2008); N.M. STAT. § 31-15-12 (2008); N.C. GEN. STAT. § 7A-451(a) (2007); OKLA. STAT. tit. 22, § 1355.6 (2008); WIS. STAT. § 967.06 (2007); ARIZ. R. CRIM. P. 6.1(b); IOWA R. CRIM. P. 2.28, 2.61; KY. R. CRIM. P. 3.05; LA. CODE CRIM. PROC. art. 513 (2003); MASS. R. CRIM. P. 8; MASS. SUP. JUD. CT. R. 3:10; N.Y. CRIM. PROC. LAW §§ 170.10(3), 180.10(3) (2008); N.Y. COUNTY LAW §§ 717, 722-a (2008); TEX. CODE CRIM. PROC. art. 26.04 (2007); WASH. SUPER. CT. R. § 3.1; *People v. Weinstock*, 363 N.Y.S.2d 878 (1974).

144. See ALASKA CONST. art. I, § 11; ALASKA STAT. § 18.85.100 (2007); 725 ILL. COMP. STAT. 5/113-3(b) (1993); MD. CODE art. 27A §§ 2, 4 (2007); MINN. STAT. §§ 609.02, 611.14 (2007); MISS. CODE §§ 25-32-9, 99-15-15 (1972); NEV. REV. STAT. §§ 178.397, 193.120 (2007); OHIO R. CRIM. P. 2, 44; MD. CODE CRIM. P. § 16-204 (2008); *Alexander v. City of Anchorage*, 490 P.2d 910 (Alaska 1971).

145. See COLO. REV. STAT. §§ 21-1-103(1,2), 16-5-501 (2007); CONN. GEN. STAT. §§ 51-296(a), -297(f) (2008); MONT. CODE § 46-8-101 (2007); N.J. STAT. § 2A:158A-5.2 (2008); UTAH CODE § 77-32-302 (2007) (discussing where there is a substantial probability of confinement); VA. CODE §§ 19.2-159, -160 (2004); VT. STAT. tit. 13, §§ 5201, 5231 (2007); WYO. STAT. §§ 7-6-102, -104 (2007); ARK. R. CRIM. P. 8.2(b); FLA. R. CRIM. P. 3.111(b); ME. R. CRIM. P. 44; N.D. R. CRIM. P. 44 (applying to all non-felony cases); PA. R. CRIM. P. 122(A); MO. SUP. CT. R. 31.02.

146. See KAN. STAT. §§ 12-4405, 22-4503; ALA. CODE §§ 15-12-1, -20 (2008); MICH. COMP. LAWS § 775.16 (2006); S.C. CODE § 17-3-10 (2007); ALA. R. CRIM. P. 6.1; *State v. Delacruz*, 899 P.2d 1042 (Kan. 1995); *People v. Studaker*, 199 N.W.2d 177 (Mich. 1972) (discussing any felony but only with actual imprisonment for misdemeanors).



## B. FOUR GOOD REASONS TO ELIMINATE THE RESTRICTIVE RULE

If the concerns about extending the right to counsel to all, or virtually all, criminal cases in all states are not overpowering, are there at least some strong reasons to extend that right? Yes, there are, and here are four of the most persuasive.

### 1. The Problem is Not Simply Possible, It Happens Regularly

While many states go beyond the federal mandate and give counsel essentially in all criminal cases, that is certainly not the universal rule. Quite a number of states do not give counsel in cases in which imprisonment is not likely to be a serious option for the sentencing judge.<sup>147</sup> Furthermore, in several of them, a conviction at that trial can be used adversely against the defendant later.<sup>148</sup> Consider these illustrative states.<sup>149</sup>

#### a. Arizona

Arizona state law does not require the appointment of counsel in *all* cases, and according to one judge there are individuals who are denied counsel because the offense does not carry jail time or is not an offense involving moral turpitude.<sup>150</sup> As put by one permanent law clerk, if the prosecutor expressly states he or she is not seeking jail time and the defendant will not be held in custody, it is unlikely counsel will be appointed, even if requested.<sup>151</sup> The web page for the Tucson City Court states:

You have the right to hire an attorney at your own expense and have that attorney represent you at trial. You should know that the court will appoint an attorney to you only if the prosecutor is seeking jail time as part of your sentence, and the judge finds that you cannot afford an attorney.<sup>152</sup>

#### b. Illinois

Under state law, appointment of counsel is broad. Still, one code

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147. See, e.g., MICH. COMP. LAWS § 775.16 (2006); see also *People v. Studaker*, 199 N.W. 2d 177, 179 (Mich. 1972) (stating that any felony but only with actual imprisonment for misdemeanors).

148. See *infra* section V.B.2.

149. These examples come from reported cases, statutes and also correspondence (which is on file with the author) with judges, prosecutors and defense lawyers in the respective states.

150. See ARIZ. R. CRIM. P. 6.1(b).

151. This example comes from correspondence, which is on file with the author.

152. Tucson City Court, *Your Rights*, [http://www.tucsonaz.gov/courts/How\\_To/Motions\\_-\\_Pro\\_Se/Your\\_Day\\_In\\_Court/Your\\_Rights/your\\_rights.html](http://www.tucsonaz.gov/courts/How_To/Motions_-_Pro_Se/Your_Day_In_Court/Your_Rights/your_rights.html) (last visited May 13, 2008).



section notes that counsel is not always given.<sup>153</sup> “In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel.”<sup>154</sup> As explained by one law professor there, in some parts of the state no lawyer is appointed where jail is not a possible sentence.<sup>155</sup>

c. Florida

The key here is whether the prosecutor is seeking imprisonment upon conviction. One judge said, “[e]ven if the defendant wishes to have an attorney we do not appoint attorneys based on the announcement on the record by the state that they are not seeking jail time [in misdemeanor cases].”<sup>156</sup> A law professor who has worked closely with public defender offices wrote:

[I]f the judge announce[s] that he/she will not impose a sentence of confinement in the case . . . [t]he judge . . . will inform the defendant that he/she is no longer entitled to the services of the public defender . . . [O]nce the judge has made the decision to not impose confinement as a sentence the defender is not allowed to assist the defendant.<sup>157</sup>

d. Virginia

Virginia state law is quite explicit as to the ability of the trial court to require an indigent defendant to proceed on her own without the aid of a lawyer.

However, if, prior to the commencement of the trial, the court states in writing, either upon the request of the attorney for the Commonwealth or, in the absence of the attorney for the Commonwealth, upon the court’s own motion, that a sentence of incarceration will not be imposed if the defendant is convicted, the court may try the case without appointing counsel, and in such event no sentence of incarceration shall be imposed.<sup>158</sup>

As stated by one experienced judge, the provision is not used frequently, but is used, both on motion of the prosecutor and on the judge’s own motion.<sup>159</sup>

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153. See 725 ILL. COMP. STAT. 5/113-3b (1993).

154. *Id.*; see *People v. Campbell*, 862 N.E. 2d 933, 937 (Ill. 2007).

155. Letter on file with author.

156. Letter on file with author.

157. Letter on file with author.

158. VA. CODE 19.2-160 (2004). Several states have similar statutory provisions. See, e.g., ARK. CODE, RULES OF CRIM. PROC., Rule 8.2(b); COLO. REV’D STAT. tit. 16, § 16-5-501; WYO. STAT. tit. 7, § 7-6-102(a)(v).

159. Letter on file with author.

## 2. Use of Convictions in Later Criminal Cases

*Nichols v. United States*,<sup>160</sup> was one of the many counsel cases decided by the Supreme Court in the years following *Gideon v. Wainwright*, as noted previously. What was special in *Nichols* was that the Justices were confronted with an issue that had divided them in the past, whether a prior uncounseled misdemeanor conviction—valid under *Scott v. Illinois*—could be used to enhance a sentence in a later, unrelated prosecution.<sup>161</sup>

*Nichols* was convicted of conspiracy to possess cocaine with intent to distribute.<sup>162</sup> In addition to a prior felony drug conviction, a prior misdemeanor DUI conviction was used to lift his sentence from 168–210 months to 188–235 months.<sup>163</sup> His prior misdemeanor conviction was uncounseled, and the lower court determined that he had not then waived his right to counsel.<sup>164</sup> On appeal, the petitioner claimed that the use of his prior uncounseled misdemeanor conviction violated his 6th Amendment rights.<sup>165</sup> However, the Supreme Court disagreed.<sup>166</sup> In rendering its decision, the Justices relied heavily on *Scott*.<sup>167</sup> They held that prior uncounseled misdemeanor convictions were valid because they did not result in prison time at the time and could be used to enhance a later sentence.<sup>168</sup>

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

161. See *id.* at 740; see also *Balsadar v. Illinois*, 446 U.S. 222, 224 (1980) (when the issue previously came before the court, the result was a per curiam opinion voiding later enhancements based on earlier uncounseled convictions).

