

SIXTH AMENDMENT FEDERALISM

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Scholarship on the right to appointed counsel in misdemeanor cases has generally focused on the U.S. Constitution, neglecting the role of state law. As states across the country fail to provide effective counsel in more serious cases, some academics have argued that the U.S. Supreme Court should create a constitutional right to appointed counsel in all criminal cases.

This Article focuses instead on state law, arguing that federalism is the key to reforming our misdemeanor indigent defense system. In the process, it pursues both descriptive and normative goals. Descriptively, it documents the current law of the fifty States on the right to appointed counsel and finds that states have not acted in a stereotypically miserly manner. Thirty-four states guarantee a broader right to appointed counsel than the U.S. Supreme Court requires.

Normatively, this Article advocates for a more dynamic federalism to improve our misdemeanor indigent defense system. First, this Article challenges the popular scholarly view that there should be a federal constitutional right to appointed counsel in all criminal cases, addressing both legal and policy arguments. Second, this Article focuses on federalism. Because the U.S. Supreme Court has not imposed a uniform solution on all of the states, there is room for experimentation. But many states have not yet seized the opportunity. Intending to shift the conversation toward finding innovative solutions within federalism, this Article introduces three alternatives to providing ap-

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pointed counsel in misdemeanor cases: non-prosecution, diversion, and an inquisitorial system of adjudication.

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INTRODUCTION: MISDEMEANOR TRIALS IN MONTGOMERY COUNTY, PENNSYLVANIA

On a Tuesday afternoon in King of Prussia, Pennsylvania, a magisterial district judge is conducting shoplifting trials. His court, the judge explains, “gets a ton of business” from shoplifting at the massive King of Prussia Mall across the street. The defendant in his next case, Mindy, is accused of stealing sixty dollars’ worth of clothing from a store. Outside the courtroom, the defendant had struck a bargain with the police officer prosecuting her case. She would plead guilty to shoplifting, she offered, if she could get a payment plan for the fine. The police officer is fine with that arrangement.

As the trial begins, the judge takes control of the proceeding. He asks the defendant a variety of questions about her background, establishing that she has a job as a store clerk and no criminal record. After Mindy tells the judge she wishes to plead guilty, the judge asks the police officer if the Commonwealth would accept a guilty plea to the lower offense of disorderly conduct. The police officer agrees. The judge tells Mindy he is cutting her a “major break” and asks her to also thank the officer, which she happily does. The judge then imposes a fine of \$160 and agrees to a payment plan by which Mindy will pay \$20 per month. After Mindy leaves, the judge explains to me that a retail theft conviction would cost Mindy her job. Because she was a first-time offender, he wanted to cut her a break. As he put it, “peoples’ lives are complicated, and I try to cut people a break unless someone’s an idiot.”

The informal proceeding took all of about ten minutes. There was no formal submission of evidence or cross-examination. And yet Mindy came into the courtroom without a criminal record, and left with one. Perhaps most interestingly, there was no defense lawyer. Indeed, there were no defense lawyers at any of the twelve criminal trials I watched that morning in Montgomery County.

Criminal law scholarship has typically covered misdemeanors and petty offenses only lightly.¹ These labels encompass a vari-

1. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012) (denouncing the “felony-centric” view of criminal law). Some states classify misdemeanors and “petty” offenses separately. In general, when the distinction ex-

ety of offenses, including driving with a suspended license, disorderly conduct, drug possession, shoplifting, harassment, underage drinking, minor assault, vandalism, and even hunting oysters without a license.² Compared with felonies and capital cases, the stakes may seem low. But misdemeanors dominate our criminal justice system. About *fifteen million* misdemeanors are processed in the United States each year, easily dwarfing the number of felonies.³ Misdemeanors matter.

In misdemeanor cases, a significant percentage of criminal defendants do not have a federal constitutional right to appointed counsel. In *Scott v. Illinois*,⁴ the U.S. Supreme Court held that states are obligated to appoint counsel to indigent defendants only when a sentence of imprisonment is imposed.⁵ When other criminal punishments are imposed—most commonly fines—the Federal Constitution does not require States to appoint counsel.⁶ If that does not sound like much, it is worth remembering that many, if not most, criminal charges brought in the state courts are low-level misdemeanors that are generally punished solely with fines.⁷ Thus, States have the discretion not to appoint counsel in a large portion of criminal cases.

ists, a petty offense is considered less serious. Because not all states recognize petty offenses, the term “misdemeanor” refers herein to both.

2. See *id.* at 1321; Sarah Mollett, *The Chesapeake Bay's Oysters: Current Status and Strategies for Improvement*, 18 PENN ST. ENVTL. L. REV. 257, 270 (2010).

3. See RICHARD Y. SCHAUFFLER ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 45, 47 (2010), <http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx> [<https://perma.cc/5DBA-5P6D>].

4. 440 U.S. 367 (1979).

5. *Id.* at 373–74. The States must also appoint counsel before imposing suspended sentences that could result in the defendant being actually imprisoned. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002).

