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Beyond "Life and Liberty": The Evolving Right to Counsel

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The majority of Americans, if they have contact with the criminal justice system at all, will experience it through misdemeanor courtrooms. More than ever before, the criminal justice system is used to sort, justify, and reify a separate underclass. And as the system of misdemeanor adjudication continues to be flooded with new cases, the value that is exalted over all others is efficiency. The result is a system that can make it virtually painless to plead guilty (which has always been true for low-level offenses), but that is now overlaid with a new system of increasingly harsh collateral consequences. The hidden consequences of a conviction may never be explained to the person choosing to plead guilty, leading to unjust results that happen more regularly and with more severe consequences than ever before.

This Article argues that current Sixth Amendment jurisprudence on the right to counsel has not adequately adapted to the changed realities within which misdemeanor prosecutions take place today. Because of the dramatic changes in the cultural meaning and real-life consequences of low-level convictions, there is no longer a useful or constitutionally significant line between those cases resulting in actual imprisonment and those cases not resulting in imprisonment. Three years ago in Padilla v. Kentucky*, the Supreme Court recognized that the line between the direct and collateral consequences of a conviction has no constitutional significance in defining the effective assistance of counsel. Recognizing that the Sixth Amendment right to counsel has evolved throughout its history to accommodate the changing cultural context of criminal prosecutions, this Article calls for a robust expansion of the right to counsel in all criminal cases.*

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INTRODUCTION

Millions of people cycle through American criminal courts each year, the vast majority of them in low-level misdemeanor courts. Although it has always been true that more people are prosecuted for petty offenses than for serious criminal misconduct, the world of criminal justice has changed in two important respects in the last thirty years. First, the advent and spread of zero-tolerance policing and prosecution has drawn a far higher percentage of people into the criminal justice system.[1] Second, the scope, severity, and ubiquity of the collateral consequences[2] of a misdemeanor conviction have dramatically increased. The contours of the federal constitutional right to counsel in a criminal case, however, have remained frozen in time over the same period. Because the seriousness of a case — for the purpose of determining who does and does not have a right to appointed counsel — continues to be defined solely by the fact of incarceration, courts are only required to appoint counsel in misdemeanor cases if the defendant is actually sentenced to a period of incarceration.[3] Problematic at its inception, this crude and arbitrary dichotomy between "petty" and "serious" makes less and less sense as the world of criminal justice continues to evolve in the direction of mass processing and externally imposed collateral consequences.[4]

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[1] As described in Part II.A, *infra*, police forces and officers have embraced a model of policing that moves away from the exercise of discretion in deciding whom to arrest, and legislatures have systematically taken away the ability of judges and, in some cases, prosecutors to exercise discretion.

[2] As more fully explained in Part II.C, *infra*, collateral consequences are all those civil restrictions that flow from a criminal conviction, including limitations on employment, custodial rights, and immigration consequences.

[3] *See* Scott v. Illinois, 440 U.S. 367, 383–84 (1979). Courts may neither impose a sentence involving incarceration nor suspend such a sentence without offering the indigent defendant the assistance of court-appointed counsel. *See infra* Part I.C.

[4] Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101, 105 (forthcoming 2012), *available at* http://ssrn.com/abstract=2010826 ("[M]isdemeanor processing reveals the deep structure of the criminal system: as a pyramid that functions relatively transparently and according to legal principle at the top, but in an opaque and unprincipled way for the vast majority of cases at the bottom.").

Addressing some of these changed circumstances, in 2010, the Supreme Court held that when a person is charged with a crime that carries the potential consequence of deportation, her lawyer has an affirmative duty to give correct advice about that consequence.[5] In that case, *Padilla v. Kentucky*, the defendant was charged with a felony, transporting a large amount of marijuana in his tractor-trailer, and was therefore entitled to counsel as a matter of federal constitutional law. If Mr. Padilla had been charged with simple possession of marijuana, however, his right to counsel under the United States Constitution would have been contingent upon whether or not the judge intended to sentence him to jail.[6] For the many people accused of drug-related misdemeanors for which incarceration is not imposed, current Sixth Amendment jurisprudence provides no right to court-appointed counsel. But the prospect of deportation and other life-altering consequences of such a conviction are no less real and not necessarily any less certain than in the felony context.[7] The Supreme Court has expanded the right to the *effective* assistance of counsel to a point where it is logically incoherent to deny vulnerable misdemeanor defendants the right to court-appointed counsel at all.

The classic account of misdemeanor process, Malcolm Feeley's *The Process is the Punishment*, describes a system focused on the sorting of defendants into two groups, not on the basis of guilt or innocence, but rather on their willingness to pay the "process costs" of an overburdened system.[8] The same dynamic governs low-level courtrooms today: a savvy overworked misdemeanor prosecutor can efficiently resolve many cases at an early stage by offering a non-incarcerative sentence.[9] Faced with the choice between

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[5] Padilla v. Kentucky, 130 S. Ct. 1473, 1477 (2010). This is true, the Court held, at least where the potential consequence of deportation is "truly clear." *See id.*

[6] *See Scott*, 440 U.S. at 383–84. Of course, Mr. Padilla may have had a statutory right to counsel under Kentucky law. *See* KY. REV. STAT. ANN. § 31.100(4)(b) (2012) (granting a right to counsel to those charged with "[a] misdemeanor or offense any penalty for which includes the possibility of confinement"). *See generally infra* notes 238–43 and accompanying text for discussion of states exceeding the federal constitutional floor.

[7] "Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." 8 U.S.C. § 1227(a)(2)(B)(i) (2011). The only instance in which a drug-related conviction would not render a noncitizen deportable, therefore, is for possession of a very small amount of marijuana.

[8] *See generally* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979). Feeley discusses the concept of "process costs" specifically at pages 290–92.

[9] *See* M. Chris Fabricant, *Rethinking Criminal Defense Clinics in 'Zero-Tolerance' Policing Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2012) (manuscript at 20–21), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921445. One scholar-practitioner describing a contemporary high-level misdemeanor system wrote that Feeley's book "capture[d] what may be the most essential truth about the lower criminal court — so long as the cost of proceeding is greater than the ultimate sanction, most cases will never be litigated." Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1177 (2004).

leaving court with a small fine and a conviction, and facing a trial weeks or months in the future with the possibility of six months of incarceration, most people would quickly take the non-jail alternative and consider the matter closed. That alternative can be accomplished without the state ever having to pay for a lawyer for the defendant.

Many jurisdictions provide, either formally or informally, for some kind of deferred adjudication or diversionary program for those accused of minor offenses.[10] Where such programs carry no possibility of incarceration, the accused is not entitled by federal constitutional doctrine to the appointment of counsel.[11] And nobody, therefore, bears the responsibility of explaining any consequence to the defendant that is external to the criminal justice system, no matter how long-lasting or life-altering. When the judge presents the unrepresented accused with the option of pleading guilty and being placed in a first offender program, or accepting a sentence consisting only of a fine, it would seem an irrational move to decline the offer.[12] This is how many hundreds of thousands of minor offenses are resolved every year.[13] Because the longer-term consequences to the defendants are largely external to the criminal justice system, however, they remain invisible to that system. The uncounseled defendant who chooses a quick, short-term resolution that does not involve incarceration might later be deported, evicted, have her children removed, or suffer any number of other consequences that do not constitute a "direct" consequence of the criminal conviction.[14]

Current Sixth Amendment jurisprudence on the right to counsel allows for the "waiving" of incarceration by prosecutors or judges, and the structure and incentives of the criminal justice system can even encourage such a move, thereby removing from the defendant her right to appointed counsel. A common practice in some misdemeanor courtrooms is for the judge to ask the prosecutor at the initial hearing whether or not counsel needs to be appointed.[15] Should the prosecutor advise the judge that the government will not be seeking incarceration, the judge will not appoint counsel for the de-

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[10] *See infra* Part II.D.

[11] *See infra* Part I.C.

[12] Accepting a quick guilty plea and entry into a "first offender" program not only eliminates the need for the accused to return to court for subsequent hearings, it allows the accused to control her own destiny; most such programs allow for the dismissal of minor charges upon successful completion of the program's requirements. *See, e.g.*, VA. CODE ANN. § 18.2-251 (2011). Of course, no institutional actor has any incentive to discourage the accused from entering into such a program or to explain the odds of successfully completing such a program.

[13] Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 698 (2002) ("More than ninety percent of dispositions on the merits of criminal prosecutions are convictions, and more than ninety percent of convictions result from guilty pleas.").

[14] *See infra* Part II.C.

[15] *See, e.g.*, John D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE (Erik Luna & Marianne Wade eds., forthcoming 2012) (manuscript at 8), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1953880; Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 311 (2011).

fendant. Although it may seem somewhat perverse to allow the prosecutor to decide which defendants do and do not have a right to appointed counsel, the practice described above is perfectly consistent with current federal constitutional doctrine on the right to appointed counsel.[16] Despite the "collateral" threats of deportation, eviction, and other longer-term consequences, the indigent defendant facing a misdemeanor is only entitled to "the guiding hand of counsel"[17] if the trial judge believes it necessary.[18]

Of course, our system has long recognized that criminal convictions obtained without presence of defense counsel are less reliable.[19] Without counsel, the defendant forfeits the ability to challenge meaningfully myriad issues, and the system receives none of the benefits of a truly adversarial challenge.[20] Was there a constitutional violation in the police actions? Is the defendant competent to stand trial? Was the defendant factually guilty of the charged crime? Was the defendant legally guilty of the charged crime?[21] The system of adjudicating low-level crimes has historically tolerated this lack of precision and accuracy because the offenses involved are "petty" and the consequences are not serious.[22] To the extent that this distinction made any logical sense when it was created, it does not anymore. The rationale no longer fits the reality.

As the Supreme Court suggested in *Padilla*, the demarcation between the "direct" and "collateral" consequences of a conviction is not as clear or as meaningful as previous precedent has pretended them to be.[23] The logic of *Padilla* presents a challenge to the Court's prior jurisprudence, which divides cases neatly into "petty" and "serious" cases for purposes of determining whether the Sixth Amendment requires the appointment of counsel. Rereading the Court's decisions on the right to counsel against a backdrop of the actual practice of contemporary adjudication and the potential consequences of even a low-level conviction requires a rethinking of the scope of the right to counsel.[24] As it has several times in the past century,[25] the Court

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[16] *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

[17] Powell v. Alabama, 287 U.S. 47, 69 (1932); *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.2 n.9 (3d ed. 2000).

[18] *See Scott*, 440 U.S. at 383–84 (Brennan, J., dissenting); *infra* Part I.D.

[19] *See* Alabama v. Shelton, 535 U.S. 654, 667 (2002).

[20] *See* Francis D. Doucette, *Non-Appointment of Counsel in Indigent Criminal Cases: A Case Study*, 31 NEW ENG. L. REV. 495, 496–99 (1997) (describing the processing of a typical case involving possession of marijuana in a Massachusetts district court and listing each of the potential factual and legal issues in the case that remained unexplored).

[21] For a discussion of the expressive differences of the concepts of "actual innocence" and "legal innocence" and an argument against a binary understanding of the two concepts, see generally Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083 (2011).

[22] *See* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 6, 61 (1964); FEELEY, *supra* note 8, at 5–14.

[23] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010).

[24] Others have called for the Sixth Amendment's right to counsel to adapt to modern realities in other ways, including a recognition of the increased use of plea bargaining and cooperation. *See, e.g.*, Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1637 (2003) (arguing that courts should expand the under-

should acknowledge the new reality with regard to the collateral consequences of a conviction and allow the right to counsel to continue to evolve.

Part I of this Article describes the historical development of the federal constitutional right to appointed counsel and the freezing of the development of that doctrine in 1979 with the Supreme Court's decision in *Scott v. Illinois*.[26] Part II explains the changed context within which criminal cases are adjudicated today, exploring the dramatic increase in the scope, severity, and ubiquity of collateral consequences of a minor criminal conviction. Part III analyzes the application of the current doctrine to the modern context of criminal adjudication and the collateral consequences faced by criminal defendants. Part III then argues that the *Scott* Court's adoption of the single factor of actual incarceration as the *sine qua non* of the Sixth Amendment right to counsel should be abandoned in favor of a bright-line rule entitling any indigent defendant accused of a criminal offense to a court-appointed attorney. Because the right to counsel is the "master key" to all of the other rights-protecting and reliability-ensuring rules of criminal procedure,[27] it should evolve to meet the realities of today's world and be made available to any indigent facing criminal charges.

I. The History of the Sixth Amendment Right to Counsel

The guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"[28] has, from its beginning, evolved to meet the demands of a changing criminal justice system. Indeed, Chief Justice Warren Burger recognized that "[t]he right to counsel has historically been an evolving concept."[29] Just as the Framers of the Sixth Amendment rejected the traditional English proscription against lawyers for serious offenses,[30] subsequent interpreters of the Sixth Amendment have found a right to counsel much broader than that foreseen by the Framers, and one more consonant with the values of a changing cultural context.

A. English Common Law and the Framers

The English common law right to counsel evolved in reaction to the types and volume of crimes being prosecuted, as well as the manner in

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standing of what is a "critical stage" of a criminal prosecution to encompass events like plea bargaining, snitching, and assisting with preparation of the presentence report).

[25] *See infra* Parts I.B, I.C.

[26] 440 U.S. 367 (1979).

[27] Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment*, 30 U. Chi. L. Rev. 1, 7 (1962). Without a lawyer, "it is quite unlikely that an accused will be able to enjoy the advantages of the other enumerated rights." James J. Tomkovicz, The Right to the Assistance of Counsel 128 (2002).

[28] U.S. Const. amend. VI.

[29] Argersinger v. Hamlin, 407 U.S. 25, 44 (1972) (Burger, C.J., concurring).

[30] *See* Tomkovicz, *supra* note 27, at 6–21.

which those prosecutions were carried out.[31] Far from providing any guarantee of access to counsel, English common law actually forbade the use of a lawyer for those charged with serious crimes until the mid-eighteenth century.[32] Those charged with less serious crimes (generally, those not punishable by death) were entitled to retain counsel, but no *right* to the assistance of counsel existed beyond the right to retain one's own counsel at personal expense.[33] The prohibition on defense counsel in serious cases was defended as necessary to the maintenance of order and social peace, because the risks of acquittal would be too great if the defendant charged with a serious crime were entitled to counsel.[34] As James Tomkovicz has argued, "[t]he assistance of counsel was seen as an impediment to efficient and successful prosecution and punishment."[35] The costs of actually providing counsel for a broad group of defendants, of course, are twofold: First, society must bear the financial cost of paying those lawyers. And second, the additional lawyers can be seen as imposing a cost on society by making the job of the police and prosecution more difficult.

The English common-law prohibition on participation by defense counsel in serious cases gradually eroded alongside the rise of the professional prosecutor and police force. Throughout the eighteenth century, as the English government grew stronger, the state began to focus more on threats to the public order caused by "ordinary felons."[36] As more and more of these prosecutions were carried out by a state-sanctioned prosecutor, as opposed to a private party, courts became increasingly willing to allow retained defense counsel to participate.[37]

At the time of the drafting and ratification of the Sixth Amendment, England still only guaranteed the right to retain counsel to defendants charged with misdemeanors, and even then only at their own expense.[38] The drafters of the Bill of Rights rejected this limitation to misdemeanors and included a right to counsel in the Sixth Amendment.[39] Indeed, even prior to the ratification of the Sixth Amendment, American colonies had been much

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[31] *Id.* at 2–9.

[32] *Id.* at 2–4; *see also* Metzger, *supra* note 24, at 1637–38; Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 545–46 (2009).

[33] TOMKOVICZ, *supra* note 27, at 2–4.

