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## The Problem with Misdemeanor Representation

Erica Hashimoto

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# The Problem with Misdemeanor Representation

Erica Hashimoto\*

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## *I. Introduction*

The failure to appoint counsel in misdemeanor cases may represent one of the most widespread violations of federal constitutional rights in criminal cases. A decade ago, in *Alabama v. Shelton*,<sup>1</sup> the Supreme Court held that indigent defendants sentenced to suspended terms of incarceration in misdemeanor cases<sup>2</sup> have a constitutional right to appointed counsel, even if

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\* Associate Professor, University of Georgia School of Law. I appreciate all of the work done both by my research assistant, Matthew Onyett ('13), and by the Symposium organizers and editors. Thanks also are due to Dan Coenen for his editing. All errors, of course, are my own.

1. *Alabama v. Shelton*, 535 U.S. 654 (2002).

2. The term “misdemeanor cases” in this Article encompasses all

the defendant is never actually incarcerated.<sup>3</sup> At the time, many jurisdictions limited the misdemeanor right to counsel to defendants either actually sentenced to imprisonment or likely to receive imprisonment sentences. *Shelton* therefore required those jurisdictions to appoint counsel in significantly more cases than before.<sup>4</sup> The Court's ruling notwithstanding, there is substantial evidence—both anecdotal and statistical—suggesting that some jurisdictions routinely fail to provide legal representation to those constitutionally entitled to it.

Several factors contribute to this omission. First, some jurisdictions have simply refused to honor the Court's holding. Second, potentially unconstitutional barriers to the appointment of counsel—including prohibitively high fees imposed on defendants, failures to fully inform defendants of their right to counsel, and promises of prompt case resolution only in the absence of counsel—may lead some defendants to waive counsel. Of particular concern, in comparison with felony defendants threatened with long prison terms, *Shelton* defendants may be less likely to research the scope of their rights and learn that they have a right to counsel if their terms of imprisonment are suspended. Third, an absence of incentives for defense counsel to intervene may stand in the way of providing representation to those who are constitutionally entitled to it. Most constitutional rights to which defendants are entitled are enforced by lawyers advocating on their behalf. If no lawyer is appointed, however, there is no advocate to assure that the defendant's rights—including the right to counsel—are respected. As a systemic matter, moreover, public defenders or other court-appointed counsel may be so overburdened that they have neither the time

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nonfelony criminal cases, including both misdemeanors and petty offenses.

3. *Shelton*, 535 U.S. at 672. The Court left open the possibility that a suspended sentence of imprisonment might not give rise to a right to counsel if the state permitted the defendant to relitigate guilt at any probation revocation hearing.

4. Twelve states required the appointment of counsel only if the defendant was actually imprisoned. See Brief of the States of Texas, et al. as Amicus Curiae in Support of Petitioner, *Shelton*, 535 U.S. 654 (No. 00-1214), 2001 WL 826715 at \*23 n.10 (listing the twelve states as Alabama, Arkansas, Colorado, Florida, Georgia, Maine, Mississippi, Montana, North Dakota, Rhode Island, South Carolina, and Texas).

to litigate the denial of counsel issue nor the resources to handle the additional cases that would come their way if they won.

This Article argues that all of these forces, especially in their joint operation, have created a profound problem. The central difficulty is that major constitutional violations occur on a regular basis—to the detriment of highly vulnerable criminal defendants and our legal system as a whole. Some might argue that the Court in *Shelton* did not draw the optimal line for the right to counsel. But that line has been drawn, and the *Shelton* rule offers benefits that are well worth defending. Given a commitment to the *Shelton* line, this Article explores ways to guard the rights it guarantees. Ultimately, we need to gather more data to ascertain the extent of noncompliance with the misdemeanor right to counsel and to publicize infringements—especially systemic infringements—of those rights. To the extent that there are widespread violations of *Shelton* that have not been litigated, private members of the Bar must assure that they become the subject of lawsuits in order to vindicate the constitutional right to counsel.

## *II. The Constitutional Right to Counsel in Misdemeanor Cases: The Law and the Reality*

### *A. The Constitutional Requirement*

The story of the constitutional right to counsel neither begins nor ends with *Gideon v. Wainwright*.<sup>5</sup> Rather, the Court planted the seed for *Gideon* when it concluded that the Constitution requires counsel in death penalty cases prosecuted in state courts at least under certain circumstances.<sup>6</sup> Six years later, the Court extended that right to noncapital felony defendants charged in federal court.<sup>7</sup> For a quarter-century, however, the Court did not expand the right to counsel. Then, in *Gideon*, the Court issued a

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

6. *See Powell v. Alabama*, 287 U.S. 45, 58 (1932) (holding that defendants should have been afforded “right of assistance of counsel” in prosecution for rape).

7. *See Johnson v. Zerbst*, 304 U.S. 458, 469 (1938) (holding that petitioner was entitled to the right of assistance of counsel in a case in which petitioner was charged with the felony of possessing and uttering counterfeit money).

historic pronouncement, extending the right to appointed counsel to all felony defendants prosecuted in state courts and extolling the importance of that right in no uncertain terms.<sup>8</sup>

In the wake of *Gideon*, however, the constitutional right to counsel for misdemeanor defendants remained murky. In 1972 the Court held in *Argersinger v. Hamlin*<sup>9</sup> that all defendants charged with misdemeanor offenses had a constitutional right to counsel, as long as they were sentenced to any term of incarceration.<sup>10</sup> *Argersinger*, however, left open the question of right to counsel with sentences that *could*, but do not immediately, result in incarceration. In *Shelton*, the Court addressed that critical question, holding that defendants sentenced to suspended terms of imprisonment have a right to counsel, unless either (1) the state offers an opportunity to relitigate guilt or innocence at any later revocation proceeding or (2) the defendant is sentenced to probation that cannot trigger incarceration.<sup>11</sup> The practical effect of *Shelton* is that all misdemeanor defendants sentenced either to probation or incarceration have a right to the appointment of counsel. All other misdemeanor or petty offense defendants, including those who *could* have been sentenced to incarceration but instead received only a fine, do not have a federal constitutional right to representation.<sup>12</sup>

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8. *Gideon*, 372 U.S. at 342–43.

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

10. *See id.* at 26 (holding that a defendant sentenced to incarceration had right to counsel regardless of whether the offense was classified as a petty offense or a misdemeanor).

11. *See Alabama v. Shelton*, 535 U.S. 654, 655–57 (2002) (holding that “a suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime charged” but discussing two exceptions to this rule (quoting *Argersinger*, 407 U.S. at 40)).

12. *See Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (holding that a defendant sentenced to a fine had no right to counsel even though crime was *punishable* by imprisonment). Of course, some states provide a more expansive right to counsel than the federal constitution. *See, e.g.*, HAW. REV. STAT. § 802-1 (1993) (providing a right to counsel to any indigent person charged with an offense punishable by imprisonment); 725 ILL. COMP. STAT. 5/113-3 (2000) (providing right to counsel in all criminal cases except those punishable only by a fine); NEB. REV. STAT. § 29-3902 (1990) (providing right to counsel for all indigent defendants charged with misdemeanors punishable by imprisonment).

