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THE RIGHT TO COUNSEL IN MISDEMEANOR CASES

JOHN M. JUNKER*

The indigent misdemeanor's right to appointed counsel¹ has yet to receive explicit constitutional recognition by the United States Supreme Court. And in the absence of such recognition, a large majority of the estimated five million persons annually charged with non-traffic misdemeanors² must, if they are financially unable to hire an attorney,³ face the bewildering, stigmatizing and (especially at this level) assembly-line criminal justice system⁴ without the assistance of counsel. The misdemeanor prosecution is the "Appalachia" of the criminal justice system. At the same time, the misdemeanor's claim to a share in the general affluence could hardly be stronger. It draws doctrinal strength from three powerful constitutional sources: (1) counsel-at-trial cases, like *Gideon v. Wainwright*,⁵ (or *In re Gault*)⁶ arising under the sixth and fourteenth amendments; (2) counsel-on-appeals cases, like *Douglas v. California*⁷ arising under

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¹ Economy of expression has required that several recurring matters be expressed in short-hand terms. They should be understood to have the meaning here ascribed to them. "Indigent" refers not to "a total absence in the accused of all means and resources," but to "a lack of financial resources adequate to permit the accused to hire his own lawyer." See REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 7 (1963) [hereinafter cited as ALLEN REPORT, after Professor Francis A. Allen, chairman of the Committee]. "Misdemeanant" refers to persons accused of misdemeanor offenses as herein defined. See note 170 *infra*. "Appointed counsel" is intended to include all modes of providing lawyers for indigent persons, even though in some jurisdictions such lawyers may not be formally "appointed" by the court.

² 1 L. SILVERSTEIN, DEFENSES OF THE POOR IN THE CRIMINAL CASES IN AMERICAN STATE COURTS 123 (1965) [hereinafter cited as 1 SILVERSTEIN]; *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389, 392 (1966). Since the "Manpower" conferees apparently relied on Silverstein's estimate of the need, it is not surprising that both studies agree on the 5,000,000 figure. What is odd is that Silverstein's 1965 estimate seems to have included traffic cases while his identical 1966 estimate specifically excludes them.

³ Silverstein estimates that at least 25% and perhaps as many as 50% of those charged with misdemeanor offenses are unable to afford an adequate defense. 1 SILVERSTEIN at 125.

⁴ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 29-36 (1967); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); cf. A. TREBACH, THE RATIONING OF JUSTICE 63-64 (1964). On the stigma that attaches even to a minor offense, see Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 SOCIAL PROBLEMS 133 (1962).

⁵ 372 U.S. 335 (1963).

⁶ 387 U.S. 1 (1967).

⁷ 372 U.S. 353 (1963).

the equal protection clause of the fourteenth amendment; and (3) other right-to-counsel cases, like *Miranda v. Arizona*⁸ in which the right is derived from the need to protect other specific constitutional guarantees, or like *United States v. Wade*⁹ and *Gilbert v. California*¹⁰ in which the right is designed to assure fairness during informal proceedings.

Moreover, in every relevant sense, the indigent misdemeanor is indistinguishable from the indigent charged with a felony. Neither is capable, unaided, of providing the kind of challenge that has traditionally been considered essential to assure both the reliability of the criminal process and the containment of governmental power.¹¹ Thus the relevant analytical task at this juncture is not so much the conventional one of evaluating the factors that bear on the question of whether misdemeanants, like felons, ought to be entitled to appointed counsel, but rather to explain why a proposition as doctrinally secure and humanely appealing as the notion that a person accused of a misdemeanor "requires the guiding hand of counsel at every step in the proceedings against him," has thus far failed to produce the apparently inevitable result; why, despite opportunities to confront and resolve these constitutional issues, the Court has thus far withheld its writ. Such an analysis yields more than explanation; it also exposes for consideration the existence and strength of policy elements too often left unanalyzed. Specifically, this line of inquiry forces one to deal with the issues of where, on principle, the right-to-counsel line should be drawn; whether some classes of offenses generally termed "criminal" may legitimately be excluded; and, if so, how one formulates and justifies a standard embodying such exclusions.

These then are the focal tasks of the present inquiry: first, to examine the present status of the misdemeanor's right to counsel under the Constitution; second, to evaluate possible substitutes for the felony standard; and finally, to attempt to explain the longevity of the felony standard in the face of powerful doctrinal and social forces for change. The present status of the misdemeanor's right to appointed counsel, both in law and in fact, is detailed in the Appendix.

⁸ 384 U.S. 436 (1966).

⁹ 388 U.S. 218 (1967).

¹⁰ 388 U.S. 263 (1967).

¹¹ See ALLEN REPORT 8-11; Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957); but see Blumberg, *Covert Contingencies in the Right to the Assistance of Counsel*, 20 VAND. L. REV. 581 (1967), discussed *infra* at text accompanying notes 72-100.

I. THE CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL IN MISDEMEANOR CASES

A. The Sixth Amendment

Although the dominant trend during the period since *Gideon* has been increasingly toward providing counsel for the indigent misdemeanant, in one sense the case for recognition of a sixth amendment right to counsel in such cases has been on the wane. Since *Gideon* involved a felony conviction, conventional analysis would insist that the Court could not there have held that counsel must be appointed in misdemeanor cases. Nor, in the ensuing five years, has the Court yet so held. In this respect, the misdemeanor prosecution must be counted as something of an exception. For the same period has seen a remarkable expansion of the right to appointed counsel in related criminal proceedings, and the trend shows no signs of abating.¹² The misdemeanant—in many ways the most likely candidate for inclusion in the right-to-counsel ranks in the immediate post-*Gideon* era—has been passed over in favor of the suspected offender,¹³ the indicted suspect subjected to surreptitious interrogation,¹⁴ the “in-custody” suspect,¹⁵ the juvenile,¹⁶ the suspect at an identification line-up¹⁷ and, most recently, the probation revokee.¹⁸ During this same period, the Court has refused to review misdemeanor convictions challenged on right-to-counsel grounds.¹⁹ These post-*Gideon* developments open up several analytical avenues. They provide a kind of rhetorical record of the scope of the right to counsel recognized in *Gideon*. Viewed more conventionally, they obviously also provide analogical support for extension of the right to counsel to misdemeanor cases. Finally, the post-*Gideon* counsel cases suggest an explanation for the Court’s refusal thus far to recognize a right to appointed counsel in misdemeanor cases. The last two avenues are explored later in this article;²⁰ the immediate task is to consider the waning strength of the misdemea-

¹² *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Mempa v. Rhay*, 88 S. Ct. 254 (1967).

¹³ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹⁴ *Massiah v. United States*, 377 U.S. 201 (1964).

¹⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁶ *In re Gault*, 387 U.S. 1 (1967).

¹⁷ *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

¹⁸ *Mempa v. Rhay*, 88 S. Ct. 254 (1967).

¹⁹ *Winters v. Beck*, 385 U.S. 907 (1966); *Cortinez v. Flournoy*, 385 U.S. 925 (1966); 385 U.S. 982 (1966); cf. *Heller v. Connecticut*, 88 S. Ct. 213 (1967), cert. denied, (Fortas, J., dissenting).

²⁰ See text accompanying notes 42-48, 63-71 and 162-68 *infra*.

nant's claim to counsel as evidenced by the rhetoric of the post-*Gideon* counsel cases.

As suggested, conventional analysis would require that the holding of the *Gideon* case be stated with reference to the fact that it involved a felony conviction. At an only slightly higher level of abstraction, however, *Gideon* could be characterized as involving a conviction of a crime; and it would not, in most contexts, have been an indefensible position to suggest that any indigent person charged with a crime was, by virtue of *Gideon*, entitled to appointed counsel. No one has suggested, for example, that because the defendant in *Mapp v. Ohio*²¹ was convicted of a felony,²² the fourth amendment prohibition against unreasonable searches and seizures was therefore applicable only to state felony prosecutions.²³ No such argument was ad-

²¹ 367 U.S. 643 (1961).

²² The offense was possession of obscene books and pictures, punishable under Ohio law by not less than one nor more than seven years' imprisonment. The actual sentence was indeterminate, with no possibility of parole until service of "the minimum term provided for such felony." *State v. Mapp*, 170 Ohio St. 427, 166 N.E.2d 387, 388n (1960).

²³ "There is, so far as I understand constitutional history, no distinction under the Fourth Amendment between types of crimes . . . [T]he Fourth Amendment draws no lines between various substantive offenses." *Katz v. United States*, 88 S. Ct. 507, 516 (1967) (concurring opinion).

It may be argued that the suggested analogy between the fourth and sixth amendments is false. The breadth of the protection against illegal searches and seizures, such an argument would run, is simply an accurate reflection of the breadth of the rationale for excluding illegally seized evidence. Exclusion has never been justified as reparation to the victim of an unconstitutional search and seizure; the victim stands instead as the fortuitous champion of the public's right of privacy. The purpose of the exclusionary rule is "to deter—to compel respect for the constitutional guaranty . . . by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). And since privacy is as much invaded in a misdemeanor as in a felony case, the deterrence rationale requires that the exclusionary rule be "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). The rationale of the right-to-counsel is much narrower, the argument continues, since it is designed not to benefit the public but to protect the accused's interest in a reliable adjudication of his guilt or innocence. It follows that the accused's circumstances—such as whether the offense charged is a felony or a misdemeanor—may properly be considered in determining whether to recognize his right to appointed counsel.

The argument is vulnerable on several grounds. While it purports to justify the difference between the scope of the two rights, it fails even to explain that difference. The deterrence rationale does not of its own force demand complete, or even optimal, compliance with the fourth amendment ban on unreasonable searches and seizures. If it is permissible to argue that reliability may be sacrificed in some cases out of deference to other goals of the legal system, it is likewise permissible to suggest that deterrence of unlawful searches and seizures may, in appropriate circumstances, be subordinated to other pressing demands of the criminal process. *Cf. Chapman v. California*, 386 U.S. 18, 42, 44 n.2 (1967) (Stewart J., concurring). Moreover, the argument fails to explain why other sixth amendment rights which, like the right to counsel, are designed to assure the reliability of the criminal process, are applicable in misdemeanor as well as felony proceedings. *See* text at notes 115-27 *infra*.

These responses challenge the assertion that the analogy between the fourth and sixth amendment rights is false on its own terms; they accept the premise of that

vanced by California in opposition to the defendant's reliance, in *Schmerber v. California*,²⁴ on the *Mapp* decision²⁵ even though the conviction there involved the relatively minor misdemeanor of drunken driving, for which the defendant received a thirty-day sentence.²⁶ And although the Court denied the claimed fourth amendment violation in *Schmerber*, it did so on the ground that the search was a reasonable one,²⁷ not on the ground that misdemeanants have no right to be free from unreasonable searches. That a holding of the latter sort would generally be considered exceedingly novel, whereas a similar holding with respect to the right to appointed counsel would not, surely derives from the special way in which lawyers nurtured on *Betts v. Brady*²⁸ and *Bute v. Illinois*²⁹ have come to think about the right to appointed counsel. Those decisions, limiting the right to cases involving "special circumstances" or capital crimes,³⁰ inevitably engendered the belief that while other constitutional rights might be available to criminal defendants generally, the right to appointed counsel was to be granted only sparingly, in cases of unarguable necessity.

The Court's opinion in *Gideon* provided no support for continuing to conceive of the right to counsel in the restrictive, *Bettsian* manner. Indeed, there was good reason to believe that *Gideon* sought to place the right to counsel on an equal plane with other constitutional rights. The opinion is framed not in terms of the rights of the felony defendant, but consistently and, one infers, studiously, in terms of the rights of persons "charged with crime."³¹ Such a characterization very arguably includes persons charged with crimes called misdemeanors. And

argument that the right to be free from unreasonable searches and seizures protects the public generally, whereas the right to counsel protects only the accused's individual interest in the right determination of his guilt or innocence. The critical defect in the argument, however, is that this basic postulate is false. Society also benefits from the assurance of reliability that counsel for the indigent is designed to provide. The point is nowhere more convincingly made than in the Allen Report:

The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions.

ALLEN REPORT 10.

²⁴ 384 U.S. 757 (1966).

²⁵ Brief for Respondent at 8-12, *Schmerber v. California*, 384 U.S. 757 (1966).

²⁶ *Id.* at 7.

²⁷ 384 U.S. at 770-72.

²⁸ 316 U.S. 455 (1942).

²⁹ 333 U.S. 640 (1948).

³⁰ *Bute v. Illinois*, 333 U.S. 640, 676, 677 (1948) (dictum).

³¹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

the Court's per curiam decision in *Patterson v. Warden*,³² applying *Gideon* to misdemeanors punishable by felony-length terms of imprisonment, increased the possibility that "crime," not "felony," was the measure of the right. Indeed, it is fair to say that, at that juncture, the apparent breadth of the *Gideon* opinion would also have supported the per curiam inclusion of some or all conventional misdemeanor offenses within the scope of the sixth amendment right to counsel. Five years later it has become abundantly clear that the Court believes that *Gideon* does not, of its own force, include misdemeanor offenses. The first task, therefore, is to trace the decline of the misdemeanant's right from its *Gideon-Patterson* apogee.

For three years following *Gideon* the situation remained relatively unchanged. The Court's references to *Gideon* in *Massiah v. United States*,³³ *Escobedo v. Illinois*,³⁴ and *Miranda*³⁵ manifested no intent to disturb the ambiguous status quo by recharacterizing *Gideon* either more broadly or more narrowly than originally formulated. In 1966 the ambiguity ended. The occasion was the Court's denial of certiorari in *Winters v. Beck*³⁶ and *DeJoseph v. Connecticut*,³⁷ cases in which state courts had refused to apply *Gideon* to misdemeanor prosecutions.³⁸ Dissenting from the denial of certiorari in *Winters*, Mr. Justice Stewart took care to intimate no opinion as to the "ultimate resolution of this problem," but had no doubt that "the answer cannot be made to depend upon artificial or arbitrary labels of 'felony' or 'misdemeanor' attached to criminal offenses by 50 different states."³⁹ Dissenting in *DeJoseph*, Mr. Justice Stewart, joined by Justices Black and Douglas, urged the Court to "make clear the meaning of *Gideon*

³² 372 U.S. 776 (1963), *rev'g* *Patterson v. State*, 227 Md. 194, 175 A.2d 746 (1961) and remanding for "further consideration in light of *Gideon*..." The offenses involved, although labelled "misdemeanors" under Maryland law, carried maximum terms of two years' imprisonment. On remand, the Maryland court found *Gideon* to be controlling, reversed the convictions and remanded for trial with appointed counsel. *Patterson v. State*, 231 Md. 509, 191 A.2d 237 (1963).

³³ 377 U.S. 201, 205 (1964).

³⁴ 378 U.S. 478, 487 (1964).

³⁵ 384 U.S. 436, 472-73 (1966).

³⁶ 385 U.S. 907 (1966).

³⁷ 385 U.S. 982 (1966).

³⁸ In *Winters*, the Arkansas Supreme Court affirmed the petitioner's conviction for "immorality" under a city ordinance, for which he was sentenced to thirty days in jail and to pay a fine of \$254, converted by state law into 254 days of additional imprisonment because of petitioner's inability to pay the fine. *Winters v. Beck*, 239 Ark. 1093, 397 S.W.2d 364 (1966). In *DeJoseph*, defendant was convicted of non-support, an offense punishable by up to a year's imprisonment, and received a six-month sentence. The right-to-counsel issue was seriously blurred by the Connecticut court's finding that defendant had failed adequately to demonstrate his indigence. *State v. DeJoseph*, 222 A.2d 752, 759 (Conn. Cir. 1966).