[34] *Id.* (citing FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 10 (1951)).

[35] *Id.* at 4. Similarly, one commentator has observed of the modern criminal justice system that "the Sixth Amendment's guarantee of counsel conflicts with society's need for effective law enforcement." Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right*, 29 AM. CRIM. L. REV. 35, 62 (1991).

[36] TOMKOVICZ, *supra* note 27, at 6–7.

[37] *See id.* at 7.

[38] *See id.* at 8. One additional (and very small) group of defendants was statutorily entitled to counsel: those impeached by the House of Commons for high treason. *See id.* Curiously, then, the right to counsel attached to those accused of the most minor and the most serious crimes, but not those falling somewhere between the two.

[39] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence.").

more liberal than English courts in their recognition of a right to counsel.[40] It is generally understood, however, that the drafters did not intend to afford those charged with crimes an affirmative right to counsel, but rather the right to retain counsel at their own expense.[41]

B. The Beginnings of a Right to Court-Appointed Counsel

Just as the right to counsel had evolved over time in England, so has the right evolved in the modern United States. In 1932, the Court decided *Powell v. Alabama*, in which nine African American men were charged with rape, which at the time was a capital offense.[42] The case proceeded to trial quickly and without concern for fairness or accuracy. Six days after the accusation was made, indictments were handed up and the defendants arraigned.[43] Six days later, trial began and each of the unrepresented defendants was convicted and sentenced to death within a single day.[44] Considering the trial proceedings, the Supreme Court reversed the convictions and found that the trial court had a "duty" to appoint counsel for the defendants due to the specific circumstances of the case.[45] In determining that due process required the presence of counsel, the Court issued its famous statement about the importance of defense counsel to the reliability of the process:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he

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[40] After describing the English common-law prohibition on counsel in serious cases, the *Powell* Court put it in no uncertain terms: "The rule was rejected by the colonies." Powell v. Alabama, 287 U.S. 45, 61 (1932); *see also* Uhrig, *supra* note 32, at 547–48 (summarizing the various rights to counsel provided by the colonies at the time immediately prior to the adoption of the Sixth Amendment and describing the far more liberal approach than that set forth at English common law).

[41] *See, e.g.*, Scott v. Illinois, 440 U.S. 367, 370 (1979) ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense."); Garcia, *supra* note 35, at 41–42 (explaining that, at the time of enactment, the Sixth Amendment guarantee of right to counsel was a right to be free to retain counsel of choice at one's own expense).

[42] *Powell*, 287 U.S. at 49–50.

[43] *Id.* at 49.

[44] *Id.* at 50–53. The trial court had appointed "all members of the bar" for purposes of arraignment and trial. *Id.* at 49. When no lawyer appeared at trial for the defendants, the trial court appointed an out-of-state lawyer who said that he had not prepared, was not familiar with Alabama procedure, and had merely come down to Alabama "as a friend." *Id.* at 55. The Supreme Court found that such an appointment did not amount to a meaningful appointment of counsel. *See id.* at 71.

[45] *Id.*

> be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[46]

Notwithstanding this soaring rhetoric, the *Powell* Court took great pains to limit its holding to the facts before it. Read narrowly, *Powell* established only that a state was constitutionally required to provide counsel to an indigent defendant in a capital case where such a defendant was "incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy or the like . . . ."[47] The *Powell* Court left unanswered questions about the scope of the right in cases less serious and in circumstances less compelling.

Although *Powell*'s fact-specific approach might have had the benefit of flexibility, the doctrine failed to provide a workable doctrine for courts to follow, and failed to provide protections for subsequent defendants. Only a few years after *Powell*, the Court began to take a more categorical approach to the right to counsel, at least as it applied to federal criminal prosecutions. In *Johnson v. Zerbst*, the Court refused to apply a case-by-case analysis and held instead that the federal government must provide counsel to any defendant facing criminal charges.[48] The Court declined, however, to extend the categorical rule established in *Johnson* to state criminal proceedings. In *Betts v. Brady*, the Court concluded that the Sixth Amendment right to counsel was not essential to a fair trial and was, therefore, not required by due process in all state criminal prosecutions.[49]

In the three decades after *Powell*, the Court gradually moved from a fact-specific and flexible approach to a categorical approach, eventually establishing the categorical right to court-appointed counsel in any serious case in *Gideon v. Wainwright*.[50] When he appeared for his trial on the felony charge of breaking and entering, Clarence Gideon made history by telling the judge that he wanted a lawyer and could not afford one. The trial judge refused to appoint counsel, Gideon defended himself "about as well as could be expected from a layman," and the jury returned a guilty verdict.[51] Gideon was sentenced to a five-year period of incarceration.[52] When his case reached the Supreme Court, the Court concluded that the right to counsel

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[46] *Id.* at 68–69.

[47] *Id.* at 71.

[48] Johnson v. Zerbst, 304 U.S. 458, 463 (1938) ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.").

[49] Betts v. Brady, 316 U.S. 455, 473 (1942). The case-by-case and fact-specific approach that the Court embraced in *Betts* would be squarely rejected in *Gideon v. Wainwright* two decades later. *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) ("The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. . . . Twenty-two States, as friends of the Court, argue that *Betts* was 'an anachronism when handed down' and that it should now be overruled. We agree.").

[50] 372 U.S. at 335.

[51] *Id.* at 337.

[52] *Id.*

was a fundamental right and therefore incorporated by the Fourteenth Amendment's Due Process Clause against the states.[53] Although the Court again left open the precise contours of the right, the Court held that it was an "obvious truth"[54] that fairness required that counsel be appointed for any indigent defendant facing a serious criminal charge: "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[55] Thus, in *Gideon*, the Court rejected a balancing-test approach in favor of a categorical requirement of counsel, at least in felony cases.[56]

To demonstrate the proposition that the right to counsel was "fundamental and essential to a fair trial,"[57] the *Gideon* Court pointed out that governments spend "vast sums of money to establish machinery to try defendants accused of crime."[58] Why would governments do this, argued the Court, unless the presence of a professional prosecutor was necessary for the proper functioning of the legal system? And if the presence of the prosecutor was necessary, then so too was the presence of defense counsel.[59] This argument applies with perhaps even more force to low-level crimes for two reasons. First, the capacious machinery that exists to process the multitudes of low-level arrestees through misdemeanor courtrooms depends on a professional prosecutor to function smoothly and efficiently. Second, because of the far greater volume in misdemeanor courtrooms, judges lack the ability to ensure fairness and procedural regularity; prosecutors have relatively greater control over the system of processing low-level crimes than over serious crimes.[60] Because of the diminished procedural protections and formal safeguards in misdemeanor courtrooms, the prosecutor takes on an even more powerful role than in felony courtrooms; unchecked, this power can obviously lead to a skewing of the process. Accordingly, just as the Court explained in *Gideon*, the need for a professional prosecutor makes clear the need for a defense attorney.

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[53] *Id.* at 353–45.

[54] *Id.* at 344.

[55] *Id.*

[56] For an interesting discussion of the evolution in the Supreme Court's constitutional criminal procedure jurisprudence from a categorical approach to a balancing-test approach, see Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1500–01 (2006).

[57] *Gideon*, 372 U.S. at 342.

[58] *Id.* at 344.

[59] *Id.* ("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.").

[60] *See infra* Part II.B.

C. Contours and Limits of the Contemporary Right to Counsel

As states adapted to the newly defined constitutional right to court-appointed counsel, state courts and legislatures came to different conclusions regarding whether the right was limited to felonies, serious crimes (defined in some other way), cases involving the potential for incarceration, cases involving actual incarceration, or all criminal cases.[61]

Although the cases in which the Court construed the right to counsel — from *Powell* through *Gideon* — each involved felony charges, there is no limiting language in the opinions that would restrict the rationales and the holdings to felony cases. In fact, the language the Court uses in those decisions is striking in its breadth, referring to lawyers as "necessities, not luxuries"[62] and the right to counsel as an "essential barrier[] against arbitrary or unjust deprivation of human rights."[63] Later cases, however, refined and restricted the right to appointed counsel in nonfelony prosecutions.[64]

The Court took its next step toward resolving the scope of the right in 1972, when it decided *Argersinger v. Hamlin*.[65] In *Argersinger*, the defendant had been charged with carrying a concealed weapon, a misdemeanor carrying a potential penalty of six months incarceration and a $1,000 fine.[66] The accused requested that the court appoint him counsel because of his inability to pay, and the trial court refused this request.[67] After a bench trial, the judge found him guilty and sentenced him to a ninety-day period of incarceration.[68] In addressing Argersinger's claim that he was deprived of his Sixth Amendment right to counsel, the Supreme Court agreed and for the first time explicitly expanded the *Gideon* rule beyond the felony arena.[69] The Court explained that in almost every other context, the guarantees of the Sixth Amendment apply to all criminal cases without regard to the seriousness of the particular offense charged.[70] Listing various protections con-

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[61] *See* Argersinger v. Hamlin, 407 U.S. 25, 27 n.1 (1972) (citing Comment, *Right to Counsel: The Impact of* Gideon v. Wainwright *in the Fifty States*, 3 CREIGHTON L. REV. 103 (1970)) (describing the post-*Gideon* landscape in which thirty-one states had extended the holding of *Gideon* to cover nonfelonies, in some cases including even traffic offenses, but in others only involving "serious misdemeanors").

[62] *Gideon*, 372 U.S. at 344.

[63] Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

[64] *See generally* Scott v. Illinois, 440 U.S. 367 (1979); *Argersinger*, 407 U.S. at 25. In every felony prosecution, regardless of whether or not the defendant is sentenced to incarceration, the state must provide counsel to an indigent defendant. *See* Whorton v. Bockting, 549 U.S. 406, 419 (2007).

[65] 407 U.S. at 25.

[66] *Id.* at 26.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 36–40.

[70] *Id.* at 27–29. The *Argersinger* Court explained in some detail why the right to trial by jury stands on a different footing than the other rights found within the Sixth Amendment, making clear that "the right to trial by jury has a different genealogy and is brigaded with a system of trial to a judge alone." *Id.* at 29.

tained within the Sixth Amendment, the Court explained that "[w]e have never limited these rights to felonies or to lesser but serious offenses."[71] The rhetoric of the Court went further, arguing that both history and logic compelled a broad reading of the right to counsel, even in cases less serious than felonies.[72] The Sixth Amendment, the Court explained, had embodied a clear rejection by the colonies of the British common law's restrictions on allowing counsel in criminal cases.[73] The Court went on to argue that just as counsel was a necessary ingredient for a fair trial in a serious case, so too was the presence of counsel necessary for a fair trial in a case like that before it:

> The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.[74]

Notwithstanding the broad rhetoric of the majority opinion, the *Argersinger* Court stopped short of declaring a right to appointed counsel in all criminal cases. Instead, the Court created a bright-line rule that no person may be incarcerated in a criminal case unless that person was either represented by counsel at trial or had validly waived the right to counsel.[75]

The *Argersinger* Court thus rejected the more flexible approach urged by Justice Powell.[76] Concurring in the result, Justice Powell criticized the majority approach as overly rigid and both under- and over-inclusive in scope. Justice Powell would have adopted a three-factor test in determining whether the Due Process Clause of the Fourteenth Amendment required the appointment of counsel for an indigent accused in a misdemeanor case: the complexity of the charged offense, the probable sentence if the accused were to be convicted, and any other case-specific factual circumstances.[77] In elaborating on the second factor, Justice Powell argued that imprisonment should not be the only consequence to be considered; rather, courts should take a broader view of the consequence of a conviction in deciding whether due process required the appointment of counsel.[78] "The consequences of a mis-

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[71] *Id.* at 28.

[72] *Id.* at 32–37.

[73] *Id.* at 30 ("The Sixth Amendment thus extended the right to counsel beyond its common-law dimensions."); *see also* Powell v. Alabama, 287 U.S. 45, 61 (1932).

[74] *Argersinger*, 407 U.S. at 33. The reference to crimes punishable by imprisonment of six months or more is a reference to the separate constitutional guarantee of trial by jury, which applies only to "serious offenses" as defined by the potential maximum period of incarceration, rather than the fact of actual incarceration. *See* Duncan v. Louisiana, 391 U.S. 145, 159–62 (1968).

[75] *Argersinger*, 407 U.S. at 40.

[76] *Id.* at 47–48 (Powell, J., concurring).

[77] *Id.* at 64.

[78] *Id.* at 47–48.

demeanor conviction," Justice Powell continued, "whether they be a brief period served under the sometimes deplorable conditions found in local jails *or the effect of a criminal record on employability*, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty.'"[79] One of Justice Powell's main criticisms of the majority opinion was that it was not sufficiently protective of a defendant's due process rights in cases that did not result in imprisonment. "Serious consequences," he wrote, "also may result from convictions not punishable by imprisonment."[80] To be sure, Justice Powell was not advocating for a blanket right to counsel in all criminal cases, which he described as appealing in its simplicity but overbroad and unnecessary.[81] His opinion in *Argersinger*, however, although opaque in terms of limiting principles, is prescient for its focus on the potential impact of the collateral consequences of a criminal conviction and for its argument that courts should account for these consequences in evaluating "seriousness" in the context of the Sixth Amendment right to counsel.

After *Argersinger*, many thought it was only a matter of time before the Court explicitly declared a right to appointed counsel in all criminal cases.[82] In 1979, however, the Court put a stop to the development of the Sixth Amendment right to counsel in *Scott v. Illinois*.[83] Charged with misdemeanor theft, Scott faced a potential penalty of one year imprisonment, a $500 fine, or both.[84] The judge denied Scott's request for court-appointed counsel and, after a brief bench trial, found him guilty as charged and imposed a sentence consisting of a $50 fine and no incarceration.[85] The Supreme Court affirmed the conviction, holding that counsel need only be appointed in "serious cases," which the Court defined as those cases that resulted in actual incarceration.[86] In so holding, the Court characterized incarceration as a uniquely severe sanction.[87]

Interestingly, the majority opinion in *Scott* was authored by then-Justice Rehnquist, who had joined Justice Powell's concurring opinion in *Argersinger*. Unlike their concurring opinion in *Argersinger*, however, the majority opinion in *Scott* was devoid of any analysis of the collateral consequences of a criminal conviction, focusing instead on actual imprisonment as the sole determinant of whether due process requires the appointment of

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[79] *Id.* at 47–48 (emphasis added).

[80] *Id.* at 48; *see also id.* at 48 n.11 (listing such collateral consequences as social stigma, loss of a driver's license, forfeiture of public office, disqualification from a licensed profession, and loss of pension rights).

[81] *See id.* at 50–52.

[82] *See generally* Alan K. Austin, *The Pre-Trial Right to Counsel*, 26 STAN. L. REV. 399 (1974); John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88 (1977); Note, *Right to Counsel Where Imprisonment is Possible*, 93 HARV. L. REV. 82 (1979).

[83] 440 U.S. 367 (1979).

[84] *Id.* at 368.

[85] *Id.*

[86] *Id.* at 373–74.