*B. The Constitutional Right in Practice*

Although many misdemeanor defendants have a right to counsel under *Argersinger* and *Shelton*, the enforcement of that right has not been respected in the same way it has been for felony defendants. Counsel is routinely appointed for virtually all felony defendants who cannot afford a lawyer.<sup>13</sup> The available evidence indicates, however, that representation rates for misdemeanor defendants, who have a constitutional right to counsel, lag behind those for felony defendants and lag far behind in at least some jurisdictions.<sup>14</sup> This evidence includes (1) the admission of one state supreme court chief justice that her state does not comply with *Shelton*; (2) a survey of inmates incarcerated for misdemeanor convictions; and (3) data on misdemeanor caseloads of public defenders in a couple of states.

First, noncompliance with *Shelton* has been openly admitted in one state. The Chief Justice of the South Carolina Supreme Court has been quoted as saying that *Shelton* is “one of the more misguided decisions of the United States Supreme Court . . . If we adhered to it in South Carolina we would have the right to counsel probably . . . by dragooning lawyers out of their law offices to take these cases in every magistrate’s court in South Carolina, and I have simply told my magistrates that we just don’t have the resources to do that. So I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation.”<sup>15</sup> It is possible that South Carolina stands alone in its failure to

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13. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 5 (2000), <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf> (noting that 99.6% of felony defendants in the nation’s 75 largest counties were represented by counsel in 1996). The *effectiveness* of the representation being provided certainly has been debated, see, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835, 1841–44 (1994), but at the very least, virtually all felony defendants have a lawyer.

14. See, e.g., HARLOW, *supra* note 13, at 1, 3 (reporting that although 99.7% of felony defendants in federal court were represented, 38.4% of misdemeanor defendants were unrepresented).

15. Bobby G. Frederick, *The Scarlett Letter*, TRIAL THEORY: A S.C. CRIMINAL DEFENSE BLOG, (Oct. 10, 2009, 2:20 PM), [http://www.trialtheory.com/legislation/the\\_scarlet\\_letter/](http://www.trialtheory.com/legislation/the_scarlet_letter/) (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

comply with *Shelton*, but particularly given the data set forth below, that seems unlikely.

Second, although there are no nationwide data documenting the extent to which constitutionally entitled misdemeanants in state courts have counsel, the one national dataset documenting representation—at least for misdemeanor defendants sentenced to incarceration—indicates that many constitutionally-entitled misdemeanor defendants remain unrepresented. The only available nationwide data on representation rates in misdemeanor cases come from a Bureau of Justice Statistics (BJS) survey of inmates confined in local jails.<sup>16</sup> Data from those surveys demonstrate that a significant percentage of misdemeanor defendants who have a right to counsel are not represented. All of the inmates included in Table 1 were incarcerated as a result of their misdemeanor convictions and therefore had a right to counsel.<sup>17</sup> But in 2002, 30% of them reported that they were not represented.

Table 1: Representation for Inmates Charged with Misdemeanors and Sentenced to Incarceration<sup>18</sup>

	Percentage <sup>19</sup>
Represented by counsel	69.4
Not represented by counsel	30.0
Do not know	0.5

These numbers confirm that a significant percentage of misdemeanor defendants who had a right to counsel under *Argersinger* remained unrepresented in federal court. The dataset, however, has relatively limited value for drawing broad conclusions about misdemeanor representations. Most important, the sample of misdemeanor defendants surveyed was small, so it

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16. INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, BUREAU OF JUSTICE STATISTICS, SURVEY OF INMATES IN LOCAL JAILS (2002), *available at* <http://dx.doi.org/10.3886/ICPSR04359.v2> (last visited Apr. 2, 2013) [hereinafter BUREAU OF JUSTICE STATISTICS, SURVEY OF INMATES] (on file with the Washington and Lee Law Review).

17. *See Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that no person can be imprisoned without representation or valid waiver of the right to counsel).

18. BUREAU OF JUSTICE STATISTICS, SURVEY OF INMATES, *supra* note 16.

19. Percentages do not add up to 100% because of rounding.

is difficult to draw definitive conclusions from the data.<sup>20</sup> In addition, the survey includes only defendants incarcerated as a result of their convictions (the so-called *Argersinger* defendants), and thus, provides no information on *Shelton* defendants who received probated sentences. As a result, these statistics may underreport the lack of representation because *Shelton* defendants would seem to be at a *higher* risk for unconstitutional denial of the right to counsel than *Argersinger* defendants.<sup>21</sup> Unfortunately, we have no data to assess, on a nationwide basis, whether *Shelton* defendants are receiving counsel. Indeed, we do not even have any idea how many *Shelton* and *Argersinger* defendants there are because there is no nationwide database with information on misdemeanor cases.

The lack of nationwide data stems both from the BJS's failure to collect data on misdemeanor defendants and from the difficulty of ascertaining which misdemeanor defendants are entitled to representation. Although the BJS maintains data (including representation rates) on *felony* defendants prosecuted in state courts in the seventy-five largest counties in the country,<sup>22</sup> it does not collect similar data on misdemeanor defendants. Thus, there is no nationwide database on misdemeanor defendants in state courts. Indeed, other than the information gathered in the survey of jail inmates described above, we know very little about misdemeanor cases in the states except as to those few states that make such data publicly available. In addition, unlike in felony cases, the right to counsel in misdemeanor cases depends upon the sentence the defendant ultimately receives,<sup>23</sup> so even if data on misdemeanor

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20. There were only 559 inmates who were convicted of misdemeanors and sentenced to imprisonment for that conviction who responded to the question regarding representation. BUREAU OF JUSTICE STATISTICS, SURVEY OF INMATES, *supra* note 16.

21. See ALISA SMITH & SEAN MADDEN, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 15 (2011), <http://www.nacdl.org/News.aspx?id=23653&terms=three+minute+justice> (noting that the "most significant predictor of waiving counsel at arraignment was the custody status of the defendant. In custody defendants were 10 times more likely than released defendants to obtain counsel").

22. HARLOW, *supra* note 13, at 4. Indeed, the Bureau of Justice Statistics documents not only *whether* defendants were represented, but also by what type of counsel.

23. See *Argersinger*, 407 U.S. at 36 (holding that without representation or



representation rates were available, that data would not necessarily reflect the extent to which defendants constitutionally entitled to counsel remain unrepresented.<sup>24</sup> In the absence of more complete data, the survey of inmates in local jails provides the only nationwide information on representation in misdemeanor cases, and it at the very least strongly suggests that many misdemeanor defendants who have a constitutional right to counsel remain unrepresented.

The final piece of evidence draws on information from both North Carolina and Florida that supports rough estimates of misdemeanor representation practices in those jurisdictions. These data suggest both that there may be a fair amount of interjurisdiction variation in the provision of counsel in misdemeanor cases and that at least some states may not be providing counsel to constitutionally entitled misdemeanants at rates comparable to those of felony defendants. In North Carolina, the one state with readily available misdemeanor sentencing statistics,<sup>25</sup> it appears that the misdemeanor and felony caseloads of publicly appointed counsel roughly

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valid waiver a defendant may not be imprisoned); *see also* Scott v. Illinois, 440 U.S. 367, 369 (1979) (clarifying *Argersinger* by explaining that the Constitution does not require a defendant to have representation if “imprisonment upon conviction is authorized but not actually imposed”); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 476–80 (2007).