³⁹ 385 U.S. at 908-09.

v. Wainwright.”⁴⁰ He again scrupulously avoided suggesting a view on the merits of the issue. It is clear by this time, however, that what was once in doubt—whether *Gideon* itself ruled cases such as *Winters* and *DeJoseph*—was no longer in question, the ambiguity having been resolved against inclusion of misdemeanor offenses.

Thus, in 1967, it is not surprising to find Mr. Justice Marshall saying for the Court in *Mempa v. Rhay*, “in *Gideon v. Wainwright* . . . this Court held . . . that there was an absolute right to appointment of counsel *in felony cases*.”⁴¹ I do not of course mean to suggest that any of the foregoing bars a subsequent holding extending *Gideon* to include some or all misdemeanor proceedings. The position is no longer tenable, however, in contrast to the situation nearly five years ago, that that issue has *already* been decided in *Gideon*.

Although the Court in *In re Gault*, as in *Mempa*, read *Gideon* as requiring appointed counsel only in felony cases,⁴² its recognition of the juvenile’s right to counsel at a delinquency adjudication puts in question the continued vitality of the felony standard. The argument, however, has its defects. Narrowly read, *Gault* is entirely consistent with the felony standard. Although Gerald Gault’s offense was a misdemeanor for which an adult could have been imprisoned for no more than two months, as a 15-year-old delinquent committed to the state Industrial School “for the period of his minority,”⁴³ he received, in effect, a six year “sentence.” Moreover, as the Court notes,⁴⁴ virtually every delinquency adjudication exposes the juvenile to commitment for a minimum of three years—the difference between the juvenile court’s jurisdiction to adjudicate, age 18 or under, and its power to commit for the period of the child’s minority. Under these circumstances, it may be argued, the right to counsel recognized in *Gault*⁴⁵ involves no extension of the *Gideon-Patterson* standard. Indeed, since the commitment of a juvenile also operates to terminate the parents’ right of custody, the *Gault* decision may be said to follow a fortiori from *Gideon-Patterson*.

⁴⁰ *Id.* at 982.

⁴¹ 88 S. Ct. 254, 256 (1967) (emphasis added). Similarly, in dissenting from the Court’s denial of certiorari in *Heller*, Mr. Justice Fortas argued that the Court should consider “[w]hether a prosecution for being ‘found intoxicated,’ subjecting the defendant to as much as 30 days’ imprisonment, is within the category of *serious state criminal prosecutions* to which the federal constitution guarantee of assistance of counsel applies, under the decisions of this Court,” citing *Gideon*. *Heller v. Connecticut*, 88 S. Ct. 213, 214 (1967) (emphasis added).

⁴² 387 U.S. at 29.

⁴³ *Id.* at 7.

⁴⁴ *Id.* at 37 n.60.

⁴⁵ *Id.* at 36.

More generously interpreted, however, *Gault* offers hope for the adult misdemeanor. The decision rests not only on the conclusion that a delinquency proceeding "is comparable in seriousness to a felony prosecution;" it also finds that counsel is essential to a fair and reliable adjudication of the issues raised, as in *Gault*, by a misdemeanor accusation. In this respect, the adult misdemeanor, no less than

[t]he juvenile [,] needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.⁴⁶

This finding necessarily rejects the argument that appointed counsel may be unnecessary in misdemeanor cases because such charges are inherently less complicated than felony prosecutions. On the contrary, whether Gerald Gault's conduct was within the statute prohibiting "the use of vulgar language 'in the presence or hearing of' a woman or child" was a matter about which the juvenile court judge was himself "uncertain,"⁴⁷ and it raised factual and legal issues as bewildering to the layman as any that might have been raised by a felony indictment.

Moreover, there is something at least anomalous about a constitutional scheme that provides counsel at the "critically important" hearing to waive juvenile court jurisdiction to insure that "[t]he child is protected against [the] consequences of adult conviction;"⁴⁸ that now guarantees appointed counsel at the adjudication on the merits if the waiver issue is decided in the juvenile's favor; but that, with respect to the same conduct alleged to violate the same statutory prohibition, denies counsel to the indigent—child or adult—in criminal court.

In a final and probably most significant sense the case for including the misdemeanor among those entitled under the sixth amendment to appointed counsel has surely improved in the years since *Gideon*. All of the lower federal court decisions since (and before, for that matter) *Gideon* in which the issue has been presented have extended the right to misdemeanor proceedings.⁴⁹ With a few exceptions, the state court

⁴⁶ *Id.*

⁴⁷ 387 U.S. 36 n.58.

⁴⁸ *Kent v. United States*, 383 U.S. 541, 556-57 (1966); *In re Gault*, 387 U.S. 1, 12, 36 (1967).

⁴⁹ The leading cases are *Evans v. Rives*, 126 F.2d 633 (D.C. Cir. 1942) (failure to provide for minor child; one year jail sentence); *Harvey v. Mississippi*, 340

decisions have been in the same direction. The period has also seen the enactment of state and federal legislation, generally including at least some misdemeanor offenses within the scope of the right.⁵⁰ By expressing the consensus of the states⁵¹ and thereby blunting the edge of whatever may be left of the "federalism" argument,⁵² these developments bode well for eventual constitutional recognition of the misdemeanor's right to counsel.

B. Equal Protection

Whether the demand for equality in the administration of the criminal law, as exemplified by *Griffin v. Illinois*,⁵³ *Douglas v. California*⁵⁴ and their progeny, focuses on any right-to-counsel interests not cognizable under the sixth amendment seems to me subject to serious doubt.

In fashioning a right to appointed counsel during in-custody interrogation, the Court apparently perceived no relevant difference between the two sources of the right.

Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon v. Wainwright* and *Douglas v. California*.⁵⁵

Although *Gideon* is a sixth amendment case, Mr. Justice Black's opinion for the Court suggests an equal protection rationale:

[T]here are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have

F.2d 263 (5th Cir. 1965) (possession of whiskey; \$500 fine, ninety day jail sentence); *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965) (illegal possession and sale of whiskey \$250 fine or six months in jail on each charge), discussed in L. HALL & Y. KAMISAR, *MODERN CRIMINAL PROCEDURE* 293-94 (2d ed. 1966). See also cases cited *infra* notes 195, 223; but see note 224 *infra*.

⁵⁰ The state judicial and legislative developments are considered at length in the Appendix. In federal courts, the right to appointed counsel is governed by the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1964) and FED. R. CRIM. P. 44. On the operation of the Criminal Justice Act see, e.g., Hastings, *The Criminal Justice Act of 1964*, 57 J. CRIM. L.C. & P.S. 426 (1966); JUNIOR BAR SECTION, BAR ASS'N OF THE DISTRICT OF COLUMBIA, *THE OPERATION OF THE CRIMINAL JUSTICE ACT IN THE DISTRICT OF COLUMBIA* (1967).

⁵¹ Cf. *Mapp v. Ohio*, 367 U.S. 643, 651 (1966); *In re Gault*, 387 U.S. 1, 37-38 (1967).

⁵² See Allen, *The Supreme Court, Federalism and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 230 (1959).

⁵³ 351 U.S. 12 (1956).

⁵⁴ 372 U.S. 353 (1963).

⁵⁵ *Miranda v. Arizona*, 384 U.S. 436, 472-73 (1966).

the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal cases are necessities, not luxuries.⁵⁶

While this language is doubtless responsive to the sixth amendment inquiry of what process is due persons charged with crime (here determined by reference to common practice), it is relevant as well to the equality principle. The extent to which the poor person charged with crime should be made the equal of his wealthy counterpart should depend not on the rights theoretically available to the defendant of means, but upon the finding that such rights are in fact exercised by him.⁵⁷ Accordingly, that "defendants who have the money" almost always exercise their option to hire counsel supports an equal protection as well as a sixth amendment right to counsel.

The opposite is also true. The Court's appellate procedure cases, although played on the equal protection scale, produce due process overtones:

[A] State can, consistently with the Fourteenth Amendment, provide for differences *so long as the result does not amount to a denial of due process* or an "invidious discrimination."⁵⁸

Although the sixth amendment and equal protection bases of the right to counsel to a large extent overlap, the equality principle brings an important new perspective to bear on the analysis of the right. Historically, the sixth amendment counsel right has been a limited one. Broad dicta to the contrary in both *Powell v. Alabama*⁵⁹ and *Gideon v. Wainwright*⁶⁰ have not, as we have seen, carried the day. But if the sixth amendment right to counsel appears inherently narrow, the equal protection right seems inherently broad. Indeed, as the Allen Report demonstrates,⁶¹ the job of the reformer who would rely upon the equal protection ban on "discrimination against the indigent" is not so much to extend the right to counsel but to justify its containment short of complete equality. This paper confronts that

⁵⁶ 372 U.S. at 344.

⁵⁷ See text accompanying notes 142-52 *infra*. "During the reign of *Betts v. Brady*, the Court made it clear that denying a defendant the assistance of *his own lawyer* in any case, at any stage, on any issue, constituted a per se violation of 'fundamental fairness.'" L. HALL & Y. KAMISAR, *MODERN CRIMINAL PROCEDURE* 272 (2d ed. 1966) (emphasis in original). See *Chandler v. Fretag*, 348 U.S. 3 (1954); *Ferguson v. Georgia*, 365 U.S. 570 (1961).

⁵⁸ *Douglas v. California*, 372 U.S. 353, 356 (1963) (emphasis added).

⁵⁹ 287 U.S. 45, 67 (1932).

⁶⁰ 372 U.S. 335, 344 (1963).

⁶¹ ALLEN REPORT 9-10.

task in a later section.⁶² For present purposes it is sufficient to note that recognition of governmental discrimination against the poor as an *independent* constitutional violation introduces a powerful new policy element into right-to-counsel analysis, which, unlike traditional sixth amendment analysis, puts the burden of justification on those who would continue the present economic discrimination against the misdemeanant.

C. *The Right to Counsel during Investigation*

Recent Supreme Court decisions creating a right to appointed counsel during the investigatory stage of criminal proceedings suggest a third ground for recognition of the indigent misdemeanant's right to publicly provided defense counsel.

Ignoring factual and doctrinal details not relevant in the present context, the Court's decisions in *Massiah*,⁶³ *Escobedo*⁶⁴ and *Miranda*⁶⁵ recognize a right to appointed counsel during police investigation designed to elicit testimonial evidence from the accused. In *United States v. Wade*⁶⁶ and *Gilbert v. California*,⁶⁷ the Court recognized a similar right during any "critical" pretrial confrontation between the government and the accused, and held that identification of an accused at a pretrial line-up was such a confrontation.

At first glance, these cases establishing a right to counsel during critical stages of the investigatory process appear to contribute no ground for recognition of the indigent misdemeanant's right to counsel beyond those already provided by *Gideon*.

Like that case, they all arose out of felony prosecutions and, like *Gideon*, their applicability to misdemeanor prosecutions is itself open to question. The counsel-during-investigation cases do, however, make it more difficult to sustain the felony-misdemeanor distinction with respect to trial counsel. That distinction can operate only in a setting in which it is relatively clear into which category particular cases fall. Trial or other formal disposition, the stage with which *Gideon* dealt, is such a setting: the charge is either a felony or a misdemeanor. No such certainty can be ascribed to the charge during the investigatory stage. On the contrary, whether a given case will be disposed of as a felony or as a misdemeanor is often a matter of great uncertainty,

⁶² See text accompanying notes 146-54 *infra*.

⁶³ 377 U.S. 201 (1964).

⁶⁴ 378 U.S. 478 (1964).

⁶⁵ 384 U.S. 436 (1966).

⁶⁶ 388 U.S. 218 (1967).

⁶⁷ 388 U.S. 263 (1967).

depending on at least (1) the gravity of the offense; (2) the state of the evidence; (3) the willingness of government witnesses to cooperate with the prosecution and, assuming willingness, their probable credibility; (4) the accused's prior record; (5) prosecutorial attitudes toward the offense; and (6) the state of the criminal docket in the jurisdiction.⁶⁸

Although far from complete, the available data indicate that a substantial proportion of felony arrests are charged as misdemeanors.⁶⁹ Moreover, since investigation commonly overlaps the arrest, it is often unclear just what the evidence, once obtained, will support. As a result, the investigatory stage of criminal proceedings is *not* a setting in which cases may be authoritatively labelled either "felony" or "misdemeanor." Added to these dispositional uncertainties is the doctrinal uncertainty whether the right to counsel during investigation is not already applicable to misdemeanor prosecutions.

Faced with uncertainties of this magnitude and reluctant to risk an adverse outcome for reasons unrelated to "factual guilt,"⁷⁰ the rational course for enforcement officers is to follow the *Miranda-Wade* procedures in every case. In any event, they may be expected to conform to those procedures with respect to any case that may be disposed of as a felony.

The point is not that the right to counsel during investigation will, for the reasons given, tend to become *de facto* applicable to some or all misdemeanors, and that the right should therefore be given *de jure* recognition. Rather, the essential point is that *de facto* application of the right to counsel during investigation powerfully suggests that the right to counsel at trial or other disposition ought to be given comparable applicability. Absent such comparability of the earlier and later rights to counsel, a substantial proportion of accused indigents will be subjected to the anomalous procedure of being advised of their right to counsel before interrogation and at other critical investigatory confrontations only to be denied counsel by the court when their case is disposed of as a misdemeanor. To reverse Professor Kamisar's metaphor, should the defendant's rights in the "mansion" be any less than those in the "gatehouse"?⁷¹

⁶⁸ D. NEWMAN, CONVICTION 67-130 (1966).

⁶⁹ Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 33 (1962); J. SKOLNICK, JUSTICE WITHOUT TRIAL 114 (1966).

⁷⁰ Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 11-13 (1964).

⁷¹ Y. KAMISAR, F. INBAU, T. ARNOLD, CRIMINAL JUSTICE IN OUR TIME 1 (1965).

II. THE IMPACT OF COUNSEL ON THE CRIMINAL JUSTICE SYSTEM

In assessing the case for providing defense services for indigent persons one can no longer ignore the mounting criticism by observers of the criminal justice system that the policy assumptions for providing such services simply do not square with social reality. The argument, not easily summarized, runs roughly as follows.

The conception of criminal adjudication to which broader provision of defense services is a rational response is one that views the determination of guilt or innocence as "an *adversary, combative* proceeding,"⁷² a system "resting upon an assumption of genuine conflict."⁷³

Not coincidentally, it is this conception of the criminal process that the Supreme Court has invoked in determining the existence of "critical stages" in the process to which the right to counsel applies. As the Court said in the most recent of these cases, holding that a pretrial line-up was such a stage,

[t]he presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution.⁷⁴

Professor Packer has ably demonstrated that this view, which conforms to his "Due Process Model"⁷⁵ of the criminal justice system, is only one of a spectrum of views that range between that model and its polar opposite, the "Crime Control Model."⁷⁶ While the former "looks very much like an obstacle course . . . the Crime Control Model resembles an assembly line. . . ."

It might be said of the Crime Control Model that, reduced to its barest essentials and when operating at its most successful pitch, it consists of two elements: (a) an administrative factfinding process leading to exonerated of the suspect, or to (b) the entry of a plea of guilty.⁷⁷

But, for Packer, these models were distortions of reality, designed solely to "clarify the terms of discussion."⁷⁸ Other observers, however, seem to suggest that Packer's "Crime Control Model" represents cur-

⁷² Blumberg, *Covert Contingencies in the Right to the Assistance of Counsel*, 20 VAND L. REV. 581, 583 (1967) (emphasis in original) [hereinafter cited as Blumberg].

⁷³ Skolnick, *Social Control in the Adversary System*, 11 CONFLICT RESOLUTION 52 (1967).

⁷⁴ *United States v. Wade*, 388 U.S. 218, 227 (1967).

⁷⁵ Packer, *supra* note 70, at 13-23.

⁷⁶ *Id.* at 9-13.

⁷⁷ *Id.* at 13.

⁷⁸ *Id.* at 6.

rent "social reality" in the criminal courts system and that the defense lawyer, whether privately or publicly retained, consciously strives to maintain that system.