[87] *Id.* at 373.

counsel. "Even were the matter *res nova*," wrote Justice Rehnquist, "we believe that the central premise of *Argersinger* — that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment — is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel."[88] Justice Powell concurred separately again, arguing for the adoption of a more flexible due process analysis like the one he endorsed in *Argersinger*.[89]

In limiting the right to counsel to cases involving actual imprisonment, the *Scott* Court looked to the language of its recent cases interpreting the Sixth Amendment's right to counsel and its application in state criminal cases. Focusing on the language from *Argersinger* that "no person may be *imprisoned* for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial,"[90] the Court ignored a rich history of precedent explaining the function of the right to counsel and its importance in the fundamental fairness of the criminal justice system. It may certainly be true that the drafters of the Sixth Amendment had no intention of providing any right to counsel beyond the right of an accused to hire her own counsel.[91] Since *Powell*, however, courts had increasingly described the actual presence of counsel (and not merely the right to be free from interference with one's choice of counsel) as a fundamental and necessary component of a reliable and fair trial.[92] *Scott* also failed to address the argument advanced in *Argersinger* that the legal and constitutional questions involved in many petty offenses are no less serious than those presented in felony prosecutions. Despite these developments that re-

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[88] *Id.*

[89] *Id.* at 374–75 (Powell, J., concurring).

[90] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (emphasis added), *quoted in Scott*, 440 U.S. at 369.

[91] WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27–30 (1955), *cited in Scott*, 440 U.S. at 370.

[92] For example, see *Gideon v. Wainwright*:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

372 U.S. 335, 344 (1963). *See also* Powell v. Alabama, 287 U.S. 45, 53 (1932) (deciding that the Sixth Amendment right to counsel was of a "fundamental character" embraced within the Due Process Clause of the Fourteenth Amendment). Foremost among the variety of procedural safeguards that accompany a criminal prosecution, the right to counsel has in recent times been recognized as essential to establishing a fundamentally fair system of criminal adjudication. *See* Maine v. Moulton, 474 U.S. 159, 168 (1985) (referring to the right to the assistance of counsel as "indispensable to the fair administration of our adversarial system of criminal justice").

inforced the importance of a broader right to counsel, the decision in *Scott*[93] essentially froze the evolution of the right to appointed counsel.[94]

D. Shortcomings of the Current Doctrine

Scott presents serious logistical as well as conceptual problems. The *Scott* doctrine requires judges to decide in advance of trial whether or not they might send the accused to jail. Like the Queen of Hearts in *Alice in Wonderland*,[95] judges in low-level cases are invited to decide in some respect the sentence before the trial. The Court also left open many procedural questions: When exactly does the judge make the determination about incarceration? At arraignment? How does the judge make this determination? Does she take evidence on the question? Consult with the prosecutor? Or does the prosecutor decide alone, essentially certifying which cases are serious enough to warrant incarceration and therefore counsel? Can the right to counsel come and go as the facts of the case become clear?

The primary shortcoming with *Scott*, however, and the main scholarly criticism of the decision, has always been conceptual — if due process and fundamental fairness require counsel in serious cases, how could it be otherwise in petty cases?[96] With rare exception,[97] the rules of evidence and proce-

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[93] Four members of the *Scott* Court dissented but did not all agree on an alternative doctrine. *See Scott*, 440 U.S. at 375–89 (Brennan, J., dissenting); *id*. at 389–90 (Blackmun, J., dissenting). Justice Blackmun did not join in the main dissent in *Scott*, which argued that any person charged with an offense that carried any authorized imprisonment had the right to appointed counsel. *Id*. at 382 (Brennan, J., dissenting). While rejecting the majority's focus on "actual imprisonment," Justice Blackmun would have held only that the right to appointed counsel attached to any prosecution for an offense in which the accused is entitled to a trial by jury (because the authorized punishment was at least six months of incarceration). *Id*. at 389–90 (Blackmun, J., dissenting). Because the defendant in *Scott* was entitled to a jury trial but was denied appointed counsel, Justice Blackmun would have reversed his conviction. *See id*. at 390.

[94] There have been only two significant subsequent developments in the *Gideon-Argersinger-Scott* line of cases. In 1994, the Court approved the use of a valid uncounseled misdemeanor conviction to enhance a subsequent sentence. United States v. Nichols, 511 U.S. 738, 748–49 (1994). In 2002, the Court made clear that a defendant cannot be sentenced to any term of incarceration — even after having been initially sentenced to probation — unless the underlying conviction was obtained either with the presence of counsel or after a valid waiver of the defendant's right to counsel. Alabama v. Shelton, 535 U.S. 654, 662 (2002).

[95] *See* LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 187 (The MacMillan Co. 1921) (1865).

[96] *See* Argersinger v. Hamlin, 407 U.S. 25, 28 (1972); Garcia, *supra* note 35, at 54–55; Lawrence Herman & Charles A. Thompson, Scott v. Illinois *and the Right to Counsel: A Decision in Search of a Doctrine?*, 17 AM. CRIM. L. REV. 71, 71–72 (1979); John M. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 705 (1968); Roberts, *supra* note 15, at 290–313; Jane Rutherford, *The Myth of Due Process*, 72 B.C. L. REV. 1, 29 (1992).

[97] *See, e.g.*, Baldwin v. New York, 399 U.S. 66, 73 (1970) (holding that a defendant charged with a "petty offense" for which the maximum penalty did not exceed six months of incarceration was not entitled to a trial by jury).

dure are the same, and the complexity of trials is not necessarily different.[98] The point of this Article, however, is not to rehash the familiar criticisms of *Scott*'s analysis. It is to argue that, even assuming *Scott* made sense when it was decided, its analytical framework no longer stands up. Changed circumstances have eliminated the category of criminal convictions previously characterized as "petty."

The "actual incarceration" line drawn by the Court in *Scott* finds support neither in the history of the right to counsel nor in the logic of the Court's previous cases. Indeed, the Court had shown a willingness to consider the right to counsel more fundamental to the process than other procedural rights. The Court in *Argersinger* distinguished between the historical right to counsel and the historical right to trial by jury: "While there is historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases,' there is no such support for a similar limitation on the right to assistance of counsel."[99] The Court went on to examine the history of the right to counsel, finding that the language of the Sixth Amendment "extended the right to counsel beyond its common-law dimensions. But there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided."[100] Although the history did not support a right to court-appointed counsel for low-level offenses, neither did it support the drawing of a line at the fact of actual imprisonment.

Just as history provided no support for the limitation settled on by the Court in *Scott,* neither did the logic of the Court's previous decisions. The *Argersinger* Court recognized that "[t]he problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial."[101] In neither *Argersinger* nor *Scott*, however, did the Court embrace any logical or instrumental argument for a greater need for counsel in more serious crimes. The Court in *Argersinger* even suggested that the higher volume of cases that characterize the misdemeanor adjudication system may make the presence of counsel even more necessary in that context because of the "obsession for speedy dispositions, regardless of the fairness of the result."[102]

Drawing the bright line at actual incarceration was not supported either by history or by logic, but by expense. In *Scott*, the closely divided Court read *Argersinger* as setting an outer (or lower) limit for the right to court-appointed counsel, and it explained that the actual imprisonment standard had "proved reasonably workable, whereas any extension would create con-

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[98] *See* Roberts, *supra* note 15, at 292 (exploring the ways in which advocacy in low-level cases can differ (or not) from advocacy in more serious cases).

[99] *Argersinger*, 407 U.S. at 30, *quoted in* Scott v. Illinois, 440 U.S. 367, 379 n.6 (1979).

[100] *Id.*

[101] *Id.* at 36–37.

[102] *Id.* at 34.

fusion and impose unpredictable, but necessarily substantial, costs on fifty quite diverse states."[103] Contrary to the Court's assertion, of course, the extension of the right to counsel in any criminal case would eliminate confusion regarding the scope of that right. It seems clear instead that the Court was focused on the specter of increased costs in reaching its decision to limit the right to counsel to those facing actual imprisonment.[104] This resource-focused approach differed dramatically from that of the *Argersinger* Court, which addressed outright the argument that extension of the right to counsel in low-level cases would be prohibitively expensive: a "partial solution" to the concern about cost would be for states to decriminalize petty misconduct.[105]

From the 1930s through the late 1970s, the Supreme Court gradually staked out the contours of the federal constitutional right to counsel. This half-century of cases developed the importance of counsel to the fairness, accuracy, and legitimacy of a criminal conviction. The development of the right to counsel stalled in 1979 with *Scott v. Illinois*. And in freezing the right to counsel around the sole factor of actual incarceration, the Court failed to honor a long tradition of flexible jurisprudence that allowed the scope of the right to respond to changing institutional and social needs. The Court further failed to justify in any satisfying way the creation of a bright line between petty and serious offenses in this context. As a result, at the very time that misdemeanor prosecutions were exploding in number and collateral consequences becoming far more widespread and severe, the right to counsel was prevented from evolving to meet these changed circumstances.

II. The Changed Context of Misdemeanor Prosecutions

A. Broken Windows

The end of the expansion of the right to counsel coincided almost exactly with the rise of the era of greatly expanded collateral consequences.[106] In the 1980s, the "broken windows" theory of policing became ascendant and quickly had an impact in both police departments and prosecutors' offices across the country.[107] Generally traced to a 1982 article in *The Atlantic*

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[103] *Scott*, 440 U.S. at 373.

[104] In declining to extend the right to counsel to all criminal cases where imprisonment is an authorized penalty, the Court provides the following rather opaque explanation: "Unfortunately, extensive empirical work has not been done. That which exists suggests that the requirements of *Argersinger* have not proved to be unduly burdensome. That some jurisdictions have had difficulty implementing *Argersinger* is certainly not an argument for extending it." *Id.* at 373 n.5 (citations omitted).

[105] *Argersinger*, 407 U.S. at 38 n.9 ("One partial solution to the problem of minor offenses may well be to remove them from the court system. . . . Such a solution, of course, is peculiarly within the province of state and local legislatures.").

[106] *See infra* Part II.B.

[107] *See* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New*

by James Q. Wilson and George L. Kelling,[108] the "broken windows" theory posits that "at the community level, disorder and crime are usually inextricably linked, in a kind of developmental sequence."[109] If a single broken window is left unattended, they argue, others will follow; before long, informal and traditional methods of maintaining social order begin to disappear and the message is sent out that deviant or disorderly behavior will be tolerated.[110] Although they stop short of arguing that social disorder of the kind they describe inevitably leads to serious crime, Wilson and Kelling argue that the kind of social breakdown that follows from a progression of petty crime leaves a community "vulnerable to criminal invasion."[111] Although the claims of the "broken windows" school of thought have been hotly contested and the consequences of such an approach to policing fiercely criticized,[112] it has certainly led to a dramatic rise in the rate of low-level prosecution. In the last few decades, the number of misdemeanor prosecutions has more than doubled, to a 2006 level of approximately 10.5 million.[113]

Wilson and Kelling's main argument has nothing specifically to do with the *prosecution* of crime but rather is focused on *policing*. Their argument, rather than a call for greater prosecution of minor crimes, is primarily for a return to the traditional role of police officers as enforcers of community norms.[114] They call for police strategy to retreat from its focus on crime solving and instead for a return to the police officer as maintainer of peace

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York Style, 97 MICH. L. REV. 291, 292–93 (1998) [hereinafter Harcourt, *Reflecting on the Subject*]. For an excellent history and analysis of the various strains of thought generally comprising the "broken windows" school of thought, see generally BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001) [hereinafter HARCOURT, ILLUSION OF ORDER].

[108] *See* James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

[109] *Id.* at 29, 31.

[110] *See id.*

[111] *Id.*; *see also* Harcourt, *Reflecting on the Subject*, *supra* note 107, at 292–95 (questioning the effectiveness of order-maintenance policing in New York City but stating that "New York City's new policing strategy has met with overwhelming support in the press and among public officials, policymakers, sociologists, criminologists, and political scientists. The media describe the 'famous' *Broken Windows* essay as 'the bible of policing' and 'the blueprint for community policing.' "); Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2488 (1997) (arguing that order-maintenance policing has achieved "startlingly successful results" in New York City by strict police enforcement of orderliness).

[112] *See, e.g.*, HARCOURT, ILLUSION OF ORDER, *supra* note 107, at 59–89; K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 281–82 (2009).

[113] *See* ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009); HARCOURT, ILLUSION OF ORDER, *supra* note 107, at 46–53; Roberts, *supra* note 15, at 281 n.11–12.

[114] Wilson & Kelling, *supra* note 108, at 29, 34 ("The essence of the police role in maintaining order is to reinforce the informal control mechanisms of the community itself. The police cannot, without committing extraordinary resources, provide a substitute for that informal control.").

and order.[115] Whatever the original intent of Wilson and Kelling, their ideas have led to a change in the way petty misconduct is handled on American streets and in American courts. In the three decades since their article was published, "[b]roken windows policing has swept the American criminal justice system at record speed."[116] And as the number of arrests has risen since the early 1980s, so too has the number of criminal prosecutions for petty crime.[117]

Of course, the majority of criminal prosecutions have always been for misdemeanors. The majority of Americans, if they have contact with the criminal justice system at all, will contact it through its misdemeanor courtrooms. The system of adjudicating misdemeanors affects far more people than the system of adjudicating felonies.[118] Consequently, the majority of the approximately 65 million people in the United States with criminal records have misdemeanor records.[119] The more than 30% of Americans who have been arrested for a criminal offense by the age of twenty-three are predominantly arrested for misdemeanors.[120] And of the new criminal cases

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[115] *See* HARCOURT, ILLUSION OF ORDER, *supra* note 107, at 24–25 ("The order-maintenance function focuses on integrating police officers into the community and teaching them to maintain the peace and order rather than solve crimes. It is symbolized by the foot-patrol officer on his beat, making his rounds, enforcing rules of civility, and maintaining good order.").

[116] *Id.* at 23. "In 1993, New York City began implementing the quality-of-life initiative, an order-maintenance policing strategy targeting minor misdemeanor offenses like turnstile jumping, aggressive panhandling, and public drinking. . . . New York City's new policing strategy has met with overwhelming support in the press and among public officials, policymakers, sociologists, criminologists and political scientists." Harcourt, *Reflecting on the Subject*, *supra* note 107, at 292–93. *See also* HARCOURT, ILLUSION OF ORDER, *supra* note 107, at 23. Harcourt goes on to describe and differentiate the various and related philosophies, concepts, and practices that are sometimes grouped together under the "broken windows" umbrella: "[o]rder maintenance, broken windows, zero tolerance, community policing, social norms, social meaning, [and] social influence . . . ." *Id.*

[117] For a comparison of the numbers from before and after the policy came into effect, see Howell, *supra* note 112, at 281–82 (comparing New York City's 86,000 nonfelony arrests in 1989, prior to the introduction of the city's strategy of Zero Tolerance Policing, with the 176,000 nonfelony arrests in 1998, after the strategy had been implemented).

[118] Roberts, *supra* note 15, at 280–81.

[119] *See* MICHELLE N. RODRIGUEZ & MAURICE EMSELLEM, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 27 n.2 (2011). Estimates of how many Americans have a criminal record are difficult to verify and range from 65 million to 92 million. *See* Margaret Colgate Love, *The Collateral Consequences of* Padilla v. Kentucky*: Is Forgiveness Now Constitutionally Required?*, 160 U. PA. L. REV. PENNUMBRA 113, 118 nn.23–24 (2011), *available at* http://www.pennumbra.com/essays/12-2011/Love.pdf. Roughly 2.3 million people live behind bars in the United States. *See* Lauren E. Glaze, *Correctional Population in the United States, 2010*, *in* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 3 tbl.1 (Ser. No. NCJ 236319, 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf.