162. See *Nichols*, 511 U.S. at 740.

163. See *id.*

164. See *id.* at 741.

165. See *id.*

166. See *id.* at 748–49.

167. See *id.* at 748.

168. See *Nichols*, 511 U.S. at 748–49.

Most states have accepted the Court's decision in *Nichols*,<sup>169</sup> even in response to state constitutional challenges. Not all states do so, however.<sup>170</sup> Typically, in these cases, the defendants point to serious punishment from later convictions resulting from earlier uncounseled convictions.<sup>171</sup> Defendants also assert that the prior uncounseled convictions should not be considered because of their unreliability.<sup>172</sup> Still, most state courts agree with the rationale expressed in *Nichols* that enhancement statutes are commonplace; that the sentencing process is less rigid than the process of establishing guilt; and that judges are allowed to conduct broad inquiries and consider a number of factors—including prior criminal history—in reaching their decisions.<sup>173</sup> Nevertheless, the later convictions can and

169. See *State v. Thrasher*, 783 So. 2d 103, 106 (Ala. 2000); *State v. Brooks*, 874 A.2d 280, 286–88 (Conn. 2005); *State v. Pressley*, 2002 WL 863599, at \*1–2 (Del. Super. Ct. Apr. 19, 2002); *State v. Keeth*, 203 S.W. 3d 718, 727–28 (Mo. 2006); *Glaze v. State*, 621 S.E. 2d 655, 656–57 (S.C. 2005); *State v. Ferguson*, 111 P.3d 820, 824–25 (Utah 2005); see also *Morris v. State*, 798 A.2d 1042, 1042–43 (Del. 2002); *Simmons v. State*, 629 S.E.2d 86, 87–88 (Ga. 2006); *Williams v. State*, 974 P.2d 83, 85 (Idaho 1998); *People v. Laskowski*, 678 N.E. 2d 1241, 1244–45 (Ill. 1997); *Morphew v. State*, 672 N.E.2d 461, 465–66 (Ind. 1996); *State v. Wilkins*, 687 N.W. 2d 263, 264–65 (Iowa 2004); *State v. Cook*, 706 A.2d 603, 606–07 (Me. 1998); *People v. Reichenbach*, 459 Mich. 109, 123–24 (Mich. 1998); *Ghoston v. State*, 645 So. 2d 936, 938–39 (Miss. 1994); *State v. Hansen*, 273 Mont. 321, 324–26 (Mont. 1995), *abrogated by* *Alabama v. Shelton*, 535 U.S. 654, 660 (Mont. 2002); *State v. Orduna*, No. A-95-284 1995 Neb. App. LEXIS 396, at \*7–9 (Neb. Ct. App. Dec. 19, 1995); *State v. Sharp*, 694 N.E. 2d 1003, 1003–04 (Ohio 1994); *State v. Skala*, 2002-Ohio-2962; *In re Advisory Opinion to the Governor*, 666 A.2d 813, 814 (R.I. 1995); *State v. Sanders*, No. M2005-00088-CCA-R3-CD, 2006 Tenn. Crim. App. LEXIS 506, at \*3–5 (Tenn. Crim. App. June 21, 2006); *Garcia v. State*, 909 S.W. 2d 563, 567 (Tex. 1995); *Kapoor v. Commonwealth*, No. 2582-03-4, 2004 Va. App. LEXIS 557 at \*2–3 (Va. App. Nov. 16, 2004); *State v. Porter*, 671 A.2d 1280, 1281 (Vt. 1996); *State v. Schoenick*, No. 94-2536-CR, 1995 Wis. App. LEXIS 296, at \*12–13 (Wis. App. Mar. 7, 1995).

170. See, e.g., these cases, relying on their own state constitutional counsel provisions: *State v. Hrycak*, 877 A.2d 1209 (N.J. 2005) (emphasizing the unreliability of uncounseled convictions); *State v. Deville*, 879 So. 2d 689 (La. 2004) (under Article I, Section 13 of the Louisiana Constitution, an indigent individual has the right to appointed counsel if he is charged with an offense punishable by imprisonment. Because the Louisiana Constitution affords a greater right to counsel than the Federal Constitution, an individual's prior uncounseled misdemeanor conviction punishable by imprisonment cannot be used to enhance his sentence or reclassify his offense.); *Brisson v. State*, 955 P.2d 888 (Wyo. 1998) (Prior uncounseled convictions could not be used to "impose or enhance a subsequent prison sentence." The rationale is that prior uncounseled convictions are unreliable.).

171. See *supra* note 170.

172. *Id.*

173. See, e.g., *State v. Woodruff*, 951 P.2d 605, 606 (N.M. 1997) (stating that with the enhancement, the maximum amount of jail time the defendant could have received increased from 90 days to 364 days and he faced a mandatory jail term of not less than 72 hours); *State v. Delacruz*, 899 P.2d 1042, 1045 (Kan. 1995) (stating that as a result of the enhancement, the defendant was sentenced to 40 months' imprisonment with a "post-release supervision period of 24 months." Without the enhancement, the defendant might not have received any imprisonment at all.); *State v. Hopkins*, 453 S.E. 2d 317, 319 (W.Va. 1994) (stating that because of the enhancement, the defendant was sentenced to 1–10 years in prison and he was "fined \$500 for the



often do result in far greater punishment—potentially years in prison—based entirely on the enhancement due to the earlier uncounseled convictions.<sup>174</sup>

### 3. Minor cases can be complicated

*Argersinger* made clear that a judge could not sentence the defendant to any term of imprisonment unless the defendant had been given the option of legal representation.<sup>175</sup> The rationale of the Supreme Court in *Scott* for drawing the Sixth Amendment line at actual imprisonment is that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment.<sup>176</sup> Presumably, one reason the majority Justices were able to reach that conclusion is the notion that the minor criminal cases, those not involving imprisonment, just are not very difficult, and the absence of counsel would not seriously affect the fairness of the proceeding.<sup>177</sup> Yet, in the Court's *Argersinger* opinion, Justice Douglas argued forcefully that it is the nature of the issues, not the type of punishment involved, which should determine how important the presence of counsel would be.<sup>178</sup> "[E]ven in prosecutions for offenses less serious than felonies, a fair trial may require the presence of a lawyer."<sup>179</sup>

And, Justice Douglas was correct. Law students routinely study complex and difficult criminal cases in which no imprisonment is ordered upon conviction. The reader's attention is directed to several of these:<sup>180</sup>

- *Powell v. Texas*.<sup>181</sup> A split Supreme Court decides that a defendant may be convicted when being found in a state of

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conviction, \$50 as a mandatory penalty, payable to the mercantile establishment, and the costs of the proceeding;" this was considerably more than would have been possible without the enhancement).

174. See, e.g., *Burgess v. United States*, 128 S. Ct. 1572, 1575–76 (2008) (stating that the defendant was convicted of a misdemeanor offense in state court and later convicted of an unrelated federal drug offense). Because the state conviction was subject to more than one year's imprisonment—though classified by the state as a misdemeanor—it could be viewed as a "felony drug offense" for the purpose of imposing a substantial minimum sentence of federal imprisonment. *Id.* at 1576.

175. See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

176. See *Scott v. Illinois*, 440 U.S. 367, 373 (1979). This view was immediately, and strongly, criticized in *Right to Counsel Where Imprisonment is Possible*, 93 HARV. L. REV. 82, 86–87 (1979).

177. See *Scott*, 440 U.S. at 367.

178. See *Argersinger*, 407 U.S. at 39.

179. See *id.* at 34.

180. With thanks to these law professors for making excellent suggestions of such cases: John Douglass, Roger Fairfax, Stuart Green, Susan Herman, Sheri Johnson, Wayne Logan, Leo Romero, and David Wexler.