All the court personnel, including the accused's own lawyer, are co-opted to become agent-mediators who help the accused redefine his situation and restructure his perceptions consonant with a plea of guilty.⁷⁹

Because the defense lawyer's product lacks "visibility," and because the criminal accused always "loses," the argument runs, he must present to a fee-paying client a "stage managed image of a personage of great influence and power in the court organization."⁸⁰ And because court personnel are keenly aware of the extent to which the defense attorney relies upon this "lawyer-client confidence game,"⁸¹ "the lawyer is 'bound in' to the authority system of the court's organizational discipline."⁸²

Further, all lawyers in the criminal courts system have continuing relations with the prosecutor's office and the court, to which institutions, Blumberg argues, client demands will be subordinated.

Accused persons come and go in the court system scheme, but the structure and its occupational incumbents remain to carry on their respective career, occupational and organizational enterprises. The individual tensions and conflicts a given accused person's case may present to all the participants are overcome because the formal and informal relations of all the groups in the court setting require it. The probability of continued future relations and interactions must be preserved at all costs.⁸³

Blumberg's argument that private counsel are conscripted to serve administrative goals as a result of their complicitous relationship with other court personnel in maintaining a fee-deserving image does not adequately explain his attribution of similar behavior to counsel paid from public funds. There is reason to believe, however, that such attribution may be deserved.

In his study of a public defender office, Sudnow found that the defender "and the D.A., as co-workers in the same courts, take it for granted that the persons who come before the courts are guilty of

⁷⁹ Blumberg 586.

⁸⁰ *Id.* 594.

⁸¹ *Id.* at 590, 593; cf. D.T. Bazelon, *Clients Against Lawyers*, HARPERS Sept., 1967, 104, at 110: "I realize that there is no legal practice without clients, but still [the client] is irrelevant."

⁸² Blumberg 594.

⁸³ *Id.* 587.

crimes and are to be treated accordingly. . . ."⁸⁴ After observing the same agency, Skolnick largely agreed, finding, however, that "the public defender, as an institution, does not significantly differ from other 'cooperative' defense attorneys."⁸⁵

Most private defense attorneys usually operate on a theory of defense similar to that of the public defender. . . . This theory presupposes the guilt of the client, as a general matter. . . .⁸⁶

Moreover, Blumberg's data show that, regardless of the type of counsel—private, legal aid or assigned—clients in more than three-quarters of the cases studied reported that counsel urged them to plead guilty to a lesser charge at the first or second contact.⁸⁷

Participants in the criminal process generally recognize the guilty plea as an efficient means of adjusting limited court facilities to large numbers of criminal cases.⁸⁸

Thus far, the argument poses no real challenge to the extension of defense services to indigent misdemeanants. Rather, it suggests that because of situational pressures common to all systems of criminal defense, such an extension may be somewhat less beneficial to the misdemeanant than has been commonly supposed. But that suggests no reason to exclude, on grounds of poverty, those services that counsel can perform for the indigent guilty plea defendant. These functions have been broadly categorized as:

Expert evaluation of the appropriateness of the guilty plea and aid in obtaining charge and sentence leniency by plea negotiation. Both of these are very important to the guilty defendants and, as a matter of fact, successful representation of the guilty requires knowledge and skills no less demanding than representation at trial.⁸⁹

At this point, therefore, the proponent of counsel for the misdemeanant may appropriately demur. May he demur as well to Blumberg's further contention that the Court's decisions extending the right to counsel to trial and pretrial proceedings will promote not the values of due process but the ends compendiously denoted by Packer's "Crime Control Model"?

The more libertarian rules will tend to produce the rather ironic end

⁸⁴ Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOCIAL PROBLEMS 255 (1964).

⁸⁵ Skolnick, *supra* note 73, at 53.

⁸⁶ *Id.* at 62.

⁸⁷ Blumberg 603.

⁸⁸ Skolnick, *supra* note 73, at 54.

⁸⁹ D. NEWMAN, *CONVICTION* 198 (1966).

result of augmenting the *existing* organizational arrangements, enriching court organizations with more personnel and elaborate structure, which, in turn will serve to maximize organizational goals of "efficiency" and "production." Thus, many defendants will find that *courts will possess an even more sophisticated apparatus for processing them toward a guilty plea!*⁹⁰

Thus, the full implications of the argument suggest that a conception of the criminal process that conforms to social reality militates against further extensions of the right to counsel.

An assault on this conception of "social reality" must call upon more than the rhetoric of the "adversary" system, since the challenge asserts that it is rhetoric only. Unfortunately, most proponents of a broadened right to counsel have felt no obligation to go beyond the ideology of adversariness.

Is it necessary, however, to meet the challenge frontally? Is it not a sufficient answer to say, with Newman, that the lawyer's skills are at least potentially as relevant to the right resolution of non-trial disputes as to the much-vaunted but numerically much less significant courtroom battle?⁹¹ Newman's catalogue of the lawyer's functions in non-trial adjudication certainly suggests an affirmative response. He ascribes to counsel the tasks of (1) assuring the accuracy of the guilty plea, (2) assuring fairness in the plea-disposition by promoting client understanding of the plea's effects and by demanding consistent treatment for his client, (3) assuring an adequate record of the conviction, and (4) in the conscientious performance of these functions, ultimately promoting the client's amenability to the correctional process.⁹²

⁹⁰ Blumberg 605 (emphasis added).

⁹¹ Newman estimates that "guilty pleas account for roughly 90 percent of all criminal convictions." D. NEWMAN, *supra* note 89, at 8.

⁹² In increasing numbers, commentators on the criminal justice system have suggested that the fairness of the procedures employed in the guilt-determining process may have an important effect on the amenability of the convicted defendant to treatment and rehabilitation. *See, e.g.*, D. NEWMAN, *supra* note 88 at 224-30; ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, ADVISORY COMMITTEE ON SENTENCING AND REVIEW, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES § 1.2 and commentary at 25-27 (1967); Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669, 671-72, 689 (1966); Bennett, *To Secure the Right to Counsel*, 32 J. AM. JUD. SOC. 117, 181 (1949); Studdt, *The Client's Image of the Juvenile Court*, in JUSTICE FOR THE CHILD 200 (M. Rosenheim ed. 1962); Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 207 (1967); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 833-34 (1968); *cf. In re Gault*, 387 U.S. 1, 26 (1967); REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 85 (1967).

The idea has been forcefully expressed by a former director of the Federal Bureau of Prisons:

The correctional process cannot begin to operate until somehow the bitterness and antagonisms which are more often than not engendered by the legal process

Nor are these functions merely theoretical. Contrary to the thrust of Blumberg's argument, Silverstein found that in general unrepresented defendants were more likely to plead guilty than were defendants with counsel.⁹³ More significantly, of the unrepresented guilty plea defendants, "the overwhelming majority pleaded to the principal offense rather than to a lesser offense."⁹⁴ Thus, regardless of whether the high rate of guilty pleas is referable to co-optation of defense counsel by the enforcement system or to a conscientious attempt by counsel to minimize the range of impossible sanctions, it is demonstrable that with respect to matters of crucial importance both to the client and to the proper functioning of the criminal justice system, counsel plays an important role.

are overcome... Since rehabilitation to be true and lasting must come from within, nothing can be done with [the prisoner] until he has been purged of this rancor. Much of the antagonism aroused can be avoided by fair and just treatment and representation throughout the proceedings. By minimizing errors, misunderstanding and friction during the criminal proceedings, mental strains and tensions can be lessened, bitterness avoided and the number who are incurably warped substantially reduced.

Bennett *supra* at 181.

The notion that criminal detection and adjudication procedures serve a therapeutic (or counter-therapeutic) function should be skeptically examined. It is an empirical proposition that is unsupported, so far as I have been able to discover, by any systematically gathered and analyzed empirical evidence. And there is no *a priori* case for attributing any significant or lasting effect, either positive or negative, to the procedure used by government officials during the investigation and disposition of a convicted defendant's case. That episode, after all, represents only one of countless experiences in the life of the defendant, and must certainly be less important in shaping the individual's attitude toward governmental authority than, say, his daily treatment during a period of incarceration. Nevertheless, the persistence and pervasiveness of the belief that the criminal adjudication process may produce social pathology in the same way that the physician's waiting room may produce physical pathology warrants further investigation and reflection.

Although the process from apprehension to conviction may be but one stimulus contributing to the individual's attitudes toward authority and society, it may well be a decisive experience. His confrontation with established authority is not ephemeral or diffuse; it is face-to-face, the defendant versus the state. The stakes, obviously, are high, and in combination with the dramaturgical character of the adjudication process, will tend to give the conviction episode an inordinate salience. Finally, in those cases that result in incarceration or even conditional freedom, every real or imagined restriction of freedom may serve, over a long period, to remind the individual of the enforcement process to which they are all attributable. Of course, he could reflect upon the criminal conduct to which this process is in turn attributable, resolving to avoid official sanctions by avoiding such conduct. And this, I take it, is the goal of procedural "therapy": to render attacks against the "system" impossible, or at least implausible, so that the correctional therapy theoretically available for use in rehabilitating the offender will not be thwarted by the existence of "jurido-genic" pathology.

In light of these conflicting and equally plausible theoretical positions on the role of criminal procedure in the rehabilitative process, resolution of the issue must await the evidence. The evidence should be directed as well toward what one sociologist, referring to prison practices, has termed the "irony of a somewhat therapeutic and permissive policy—the inmate becomes less able to protect his ego by directing hostility to external targets." E. GOFFMAN, *ASYLUMS* 58 (1961).

⁹³ 1 SILVERSTEIN 98-99.

⁹⁴ *Id.* at 91.

Moreover, even if one accepts Blumberg's view of the criminal process as an accurate portrayal of social reality, the range of appropriate responses surely encompasses more than "succumbing to the inevitability of a reality that deviates from the ideal."⁹⁵

Newman notes, for example, that meaningful representation is hindered in systems in which the defendant makes an early informal commitment to plead guilty, counsel being appointed only later in the process. Under these circumstances, non-trial adjudication "is typically less an intense shared search for an appropriate plea than a sort of cursory checkup by counsel of a plea already decided upon by the defendant."⁹⁶ The forthright response to this situation is to provide an absolute right to counsel during plea bargaining by recognizing such confrontations as "critical stages" in the criminal process.

A measured response to Blumberg, still demurring to his view of social reality, may involve less *whether* to provide counsel for indigent defendants than *how* to provide those services. As we have seen, Blumberg's argument is weakest when applied to publicly retained and compensated counsel, who have, one would assume, no motive for creating or maintaining the fee-deserving image that, Blumberg asserts, weds defense counsel to enforcement goals. Appointed private counsel who are also regular criminal court practitioners, however, probably cannot escape the systemic pressures associated with fee-collection in their private cases. It is in the nature of an image that it must be scrupulously maintained, even under seemingly irrelevant circumstances.

What this suggests is something quite compatible with other demands likely to be associated with providing counsel in misdemeanor cases: that such defense be rendered by a public defender. The added demand for legal services may recommend a defender office as the most efficient means for meeting it.⁹⁷ More important to the present analysis, a public defender office may be most resistant to the pressures exerted by the enforcement system.

In general, the power of the prosecutor over the defense function derives from his ability to frustrate defense goals. The individual attorney, whether privately retained or for-this-case assigned, enjoys no countervailing influence. But, "as a result of the cases it controls, the PD's office is in a structurally advantageous position"⁹⁸ vis-a-vis

⁹⁵ Skolnick, *supra* note 73, at 70.

⁹⁶ D. NEWMAN, *supra* note 89, at 204.

⁹⁷ Cost data are collected in I SILVERSTEIN 63-69.

⁹⁸ Skolnick, *supra* note 73, at 63.

the prosecutor. In essence, what is being suggested is that against the enforcement system's "monstrous appetite for the co-optation of entire professional groups as well as individuals,"⁹⁹ an equivalent defense organization, possessing the ability to frustrate prosecutorial objectives, stands the best chance to survive in the criminal courts arena with its principles intact.

Thus, contrary to the argument that the social structure necessarily imposes cooperation in DA-PD relations . . . the structure of the situation would appear to give the PD relatively greater organization leverage over the DA.¹⁰⁰

III. WHERE TO DRAW THE LINE?

Much of the discussion concerning extension of the right to appointed counsel beyond the facts of *Gideon* revolves around the search for a principle that will contain that right, once loosed from its felony moorings, within bounds that are financially and logistically feasible.¹⁰¹ The feared inability of the legal profession to accommodate a potential eightfold increase¹⁰² in the demand for appointed counsel,¹⁰³ coupled with the felt unlikelihood or unwisdom of expending the public resources necessary to provide defense services on such a scale,¹⁰⁴ has invariably led to a variety of proposals for limiting the right.

A. Spurious Standards

The suggestion that the right be limited to cases in which the misdemeanor appears to have a defense of real substance or in which complicated issues of fact or law are anticipated seems clearly spurious.¹⁰⁵ Despite the apparent ability of such a standard to discriminate with great sensitivity between deserving and non-deserving cases, it has been found to be unworkable in fact¹⁰⁶ and unacceptable in law.¹⁰⁷

Limiting the right to those cases in which appointed counsel is requested warrants even shorter shrift. Few constitutional principles

⁹⁹ Blumberg 605.

¹⁰⁰ Skolnick, *supra* note 73, at 63.

¹⁰¹ *Betts v. Brady*, 316 U.S. 455, 473 (1942); *McDonald v. Moore*, 353 F.2d 106, 108-09 (5th Cir. 1965); Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 62-88 (1963).

¹⁰² See text *infra* at notes 156-60.

¹⁰³ See, e.g., *People v. Lettorio*, 16 N.Y.2d 307, 213 N.E.2d 670, 672, 266 N.Y.S.2d 368, 371 (1965).

¹⁰⁴ Kamisar & Choper, *supra* note 101, at 84.

¹⁰⁵ L. HALL & Y. KAMISAR, *MODERN CRIMINAL PROCEDURE* 295 (2d ed. 1966).

¹⁰⁶ *Chewning v. Cunningham*, 368 U.S. 443 (1962).

¹⁰⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

are more firmly established than the proposition that where an individual is otherwise entitled to counsel, the existence of the right cannot be made to depend upon a request.¹⁰⁸

B. *The Petty Offense Standard*

Of all the formula, by which it has been sought to contain the right to appointed counsel (or to explain its containment), only the "petty offense"¹⁰⁹ argument claims to rest upon affirmative Supreme Court precedent. The argument can be stated with disarming simplicity: because the sixth amendment right to a trial by jury does not extend to "petty offenses,"¹¹⁰ neither does the sixth amendment right to counsel.¹¹¹ More technically, the argument asserts that the term "criminal prosecutions" qualifies all of the rights enumerated in the sixth amendment, and since in the jury trial cases that term has been interpreted to exclude "petty offenses," it follows as a matter of conventional interpretation that a similar exclusion applies to the right to counsel.

The argument is fundamentally unsound. In the first place, it assumes the existence of a tolerably certain and stable definition of the term "petty offense." The cases belie such an assumption. Whether an offense is "petty" for purposes of determining the existence of a right to jury trial has been held to turn upon a two-dimensional analysis of the nature of the offense and the severity of the penalty imposed or impossible for its violation. Thus the offense of selling second-hand property without a license, carrying a penalty of ninety days' imprisonment, is "petty" for jury trial purposes,¹¹² while a traffic offense—reckless driving "so as to endanger property and individuals" punishable by thirty days' imprisonment or a \$100 fine—is "an act of such obvious depravity that to characterize it as a petty offense would be to

¹⁰⁸ *Carnley v. Cochran*, 369 U.S. 506, 513 (1962); *Miranda v. Arizona*, 384 U.S. 436, 470-72 (1966); *but cf. Escobedo v. Illinois*, 378 U.S. 478, 491 (1964).