[120] *See* Erica Goode, *Many in U.S. Are Arrested by Age 23, Study Finds*, N.Y. TIMES, Dec. 19, 2011, at A16, *available at* http://www.nytimes.com/2011/12/19/us/nearly-a-third-of-americans-are-arrested-by-23-study-says.html?_r=0 (noting that the 30.2% of twenty-three-year-olds who reported having been arrested for "an offense other than a minor traffic violation" was markedly higher than the 22% who made a similar report in a 1965 study).

each year, the vast majority are misdemeanors.[121] The misdemeanor courtroom is, for most people, the American criminal justice system, but the subject has received relatively little scholarly attention.[122] As has long been the case, the adjudication of low-level offenses (and therefore, most offenses) is driven largely by one factor: efficiency.[123] There has always been a tension between the formal procedural safeguards that are supposed to accompany any criminal prosecution and the very different practice on the ground.[124] As the numbers have increased over the past few decades, the tension has increased: "broken windows" policing has led to more arrests, which has led inexorably to more prosecutions, which has led in turn to larger caseloads on prosecutors, defense lawyers, and judges. At the same time that changes in policing philosophies and prosecution strategies have led to hugely increased numbers and a demand for more efficient mass processing of cases, the actual (and externally imposed) effects of a criminal conviction have become far more severe.

B. A View from the Ground Floor: How Misdemeanors are Processed

There has always been a tension between the formal procedural safeguards that are supposed to attend any criminal prosecution and the very different practice on the ground. Of course, nowhere is this tension more pronounced than in the adjudication of misdemeanors, which are processed in huge and increasing numbers. The two "models of the criminal process" described by Herbert Packer in 1964 continue to define the poles of criminal adjudication.[125] The due process model "presumes the fallibility of actors and thus values formalized procedures and protections,"[126] while the crime control model "begins from a presumption of guilt and an overriding faith in the administrative processes that precede the bringing of the formal charge

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[121] While nationwide misdemeanor statistics are not routinely kept, it is clear that they greatly outnumber felonies. *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1803 n.78 (2012) (comparing felony convictions to misdemeanor convictions); Natapoff, *supra* note 4, at 108, 108 n.25 (citing BORUCHOWITZ ET AL., *supra* note 113, at 11) (estimating 10.5 million misdemeanor prosecutions annually).

[122] There are, of course, many wonderful exceptions to the general lack of scholarly interest in how low-level crimes are processed. *See generally, e.g.*, FEELEY, *supra* note 8; Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 604 (1956); Natapoff, *supra* note 4; Roberts, *supra* note 15; Weinstein, *supra* note 9.

[123] *See* Foote, *supra* note 122, at 644.

[124] *See generally* King, *supra* note 15; *see also* Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1155–56 (2005) ("The distinction between substance and procedure pervades academic thinking all the way down to the foundations . . . . In trial-level courthouses, however, the distinction fades, as the defendant trades his procedural rights for reductions in his substantive liability.").

[125] Packer, *supra* note 22, at 6.

[126] King, *supra* note 15, at 2.

in court."[127] One need only spend a morning in a misdemeanor courtroom to understand the differences between the two models and the greater expediency (if not accuracy, fairness, or justice) provided by the crime control model. If every defendant charged with a misdemeanor were to insist meaningfully and fully on her rights — not only to counsel and a trial, but also to the presumption of innocence, compulsory process, confrontation rights, and all of the other formal procedural safeguards to which she is entitled — the system of criminal prosecution would have to undergo enormous change in response.

Descriptions of misdemeanor courtrooms bear this out. Historical and contemporary accounts of how low-level crimes are actually adjudicated support Justice Douglas's 1972 characterization of the system as one of "assembly-line justice."[128] One of the best-known descriptions is Caleb Foote's 1956 article, *Vagrancy-Type Law and Its Administration*.[129] After spending almost three years observing Philadelphia's lowest-level criminal courts, Foote described a system that valued quick dispositions of cases above all else, and that depended on deference to the police officers who brought the charges, as opposed to the formal procedural safeguards that make up due process.[130] According to Foote, these safeguards, and what would later come to be characterized as the "due process model"[131] of criminal adjudication, "do[] not penetrate to the world inhabited by the 'bums' of Philadelphia . . . ."[132] Rather, the judges of Philadelphia's magistrate courts conducted their hearings according to the more efficient and informal crime control model.[133]

The mass processing of low-level charges without significant regard for either substantive or procedural justice, however, is not merely an artifact of history. In the almost half-century since Foote's article was published, the sheer number of cases processed through those courts has expanded greatly. The "broken windows" era of policing has led to increased pressure on misdemeanor courtrooms and a greater perceived need for efficiency in the mass processing of low-level crimes. This increased pressure has led to a tacit agreement among institutional actors to streamline the process from arrest to conviction. Accordingly, the progress toward greater actual due process

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[127] *Id*.
[128] Argersinger v. Hamlin, 407 U.S. 25, 36 (1972).
[129] Foote, *supra* note 122.
[130] *See id*. at 649.
[131] Packer, *supra* note 22, at 6.
[132] Foote, *supra* note 122, at 604.
[133] *See also* Steven Duke, *The Right to Appointed Counsel:* Argersinger *and Beyond*, 12 AM. CRIM. L. REV. 601, 621–23 (1975) (summarizing studies in the early 1970s of low-level courts and the widespread failure of judges in those courts to inform defendants of their right to appointed counsel); King, *supra* note 15, at 5–7 (comparing the situation described by Foote with today's misdemeanor courtrooms and arguing that reliance on the crime control model has continued unabated while the consequences to misdemeanor defendants have become more severe).

safeguards in the misdemeanor criminal justice system has been halting at best.

A 2011 study of Florida's misdemeanor courts conducted by the National Association of Criminal Defense Lawyers concluded that "[f]or many of the nearly half million individuals who pass through Florida's misdemeanor courts each year, due process is illusory."[134] The report found that 70% of misdemeanor defendants pled guilty or no contest at arraignment and that the highest percentage of those entering such a plea at arraignment were those defendants in custody.[135] The average time of an arraignment proceeding (at which almost three of every four defendants waived their right to a trial and admitted guilt) was 2.93 minutes.[136] Not surprisingly, those defendants who admitted their guilt at their arraignment and waived their right to trial were more likely to be unrepresented by counsel.[137] The report concluded that the absence of counsel in the majority of the cases observed led to an environment where ill- or unadvised defendants were opting for short-term gain and long-term difficulties:

> These findings raise significant concerns that unrepresented defendants . . . underestimate the non-immediate yet serious and long-term consequences of misdemeanor convictions. Without information on the potential long-term and collateral consequences . . . defendants underestimate the importance of counsel and the collateral consequences to their post-plea quality-of-life.[138]

Factually guilty or not, a defendant charged with a misdemeanor might choose a quick guilty plea over a drawn-out trial process. There is every reason to believe that the phenomenon of wrongful convictions happens far more often in low-level cases than in high-level cases.[139] The difference between the two, however, is that in low-level cases it is far more likely to occur with the consent or acquiescence of the defendant, who chooses this

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[134] ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 14 (2011).

[135] *Id.* at 15. This number is remarkably similar to the findings of a New York study from 2000: "[P]rivate attorneys representing indigent defendants through an assigned-counsel plan 'were disposing of 69 percent of all misdemeanor cases at arraignment.'" Roberts, *supra* note 15, at 307 (quoting THE SPANGENBERG GRP., STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES 142 (2006), *available at* http://www.courts.state.ny.us/ip/indigentdefensecommission/SpangenbergGroup/Report.pdf).

[136] SMITH & MADDAN, *supra* note 134, at 16.

[137] *Id.* at 18.

[138] *Id.*

[139] *See* Natapoff, *supra* note 4, at 116 ("Lacking evidentiary rigor and adversarial testing, [the world of low-level criminal adjudication] is a world in which a police officer's bare decision to arrest can lead inexorably, and with little scrutiny, to a guilty plea. It is, in other words, a world largely lacking in a scrutinized evidentiary basis for guilt and therefore one in which the risk of wrongful conviction is high.").

course of action, sometimes rationally (at least in the short term).[140] The hidden consequences of a conviction may not ever be explained to the person choosing to plead guilty, leading to unjust results that happen more regularly and more severely than ever before.[141] While the consequences of a conviction in a serious case are transparent, they can be opaque or invisible in a misdemeanor until long after the conviction is complete. Counsel has an important but often overlooked role to play in making these hidden consequences known to the defendant charged with a low-level crime.

C. Collateral Consequences

1. Background.

The "collateral consequences" of a criminal conviction have been defined as "all civil restrictions that flow from a criminal conviction."[142] Some have referred to these as "status-generated penalties" because it is the subject's status as a criminal (or as a certain type of criminal) that gives rise to the extra-judicially imposed sanction.[143] These collateral consequences often constitute a far more serious form of punishment than the direct consequences of a conviction, especially for the many people convicted of low-level crimes who are never sentenced to incarceration.[144] The Supreme Court hinted at this long before *Padilla*, when it acknowledged in *INS v. St. Cyr* that "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'"[145]

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[140] *See, e.g.*, Russell Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 79–80 (2009) ("[P]lea bargains will be most generous (and therefore most frequently accepted) in cases involving misdemeanors and other less serious offenses. The process costs expended by defendants will be particularly high relative to penalty costs where only minor penalties are involved."); King, *supra* note 15, at 10–11 ("The danger of wrongful convictions in low-level prosecutions . . . comes from . . . the nonfeasance, rather than the misfeasance or malfeasance, of the prosecutor."); Roberts, *supra* note 15, at 302.

[141] *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("In today's criminal justice system, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.").

[142] Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999). Generally, the collateral consequences of a criminal conviction can be divided into two broad categories: collateral sanctions and discretionary disqualifications. A collateral sanction is "a legal penalty, disability, or disadvantage . . . imposed on a person automatically upon that person's conviction . . . even if it is not included in the sentence." AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, R-7–R-8 (3d ed. 2004). By contrast, a discretionary disqualification is a "penalty, disability, or disadvantage . . . that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction." *Id.*

[143] *See* Love, *supra* note 119, at 91.

[144] *See* Demleitner, *supra* note 142, at 154; Roberts, *supra* note 15, at 300.

[145] INS v. St. Cyr, 533 U.S. 289, 323 (2001) (quoting 3 MATTHEW BENDER, CRIMINAL DEFENSE TECHNIQUES §§ 60A.01, 60A.02[2] (1999)).

Because misdemeanor courtrooms typically lack the procedural protections and formality of felony courtrooms, the collateral consequences of low-level convictions often catch convicted misdemeanants by surprise.[146] Under the system currently in place in most states, defendants plead guilty to low-level crimes with no knowledge of the serious and lasting effects of their decision. Two of the great works to have examined the adjudication of misdemeanor offenses are Caleb Foote's 1956 article *Vagrancy-Type Law and Its Administration*,[147] and Malcolm Feeley's 1979 book, *The Process is the Punishment*.[148] Indeed, much of what was described by Foote and Feeley in the mid-twentieth century still rings true to anyone who spends time in misdemeanor courtrooms today. Two significant changes have occurred since the classic mid-twentieth century accounts of low-level prosecutions. Inside the courtroom, the volume of such prosecutions has greatly increased. Outside the courtroom, meanwhile, there has been a dramatic rise in the scope and severity of the collateral consequences of a low-level conviction. For the "vagrants" described by Foote and Feeley, a conviction doled out in the rough justice of the low-level courts meant no more than the ten days in jail or fine directly administered by the sentencing judge. Over the past few decades, however, legislatures and nongovernmental entities have systematized and institutionalized a regime of collateral consequences, and technology has made those consequences ubiquitous and virtually inescapable.

Today, a person convicted of even a misdemeanor can suffer a panoply of severe consequences, of which only the best known is related to immigration. Because of the Supreme Court's recent focus on the immigration context in *Padilla v. Kentucky*, much has recently been written about deportation as a consequence at least as severe as incarceration.[149] Indeed, the Court in *Padilla* recognized that it had long considered deportation a "particularly severe penalty"[150] and a "drastic measure."[151] As the dissenters in *Padilla* correctly pointed out, however, there is no logical stopping point to the rationale of the majority opinion. As Justice Scalia argued, "[t]he suggestion that counsel must warn defendants of potential removal consequences . . . cannot be limited to those consequences except by judicial

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[146] *See* Natapoff, *supra* note 4, at 105 ("[M]isdemeanor convictions have become significant long-term burdens on individual defendants even though the processes by which such convictions are generated fall far short of minimum legal and evidentiary standards taken for granted in the felony world.").

[147] Foote, *supra* note 122.

[148] FEELEY, *supra* note 8.

[149] *See e.g.*, Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 586 (2011); Love, *supra* note 119, at 91; Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1301 (2011); Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1708 (2011).

[150] Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (internal citations and punctuation omitted).

[151] *Id.* at 1478.

caprice."[152] If the longstanding dichotomy between direct and collateral consequences breaks down in the context of immigration, there is no reason why it would not similarly break down in the context of a defendant facing eviction, mandatory registration on a sex offender registry, or any number of other consequences that have long been considered beyond the scope of the criminal case itself.

2. Immigration.

Congress has dramatically changed the immigration-related consequences of a criminal conviction since the decision in *Scott v. Illinois*. Each of the modern immigration reforms has made the deportation or excludability of those convicted of certain criminal offenses more automatic by limiting the possibility of discretionary relief.[153] For instance, in 1990, Congress stripped sentencing judges of the power to grant a judicial recommendation against deportation (JRAD).[154] In 1996, Congress went one step further and

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[152] *Id.* at 1496 (Scalia, J., dissenting). Justice Alito also predicted that the holding in *Padilla* would be impossible to contain and could expand to apply to many other indirect consequences of a criminal conviction:

> This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities. All of these consequences are "serious," but this Court has never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about such matters.

Id. at 1488 (Alito, J., concurring) (internal citations and punctuation omitted). State courts have begun to use *Padilla* as authority to allow for the withdrawal of guilty pleas where, for instance, counsel has either failed to advise or has provided incorrect advice about the loss of pension benefits and about sex offender registration. *See* State v. Fonville, 804 N.W.2d 878, 890–95 (Mich. Ct. App. 2011) (allowing defendant to withdraw guilty plea to child enticement because defense counsel failed to provide any advice on the issue of mandatory sex offender registration); State v. Powell, 935 N.E.2d 85, 92 (Ohio Ct. App. 2010) (allowing defendant to withdraw guilty plea to voyeurism because defense counsel provided incorrect advice regarding sex offender registration requirements).

[153] *See Padilla*, 130 S. Ct. at 1478 ("While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.").

[154] *See id.* at 1480. The *Padilla* Court summarized the dramatic change enacted by Congress in 1990 by describing the previous procedure:

> At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation "that such alien shall not be deported." This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation." Thus, from 1917 [until 1990], there was no such creature as an automatically deportable offense. Even as the class of deportable

eliminated the Attorney General's authority to grant discretionary relief from deportation.[155]

At the same time, the scope of criminal offenses that can subject someone to this near-automatic deportation has grown ever larger. Crimes involving moral turpitude and those classified as an "aggravated felony" have long rendered an alien subject to deportation in the United States.[156] These elastic categories of criminal offenses have continued to grow, and now encompass many crimes that rarely carry a jail sentence, including shoplifting, driving under the influence of alcohol, possession of any type of drug (although a small amount of marijuana for personal use still does not qualify), and assault on a family member.[157]

Because of these changes in immigration policy, the number of people who face deportation because of a criminal conviction has skyrocketed in the past three decades: In 1979, when the Supreme Court decided *Scott*, 264 noncitizens were deported because of a criminal conviction.[158] By contrast, in 2004, 42,510 noncitizens were deported on this basis.[159] In fiscal year 2011, 216,698 of the noncitizens removed from the country had been convicted of a crime.[160]

3. Sex Offender Registries.

Another way in which the broader context has changed since *Scott* is the spread of sex offender registries. In 1979, when the Court decided *Scott*, few states had statewide criminal registries and the widespread belief was that such registries and community notification had failed and were likely

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offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

Id. at 1479 (citation omitted).