24. In addition, of course, as with felony defendants, misdemeanor defendants only have a right to state-appointed counsel if they are indigent and cannot afford a lawyer. *See* Adam Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L. REV. 571, 571–72 (2005) (noting that the Supreme Court has expanded an indigent’s right to counsel to misdemeanor cases but discussing how precedent leaves unclear how poor a person must be to qualify for appointed counsel). Thus, data on rates of indigence also would be needed to determine the extent to which those constitutionally entitled to counsel are not being represented.

25. North Carolina has a structured sentencing system for misdemeanors, and keeps statistics on sentences imposed in most misdemeanor cases. *See* T. FLINCHUM, A. GALLAGHER, G. HEVENER & V. ETHERIDGE, N.C. SENTENCING AND POLY ADVISORY COMM’N, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS: FISCAL YEAR 2008/09, at 44–53 (2010), [http://www.nccourts.org/courts/crs/councils/spac/documents/statisticalrpt\\_fy0809\\_r.pdf](http://www.nccourts.org/courts/crs/councils/spac/documents/statisticalrpt_fy0809_r.pdf). The report excludes sentences for misdemeanor driving under the influence cases because they are not covered by the structured sentencing system. *Id.* at 37.

approximate the expected caseloads. But the caseloads of Florida public defenders do not reflect expected trends.

In North Carolina, approximately 80% of misdemeanor defendants received sentences that give rise to a constitutional right to counsel. As set forth in Table 2 below, in fiscal year 2008–2009, the vast majority of misdemeanor defendants were sentenced to either incarceration or probation.

Table 2: Misdemeanor Sentences in North Carolina<sup>26</sup>

Incarceration	Intermediate Punishment <sup>27</sup>	Community Punishment: Supervised Probation	Community Punishment: Unsupervised Probation	Community Punishment: Fine only	Community Punishment: Unspecified or Unreported <sup>28</sup>
24%	2%	24%	31%	7%	13%

Although not all of those defendants had court-appointed counsel, caseloads of court-appointed lawyers suggest that a significant percentage of them were represented. Data from two separate sources indicate that court-appointed counsel in North Carolina represent between 1.4 and 1.7 misdemeanor defendants for every felony defendant. In 2007, the BJS collected caseload information from indigent defense systems across the country.<sup>29</sup> The public defender offices in North Carolina that handle misdemeanor cases had a total of 21,185 felony noncapital cases, and 28,760 misdemeanor cases.<sup>30</sup> In other words, those offices

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26. *Id.* at 44–53.

27. Intermediate punishments include sanctions such as “Special Probation (SP), House Arrest with Electronic Monitoring (HAEM), Intensive Supervision Probation (ISP), Day Reporting Center (DRC), Residential Treatment Facility (RESID), and Drug Treatment Court (DTC).” *Id.* at 49.

28. The type of community punishment was not reported for approximately 8% of the cases in which the court imposed a community punishment. *Id.* at 51. In addition, in 9% of the cases in which the court ordered community punishment, no specific sanction was ordered. I have combined those two categories for purposes of this table.

29. The 2007 census sent questionnaires to 1046 public defender offices and received responses from approximately 97% of the offices. *See* INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, BUREAU OF JUSTICE STATISTICS, CENSUS OF PUBLIC DEFENDER OFFICES: COUNTY-BASED AND LOCAL OFFICES (ICPSR 29502) 5 (2007), <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/29502/documentation> [hereinafter CENSUS OF PUBLIC DEFENDER OFFICES].

30. *Id.*

took in approximately 1.4 misdemeanor cases for every felony case.<sup>31</sup> Similarly, data available from the court system reflects that in fiscal year 2011–2012, public defenders and court-appointed counsel disposed of approximately 122,705 nontraffic misdemeanor cases and 73,808 felony cases, or approximately 1.7 misdemeanor cases for every felony.<sup>32</sup>

Like most jurisdictions, North Carolina prosecutes more misdemeanor than felony cases. In fiscal year 2010–2011, for instance, approximately 102,803 felony cases were filed in superior court<sup>33</sup> and 74,887 in district court<sup>34</sup> for a total of 177,680 felony cases. In the same time frame, 487,252 nontraffic misdemeanor cases were filed.<sup>35</sup> Factoring in that only about 80% of North Carolina’s misdemeanor defendants received sentences requiring the appointment of counsel, the misdemeanor to felony ratio should be approximately 2.2 misdemeanor cases for every felony (assuming equivalent rates of indigence between misdemeanor and felony defendants), rather than 1.4 or 1.7

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31. *Id.*

32. N.C. COURT SYS., *Public Defender Case Disposition Activity Report: Fiscal Year 2011–2012* (2012), available at [http://www.nccourts.org/Citizens/SRPlanning/Statistics/CARports\\_fy11-12.asp](http://www.nccourts.org/Citizens/SRPlanning/Statistics/CARports_fy11-12.asp) (follow “Public Defender Case Disposition Activity Report” hyperlink). Superior Courts in North Carolina have jurisdiction over felony cases and hear appeals from misdemeanor cases. District Courts have jurisdiction over certain felony dispositions and also process most of the misdemeanor cases. The numbers listed above include all misdemeanors in either district court (115,812) or superior court (6,893) that reported either public defender or court-appointed representation, and all felonies in superior court reporting those categories of representation (42,587) along with any felonies in district court reporting both a final disposition (i.e., a guilty plea, trial, or dismissal) and the same representation categories (31,221).

33. N.C. COURT SYS., NORTH CAROLINA COURTS STATISTICAL AND OPERATIONAL REPORT: 2010–2011 TRIAL COURTS 3 (2011), [http://www.nccourts.org/Citizens/SRPlanning/Documents/2010-11\\_SOR-TrialCourts.pdf](http://www.nccourts.org/Citizens/SRPlanning/Documents/2010-11_SOR-TrialCourts.pdf).

34. As with the representation statistics set forth above, I included only those district court felony cases that were resolved in district court.

35. *See* N.C. COURT SYS., *supra* note 33, at 3, 6 (reporting 465,189 nontraffic misdemeanor cases were filed in district court and 22,063 were filed in superior court). A total of 1.12 million traffic offenses (including DUI’s) were filed, but not included in these numbers. *See id.* (reporting 1,117,325 were filed in district court and 10,758 were filed in superior court). In fiscal year 2010–2011, 67,712 impaired driving cases were filed in North Carolina. N.C. JUDICIAL DEP’T, ANALYSIS OF FY2010-2011 IMPAIRED DRIVING CHARGES AND IMPLIED CONSENT CHARGES FILED AND CHARGES DISPOSED 1 (2011), <http://www.nccourts.org/Citizens/SRPlanning/Documents/ratfy2010-2011.pdf>.

misdemeanors per felony. That difference may be attributable, at least in part, to differing rates of indigence between misdemeanor and felony defendants, but we currently do not have sufficient data to reach that conclusion.<sup>36</sup> It appears, then, that although North Carolina's misdemeanor representation rates are not as high as its felony representation rates, they at least approach that rate.