6. *Scott*, 440 U.S. at 373–74.

7. In 2018, Texas had around 1.1 million non-traffic misdemeanor cases in the justice and municipal courts where the defendant could only be punished by fine, and thus was not entitled to appointed counsel. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY FISCAL YEAR 2018, at Detail 50 (2018), <https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf> [<https://perma.cc/X7UY-PY44>]. That same year, about 290,000 criminal cases were filed in the Texas District Courts, where defendants charged with more serious misdemeanors or felonies are entitled to appointed counsel. See *id.* at Court-Level 20. In other words, the number of criminal cases where defendants were not entitled to appointed counsel easily dwarfed the number of cases where they were.

Most scholars who have considered the right to appointed counsel in misdemeanor cases argue *Scott v. Illinois* was erroneous and should be overruled.⁸ Indeed, some scholars denounce the decision in strong terms, declaring it at odds with the Supreme Court's important decision in *Gideon v. Wainwright*,⁹ which guaranteed indigent defendants the right to appointed counsel in felony cases.¹⁰

8. See, e.g., Russell L. Christopher, *Appointed Counsel and Jury Trial: The Rights that Undermine the Other Rights*, 75 WASH. & LEE L. REV. 703, 777 (2018) (arguing *Scott* clashes “under some circumstances, with ten constitutional rights emanating from the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments”); Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV. 89, 108 (2018) (denouncing *Scott*); Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon’s Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299, 2303–04 (2017) (“[T]he Supreme Court’s decision in *Scott* is fundamentally flawed . . .”); Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1169–70 (2015) (criticizing *Scott* for inattentiveness to collateral consequences); Russell L. Christopher, *Penalizing and Chilling an Indigent’s Exercise of the Right to Appointed Counsel for Misdemeanors*, 99 IOWA L. REV. 1905, 1908 (2014) (“*Scott*’s ‘actual imprisonment’ standard may unconstitutionally penalize and chill an indigent’s exercise of the right to appointed counsel.”); John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 16 (2013) (“[E]ven assuming *Scott* made sense when it was decided, its analytical framework no longer stands up.”); John P. Gross, *What Matters More: A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55, 87 (2013) (arguing that *Scott* should be overruled); Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 602 (2011) (criticizing *Scott*’s “false binary between incarceration . . . and mere fines”); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 333 (2011); 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, 189 (2009) (“*Scott* was wrongly decided and the Constitution truly does mandate counsel in all criminal cases.”); 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, 36 (2004) (“The thesis of this article . . . is that the right to appointment of counsel should be extended to all criminal defendants . . .”). A small number of scholars defend *Scott*. See BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 40–41, 104–05 (2017) (“There is little evidence that lawyers make much of a difference in simple, nonjury cases.”); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 477, 496 (2006) (arguing that the appointment of counsel is not that important in low-level misdemeanor cases and advising states to “change [relevant state-law] rule[s] so that counsel is appointed only when the defendant has a constitutional right to that appointment”).

9. 372 U.S. 335 (1963).

10. *Id.* at 344; see, e.g., Buskey & Lucas, *supra* note 8, at 2303 (calling *Scott* the “anti-*Gideon*”); Kitai, *supra* note 8, at 58 (expressing a hope that “*Scott v. Illinois* is merely a way-station, a pause in the evolution of the right to appointed counsel”

This Article takes a different approach, focusing on the important role of the States in defining and actualizing the right to counsel in misdemeanor cases. This important topic, which affects millions of Americans every year, has received surprisingly little attention from academics.¹¹ This Article thus serves an important descriptive function and takes a fresh analytical approach to the challenge of improving our nation's misdemeanor justice system. Instead of advocating that the Supreme Court force a one-size-fits-all solution on the States by mandating appointed counsel in all criminal cases, this Article endorses a federalist approach to the issue. But it does not extoll the status quo. Instead, this Article champions a "better federalism" in the area of misdemeanor justice, whereby states try out bold and innovative solutions, breaking free of the inertia that sometimes robs federalism of its full potential.

Part I reviews existing federal law, documenting how the Supreme Court left the States some room to define the scope of the right to appointed counsel. After describing the typical misdemeanor proceeding, Part II surveys the laws of each state on the right to appointed counsel and explores how they arrived at them, providing the first detailed account of state law in this area. In summary, thirty-four states guarantee a broader right to appointed counsel than required by *Scott*. Among the thirty-four states with a broader right, the state legislatures, rules committees, and judiciaries have all played important roles. But the state legislatures have had the most impact, acting as the first mover in expanding the right to appointed counsel in twenty-one of the thirty-four states.

Part III considers the legal and policy arguments for and against a broader right to appointed counsel. Part III.A considers whether existing law is *legally* correct. Challenging the ortho-

(quoting 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, 117 (1979)) (internal quotation marks omitted)).