181. See *Powell v. Texas*, 392 U.S. 514 (1968).

intoxication in a public place.<sup>182</sup> Defendant was fined \$20.<sup>183</sup>

- *Atwater v. City of Lago Vista*.<sup>184</sup> The famous soccer mom can be arrested for a very minor offense [driving without a seatbelt].<sup>185</sup> She was fined \$50.<sup>186</sup>
- *Scott v. Illinois*.<sup>187</sup> A minor shoplifting case, in which the defendant was fined \$50, the very case which decided the Sixth Amendment limitation.<sup>188</sup>
- *Jacobson v. United States*.<sup>189</sup> Upon conviction for receiving obscene materials through the mails, the defendant was ordered to serve two years probation and 250 hours of community service.<sup>190</sup> Major entrapment decision by the Court.
- *Staples v. United States*.<sup>191</sup> Penalty here was probation and fine.<sup>192</sup> An important case laying out the state of mind requirement for a firearms violation.<sup>193</sup>
- *Lawrence v. Texas*.<sup>194</sup> After a *nolo contendere* plea, the trial court ordered a \$200 fine.<sup>195</sup> In a landmark decision, the Justices struck down an anti-sodomy statute.<sup>196</sup>
- *Gall v. United States*.<sup>197</sup> The question here was whether a sentence imposed outside the range suggested by the Federal Sentencing Guidelines need be justified by extraordinary circumstances.<sup>198</sup> The defendant was given 36 months probation for selling ecstasy.<sup>199</sup>
- *Hiibel v. Sixth Judicial District Court of Nevada*.<sup>200</sup>

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182. *See id.* at 536.

183. *See id.* at 517.

184. *See Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

185. *See id.* at 354.

186. *See id.* at 324.

187. *See Scott v. Illinois*, 440 U.S. 367 (1979).

188. *See id.* at 368.

189. *See Jacobson v. United States*, 503 U.S. 540 (1992).

190. *See id.* at 542.

191. *See Staples v. United States*, 511 U.S. 600 (1994).

192. *See id.* at 604.

193. *See id.* at 619.

194. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

195. *See id.* at 563.

196. *See id.* at 578.

197. *See Gall v. United States*, 128 S. Ct. 586 (2007).

198. *See id.* at 591.

199. *See id.* at 592–93.

200. *See Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177 (2004).

Determination that stop and identify statutes do not violate Fourth or Fifth Amendments.<sup>201</sup> The defendant received a \$250 fine.<sup>202</sup>

- *United States v. Wen Ho Lee*.<sup>203</sup> Scientist at Los Alamos National Laboratory was accused of being a spy in a widely reported matter.<sup>204</sup> After a plea bargain to unlawful retention of national defense information, he received a sentence of time served while awaiting trial.<sup>205</sup>

In each of these cases, a defense lawyer at trial [and prior to it] would have been absolutely essential to raise, assert, and preserve highly significant and difficult legal issues. Yet, under the Court's reasoning in *Scott*, no lawyer would be constitutionally required in any of them.<sup>206</sup>

#### 4. Collateral Consequences of Convictions

In the American criminal justice system, collateral sanctions<sup>207</sup> often create persistent and lasting obstacles for a convict long after she has supposedly discharged her debt to society. For felons, these consequences can severely impinge personal freedoms and civil liberties by causing exclusion from federal aid programs,<sup>208</sup> disqualification from military

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201. See *id.* at 189–91.

202. *Id.* at 182.

203. See *United States v. Wen Ho Lee*, 2000 U.S. App. LEXIS 3082 (10th Cir. 2000). The 2000 prosecution is discussed in Neely Tucker, *Wen Ho Lee Reporters Held in Contempt*, WASH. POST, Aug. 19, 2004, at A02, available at <http://www.washingtonpost.com/wp-dyn/articles/A13508-2004Aug18.html>.

204. See Tucker, *supra* note 203.

205. See Joshua Micah Marshall, *Wen Ho Lee is Free*, SALON, Sept. 13, 2000, available at <http://archive.salon.com/news/feature/2000/09/13/lee/index.html>.

206. See *Scott v. Illinois*, 440 U.S. 367, 373 (1979). In fairness, one should note that under the later *Shelton* decision some of the cases—involving suspended sentences—would today require counsel. *Alabama v. Shelton*, 535 U.S. 654, 674 (2002).

207. See REPORT TO THE HOUSE OF DELEGATES: ABA CRIMINAL JUSTICE STANDARDS ON COLLATERAL SANCTIONS AND DISQUALIFICATION OF CONVICTED PERSONS (2003), <http://www.abanet.org/leadership/recommendations03/103A.pdf> (stating that the American Bar Association defines “collateral sanction” to conviction as a “legal penalty, disability, or disadvantage, however denominated, that is imposed on a person automatically upon that person’s conviction for a felony, misdemeanor, or other offense, even if it is not included in the sentence”). See generally Jenny Roberts, *The Myth of Collateral Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. (forthcoming 2009).

208. See 21 U.S.C.A. § 862a (1997) (certain drug convictions bar felons from “assistance under any State program funded under . . . the Social Security Act” as well as “benefits under the food stamps program . . . or any State program carried out under the Food Stamp Act of 1977.”).



service,<sup>209</sup> and disenfranchisement.<sup>210</sup> Misdemeanor convictions may seem minor.<sup>211</sup> However, the collateral consequences of such convictions can also lead to serious repercussions, often outweighing the severity of the crime and the formal criminal punishment imposed at the original sentencing. Four such consequences are especially noteworthy.

a. Employment

Persons convicted of misdemeanors can face grave employment hurdles that make it difficult to get and keep jobs. This, in turn, creates substantial barriers since the inability to sustain credible employment often plays a major role in recidivism.<sup>212</sup> The mere stigma of a conviction—no matter how trivial the crime may be—complicates the hiring process.<sup>213</sup> Due in part to the advent of speedy internet search engines, and the popularity and availability of private background screening searches,<sup>214</sup> employers have easy access to information regarding a job applicant's criminal background.<sup>215</sup> Further, these screening services go virtually

209. See 10 U.S.C.A. § 504 ("No person who . . . has been convicted of a felony may be enlisted in any armed force.").

210. See ACLU Drug Policy Rehabilitation Project, *Collateral Consequences of the War on Drugs*, Jan. 2003, at 3, <http://www.aclu.org/FilesPDFs/final%20brochure.pdf> (noting that, while felony disenfranchisement laws vary from state to state, only Vermont and Maine have no voting restrictions for convicted felons).

211. See CAL. PENAL CODE § 19 (2008). In California, for instance, a misdemeanor "is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both." *Id.* That is a fairly typical approach.

212. Margaret Colgate Love, *The Debt That Can Never Be Paid*, ABA CRIM. JUST., Fall 2006, at 17. For more information regarding the role employment restrictions can play, see Joan Petersilia, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2003) (stating that prisoners will have a difficult time finding employment after their release); Pierre, *Ex-Offenders Protest Death of Jobs, Services*, WASH. POST, July 2, 2008, at B04, available at [http://www.washingtonpost.com/wp-dyn/content/article/2008/07/01/AR2008070102608\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/07/01/AR2008070102608_pf.html) (stating that "the unemployment rate for ex-offenders is as high as 50 percent"). This article well describes the painful application process ex-offenders face. *Id.*

213. See Avi Brisman, *Double Whammy: Collateral Consequences of Conviction and Imprisonment for Sustainable Communities and the Environment*, 28 WM. & MARY ENV'T'L L. & POL'Y REV. 423, 425–42 (2004).

214. See, e.g., Minnesota Criminal Background Check, <http://www.mncriminals.com> (advertising "totally free criminal background checks"); see also Abika, <http://www.abika.com/Reports/Freebackgroundchecksandverifications.htm> (advertising "Free Background checks, address checks, court record searches and verifications"); BackgroundCheckGateway, <http://www.backgroundcheckgateway.com/public-records.html> (promoting "free instant background checks"); AAA Infosystems.com, <http://www.aaainfosystems.com> (advertising "Background Checks – Free Online Information Resources").