[155] During the five years after Congress eliminated the JRAD, the Attorney General exercised his authority to prevent the deportation of over 10,000 noncitizens that had been convicted of a crime making them otherwise deportable. *Id.* at 1480. In 1996, however, Congress eliminated the power of the Attorney General to prevent deportation in this manner. *See id.*

[156] *See* 8 U.S.C. § 1227(a)(2)(A)(ii)–(iii) (2012).

[157] *See* Clapman, *supra* note 149, at 591–92 (2011) (describing the aggressive broadening by Congress of the categories of deportable offenses, especially during the 1990s).

[158] IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 187 tbl. 67 (1999), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1997YB.pdf.

[159] OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS 161 tbl. 42, *available at* http://www.dhs.gov/files/statistics/publications/YrBk04En.shtm.

[160] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FY 2011: ICE ANNOUNCES YEAR-END REMOVAL NUMBERS, HIGHLIGHTS FOCUS ON KEY PRIORITIES INCLUDING THREATS TO PUBLIC SAFETY AND NATIONAL SECURITY (Oct. 18, 2011), *available at* http://www.ice.gov/news/releases/1110/111018washingtondc.htm. This number might overrepresent somewhat the number of noncitizens removed *because of* their criminal convictions because someone with a criminal conviction could, of course, be removed for some other reason. Almost 36,000 noncitizens were deported due to a conviction for driving under the influence, an offense that is usually classified as a misdemeanor and that frequently results in no incarceration. *See id.*

soon to disappear completely.[161] Certainly, the members of the Court would have had no reason even to consider the possibility that a misdemeanor conviction could result in lifetime registration in a nationwide database; this potential collateral consequence does not even merit a mention in the *Scott* opinion.[162] At the time that the Supreme Court decided *Scott*, the consensus among those considering the issue was that collateral consequences were generally fading away. Indeed, just a few years after the *Scott* opinion, the American Bar Association considered the state of collateral consequences of criminal convictions and saw a trajectory toward abolition: "As the number of disabilities [collateral consequences] diminishes and their imposition becomes more rationally based and more restricted in coverage, the need for expungement and nullification statutes decreases."[163] The fact that criminal registration statutes were so rare and the belief that they were fast becoming obsolete explain their lack of inclusion in the discussion about which offenses are "petty" and which are "serious."

Today, both the reach and the scope of such registries are breathtaking. Within a few short years at the beginning of the 1990s, states implemented sex offender registries at a rapid clip, and by 1996, every jurisdiction had passed a law requiring those convicted of certain sex offenses to register.[164] In 1994, the federal government first began to condition the grant of certain federal funds on states' implementation of systems to track the whereabouts of sex offenders.[165] While the 1994 federal law only required states to maintain and track sex offenders, Congress soon thereafter expanded the reach of the statute to require notification to a community when a sex offender lived nearby.[166] In 2003, Congress updated the 1996 law to require states to maintain a publicly accessible website containing information about sex offenders

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[161] *See* WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 20–48 (2009); Lindsay B. Fetzer, *The Sexual Offender Registration and Notification Act: No More Than " 'Statutory Lip Service' to Interstate Commerce"*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 483, 487–89 (2010).

[162] Wayne Logan has shown how the popularity of registration laws gradually fell from their peak around the middle of the twentieth century to a point where "registration laws scarcely figured in American life." LOGAN, *supra* note 161, at 48. Between 1968 and 1984, no state passed a new registration law and, in 1978, Arizona repealed its criminal registration law. *Id.* at 46.

[163] AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: LEGAL STATUS OF PRISONERS § 23-8.2 cmt. at 143 (2d ed. 1983), *quoted in* Love, *supra* note 119, at 115.

[164] *See* HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 47–49 (2007), *available at* http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf.

[165] 42 U.S.C. § 14072 (1994). This legislation, also known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, was passed in response to the abduction of an eleven-year-old boy from his rural Minnesota neighborhood. *See* LOGAN, *supra* note 161, at 55–60.

[166] 42 U.S.C. § 14071(e)(2) (2000). Like the 1994 statute, this legislation followed the highly publicized rape and murder of a child. It is popularly known as "Megan's Law" after seven-year-old Megan Kanka. See generally Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315 (2001), for a detailed discussion of the history of legislation involving sex offender registration.

and the locations of their residence.[167] Most recently, in 2006, Congress overhauled the system of sex offender registries, expanding the national registry and requiring states to share the information in state registries with each other.[168] In terms of reach, every state now has an online sex offender registry, a system of community notification, and a system of exchanging information with other states and the federal government.[169] In terms of scope, registries have expanded to include those convicted of even very minor misdemeanor offenses.[170] More than 700,000 people are currently on some kind of sex offender registry in the United States.[171]

4. Sentencing Enhancements.

The introduction and proliferation of sentencing guidelines since the early 1980s has given rise to an additional consequence of any criminal con-

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[167] 42 U.S.C. § 14071 (2003).

[168] 42 U.S.C. § 16901 (2006). *See also* Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 10 (2008) (describing the increased requirements imposed on states by the Adam Walsh Child Protection and Safety Act of 2006, including requirements of community notification and that states share information with other states and with the federal government).

[169] *See* LOGAN, *supra* note 161, at 66–74; *see also* Fetzer, *supra* note 161, at 489.

[170] *See* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1081–82 (2012) (describing such registries as growing "dramatically in number and scope"). *See generally* Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 DEV. MENTAL HEALTH L. 33 (2008) (discussing the expansion of such registries to include juvenile offenders). One of the earliest states to adopt a sex offender registry was California. In an interesting precursor to *Padilla v. Kentucky*, the California Supreme Court in 1973 considered whether a guilty plea for a misdemeanor for lewd and dissolute conduct was knowing and voluntary when it was made without the defendant's knowledge that it carried a collateral consequence of lifetime registration on the state's sexual offender registry. *In re* Birch, 515 P.2d 12 (Cal. 1973). The unrepresented defendant, who was arrested for urinating in public, argued that his lack of knowledge of the registration requirement rendered his guilty plea invalid. *Id.* at 14. The California Supreme Court agreed, citing the "unusual and onerous nature" of the registration requirement and explaining that "[a]lthough the stigma of a short jail sentence should eventually fade, the ignominious badge carried by the convicted sex offender can remain for a lifetime." *Id.* at 16–17, *cited in* LOGAN, *supra* note 161, at 44. The Court in *Birch* went on to describe the unlikelihood that the defendant could have foreseen the dire and permanent collateral consequence of registration: "While petitioner possibly might have suspected that a guilty plea could result in a short jail sentence, we cannot believe that he was aware that as a consequence of urinating in a parking lot at 1:30 in the morning he would be required to register as a *sex offender*. . . . Without this [awareness], we conclude that petitioner's . . . plea of guilty cannot be regarded as having been knowingly and intelligently made." *Birch*, 515 P.2d at 17.

[171] Alan Greenblatt, *States Struggle to Control Sex Offender Costs*, NAT'L PUB. RADIO (May 28, 2010), http://www.npr.org/templates/story/story.php?storyID=127220896, *cited in* Emily J. Stine, *When Yes Means No, Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders*, 60 DEPAUL L. REV. 1169, 1176 n.49 (2011). The phenomenon of widespread and inescapable collateral consequences has begun to make appearances in popular culture as well. *See* RUSSELL BANKS, LOST MEMORY OF SKIN (2011) (describing a community of convicted sex offenders living together in tents under a causeway, a result of being legally unable to reside within 2,500 feet of a school, church, or playground); HORRIBLE BOSSES (New Line Cinema 2011) (showing a character who, after being convicted of urinating in public, is required to register as a sex offender and has difficulty finding employment as a result).

viction.[172] Today, even a low-level conviction can also result in a drastic increase in punishment for any subsequent criminal conviction. In 1994, in *Nichols v. United States*, the Court held that an uncounseled misdemeanor conviction, valid under *Scott v. Illinois*, may be used to enhance the punishment of any subsequent conviction.[173] The defendant in *Nichols* had previously appeared without counsel and been convicted of driving under the influence, a misdemeanor for which he received a $250 fine and no sentence of incarceration.[174] Seven years later, he entered a plea of guilty to conspiracy to possess cocaine with the intent to distribute; under the federal sentencing guidelines, he was assessed a criminal history point for his prior uncounseled misdemeanor DUI conviction, moving him from Criminal History Category II to Category III.[175] The defendant's guideline range thus moved from a range of 168–210 months to a range of 188–235 months, an increase of approximately two years of incarceration.[176] The Court affirmed the defendant's 235-month prison sentence, holding that the additional twenty-five months of incarceration were not punishment for the prior uncounseled misdemeanor offense but instead for the instant offense.[177] The *Nichols* majority ruled that the increase in the defendant's subsequent sentence did "not change the penalty imposed for the earlier conviction"[178] and held that "an uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment."[179] Although state and federal guidelines systems are no longer mandatory,[180] calculations of prior criminal history continue to

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[172] *See* Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1328–33 (2005) (discussing the vast difference between the severity of sentences imposed before and after the federal sentencing guidelines became effective); Michael Vitiello, *Alternatives to Incarceration: Why is California Lagging Behind?*, 28 GA. ST. L. REV. 1275, 1280–81 (2012) (discussing the Sentencing Reform Act of 1984 and subsequent increases in incarceration brought about by policy changes like California's Three Strikes law).

[173] Nichols v. United States, 511 U.S. 738, 748–49 (1994).

[174] *Id.* at 740.

[175] *Id.*

[176] *Id.*

[177] *Id.* at 747.

[178] *Id.*

[179] *Id.* at 746–47. Some states have rejected the rationale of *Nichols* on state constitutional grounds, deciding that the inherent unreliability of an uncounseled conviction precludes its use in enhancing a subsequent sentence. *See, e.g.*, State v. Hrycak, 877 A.2d 1209, 1216 (N.J. 2005) ("We are convinced that a prior uncounseled DWI conviction of an indigent is not sufficiently reliable to permit increased jail sanctions under the enhancement statute."); *see also* State v. Kelly, 999 So.2d 1029, 1053 (Fla. 2008) (similar); State v. Deville, 879 So.2d 689, 690 (La. 2004) (stating that an uncounseled misdemeanor conviction for driving while intoxicated "may not serve as the predicate for enhancement of a subsequent D.W.I. offense in the absence of a valid waiver of counsel. . . . [T]his rule applies without regard to whether the defendant actually served a term of imprisonment for the prior offense.").

[180] *See* United States v. Booker, 543 U.S. 220, 245 (2005); Blakely v. Washington, 542 U.S. 296, 301 (2004).

have enormous influence on sentences.[181] In addition to the sentencing context, civil commitment statutes (or sexually violent predator statutes) rely on prior convictions, and can certainly rely on an uncounseled misdemeanor sex-related conviction.[182]

5. Child Custody and Parental Rights.

Many states now require family court judges, while conducting a "best interests of the child" determination, to consider criminal history as a factor in awarding custody of children.[183] The reappearance of a petty conviction in such an important proceeding surely comes as a surprise to those who have pled guilty years earlier to minor charges with very little direct consequence. One such example is Samuel DeNillo, who had been charged with two counts of indecent exposure in Pennsylvania.[184] Prior to trial, Mr. DeNillo was offered the chance to resolve the charges without a conviction through participation in the Accelerated Rehabilitative Disposition (ARD) program for first-time offenders.[185] Pursuant to the terms of the ARD program, Mr. DeNillo was given two years of probation and ordered to undergo a mental evaluation and to pay court costs; at the completion of the two years, the charges against him would be dismissed.[186] Three years after agreeing to enter the ARD program, Mr. DeNillo found himself in a custody dispute with his ex-wife.[187] When his ex-wife urged the family court judge to consider the indecent exposure charges against Mr. DeNillo in determining his fitness as a custodian, Mr. DeNillo explained that he was innocent but "consented to ARD only to avoid the embarrassment of a trial."[188] The family court judge credited this explanation and did not consider the indecent exposure charges.[189] The Superior Court of Pennsylvania reversed this decision, however, concluding that the court below had abused its discretion by not considering the dismissed charges: "We believe that the criminal

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[181] *See* Rita v. United States, 551 U.S. 338, 350–51 (2007) (instructing district judges to continue to engage in guidelines calculations even after such guidelines had been held to be advisory in nature rather than mandatory); U.S. SENTENCING COMMISSION GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2011) ("A defendant's record of past criminal conduct is directly relevant to [purposes of calculating an appropriate sentence]. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.")

[182] *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670, 711 (2008).

[183] *See, e.g.*, DEL. CODE ANN. tit. 13, § 722 (2009); 23 PA. CONS. STAT. § 5329 (2011); Meins v. Meins, 218 S.W.3d 366, 372 (Ark. 2005); *In re* Marriage of Ortiz, 801 P.2d 767, 770 (Or. 1990).

[184] DeNillo v. DeNillo, 535 A.2d 200, 200 (Pa. Super. Ct. 1987).

[185] *Id.* at 201.

[186] *Id.*

[187] *Id.*

[188] *Id.* at 204 (Beck, J., dissenting).

[189] *Id.*

charges against appellee, even though disposed of through ARD, are relevant in this custody dispute. . . . '[I]t is also important to remember that a criminal suspect's election of ARD is a *voluntary* decision.'"[190] Just as Mr. Nichols decided, without benefit of counsel, to enter a plea of guilty to his DUI charge that carried no risk of incarceration, so did Mr. DeNillo decide to accept a non-criminal resolution to the criminal charges against him. In Mr. Nichols's case, what seemed like an easy decision resulted in an additional twenty-five months of incarceration. In Mr. DeNillo's case, his decision impacted his ability to have joint custody of his child.

6. Employment.

Loss of employment or the ability to gain future employment, while always a potential informal collateral consequence of a criminal conviction, has taken on an increased importance in recent years. Criminal background checks are now quick, cheap, and available online, and can search all levels of criminal conviction from throughout the country.[191] The uncounseled misdemeanor defendant who pleads guilty to shoplifting in Oregon in exchange for a small fine may be surprised years later when that conviction prevents her from getting a job in New York. Forty years ago, Justice Powell recognized that "[t]he consequences of a misdemeanor conviction . . . or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty.'"[192] As true as that was before the age of Google and online background checks, it is far truer today.[193] This real-world change in the meaning of a criminal conviction has been acknowledged by the American Bar Association in its attempt to develop standards relating to the collateral consequences of a criminal conviction: "The collateral consequences of conviction have been increasing steadily in variety and severity for the past 20 years, and *their lingering effects have become increasingly difficult to shake off*."[194] Stories of people who have led law-abiding lives for years but are still burdened by a decades-

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[190] *Id.* at 202 (majority opinion) (alterations in original) (quoting Commonwealth v. Becker, 530 A.2d 888, 892 (Pa. Super. Ct. 1987)).

[191] *See* Roberts, *supra* note 15, at 287 nn.40–45.

[192] Argersinger v. Hamlin, 407 U.S. 25, 47–48 (1972) (Powell, J., concurring).

[193] No longer can a person convicted of a crime escape her past by declaring that she is GTT, or "Gone to Texas," as many people did in the 1800s to escape debts or criminal convictions. In the first half of the nineteenth century, Texas developed the reputation for harboring outlaws, and the houses of people in other states who had absconded were marked in chalk with the initials "GTT." *See* FREDERICK LAW OLMSTED, A JOURNEY THROUGH TEXAS, OR, A SADDLE-TRIP ON THE SOUTHWESTERN FRONTIER 124 (1857) ("[M]any an adventurer crossed the border, spurred by a love of life or liberty, forfeited at home, rather than drawn by the love of adventure or of rich soil. . . . 'G.T.T.,' (or gone to Texas) was the slang appendage . . . to every man's name who had disappeared before the discovery of some rascality. Did a man emigrate thither, every one was on the watch for the discreditable reason to turn up."); Tex. State Historical Ass'n, *GTT*, HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/pfg01 (last visited Jan. 25, 2012).