¹⁰⁹ 18 U.S.C. § 1(3) (1964): "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both, is a petty offense." It was this "petty offense" standard that Congress adopted for purposes of containing the right to compensated appointed counsel in federal criminal cases. Criminal Justice Act of 1964. 18 U.S.C. § 3006A (1964). It is possible, of course, to define "petty offenses" more narrowly. In New Hampshire, for example, "a petty offense is any misdemeanor, the penalty for which does not provide for imprisonment or a fine exceeding five hundred dollars." N.H. REV. STAT. ANN. § 604-A:1 (Supp. 1967). For constitutional purposes, however, the "petty offense" concept implies no such rigid test. Indeed, according to some commentators, the very dynamism of the concept commends its use as a device for delineating the scope of the right to counsel. *Kamisar & Choper*, *supra* note 101, at 73.

¹¹⁰ *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

¹¹¹ *Kamisar & Choper*, *supra* note 101, at 71.

¹¹² *District of Columbia v. Clawans*, 300 U.S. 617 (1937).

shock the general moral sense."¹¹³

But to criticize the petty offense standard on these grounds is, in a sense, misleading. For such criticism appears to assume the existence of a sound doctrinal and policy base for extending that standard (were it knowable) from the jury trial cases to the right to counsel situation. In fact no such basis exists.

The argument for use of the jury trial standard to contain the scope of the right to counsel fails because it proves far too much. As we have seen, its doctrinal foundation is that the jury trial cases authoritatively define the scope of the term "criminal prosecutions" which qualifies all of the rights protected by the sixth amendment. Applied only to the rights to trial by jury and to counsel the argument has (for different reasons) a certain surface plausibility. The sixth amendment also guarantees, however, the right to a speedy and public trial, the right to an impartial jury in the district in which the offense was committed, the right to be informed of the nature and cause of the accusation, to confront and cross-examine prosecution witnesses, and the right to compulsory process for obtaining witnesses for the defense. The proposition that these other sixth amendment rights might constitutionally be denied to petty offenders is refuted by its very statement. It is simply not arguable, nor has any court ever held, that the trial of a petty offense may be held in secret, or without notice to the accused of the charges, or that in such cases the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf. "Under our Constitution," to paraphrase *Gault*, "the condition of being a [petty offender] does not justify a kangaroo court."¹¹⁴

That the petty offense standard does not and cannot operate to deny petty offenders those basic trial rights set forth in the sixth amendment seems self-evident. The straight-faced acceptance of the notion that the right to counsel has no application to petty offenses,¹¹⁵ however, warrants further consideration. The cases demonstrate that, far from carrying all other sixth amendment protections in its wake, the right to trial by jury alone has been limited to "non-petty" offenses. The leading jury trial case, *District of Columbia v. Clawans*,¹¹⁶ provides a perfect example. While the Court there held that the respondent was

¹¹³ *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930).

¹¹⁴ *In re Gault*, 387 U.S. 1, 28 (1967).

¹¹⁵ *Kamisar & Choper*, *supra* note 101, at 71; see Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1964).

¹¹⁶ 300 U.S. 617 (1937).

not entitled to a jury trial in a "criminal proceeding" under an ordinance prohibiting the sale of second-hand goods, it reversed the conviction on the ground that the trial judge had prejudicially restricted respondent's cross-examination of the prosecution's expert witnesses.¹¹⁷ Although the reversal was not based on the sixth amendment, a constitutional foundation for the right of cross-examination in the trial of "petty offenses" may be found in the contempt cases.

It is now clear that the sixth amendment does not bar punishment for criminal contempt by a summary trial without a jury where the penalty imposed is no greater than that provided for petty offenses.¹¹⁸ Whether other sixth amendment protections may also be dispensed with in the trial of "petty" criminal contempts was the issue raised in *In re Oliver*.¹¹⁹ There the petitioner challenged by writ of habeas corpus his summary imprisonment for contempt by a Michigan "one-man grand jury." The Court found that because of the "haste and secrecy" with which the petitioner had been adjudged in contempt, he had "no chance to prepare his defense, and no opportunity either to cross-examine the other grand jury witness or to summon witnesses to refute the charge against him."¹²⁰ Since the maximum penalty imposable under Michigan law was sixty days' imprisonment and a \$100 fine, the offense was, for jury trial purposes, arguably "petty" under then-existing standards,¹²¹ and clearly "petty" under present standards.¹²²

Neither the parties nor the Court, however, seems even to have considered the possibility that the petty offense concept justified the procedure followed. On the contrary, the Court held the procedure violative of fourteenth amendment due process:

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.¹²³

¹¹⁷ *Id.* at 630.

¹¹⁸ *Cheff v. Schnackenberg*, 384 U.S. 373, 378-80 (1966). For a criticism of this development in the context of an earlier case, see Tefft, *United States v. Burnett: "Twas a Famous Victory,"* 1964 Sup. Ct. Rev. 123.

¹¹⁹ 333 U.S. 257 (1948).

¹²⁰ *Id.* at 259.

¹²¹ *District of Columbia v. Clawans*, 300 U.S. 617 (1937).

¹²² *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966).

¹²³ *In re Oliver*, 333 U.S. 257, 273 (1948). Were *Oliver* to be decided today, it is clear that the holding would be based on the specific provisions of the sixth amendment. *Pointer v. Texas*, 380 U.S. 400 (1965); *Parker v. Gladden*, 385 U.S. 363 (1966); *Specht v. Patterson*, 386 U.S. 605 (1967).

The response to the argument that the Court's jury trial decisions govern all sixth amendment rights, including the right to counsel, may be even more strongly put. Sixth amendment rights other than the jury trial right are not only applicable both to petty and non-petty offenses, they are applicable as well to non-offenses. In *Greene v. McElroy*¹²⁴ the Court avoided what it termed "serious constitutional problems"¹²⁵ by finding no executive or legislative delegation of power to the Department of Defense authorizing the use of an industrial security clearance program that denied affected individuals the right to confront and cross-examine witnesses against them. Similarly, in *Reilly v. Pinkus*¹²⁶ the Court forbade "so mild a whip"¹²⁷ as restricting an individual's use of the mails where his right to cross-examine government witnesses had been denied at the injunction hearing.

Clearly, then, the jury trial cases can have no *necessary* effect on the proper scope of the right to counsel in "criminal prosecutions." At best they are doctrinally neutral, establishing only that the sixth amendment protects two species of rights: those like the right to jury trial that apply only to non-petty offenses and those like the right to confront and cross-examine witnesses that apply to the trial of all offenses, petty and nonpetty alike. The ease with which it has been assumed that the right to counsel could for these purposes be placed in the former category seems to me to stem not from any real equivalence of the jury trial and counsel rights. What the right to counsel and the right to trial by jury have in common that largely distinguishes them from other sixth amendment rights is that both require sizable out-of-pocket expenditures of public funds. A trial can be speedy and public as cheaply as it can be delayed and secret. It costs little or nothing to inform the defendant of the charges against him. And although trials without the rights to confront and cross-examine prosecution witnesses or to compel the attendance of defense witnesses could obviously be conducted less expensively, in the ordinary misdemeanor case the savings would not appear to be substantial.¹²⁸

¹²⁴ 360 U.S. 474 (1959).

¹²⁵ *Id.* at 507.

¹²⁶ 338 U.S. 269 (1949).

¹²⁷ *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

¹²⁸ In their study of criminal jury trials, Kalven and Zeisel found that in 84% of the cases studied the defense called no more than five witnesses (and in 35% of the cases, no more than one witness). The comparable figures for the prosecution were 58% (no more than five) and 2% (no more than one). H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 136 (1966). Since their sample was at least two-thirds felony offenses (*id.* at 41) it seems fair to assume that it overstates the number of witnesses that would ordinarily be involved in the trial of misdemeanor offenses.

While this sort of fiscal analysis may help to explain the tendency to apply to the right to counsel the restrictive scope of the jury trial right rather than the broader scope applicable to all other sixth amendment rights, it does not justify that tendency.

Until very recently, it would have been possible at this point to make a reasonably strong case for the proposition that the jury trial right is a sport among the rights protected by the sixth amendment; that unlike other sixth amendment rights, the right to a jury could be restricted without impairing any legitimate interest of the bench-tried defendant; and that, since the same could not be said of the unrepresented defendant, the right to counsel ought not to be so restricted.¹²⁹ In light of Kalven and Zeisel's finding that in criminal cases "the jury trials show on balance a net leniency [in favor of the defendant] of 16 percent"¹³⁰ (and assuming that criminal defendants have a "legitimate" interest in benefiting from jury leniency) the argument that the jury trial right is a constitutional sport can no longer stand. This is not to say, however, that the argument's conclusion should now be abandoned. Rather, the jury data suggest that the error has been in restricting the right to jury trial to nonpetty offenses. If this is so, surely the rational response is to reverse that error,¹³¹ not to magnify its effect by imposing a similar restriction on the scope of the right to counsel.

C. Imprisonment Standards

Even jurisdictions that have recognized a broad right to counsel in misdemeanor cases have generally restricted its scope to offenses pun-

¹²⁹ It was precisely this argument that led the Minnesota court to reject the "petty offense" standard:

But even though the two rights derive from the same provisions of our Federal Constitution, they are not of equal significance when it comes to the matter of obtaining a fair trial. It is conceivable that a fair trial may be had before an impartial judge without a jury, but it is hardly conceivable that a person ignorant in the field of law can adequately defend himself without the assistance of counsel. Consequently, we do not consider the cases involving the right to a jury trial controlling in this area.

State v. Borst, —Minn.—, 154 N.W.2d 888, 894 (1967).

¹³⁰ H. KALVEN & H. ZEISEL, *supra* note 128, at 59. "This means that in the cases which the defendant decides to bring before the jury, on balance, he fares better 16% of the time than he would have in a bench trial." *Id.*

¹³¹ The scope of the constitutional right to trial by jury is before the Court this Term. Bloom v. Illinois, 235 Ill. 2d 255, 220 N.E.2d 475 (1966), *cert. granted*, 386 U.S. 1003 (1967); Duncan v. Louisiana, 250 La. 253, 195 So. 2d. 142 (1967), *prob. juris. noted*, 389 U.S. 809 (1967). For conflicting views on the issue see Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926); Kaye, *Petty Offenders Have No Peers!*, U. CHI. L. REV. 245 (1959).

ishable by imprisonment.¹³² As used in those jurisdictions, "imprisonment" appears always to mean imprisonment-in-law: if the law allows the imposition of a sentence of imprisonment on conviction of the offense charged, such an offense is "punishable by imprisonment," invoking the right to counsel. Since even the most trivial misdemeanors are often, in this sense, "punishable" by imprisonment, adoption of this standard potentially imposes a heavy burden on the legal profession and on the public purse.

By shifting from a "legal" to a "factual" emphasis, the imprisonment standard may be more narrowly defined. Thus, appointed counsel could be provided in misdemeanor proceedings that, as a matter of fact, put the indigent misdemeanant's liberty in jeopardy. The imprisonment-in-fact standard may be applied in two quite different ways. On the one hand, it could require, as has been suggested,¹³³ a determination by the trial judge of the likelihood of imprisonment in the particular case before him. On the other hand, it could require the appointment of counsel in those classes of cases in which, in the event of conviction, there is some likelihood of imprisonment.

The former, case-by-case approach is the narrowest and therefore the least expensive formulation of the imprisonment standard. It appears capable of selecting from among the vast number of misdemeanors punishable, on paper, by imprisonment only those in which imprisonment in fact threatens. At the same time, it raises several difficult issues not encountered under the alternative formulation of the imprisonment-in-fact standard. Does it not share some of the difficulties that made *Betts v. Brady* practically impossible to administer?¹³⁴ How certain can a judge be, if he has not prejudged the case, that imprisonment may or may not be imposed? Must he not know, according to modern notions of individualized sentencing, facts that he ought not know prior to the adjudication of the defendant's guilt or innocence? The case-by-case approach has other shortcomings. Viewed cynically, it empowers the beleaguered judge and, through him, perhaps the prosecutor uncertain of the strength of his case, to forestall an effective challenge to the charges by foregoing imprisonment but not conviction. Finally, even were the standard workable and immune to possible abuse, is it not too selective?¹³⁵ Certainly in many felony

¹³² See Appendix at notes 276-80.

¹³³ L. HALL & Y. KAMISAR, *MODERN CRIMINAL PROCEDURE* 295 (2d ed. 1966).

¹³⁴ *Gideon v. Wainwright*, 372 U.S. 335, 349, 350-51 (1963) (Harlan, J., concurring).

¹³⁵ L. HALL & Y. KAMISAR, *supra* note 133, at 295-96.

prosecutions it is possible to predict with fair certainty that the defendant if convicted will not be imprisoned, but because of the stigma that attaches to a felony conviction, we would be properly reluctant to withhold the right to counsel in such cases. There is no reason to be less reluctant to do so when that stigma is the result of a misdemeanor conviction.

What is needed, therefore, is a standard that guarantees a right to counsel in any case as to which imprisonment *or* stigma is a predictable result. There is reason to believe that the "imprisonable class" formulation of the imprisonment-in-fact standard, while not designed to include stigmatizing offenses, would in practice draw just such a line. Extending the right to counsel to those classes of cases in which there is in fact some likelihood of imprisonment also avoids other difficulties associated with a case-by-case approach: since the decision to appoint counsel depends on a pre-selection of the classes of cases in which liberty may be jeopardized, that decision can neither taint nor be tainted by the defendant's probable culpability.

The "imprisonable class" standard, however, is not without its own difficulties. Unlike other imprisonment standards, the imprisonment class standard is not self-executing. The standard assumes that we know, or can discover, those classes of misdemeanor offenses which, although in law punishable by imprisonment, in actuality never or rarely result in imprisonment. A field study of all criminal and related proceedings in Seattle, Washington illustrates both the relative simplicity of the empirical task and the scope of the right to counsel delineated by the imprisonment class standard.¹³⁶

It was discovered that the accused faces a more than negligible

¹³⁶ Junker, *Report on the Need for Publicly Provided Counsel in King County* (1965), reproduced in part as Appendix A to NAT'L LEGAL AID AND DEFENDER ASSOCIATION, *HOW TO ORGANIZE A DEFENDER OFFICE*, 39-51 (1967) [hereinafter cited as *NLADA DEFENDER*]. The methodology of the study was essentially the same as that used by the American Bar Foundation in gathering data for *DEFENSE OF THE POOR*, involving primarily surveys or samples of docket information and interviews with court officials.

Although the data of necessity reflect the experience of only one jurisdiction, that factor seems less critical in this context than in others. A proposed standard for the appointment of counsel ought to be evaluated by its probable impact on a going criminal justice system. And since the administration of criminal justice in this country is extremely decentralized, it is appropriate to measure that impact microcosmically. Moreover, the "imprisonable class" standard assumes that such data will be separately gathered in those jurisdictions that adopt the standard. (This means, of course, that adoption of the imprisonment class standard could result in the Balkanization of the right to counsel. The range of permissible variation, however, would be extremely narrow, limited in practice to the inclusion or exclusion of various traffic offenses.)

possibility of incarceration¹³⁷ in all non-traffic misdemeanor cases.¹³⁸ Most traffic offenders, on the other hand, are not imprisoned, and those who are in jeopardy of imprisonment fall into clearly definable classes.