11. I am aware of only one scholar who has written an article focusing on the state-law aspect of the right to counsel. See B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?*, 5 ROGER WILLIAMS U. L. REV. 417 (2000). However, it is outdated, provides little detail on how—or why—states took the paths they did, and offers a limited prescriptive vision. Other scholars have mentioned the existence of broader state-law rights, but they usually used the States as evidence to argue that it would not be too costly for the U.S. Supreme Court to impose a uniform solution on the States. See, e.g., Buskey & Lucas, *supra* note 8, at 2325.

dox view among scholars, it argues that *Scott* was correctly decided: the Federal Constitution does not guarantee the right to appointed counsel in all criminal cases. It also notes that the case for a broader right to appointed counsel is stronger under some state constitutions.¹² Of course, the courts are not the only government actors that define rights, and thus Part III.B turns to the question of whether it is good public policy to provide counsel in a broader range of cases than the U.S. Supreme Court requires. This Article argues there is no one-size-fits-all answer, recognizing that the optimal approach for a state or locality depends largely on the jurisdiction's unique characteristics and needs.

Above all, this Article contends that federalism is the key to building a better misdemeanor indigent defense system, and Part IV explains how. Part IV.A acknowledges that, on paper, the scope of appointed counsel is a federalism success story. States have not fit the stereotypical account that portrays them as hostile to criminal defendants' rights.¹³ Thirty-four states have guaranteed a broader right to appointed counsel than the U.S. Supreme Court requires.

Still, the state of our misdemeanor indigent justice system is troubling. Reports of routine failures to honor the existing right to appointed counsel abound. The right of misdemeanor defendants to effective appointed counsel is largely an unfunded and unfulfilled mandate. And where the law is followed, the dominance of uncounseled or barely counseled guilty pleas and cookie-cutter sentences raises serious questions about whether misdemeanor defendants are getting individualized adjudications. The fruits of federalism in this area today do not truly warrant celebration.

Although the States bear some blame, this Article does not echo the chorus of scholars demanding States allocate more money to indigent defense. Instead, this Article calls on States to try out innovative ideas for improving misdemeanor justice in America, even going outside the traditional Anglo-American

12. Cf. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 8–9 (2018) (arguing that state constitutions are frequently overlooked by litigants as vehicles for upholding individual rights).

13. See, e.g., ANTHONY LEWIS, GIDEON'S TRUMPET 211–12 (1964) (“[L]egislatures, feeling no demand from the voters, will rarely do anything about unfairness in the administration of the criminal law except under pressure from the courts . . .”).

adversarial system. Part IV.B suggests three approaches that jurisdictions could take toward misdemeanors: declination, diversion programs, and an inquisitorial model of adjudication. The purpose of this Article is not to endorse one of those approaches, but rather to shift the conversation away from seeking a one-size-fits-all solution from the U.S. Supreme Court. Instead, we should be discussing how the States can fulfill their potential as laboratories of democracy in this area and explore new solutions to old problems. Because the Supreme Court did not force a uniform solution on the States in *Scott v. Illinois*, there is room for states to act as real innovators and help create a better misdemeanor justice system in the process.

I. EXISTING SIXTH AMENDMENT LAW ON THE RIGHT TO APPOINTED COUNSEL

A. *The Right-to-Counsel Revolution*

The Sixth Amendment to the U.S. Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”¹⁴ The Supreme Court was initially slow to incorporate the Sixth Amendment against the States. But in *Powell v. Alabama*,¹⁵ a case dominated by lynch mob dynamics in the Jim Crow-era South, the Court held that the States must appoint counsel in capital cases under special circumstances.¹⁶ In a famous passage, Justice Sutherland stated, “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.”¹⁷ He explained that a man “[l]eft without the aid of counsel . . . may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.”¹⁸ This possibility created a severe risk that a defendant, “though he be not guilty, [would] face[] the danger of conviction because he does not know how to establish his innocence.”¹⁹

14. U.S. CONST. amend. VI.

15. 287 U.S. 45 (1932).

16. *Id.* at 71.

17. *Id.* at 68–69.

18. *Id.* at 69.

19. *Id.*

In *Gideon v. Wainwright*, the Supreme Court began the “right to counsel revolution.”²⁰ Justice Black’s opinion for the Court concluded it was an “obvious truth” that a person “cannot be assured a fair trial unless counsel is provided for him.”²¹ Although *Gideon* was initially understood to apply only to felony cases,²² the Court dramatically expanded the Sixth Amendment right in *Argersinger v. Hamlin*.²³ Justice Douglas’s opinion extended *Gideon* to misdemeanors, reasoning that providing counsel was necessary because of their large volume, which risked an “obsession for speedy dispositions, regardless of the fairness of the result.”²⁴

B. Scott v. Illinois

Although the *Argersinger* Court did not hold that appointed counsel was required for *all* criminal cases, it expressly reserved the question.²⁵ Many scholars at the time believed that the Court would soon go the rest of the way and guarantee appointed counsel in all criminal cases.²⁶ But in *Scott v. Illinois*, the Court drew a boundary line. Justice Rehnquist’s majority opinion held that the Sixth Amendment only requires appointed counsel when a defendant is sentenced to jail.²⁷

Aubrey Scott was charged with shoplifting merchandise valued below \$150, an offense punishable by one year’s imprisonment and a \$500 fine under Illinois law.²⁸ Scott was convicted and fined \$50 after a bench trial where he defended himself.²⁹ The state supreme court affirmed, over Scott’s argument that the state was required to appoint counsel for him.³⁰ By a 5-4 vote, the Supreme Court affirmed the conviction and held that

20. See AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* i, iv (2004), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lisclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [https://perma.cc/SP4Q-AMUE].