215. See Love, *supra* note 212, at 17.

unregulated, opening more doors for misuse and abuse of criminal history in the employment process.<sup>216</sup> Federal law does not protect convicted misdemeanants from employment discrimination,<sup>217</sup> and most states do not either. Some states do take individual action to limit employment practices that result in unfair bias based upon convictions.<sup>218</sup> For example, Wisconsin<sup>219</sup> and New York<sup>220</sup> prohibit blanket disqualification of job applicants based on criminal convictions.<sup>221</sup>

Misdemeanor convictions may also have repercussions for professional licensing. Many licensing applications require full disclosure of all prior convictions. They often note, though, that misdemeanor convictions will only be one consideration in the overall decision to grant a professional license.<sup>222</sup> In some professions, such as law enforcement, applications set a limit for the degree of misdemeanor that will trigger

216. *See id.*

217. *See* 42 U.S.C.A. § 2000e-2(a)(1). Title VII of the U.S. Code is silent on this point. *Id.* Consider this:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

*Id.*

218. *See* Brisman, *supra* note 213, at 437–40.

219. WIS. STAT. § 111.321 (“[N]o employer, labor organization, employment agency, licensing agency or other person may engage in any act of employment discrimination . . . against any individual on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record . . .”).

220. N.Y. CORRECT. LAW § 752 states:

No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of ‘good moral character’ when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses.

221. *See supra* notes 219 and 220 (showing that the statutes in both Wisconsin and New York allow consideration of criminal background if a substantial relationship exists between the conviction and job at issue).

222. *See, e.g., Rules for the Virginia Board of Bar Examiners*, <http://www.vbbe.state.va.us/pdf/VBBERules.pdf> (explaining that, while “commission or conviction of a crime” may be ground for denial of the right to practice law in the state of Virginia, the Board considers factors such as “seriousness of the conduct” and “candor of the applicant in the admissions process”); *see Statutes and Regulations: Social Workers*, Dep’t of Commerce, Community, and Economics Development, State of Alaska, at 7 (June 2006); ALASKA ADMIN. CODE tit. 12, § 18.140c, *available at* <http://www.dced.state.ak.us/occ/pub/SocialWorkStatutes.pdf> [hereinafter *Statutes and Regulations*] (“The board will, in its discretion, deny an application for a license under AS 08.95.110 if the board finds that the applicant’s history of felony or misdemeanor convictions make the applicant unfit for the license.”).



denial of a license or disciplinary proceedings for licensed professionals.<sup>223</sup> Sometimes the nature of the crime or conviction must bear a direct relationship to the particular skills or requirements of the profession to incur a penalty.<sup>224</sup> For instance, under federal law, doctors may have their ability to prescribe medications revoked if convicted of “any . . . law of the United States, or of any State, relating to any substance defined . . . as a controlled substance or a list I chemical;”<sup>225</sup> also, “a misdemeanor conviction for possession of burglar’s tools bars licensure as a locksmith” in New York.<sup>226</sup> Therefore, while a hiring or licensing process might not categorically exclude those convicted of minor crimes, such convictions—wholly apart from their sentences—may allow for exclusion.<sup>227</sup> Moreover, while misdemeanor convictions do not carry the weight of a felony conviction for professional licensing purposes,<sup>228</sup> those convicted of a misdemeanor may well face an uphill battle when seeking such licensing.

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223. See, e.g., *Police Officer Supplemental Questionnaire*, City of Savage, available, <http://www.ci.savage.mn.us/DepartmentsAndServices/Administration/documents/PoliceOfficer-2007-Supplement.pdf> (stating that “[b]eing convicted of a felony or gross misdemeanor in [Minnesota]” constitutes grounds for discipline of licensed officers); see *Procedure for Qualifying Applicants for Employment as Peace Officers*, The University of Texas Systems, <http://www.utsystem.edu/pol/application.htm> (applicants may not have been convicted of “any criminal offense above the grade of Class B misdemeanor or a Class B misdemeanor within the last ten years from the date of the court order”).

224. See, e.g., *Misdemeanor/Felony Conviction Form*, Michigan State Board of Education, <http://www.umflint.edu/graduateprograms/documents/MisdemeanorFelonyConvictionForm.pdf> (“Conviction, as an adult, of an act of immoral conduct contributing to the delinquency of a child, or of a felony involving moral turpitude” may lead to refusal to grant a teacher certification or revocation or suspension of a previously granted license); see *Statutes and Regulations*, *supra* note 222 (a licensed social worker may be disciplined if he “has been convicted of a felony or has been convicted of a misdemeanor that reflects on the licensee’s ability to practice competently and professionally”).

225. 21 U.S.C.A. § 824(a)(2). Thus, a minor drug conviction may adversely impact a licensed doctor’s medical practice if she is prohibited from prescribing or distributing controlled medications to patients.

226. Legal Action Center, *Setting the Record Straight: What Defense Attorneys Need to Know About the Civil Consequences of Client Criminal Records*, at 8 (2001), [http://www.hirenetwork.org/pdfs/setting\\_the\\_record\\_straight.pdf](http://www.hirenetwork.org/pdfs/setting_the_record_straight.pdf).

227. See *id.*

228. See Gruson, *Convict-Turned-Doctor Provokes Pennsylvania License Battle*, N.Y. TIMES, Dec. 8, 1985, <http://query.nytimes.com/gst/fullpage.html?res=9501E6DE173BF93BA35751C1A963948260&sec=health&spon=&pagewanted=1> (a state board in Pennsylvania improperly denied a convict-turned-doctor’s application for a license to practice medicine based on a misdemeanor, rather than felony, conviction).



b. Education

Misdemeanor convictions can complicate access to educational opportunities, particularly for those whose convictions involve drug use or possession. Any student convicted of “any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance . . .” will not be eligible to receive future assistance for a period of years determined by the nature of the conviction.<sup>229</sup> Question 35 of the Free Application for Federal Student Aid (“FAFSA”) requires applicants to disclose any prior drug convictions;<sup>230</sup> applicants who answer in the affirmative or fail to answer at all will automatically be denied financial aid.<sup>231</sup> Students may resume eligibility prior to the completion of their suspension through a rehabilitation program,<sup>232</sup> nonetheless, the ability to finance education could well be compromised.

It is not simply funding for academic activities which is adversely affected by criminal convictions. For students with misdemeanor convictions, gaining admission to institutions of higher learning can pose a challenge. In the wake of the Virginia Tech shootings, colleges and universities are now taking a closer look at applicants’ criminal records in an effort to avoid admitting students who might cause trouble at their institutions.<sup>233</sup> In 2007, the *Common Application*, an application form used by approximately 320 schools, was changed to require disclosure of misdemeanor and felony convictions<sup>234</sup> This change was spurred by the

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229. 20 U.S.C. § 1091(r)(1) (2008). Possession of controlled substances offenses bars the person from receiving aid for one year for a first offense, two years for a second offense, and indefinitely for a third offense. § 1091(r)(1). Sale of controlled substances offense bars the person from receiving aid for 2 years for a first offense, and indefinitely for a second offense. § 1091(r)(1). Challenges to the statute have been wholly unsuccessful. See *Students for Sensible Drug Policy Found. v. Spellings*, 523 F.3d 896, 899–900 (8th Cir. 2008) (indicating the most recent example of a futile statutory challenge).

230. See *Collateral Consequences of the War on Drugs*, *supra* note 210, at 1.

231. *Id.* “Since 2000, 87,637 students have been denied aid under this act.” *Id.*

232. 20 U.S.C. § 1091 (r)(2)(A)(i)-(ii) (2008). The statute provides:

A student whose eligibility has been suspended under paragraph (1) may resume eligibility before the end of the ineligibility period determined under such paragraph if . . . (A) the student satisfactorily completes a drug rehabilitation program that—(i) complies with such criteria as the Secretary shall prescribe in regulations for purposes of this paragraph; and (ii) includes two unannounced drug tests . . . .

§ 1091 (r)(2)(A)(i)-(ii).

233. Marc Fischer, *Cho: How'd He Get Into Virginia Tech?*, WASH. POST, Apr. 23, 2007, [http://voices.washingtonpost.com/rawfisher/2007/04/cho\\_howd\\_he\\_get\\_into\\_virginia.html](http://voices.washingtonpost.com/rawfisher/2007/04/cho_howd_he_get_into_virginia.html).

234. See *The Common Application Inc., 2008–09 First-Year Application*, <https://www.commonapp.org/CommonApp/docs/downloadforms/CommonApp2008.pdf> (last

realization that when given the choice between using a college's official application form or the Common Application, students with discipline problems were using the Common Application because it did not ask about such conduct.<sup>235</sup>

Although there does not seem to be an official policy stating that misdemeanor convictions will result in the automatic rejection of an admission candidate, in deciding whether to admit the student, schools appear to take a hard look at any applicant convicted of a crime.<sup>236</sup> With record numbers of students applying to colleges,<sup>237</sup> admissions officers are

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visited Oct. 27, 2008); Laura Pappano, *Conduct Unbecoming*, N.Y. TIMES, Apr. 22, 2007, <http://www.nytimes.com/2007/04/22/education/pappano.html?partner=permalink&exprod=permalink>.