Forty thousand traffic charges (arising out of 150,000 non-parking traffic citations) were disposed of by court action in Seattle during 1964. The study showed, however, that in only about 4,500 cases was there any possibility of imprisonment as the result of a traffic conviction.¹³⁹ In only three kinds of cases was the accused exposed to any danger of imprisonment: (1) where the offense charged was hit-and-run, reckless or drunken driving; or (2) where any additional traffic violation was charged against an individual subject to a suspended sentence for a previous violation; or (3) where, whatever the offense charged, the convicted individual was unable to pay the fine imposed.¹⁴⁰

Thus, in one locality at least, the imprisonable class standard appears to comply with all of the criteria that have been suggested. All persons in fact subject to the possibility of imprisonment or criminal stigma are entitled to representation. The standards for eligibility can be stated without reference to particular cases, and appointments may, if desired, be administered well in advance of trial by non-judicial court personnel. The potential demand for counsel in traffic cases is only one-tenth as large as that produced by the "imprisonment-in-law" standard.

The imprisonable class standard is more easily described than justified. The demand for reliability and fairness to which the right to counsel responds exists as well in cases that do not jeopardize the accused's liberty as in those that do. With respect to non-imprisonable classes of cases, "the kind of trial a man gets" would still depend "on the amount of money he has."¹⁴¹

Several possible defenses of the imprisonable class standard may be

¹³⁷ No effort was made to determine in advance the threshold level of likelihood of incarceration that would warrant characterizing an offense as "imprisonable." In applying the standard, a 5% probability of imprisonment was deemed to be "more than negligible." NLADA DEFENDER 40-41. This figure is also a measure of the "waste" produced by the "imprisonable class" standard in comparison with the case-by-case approach: to assure representation of the one individual in twenty who faces imprisonment, it must also be offered to nineteen other defendants who, we may predict, are not so jeopardized.

¹³⁸ NLADA DEFENDER 40, 42-43, 51.

¹³⁹ Not all of whom, of course, were indigent. NLADA DEFENDER 41-42, 48.

¹⁴⁰ *Id.*

¹⁴¹ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)

offered. The first is that the line thus drawn does not purport to be a principled one; that it is nothing more or less than the best compromise between the demands of constitutional policy and the limitations of purse and personnel. Such a defense is inadequate. The same could be said with equal plausibility of the lines now drawn between felonies and misdemeanors or between misdemeanors carrying varying maximum penalties. The proposition that any of these standards represents the "best" compromise must rest on some basis more compelling than mere assertion.

Liberalistically construed, what the sixth and fourteenth amendments may be said to require of the right to counsel is that it be provided for any person "charged with crime"¹⁴² and that the indigent defendant enjoy "the same rights and opportunities . . . as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but are able to afford the retention of private counsel."¹⁴³

The imprisonable class standard more nearly meets these requirements than any other. What constitutes being "charged with crime" must, of course, be measured by a constitutional definition of "crime." The states can no more *expand* the scope of the *Gideon* dictum by attaching the label of "crime" to conduct popularly perceived and officially treated as non-criminal than they could *contract* the scope of the *Gideon* holding by labelling serious offenses carrying felony-length sentences "misdemeanors."¹⁴⁴ Without attempting a complete constitutional definition of "crime," there is little doubt that for sixth amendment purposes it ought to include proceedings in which the individual is exposed to the possibility of incarceration or to the stigma that flows from official condemnation.¹⁴⁵ If this analysis is sound, there is no war between sixth amendment doctrine and the imprisonable class standard. Obviously, the same cannot be said of less inclusive standards.

Squaring the imprisonable class standard with the equal protection clause of the fourteenth amendment poses more difficult issues. Logically extended from its present doctrinal base, the constitutional ban on discrimination against the indigent requires that he be given appointed counsel in any proceeding in which a financially able person may appear with counsel. Obviously, if this is what equal protection

¹⁴² *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

¹⁴³ *Anders v. California*, 386 U.S. 738, 745 (1967).

¹⁴⁴ *Patterson v. Warden*, 372 U.S. 776 (1963) (per curiam).

¹⁴⁵ Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROB. 401, 402-06 (1958); see Kamisar & Choper, *supra* note 101, at 68-69.

requires, no imprisonment standard can survive constitutional challenge. Indeed, such an interpretation of the equality principle makes irrelevant all attempts at drawing the line beyond which appointed counsel need not be provided, since, on this view, the equal protection clause itself draws that line. On both theoretical and doctrinal grounds, however, it is possible to liberate discussion of the scope of the right to counsel from the hold of the "logic" of equality. Unfettered by the conclusions built into that logic, it becomes possible to consider the grounds upon which a lesser scope of the right might be justified.

Underlying the expansive view of the scope of equal protection is the theory that all defendants must be given an equal opportunity to be represented by counsel; that opportunity, self-provided by the financially able, must be government-provided for the indigent. It is far from clear, however, that equal protection demands adoption of this theory. According to *Griffin*, what is forbidden is allowing "the kind of trial a man gets," to depend "on the amount of money he has."¹⁴⁶ Compliance with *Griffin* does not automatically require appointment of counsel in all cases in which persons not barred by poverty *might* hire counsel. That result is mandatory only if it can be shown that the financially able in fact hire counsel in all such cases; for if they do not, financial ability is clearly irrelevant to the trial of such cases. An example will clarify. If it is found that no one, rich or poor, bothers to hire counsel to defend against illegal parking charges, why should equal protection require that counsel be provided for the poor in such cases? According to *Griffin*, counsel need not be provided, since the amount of money the defendant has is irrelevant to the kind of trial he will receive. Accordingly, the imprisonable class standard can be made to conform to *Griffin*, and thus to the equal protection clause, if it can be demonstrated that in non-imprisonable classes of cases counsel are rarely if ever hired even by those financially able to do so. While the data are far from conclusive, the Seattle study provides some evidence in support of the commonly held assumption that even the rich are not represented in minor traffic proceedings. In Seattle it was found that persons charged with two non-imprisonable offenses—speeding and driving without a license—hired counsel in only about 6.5 percent of

¹⁴⁶ 351 U.S. at 19.

the sample cases.¹⁴⁷ In contrast, persons charged with imprisonable traffic offenses—hit-and-run, reckless or drunken driving—hired counsel in 47 percent of the cases studied.¹⁴⁸ These figures suggest, though they do not demonstrate, that compliance with equal protection is not necessarily inconsistent with adoption of the imprisonable class standard.

The proposition that equal protection demands exactly equal treatment of rich and poor defendants is also vulnerable on doctrinal grounds. In the first place, application of the equal protection clause has, in terms, been limited to cases challenging appellate procedures.¹⁴⁹ Moreover, even in that limited sphere, the equality principle has never been extended to the limit of its logic.¹⁵⁰ Finally, the Court has recently held that not every discrimination against the impoverished appellant is constitutionally forbidden. While the financially able may insist upon full prosecution of a frivolous appeal, the indigent is entitled only to counsel's "conscientious examination" of his case and to "a brief referring to anything in the record that might arguably support the appeal."¹⁵¹ If equality on appeal need be attained only "as nearly as is practicable,"¹⁵² equality at trial, to which the equal protection doctrine has never been explicitly applied, surely requires no more.

I do not suggest that these theoretical and doctrinal arguments conclude discussion of the appropriate scope of the right to counsel in misdemeanor cases, but rather that they liberate that discussion from the apparent inexorability of the equality principle. The notion of equality, however, exerts an important residual influence on the formulation of the constitutional issue. Whereas sixth amendment doctrine focuses on the constitutional necessity of extending the right to counsel to previously excluded classes of indigents, equal protection doctrine questions whether any such exclusions are justifiable. On what grounds may equality legitimately be denied? Two rationales may be

¹⁴⁷ Junker, *Report on the Need for Publicly Provided Counsel in King County*, Appendix D (1965) (unpublished, on file at the University of Washington and Harvard law libraries); *State v. Borst*,—Minn.—, 154 N.W.2d 888, 898 (1967) (concurring opinion): "It is a matter of general knowledge that many people who can afford to do so nevertheless do not engage counsel in defense of traffic violations..." Cf. *In re Johnson*, 62 Cal. 2d 325, 398 P.2d 420, 427, 42 Cal. Rptr. 228, 235 (1965).

¹⁴⁸ NLADA DEFENDER 41.

¹⁴⁹ *E.g.*, *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Anders v. California*, 386 U.S. 738 (1967).

¹⁵⁰ Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783 (1961).

¹⁵¹ *Anders v. California*, 386 U.S. 738, 744 (1967).

¹⁵² *Id.* at 745.

suggested. First, there are those cases with respect to which it seems fair to say the consequences of non-representation are *de minimis*, either because the sanctions are slight or because the disparity in result referable to the absence of counsel is insubstantial.¹⁵³ Second, it seems impossible responsibly to ignore the financial and manpower demands on the legal system that strict equality might impose.¹⁵⁴ The administration of justice is not advanced by promising more than it can deliver. Moreover, to limit equality of treatment on this ground does not foreclose reconsideration of the issue in light of revised estimates of the predictable demand for legal services or of society's ability to meet that demand.

On this analysis, non-imprisonable offenses would seem justifiably excluded from the scope of the right to counsel. By definition, neither incarceration nor stigma results from conviction for such an offense. At the same time, the exclusion of non-imprisonable offenses relieves the legal system of responsibility for the vast majority of traffic offenses and the feared inundation they represent.

IV. SPECULATIONS ON THE PERSISTENCE OF THE FELONY STANDARD

As we have seen, the doctrinal and policy bases for recognizing the indigent misdemeanant's claim to appointed counsel tap not one but several powerful strands of constitutional doctrine. Moreover, the issue implicates basic goals of the criminal justice system, both with respect to the fair and efficient treatment of alleged offenders and in terms of the impact of the criminal process on the quality of American society generally.

Yet in all but a handful of states many, and in twenty-one states nearly all, indigent misdemeanants are forced to defend against criminal charges without the assistance of counsel. Nor does the constitutional issue appear any closer to resolution than it was nearly five years ago, at the time of the *Gideon* decision. In some ways, in fact,

¹⁵³ 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, 483 (1966).

¹⁵⁴ When questions of proper procedure implicate as well the proper allocation of scarce public funds, it may be appropriate to consider the financial impact produced by procedural change—here, the extension of the right to appointed counsel to the marginal case. It is not self-evident that the need for counsel in non-imprisonable classes of cases is more pressing than the need for housing, adequate medical care, improved educational opportunities or any of a host of other exigent demands of contemporary society.

resolution now appears more distant.¹⁵⁵ The ability of the status of the misdemeanor's right to counsel to remain relatively unchanged during a period otherwise characterized by rapid, radical developments in the rights of persons accused of crime demands some explanation. The answer suggested here has several aspects, most of which may be subsumed under the heading of the "magnitude" of the task of providing adequate defense services for the misdemeanor population.

At its most elementary level, the "magnitude" issue is one simply of numbers. It is estimated that about 5,000,000¹⁵⁶ persons annually are charged with misdemeanors, excluding traffic offenses—more than fourteen times the number of persons charged with felonies.

Focusing more narrowly on the indigent accused, the misdemeanor-felony ratio drops to eight-to-one, based on estimates that there are about a million and a quarter indigent defendants charged with non-traffic misdemeanors each year,¹⁵⁷ as compared to about 150,000 indigent felony defendants.¹⁵⁸ Put in terms of the demand for lawyers' services, it is estimated that "the number of lawyers working full-time on the prosecution and defense needed to satisfy the demand for lawyers in felony and misdemeanor cases is 15,000 - 20,000. . . . [T]he lawyer manpower presently in the field meets less than half the estimated need."¹⁵⁹ This aspect of the "magnitude" explanation, then, frankly questions the ability of the legal system to accommodate an eightfold increase in the demand for appointed counsel.¹⁶⁰

The magnitude explanation seems to me also to have other, less apparent aspects. The first involves the relationship between the right to counsel at trial and the right to counsel at other stages of the criminal process. The second examines the impact of evolving concepts of the nature and scope of government's obligation to the indigent accused. Finally, and most speculatively, it is worth considering whether the recalcitrance of the right does not reflect an irrational reaction to what Judge Friendly has called "the Bill of Rights as a code of criminal procedure."¹⁶¹

The expansion of the right to counsel in the post-*Gideon* period is

¹⁵⁵ See text, *supra* at notes 33-41.

¹⁵⁶ 1 SILVERSTEIN 123; *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389, 392 (1966).

¹⁵⁷ 1 SILVERSTEIN 125.

¹⁵⁸ *Id.* at 9.

¹⁵⁹ *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389, 393-94 (1966).

¹⁶⁰ See notes 101, 103, *supra*.

¹⁶¹ Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

remarkable both in scope and direction. Previously the right had served primarily as a mechanism for assuring the reliability of formal determinations of criminal guilt. In recent years, however, the right to counsel has been pressed into service in the protection of a variety of other interests. In the attempt to impose constitutional limitations on official interrogation and other investigatory practices,¹⁶² the Court has relied heavily, though not exclusively, on the right to counsel. And while these new applications of the right serve in part the traditional goal of assuring reliable determinations of guilt and innocence, it is clear that this effect, though not peripheral, is not essential to the existence of the right.¹⁶³ Since *Gideon*, the right to counsel has come to include not merely the right to a courtroom champion but also the right to be free from surreptitious and "inherently compelling" interrogation by government officials and the right to resist or later effectively challenge unfair identification procedures, as well as a right to post-conviction counsel on appeal and at probation revocation proceedings.

The suggestion made here is that the expanded scope and new direction of the post-*Gideon* right to counsel seriously aggravates the perceived gravity of the magnitude issue. In short, nonrecognition of the indigent misdemeanant's right to counsel at trial also serves to avert recognition of the misdemeanant's right to pretrial and post-conviction counsel.

The same effect may also be ascribed to the evolution in recent years of a more expansive conception of the indigent's need for legal services. The government's obligation can no longer be discharged simply by providing the indigent with an attorney. He is entitled to adequate defense services, which, in a given case, may also include the services of investigators, expert witnesses and other non-counsel services.¹⁶⁴ As with the rights to pretrial and post-conviction counsel, the right to non-counsel services is commonly conceived of as logically dependent upon recognition of the misdemeanant's right to counsel at trial.

Thus, although according to conventional analogical analysis the post-*Gideon* right to counsel cases would support extension of the

¹⁶² See text, *supra* notes 3-7.

¹⁶³ *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966); *Stovall v. Denno*, 388 U.S. 293, 299 (1967).

¹⁶⁴ Kamisar & Choper, *supra* note 101, at 8; Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054 (1963); ALLEN REPORT 39-40 (1963).

right to indigent misdemeanants, it is arguable that, on this practical level, their effect has been to retard that extension.

A final suggested explanation may be worth airing. It is related to the preceding explanations based on the magnitude of the misdemeanant's need, but it proceeds from a more speculative base. Is it too far-fetched to suggest that the misdemeanant has been denied the right to counsel he seems, on doctrinal and policy grounds, so eminently to deserve in irrational reprisal against the pressures exerted on the criminal justice system by the Court's promulgation, largely during this decade, of a "constitutional code of criminal procedure?"¹⁶⁵ While the cases surely do not all go in one direction, and while many are designed to assure the system's reliability, the official criminal process now more clearly resembles, to use Packer's simile, an "obstacle course"¹⁶⁶ than it did in the pre-*Mapp* era. And the effect of each obstacle, whether or not reliability-based, is, viewed from an enforcement perspective, to immunize from conviction persons deemed to be administratively "guilty."¹⁶⁷

To those for whom the ability of the system efficiently to convict "guilty" persons outweighs the interests protected by denying convictions where improper procedures are used—a group that undoubtedly includes a fair number of law-makers—counsel for the misdemeanant may appear to be just another "obstacle." Such opposition would be irrational—since elementary fairness and reliability and thus, in these terms, efficiency, would seem to depend upon provision of counsel—but it would not be incoherent. What I am here tentatively suggesting, in other words, is that the criminal justice system has a fairly low tolerance for excluding from conviction persons presumed, as an administrative matter, to be "guilty."¹⁶⁸ If, as a result of exclusions based on violations of recently enlarged fourth and fifth amendment rights, that level has, at least temporarily, been reached, it may tend to explain the recalcitrance of the misdemeanant's right to counsel.