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

22. Buskey & Lucas, *supra* note 8, at 2302–03.

23. See 407 U.S. 25, 36–37 (1972).

24. *Id.* at 34.

25. See *id.* at 37.

26. See King, *supra* note 8, at 13 n.82 (listing scholars who made this prediction).

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

28. *Id.* at 368.

29. *Id.*

30. *Id.* at 368–69.

Scott was not entitled to appointed counsel because his only punishment was a fine, not imprisonment.³¹

Federalism considerations dominated Justice Rehnquist's opinion. The majority noted the "special difficulties" arising from the incorporation of the Sixth Amendment against the States because the "range of human conduct regulated by state criminal laws is much broader than that of the federal criminal laws, particularly on the 'petty' offense part of the spectrum."³² The Court then reasoned that "any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States."³³ As for the individual's interest, the Court reasoned that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment."³⁴

In dissent, Justice Brennan argued that the Sixth Amendment entitles criminal defendants to appointed counsel in any case where they are charged with an offense for which imprisonment is authorized.³⁵ *Gideon*, he argued, stood for the proposition that counsel was necessary in all criminal cases to "equalize the sides in an adversary criminal process" and to "give substance to other constitutional and procedural protections afforded criminal defendants."³⁶ As for the burden on the States, Justice Brennan deemed it "irrelevant," reasoning that constitutional requirements cannot depend on whether they are difficult to implement.³⁷

Dissenting separately, Justice Blackmun argued for a middle approach. He argued that the Sixth Amendment should be understood to require the appointment of counsel in cases of actual imprisonment and in cases where the defendant was charged with an offense whereby he would be entitled to a jury trial.³⁸

31. *See id.* at 373–74.

32. *Id.* at 372.

33. *Id.* at 373.

34. *Id.*

35. *Id.* at 375–76 (Brennan, J., dissenting).

36. *Id.* at 377.

37. *See id.* at 384.

38. *Id.* at 389–90 (Blackmun, J., dissenting).

C. *Suspended Sentences*

A divided Court later held in *Alabama v. Shelton*³⁹ that suspended sentences cannot be imposed without appointing counsel for indigent defendants. After defending himself in a jury trial without counsel, LeReed Shelton had been convicted of third-degree assault and had been sentenced to thirty days' imprisonment.⁴⁰ But the judge had suspended that sentence and imposed two years' unsupervised probation, conditioned on the payment of court costs, a fine, and restitution.⁴¹ If Shelton was accused of violating those terms, he would be entitled to a hearing; if he was found to be in violation, the court could force him to serve his prison sentence.⁴²

The Supreme Court ultimately held that this sentence was unconstitutional because the state failed to appoint counsel.⁴³ Justice Ginsburg's majority opinion reasoned that a suspended sentence is a term of imprisonment within the meaning of *Scott*.⁴⁴ Dissenting, Justice Scalia argued that Alabama's system was constitutional, reasoning that *Scott* drew a "bright line between imprisonment and the mere threat of imprisonment," and observing it was highly unlikely that Shelton would actually be imprisoned.⁴⁵ Additionally, he argued that the majority's rule would force a burden on states, including "some of the poorest" ones, that did not already provide counsel in cases resulting in suspended sentences.⁴⁶

D. *Using Uncounseled Convictions to Enhance Sentences*

Parts I.A through C have established that there is a class of criminal cases for which the appointment of counsel to indigent defendants is not required. A separate, but conceptually related, question concerns what a state can do with uncounseled convictions. In particular, if the defendant is subsequently charged with another offense, represented by counsel in that latter case, and convicted, can the court use the prior uncoun-

39. 535 U.S. 654 (2002).

40. *Id.* at 658.

41. *Id.*

42. ALA. CODE § 15-22-54 (1995).

43. *Shelton*, 535 U.S. at 659–60, 674.

44. *See id.* at 662.

45. *See id.* at 674–76 (Scalia, J., dissenting).

46. *Id.* at 679–81.

seled conviction to aggravate the defendant's sentence in the latter case?