The data regarding misdemeanor representation in Florida is much more problematic, raising concerns that the patterns of appointment of counsel have shifted *away* from appointments in misdemeanor cases in the wake of *Shelton*. Prior to *Shelton*, Florida did not require the appointment of counsel in misdemeanor cases if the trial judge "filed a statement in writing that the defendant will not be imprisoned if convicted."<sup>37</sup> Recognizing that *Shelton* defendants could be deprived of counsel under this rule, the Florida Supreme Court altered state practice to require representation in misdemeanor cases unless the trial judge files a written order "certifying that the defendant will not be incarcerated in the case pending trial or probation violation hearing, or as part of a sentence after trial, guilty or nolo contendere plea, or probation revocation."<sup>38</sup> Because *Shelton* required counsel for this whole new category of defendants in Florida, it seems as though it should have resulted in the appointment of counsel in significantly more misdemeanor cases.

That fact notwithstanding, data from BJS's surveys of indigent defense systems in 1999<sup>39</sup> and 2007<sup>40</sup> suggest that the proportion of

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36. See HARLOW, *supra* note 13, at 1, 6 (reporting that in 1998, 82% of felony defendants in state courts had court-appointed counsel, but only 56% of misdemeanor defendants being held in local jails either as part of a sentence or pre-trial had court-appointed counsel). It is difficult to draw any conclusions about the rates of indigence of misdemeanor defendants from this statistic, however, both because 28% of the local jail inmates reported having no lawyer so there is no data on their indigence and because it is not at all clear that the rates of indigence of jail inmates are representative of all misdemeanor defendants.

37. Amendments to FLA. R. CRIM. P. 3.111(b)(1), 837 So. 2d 924, 927 (2002).

38. *Id.*

39. In 1999, the Bureau of Justice Statistics collected program data from 314 criminal defense programs in 72 of the 100 largest counties (the other 28 counties were located in states that wholly funded indigent representation). See INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, NATIONAL SURVEY OF INDIGENT DEFENSE SYSTEMS (ICPSR 3081) 3-5 (2001), <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/3081/documentation> (follow "Codebook-pdf" hyperlink). The 1999 survey included data from seven Florida counties.

40. The 2007 census sent questionnaires to 1046 public defender offices and

misdemeanor cases in relation to felony cases handled by those offices *decreased* during that time period. In response to those surveys, indigent defense providers from a number of counties furnished data on the number of misdemeanor and felony cases they handled. The 2007 census includes data from more than twice as many Florida offices as the 1999 survey, so the data presented in Table 3 for purposes of comparison is calibrated to 1000 felony cases.

Table 3: Proportion of Felony and Misdemeanor Cases Represented by Appointed Counsel in Florida (Adjusted to 1000 Felonies)

	Number of Felony Cases	Number of Misdemeanors Cases
1999 Survey <sup>41</sup>	1000	1723
2007 Census <sup>42</sup>	1000	1066

Thus, for every 1000 felony cases in 1999, indigent defense systems in Florida represented defendants in 1723 misdemeanor cases. But by 2007, that number had shrunk to 1066 misdemeanor cases per 1000 felony cases, a nearly 40% drop. The reduction in misdemeanor cases is especially problematic given that one would have expected the proportion of misdemeanor to felony cases to *rise* after *Shelton* and the associated Florida rule change, both of which occurred in 2002.

As with the data from North Carolina, there are several potentially significant limitations to the usefulness of this data for the purposes of drawing any definitive conclusions about the extent of misdemeanor representation. First, data on the number of misdemeanor and felony cases prosecuted in Florida are not available either for 1999 or 2007, so it is possible that the proportion of misdemeanor cases to felony cases decreased significantly between 1999 and 2007. Second, at least some of the data in the 1999 and 2007 surveys came from different offices,<sup>43</sup>

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received responses from approximately 97% of the offices. See CENSUS OF PUBLIC DEFENDER OFFICES, *supra* note 29, at 5. It included data from offices in fifteen Florida counties.

41. The dataset on which I based this analysis is available at <http://dx.doi.org/10.3886/ICPSR03081.v1>.

42. The dataset on which I based this analysis is available at <http://dx.doi.org/10.3886/ICPSR29502.v1>.

43. It is somewhat difficult to ascertain the offices that responded to these questions in the two surveys, but both datasets appear to include information from Pinellas, Palm Beach, and Broward Counties. The remaining jurisdictions

so it is possible that the offices completing the 2007 census do not represent most of the misdemeanor defendants in their jurisdictions.<sup>44</sup> Finally, because misdemeanor sentencing statistics are not available for Florida, the number of *Shelton* defendants cannot be ascertained. There is, however, evidence that roughly a quarter of misdemeanor defendants in Florida who pled guilty at arraignment were sentenced to probation, so one would have expected at least *some* increase, rather than a decrease, in the misdemeanor statistics between 1999 and 2007.<sup>45</sup>

The limitations on the data notwithstanding, the proportional drop in misdemeanor representation in Florida raises grave concerns that a significant percentage of misdemeanor defendants who are constitutionally entitled to counsel remain unrepresented. And if a significant percentage of these defendants are going unrepresented in Florida, it is likely they are going unrepresented in at least some other states as well. Indeed, all evidence points toward significant percentages of constitutionally-entitled misdemeanor defendants who remain unrepresented. The question, then, is why.

### *III. The Reasons Underlying the Numbers*

The data are far from complete, but it appears that representation rates of misdemeanor defendants who have a right to counsel do not approach representation rates in felony cases. It also appears that states may vary quite significantly in those representation rates—a fact that suggests that constitutional violations are occurring, and perhaps occurring in large numbers. Why are misdemeanor defendants entitled to counsel not

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likely are different.

44. The force of that argument is undermined by the fact that Florida law requires public defender offices to represent *all* indigent defendants charged either with felonies or with misdemeanors unless the trial judge has filed the certification that the defendant is not entitled to representation. FLA. STAT. ANN. § 27.51 (West 2006). There also, of course, is an exception for conflict cases. *Id.* § 27.511.

45. See SMITH & MADDEN, *supra* note 21, at 18–19 tbl.6 (reporting that in observations of 1649 arraignments in twenty-one of Florida's sixty-seven counties over an eight month period, 27% of those who pled guilty at arraignment were sentenced to probation).

represented to the same extent as felony defendants? Two sets of answers deserve exploration. The first concerns real-world barriers individual defendants face. The second involves systemic forces that give rise to those real-world conditions.

### *A. Criminal Defendants and the Real World*

Misdemeanor defendants confront real-world obstacles to obtaining court-appointed counsel, including (1) the provision of insufficient information to defendants; (2) prohibitively high fees charged to misdemeanor defendants who exercise their right to counsel; and (3) the interest that many defendants have in obtaining a speedy resolution of their cases.<sup>46</sup> Each of these factors significantly limits appointment of counsel to misdemeanor defendants.

There is evidence that, at least in some jurisdictions, defendants waive the right to counsel without being adequately informed of the existence and scope of that right.<sup>47</sup> Cases such as those in which waiver is based on insufficient information clearly involve unconstitutional denials of counsel. Although *voluntary* waivers of the right to counsel must be respected,<sup>48</sup> the Court has emphasized that the defendant must not only know of the existence of the right but also understand the risks of waiving such right before the defendant forfeits it.<sup>49</sup>

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46. ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 14–17 (2009), <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808>.

47. See SMITH & MADDEN, *supra* note 21, at 15 (discussing how “for those without lawyers, information regarding proceedings and defendant’s options were limited to generic explanations of court protocols generally communicated en masse”).

48. See *Faretta v. California*, 422 U.S. 806, 806 (1975) (holding “that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so, and that the state may not force a lawyer upon him when he insists that he wants to conduct his own defense”).