235. Pappano, *supra* note 234.

236. This close scrutiny is all too familiar for one-time University of Maryland basketball recruit Tyree Evans. See Luke Winn, *College Basketball*, COLLEGE BASKETBALL SPORTS ILLUSTRATED, June 5, 2006, at 78. Plagued by criminal charges, Evans had already been denied the chance to play for at least two universities. See Jeff Barker & Don Markus, *Evans Not a Terp Yet; Maryland Reviewing Admission of Recruit With Troubled Past; Men's Basketball*, BALTIMORE SUN, May 8, 2008, at 11-Z. Evans eventually pled guilty to two misdemeanors; the first for marijuana possession and the second for assault and battery. *Id.* In April 2008, Evans signed with the Terrapins and was thrilled with the school for "[g]iving [him] a shot . . . ." See Luke Winn, *Maryland Takes a Risk on a Talented Player With a Troubled Past*, SPORTS ILLUSTRATED, May 5, 2008, [http://sportsillustrated.cnn.com/2008/writers/luke\\_winn/05/05/evans.maryland/index.html](http://sportsillustrated.cnn.com/2008/writers/luke_winn/05/05/evans.maryland/index.html). Though Evans had the full support of the Maryland basketball coach, who intended to mentor Evans, the recruit could not be admitted to the university without facing a review by the Office of Student Conduct. See Barker & Markus, *supra* note 236, at 11-Z. Before the Office of Student Conduct even considered Evan's convictions, Evans asked for, and was granted, release from his letter of intent. See Jeff Barker, *Evans Won't Attend UM; Terps Accept Controversial Recruit's Request to be Released From Commitment; Men's Basketball*, BALTIMORE SUN, May 24, 2008, at 3-Z. See generally Eric Prisbell, *Troubled Basketball Recruit Evans Won't Play for Terps After All*, WASH. POST, May 24, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/23/AR2008052302745.html>, for good overviews of the matter. The University of Maryland's policy is that "All Maryland applicants, including non[-]athletes, must be reviewed by the Office of Student Discipline if they have been found guilty of any violation of the law." See Barker, *supra* note 236, at 3-Z.

237. See Pappano, *supra* note 234; Nick Perry, *University of Washington Rejects a Record Number of Applications*, SEATTLE TIMES, Mar. 18, 2008, [http://seattletimes.nwsource.com/html/education/2004422043\\_acceptance18m.html](http://seattletimes.nwsource.com/html/education/2004422043_acceptance18m.html) (reporting that "[a]pplications are up 12 percent at Washington State University this year and up 7 percent at Western Washington University. Applications to Seattle University hit 5,000 for the first time, and just 65 percent of those students were accepted."); Karen W. Arenson, *Applications to Colleges are Breaking Records*, N.Y. TIMES, Jan. 17, 2008, <http://www.nytimes.com/2008/01/17/education/17admissions.html> (stating "Harvard said Wednesday that it had received a record number of applicants — 27,278 — for its next freshman class, a 19 percent increase over last year. Other campuses reporting double-digit increases included the University of Chicago (18 percent), Amherst College (17 percent), Northwestern University (14 percent) and Dartmouth (10 percent)."); California State University, *California Receives Record Number of Applications for Fall 2008*, Feb. 1, 2008,



now looking at criteria beyond just grade point averages and standardized test scores to determine which applicants will receive acceptance letters. According to the dean of admissions for Syracuse University, the selection process "isn't any longer about admitting students who would be successful and denying those who wouldn't. It is moving into an area of selecting people who will bring something to your campus and contribute."<sup>238</sup> For students with misdemeanor convictions, this new trend in the admissions criteria can certainly limit—or seem to limit—the field of potential colleges.<sup>239</sup> One Oregon teenager had a stellar academic record, but also a conviction for shoplifting a shirt.<sup>240</sup> He wondered if it was even "worth it to apply[,]" to schools inquiring about criminal misconduct.<sup>241</sup> At the time he was interviewed, the teen said that he had "only applied to universities that do not ask about such issues and he [was] hesitant to apply to those that do."<sup>242</sup>

The issues raised by minor convictions can also surface later. Indeed, students convicted of crimes are often surprised to learn that their schools have policies which support punishment of criminal conduct in addition to court sanctions,<sup>243</sup> even for crimes which did not occur on school property.<sup>244</sup> Student conduct policies often include broad language

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[http://www.calstate.edu/pa/news/2008/Record\\_Number\\_Undergraduate.shtml](http://www.calstate.edu/pa/news/2008/Record_Number_Undergraduate.shtml) (providing "The California State University has received a record 515,448 undergraduate applications for fall 2008 admissions as of January 29. This represents an increase of 47,967 applications received to date from the same time period last year."). As stated in a recent Kansas City newspaper article: Enrollments have grown at many colleges and universities during the last decade as baby boomers' children graduated high school, national experts say. But this year may be a bumper crop for public institutions across the country, with record freshman classes predicted from San Diego State University in the west to Virginia Tech in the east.

See Mara Rose Williams, *Freshmen Flock to Universities*, KANSAS CITY STAR (Mo.), June 3, 2008, at A-1.

238. Pappano, *supra* note 234.

239. See Larry Gordon, *Does a Pot Bust Trump a 4.0 GPA?*, L.A. TIMES, Dec. 5, 2007, <http://www.latimes.com/news/education/la-me-admit5dec05,1,1651158.story?coll=la-news-learning>.

240. *Id.*

241. *Id.*

242. *Id.*

243. See, e.g., University of Colorado Office of Judicial Affairs, *The Most Frequently Asked Questions by Students About Judicial Affairs*, <http://www.colorado.edu/studentaffairs/judicialaffairs/student-faq.html> (last visited Oct. 27, 2007). The University of Colorado website explains to students that being charged in court or being referred to judicial affairs for additional discipline is not double jeopardy. *Id.* "As a student, you are held responsible by the university for your behavior under the Student Conduct Code, rather than criminal statutes." *Id.*

244. See, e.g., The University of Virginia, *Good Neighbor Guide* (2006), [http://www.virginia.edu/communityrelations/off\\_grounds\\_guide.pdf](http://www.virginia.edu/communityrelations/off_grounds_guide.pdf) (explaining that students



regarding what degrees of off-campus criminal misconduct will result in disciplinary action by the school. For example, the Western State College of Colorado *Policy Regarding Off-Campus* states:

[A] student's behavior in the larger community may be grounds for misconduct action, provided that the behavior could have serious adverse impact on the college community. The College believes that all students are responsible for obeying federal, state, and municipal laws; violation of these laws can lead to misconduct action by the college.<sup>245</sup>

In order to enforce these policies punishing crimes committed off-campus, schools work with other academic institutions and state agencies to stay informed of instances of such student misconduct.<sup>246</sup> Going one step further, some schools require students to report *themselves* to the Office of the Dean of Students in the event of "[a]ny arrests or convictions for violation of federal, state, local, or international law . . . ."<sup>247</sup> A

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living off campus are still subject to the University Judiciary Committee for any violation of federal, state, or local law); see also Kara Rowland & Whitney Garrison, *Eight Students, Seven Others Arrested in Drug Bust*, THE CAVALIER DAILY, Oct. 6, 2003, <http://www.cavalierdaily.com/news/2003/oct/06/eight-students-seven-others-arrested-in-drug-bust/> (adding that University of Virginia students involved in drug trafficking, if convicted, could face charges for violating the University's standard code of conduct).

245. See Western State College of Colorado, *Institutional Security Policies & Crime Statistics* (2008), [http://www.western.edu/studaff/handbook/crime\\_report.html](http://www.western.edu/studaff/handbook/crime_report.html) (last visited on Oct. 27, 2008).

246. See, e.g., Virginia Tech, *University Policies for Student Life* § 3A, <http://www.judicial.vt.edu/upsl.php#jurisdiction>; see also Colorado University, *Ralphie's Guide to Student Life: Safety*, <http://www.colorado.edu/ralphie/ralphie.cgi?file=s/safety.html> (last visited on Oct. 27, 2008). The Virginia Tech University policy explains:

University detectives coordinate with the district or city attorney's offices for the filing of criminal charges. Cases involving students also are referred to the Office of Judicial Affairs for review and possible university sanctions. UPD crime reports containing information that might affect the security of other university units are routed to those units and appropriate administrators.