Initially, the Court suggested the answer to this question was "no" in *Baldasar v. Illinois*,⁴⁷ where a heavily fractured five-Justice majority held that a defendant's sentence cannot be enhanced based on a prior uncounseled conviction.⁴⁸ Dissenting, Justice Powell argued that the Court's decision unfairly taxed the States' prerogative not to provide counsel in certain cases under *Scott*.⁴⁹

Fourteen years later, the Court overruled *Baldasar*. In *Nichols v. United States*,⁵⁰ Kenneth Nichols had previously been convicted (without appointed counsel) of driving under the influence (DUI), for which he was fined but not incarcerated.⁵¹ In a subsequent prosecution for conspiracy to possess cocaine with intent to distribute, he pleaded guilty and was assessed a criminal history point for his DUI conviction, increasing his potential prison sentence by twenty-five months.⁵² Relying on *Baldasar*, Nichols objected to the inclusion of the DUI misdemeanor in his criminal history score because he had not been represented by counsel in the earlier case.⁵³

Chief Justice Rehnquist's opinion for the Court overruled *Baldasar*.⁵⁴ The Court reasoned that enhancement statutes "do not change the penalty imposed for the earlier conviction,"

47. 446 U.S. 222 (1980), *overruled by* *Nichols v. United States*, 511 U.S. 738 (1994).

48. Thomas Baldasar was initially charged with a misdemeanor theft but received an enhanced conviction as a felon and was sentenced to prison because of a prior conviction. *Id.* at 223. In a brief per curiam opinion the Court reversed the enhanced conviction "[f]or the reasons stated in the [three] concurring opinions." *Id.* at 224. The concurring opinions, however, each viewed the problem quite differently. Justice Stewart's brief concurrence reasoned that an uncounseled conviction resulted in a deprivation of defendant's liberty (via the enhanced sentence in the second prosecution), so that reversal was required by *Scott*. *See id.* at 224 (Stewart, J., concurring). Justice Marshall renewed his objection to *Scott*, but otherwise agreed with Justice Stewart. *See id.* at 224–29 (Marshall, J., concurring). Justice Blackmun also renewed his prior objection to *Scott*, arguing that indigent defendants should be entitled to counsel whenever charged with an offense for which at least six months of imprisonment was authorized. *Id.* at 229–30 (Blackmun, J., concurring).

49. *Id.* at 230–35 (Powell, J., dissenting).

50. 511 U.S. 738.

51. *Id.* at 740.

52. *See id.*

53. *See id.* at 741.

54. *Id.* at 748.

thus viewing the sentence imposed on Nichols as a consequence only of his second offense, and not his first one.⁵⁵ The Court supported this move by citing the broad range of factors that sentencing judges are allowed to consider in imposing sentences, including past criminal behavior that did not result in a conviction.⁵⁶ Justices Blackmun and Ginsburg both wrote dissents.⁵⁷ The Court unanimously reaffirmed *Nichols* in 2016.⁵⁸

E. Summary of Sixth Amendment Law

There is a popular misconception that the Federal Constitution guarantees the right to counsel in all criminal cases.⁵⁹ Indeed, in the movie version of *Gideon's Trumpet*, Henry Fonda (playing Clarence Earl Gideon) stated that "Nobody is gonna go on trial in this country ever again without a lawyer."⁶⁰ Fonda was mistaken. The scope of the federal constitutional right can be helpfully boiled down into two rules. First, an indigent criminal defendant cannot be imprisoned unless the court appointed constitutionally effective counsel or the defendant waived his right. Second, a state cannot sentence an indigent criminal defendant to probation, without appointing counsel or securing a waiver, where a violation of the probation terms would result in imprisonment.

But the Sixth Amendment right under *Gideon* has not been expanded to all criminal cases. Under federal law, the States can do the following without appointing counsel:

1. Try to convict indigent criminal defendants without appointed counsel and:

55. *Id.* at 747.

56. *See id.*

57. *Id.* at 754–65 (Blackmun, J., dissenting); *id.* at 765–66 (Ginsburg, J., dissenting).

58. In *United States v. Bryant*, 136 S. Ct. 1954 (2016), the Court relied on *Nichols* to hold that uncounseled convictions obtained in tribal courts could be used to enhance the defendant's sentence in a subsequent prosecution. *Id.* at 1958–59, 1965 (2016) ("*Nichols*' reasoning steers the result here.>").

59. *See, e.g.*, SIXTH AMENDMENT CTR., ACTUAL DENIAL OF COUNSEL IN MISDEMEANOR COURTS 3 (2015), <https://sixthamendment.org/wp-content/uploads/2015/05/Actual-Denial-of-Counsel-in-Misdemeanor-Courts.pdf> [<https://perma.cc/S6UK-5AY9>] ("The . . . Sixth Amendment prohibits federal, state and local governments from taking the liberty of a person of limited financial means unless a competent attorney is provided to the indigent accused This is true, even if the potential term of incarceration is no more than a single day.").

60. *See* GIDEON'S TRUMPET (Worldvision Enterprises & Hallmark Hall of Fame Productions 1980).