49. See *id.* at 814 (noting that a defendant may “competently and intelligently waive his constitutional right to counsel”); *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938) (“The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the

In spite of this requirement, there is evidence that courts in certain jurisdictions are accepting counsel waivers without sufficiently advising defendants of their right to counsel and those risks. For instance, a study of misdemeanor cases in Florida found that 27% of unrepresented defendants were not told that they had a right to counsel, and over 60% of them were not informed of the importance of being represented by counsel.<sup>50</sup> Site observations in a number of misdemeanor courts across the country also demonstrate that judges failed to inform most defendants of the dangers of self-representation, and many waivers either were obtained on written forms or as part of compound or confusing questions.<sup>51</sup> As a result, it appears that many unrepresented misdemeanor defendants either may not know that they have a right to court-appointed counsel or may not receive sufficient information to validly waive the right to counsel.

There are also practical barriers to invoking the right to counsel, even if the right is fully understood. In many jurisdictions, defendants must pay a fee in order to be represented by court-appointed counsel.<sup>52</sup> Indeed, in some states, defendants must pay a fee before they can *apply for* court-appointed representation.<sup>53</sup> Because states may not deny counsel simply because a defendant lacks the resources to pay a fee, most of the statutes specify that defendants are not responsible for paying the fee if they cannot afford it.<sup>54</sup> But it is not clear that all

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background, experience, and conduct of the accused.”).

50. See SMITH & MADDEN, *supra* note 21, at 22 tbl.6.

51. See BORUCHOWITZ ET AL., *supra* note 46, at 15–16 (noting that one judge told a defendant “I want you to waive your right to an attorney,” because the judge refused to appoint a public defender and did not think the defendant would hire an attorney).

52. Approximately 80% of county-based or local public defender offices require the payment of some sort of fee. See DONALD J. FAROLE, JR. & LYNNE LANGTON, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007 at 6 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf>.

53. Approximately 44% of the offices that require the payment of fees use up-front application or administrative fees. *Id.*; see also, e.g., GA. CODE ANN. § 15-21A-6(c) (2012) (requiring that a \$50 application fee must be submitted before application for counsel will be evaluated).

54. See, e.g., GA. CODE ANN. § 15-21A-6(c) (“The court shall waive the fee if it finds that the applicant is unable to pay the fee or that measurable hardship



jurisdictions actually *inform* defendants that the fee can be waived.<sup>55</sup> This form of failed notice raises obvious constitutional difficulties. After all, a defendant who believes he must pay for counsel even if he cannot afford it is not receiving the right to appointment of counsel guaranteed by the Constitution.

There is a further obstacle to invoking the right to counsel. In some jurisdictions, defendants are told that if they request counsel, their case will be delayed.<sup>56</sup> Particularly for misdemeanor defendants who have been denied bail and who receive a time-served plea offer that will get them out of jail as soon as they plead guilty, any delay results in additional time in jail. Under those circumstances, defendants (even those who are innocent) have every incentive to waive counsel in order to plead guilty and resolve the case as quickly as possible. Suffice it to say, then, significant (and perhaps unconstitutional) pressure is exerted to obtain waivers of the right to counsel from misdemeanor defendants.

### *B. Systemic Factors Leading to Underrepresentation*

The obstacles described above almost certainly contribute to misdemeanor defendants' lower rates of representation. But they leave the underlying question of why jurisdictions with virtually 100% felony representation have neither striven for nor achieved similar misdemeanor representation rates. In other words, why have special barriers arisen to representation in misdemeanor, but not in felony cases? The answer to that question, I think, has much to do with systemic forces.

At the time the Court decided *Gideon*, forty-four states already provided representation to all indigent felony defendants, and only five states limited such representation to capital cases.<sup>57</sup>

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will result if the fee is charged.”).

55. See BORUCHOWITZ ET AL., *supra* note 46, at 20 (noting that many defendants who are unaware the fee can be waived do not seek court-appointed counsel and proceed pro se).

56. *Id.* at 18–19.

57. See John F. Decker & Thomas J. Lorigan, Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103, 104 & n.13 (1970).

As a result, *Gideon*'s guarantee of a right to counsel affected only the five states that had not been providing counsel to all felony defendants. Also of importance, counsel in those jurisdictions had a financial incentive to ensure that the state respected the right to counsel. At the time, very few jurisdictions had public defender systems,<sup>58</sup> and private lawyers were appointed as a matter of judicial discretion to represent criminal defendants.<sup>59</sup> Of course, some states or counties paid appointed counsel very little (if anything), but for the most part, appointed counsel were paid for their work.<sup>60</sup> Thus, in most jurisdictions counsel had at least some incentive to ensure that indigent defendants received the representation to which they were constitutionally entitled.

The enforcement of the right to counsel for misdemeanor defendants guaranteed by *Argersinger* and *Shelton* presented more difficult issues. First, *Argersinger*, and perhaps to an even greater extent *Shelton*, increased the number of defendants entitled to appointment in many more states than *Gideon*. Post-*Gideon*, nineteen states did not provide counsel to *any* misdemeanor defendants, and twelve additional states appointed counsel only for defendants charged with serious misdemeanors.<sup>61</sup> Similarly, pre-*Shelton*, sixteen states did not provide counsel to defendants in *Shelton*'s circumstances (i.e., sentenced to a "substantial fine" and a suspended term of incarceration under a statute authorizing imprisonment of up to one year), and ten

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58. See George Yuhas, Note, *Statewide Public Defender Organizations: An Appealing Alternative*, 29 STAN. L. REV. 157, 157 n.3 (1976) ("The year *Gideon* and *Douglas* were decided only 18 states had legislation authorizing the establishment of local defender offices, and only 5 states had any sort of statewide public defender system.").

59. See Nancy A. Goldberg, *Defender Systems of the Future: The New National Standards*, 12 AMER. CRIM. L. REV. 709, 713 (1975) (noting that at the time *Gideon* was decided, indigent defense "was a matter of judicial discretion and charitable contribution by bar associations rather than a 'system'").

60. See Richard L. Grier, Comment, *Analysis and Comparison of the Assigned Counsel and Public Defender Systems*, 49 N.C. L. REV. 705, 707-08 (1971) (reporting that assigned counsel has been less expensive because attorneys have been paid only a fraction of the value their services would otherwise bring, but noting that even when state statutes did not provide for payment of assigned counsel, courts still required at least some payment).

61. See Decker & Lorigan, *supra* note 57, at 119-24 (discussing the various methods these twelve states used to determine if a misdemeanor was serious enough to warrant appointed counsel).

other states did not provide counsel to all defendants covered by the Court's holding.<sup>62</sup> Thus, *Argersinger* and *Shelton* required a far more significant expansion in the appointment of counsel than did *Gideon*. Second, the vast majority of cases prosecuted in state courts across the country are misdemeanor offenses, and a significant percentage of defendants convicted in misdemeanor cases are likely sentenced either to incarceration or to probation.<sup>63</sup> As a result, the holdings in *Argersinger* and *Shelton* likely covered more cases than were affected by the Court's holding in *Gideon*.