¹⁶⁵ Friendly, *supra* note 161.

¹⁶⁶ Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 13 (1964).

¹⁶⁷ *Id.* at 11-13.

¹⁶⁸ The problem is not a new one.

It is one instance of a miserable set of irrational compromises, which, under pretence of being practical expedients, produce almost all the practical hardships and defects with which the law can be justly reproached. Abuses are constantly defended, more or less consciously, on the ground that the hardships imposed on the innocent may, as it were, be set off against the chances of escape held out to the guilty. . . . So one of the commonest arguments against allowing prisoners to be defended by counsel always was, that rogues had too many chances of escape already.

J. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 174-75 (1863).

APPENDIX

THE MISDEMEANANT'S RIGHT TO COUNSEL IN
AMERICAN STATE COURTS

This appendix describes the present status of the indigent misdemeanor's right to appointed counsel both in law and, so far as can be determined, in fact. Such a survey promises significant dividends. Clearly a reasoned response to the questions whether and to what extent the law ought to recognize the indigent's right to counsel in misdemeanor proceedings should begin with a relatively firm understanding of the extent to which that right is already recognized. The significance of such data in the evolution of constitutional rights is well established.¹⁶⁹ And there is reason to believe that such data are more likely to be decisive in the present context than might be true in other areas of constitutional adjudication. The critical issues involved in fashioning a right to counsel in misdemeanor cases are not so much doctrinal as practical. Can the states realistically meet the demand for legal services that would be imposed upon them by recognition of the 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? Present state practices vary from outright rejection to apparently unqualified acceptance of the indigent misdemeanor's right to counsel, with the fast majority of the states occupying positions somewhere between these poles, providing, at least potentially, a rich source of experience from which future constitutional policy may be derived.¹⁷⁰

A. Three Preliminary Views

For an initial view of the law and practice it may be useful temporarily to obscure all but the most obvious differences among the juris-

¹⁶⁹ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 651 (1961); *In re Gault* 387 U.S. 1, 37-41 (1967); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 330-33 (1957).

¹⁷⁰ A pervasive problem encountered in attempting to discover and describe the extent of the right to counsel in misdemeanor cases derives from the fact that the meaning of the term "misdemeanor" varies substantially from jurisdiction to jurisdiction. See, e.g., *Patterson v. State*, 227 Md. 194, 175 A.2d 746 (1961), *rev'd per curiam*, 372 U.S. 776 (1963) discussed *supra*, note 32; *Klopfer v. North Carolina*, 386 U.S. 213, 217 n.3 (1967); N.J. STAT. ANN. §§ 2A:85-1 to -12 (1953). For purposes of this paper the term will be operationally defined to include any criminal offense for which the maximum sentence imposed on conviction is not more than one year's imprisonment. This standard reflects the position that now obtains in general in most jurisdictions. MODEL PENAL CODE, § 1.05 Comment at 7 (Tent. Draft No. 2 1954); 1 SILVERSTEIN 123.

dictions. On this view, one can identify the polar extremes, consisting of California,¹⁷¹ the only jurisdiction in which indigent misdemeanants appear without exception to be entitled to the appointment of counsel, and, at the other extreme, Arkansas,¹⁷² Florida,¹⁷³ Louisiana¹⁷⁴ and Ohio,¹⁷⁵ in which the misdemeanant's right to counsel has been unequivocally rejected by judicial or legislative action. All the remaining jurisdictions lie between these poles.

That only four jurisdictions have rejected the misdemeanant's claim to counsel is a significant fact. Taking the "consumer's" view,¹⁷⁶ however, it can make little difference to an indigent person whether his lack of counsel derives from affirmatively declared policy or from the failure of the courts and legislature to recognize and implement a right to counsel. From the "consumer's" view, the no-counsel position gains several additional jurisdictions: Alabama,¹⁷⁷ Alaska,¹⁷⁸ Ha-

Another difficulty warranting preliminary discussion derives from the fact that the right to appointed counsel has both a legal and a factual dimension. In some jurisdictions, for example, the stated law would seem to compel or at least allow the appointment of counsel in some misdemeanor cases, whereas in fact such appointments are rarely or never made. Compare S.D. CODE § 34.1901 (Supp. 1960) with 3 DEFENSE OF THE POOR 676 (L. Silverstein ed. 1965) [hereinafter cited as 3 SILVERSTEIN]. More commonly, the opposite is true: whereas the legal standard is by its terms restricted to felony cases, in fact appointments are often made in certain classes of misdemeanor cases. Compare ORE. REV. STAT. § 133.625 (Supp. 1967) with 3 SILVERSTEIN 625; But cf. ORE. REV. STAT. §§ 135.320-.330 (Supp. 1967). This tension between the legal and factual right to counsel, while undoubtedly an accurate reflection of the present uncertain state of the right, greatly complicates the attempt to describe its present status. Accordingly, I have attempted at all times to be clear about which dimension of the right is being discussed, and, where to do so seemed more likely to illuminate than to distort the presentation, I have explicitly adopted conventions for dealing with recurring situations. For example, in determining the existence and extent of the legal right to counsel in misdemeanor cases, pre-Gideon judicial decisions have been ignored unless the right was, to some extent, recognized. The refusal to recognize the misdemeanant's right during that period follows a fortiori from *Betts v. Brady*, and it seems quite inaccurate now to say that such jurisdictions have rejected the right. On the factual side, a distinction is drawn between systematic provision of counsel, to a greater or lesser extent, in misdemeanor proceedings, and the casual or episodic provision of counsel in some cases or, more usually, in some parts of the jurisdiction.

¹⁷¹ See text *infra* at notes 269-75.

¹⁷² ARK. STAT. ANN. § 43-1203 (1964); *Winters v. Beck*, 239 Ark. 1151, 387 S.W.2d 364 (1965), *cert. denied*, 385 U.S. 907 (1966); *Kirkwood v. State*, 199 Ark. 879, 136 S.W.2d 174 (1940); 2 DEFENSE OF THE POOR 49 (L. Silverstein ed. 1965) [hereinafter cited as 2 SILVERSTEIN].

¹⁷³ See text *infra* at notes 189-97.

¹⁷⁴ LA. CRIM. PRO. CODE ANN. art. 513 (West 1966): "This article continues the Louisiana policy of limiting state-provided counsel to felony cases." Comment to art. 513.

¹⁷⁵ OHIO REV. CODE ANN. § 2941.50 (Supp. 1966); *Toledo v. Frazier*, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967); cf. 3 SILVERSTEIN 585, 592.

¹⁷⁶ Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1 (1963).

¹⁷⁷ ALA. CODE tit. 15 §§ 318(1)-(2) (Supp. 1965); *Martin v. State*, 277 Ala. 153, 167 So. 2d 912 (1964); 2 SILVERSTEIN 2; but see *Irvin v. State*, 203 So. 2d 283 (Ala. App. 1967).

¹⁷⁸ ALASKA R. CRIM. P. 39; 2 SILVERSTEIN 20; cf. *Knudsen v. Anchorage*, 358

wai,¹⁷⁹ Mississippi,¹⁸⁰ South Carolina,¹⁸¹ Tennessee¹⁸² and Virginia.¹⁸³ These states, plus, of course, Arkansas, Florida, Louisiana and Ohio, recognize no right to counsel in any misdemeanor proceeding. Nor, so far as one can discover, are counsel ever in fact appointed for misdemeanants in these jurisdictions. Thirty-nine jurisdictions either recognize a right to, or in fact appoint, counsel in some misdemeanor cases. California remains the only full-counsel jurisdiction. This second general view, however, also obscures more than it illuminates, since it includes within the middle, "limited-counsel", category jurisdictions that more nearly resemble one or the other polar extreme than one another.

Two adjustments will provide a more useful third view of the present law and practice. Jurisdictions in which counsel are in fact appointed not according to a statewide system for providing such services but only casually or locally will be included in the no-counsel category. Jurisdictions that provide counsel for misdemeanants in all but traffic or other minor, essentially non-criminal proceedings will be categorized as full-counsel states.

On this third view, both polar categories are enlarged at the expense of the middle group. Twenty-one jurisdictions¹⁸⁴ recognize no right to appointed counsel in misdemeanor cases, as herein defined,¹⁸⁵ although casual or local appointments may in fact be made. Seven jurisdictions¹⁸⁶ provide counsel for indigents in all or substantially all misdemeanor proceedings. Counsel are systematically provided in some misdemeanor cases in the remaining twenty-two jurisdictions.¹⁸⁷

Although still obscuring rather substantial variations in practice, this third view provides a reasonably accurate general outline of the

P.2d 375 (Alaska 1960). A bill providing for appointment of counsel in misdemeanor cases, reproduced in 2 SILVERSTEIN at 30, apparently failed to pass.

¹⁷⁹ HAWAII REV. LAWS § 253-5, as amended Act 179, [1967] Hawaii Sess. Laws; 2 SILVERSTEIN 176.

¹⁸⁰ MISS. CODE ANN. § 2505 (1956); 2 SILVERSTEIN 404.

¹⁸¹ S.C. CODE ANN. § 17-507 (1962); Pitt v. MacDougall, 245 S.C. 98, 138 S.E. 2d 840 (1964); cf. 3 SILVERSTEIN 666.

¹⁸² TENN. CODE ANN. §§ 40-2014-2028 (Supp. 1966).

¹⁸³ VA. CODE ANN. § 19.1-241.1 (1960); Manson, *The Indigent in Virginia*, 51 VA. L. REV. 163 (1965); 3 SILVERSTEIN 756.

¹⁸⁴ Alabama, Alaska, Arkansas, Florida, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Missouri, Mississippi, New Mexico, Nebraska, Ohio, Rhode Island, S. Carolina, S. Dakota, Tennessee, Virginia, Washington and Wyoming.

¹⁸⁵ See note 170, *supra*.

¹⁸⁶ California, Illinois, Massachusetts, New Hampshire, New York, Texas and Minnesota.

¹⁸⁷ Arizona, Colorado, Connecticut, Delaware, Idaho, Indiana, Iowa, Maine, Maryland, Michigan, Montana, Nevada, New Jersey, N. Carolina, N. Dakota, Oklahoma, Oregon, Pennsylvania, Utah, Vermont, West Virginia and Wisconsin.

current status of the misdemeanant's right to counsel in American courts. Only a few states recognize such a right without major qualifications. A substantial number of jurisdictions have gone beyond the facts of *Gideon* although not so far as its rhetoric¹⁸⁸ would lead them. A nearly equal number of jurisdictions, representing most sections of the country (but over-representing the South), appoint counsel only in felony cases, with insubstantial exceptions. Within these broad classes, of course, exist substantial, and sometimes instructive, variations in doctrine and practice, to which we now turn.

B. No-Counsel Jurisdictions

As we have seen, the hard core no-counsel states are those in which the right has been considered and expressly rejected. Florida is typical. Following the Supreme Court's decision in *Gideon*, the Florida Legislature enacted legislation setting up a public defender, charged with the duty of representing "any person . . . charged with a non-capital felony. . . ."¹⁸⁹ In 1963 the Attorney General officially opined that the public defender's duties were limited to noncapital felony cases.¹⁹⁰ The following year,¹⁹¹ and twice since,¹⁹² the Florida Supreme Court has affirmed misdemeanor convictions challenged on the ground that counsel had not been provided.

Until authoritatively determined to the contrary by the Supreme Court of the United States, the rule in Florida is that there is no absolute organic right to counsel in misdemeanor trials.¹⁹³

It is ironic, and typical of the chaotic state of the law in this area, that even in Florida, despite contrary official pronouncements by its legislature, attorney general and supreme court, there is a legal and perhaps a factual right to counsel in some misdemeanor cases. In two federal habeas corpus cases the United States Court of Appeals for the Fifth Circuit has held unconstitutional state misdemeanor convictions in which the defendant was not advised of his right to appointed counsel.¹⁹⁴ The opposing federal-state lines are so clearly

¹⁸⁸ 372 U.S. at 344.

¹⁸⁹ FLA. STAT. ANN. § 27.51 (1) (1966).

¹⁹⁰ FLA. OP. ATT'Y GEN. 463-90 (1963).

¹⁹¹ *Fish v. State*, 159 So. 2d 866 (Fla. 1964).

¹⁹² *Watkins v. Morris*, 179 So. 2d 348 (Fla. 1965); *Florida ex rel. Taylor v. Warden*, 193 So. 2d 606 (Fla. 1967).

¹⁹³ *Watkins v. Morris*, 179 So. 2d 348, 349 (Fla. 1965).

¹⁹⁴ See *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965); *McDonald v. Moore*, 353 F.2d 106 (5th Cir. 1965).

drawn that the Federal District Court for the Southern District of Florida, in a recent decision ordering the release of an indigent Florida misdemeanor pursuant to *Harvey-McDonald*, also held that federal habeas corpus would lie even though the petitioner had not exhausted his state remedies, since it was clear from the Florida cases that he could get no adequate relief in the state courts.¹⁹⁵ The notion that the Supreme Court could, by promulgating a uniform national rule in *Gideon* reduce the opportunity for federal-state abrasion¹⁹⁶ seems not to have stood the test of time.

Whether McDonald and Rutledge were retried with counsel is not known. It is reported, however, that prior to the new public defender legislation, public defender offices in Dade (Miami) and Hillsborough (Tampa) Counties provided representation for indigent persons "for the more serious and complicated misdemeanors."¹⁹⁷ Whether this practice has survived *Fish*, *Morris* and *Taylor* is uncertain.

Apart from this example of neo-interposition, there is little to be gained from further consideration of the law and practice in the hard core states. None has attempted to provide a reasoned or principled justification of its policy.¹⁹⁸ While what they are saying is less than "Never," it amounts to nothing more than "Not now."

The remaining no-counsel jurisdictions fall into two groups: (1) those in which the right to appointed counsel is by statute expressly limited to felony proceedings; and (2) those in which the governing legal standard would appear to permit (if not compel) appointments in some misdemeanor cases, but has never been so interpreted. Counsel may in fact be appointed in some misdemeanor cases in either set of jurisdictions, but only on a casual or local basis.

In nine jurisdictions the power to appoint counsel for indigent persons is by statute restricted to felony cases.¹⁹⁹ With one exception,

¹⁹⁵ *Rutledge v. Miami*, 267 F.Supp. 885 (S.D. Fla. 1967).

¹⁹⁶ *Gideon v. Wainwright*, 372 U.S. 335, 349, 351 (1963) (Harlan, J., concurring); Junker, Book Review, 2 S.D.L. Rev. 182, 185-86 (1965).

¹⁹⁷ 2 SILVERSTEIN 147.

¹⁹⁸ The Arkansas Supreme Court's opinion in *Winters* occupies exactly one-half page in the case reports. *Winters v. Beck*, 239 Ark. 1151, 397 S.W.2d 364 (1965). The combined opinions in *Fish*, *Watkins* and *Taylor*, *supra* notes 191-93, cover but four pages of the Southern Reporter.

