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other is supervised directly by states.[34] While national banks are required to become members of the Federal Reserve System and the Federal Deposit Insurance Corporation (F.D.I.C.)[35] the vast majority of state banks, because of the public's confidence in federal insurance protection, seek to become members at least of the F.D.I.C.[36] The recent trend is for state banks to convert to national charters because of more liberal federal supervisory attitudes[37] and because membership in the F.D.I.C. has virtually become a prerequisite for a state bank to do business. As between the two, as far as operations are concerned, there is no distinction to be drawn. The Court failed to hold the modern day similarity as controlling in view of the fact that Congress had preempted the field.

It appears from the instant case that the Court does not, as Justice Thurgood Marshall urged in his dissent, " 'feel free to bring its opinions into agreement with experience and with facts newly ascertained. . . .' "[38] In view of the present day functions of the national banks, it is unfortunate that the Court could not question anachronistic precedent and advise Congress that change in this area is essential to sustain the dual banking system.

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MISDEMEANANT'S RIGHT TO COUNSEL: IMPRISONMENT STANDARD

James v. Headley, 281 F. Supp 588 (S.D. Fla. 1968)

Petitioner Betty James was charged with five separate offenses; petty larceny, resisting arrest, and three charges of assault and battery upon a police officer. Petitioner Raymond Miller was charged with two separate offenses; petty larceny and resisting arrest. They were found guilty in a municipal court and sentenced to 60 days for each offense, sentences to run consecutively. The total period of confinement for James was 300 days; for Miller 120 days. The petitioners sought a federal habeas corpus action on the ground that they were denied a right to appointed counsel at their

34. 353 Mass. 172, ___, 229 N.E.2d 245, 256 (1967).

35. Annual Report of the Federal Deposit Insurance Corp. (1966).

36. *Id.*

37. Miami (Fla.) Review, Oct. 24, 1968, at 1, col. 3. An example of the more liberal federal requirements under the National Banking Act is that the directors of the national banks need only be elected by the shareholders (12 U.S.C. §71 (1964)) while under the corresponding Florida statute (FLA. STAT. §659.11 (2) (1967)) the director of a state bank must not only be elected by the shareholders, but must also be a stockholder himself.

38. 88 S. Ct. at 2178 (dissenting opinion).

trials. The federal court for the southern district of Florida stated that the dividing line between "serious" and "petty" offenses was six months confinement. The court HELD, that since the petitioners were charged with misdemeanors coming within this federal definition of "petty offenses," they had no constitutional right to court appointed counsel.

The instant case raises the still unsolved constitutional issue of whether and to what extent the law should recognize the indigent's right to counsel in misdemeanor proceedings. The critical issues involve both constitutional and practical considerations. In the landmark case of *Gideon v. Wainwright*,[1] the Court declared the right to counsel to be a fundamental and essential requisite of due process. However, the *Gideon* holding is equivocal, for although it clearly establishes an absolute right to counsel in state felony prosecutions, it is unclear whether the right was intended to encompass misdemeanors. Moreover, it is hypothesized that the states cannot realistically meet the demand for legal services that would be imposed upon them by recognition of this right. If extension of the right to all misdemeanor proceedings appears beyond society's present capabilities, are there principled ways to contain the right within manageable proportions?

Since *Gideon*, federal courts have consistently held that the *Gideon* doctrine requires state courts to appoint counsel to defend indigent misdemeanants.[2] The federal standard, established in the Criminal Justice Act of 1964,[3] provides for the appointment of counsel in federal prosecutions of indigent defendants in all cases other than petty offenses. A petty offense is defined as "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine not more than $500 or both."[4] Despite this precedent established by the federal courts, a majority of states have refused to recognize any constitutional obligation to appoint counsel in nonfelony cases even when a misdemeanor conviction carries a substantial prison sentence.[5]

As a result of the equivocal nature of *Gideon* and the Supreme Court's repeated refusal to clarify the holding,[6] a double standard of the due process guarantee has evolved. State courts applying one standard are denying right to counsel,[7] while federal courts, applying a different standard, are requiring it.[8]

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1. 372 U.S. 335 (1963).

2. McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); Harvey v. State, 340 F.2d 263 (5th Cir. 1965); Rutledge v. City of Miami, 267 F. Supp. 885 (S.D. Fla. 1967); Arbo v. Hegstrom, 261 F. Supp. 397 (D. Conn. 1966); Petition of Thomas, 261 F. Supp. 263 (W.D. La. 1966).

3. 18 U.S.C. §3006A (b) (1964).

4. 18 U.S.C. §1 (1964).

5. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 721 (1968).

6. Winters v. Beck, 239 Ark. 1093, 397 S.W.2d 364 (1966), *cert. denied*, 385 U.S. 907 (1966); State v. DeJoseph, 3 Conn. Cir. 624, 222 A.2d 752 (Conn. Cir. 1966), *cert. denied*, DeJoseph v. Connecticut, 385 U.S. 982 (1966).