In addition, lawyers have had significantly less incentive to ensure the enforcement of *Shelton* than *Gideon*. By the time the Court decided *Shelton*, most criminal defendants were arrested in jurisdictions that had established public defender systems.<sup>64</sup> States had good reasons for establishing these offices, both because significant questions regarding the quality of representation provided by contract (and some other appointed) counsel had been raised<sup>65</sup> and because there was evidence that public defender offices handle cases more efficiently and economically than other methods of court-appointed representation.<sup>66</sup> But for misdemeanor defendants, the public

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62. See *Alabama v. Shelton*, 535 U.S. 654, 679 n.4 (2002) (Scalia, J. dissenting) (listing the states, in addition to the sixteen identified by the majority in its decision, whose laws would be altered as a result of the majority's decision).

63. As discussed above, North Carolina sentences approximately 55% of its misdemeanor defendants to probation and 24% to incarceration, but Florida appears to sentence misdemeanants to probation at a much lower rate. See *supra* Part II. Data on incarceration and probation rates of misdemeanants across the states are simply lacking in most states.

64. See HARLOW, *supra* note 13, at 4 (noting that in 1999, two-thirds of state prosecutors "reported that their courts used public defenders").

65. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 13–15 (2000), <http://www.ncjrs.gov/pdffiles1/bja/181160.pdf> (detailing the caseload problems that can arise in contract systems); Paul Calvin Drechsel, *The Crisis in Indigent Criminal Defense*, 44 ARK. L. REV. 363, 381–82 (1991) (noting the trend toward the use of contract systems and observing that these systems fail to provide effective assistance); Nat'l Ass'n of Criminal Def. Lawyers, *Low-Bid Criminal Defense Contracting: Justice in Retreat*, 21 CHAMPION 22, 22–24 (1997) (lamenting the rise of low-bid contracting for indigent defense services).

66. See, e.g., Pauline Houlden & Steven Balkin, *Quality and Cost Comparisons of Private Bar Indigent Systems: Contract vs. Ordered Assigned*

defender system model creates a serious problem. The problem is that lawyers in these offices, already swamped with excessive caseloads, have little incentive to take on more clients. Indeed, public defenders facing ever-mounting caseloads arguably have an ethical obligation to their existing clients to prevent additional cases from being assigned to them.<sup>67</sup> As a result, public defenders have very little incentive to ensure that the state respects misdemeanor defendants' constitutional right to counsel. Thus, in striking contrast to the situation with respect to virtually every other constitutional right guaranteed to criminal defendants that have lawyers, public defenders may have powerful incentives not to seek the additional work that would result from protecting the right to counsel.

Another problem arises from excessive public defender or assigned counsel caseloads. Such caseloads may discourage misdemeanor defendants from seeking representation by those lawyers. As others have documented, publicly appointed lawyers often labor under overwhelming caseloads that force them to limit representation to the most minimal level.<sup>68</sup> After all, a lawyer expected to represent, in some documented instances, thousands of clients per year can do nothing beyond telling the client to plead guilty and then standing by as the client does so.<sup>69</sup> Given the reality that lawyers with these caseloads may not be

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*Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 176, 180 (1985).

67. See Heidi Reamer Anderson, *Funding Gideon's Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 421–22 (2012) (describing state underfunding as creating for public defenders a “current client conflict, in which the number of other criminal defendant clients currently assigned to him ‘materially limits’ his ability to represent any one of his clients”).

68. 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* 17–18 (2004), <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> (detailing caseloads of public defenders across the country); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1054–57 (2006) (describing the crushing caseloads of public defenders).

69. See Backus & Marcus, *supra* note 68, at 1082 (reporting that two part-time contract attorneys in Indiana were assigned a total of 2668 misdemeanor cases in one year); Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic*, 9 CRIM. JUST. 13, 15 (1994) (noting the reality that “overburdened public defenders are often forced to pick and choose which cases to focus on, resulting in the inadequate handling of a large number of cases”).

able to significantly alter the outcome for clients, it perhaps is not surprising that misdemeanor defendants waive that right.

Finally, judges in at least some jurisdictions either are unaware of or disagree with *Shelton* and therefore do not enforce it. As discussed above, the Chief Justice of the South Carolina Supreme Court admitted that South Carolina did not comply with *Shelton*.<sup>70</sup> In the face of such flagrant disregard for the Court's holding in *Shelton* by a person sworn to enforce constitutional rights, it perhaps is not surprising that trial judges do not feel compelled to ensure protection of this right.

To be sure, it is possible that some misdemeanor defendants do not insist on appointment of counsel either because they affirmatively want to represent themselves or because they believe that the case is not sufficiently important to bother with representation. And if misdemeanor defendants make that decision knowingly and voluntarily, they have a constitutional right to represent themselves.<sup>71</sup> Two facts, however, suggest that unrepresented misdemeanor defendants have not freely chosen self-representation. First, observations of misdemeanor courts demonstrate that many defendants either are not told of their right to counsel or have the right explained only in boilerplate writing.<sup>72</sup> Second, the felony representation statistics undermine any argument that a significant percentage of defendants offered counsel choose self-representation.<sup>73</sup> In sum, the combination of the factors discussed above seems to have led to significant violations of the right to misdemeanor representation.

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70. See *supra* note 15 and accompanying text.

71. *Faretta v. California*, 422 U.S. 806, 815–16 (1975) (“The United States Court[s] of Appeal[] have repeatedly held that the right of self-representation is protected by the Bill of Rights.”).

72. See SMITH & MADDEN, *supra* note 21, at 15 (“In some counties, defendants (15.9%) were advised of their rights when they were handed a written form by the bailiff as they walked into court. The forms, which are written in the negative, presume defendants will waive their right to counsel and enter pleas of guilty or no contest.”).

73. See Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 442 (2007) (noting that among defendants in the Federal Docketing Database who reported type of counsel, “less than 0.5% of the defendants reported as self-representing”).

*IV. Fixing Misdemeanor Representation*

So what should we do? From all appearances, the constitutional guarantee of the right to counsel in misdemeanor cases has come to mean very little in some jurisdictions, violated both blatantly and covertly without any repercussions. Indeed, the system has encouraged states to find ways around the constitutional requirement that they appoint counsel, and many states have responded by simply failing to afford representation, developing coercive processes that result in waivers of counsel, or requiring misdemeanor public defenders to undertake representation of so many clients that they cannot possibly represent any, let alone all, of those clients effectively.<sup>74</sup> In my view, these practices are both deeply problematic and largely preventable.

*A. Defending the Shelton–Argersinger Line*

Before turning to the issue of prevention, a more fundamental question needs to be addressed. Even if many jurisdictions are not providing counsel for misdemeanor defendants or are creating significant barriers to assertion of the constitutional right, if those defendants are indifferent, is there any cause for concern? To put it another way, even assuming that some jurisdictions violate the constitutional right to counsel set forth in *Argersinger* and *Shelton*, should we care? The answer, I think, is “yes” for several reasons.

First, *Argersinger* and *Shelton*, like *Gideon*, are decisions of the United States Supreme Court defining the basic scope of the right to counsel guaranteed by the Constitution. Permitting states to blatantly flout their most fundamental constitutional obligations to criminal defendants<sup>75</sup> provides a dangerous precedent. To be sure, states and their citizens often disagree with constitutional decisions of the Supreme

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74. See *supra* Part III.

75. See *Whorton v. Bockting*, 549 U.S. 406, 419–21 (2007) (identifying *Gideon*’s guarantee of a right to counsel as perhaps the only “watershed” rule of criminal procedure).