[194] AM. BAR ASS'N, *supra* note 142, at 8 (emphasis added).

old criminal conviction have received increasing attention in the press and popular culture.[195]

7. Impact on the Community.

The effects of the current regime of collateral sentencing consequences, moreover, are felt not just on discrete individuals but also on whole communities. "Ultimately, exclusions from the political, economic and social spheres of life undermine the notion that offenders can ever be successfully rehabilitated. . . . [C]ollateral sentencing consequences have contributed to exiling ex-offenders within their country, even after expiration of their maximum sentences."[196] As large numbers of particular groups are stigmatized and disempowered through the reach of collateral consequences, whole communities are marginalized and excluded from participation in mainstream society.[197] The result is a de facto "sorting" of the population into two categories: those allowed full participation in society and those deemed unworthy of full participation. This sorting is accomplished by the criminal justice system but given meaning by the entirely different and external system of collateral consequences.

The imposition of social disability and ostracism after conviction of a crime is nothing new. Conviction of serious crime has long carried the consequence of "civil death," by which the offender was seen as having forfeited certain fundamental social rights.[198] But whereas the historical phenomenon of civil death was limited in the past to the most serious categories of criminal activity, the current trend over the last quarter-century has been to alienate and exclude offenders through collateral consequences, even when convicted of very minor convictions.

8. Enhanced Impact of Collateral Consequences.

Although a criminal conviction has always carried with it consequences that are external to the sentencing process, both in terms of informal stigma

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[195] *See, e.g.*, Alfred Blumstein & Kiminori Nakamura, *Paying a Price, Long After the Crime*, N.Y. TIMES, Jan. 9, 2012, at A23 (describing a case where a man was not hired on the basis of a conviction more than twenty years old, for which he had received probation); Adam Cohen, *Why We Need to Protect Ex-Con Job Seekers from Discrimination*, TIME MAGAZINE (Aug. 1, 2011), http://www.time.com/time/nation/article/0,8599,2086114,00.html (discussing the increasing difficulty of finding employment with a criminal record); Alana Semuels, *It's a Bad Time for Job Seekers With Criminal Records*, L.A. TIMES (Nov. 30, 2010), http://articles.latimes.com/2010/nov/30/business/la-fi-felon-jobs-20101130.

[196] Demleitner, *supra* note 142, at 154.

[197] *See* Andrew E. Taslitz, *Destroying the Village to Save It: The Warfare Analogy (Or Dis-Analogy?) and the Moral Imperative to Address Collateral Consequences*, 54 HOW. L.J. 501, 511–12 (2011) ("Too little of the commentary on the social harm done [by collateral consequences] focuses on the dangers of group-based exclusion in a thorough fashion . . . .").

[198] *See, e.g.*, Chin, *supra* note 121, at 1790; Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–64 (2011–2012).

and formal restrictions on civil participation, these consequences were historically secondary to the direct consequences of a conviction.[199] Today, however, even a misdemeanor conviction that results in no imprisonment can result in the loss of the right to possess a firearm,[200] to serve in the military,[201] to live in public housing,[202] to receive student aid and other public benefits,[203] to drive a car legally,[204] and to adopt a child.[205]

One of the peculiar hallmarks of collateral consequences, and one that is troubling from a due process standpoint, is that they "are neither imposed in open court nor subjected to a proportionality analysis."[206] Because collateral consequences have long been seen as civil consequences, they have re-

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[199] Convictions of certain serious crimes have for centuries carried with them social disabilities such as the loss of the right to vote, serve on juries, or hold public office. *See* Chin, *supra* note 121, at 1806–07 ("Courts have imposed few limits on creation and implementation of collateral consequences. They are generally regarded as nonpunitive. Accordingly, they are not evaluated for overall proportionality, nor is there significant scrutiny for reasonableness."); King, *supra* note 15, at 7; Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. Rev. 623, 638–39 (2006) ("Despite their proliferation . . . collateral consequences remain excluded from the criminal process."); Roberts, *supra* note 182, at 678 (discussing the difference between direct and collateral consequences of criminal convictions).

[200] 18 U.S.C. § 922(g)(9) (2011) (prohibiting a person who has been convicted of a misdemeanor crime of domestic violence from possessing firearms or ammunition).

[201] *See* Am. Bar Ass'n, Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations 18 (2009), *available at* http://americanbar.org/content/dam/aba/migrated/cecs/internalexile.authcheckdam.pdf ("Department of Defense internal policy . . . bars people with misdemeanor convictions, including misdemeanor domestic violence, from enlisting unless a waiver is granted. This bar, however, is not statutory.").

[202] The Supreme Court has upheld a policy of evicting tenants of public housing when those tenants, a household member, or a guest engages in drug-related activity in the public housing, regardless of whether those tenants knew or should have known about the drug-related activity. *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002). Current federal public housing law continues to require that, subject to certain limited exceptions contained in the statute, all public housing agencies:

> shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy . . . .

42 U.S.C. § 1437d(l)(6) (2006).

[203] *See* 20 U.S.C. § 1091(r)(1) (2012) (making ineligible for federal student financial aid those who have been convicted of any crime involving "the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance . . . ."). The same statute contains a provision by which a person made ineligible for student financial assistance may prove their "rehabilitation" and resume receiving federal student financial aid. *See id.* at § 1091(r)(2).

[204] *See* Am. Bar Ass'n, *supra* note 201, at 41 (citing 23 U.S.C. § 159 (2012)).

[205] *See* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and its Impact on Penalties Beyond Deportation*, 54 How. L.J. 795, 825 (2011) (describing the impact of certain types of criminal convictions on custody issues and parental rights). For a comprehensive catalog of collateral consequences, see Am. Bar Ass'n, *supra* note 142, at 7; *see also generally* Am. Bar Ass'n, *supra* note 201.

[206] Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 339, 341 (2005); *see also id.* at 356 (referring to collateral consequences as "invisible mandatory minimum sentences, fre-

mained outside the scope of the criminal justice system. Courts are institutionally incapable of controlling the spread of collateral consequences precisely because the consequences have always been considered collateral to the criminal proceeding. Calls to roll back or eliminate collateral consequences, therefore, have been unsuccessful.[207] Where courts do have an institutional ability to effect change in this regard is in the provision of safeguards in the criminal process: there is no more fundamental safeguard than the appointment of counsel.

D. State Experimentation with Quasi-Criminal and Non-Criminal Resolutions

As state criminal justice systems have come under increasing financial strain in the last few years, courts and legislatures have begun experimenting anew with a move to a quasi-criminal type of adjudication: drug courts, diversionary programs, and the expansion of the class of non-jailable offenses. This expansion of quasi-criminal adjudication can act even to further constrain the right to counsel without addressing the consequences that follow from a conviction.

One such proposal in Virginia in 2010 would have made certain misdemeanors presumptively non-jailable; judges would only appoint counsel if the prosecutor affirmatively announced prior to trial that the state intended to seek imprisonment or if the judge believed that imprisonment might be appropriate.[208] In fact, this is not unlike what happens informally on a regular basis quite often: At the initial hearing of an accused before a judge, the judge asks the prosecutor whether or not the state is seeking imprisonment. If the answer is no, the accused is not appointed counsel.[209] All the Virginia proposal would have done is to formalize that process.

There is a significant difference, however, among the different systems that seek to adjudicate without defense lawyers. Some remove the adjudicative process entirely from the criminal justice system. Others simply remove the possibility of incarceration but leave the process within the world of traditional criminal adjudication. In contrast to the Virginia legislative proposal described above, the State of California recently changed the petty

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quently imposed on a vast array of offenders without their knowledge and without any recourse").

[207] For an excellent description of the various legal challenges and policy arguments advocating against the seemingly inexorable increase in collateral consequences, see Pinard, *supra* note 199, at 636–49.

[208] H.B. 1394, 2010 Gen. Assem., Reg. Sess. (Va. 2010). *See also* Deirdre Fernandes, *Bill Looks to Trim Attorney Costs*, THE ROANOKE TIMES (Mar. 17, 2010), http://www.roanoke.com/politics/wb/239053 ("Supporters of HB 1394 suggest that it will save Virginia several million dollars . . . .").

[209] This is routine practice in many misdemeanor courtrooms already. *See generally* King, *supra* note 15; Anita Ortiz Maddali, Padilla v. Kentucky*: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1 (2011).

crime of possession of a small amount of marijuana from a criminal charge to a civil infraction.[210] In explaining his decision to sign the bill into law, the California governor recognized that "[i]n this time of drastic budget cuts, prosecutors, defense attorneys, law enforcement, and the courts cannot afford to expend limited resources prosecuting a crime that carries the same punishment as a traffic ticket."[211] Other states have responded in a similar fashion, especially with regard to the possession of small amounts of marijuana.[212] It might seem at first blush that there is little difference between a petty criminal offense that carries — as previous California law did — no potential for imprisonment and a civil infraction for the same behavior that carries the same potential fine. The enormous difference, however, comes with the collateral consequences. While the person convicted of the crime of possession of a small amount of marijuana would become ineligible for federal student aid, for example, no such consequence would apply to the person who is found to have committed the civil infraction for the same offense.[213]

Under the *Scott* doctrine, states are free to be as creative and as punitive as possible in fashioning criminal sanctions without triggering a right to appointed counsel, as long as those sanctions do not involve incarceration. Indeed, such a response is a rational response to the current fiscal crisis and the constitutional landscape regarding the right to counsel. Although the various types of alternative approaches discussed above can achieve the laudable goals of reducing the number of people incarcerated and the costs to the state of housing them, they do not diminish the real collateral consequences to individuals and communities.[214] The very real effect of misdemeanor adjudication is not to punish directly but instead to achieve a sorting of those with full legal rights and those who must endure "a permanent debasement of

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[210] CAL. HEALTH & SAFETY CODE § 11357(b) (West 2010).

[211] Letter from Arnold Schwarzenegger, Governor of Cal., to the Members of the Cal. State Senate (Sept. 30, 2010), *available at* http://www.salem-news.com/articles/october 012010/schwarzenegger-marijuana.php, *quoted in* Roberts, *supra* note 15, at 331.

[212] Roberts, *supra* note 15, at 332 (listing California, Hawaii, and Massachusetts as examples of states that have moved some previously criminal offenses into the civil infraction system).

[213] The relevant federal statute prohibits federal student financial aid for a period of time for those who have been "convicted of any offense" involving the "possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving [federal financial student aid]." 20 U.S.C. § 1091(r)(1) (2012).

[214] As Wayne Logan describes:

> When governments are less punitive, either with respect to the use of incarceration or the quantum of punishment, they avoid the need to extend jury and appointed counsel rights, with consequent resource savings, but negative consequences for individuals. The disadvantages associated with lack of trial counsel have long been known and uncounseled convictions can later be used both to enhance punishment for subsequent convictions and justify deportation.

Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 157–58 (2009) (citations omitted).

legal status."[215] Legislative or judicial "fixes" that simply make this sorting easier by removing procedural safeguards like the right to counsel may achieve financial savings, but at the cost of accuracy, perceived justice, and actual justice.

III. The Evolving Right to Counsel

A. Padilla*'s Challenge to* Scott

The explosion of low-level criminal prosecutions that resulted from the advent of the broken windows philosophy happened almost immediately after the Supreme Court limited the right to appointed counsel to those cases involving actual incarceration. The Court's decision in *Scott* reflected an understanding of a world that was soon to disappear. As noted at the end of Part I(C), in evaluating the seriousness of a misdemeanor conviction, the Court in 1979 could not have conceived of a world in which such a conviction would regularly and automatically result in deportation, long-term registration requirements, and all of the other consequences that have become regular post-scripts to contemporary misdemeanor convictions.[216]

Central to the Court's analysis in *Scott* was the idea that incarceration was different from other punishments not just in degree but also in kind. In drawing the bright line at liberty, the Court accepted the argument of the State that incarceration was meaningfully different from other punishments.[217] As the State of Illinois argued in its brief to the Court: "Loss of . . . liberty has traditionally been viewed as a penalty which is inherently degrading, which stigmatizes an individual by its very imposition and which is almost exclusively imposed as a result of the criminal process."[218]

This conclusion was not, however, unanimously accepted by the members of the Court in *Argersinger* and *Scott*. Indeed, Justice Powell's rejection of incarceration as the *sine qua non* of seriousness resounds in the current world of ubiquitous and severe collateral consequences.[219] The current system roughly sorts the population into two categories: criminal and non-criminal. The sentencing aspect of a misdemeanor judge is of vastly diminished importance; once the accused is separated into one of those two piles, a separate and external system — that of collateral consequences — imposes punishment.

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[215] Love, *supra* note 119, at 114.

[216] Even Justice Powell's concurring opinion in *Argersinger*, which argued for taking into account the "seriousness" of consequences other than incarceration, only mentioned social stigma, difficulty finding employment, loss of a license to drive or other professional license, and the loss of pension rights. Argersinger v. Hamlin, 407 U.S. 25, 48 n.11 (1972) (Powell, J., concurring).

[217] *See* Scott v. Illinois, 440 U.S. 367, 372–73 (1979).

[218] Brief for Respondent at 8, Scott v. Illinois, 440 U.S. 367 (1979) (No. 77-1177), 1978 WL 206719.

[219] *See Argersinger*, 407 U.S. at 47–48 (Powell, J., concurring).

The Supreme Court may have recently shown a willingness to reconsider both the rigid dichotomy between petty and serious offenses in this context and the fact of incarceration as the touchstone between the two categories of offenses. In *Padilla v. Kentucky*, the Court addressed a situation in which the non-citizen defendant's lawyer advised him incorrectly that he " 'did not have to worry about immigration status since he had been in the country so long.' "[220] Rather than resolving the case narrowly, the Court wrote broadly, holding that defense counsel had an obligation to give correct advice regarding the immigration consequences of a criminal conviction, at least "when the deportation consequence is truly clear . . . ."[221] The Court explicitly rejected the narrower approach urged by Justice Alito, which would have only required that defense counsel refrain from giving incorrect advice.[222] Instead, the majority held that "[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the [deficient performance] prong of the *Strickland* analysis.' "[223] Although *Padilla* involved a felony charge of marijuana trafficking, the deportation consequences would have been the same if the defendant had been charged with simple possession of marijuana or some other drug — both misdemeanors.[224] And if, in that hypothetical possession of marijuana charge, the prosecutor had agreed prior to trial not to seek incarceration, the defendant would not have had any federal constitutional right to counsel.[225] *Padilla* seems to confer a right to the *effective* assistance of counsel, then, on a class of defendants that has no right to counsel at all under the *Scott* doctrine.

Although *Padilla* concerned a felony drug trafficking offense, its logic is by no means confined to that context. And although its holding was limited to the context of ineffective assistance of counsel and the effect on the knowing and voluntary nature of a guilty plea, it is significant that the Court rejected the idea that there is a meaningful difference between the direct and

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[220] Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) (internal citations omitted).

[221] *Id.* at 1483.

[222] *Id.* at 1487 (Alito, J., concurring).

[223] *Id.* at 1484 (majority opinion) (citations omitted). In *Strickland v. Washington*, the Court laid out the basic contours of defining constitutionally ineffective assistance of counsel, holding that a petitioner must establish both constitutionally deficient performance by counsel and also that such deficient performance was prejudicial to the defense. Strickland v. Washington, 466 U.S. 668, 688–93 (1984). The Court has, of course, elaborated on both prongs of the analysis in subsequent cases.