*Id.*

247. See University of Virginia, *Non-Academic Regulations*, [http://records.ureg.virginia.edu/content.php?catoid=7&page=08b\\_non\\_academic\\_regulations.htm](http://records.ureg.virginia.edu/content.php?catoid=7&page=08b_non_academic_regulations.htm) 1 (last visited on Oct. 27, 2008). Other schools have similar self-reporting policies. See Greenville Technical College Health Science/Nursing Division, *Criminal Background Check Policy* (July 14, 2006),

[http://www.gyltec.edu/academics/health\\_nursing/CRIMINAL\\_BACKGROUNDCHECK.POLICY0706.pdf](http://www.gyltec.edu/academics/health_nursing/CRIMINAL_BACKGROUNDCHECK.POLICY0706.pdf). Greenville Technical College in South Carolina requires students in the Healthcare Science/Nursing Division to "[r]eport within 3 calendar days to the Assistant Dean of Health Science/Nursing any arrests and/or criminal charges or convictions filed subsequent to the completion of the criminal background check. Failure to report will make the student subject to administrative withdrawal from the program." *Id.* Troy University's School of Nursing, in Alabama, has a similar disclosure policy which requires students to:

[R]eport any arrests or legal convictions including, but not limited to, misdemeanors, felonies, sexual offender convictions or governmental sanctions . . . . Failure to report arrests or legal convictions will result in dismissal from the School of Nursing . . . .

student's failure to report an arrest or conviction could lead to further discipline by the University, should the misconduct come to the attention of school administrators.<sup>248</sup>

Student conduct policies allowing for punishment of crimes committed off-campus are not empty threats. Schools can, and do, sanction students for these crimes. In a move that garnered much attention, and ultimately resulted in various lawsuits, the University of Virginia took action against three students for assaulting another student off campus, in the Charlottesville area.<sup>249</sup> The three students who all pled guilty or no contest to criminal charges, were convicted of misdemeanors.<sup>250</sup> After the court proceedings, the University imposed its own additional sanctions and suspended all three students (with one student's suspension for two full years) and required that two of the students complete seventy-five hours of community service and the other student complete 100 hours of community service.<sup>251</sup>

Not surprisingly, institutions are particularly concerned with violations of the law involving alcohol and drugs.<sup>252</sup> Here is Virginia

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At such time a nursing student is arrested, the student has 24 hours to report this arrest to the appropriate Program Director. Failure to report the arrest will result in automatic dismissal from the School of Nursing.

Troy University College of Health and Human Services, School of Nursing, *Disclosure of Legal Convictions and Arrests* (2005),

<http://troj.troy.edu/nursing/pdf/BSNorientation.pdf>. At the University of Miami, students employed as part of the Federal Work Study program have the responsibility to disclose to their employer any arrests or convictions occurring after their date of hire. See University of Miami Office of Student Employment, *Employment Practices and Procedures Manual*, [http://www6.miami.edu/UMH/CDA/UMH\\_Main/0,1770,13439-1;13447-2;24490-3,00.html](http://www6.miami.edu/UMH/CDA/UMH_Main/0,1770,13439-1;13447-2;24490-3,00.html) (last visited on Oct. 27, 2008). "Upon this disclosure, or if the University discovers an arrest or conviction has occurred, the employer may take action as it deems necessary to protect the University community, which may include suspension of the student-employee pending further review or immediate termination." *Id.*

248. *Id.* (indicating that before a review is conducted by the police or University officials, there may be action taken by the hiring department).

249. See Maria Tor, *Judge Throws Out Part of Tigrett Suit*, THE CAVALIER DAILY, June 15, 2000, available at <http://www.cavalierdaily.com/CVArticle.asp?ID=4560&pid=583>; *Tigrett v. Rector & Visitors of the Univ. of Va.*, 290 F.3d 620, 621-22 (4th Cir. 2002).

250. See John Clark, *Kory May Sue Smith, Kintz, Tigrett for Personal Injury*, THE CAVALIER DAILY, Nov. 17, 1999, available at

<http://www.cavalierdaily.com/CVArticle.asp?ID=2205&pid=506>. One of the students was sentenced to 12 months in jail with all but 10 days suspended, while the other two received a sentence of 30 days with all but eight days suspended. Jacqueline Roper, *University to Begin Defense Against Smith Lawsuit Today*, THE CAVALIER DAILY, Apr. 25, 2008, available at <http://cavalierdaily.student.virginia.edu/CVArticle.asp?ID=5962&pid=633> (listing the suspensions).

251. See Rector, *supra* note 249 at 625.

252. The University of Oklahoma, *Student Alcohol Policy*, <https://webapps.ou.edu/alcohol/policy.cfm>.



Tech's policy regarding criminal activity occurring off-campus:

Disciplinary action may be taken by the university for any act constituting a violation of the law when the act is contrary to the university's interests as an academic community . . . . The university is especially concerned about high-risk consumption of alcohol and other drug use which threatens the lives, health, safety, and academic success of our students and has deemed off-campus violations of the alcoholic beverage and illegal drug policies to be actionable in the university judicial system.<sup>253</sup>

To further its goal of preventing alcohol and drug abuse, Virginia Tech, punishes, for example, students convicted of driving under the influence (DUI).<sup>254</sup> Generally, when students with no prior alcohol-related offenses are convicted of DUI offenses, they are given deferred suspensions from school and must take part in an "educational experience" designed to teach the students responsible decision making.<sup>255</sup> When students with prior alcohol-related offenses are convicted of a DUI, they are typically suspended from Virginia Tech and must take part in an educational experience upon their return to campus, wholly part from any punishment from the criminal justice system.<sup>256</sup>

For students who are convicted of crimes, the range of sanctions a

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[A]ll students who are currently enrolled at the University of Oklahoma or are pre-enrolled for subsequent semesters and have either attended the institution for at least one semester in the current or past academic year are responsible for following federal, state and local laws, the Student Code of Responsibilities and Conduct, and the Student Alcohol Policy . . . . To curtail alcohol abuse on and off campus, the university has adopted a mandatory, minimum "3 Strikes" policy. The first alcohol violation, whether off campus or on campus, automatically will result in appropriate parent/guardian notification and further alcohol education. A second offense will also automatically carry parent/guardian notification and an appropriate sanction. A third violation will result in automatic suspension from the university for a minimum of one semester.

*Id.*

253. See Virginia Tech, *University Policies for Student Life* § 3A, <http://www.judicial.vt.edu/upsl.php>; see also Eastern Washington University, *Alcohol Policy*, <http://www.ewu.edu/x4333.xml>, is similar:

The purpose of this policy is to further the university mission by creating a safe environment for student learning. To accomplish this, the university will support the enforcement of federal, state, and local laws, as well as its own alcohol and drug policies and procedures . . . . Eastern Washington University . . . complies with and upholds all federal, state, and local laws that regulate or prohibit the possession, use, or distribution of alcohol. Violations of such laws that come to the attention of university officials will be addressed within the university or through prosecution in the courts, or both.

*Id.*

254. See Virginia Tech, *Judicial Affairs, Sanction Information*, <http://www.judicial.vt.edu/sanctionrange.php>.

255. See *id.*

256. See *id.*



school can impose on a student is generally vast, from formal warnings to permanent expulsion.<sup>257</sup> Though penalties such as suspension and expulsion are particularly disturbing to a student's daily life, any disciplinary action can affect a student for years to come as he or she applies to graduate schools and attempts to become a member of a professional organization.<sup>258</sup>

c. Housing

The Housing Opportunity Program Extension Act of 1996 gives public housing authorities the right to access criminal files of an applicant or tenant, and also records from drug treatment facilities.<sup>259</sup> The purpose of the law is to assist authorities in deciding whether the applicant is currently engaging in illegal use of a controlled substance.<sup>260</sup> While this information must be kept confidential,<sup>261</sup> applicants with misdemeanor convictions could face serious consequences in the housing application process. In many places, the housing authority has the discretion to deny admission to applicants if they—or members of family—have been convicted of certain misdemeanors such as those involving drug use.<sup>262</sup> Federal law is quite specific, denying applications if:

[A]ny member of the applicant's household is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing agency employees.<sup>263</sup>

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257. See *id.*

258. See, e.g., William and Mary Law School, *Application for Admission*, [http://www.law.wm.edu/law/documents/jd\\_application07.pdf](http://www.law.wm.edu/law/documents/jd_application07.pdf) (asking law school applicants whether they have been subject to disciplinary action for scholastic or other reasons in any of the colleges, universities, graduate or professional schools they have attended); see also Virginia Board of Bar Examiners, *Applicant's Character and Fitness Questionnaire 7*, <http://www.vbbe.state.va.us/pdf/LRC&FQuestion.pdf> (requiring Virginia State Bar applicants to indicate whether they have ever been disciplined by a college, university, or any other post-high school educational facility).