¹⁹⁹ Hawaii: HAWAII REV. LAWS § 253-5, as amended Act 179, [1967] Hawaii Sess. Laws; Mississippi: MISS. CODE ANN. § 2505 (1956); Missouri: MO. ANN. STAT. § 545-820 (1949); Nebraska: NEB. REV. STAT. §§ 29-1803.01, 29-1804 (Supp. 1965); New Mexico: N.M. STAT. ANN. §§ 21-1-1 (92), 41-11-2 (1965), cf. 3 SILVERSTEIN 513-14; S. Carolina: S.C. CODE ANN. § 17-507 (1962); Tennessee: TENN. CODE ANN. §§ 40-2014 to -2028 (Supp. 1966); Virginia: VA. CODE ANN. §§ 19.1-241.1 (1960); Washington: WASH. REV. CODE § 10.01.110 (Supp. 1965), but see WASH. REV. CODE § 10.40.030 (1957).

the doctrinal differences among these "restrictive-rule" jurisdictions are insubstantial. When the Washington statute was amended in 1965, the legislature added a proviso extending the right to appointed counsel to all "other proceedings . . . as may be constitutionally required."²⁰⁰ The question whether an indigent misdemeanant has a constitutional right to counsel, and thus, it would follow, to appointed counsel under the statute is presently pending before the Washington Supreme Court.²⁰¹ Doctrinal developments have not all been in the same direction, however. Prior to 1965, the Tennessee Code appeared to extend the right to counsel to persons "accused of any crime or misdemeanor whatsoever."²⁰² Legislation enacted in 1965, however, expressly limits the right to *appointed* counsel to persons charged with felonies.²⁰³

As a matter of practice, reports from six restrictive-statute jurisdictions indicate that counsel are rarely if ever appointed for misdemeanants;²⁰⁴ in the remaining three counsel are appointed in some "serious" misdemeanor cases,²⁰⁵ or in some localities.²⁰⁶

While the existence of a factual as well as a legal dimension to the right to appointed counsel may make efforts at description more difficult, it serves also as an aid to accurate description by providing a contemporaneous *de facto* interpretation of an otherwise ambiguous standard. This is especially significant with respect to the remaining no-counsel jurisdictions. In these eight jurisdictions the statutory standard would appear to permit the appointment of counsel in some or all misdemeanor proceedings.²⁰⁷ Lacking an authoritative judicial interpretation of such standards, as is the case with respect to nearly all of the "permissive-statute" jurisdictions, one could only assume (wrongly, it turns out) that the practice conformed to a reasonable construction of the standard. In truth, the characteristic common to

²⁰⁰ WASH. REV. CODE § 10.01.110 (Supp. 1965).

²⁰¹ Seattle v. Hendrix, No. 38357, Wash. Supreme Court (filed 1/11/67) (set for reargument on 5/10/68).

²⁰² TENN. CODE ANN. §§ 40-2002 to -2003 (1955).

²⁰³ TENN. CODE ANN. §§ 40-2014 to -2028 (Supp. 1966).

²⁰⁴ HAWAII: *cf.* 2 SILVERSTEIN 176; Mississippi: 2 SILVERSTEIN 404-05; Missouri: 3 SILVERSTEIN 414; S. Carolina: *cf.* 3 SILVERSTEIN 666; Tennessee: 3 SILVERSTEIN 689, 692; Virginia: 3 SILVERSTEIN 756-57.

²⁰⁵ Nebraska: 3 SILVERSTEIN 440; Washington: 3 SILVERSTEIN 772.

²⁰⁶ Ohio: 3 SILVERSTEIN 583, 585; Nebraska: 3 SILVERSTEIN 440.

²⁰⁷ ALA. CODE tit. 15 §§ 318 (1)-(2) (Supp. 1965); ALASKA R. CRIM. P. 39; GA. CONST. art. I, § 2-105, *but see* Taylor v. City of Griffin, 113 Ga. App. 589, 149 S.E.2d 177 (1966) (dictum); KAN. STAT. ANN. § 62-1304 (1964); KY. REV. STAT. ANN. 453.190 (1963); *but see* KY. R. CRIM. P. 8.04 and Wright v. Crawford, 401 S.W.2d 47 (Ky. 1966); R.I. GEN. LAWS ANN. § 12-15-3 (1956); S.D. CODE 34.1901 (Supp. 1960); WYO. STAT. ANN. § 7-7 (1957), *Id.* § 7-9 (Supp. 1967).

most of the permissive-statute jurisdictions is that counsel are never or only rarely appointed in misdemeanor cases,²⁰⁸ as that term is defined herein. In only three are counsel appointed even on a casual or local basis.²⁰⁹

The statutory standards in the no-counsel jurisdictions that have permissive statutes range from Alabama's "serious offense"²¹⁰ standard to South Dakota's statute providing for assigned counsel in "any criminal action."²¹¹ The irrelevance of this legal dimension of the right to counsel in no-counsel jurisdictions is probably best illustrated by the fact that an indigent misdemeanant is about as likely to obtain appointed counsel in a jurisdiction in which the legal right is limited to felonies than in one in which the right at least arguably extends to his case.²¹²

Nor are the statutory standards—whether restrictive or permissive—of any particular political relevance. With one uncertain exception, the legal standards are not hard-won prizes resulting from legislative confrontation of the difficult ideological, fiscal and doctrinal issues the question calls for; they are simply artifacts of an earlier constitutional era. Washington's post-*Gideon* statute is the possible exception. Like Wisconsin's contemporaneous enactment²¹³ and the 1967 amendment to the New Jersey rule,²¹⁴ the Washington statute extends the right to appointed counsel to "such other proceedings . . . as may be constitutionally required."²¹⁵ Outsiders can only speculate whether these responses represent abdication of the duty to provide standards by statute or court rule, or, more charitably, a realistic recognition of the expanding scope of the right to counsel, or simply the best temporary compromise between libertarian and logistic pressures. In any event, by begging the policy question, they offer no aid in the quest for rational constitutional standards.

C. Limited Counsel Jurisdictions

By a narrow margin, the dominant position among the states rejects the felony-misdemeanor distinction and provides counsel on a syste-

²⁰⁸ Alabama: 2 SILVERSTEIN 3; Alaska: 2 SILVERSTEIN 20; Kansas: 2 SILVERSTEIN 254-55; Rhode Island: 3 SILVERSTEIN 656; S. Dakota: 3 SILVERSTEIN 676-77.

²⁰⁹ Georgia: 2 SILVERSTEIN 164; Kentucky: 2 SILVERSTEIN 270; Wyoming: 3 SILVERSTEIN 818.

²¹⁰ ALA. CODE tit. 15 §§ 318(1)-(2) (Supp. 1965).

²¹¹ S.D. CODE § 34.1901 (Supp. 1960).

²¹² Compare notes 205-06 with note 209, *supra*.

²¹³ WIS. STAT. ANN. § 957.26 (Supp. 1967).

²¹⁴ N.J.R.R. 1:12-9.

²¹⁵ WASH. REV. CODE § 10.01.110 (Supp.1965).

matic basis for some but not all indigent misdemeanants. The standards by which the line is drawn between those misdemeanants who are entitled to appointed counsel and those who are not fall into four categories: (1) those that leave the decision to the discretion of the trial court;²¹⁶ (2) those that require appointment of counsel where the penalty imposable on conviction falls within fixed limits;²¹⁷ (3) combining the foregoing, those that allow the trial court to exercise its discretion to appoint counsel where the possible penalty falls within fixed limits;²¹⁸ and (4) a residual category of standards that are presently unsettled, although fairly clearly recognizing some right to appointed counsel in misdemeanor cases.²¹⁹

1. *Discretionary Standards*

No doubt even a hard core no-counsel jurisdiction would, in a given case, recognize the power of the judiciary to appoint a member of the bar to represent an indigent misdemeanant. In this sense, the limited-counsel jurisdictions that leave such appointments to the discretion of the trial court are not so far different from no-counsel jurisdictions. Certainly the difference does not lie in the statement of the power granted, which conventionally provides that the court "may"²²⁰ or "in the interest of justice"²²¹ may appoint counsel in misdemeanor cases. The difference between the no-counsel jurisdiction that may concede judicial power to appoint counsel in non-felony cases and the limited-counsel jurisdictions under consideration is probably best expressed in terms of the predictable legal consequences of a failure to exercise that power. Whereas in the former case the aggrieved misdemeanant would have no remedy, in a limited-counsel jurisdiction the court's failure or refusal to appoint counsel would be subject to the usual rules governing abuse of discretion.

Of more practical importance, of course, is the manner in which the discretion to appoint counsel is ordinarily exercised. Obviously, a limited-counsel jurisdiction in which the courts did not routinely pass on the question whether to appoint counsel for misdemeanor defendants would be practically indistinguishable from a no-counsel jurisdiction. In Connecticut and North Carolina, for example, the power

²¹⁶ Colorado, Connecticut, Maine, N. Carolina and Vermont.

²¹⁷ Arizona, Idaho, Nevada, and Utah.

²¹⁸ Delaware, Maryland, Montana and W. Virginia.

²¹⁹ Indiana, Iowa, Michigan, New Jersey, N. Dakota, Oklahoma, Oregon, Pennsylvania and Wisconsin.

²²⁰ *E.g.*, COLO. REV. STAT. ANN. § 39-21-3(2) (a) (1963); COLO. R. CRIM. P. 44; N.C. GEN. STAT. § 15-4.1 (1965).

²²¹ CONN. GEN. STAT. ANN. § 54-81(a)(1958).

appears to be quite sparingly used. Indeed, only inconclusive dicta support the proposition that counsel are ever appointed in misdemeanor cases (as herein defined) in either jurisdiction.²²² Moreover, in both Connecticut²²³ and North Carolina²²⁴ the state courts have affirmed discretionary denials of appointed counsel in cases involving possible one-year sentences. Arguably, therefore, such jurisdictions might more accurately be considered jurisdictions in which counsel is not provided in misdemeanor cases. The same might also be said of the remaining "discretionary" jurisdictions—Colorado,²²⁵ Maine²²⁶ and Vermont.²²⁷ The latter states are distinguishable from Connecticut and North Carolina only by the absence of case law sanctioning the denial of counsel in misdemeanor cases. At the same time, there is no case law affirmatively commanding discretionary appointments or even that such discretion be exercised. Whether attorneys are provided for indigent misdemeanants in any of these jurisdictions is thus not a legal but a factual question. Current reports of actual practice are not available, however, and recent changes in the applicable laws of all of these jurisdictions have made obsolete what data have been collected. In the absence of current studies of the practices in these jurisdictions, the least misleading course is simply to parrot the usual statutory formula: an attorney "may" be assigned to represent an indigent misdemeanant.

2. Limited Discretion Standards

A similarly unsatisfactory conclusion must be reached with respect to two of the four jurisdictions that authorize appointments within fixed limits. Montana's new code of criminal procedure, effective January 1, 1968, empowers "courts of record" to appoint counsel for indigent misdemeanants "in the interest of justice."²²⁸ It is, of course, too soon to know whether this power will be exercised in such a way as to provide a meaningful right to counsel in misdemeanor prosecutions punishable by imprisonment for one year or less. It is clear

²²² *State v. DeJoseph*, 3 Conn. Cir. 624, 222 A.2d 752, 759, *cert. denied*, 385 U.S. 982 (1966); *State v. Hayes*, 261 N.C. 648, 135 S.E.2d 653, 654, (1964); *State v. Bennett*, 266 N.C. 755, 147 S.E.2d 237, (1966); *State v. Sherron*, 268 N.C. 694, 151 S.E.2d 599, 601 (1966).

²²³ *Arbo v. Hegstrom*, 261 F. Supp. 397 (D. Conn. 1966) (habeas corpus granted.)

²²⁴ *Creighton v. State*, 257 F. Supp. 806 (E.D.N.C. 1966) (habeas corpus denied).

²²⁵ COLO. REV. STAT. ANN. § 39-21-3(2) (a) (1963).

²²⁶ ME. REV. STAT. ANN. tit. 15, § 810 (Supp. 1967).

²²⁷ VT. STAT. ANN. tit. 13, § 6503 (Supp. 1967) *construed in In re Mears*, 124 Vt. 131, 198 A.2d 27 (1964); *see* VT. STAT. ANN. tit. 13, § 6506 (1959).

²²⁸ MONT. REV. CODES ANN. § 95-1001(4) (Supp. 1968).

that counsel will not be appointed for misdemeanors punishable by not more than six months' imprisonment, since such cases are not ordinarily tried in a "court of record."²²⁹ Thus, by restricting the application to particular courts, the statute also fixes imprisonment for more than six months as the floor of the discretionary right to appointed counsel. A similar result is reached in West Virginia by excluding from the operation of the appointment statute "traffic violations and violations of municipal ordinances."²³⁰

A quite different route leads to the inclusion of Delaware as a hybrid "limited discretion" jurisdiction. Unlike discretionary jurisdictions already considered, in which the power to appoint was clear but its exercise uncertain, in Delaware (prior to the enactment of public defender legislation in 1964)²³¹ the power was uncertain but in practice the courts generally assigned counsel in any misdemeanor case tried in superior court that might "result in imprisonment for more than three months."²³²

Maryland law illustrates yet another variation on the limited discretion theme. Counsel must be appointed when the offense is one "for which the maximum punishment is . . . imprisonment for a period of six months or more," and "may" be assigned in cases involving lesser penalties.²³³

In summary, of the nine limited-counsel jurisdictions that rest the power to appoint counsel in the discretion of the trial court (whether or not exercisable only within fixed limits), only two may be confidently put down as jurisdictions in which indigent misdemeanants are actually represented on a systematic basis. Illustrating the two-dimensional nature of the right, it is noteworthy that with respect to Delaware this confidence derives from factual data,²³⁴ while as to Maryland it results from the nature of the legal standard.

3. Fixed Standards

The line between jurisdictions that apply discretionary and those that apply fixed standards is not sharp. Arizona provides the marginal case. Indigent misdemeanants are entitled to appointed counsel in any

²²⁹ MONT. CONST. art. VIII, § 25; MONT. REV. CODE ANN. §§ 95-301 to -303 (Supp. 1968) 11-1602 to -1603, -1702 (1947).

²³⁰ W. VA. CODE § 62-3-1 (1966).

²³¹ DEL. CODE ANN. tit. 29, §§ 4601-4607 (Supp. 1966).

²³² 2 SILVERSTEIN 122.

²³³ MD. R. PROC. 719 (b) (2) (Supp. 1967); *Manning v. State* 237 Md. 349, 206 A.2d 563 (1965).

²³⁴ See note 232 *supra*.

prosecution that involves a "serious offense."²³⁵ If, as is true under Idaho's recent legislation, that term were authoritatively defined to include any offense "the penalty for which includes the possibility of confinement for more than six months,"²³⁶ the scope of the right would be clearly "fixed." If, on the other hand, trial courts may determine "seriousness" on an *ad hoc* basis, it is just as clear that the power is discretionary. Arizona law falls between these examples. The Arizona Supreme Court is apparently willing to give concrete meaning to the "serious offense" standard, but thus far has not done so. It seems likely, however, that the line will be drawn to exclude cases punishable by less than six months' imprisonment.²³⁷

Two other jurisdictions, Utah²³⁸ and Nevada,²³⁹ also limit the misdemeanor's right to counsel to cases in which the punishment imposable on conviction exceeds six months imprisonment. Nevada law accomplishes this by requiring representation in "gross misdemeanor" prosecutions.

4. Unsettled Standards

The nine remaining limited-counsel jurisdictions²⁴⁰ are ones in which some misdemeanants are undoubtedly entitled to and in fact receive appointed counsel, but in which the scope of the right is at present uncertain or unsettled. The situation in Wisconsin is illustrative. Before its amendment in 1965,²⁴¹ the relevant Wisconsin statute authorized the appointment of counsel only in felony cases. Empirical studies showed, however, that counsel were in fact appointed for some misdemeanants although the "practices . . . vary widely across the state."²⁴² Despite the assertion that one could arguably find "a right to appointed counsel in misdemeanor cases under Wisconsin law"²⁴³ during that period, the Wisconsin Supreme Court had gone no further than to recognize the right with respect to a "felony-type" misdemeanor²⁴⁴—a result clearly commanded by *Patterson* but of no great significance with respect to "misdemeanors" as herein defined. The

²³⁵ State v. Anderson, 96 Ariz. 123, 392 P.2d 784, 790 (1964).

²³⁶ Ch. 181, [1967] Idaho Sess. Laws.

²³⁷ See State v. Betts, 2 Ariz. App. 27, 406 P.2d 229, 233 (1965).