[224] Although possession of fewer than thirty grams of marijuana would not constitute a deportable offense, virtually any other offense involving controlled substances would render the person deportable if convicted. 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

[225] *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979). Of course, the judge retains ultimate power to decide whether or not to eliminate incarceration from the range of potential punishments and therefore the power to bring the defendant within or outside of the scope of the federal constitutional right to counsel. The dispositive factor in this calculation, however, is likely to be the prosecutor's stated intent either to seek a sentence involving incarceration or not. *See supra* Part II.D.

collateral consequences of a criminal conviction.[226] Despite the *Padilla* Court's repeated characterization of deportation as a "unique" type of consequence, it nevertheless recognized what Justice Powell had argued in *Argersinger*: that the sole factor of incarceration is not always the best indicator of seriousness.[227] Indeed, in the misdemeanor context, where the amount of potential incarceration is quite low but the collateral consequences are significant, the use of incarceration as a proxy for seriousness is especially crude.[228] The Court's majority opinion in *Padilla* greatly undermines the logic of the *Scott* doctrine and suggests the possibility for rethinking the federal constitutional right to counsel to respond more appropriately to contemporary realities.

Although it involved a felony, *Padilla v. Kentucky* has broad implications for misdemeanor practice. *Padilla* has added to the burden for these public defenders and court-appointed lawyers by stating unequivocally that it is the job of the defense lawyer to advise clients correctly on at least certain categories of clear collateral consequences of a criminal conviction.[229] Most simply, a defense lawyer now has a clear duty under *Padilla* to educate herself on at least the immigration-related collateral consequences of the various types of criminal convictions in the cases she handles.[230] She then must advise her client about the long-term collateral consequences of a guilty plea, which might well have the effect of convincing the client to reject a seemingly generous time-served plea offer and proceed to trial, further complicating the life of the overworked and under-resourced public defender.[231] Although we might prefer the criminal justice system to consist of well-informed defendants making rational long-term decisions, the brunt of

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[226] *See Padilla*, 130 S. Ct. at 1481 ("We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*. . . . Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.") (citation omitted).

[227] *See id.* at 1482. The Court's description of deportation as "uniquely difficult to classify as either a direct or a collateral consequence" is somewhat puzzling because it always remains outside of the control of the sentencing judge. *See* Love, *supra* note 119, at 94–95 nn.33–38 (describing various tests that courts have used to classify a consequence as either "direct" or "collateral").

[228] Roberts, *supra* note 15, at 298–303.

[229] *Padilla*, 130 S. Ct. at 1477 ("[W]hen the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear."); *see also id.* at 1495–96 (Scalia, J., dissenting) (describing the logic of the majority opinion as having "no logical stopping-point" to the defense lawyer's duty to advise).

[230] *See id.* at 1482 (majority opinion) ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."). Although the *Padilla* majority endeavored to limit the holding to clear immigration consequences, lower courts have applied the *Padilla* rationale and its resulting duty to advise correctly defendants in other contexts, including, for example, sex offender registration. *See, e.g.*, Bauder v. Dep't of Corr., 619 F.3d 1272, 1275 (11th Cir. 2010); Taylor v. State, 304 Ga. App. 878, 884 (Ga. Ct. App. 2010); People v. Garcia, 907 N.Y.S.2d 398, 405 (N.Y. Crim. Ct. 2010).

[231] BORUCHOWITZ ET AL., *supra* note 113, at 34.

carrying out these improvements is borne by public defenders and court-appointed lawyers.[232] Without some accommodation or incentives to accompany any formal systemic reform, it is hard to imagine the practice on the ground improving in any meaningful sense.[233]

Although instances in which the law *formally* allows for a different level of procedural safeguards based on the seriousness of the charged offense are rare (right to trial by jury, for example, and some differences in statutory entitlement to discovery), accounts from misdemeanor courtrooms suggest a level of due process significantly different from felony courtrooms. But if the broader context has changed to make that underlying premise no longer true, and if the true meaning of a misdemeanor conviction has changed, then that changed context requires a corresponding change in the actual structure of adjudicating misdemeanor offenses. As the actual consequences of a misdemeanor conviction — both direct and collateral — increase, formal procedural safeguards must be applied to that category of offenses that has been designated, less and less accurately, as "petty."

B. Weighing Costs and Rights

Two obvious critiques of expanding the right to counsel must be addressed. First, as with every previous proposal to expand the scope of the right to court-appointed counsel, issues of cost are in the fore.[234] Politically, the idea of expanding the right to counsel to people charged with low-level crimes is a tough sell at any time, but especially in a time of fiscal crisis.[235] Such cost-based arguments have been made against every expansion of the right to counsel.[236] Second, it is widely acknowledged that the current system of indigent defense representation fails to deliver effective representation to those facing criminal charges, even in serious crimes. The question of why we should expand such a broken system is a valid one and deserves consideration.

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[232] *See* Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1396 (2011) ("For appointed counsel and the state and local entities that pay them, *Padilla* is an unfunded mandate: Defense lawyers now must know more immigration law in addition to criminal law.").

[233] *See generally* Roberts, *supra* note 15 (describing different institutional capabilities and limitations in reforming the system).

[234] *See, e.g.*, Turner v. Rogers, 131 S. Ct. 2507, 2510–11 (2011); Scott v. Illinois, 440 U.S. 367, 373–74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 49–50 (1972) (Powell, J., concurring); Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Powell v. Alabama, 287 U.S. 45, 72–73 (1932).

[235] *Argersinger*, 407 U.S. at 25, was decided in 1972, and one of the main critiques of the decision was the perceived cost of implementing the broader right to counsel. Like today, there was widespread concern at the time about the state of the national economy. *See, e.g.*, *Is the U.S. Going Broke?*, TIME MAGAZINE, Mar. 13, 1972, at Cover. For a discussion of the weighing of costs against constitutional rights in another right-to-counsel context, see DeWolfe v. Richmond, No. 34, 2012 WL 10853, at *14–15 (Md. Jan. 4, 2012).

[236] *See, e.g.*, *Turner*, 131 S. Ct. at 2510–11; *Scott*, 440 U.S. at 373–74; *Argersinger*, 407 U.S. at 49–50 (Powell, J., concurring); *Gideon*, 372 U.S. at 344; *Powell*, 287 U.S. at 72–73.

These two critiques are obviously related, and some scholars have approached the issue as a zero-sum game, arguing that the scarce resources of the criminal justice system should be spent on improving the quality of defense representation in serious cases.[237] While it is almost certainly true that a broader provision of counsel to those accused of crimes will result in more guilty people going free, we tolerate that cost because of the value we place on the procedural protections of the Sixth Amendment and the values that underlie it.

In fact, available evidence suggests that providing counsel to anyone accused of a criminal offense would not be prohibitively expensive or difficult to manage. Many states already provide a more robust protection in this context than the federal constitutional floor established in *Gideon*, *Argersinger*, and *Scott*.[238] State constitutional and statutory provisions for the appointment of counsel vary, with some states providing counsel for any indigent person accused of a crime,[239] some states providing counsel for any cases involving actual imprisonment or a fine over a specified amount,[240] and some states encouraging the appointment of counsel in cases not involving actual incarceration if required by "dictates of fairness and due process."[241] It is difficult to achieve an accurate accounting of the various state ap-

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[237] *See generally* Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007). The *Argersinger* Court directly addressed the issue of cost. *Argersinger*, 407 U.S. at 44 (Burger, C.J., concurring). Acknowledging the increased expenditures that would certainly accompany an expanded right, Chief Justice Burger wrote: "The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it." *Id.* Justice Brennan's suggestion that law students have an important contribution to make in the provision of indigent defense services foretold the current recognition of the need for experiential learning by the legal academy. He wrote:

> Law students as well as practicing attorneys may provide an important source of legal representation for the indigent. . . . Given the huge increase in law school enrollments over the past few years, I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision.

Id. at 40–41 (Brennan, J., concurring) (internal citation omitted). On the legal academy's increasing recognition of the importance of experiential education, see generally ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 165–205 (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 87–161 (2007).

[238] *See* Alabama v. Shelton, 535 U.S. 654, 668 (2002) ("Most jurisdictions already provide a state-law right to appointed counsel more generous than that afforded by the Federal Constitution."); LAFAVE ET AL., *supra* note 17, at § 11.2(a) nn.28–30B; Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?*, 5 ROGER WILLIAMS U. L. REV. 417, 418–19, 418–19 nn.8–12, 435–38 (2000) (citing thirty-five states that provide a broader right to counsel than does federal constitutional doctrine and cataloging the conceptual and practical problems with *Scott*).

[239] CAL. CONST. art. I, § 14; N.Y. CONST. art. I, § 6; CAL. PENAL CODE § 987 (West 2000); N.Y. CRIM. PROC. LAW § 170.10 (McKinney 2010).

[240] *See, e.g.*, FLA. CONST. art. I, § 16; FLA. R. CRIM. P. 3.111.

[241] Paul Marcus, *Why the United States Supreme Court Got Some (But Not a Lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 151 (2009) (summarizing state approaches to the appointment of counsel).

proaches to the appointment of counsel,[242] and actual practice can vary widely from the laws on the books,[243] but it is clear that states have adopted a variety of approaches to this issue, with some providing the bare minimum required by the federal constitutional floor and others going well beyond that standard in appointing counsel in criminal cases.

Of course, lawmakers have another option available to them if the federal constitutional right to counsel is expanded to include all criminal cases: the transfer of certain kinds of undesirable low-level conduct out of the criminal context altogether. Far from a novel or radical idea, the idea of decriminalizing petty forms of misconduct was endorsed by the drafters of the Model Penal Code in 1962[244] and recognized as a possibility by three Justices of the Supreme Court in their dissenting opinion in *Scott*:

> It may well be that adoption by this Court of an "authorized imprisonment" standard would lead state and local governments to re-examine their criminal statutes. A state legislature or local government might determine that it no longer desired to authorize incarceration for certain minor offenses in light of the expense of meeting the requirements of the Constitution. In my view this re-examination is long overdue. In any event, the Court's "actual imprisonment" standard must inevitably lead the courts to make this re-examination, which plainly should more properly be a legislative responsibility.[245]

An evolution in the scope of the right to counsel to include all criminal cases would force lawmakers to consider what should constitute a criminal offense. In addition to the growing decriminalization of small amounts of marijuana, jurisdictions would confront the possibility of dealing with other types of low-level misconduct in a more appropriate, non-criminal way.[246]

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[242] In his dissenting opinion in *Scott*, Justice Brennan listed a majority of states ("at least 33 states" and possibly "closer to 40") that provided a more generous right to counsel than the "actual imprisonment" standard adopted by the majority in *Scott*. *Scott v. Illinois*, 440 U.S. 367, 387, 387 n.22 (Brennan, J., dissenting). Commentators have suggested that Brennan's count was inaccurate and overstated the extent to which states exceeded the "actual imprisonment" standard. *See* LaFave et al., *supra* note 17, at § 11.2(a). Whatever the situation at the time of the decision in *Scott*, it is clear that some states have restricted their right to court-appointed counsel to conform to the *Scott* standard since that case was decided.

[243] *See* Roberts, *supra* note 15, at 312–13 nn.148–50.

[244] *See* Larry Cata Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 Fla. L. Rev. 755, 775 (1993).

[245] *Scott*, 440 U.S. at 388–89 (Brennan, J., dissenting).

[246] *See* Roberts, *supra* note 15, at 332–33 (listing marijuana possession, driving on a suspended license, public intoxication, and disorderly conduct as potential candidates for diversion or decriminalization and describing the potentially enormous savings from such a move). Of course, for the same reasons that it is unrealistic to expect collateral consequences to be rolled back legislatively, it is difficult to imagine that lawmakers are suddenly going to campaign on promises to decriminalize petty offenses. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 719–20 (2005).

C. Expanding a Broken Right?

Looking at the state of indigent criminal defense representation today and considering a proposal to expand the right to counsel, one thinks back to the opening line of Woody Allen's classic, *Annie Hall*: "There's an old joke — um — two elderly women are at a Catskill mountain resort, and one of them says, 'Boy, the food at this place is really terrible.' The other one says, 'Yeah, I know, and such small portions.'"[247] To be sure, expanding the right to counsel does not address the well-documented and troubling dysfunction that characterizes the state of indigent defense services throughout the country.[248]

The mere presence of defense counsel, of course, will not alone solve the problem. A recurring and enduring problem in both the substantive and procedural justice offered by misdemeanor courts is the abysmal state of indigent misdemeanor representation in many parts of the country. A 2009 study by the National Association of Criminal Defense Lawyers (NACDL) examined the state of misdemeanor courts generally, with a special focus on the practice of defense counsel in those courtrooms.[249] The report chronicled overloaded misdemeanor courts and overworked, under-experienced, and often incompetent defense lawyers who populate them.[250] "Site teams witnessed and were told the same things across the country: defenders do not have enough time to see their clients or to prepare their cases adequately, there are no witness interviews or investigations, they cannot do the legal research required or prepare appropriate motions, and their ability to take cases to trial is compromised."[251] The overwhelming number of cases assigned to public defenders and appointed counsel have been well-documented.[252] The problem is particularly concerning, however, in the case of misdemeanors, where the caseload numbers are even higher and the cases

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[247] Annie Hall (United Artists Entertainment 1977). Alas, this reference has been used before in legal scholarship. *See, e.g.*, David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Tradeoff*, 11 GEO. J. LEGAL ETHICS 959, 978–79, 978–79 n.96 (1998); Wayne R. LaFave, *The Present and Future Fourth Amendment*, 1995 U. ILL. L. REV. 111, 117 (1995).

[248] *See, e.g.*, AM. BAR ASS'N, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 7–28 (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf; AMY BACH, ORDINARY INJUSTICE 257–66 (2009); Cara Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 428–31 (2009).

[249] BORUCHOWITZ ET AL., *supra* note 113, at 30–43.

[250] *See generally id.*

[251] *Id.* at 30–31.

[252] *See, e.g.*, AM. BAR ASS'N, *supra* note 248, at 17–18, 38; Heidi Reamer Anderson, *Funding* Gideon*'s Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 425–28 (2012); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045–1103 (2006); Hashimoto, *supra* note 237, at 468–75; Roberts, *supra* note 15, at 294–97.

are handled primarily by less-experienced lawyers.[253] The NACDL documents the too-common model of defense lawyering known as "meet 'em and plead 'em."[254]

Nobody observing the current state of indigent defense representation in the country today could credibly say that the system is functioning well.[255] Even in that universe of cases requiring court-appointed counsel, the system has utterly failed to provide a robust and zealous defense for those accused of crimes.[256] To be sure, the promise of *Gideon* and the ideal of "equal justice under law" will not be realized until critical changes are made in the funding and the culture of indigent criminal defense services.[257] But fundamentally, the poor performance of the indigent defense system is a separate issue from the doctrinal question of the scope of the right to counsel, and should not be used as a stalking horse to shrink that right. Even if one were to accept the premise that the current system of appointed counsel does not provide great benefit to the represented, the answer should be to reform the system of appointed counsel, not to abandon or shrink it.

Realistically, the provision of counsel in all criminal cases is no panacea for the broader structural, practical, and theoretical problems that attend the current dual system of mass processing and collateral consequences. By overlaying increasingly serious indirect consequences on an adjudicative system that is characterized by informality and efficiency, we continue to tolerate a system that depends on defendants resolving their cases ignorant of the long-term effects on their lives or communities. Various approaches have been proposed to remedy the situation, but the appointment of counsel to individual defendants, even assuming the most severe limitations, is still the best way to ensure decisions that are truly voluntary and knowing.