Court.<sup>76</sup> But any workable commitment to the rule of law requires states (and others) to nonetheless follow those decisions.<sup>77</sup> The Supreme Court itself has recognized this principle in no uncertain terms—and rightly so, given the text of the Supremacy Clause and foundational commitments to both general stability and equal justice under law.<sup>78</sup>

The rule-of-law principles apply with particular force when the Court sets forth a clear, bright-line precipice—as in *Gideon*, *Argersinger*, and *Shelton*—rather than a more malleable standard, as in the cases setting forth the standard for the effective assistance of counsel.<sup>79</sup> The right to counsel, moreover, serves as the constitutional underpinning for criminal cases because it provides the primary mechanism for protecting all of defendants' other constitutional criminal procedure rights. Indeed, one of the primary difficulties with enforcing the misdemeanor right to counsel may be that lawyers are not available to protect the defendants' rights. Permitting jurisdictions to opt out of providing the constitutionally required gateway to all other constitutional rights undermines both the perception and provision of fairness in criminal proceedings.

Finally, the line drawn in *Argersinger*, *Scott*, and *Shelton*, although not perfect, is defensible. Of course, there are those who argue that the line should be moved either to include more defendants<sup>80</sup> or to include

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76. The resistance of school districts in the segregated south to *Brown v. Board of Education*, 347 U.S. 483 (1954), is perhaps the most oft-cited example of this. See, e.g., Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 111–12 (1994).

77. See Richard H. Fallon, Jr., *The Rule of Law as a Concept of Constitutional Discourse*, 97 COLUM. L. REV. 1, 8 (1997) (listing the five elements that generally constitute the Rule of Law).

78. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958) (“No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.”).

79. See *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984) (“When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.”).

80. The National Association of Criminal Defense Attorneys has taken the position that any defendant charged with a criminal offense should have a constitutional right to counsel because of the enormous consequences of

fewer.<sup>81</sup> To the extent that the line has not been correctly drawn, perhaps it makes most sense to spend resources getting the line moved rather than on enforcing the right that currently exists. In fact, that line has been defensibly drawn both because (1) it gives states distinct options for complying with the constitutional requirement, and (2) it permits jurisdictions to focus on ways of providing, rather than seeking ways to deny, representation.

To be sure, criminal convictions, including misdemeanor convictions, can have significant life-altering consequences for the defendant regardless of the sentence imposed as a result of the conviction.<sup>82</sup> For instance, a misdemeanor conviction can lead to deportation, denial of housing and other benefits, and loss of employment opportunities.<sup>83</sup> Each of these losses affects the defendant at least as much—and arguably far more—than a probationary or even a short incarceration sentence. And some therefore have argued that *all* criminal defendants should have a right to appointed counsel.<sup>84</sup> It is unrealistic, however, to imagine such an outcome in light of resulting costs and budgetary constraints. Perhaps more to the point, guaranteeing a right to counsel apparently has not ensured that *Shelton* and *Argersinger*

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conviction, including deportation, loss of benefits, and lost employment opportunities. See BORUCHOWITZ ET AL., *supra* note 46, at 17–18 (making recommendations in light of a report noting an absence of counsel for misdemeanor cases); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 333 (2011).

81. Cf. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 967–94 (2012) (“In rejecting a broad new constitutional right, the Court steered toward more sustainable reform for pro se litigants. The Court’s solution is far more realistic than a grandiose new right to counsel.”).

82. See Roberts, *supra* note 80, at 277 (“Yet the consequences of even the most ‘minor’ misdemeanor conviction can be far reaching, and include deportation, sex offender registration, and loss of public housing and student loans.”).

83. See *id.* (listing the various negative, “collateral consequences” of a misdemeanor conviction).

84. Rinat Kitai, *What Remains Necessary Following Alabama v. Shelton to Fulfill the Right of a Criminal Defendant to Counsel at the Expense of the State?*, 30 OHIO N.U. L. REV. 35 (2004) (arguing that all criminal defendants should have access to appointed counsel if they so request, without any limitations or conditions).



defendants are represented. Requiring appointment of counsel in *more* cases would likely only further undermine the rights already guaranteed. And so, enforcing the existing constitutional right—ensuring that states respect that right either through litigation or persuasion—takes on central importance.

If the goal is to ensure representation for those constitutionally entitled, moreover, the *Shelton* line offers a significant advantage over a guarantee to all defendants charged with a criminal offense. *Shelton*, dependent as it is on the defendant's sentence, offers states a low-cost way to comply with the Constitution: eliminate incarceration and probated sentences for low-level offenders.<sup>85</sup> The key point is that the current system gives states a clear alternative if they deem the cost of appointing counsel too high: change the penalty structure. That alternative, infinitely preferable to coercing waiver of the right to counsel, provides states with a low-cost way to comply with the Constitution without skirting its commands.

That leaves only the question of whether the benefits lawyers provide to misdemeanor defendants adequately offset the costs of those lawyers? After all, if lawyers do not benefit misdemeanor clients, then states perhaps legitimately should be seeking to avoid the strictures of *Argersinger* and *Shelton* by seeking waivers. That question proves more difficult to answer than one might expect, in part because we lack data on the effect of counsel on misdemeanor cases.<sup>86</sup> Even if we had such data, moreover, it would measure only the effectiveness of lawyers in an admittedly flawed system in which many lawyers carry overwhelming caseloads that undermine effectiveness.<sup>87</sup>

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85. See Hashimoto, *supra* note 23, at 499–502.

86. I previously reported skepticism regarding the effectiveness of counsel in misdemeanor cases, based in part on an assessment of the outcomes of misdemeanor cases in federal court. *See id.* at 489. As I discussed in that article, however, the data were subject to numerous limitations. *Id.* at 494. In addition, we completely lack data on outcomes in state courts, where virtually all misdemeanor cases are prosecuted.

87. *See id.* at 495 (“The differential in the results of state and federal felony pro se defendants may not be representative of the results of state and federal pro se misdemeanor defendants, particularly because the volume of pro se misdemeanor defendants in state courts is so much greater.”); Roberts, *supra* note 80, at 296.

Perhaps the most compelling argument that counsel can make a difference in at least some misdemeanor cases is that there is not a bright line, in terms of complexity of the case, between felonies and misdemeanors. If representation by counsel makes a difference in felony cases, it must also be able to make a difference in at least some misdemeanor cases. As a result, although I recognize that the *Shelton* line may be imperfect, ultimately I think it sufficiently defensible that it should be the basis for the right-to-counsel battleground.

### *B. Getting to Compliance*

The bottom line is that lawyers and advocacy organizations need to be working to ensure that states respect the constitutional right to counsel the Supreme Court has guaranteed. Finding ways to ensure enforcement, of course, is the challenge. There are, however, four critical steps that can be taken to help facilitate compliance: (1) Lawyers and advocacy groups need to organize around ensuring that states comply with the current constitutional mandate and remove that obligation from public defenders; (2) those organizations must continue to gather data and observe appointment practices to document the extent to which jurisdictions are (or are not) complying with the obligation to appoint counsel; (3) judges need to be educated about the constitutional right at stake and the ways in which constitutional compliance can be achieved; and (4) lawyers need to assure that misdemeanor defendants whose rights have been violated have a mechanism for appeal.