7. Watkins v. Morris, 179 So. 2d 348 (Fla. 1965).

8. Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).

The primary problem is to establish a feasible standard that will insure an equal application of constitutional guarantees. In this respect the "petty offense" standard completely fails as a meaningful criterion. Admittedly the federal standard is an improvement over the Florida supreme court view that "there is no absolute organic right to counsel in misdemeanor trials."[9] Yet the standard fails to take into cognizance many cases that should be brought within its ambit.

An analysis of the federal criterion reveals that a line is supposedly drawn between those criminal cases requiring and those not requiring counsel to represent indigent defendants. This distinction is made on the basis of the extent of the penalty. Two types of penalties are considered. First, pecuniary loss — if the penalty is less than 500 dollars it is considered of insufficient magnitude and detriment to require counsel. This line is an arbitrary one. An upper limit of 200 or 300 dollars would be just as rational.

The second penalty is loss of liberty. The federal standard concludes that imprisonment for six months or less is not of such significance to entitle a person to the right to counsel. In terms of the loss of one's personal liberty, there is no legitimate distinction between six months in jail for a petty offense, or six months and a day in jail for a misdemeanor conviction. This was recognized in *Evans v. Rives*[10] where a federal district court stated: "so far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one."

As the instant case illustrates, a conviction of several petty offenses may result in a period of incarceration much longer than six months. Under the "petty offense" standard, the indigent defendant is not privileged to the right of court appointed counsel in such an instance. There is little rationale behind extending the right of counsel to a defendant who is convicted of a misdemeanor and sentenced to eight months in jail while depriving such right to a defendant convicted of two petty offenses and sentenced to six months imprisonment on each charge.

Much of the debate concerning the extension of the right to appointed counsel beyond *Gideon* is related to the quest for a principle that will contain that right within financially and logistically feasible bounds.[11] Because of this feared incapacity of the legal profession to adapt to a predicted eight-fold increase[12] in the demand for appointed counsel, many proposals now seek to limit this right rationally and yet fulfill the minimum constitutional requirements.

If the right to counsel is to be restricted, its scope should be limited to offenses where imprisonment is an expected result. The eight jurisdictions that have already extended the right to counsel beyond *Gideon* have merely restricted the scope of this right to offenses punishable by imprison-

9. Watkins v. Morris, 179 So. 2d 348, 349 (Fla. 1965).

10. 126 F.2d 633, 638 (D.C. Cir. 1942).

11. Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 62-88 (1963).

12. 1 L. SILVERSTEIN, DEFENSES OF THE POOR IN THE CRIMINAL CASES IN AMERICAN STATE

ment.[13] In those jurisdictions, "imprisonment" is interpreted as meaning imprisonment-in-law: if the law authorizes a prison sentence to be imposed upon conviction of the offense charged, such an offense is "punishable by imprisonment," thus invoking the right to counsel. Under this standard many misdemeanors, trivial in nature,[14] yet punishable by imprisonment, are granted the right to counsel. Such an inclusive standard necessarily imposes a heavy burden on the legal profession and the public purse.

What is needed, therefore, is an imprisonment standard that is more narrowly defined. This can be accomplished by "shifting from a 'legal' to a 'factual' emphasis."[15] An imprisonment-in-fact standard would require the appointment of counsel only in those classes of cases where there is some likelihood of imprisonment. Thus, appointed counsel would not be provided in all misdemeanor and petty offense proceedings. It would be limited to those that as a matter of fact, put the indigent defendant's liberty in jeopardy.

The imprisonment class standard, however, is not without its own difficulties. The standard presupposes discovery of those classes of misdemeanor offenses that, although in law punishable by imprisonment, in actuality never or rarely result in imprisonment.[16] One field study disclosed that a more

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COURTS 123 (1965).