- a. Impose criminal fines. The use of criminal fines has been steadily growing.⁶¹ For example, in 2013, North Carolina reclassified a number of offenses to be punishable solely by fine.⁶² As another example, Texas collected around \$941,000,000 in criminal fines in 2018.⁶³ States can also do this in cases where they charge offenses for which imprisonment is authorized.
- b. Require community service. In 2018, about 90,000 misdemeanor convicts in Texas satisfied their obligation, in full or in part, to pay a criminal fine by performing community service.⁶⁴
- c. Pursue criminal or civil forfeitures. Although the Supreme Court has not established a clear test to evaluate civil forfeitures,⁶⁵ many lower courts apply a proportionality test, which tends to limit the risk of forfeitures accompanying low-level misdemeanors.⁶⁶
- d. Impose a prison sentence but give full credit for time served in the lead-up to the trial. This is

61. See COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 3 (2015), http://nacmconference.org/wp-content/uploads/2014/01/1215_cea_fine_fee_bail_issue_brief.pdf [<https://perma.cc/LGY2-2MUD>] (“The use of [fines] has increased substantially over time; in 1986, 12 percent of those incarcerated were also fined, while in 2004 this number had increased to 37 percent. When including fees as well, the total rises to 66 percent of all prison inmates. In 2014, 44 States charged offenders for probation and parole supervision, up from 26 in 1990.” (footnote omitted)).

62. See COMM’N ON INDIGENT DEF. SERVS., REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 34 (2015), <http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/LegislatureReport2015.pdf> [<https://perma.cc/4Y3P-EAAA>].

63. See OFFICE OF COURT ADMIN., *supra* note 7, at Detail 50.

64. *Id.*

65. See *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (incorporating the Excessive Fines Clause against the States); *Austin v. United States*, 509 U.S. 602, 622 (1993) (holding that civil forfeitures are limited by the Excessive Fines Clause but not establishing a test).

66. See, e.g., *Commonwealth v. Flint*, 940 S.W.2d 896, 898 (Ky. 1997).

common in Indiana, for example.⁶⁷ At least some state courts have upheld this practice.⁶⁸

- e. In a subsequent prosecution, enhance the defendant's sentence based on such an uncounseled conviction.
2. Charge the defendant with a crime, divert prosecution, and negotiate probation terms, whereby a violation of the terms would result in a criminal prosecution with the chance to contest underlying guilt.⁶⁹ The prosecutor could also negotiate a diversion agreement with the defendant before filing charges.⁷⁰
3. Negotiate with the defendant a plea bargain that does not result in actual or potential incarceration. For example, it is a common practice for defendants to plead guilty in exchange for credit for time served.⁷¹

II. EXISTING STATE LAW ON THE APPOINTMENT OF COUNSEL

For some scholars, federal law is just about all that matters. As Judge Jeffrey Sutton has recently documented, scholars, litigants, and law schools have systematically ignored the role of state law in shaping constitutional rights.⁷² This trend has carried over to the right-to-counsel context, where scholars have neglected the role of state law in shaping the scope of the right to appointed counsel, focusing instead on persuading the Supreme Court to overrule *Scott*.⁷³

Whatever the merits of *Scott*,⁷⁴ the Court's decision gave States the opportunity to experiment with different approaches

67. See IND. TASK FORCE ON PUB. DEF., FINDINGS AND RECOMMENDATIONS TO THE INDIANA PUBLIC DEFENDER COMMISSION 34–35 (2018), <https://www.in.gov/publicdefender/files/Indiana%20Task%20Force%20Report.pdf> [<https://perma.cc/GV2J-FP8P>].

68. See, e.g., *Glaze v. State*, 621 S.E.2d 655, 656 (S.C. 2005) (upholding the constitutional validity of an uncounseled conviction where the defendant was sentenced to time served after he spent ten days in jail for failure to pay bail).

69. See *Alabama v. Shelton*, 535 U.S. 654, 671 (2002).

70. See *id.*

71. SIXTH AMENDMENT CTR., *supra* note 59, at 5.

72. See SUTTON, *supra* note 12, at 8–10.

73. See *supra* note 8 (documenting the intense and consistent hostility to *Scott*).

74. See *infra* Part III.A.1.

in this area. This Part studies what the States have done with this opportunity. Part II.A begins by introducing a high-level, typical account of how the States process low-level misdemeanors. Part II.B discusses the extent to which the States have provided a broader right to counsel under state law. In short, thirty-four states have guaranteed a broader right to counsel than the Supreme Court required in *Scott*. Sixteen states do not guarantee broader protection, though some of them have mechanisms in place—like the general discretionary power of a trial judge to appoint counsel—that can result in a broader appointment of counsel in particular cases. Part II.C analyzes *how* the States have arrived at their existing laws. State legislatures, rulemakers, and courts have all played significant roles. But the primary vehicles for broadening the scope of the right to counsel in the States have been the state legislatures, not the courts. Finally, Part II.D raises serious questions about whether these rights are being consistently honored.