First, private lawyers and advocacy groups must organize around the failure to appoint counsel to constitutionally entitled misdemeanor defendants. To the extent that public defenders and court-appointed counsel have the time and resources to spend on this effort, their participation would be helpful. But they should not be expected to take the lead on this issue, both because lawyers in those offices (and particularly misdemeanor public defenders) often have completely unmanageable workloads<sup>88</sup> and because putting them in the position of advocating for taking on

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88. See Hashimoto, *supra* note 23, at 470–73.

more cases risks creating ethical conflicts for them.<sup>89</sup> Indeed, to the extent those lawyers have more clients than they can effectively represent, advocating for representing additional *potential* clients may result in an ethical violation.<sup>90</sup> As a result, the private bar and advocacy organizations must bear the burden of ensuring that states respect misdemeanor defendants' right to counsel.<sup>91</sup>

Second, collecting more data—both statistical and anecdotal—on misdemeanor representation is critical. This process has to begin with seeking a better understanding of the extent to which jurisdictions currently provide counsel to misdemeanor defendants. We need better data regarding whether jurisdictions appoint counsel to misdemeanor defendants who have a right to counsel. That will require data both on the extent to which misdemeanor defendants are represented (and by whom) and on misdemeanor sentencing. Data collections like North Carolina's may be far from perfect, but at the very least, they provide enough information that we can begin to understand the extent to which misdemeanor defendants are (or are not) being represented.<sup>92</sup> Unfortunately, North Carolina's data collection is the outlier rather than the norm.

There is, however, a problem with efforts to collect data: jurisdictions that are failing to appoint counsel to constitutionally

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89. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006)

All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments.

90. *Id.*

91. See, e.g., Rocky Robinson, *President's Message, Be Proud—Give Back*, HOUS. LAW., July/Aug. 2004, at 6, available at [http://www.thehoustonlawyer.com/aa\\_july04/presi.htm](http://www.thehoustonlawyer.com/aa_july04/presi.htm) (discussing the role of the Houston Bar Association in enforcing the Supreme Court's decision in *Brown v. Board of Education*).

92. Of course, even if those data are collected, we still will be missing data on the indigence levels of misdemeanor defendants, but at least for present purposes, data on representation and sentencing at least would provide a much clearer picture of constitutional compliance rates.

entitled misdemeanor defendants have no incentive to collect data establishing that fact. Those jurisdictions will not keep such data unless they have some incentive to do so, either a reward for collecting it or a sanction for not doing so. There are a number of ways that the BJS could provide jurisdictions with an incentive to collect this data. It could, for instance, provide grants to jurisdictions that collect this data. The Department of Justice could also withhold certain types of funding from jurisdictions that refuse to collect and provide misdemeanor data to BJS. Indeed, that essentially is how BJS has collected data on felony defendants in large counties. In addition, private organizations or lawyers need to exert pressure on jurisdictions to collect data by threatening to bring lawsuits to obtain these data from various state actors. Notably, some states do collect data on misdemeanor prosecutions but then refuse to disclose that data. If nothing else, the Bar and advocacy groups should press to change this practice. Without data on representation rates and sentencing of misdemeanor defendants, we simply do not know the extent to which counsel are, or are not, being appointed to represent defendants.

This data, if collected in a systematic way, would be important both to ascertain the practices that states use to achieve constitutional compliance and to identify the jurisdictions that are not complying. As to the first point, data would shed light on the states that actually are providing counsel to constitutionally entitled misdemeanor defendants. This would allow examination of the practices in those jurisdictions that have led to constitutional compliance, including the ways those jurisdictions have made representation economically feasible. For instance, it would allow examination of sentencing practices to determine whether the misdemeanor courts comply by increasing the use of fines as a sentence, or by simply appointing lawyers in significantly more misdemeanor cases, or by reducing the overall number of misdemeanor cases being prosecuted.<sup>93</sup> This

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93. There is significant variation among the states regarding the proportion of misdemeanor to felony cases prosecuted. See R. LaFountain, R. Schaufler, S. Strickland, S. Gibson & A. Mason, *Examining the Work of States Courts: An Analysis of 2009 State Court Caseloads* 23 (National Center for State Courts 2011), <http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf>.

information could, in turn, provide other states that have encountered greater problems with compliance with a roadmap for adjusting the way in which they handle their own misdemeanor cases.

Data also would identify the jurisdictions that are not appointing counsel. If, as expected, data and observations demonstrate that some jurisdictions either are not providing representation to significant percentages of misdemeanor defendants who have a constitutional right to representation or have coercive waiver policies in place, private lawyers and organizations must make it a priority to educate judges and the public about this pattern of wrongdoing. In some instances, violations of the misdemeanor right to counsel may be the result of a deliberate decision of a court to shirk constitutional responsibility.<sup>94</sup> In many other cases, however, judges may not fully understand the extent to which misdemeanor defendants have a constitutional right to counsel.

In addition, counsel need to work with state judges regarding alternatives for complying with the constitutional rule. Judges need to know that they can either provide counsel or eliminate imprisonment and probation penalties in misdemeanor cases.<sup>95</sup> Providing judges with a constitutional alternative to the appointment of counsel—sentencing defendants to fines rather than probation or imprisonment—responds to the worries of judges who believe that they do not have the resources to appoint counsel in all misdemeanor cases.<sup>96</sup> Perhaps most importantly, such education may foster respect for the right to counsel in keeping with the Supreme Court's teaching.

Of course, educating legislators and judges will not solve all problems. As a result, private attorneys and organizations must commit to appealing unconstitutional convictions obtained without representation or to challenging in court the practices of

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94. Consider the statement by the Chief Justice of the South Carolina Supreme Court. See Frederick, *supra* note 15 and accompanying text.

95. See Hashimoto, *supra* note 23, at 513.

96. Robert Boruchowitz has implemented just such a project to educate judges and legislators in the state of Washington. See *The Defender Initiative: Initiative's Projects and Activities*, SEATTLE UNIV. SCH. OF LAW, <http://law.seattleu.edu/x10378.xml> (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

judges who either refuse to appoint counsel or coerce defendants into waiving the right to counsel. In addition to litigating these cases, counsel can provide information to defendants on appealing their sentences, including by producing draft form briefs that pro se defendants can use. Particularly for *Argersinger* defendants sentenced to imprisonment, draft briefs challenging the constitutionality of a conviction circulating at the jail can be very helpful to pro se appellants. But educating judges about Sixth Amendment compliance and increasing the cost of failing to comply offer a promising avenue to achieving much-enhanced compliance with the misdemeanor right to counsel.

#### *V. Conclusion*

The right to counsel guaranteed by *Shelton* and *Argersinger* is as fundamental and important as that guaranteed by *Gideon*. That fact notwithstanding, significant numbers of constitutionally entitled misdemeanor defendants remain unrepresented either because the jurisdiction completely ignores the constitutional obligation to provide counsel, or because it erects unconstitutionally high barriers to the appointment of counsel. Private lawyers need to give highest priority to assuring representation for those constitutionally entitled to it by documenting misdemeanor appointment practices and by ensuring that consequences attach to unconstitutional practices. Until *all* jurisdictions respect the basic constitutional right to counsel guaranteed to misdemeanor defendants, *Gideon's* promise will remain unfulfilled.