Some have argued that the right to counsel has already been spread too thin and fails in the misdemeanor context to achieve any substantive goals of the criminal justice system. Professor Erica Hashimoto has argued that states should creatively and pragmatically reduce the number of cases in which counsel must be appointed in order to save the system's resources for those cases where counsel is most needed and useful.[258] She urges states to

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[253] *See* Roberts, *supra* note 15, at 296.

[254] BORUCHOWITZ ET AL., *supra* note 113, at 31–32 nn.161–63; *see also* BACH, *supra* note 248, at 6–7.

[255] *See generally* BACH, *supra* note 248; Backus & Marcus, *supra* note 252; AM. BAR ASS'N, *supra* note 248.

[256] *See* Brown, *supra* note 232, at 1413–14; Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 678–80 (2011).

[257] *See, e.g.*, Brown, *supra* note 232, at 1411 ("The most effective avenue to remedy suboptimal defense lawyering is also an unlikely one: reforming indigent defense systems to bring their resources — and in some cases prosecutor and court resources as well — in line with the case demands of local criminal dockets."); Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 162–64 (2009).

[258] Hashimoto, *supra* note 237, at 467.

reduce appointment of counsel to the constitutional minimum, to reduce penalties for minor offenses to get them beneath the constitutional threshold for appointment of counsel, and to require judges and prosecutors to state at the outset whether or not incarceration is a possibility.[259] She argues that, while this might initially look like a move that would harm criminal defendants, the empirical evidence shows that appointed counsel in misdemeanor cases do not typically provide meaningful benefits to defendants.[260]

This argument, however, focuses exclusively on federal misdemeanors, a category of cases far afield from the mass of cases that affect people's lives.[261] Moreover, it fails to account for the advice-giving function of counsel, only measuring results at trial or sentencing. What is absent from the data studied by Hashimoto is precisely the long-term consequences of a criminal conviction that remain external to the criminal process itself but which can be far more devastating than anything imposed by a sentencing judge: the collateral consequences. Significantly, the *Padilla* Court focused on the advice-giving role of defense counsel, rather than on whether counsel would have contributed to the possibility of a better outcome at trial or sentencing.[262] An exclusive focus on trial and sentencing outcomes is misplaced in a system where trials have become vanishingly rare; over 94% of convictions in state and federal court are obtained after the accused waives her right to trial and pleads guilty, usually after making an agreement with the prosecutor.[263] Hashimoto's analysis of the data from federal misdemeanors does not seem to account for the defendant who, for example, takes the advice of counsel and pleads guilty to an offense different from the offense charged, which in turn does not result in adverse immigration (or other) consequences. Creative defense lawyers who are concerned about immigration consequences might very well bargain with prosecutors to allow their

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[259] *Id.* at 461.

[260] *Id.* at 466.

[261] Hashimoto recognizes this limitation on her data, acknowledging that "[b]ecause the vast majority of misdemeanor defendants are prosecuted in state courts, this gap in data is significant." *Id.* at 494.

[262] Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010). By contrast, the *Argersinger* Court focused on the disparate results the represented and unrepresented misdemeanants achieved, citing evidence that "[m]isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel." Argersinger v. Hamlin, 407 U.S. 25, 36 (1972) (internal citations omitted).

[263] SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS 25 tbl.4.1 (2009). In federal court, the most recent data available show that 97.4% of cases are now resolved by plea. *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1 tbl.5.22.2010 (2010), *available at* http://www.albany.edu/sourcebook/pdf/t5222010.pdf; U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.10 (2010), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table10.pdf, *cited in* Love, *supra* note 119, 89 n.4.

client to spend extra time in jail in exchange for a reduction of the offense to one without immigration consequences.[264]

There is reason to believe, in fact, that defense counsel have much more latitude and success in avoiding collateral consequences in the context of misdemeanors. Professor Darryl Brown has argued that the *Padilla* decision may not have the dramatic impact that some have predicted because it neither changes the substantive law that imposes collateral consequences, like deportation, nor improves the low level of defense representation that is endemic, especially in state courts.[265] In misdemeanor cases, however, effective defense counsel may actually be able to engage in the sort of charge bargaining and plea negotiation that the *Padilla* Court suggested and to arrange for a creative disposition that will not result in a collateral consequence.[266]

It is correct, of course, that an expansion of the constitutional right to counsel would require some additional expenditure of resources. But the logic of the *Gideon-Argersinger* line of cases applied to a modern context requires this expansion of the right. The Supreme Court, which has recently shown a willingness to resist cost-based arguments against broad recognition of other trial rights,[267] seems to be coming close to recognizing it. In *Padilla*, the Court explicitly recognized the importance of counsel in correctly explaining and advising defendants on certain collateral consequences.[268] If counsel is constitutionally required to explain to Padilla the immigration consequences of a criminal conviction for trafficking in marijuana, then certainly defense counsel should have the same obligation to explain to a defendant facing a misdemeanor drug possession the very same immigration consequences that would result from that conviction.[269]

The right to counsel has both substantive and procedural value, and it exists not only to ensure reliable results but also to guarantee fair processes

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[264] *See, e.g.*, DEFENDING IMMIGRANTS P'SHIP, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS: A NATIONAL GUIDE 70–71 (2008); IMMIGRANT DEF. PROJECT, A DEFENDING IMMIGRANTS PRACTICE ADVISORY: DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING AN IMMIGRANT DEFENDANT AFTER *PADILLA V. KENTUCKY* 6 (2010), *available at* http://txe.fd.org/PDF%20files/PadillaPracticeAdvisory.pdf.

[265] Brown, *supra* note 232, at 1395.

[266] *See id.* at 1411 n.73 ("[S]ome indigent defense organizations not only provide quality representation generally but have been effective . . . at developing expertise to improve outcomes for clients (especially those facing misdemeanor charges) by negotiating in light of the range of collateral consequences that follow criminal convictions . . . ."). In more serious cases, prosecutors would of course be less willing to engage in the kind of charge bargaining that could avoid potential collateral consequences.

[267] *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325 (2009); Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

[268] Padilla v. Kentucky, 130 S. Ct. 1473, 1476 (2010).

[269] 8 U.S.C. § 1227(a)(2)(B)(i) (2011) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation . . . relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

for arriving at those results.[270] Those who call into question the true value of counsel to a misdemeanor defendant may well underestimate the value to a defendant of a well-informed advocate available to discuss her options and to make sure that the formal procedural safeguards in place to protect the accused actually function as intended.

Others have also suggested, in the face of practical limitations, a triage-based approach to the right to counsel. Darryl Brown has argued that public defenders and court-appointed lawyers should selectively ration their services, resources, and energy, focusing on those defendants "facing greater potential punishments."[271] Such proposals, however, fail to take account adequately of the many purposes a lawyer serves short of trial and the many indirect punishments visited upon a convicted person beyond those imposed by the sentencing judge. A person accused of a seemingly petty crime, without advice of counsel, would have no reason to suspect that a guilty plea with a suspended sentence would also subject her to deportation, eviction, and any number of externally imposed consequences. One role of the lawyer in such a situation should be to ensure that the accused is properly advised of the entirety of the consequences that would attend a conviction.

The interplay between an informal and procedurally loose system of low-level criminal adjudication and the current far-reaching and harsh system of collateral consequences creates a troubling overall regime in which people can unknowingly surrender important rights and entitlements. One way of resolving this dilemma would be to regulate and rein in the system of collateral consequences. Some have argued that, because the current system disenfranchises and disempowers ex-offenders, and is therefore at odds with national policy, many such collateral consequences should be eliminated.[272] Although a reduction in the breadth and severity of collateral consequences would certainly be a welcome development, such a solution is hindered by

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[270] For a discussion of the "conceptual tension" between a substantive and a procedural understanding of the right to counsel, see TOMKOVICZ, *supra* note 27, at xxiv (According to one understanding of the right to counsel, that right is "both a vital guarantee of fair results and an essential component of fair processes. This perspective maintains that excessive emphasis on the substantive contributions that defense lawyers make to the outcome of proceedings is misguided and fails to account for the essential role that counsel plays in ensuring that those outcomes are achieved by means of fair procedures.").

[271] Darryl Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 801 (2004); *see also* Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 914–15 (2005); John Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 VAL. U. L. REV. 925, 933 (2005); John Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1271–76 (1994); Roberts, *supra* note 15, at 346–48.

[272] Nora Demleitner argues:

> All collateral sanctions that hinder an offender's political participation or exclude her from other crucial functions of the modern state should be eliminated. These sanctions merely serve to set offenders continually apart without providing a tangible benefit. Therefore, they hamper the reintegration of offenders into society, a goal Congress and the President have declared to be crucial.

Demleitner, *supra* note 206, at 358–59 (internal citations omitted).

the multitude of sources from which these consequences flow; some arise from federal law, but many others are creatures of state law, agency regulation, or the purely private discretion of other actors, including employers.[273] Because of the broad scope of collateral consequences and their disparate sources, it is virtually impossible for an accused individual to ascertain all of the potential collateral consequences of a particular conviction.[274] The same factors make the web of collateral consequences a particularly vexing target for reform.

Many have called for state and federal lawmakers to reduce voluntarily the number and severity of collateral consequences;[275] in 2011, United States Attorney General Eric Holder called on state attorneys general to review state laws and regulations that impose such consequences on those convicted of crimes, and to repeal those that impose an undue burden on people convicted of crimes without enhancing public safety.[276] Attorney General Holder, however, is no more able to force this change than academics and others who have previously called for the rollback of collateral consequences. The proliferation (and potential repeal) of collateral consequences is a political decision ultimately controlled by politicians who have little incentive to champion the rights of convicted criminals.[277]

Ultimately, then, because of the difficulty in curtailing the sprawl and scope of collateral consequences, courts should address the problem differently and provide counsel to anyone accused of a crime that could lead to such a consequence. Realistically, due to the reach and variety of serious collateral consequences, this would require an expansion of the right to appointed counsel to anyone charged with a crime.

Throughout the middle of the twentieth century, the American right to counsel similarly evolved to better address the realities of criminal adjudica-

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[273] In the employment context, the combination of widely available online background checks and habitual unwillingness on the part of employers to hire anyone with a criminal history can be extremely difficult to overcome. Indeed, with regard to private hiring practices, the private exercise of preference falls largely outside the reach of government to change, even if lawmakers were so inclined. *See* DEP'T OF JUSTICE, EMPLOYMENT STANDARDS THAT ENCOURAGE THE EMPLOYMENT OF QUALIFIED PEOPLE [WITH] CRIMINAL HISTORIES 1 (2005), *available at* http://www.justice.gov/olp/pdf/employmentstdssumary.pdf. Some states, however, have passed legislation to limit discrimination on the basis of certain prior criminal convictions. *See, e.g.*, HAW. REV. STAT. § 378-2.5(a)-(d) (West 2012); KAN. STAT. ANN. § 22-4710(f) (West 2012); N.Y. CORRECT. LAW §§ 750–54 (2007); 18 PA. CONS. STAT. §§ 9124–25 (2012); WIS. STAT. ANN. § 111.335 (West 2012).

[274] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1477 (2010); Demleitner, *supra* note 142, at 154 ("The number and scope of such adverse consequences tend to be unknown even to the participants in the criminal justice system, often because they are scattered throughout different bodies of law.").

[275] AM. BAR ASS'N, *supra* note 201, at 9.

[276] *See* Blumstein & Nakamura, *supra* note 195.

[277] *See* Luna, *supra* note 246, at 719 ("Conventional wisdom suggests that appearing tough on crime wins elections regardless of the underlying justification . . . while it is difficult to recall a single modern politician who came into office on a platform of decriminalization or punishment reduction.").

tion.[278] Today, the right to counsel can and should continue to evolve. This evolution should reflect the changing circumstances under which prosecutions occur and the dramatically more severe penalties that now occur as an indirect result of the criminal process.

Conclusion

For the more than 50 million Americans with misdemeanor convictions on their records, the world is a very different place today than it was thirty years ago. The Supreme Court froze the development of the federal constitutional right to counsel at a particularly inopportune moment in history. At the time of *Scott v. Illinois*, it would have been difficult to conceive of a misdemeanor conviction — certainly one that did not involve incarceration — resulting in the deportation, eviction, or lifetime registration in an online database for the defendant. In such a context, using incarceration to draw a bright line between serious and petty offenses may have made some sense. Today, however, even the lowest-level criminal misdemeanor can lead directly and irreversibly to one of these or many other collateral consequences.

A system that makes it relatively painless to plead guilty (which has always been true for low-level offenses) has been overlaid with a new system of increasingly harsh collateral consequences. Without counsel to advise the accused of the longer-term, hidden, collateral consequences of a conviction, the decisional calculus is skewed and the choice to enter a quick guilty plea is easy, painless, and often uninformed and misguided.[279] By focusing on informality, efficiency, and the mass processing of cases, players in the criminal justice system (judges, defense counsel, and prosecutors) "deny the offender the dignity of free choice by keeping him ignorant of the full consequences for his life course of, for example, his pleading guilty."[280]

Moreover, the change in policing and prosecution philosophy that has occurred since the early 1980s has led to millions more people becoming ensnared in the misdemeanor criminal justice system. Calls to roll back and eliminate the system of collateral consequences have failed to yield results. Because of the externally imposed and multi-sourced nature of collateral consequences, courts have few options to control their spread. What courts can and should do, though, is recognize the changed context in which misdemeanors take place today and revisit the petty-serious dichotomy set forth in *Scott*. The use of incarceration as the *sine qua non* of seriousness no longer reflects the realities of the criminal justice system.

Throughout its history, the right to counsel has evolved to meet the changing times and circumstances of the criminal justice system. Although the evolution of the right to counsel has been gradual and halting, the Su-

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[278] *See supra* Part I.C.
[279] Roberts, *supra* note 15, at 307–08.
[280] Taslitz, *supra* note 197, at 515.

preme Court has from time to time aligned the right to better reflect the realities of criminal adjudication. *Powell* took note of the realities of the criminal adjudication system in the 1930s South and facilitated an evolution in Sixth Amendment doctrine to require the appointment of counsel at least in the most serious cases and in circumstances in which the defendant was unable to mount her own defense.[281] This jurisprudence in turn gave rise to the historic decisions in *Gideon* and then *Argersinger*, in which the Court recognized that criminal prosecutions in the 1960s and 1970s were carried out by the "machinery" of the state and that the right to counsel needed to evolve to accommodate the reality of the professional prosecutor.[282] Taking stock of the changed context of criminal prosecutions, the Court recognized the need for court-appointed counsel in all serious cases.[283] In *Gideon*, Justice Harlan looked back to the Court's previous rule that court-appointed counsel was required only when "special circumstances" made it necessary.[284] While such a fact-specific rule might have made sense in past eras, reasoned Justice Harlan, the changed modern context rendered it obsolete: "The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial."[285]

Fifty years later, because of the widespread collateral consequences that have become an inexorable corollary to even low-level convictions, any criminal prosecution now presents the "special circumstances" to which Justice Harlan referred. The *Padilla* Court expressly noted the changed context in which criminal prosecutions take place today, and the necessary next step is for the Court once again to align the right to counsel with modern realities by extending it to all criminal cases.

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[281] Powell v. Alabama, 287 U.S. 45, 52–60 (1932).

[282] *See* Argersinger v. Hamlin, 407 U.S. 25, 44 (1972) (Burger, C.J., concurring); Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[283] *See Gideon*, 372 U.S. at 344–45.

[284] *See id.* at 349–52 (Harlan, J., concurring) (citing Betts v. Brady, 316 U.S. 455 (1942); Powell v. Alabama, 287 U.S. 45 (1932)).

[285] *Id.* at 351.