259. See 42 U.S.C. § 1437d(s) (2006). The National Crime Information Center, police departments, and other law enforcement agencies must provide conviction materials for "purposes of applicant screening, lease enforcement, and eviction." § 1437d (q)(1)(A).

260. See § 1437d (t)(1).

261. See § 1437d (t)(2).

262. 42 U.S.C. § 13662 (1999).

263. See 42 U.S.C. § 13661(c) (1999). For public housing purposes, "drug-related criminal activity means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance." 42 U.S.C. § 1437a(b)(9) (2006).

Further, once a tenant resides in public housing, a misdemeanor committed even by others can interfere with the tenant's ability to remain there.<sup>264</sup> In 2002, the Supreme Court held that local public housing authorities have the right to terminate tenants whose guests or family members engage in substance abuse,<sup>265</sup> whether or not the tenant knew or had reason to know about the activity.<sup>266</sup> This "one-strike" policy can lead to evictions for even minor cases of drug-related activity, as in numerous instances in which tenants were evicted because family members smoked marijuana in an apartment complex parking lot.<sup>267</sup> Although under California law, possession of "not more than 28.5 grams of marijuana, other than concentrated cannabis" constitutes a misdemeanor punishable by a maximum \$100 fine,<sup>268</sup> the relatives of the criminals faced eviction in the case.<sup>269</sup> These harsh penalties exist not only for drug offenses, but for any other criminal offense that "threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants", whether the offense occurs on or off the premises, with or without the tenant's knowledge.<sup>270</sup>

Once a tenant has been evicted from public housing for a drug-related crime, including a misdemeanor such as possession of marijuana, she "shall not be eligible for federally assisted housing during the 3-year period beginning on the date of such eviction" unless she completes an approved rehabilitation program.<sup>271</sup> Clearly, misdemeanor crimes can have dire effects on assisted housing, both presently and in the future, even if the actual tenant on the property did not commit the crime.<sup>272</sup>

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264. See 42 U.S.C. § 13662(a)(1) (1999).

265. See *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 136 (2002).

266. See *id.* The Anti-Drug Abuse Act "requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity." *Id.*

267. *Id.* at 128.

268. See CAL. HEALTH & SAFETY CODE § 11357(b) (2008).

269. See *Rucker*, *supra* note 265 at 128.

270. 42 U.S.C. § 1437d(k) (2006).

271. See 42 U.S.C. § 13661(a) (1999).

272. Other areas are affected too, such as parental rights. See generally N.Y. SOCIAL SERVICES LAW § 378-a (McKinney 2007) (explaining a misdemeanor conviction may also affect the parental rights of the offender. In some states, a conviction for any crime of a prospective foster or adoptive parent—or any individual residing with the prospective parent—may result in a denial for the foster or adoptive application). Upon a finding of a criminal record for a certified foster parent, potential adoptive parent, or resident with either, the "authorized agency shall perform a safety assessment of the conditions in the household . . . [and] shall thereafter take all appropriate steps to protect the health and safety of such child or children, including, when appropriate, the removal of any foster child or children from the home." § 378-a. Although the authority to deny foster or adoptive applications for misdemeanor convictions is discretionary for



#### d. Immigration Proceedings

Problems for non-U.S. citizens convicted of minor crimes may even be greater. These people may be removed from the country, or deemed “inadmissible” for immigration purposes.<sup>273</sup> The commission of crimes involving moral turpitude (“CMT”) always renders an alien inadmissible.<sup>274</sup> An evaluation of moral turpitude does not hinge on the severity of the crime—or even its punishment—but rather the intent of the criminal in committing the offense.<sup>275</sup> A crime involving specific intent, such as larceny,<sup>276</sup> constitutes a CMT; however, in some cases, aggravating factors may elevate a non-CMT to a CMT.<sup>277</sup> Moral turpitude is determined by the statutory definition of the crime and not the facts underlying the conviction.<sup>278</sup>

There are two important exceptions to removability due to commission of a CMT. First, if the individual committed the CMT while

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the authorized agency, nonetheless a misdemeanor conviction may expose potential parents to serious familial repercussions. See § 378-a 2(h).

273. See 8 U.S.C.A. § 1182 (2)(A)(I) (showing that Under the Immigration and Nationality Act § 240, conviction includes a “formal judgment of guilt of the alien entered by a court” or any adjudication in which “a judge or jury has found the alien guilty[,] . . . the alien has entered a plea of guilty or nolo contendere[,] or [the alien] has admitted sufficient facts to warrant a finding of guilt” and “some form of punishment, penalty, or restraint on the alien’s liberty” has been imposed). Preston, *Perfectly Legal Immigrants, Until They Applied for Citizenship*, N.Y. TIMES, Apr. 12, 2008, available at <http://www.nytimes.com/2008/04/12/us/12naturalize.html?hp> (showing the strikingly more severe consequences here being seen in recent years). She recounts the story of one legal immigrant—an electrical engineer living in the U.S. for almost two decades—who “discovered that a 10-year-old conviction for domestic violence involving a former girlfriend, even though it had been reduced to a misdemeanor and erased from his public record, made him ineligible to become a citizen—or even to continue living in the United States.” *Id.*

274. See 8 U.S.C.A. § 1182(a)(2)(A)(i)(I). This includes convictions of CMTs, admission to convictions of CMTs, as well as commission of acts which have the same “essential elements” of a CMT. *Id.* The definition does not extend, however, to “purely political offense[s].” *Id.* See generally Vargas-Padilla, *Immigration Consequences of Criminal Conduct*, III CRIM. LAW BRIEF (American University 2007), at 24, available at <http://www.wcl.american.edu/journal/clb/issues.cfm>.

275. See *id.*

276. See U.S. DEP’T OF STATE, 9 FOREIGN AFFAIRS MANUAL NOTES 40.21(A) N2. MORAL TURPITUDE (2005) [hereinafter FAM], available at <http://www.state.gov/documents/organization/86942.pdf>.

277. See Vargas-Padilla, *supra* note 274, at 26 (“assault and battery with a deadly weapon has long been deemed a crime involving moral turpitude, because the knowing or attempted use of deadly force is deemed an act of moral depravity that takes the offense outside the ‘simple assault and battery’ category.”).

278. See FAM, *supra* note 276. This “categorical approach” allows for the divisibility of the statute of conviction provided that the statute combines both CMTs and non-CMTs in a single code section. See also Vargas-Padilla, *supra* note 274 (depicting the process of removal and conviction).



underage, it will not be used to remove him.<sup>279</sup> Second, if the crime is deemed a “petty offense,” then it will not serve as a basis for removal.<sup>280</sup> A “petty offense” means the potential imprisonment for a conviction does not exceed one year and the actual sentence imposed does not exceed six months.<sup>281</sup> However, any conviction “relating to a controlled substance” renders an alien automatically inadmissible regardless of sentence.<sup>282</sup> The statute broadly encompasses a wide array of drug offenses and convictions.<sup>283</sup> The statutory exception excludes convictions for “a single offense involving possession for one’s own use of 30 grams or less of marijuana.”<sup>284</sup> Courts generally construe this exception narrowly.<sup>285</sup> Aggravated felony convictions also serve as a means for deportability or removal, which can include misdemeanor convictions analogous to federal felonies—enumerated in 18 U.S.C.A. § 924(c)(2)—under drug trafficking laws.<sup>286</sup> However, the state drug conviction must be punishable as a federal felony to substantiate removal.<sup>287</sup> Therefore, some misdemeanor convictions may not qualify.<sup>288</sup>

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279. See 8 U.S.C.A. § 1182(a)(2)(A)(ii)(I). The automatic CIMT exclusion does not apply if: [T]he crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States.