13. Eight state jurisdictions provide counsel for indigents in all or substantially all misdemeanor cases: CAL. CONST. art. 1, §13; ILL. REV. STAT. ch. 38, §113-3 (b) (Supp. 1969); MD. R. CRIM. P. 719 (b) (2); MASS. ANN. LAWS ch. 221, §34 D (Supp. 1967); MINN. CONST. art. 1, §6; N.H. REV. STAT. ANN. §604-A:1 (Supp. 1967); N.Y. CODE CRIM. PROC. §699 (McKinney Supp. 1968); TEX. CODE CRIM. PROC. ANN. art. 26.04 (1966). Twenty-one state jurisdictions provide counsel in certain misdemeanor cases: ARIZ. R. CRIM. P. 163; COLO. REV. STAT. ANN. §39-21-3 (2) (a) (1963); CONN. GEN. STAT. ANN. §54-81 (a) (1958); DEL. CODE ANN. tit. 29, §4601-7 (Supp. 1966); IDAHO CODE ANN. §§19-851, -852 (1967); IND. CONST. art. 1, §13; IOWA CODE §775.4 (1966); ME. REV. STAT. ANN. tit. 15, §810 (Supp. 1968-1969); MICH. CONST. art. 1, §20; MONT. REV. CODES ANN. §95-1001 (4) (Supp. 1968); NEV. REV. STAT. §§171.370, 193.120, .140 (1967); N.J. STAT. ANN. §§2A:158-1, -22 (Supp. 1967); N.C. GEN. STAT. §15-4.1 (Supp. 1965); N.D. CENT. CODE §29-07-01.1 (Supp. 1967); OKLA. STAT. ANN. tit. 22, §464 (Supp. 1968); ORE. REV. STAT. §133.625 (Supp. 1967); PA. R. CRIM. P. 318; UTAH CODE ANN. §77-64-2 (Supp. 1967); VT. STAT. ANN. tit. 13, §6503 (Supp. 1968); W. VA. CODE ANN. §62-3-1 (Supp. 1968); WIS. STAT. ANN. §957.26 (Supp. 1968). *But see* twenty-one state jurisdictions that recognize no right to appointed counsel in misdemeanor cases: ALA. CODE tit. 15, §§318 (1)-(2) (Supp. 1967); ALASKA R. CRIM. P. 39; ARK. STAT. ANN. §43-1203 (1964); FLA. STAT. §27.51 (1) (1967); GA. CONST. art. 1, §2-105; HAWAII REV. LAWS §253-5 1955), *as amended*, act 179, §1 [1967] Hawaii Laws 175; KAN. STAT. ANN. §62-1304 (1964); KY. REV. STAT. ANN. §543.190 (1963); LA. CRIM. PROC. CODE ANN. art. 513 (West 1966); MISS. CODE ANN. §2505 (Supp. 1966); MO. REV. STAT. §545.820 (1959); NEB. REV. STAT. §§29-1803.01, -1804 (Supp. 1967); N.M. STAT. ANN. §§21-1-1 (92), 41-11-2 (Supp. 1967); OHIO REV. CODE ANN. §2941.50 (Page Supp. 1969); R.I. GEN. LAWS ANN. §12-15-3 (Supp. 1967); S.C. CODE ANN. §17-507 (1962); S.D. CODE §34.1901 (Supp. 1960); TENN. CODE ANN. §§40-2014, -2028 (Supp. 1968); VA. CODE ANN. §19.1-241.1 (1968); WASH. REV. CODE §10.01.110 (Supp. 1968); WYO. STAT. ANN. §§7-7, 9 (Supp. 1967).

14. *E.g.*, FLA. STAT. §823.04 (1967) provides that any owner, custodian, or person in charge of domestic animals is guilty of a misdemeanor if he does not dispose of the carcasses of such animals by burning or burying at least two feet below the ground. FLA. STAT. §877.04 (1967) deems tatooing of minors less than eighteen years of age a misdemeanor.

15. Junker, *supra* note 5, at 709.

16. *Id.* at 710.

than negligible possibility of incarceration exists in all nontraffic misdemeanor cases.[17] Traffic offenders, however, were generally not imprisoned. Out of 40,000 traffic charges only in approximately 4,500 cases were there any possibilities of imprisonment. The study also found that traffic offenders who are in jeopardy of imprisonment fall into clearly definable categories: (1) hit-and-run, reckless, or drunken driving; or (2) an additional traffic violation by an individual subject to a suspended sentence; or (3) an indigent individual unable to pay a fine.[18] It was also determined that the potential demand for counsel in traffic cases is only one-tenth as large by the imprisonment-in-fact standard as that produced by the imprisonment-in-law standard.[19] Thus, adoption of the former would alleviate the legal system's responsibility for the vast majority of traffic offenses.

It could be argued that the right to counsel exists as well in nonimprisonable offenses. Under the imprisonable class standard "the kind of trial a man gets" with respect to nonimprisonable classes of cases would depend "on the amount of money he has."[20] On what grounds may such exclusions be justified? Two rationales may be suggested. First, the consequences of lack of representation in these cases are de minimis, either because the sanctions are slight or the potential difference in outcome resulting from the lack of counsel is insubstantial.[21] Neither incarceration nor stigma results from conviction for such an offense.

Second, the line thus drawn does not profess to be a principled one. It is merely a compromise between constitutional demands and limitations of purse and personnel. The financial and manpower impositions of strict equality cannot reasonably be ignored.[22] Existing institutions cannot administer justice by promising more than they can deliver. On this analysis, the exclusion of nonimprisonable offenses from the scope of the right to counsel would appear justifiable.

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17. A 5% probability of imprisonment was determined to be "more than negligible." Junker, *Report on the Need for Publicly Provided Counsel in King County* (1965), *reproduced in part as* Appendix A to NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, HOW TO ORGANIZE A DEFENDER OFFICE 39-51 (1967).

18. *Id.* at 41-42, 48.

19. Junker, *supra* note 5, at 711.

20. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

21. Kamisar, *Has the Court Left the Attorney General Behind? — The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice*, 54 KY. L.J. 464 (1966).

22. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 158-59 (1967).