²³⁸ UTAH CODE ANN. § 77-64-2 (Supp. 1967).

²³⁹ NEV. REV. STAT. §§ 171.370, 193.120, 193.140 (1963).

²⁴⁰ Indiana, Iowa, Michigan, New Jersey, N. Dakota, Oklahoma, Oregon, Pennsylvania and Wisconsin.

²⁴¹ WIS. STAT. ANN. § 957.26 (Supp. 1967).

²⁴² Winters, *Counsel for the Indigent Accused in Wisconsin*, 49 MARQ. L. REV. 1, 25 (1965).

²⁴³ *Id.* at 24.

²⁴⁴ State *ex rel.* Barth v. Burke, 24 Wis. 2d 82, 128 N.W.2d 422, 424 (1964)

legislative responses to these practical and doctrinal developments appears to have been one of complete neutrality. Under the 1965 amendment counsel must be appointed "in any case where required by the United States or Wisconsin constitution."²⁴⁵ The amended statute is neutral in the sense that it signals a legislative withdrawal from the fray—the issue becomes wholly constitutional, that is to say, in the absence of constitutional amendment, wholly judicial. But the legislature has not only withdrawn, it has also withdrawn the "felony" standard that existed prior to 1965. In this sense, the amendment is not neutral but rather a decided endorsement of at least a limited right to counsel in misdemeanor cases. Thus, despite the fact that the statute begs the question, the cases are inclusive and the practice irregular, in combination these factors provide more support for the inference that some indigent misdemeanants are entitled to counsel in Wisconsin than for the opposite conclusion, even though the scope of that right is far from settled at the present time.

As we have seen, the scope of the right to counsel in misdemeanor cases may be described in a variety of ways: by reference to certain classes of offenses, or to the penalty imposable on conviction (which often but not always amounts to the same thing), or to the jurisdiction of particular courts, or to the source (whether state or local) of the law offended against, to name the most commonly used devices. Most of these descriptive devices can be translated, with more or less difficulty, into common analytical terms—here, the maximum period of imprisonment imposable on conviction. Where such translation cannot be made, it has been necessary to conclude that the scope of the right is uncertain. With a regularity that invites suspicion, such has been the case with the concept of "indictable" offenses. Accordingly, those jurisdictions that apply this standard—Iowa,²⁴⁶ New Jersey,²⁴⁷ Oregon²⁴⁸ and Pennsylvania²⁴⁹—are here treated as "uncertain." "Indic-

(Defendant sentenced to five consecutive one-year sentences on plea of guilty to 19 counts of issuing worthless checks.)

²⁴⁵ WIS. STAT. ANN. § 957.26 (Supp. 1967).

²⁴⁶ IOWA CODE ANN. § 775.4 (1950); 2 SILVERSTEIN 240; *cf.* *Weaver v. Her- rick*,—Iowa—, 140 N.W.2d 178 (1966); *State v. Gruver*,—Iowa—, 148 N.W.2d 405 (1967); IOWA OP. ATT'Y GEN. Oct. 20, 1966.

²⁴⁷ N.J. STAT. ANN. §§ 2A:158A-1 to -22 (Supp. 1967); N.J.R.R. 1:12-9 (Supp. 1967); *see In re Garofone*, 42 N.J. 244, 200 A.2d 101, 102 (1964) (question reserved); *but cf.* *State v. Zucconi*, 93 N.J. Super. 380, 226 A.2d 16 (1967).

²⁴⁸ ORE. REV. STAT. § 133.625 (Supp. 1967); 3 SILVERSTEIN 625; *but see* ORE. REV. STAT. §§ 133.635, 135.320-330 (Supp. 1967); *cf.* *State v. Blank*,—Ore.—, 405 P.2d 373, 374 (1965) (dictum); *but cf.* *Gebhart v. Gladden*,—Ore.—, 412 P.2d 29, 32 (1966).

²⁴⁹ PA. R. CRIM. P. 318; 3 SILVERSTEIN 637-39; *see* *Commonwealth ex rel. Firm- stone v. Myers*, 202 Pa. Super. 292, 196 A.2d 209 (1963).

table" clearly includes some misdemeanor offenses; indeed, in Iowa and Oregon the standard is "indictable" misdemeanors. As to precisely which misdemeanor offenses are included within the term "indictable," however, I confess to have found "the amount of illumination [to be] in inverse ratio to the effort of inquiry."²⁵⁰

Indiana law on this subject is unique in that it derives wholly from the state constitution, unaided by the kind of supporting legislation that has been enacted with increasing frequency around the country in recent years. Nearly every state constitution includes a provision generally recognizing the "right to assistance of counsel."²⁵¹ Contrary to experience under the sixth amendment, however, these provisions seem to have been singularly irrelevant to the development of the indigent's right to appointed counsel. Indiana is among the exceptions, its supreme court having held in 1951 that the right was "self-executing and does not depend upon legislative authority."²⁵² The uncertainty as to the indigent misdemeanant's right to appointed counsel in Indiana, as in Oklahoma,²⁵³ derives not from the governing legal standard but from its administration. In both jurisdictions the right to appointed counsel was relatively early applied to misdemeanor cases. Yet in neither jurisdiction is counsel in fact systematically appointed for misdemeanants, according to empirical studies²⁵⁴ conducted several years after adoption of a standard that would appear unambiguously to include them. Hence their inclusion here as "uncertain" jurisdictions.

North Dakota law is in a somewhat similar state. A 1967 amendment of the governing statute empowers magistrates to appoint counsel for any "defendant charged with a violation of state criminal law."²⁵⁵ In the absence of any substantial experience regarding the use of this new power, however, no verdict but "unsettled" seems justified at the present time.

In Michigan, the last of the unsettled limited-counsel jurisdictions, the issue of the scope of the misdemeanant's right to appointed counsel

²⁵⁰ Allen, *The Nature of a Crime*, 13 J. COMP. LEG. & INT'L L. (3d ser. 1931).

²⁵¹ *E.g.*, N.J. CONST. art. I, § 10; MINN. CONST. art. I, § 6; WASH. CONST. art. I, § 22.

²⁵² *Balkovac v. State*, 229 Ind. 294, 98 N.E.2d 250, 255 (1951) (construing IND. CONST. art. I, § 13).

²⁵³ *Hunter v. State*, 288 P.2d 425 (Okla. Crim. 1965); *In re Cannon*, 351 P.2d 756 (Okla. Crim. 1960); *but see*, OKLA. STAT. ANN. tit. 22, § 464, *cf. Id.* tit. 19 §§ 138.1-5 (Supp. 1967).

²⁵⁴ Indiana: 2 SILVERSTEIN 217; Oklahoma: 3 SILVERSTEIN 621.

²⁵⁵ N.D. CENT. CODE § 29-07-01.1 (Supp. 1967). Practices under prior law varied from county to county. 3 SILVERSTEIN 574-75.

produced a four-way split among the justices of the supreme court.²⁵⁶ The indigent misdemeanant came away with a right to appointed counsel on *appeal* from any conviction under state law and an uncertain right to appointed counsel at *trial*. Viewed against the national situation, the compass of the dispute remaining after *Mallory* is relatively narrow: whether to provide counsel for misdemeanants subject to imprisonment for ninety days or more or, following the federal "petty offense" model,²⁵⁷ to restrict the right to indigent persons in jeopardy of imprisonment for a period in excess of six months. Since the narrow issue in *Mallory* was the right to appellate counsel, and since the Michigan Supreme Court's rule adopting the ninety-day standard²⁵⁸ has been withdrawn,²⁵⁹ "unsettled" would appear to be the only accurate characterization of Michigan law, even though the scope of the uncertainty is comparatively narrow.

D. Full-Counsel Jurisdictions

With respect to no jurisdiction can it be said that counsel are appointed for indigent defendants in *every* misdemeanor proceeding. So far as I have been able to discover, every jurisdiction (with the potential exception of California) excludes from coverage some classes of misdemeanor offenses. What distinguishes the jurisdictions now to be considered from other limited-counsel jurisdictions is the judgment that the classes excluded are of minor significance.

For a short period, New York law appeared to guarantee a right to appointed counsel in misdemeanor cases without exception. In *People v. Witek*²⁶⁰ three youths were convicted by a justice of the peace of stealing about two dollars' worth of apples from an orchard and sentenced to imprisonment for thirty days and to pay a fine of 25 dollars.²⁶¹

By a four-three vote the court of appeals reversed on the ground that the defendants had not been informed of their right to assigned counsel. Sweeping aside statutory provisions that arguably limited the right to more serious cases, the majority held that the right to counsel "cannot be and in this State is not restricted to major crime," but

²⁵⁶ *People v. Mallory*, 378 Mich. 538, 147 N.W.2d 66 (1967).

²⁵⁷ Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1964).

²⁵⁸ Mich. St. B.J., Jan., 1967 at 37.

²⁵⁹ Mich. St. B.J., May, 1967 at 21.

²⁶⁰ 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965).

²⁶¹ Since none could pay the fine, the effective sentence was 55 days' imprisonment, reduced on appeal to the county court to the time then served—about seven days. 207 N.E.2d at 359, 259 N.Y.S.2d at 414.

rather applied "in every criminal case, large or small."²⁶²

The reaction was swift and not unpredictable. The state legislature pointedly excluded "traffic infractions" from the scope of new legislation providing generally for the "representation of persons accused of crime."²⁶³ In *People v. Lettorio*²⁶⁴ the court of appeals found no constitutional defect in this "most recent expression of the Legislature's views on the right to counsel in traffic cases."²⁶⁵ Traffic infractions, the majority reasoned, are "a form of misconduct distinguishable from more serious breaches of the law . . . [and] the practical result of assigning counsel to defendants in traffic cases would be chaotic."²⁶⁶ The two dissenting judges were less concerned with the nature of the offense than that the traffic convictions under review had both resulted in sentences of imprisonment.²⁶⁷ "[W]here imprisonment threatens, constitutional guarantees as to counsel must apply to 'non-serious' as well as 'serious' offenses."²⁶⁸

In New York, therefore, *Witenski* and *Lettorio* appear to command that in non-traffic criminal cases, however trivial, counsel must be appointed, while in traffic prosecutions, however serious, counsel need not be appointed for the indigent defendant.

Although the scope of the misdemeanor's right to appointed counsel in California has not been tested against facts quite so extreme as those in *Witenski* and *Lettorio*, the rhetoric of the cases would appear to admit of no exceptions. In *re Johnson*²⁶⁹ involved, as the California Supreme Court later characterized it, "a young scofflaw [sentenced] to 900 days for repeated violations of the Vehicle Code."²⁷⁰ Resting its decision on the state constitutional guarantee of the right to counsel,²⁷¹ it found the right "not limited to felony cases but . . . equally guaranteed to persons charged with misdemeanors in a municipal or other inferior court."²⁷²

That the California court intended to give the right to counsel a

²⁶² 207 N.E.2d at 360-61, 259 N.Y.S.2d at 415, 417.

²⁶³ N.Y. COUNTY LAW §§ 722-722-f (McKinney Supp. 1967); N.Y. CODE CRIM. PROC. § 699 (McKinney Supp. 1967).

²⁶⁴ 16 N.Y.2d 307, 213 N.E.2d 670, 266 N.Y.S.2d 368 (1965).

²⁶⁵ 213 N.E.2d at 671, 266 N.Y.S.2d at 370.

²⁶⁶ 213 N.E.2d at 672, 266 N.Y.S.2d at 371.

²⁶⁷ *Lettorio*: 42 days' imprisonment and \$1,030 fine, or in default of payment, 135 additional days' imprisonment. *Kohler*: 10 days' imprisonment and \$100 fine, or in default of payment, 30 additional days' imprisonment. 213 N.E.2d at 673, 674-75, 266 N.Y.S.2d at 368, 375.

²⁶⁸ 213 N.E.2d at 674, 266 N.Y.S.2d at 374.

²⁶⁹ 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965).

²⁷⁰ In *re Smiley*, 66 Cal. 2d 634, 427 P.2d 179, 189, 58 Cal. Rptr. 579 (1967).

²⁷¹ CAL. CONST., art. I, § 13.

²⁷² In *re Johnson*, 62 Cal. 2d 325, 398 P.2d 420, 422, 42 Cal. Rptr. 228 (1965).

scope more consistent with the rhetoric than with the facts of the *Johnson* case is suggested by its treatment of the "practical" problems of administering the right within a system of mass-produced criminal justice. Contrary to the chaos feared by the *Lettorio* majority, the court felt that

. . . probably the vast majority of citizens hailed into court on traffic violations share the judge's interest in prompt disposition of their cases, feeling themselves sufficiently inconvenienced by having to make a personal appearance in the first place.²⁷³

While it is true that, narrowly read, the California Supreme Court decisions go no further than to affirm the indigent misdemeanor's right to appointed counsel in circumstances involving substantial jail sentences,²⁷⁴ no sound reason appears to justify preferring such a narrow construction over the court's repeated insistence that "there can be no doubt" that the right extends "to all persons . . . charged with a misdemeanor in a justice or other inferior court."²⁷⁵

The five remaining full-counsel jurisdictions—Illinois,²⁷⁶ Massachusetts,²⁷⁷ Minnesota,²⁷⁸ New Hampshire²⁷⁹ and Texas²⁸⁰—all draw the right-to-counsel line at the point at which the indigent misdemeanor's liberty is put in jeopardy. Despite variations in the source—statute, case-law and court rule are all represented—and in the precise formulation of the standards, each of these jurisdictions extends the right to appointed counsel to any indigent person charged with an offense punishable by imprisonment. New Hampshire law appears to go farther, including as well persons charged with offenses for which a fine in excess of 500 dollars could be imposed,²⁸¹ but it is uncertain whether any such offense would not also be punishable by imprisonment.

²⁷³ 398 P.2d at 427, 42 Cal. Rptr. at 235. See *Blake v. Municipal Court*, 242 Cal. App. 2d 857, 51 Cal. Rptr. 771 (1966), applying *Johnson* to a case involving driving a vehicle at a speed which endangers the safety of persons and property—punishable by \$50 fine or five days in jail—where defendant received a one day jail sentence.

²⁷⁴ *In re Smiley*, 66 Cal. 2d 634, 427 P.2d 179, 58 Cal. Rptr. 579 (1967) involved an "effective sentence" of 445 days' imprisonment.

²⁷⁵ *In re Smiley*, 427 P.2d at 184, 58 Cal. Rptr. at 584.

²⁷⁶ ILL. ANN. STAT. ch. 38, § 113-3(b) (Smith-Hurd Supp. 1966); *People v. Garet*, 43 Ill. App. 2d 183, 193 N.E.2d 229 (1963) (dictum); *People v. Fletcher*, 74 Ill. App. 2d 387, 220 N.E.2d 70 (1966) (abstract only published); but cf. ILL. S. CT. RULES 605, 607, ILL. ANN. STAT. ch. 110A §§ 605, 607 (Smith-Hurd 1968).

²⁷⁷ MASS. SUP. JUD. CT. RULE 3:10 (1967); MASS. ANN. LAWS ch. 221, § 34D (Supp. 1966); *Mulcahy v. Commonwealth*,—Mass.—, 227 N.E.2d 326 (1967); *MacDonnell v. Commonwealth*,—Mass.—, 230 N.E.2d 821 (1967).

²⁷⁸ *State v. Borst*,—Minn.—, 154 N.W.2d 888 (1967); *State v. Collins*,—Minn.—, 154 N.W.2d 688 (1967); *State v. Illingworth*,—Minn.—, 154 N.W.2d 687 (1967).

²⁷⁹ N.H. REV. STAT. ANN. §§ 604-A :1, :2 (Supp. 1967).

²⁸⁰ TEX. CODE CRIM. PROC. art 26.04 (1966).

²⁸¹ N.H. REV. STAT. ANN. § 604-A :1 (Supp. 1967).