§ 1182(a)(2)(A)(ii)(I).

280. See Vargas-Padilla, *supra* note 274, at 26.

281. 8 U.S.C.A. § 1182(a)(2)(A)(ii)(II). The automatic CIMT exclusion does not apply if: [t]he maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

§ 1182(a)(2)(A)(ii)(II).

282. See 8 U.S.C.A. § 1182(a)(2)(A)(i)(II).

283. See, e.g., *Matter of Hernandez-Ponce*, 19 I&N Dec. 613 (BIA 1988) (stating that respondent was deportable for two convictions for use of phencyclidine, commonly known as “PCP”).

284. See 8 U.S.C.A. § 1227(a)(2)(B)(i).

285. See, e.g., *Matter of Moncada-Servellon*, 24 I&N Dec. 62, 62–68 (BIA 2007) (finding that the exception did not apply to an alien “convicted under a statute that has an element requiring that possession of the marijuana be in a prison or other correctional setting”).

286. See Vargas-Padilla, *supra* note 274, at 26.

287. See *Lopez v. Gonzales*, 549 U.S. 47, 51 (2006) (finding that, since the defendant’s state offense would not be punishable under the federal system, it would not be a sufficient basis for removal).

288. Many defendants have raised the issue of ineffective assistance of counsel with cases in which the defense attorney failed to warn of potentially serious immigration consequences resulting from pleas to even minor charges. These claims have not been successful. See *United States v. Fry*, 322 F.3d 1198, 1200 (9<sup>th</sup> Cir. 2003) (stating that most courts conclude that

This chart, prepared by my colleague, Angela Banks, may be useful in seeing the range of offenses subject to sanction.

	INADMISSIBLE GROUNDS	DEPORTABLE GROUNDS
Crimes involving moral turpitude (CMT)	INA § 212(a)(2)(A)(i)(I) Conviction of, admission of, or admission of acts constituting a crime involving moral turpitude	INA § 237(a)(2)(A)(i) Conviction of a crime involving moral turpitude within 5 years after the date of admission & sentence of one year or more may be imposed.
CMT youth exception	INA § 212(a)(2)(A)(ii)(I)	
CMT petty offense exception	INA § 212(a)(2)(A)(ii)(II)	
Controlled substance	INA § 212(a)(2)(A)(i)(II) Conviction of, admission of, or admission of acts constituting a violation of any law or regulation of the U.S. or foreign country relating to a controlled substance	INA § 237(a)(2)(B)(i) Conviction of a violation of State, U.S., or foreign laws relating to a controlled substance
30 gram exception for controlled substances		INA § 237(a)(2)(B)(i)
Aggravated felony conviction		INA § 237(a)(2)(A)(iii) "Any alien who is convicted of an

"deportation is a collateral consequence of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel"); *see also* *Broomes v. Ashcroft*, 358 F.3d 1251, 1254 (10<sup>th</sup> Cir. 2004) (claim of effective assistance of counsel was denied); *State v. Paredes*, 101 P.3d 799, 802 (N.M. 2004) (depicting that the "trial court had no obligation to inform defendant of specific consequences of guilty plea").

		aggravated felony at any time after admission is deportable.”
Aggravated felony defined		INA § 101(a)(43)

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In the several areas noted above, misdemeanor convictions can cause serious collateral consequences for defendants even when unaccompanied at that time by a substantial penalty such as jail time. Recognizing the severity and unfairness of these collateral consequences, the American Bar Association has attempted to persuade lawmakers to limit collateral sanctions that significantly infringe on individual liberties and rights.<sup>289</sup> Such limitations include forbidding “deprivation of legally recognized domestic relationships and rights other than in accordance with rules applicable to the general public,”<sup>290</sup> “ineligibility to participate in government programs providing necessities of life, including food, clothing, housing, medical care, disability pay, and Social Security. . . ,”<sup>291</sup> and “ineligibility for governmental benefits relevant to successful reentry into society, such as educational and job training programs.”<sup>292</sup>

## VI. CONCLUSION

It can be vitally important for a poor criminal defendant to have the aid of a trained lawyer at a criminal trial, even a trial involving the likelihood of little or no serious punishment upon conviction. The Supreme Court’s limitation of the constitutional right to cases in which imprisonment is actually to be imposed made little sense thirty years ago, and it makes even less sense today, as more states than ever recognize the ongoing problems and do give such legal aid even in minor misdemeanor prosecutions.

289. See ABA STANDARDS FOR CRIMINAL JUSTICE ON COLLATERAL SANCTIONS AND DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2003), [www.abanet.org/leadership/recommendations03/103A.pdf](http://www.abanet.org/leadership/recommendations03/103A.pdf).

290. *Id.* at STANDARD 19-2.6(c)(i). Conviction alone:

[S]hould be insufficient to deprive a person of the right to contract or dissolve a marriage; parental rights, including the right to direct the rearing of children and to live with children except during actual confinement; the right to grant or withhold consent to the adoption of children; and the right to adopt children . . . .

*Id.*

291. *Id.* at STANDARD 19-2.6(e).

292. *Id.* at STANDARD 19-2.6(f).



Justice Powell, in *Argersinger*, acknowledged that even minor misdemeanor prosecutions might well require appointed defense counsel.<sup>293</sup> For him, it was to be a case-by-case determination, not wholly dissimilar from that utilized in the deservedly discredited *Betts v. Brady* special circumstances opinion.<sup>294</sup>

I would hold that the right to counsel in petty offense cases is not absolute but is one to be determined by the trial courts exercising a judicial discretion on a case-by-case basis. The determination should be made before the accused formally pleads [and should be based on three considerations]: First, the court should consider the complexity of the offense charged. Second, the court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequence, the greater is the probability that a lawyer should be appointed. Third, the court should consider the individual factors peculiar to each case. These, of course, would be the most difficult to anticipate.<sup>295</sup>

No other Justice joined with him there, and for good reason. These determinations by a trial judge would be exceedingly difficult to make fairly after a trial. Before a trial, they would be just about impossible to make with so little known to the judge about the defendant, the nature of the case, and the likely punishment. This, of course, is what doomed the special circumstances test decades earlier.<sup>296</sup>

Some commentators have argued that critics here should become realistic. State budgets in this area are not likely to expand much, if at all, as a practical matter. Our current system, let alone an extension of the counsel right, deprives some defendants in need of real legal aid while it gives assistance to those not very much in need. The suggestion here is that to comply with *Argersinger*, states should take actions to be certain that truly minor offenses no longer have the possibility of imprisonment, thereby eliminating the counsel mandate. One astute observer put the matter in this way:

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293. See *Argersinger v. Hamlin*, 407 U.S. 27, 31 (1972).

294. *Id.* at 27.

295. See *Argersinger*, 407 U.S. at 63-64.

296. *Id.* at 53. Justice Powell himself seemed to recognize the difficulty here:

If counsel is not appointed or knowingly waived, no sentence of imprisonment for any duration may be imposed. The judge will therefore be forced to decide in advance of trial—and without hearing the evidence—whether he will forgo entirely his judicial discretion to impose some sentence of imprisonment and abandon his responsibility to consider the full range of punishments established by the legislature. His alternatives, assuming the availability of counsel, will be to appoint counsel and retain the discretion vested in him by law, or to abandon this discretion in advance and proceed without counsel.

*Id.*

[I]t makes sense to reallocate resources that otherwise would be spent in support of counsel in those cases by eliminating such cases from the caseloads of indigent defense counsel, thereby redirecting such resources to the support of cases in which the stakes are higher and the impact of counsel appears to be greater.<sup>297</sup>

This position is intriguing, and clearly more workable than that suggested earlier by Justice Powell. For me, however, it is not acceptable for two reasons. First, in my view, *Scott* was wrongly decided and the Constitution truly does mandate counsel in all criminal cases. Second, there are good reasons to impose the counsel requirement in all criminal cases, as indicated above. Even minor cases may become major in later years, and may carry dire collateral consequences. Defendants in those cases need the guiding hand of trained defense counsel.

The United States Supreme Court made some bold and highly significant judgments regarding the right to an attorney for indigents in criminal prosecutions. The decision to limit that right to cases with an imprisonment requirement was surely not one of them. The Court should revisit the matter and decide that indigent defendants should be given appointed counsel in *all* criminal cases, not just in *some* criminal cases.

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297. Hashimoto, *supra* note 87, at 496.