A. *A Typical Misdemeanor Case*

The vast majority of cases processed by the American criminal justice system are misdemeanors.⁷⁵ This label encompasses a variety of offenses, including driving with a suspended license, disorderly conduct, drug possession, shoplifting, underage drinking, harassment, minor assault, vandalism, violating the housing code, and curfew violations.⁷⁶ The prevalence of a particular offense varies by jurisdiction. For example, as a magisterial district judge in King of Prussia, Pennsylvania, explained, his court “gets a ton of business from the [King of Prussia Mall]” because of shoplifting. In Virginia, one practitioner estimated that suspended license cases may make up as much as 40 percent of the criminal docket.⁷⁷ A justice of the peace in Phoenix, Arizona, reported that she adjudicates a large number of illegal hunting license cases.⁷⁸

How does our system process almost fifteen million misdemeanors per year? This Part attempts to paint a typical picture,

75. See Natapoff, *supra* note 1, at 1314–15.

76. See *id.* at 1321.

77. See Telephone Interview with David Heilberg, Cofounder, Dygert, Wright, Hobbs & Hernandez, PLC (Feb. 18, 2019).

78. E-mail from Cathy Riggs, Justice of the Peace, Phoenix, Arizona, to author (Sept. 25, 2019, 3:20 PM EST) (on file with author).

acknowledging that there is great diversity among states and localities. Local practice is often more important than law, so this Article supplements traditional legal research with accounts from proceedings I personally witnessed and interviews with judges, prosecutors, and defense lawyers. A clear disclaimer: my evidence of local practice is anecdotal, not empirical.⁷⁹ To borrow a line from Professor Albert Alschuler, my method is “a kind of legal journalism.”⁸⁰ This Article aspires to survey general trends, at least well enough to provide context for assessing the right to counsel. We can best analyze those trends as a series of choices that jurisdictions must make in processing low-level misdemeanors.

Once the police accuse an individual of committing an offense, the first question is whether the police make an arrest or issue a citation, a choice that is, as a matter of federal constitutional law, entirely within the police officer’s discretion.⁸¹ If the defendant is cited, he will be given a ticket (usually resembling a speeding ticket) with an order to appear. For more serious misdemeanors, the police may arrest the defendant and hold him up to forty-eight hours before a preliminary hearing.⁸² The court must then determine whether to require bail, which many poor defendants cannot afford to pay.⁸³ Thus, if the court assesses bail, the defendant may remain detained until trial

79. I spoke with at least two practitioners each from Pennsylvania, Virginia, Iowa, Kentucky, Florida, Ohio, Arizona, Indiana, and Texas. These states are intended to roughly approximate the diversity of state-law approaches to misdemeanor indigent defense.

80. See Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1181 (1975) (outlining a methodology for documenting plea bargaining practice).

81. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (provided the officer has “probable cause to believe an individual has committed even a very minor criminal offense in his presence”).

82. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).

83. See 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* 32–33 (2009), <https://www.nacdl.org/getattachment/20b7a219-b631-48b7-b34a-2d1cb758bdb4/minor-crimes-massive-waste-the-terrible-toll-of-america-s-broken-misdemeanor-courts.pdf> [https://perma.cc/Q43S-G8FX].

(which could take a year or longer) or until he pleads guilty,⁸⁴ which is far more likely.

Second, the States must decide which courts, and which judges, will try misdemeanor defendants. Although some states, like California, adjudicate misdemeanors in the same trial courts that try felonies, most states have split their trial courts so that one set of courts adjudicates more serious cases, and the other handles low-level criminal cases.⁸⁵ In Pennsylvania, for example, the Court of Common Pleas is the general trial court that adjudicates some misdemeanors and all felonies, but the Magisterial District Courts adjudicate summary-level offenses, those for which state law authorizes ninety days of prison or less.⁸⁶ Magisterial district judges do not need to be lawyers, but they do need to pass a qualifying exam.⁸⁷ Although criminal defendants may appeal a decision by a magisterial district judge and receive a de novo trial at the Court of Common Pleas, multiple judges have told me that appeals are very rare.⁸⁸ Indeed, de novo appeals for misdemeanors are widely available throughout the country, but statistical evidence suggests these appeals are extremely rare.⁸⁹ As was true in *Scott* itself, the defendant will sometimes be entitled to a jury trial, but not appointed counsel.⁹⁰

84. A Kentucky judge estimated that it may take over a year to get a trial date in Jefferson County, Kentucky. See Telephone Interview with Sara Nicholson, Dist. Judge, Jefferson County, Kentucky (Mar. 22, 2019).

85. See *State Court Structure Charts*, CT. STAT. PROJECT, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts.aspx [https://perma.cc/2KSM-ZS45] (last visited Feb. 17, 2020).

86. *Pennsylvania Court Structure*, PENNSYLVANIANS FOR MODERN CTS., <https://www.pmconline.org/resources/pennsylvania-court-structure> [https://perma.cc/4JQ5-Z3BX] (last visited Feb. 11, 2020).

87. See *Learn*, UNIFIED JUD. SYS. PA., <http://www.pacourts.us/learn/> [https://perma.cc/GAR7-5LV9] (last visited Feb. 11, 2020).

88. See Telephone Interview with Albert Masland, Court of Common Pleas Judge, Cumberland County, Pennsylvania (Mar. 1, 2019); Telephone Interview with Jonathan Birbeck, Magisterial Dist. Judge, Cumberland County, Pennsylvania (Mar. 4, 2019).

89. Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1939–41 (2019).

90. See *Scott v. Illinois*, 440 U.S. 367, 368, 373–74 (1979) (“We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.”); *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (“[W]e have concluded

The third key decision is whether the court requires a preliminary hearing or just goes straight to trial. In Kentucky, low-level misdemeanor defendants appear at a preliminary hearing.⁹¹ If the judge finds probable cause, the case will be scheduled for trial.⁹² In jurisdictions that allow guilty pleas at first appearances, the vast majority of misdemeanor defendants plead guilty at them. In Florida, judges often offer a sentence in exchange for a guilty plea, and most defendants take the offer and waive their right to counsel.⁹³ One Florida defense lawyer described these proceedings as “cattle calls,” explaining that prosecutors and defendants sometimes strike deals before the judge even arrives.⁹⁴ In Columbus, Ohio, a trial judge estimated that over 99 percent of misdemeanor defendants plead guilty, usually at the first appearance.⁹⁵ In Jefferson County, Kentucky, the norm is for plea bargains to happen *after* the preliminary hearing, and after the public defender has been appointed.⁹⁶ Other states proceed to trial more quickly. For example, in most Pennsylvania counties, those charged with low-level misdemeanors usually make their first appearance at the trial itself.⁹⁷

The fourth decision is the subject of this Article: whether to appoint counsel or not. As discussed in Part II.B, there is a tremendous diversity of approaches among the States.

that no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized.”).

91. See KY. R. CRIM. P. 3.07.

92. See KY. R. CRIM. P. 3.14(1); Telephone Interview with Sara Nicholson, *supra* note 84.

93. See Telephone Interview with L.E. Hutton, Chief Assistant State Attorney, Office of the State Attorney for the Fourth Judicial Circuit of Fla. (Mar. 29, 2019).

94. See Telephone Interview with Scott L. Richardson, Attorney, Law Offices of Scott L. Richardson (Mar. 29, 2019); see also ALISA SMITH & SEAN MADDAN, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS 15 (2011), <https://nacdl.org/getattachment/eb3f8d52-d844-487c-bbf2-5090f5ca4be3/three-minute-justice-haste-and-waste-in-florida-s-misdemeanor-courts.pdf> [<https://perma.cc/QCP7-N5ZZ>].

95. Telephone Interview with Richard Frye, Court of Common Pleas Judge, Franklin County, Ohio (Oct. 4, 2019).

96. See Telephone Interview with Sara Nicholson, *supra* note 84.

97. See ADMIN. OFFICE OF PA. COURTS, 2013 CASELOAD STATISTICS OF THE UNITED JUDICIAL SYSTEM OF PENNSYLVANIA 124 (2014), <http://www.pacourts.us/assets/files/setting-768/file-3597.pdf?cb=08138b> [<https://perma.cc/34VX-FU5V>]; E-mail from Jonathan Birbeck, Magisterial Dist. Judge, Cumberland County, Pennsylvania, to author (Jan. 29, 2020, 11:06 AM EST) (on file with author).

Fifth, jurisdictions have varying approaches to pleading and plea bargaining. A few trends have emerged from my conversations with judges and practitioners. In all jurisdictions, open guilty pleas (that is, not bargained pleas) are common. For example, an Ohio trial judge estimated that most misdemeanor defendants plead guilty right away and are happy to walk away with a small fine or a few days in jail.⁹⁸ Further, in jurisdictions that do not appoint counsel, there is a relatively high number of trials. Judges in two jurisdictions that do not appoint counsel in large numbers of misdemeanor cases have estimated a trial rate of 20 to 30 percent.⁹⁹ Several judges have noted that defendants often do not have much to lose in taking a trial, because the result (a minor fine) would usually be about the same as if they just pleaded guilty. Or, as one judge in Virginia explained, some defendants just want to tell their story.¹⁰⁰ Finally, in states that appoint counsel for all jailable offenses, negotiated pleas are much more common for low-level misdemeanors. An Iowa magistrate judge explained that plea bargains became more common after the Iowa Supreme Court expanded the right, and that negotiated diversion (rather than a guilty plea with a conviction) became more frequent.¹⁰¹ A Kentucky judge estimated that about 95 percent of her low-level criminal cases were terminated by a plea bargain that was struck after a lawyer was appointed at the preliminary appearance, explaining that the public defenders knew which “cookie-cutter deal” was expected.¹⁰²

Sixth, for the misdemeanor cases that make it to trial, jurisdictions have different trial realities. In the jurisdictions that do not appoint lawyers for low-level misdemeanors, informal bench trials are relatively common.¹⁰³ Based on personal obser-

98. Telephone Interview with Richard Frye, *supra* note 95.

99. See Telephone Interview with Jonathan Birbeck, *supra* note 88; Telephone Interview with Robert Downer, Dist. Judge, Va. Sixteenth Judicial Dist. (Mar. 4, 2019).

100. See Telephone Interview with Robert Downer, *supra* note 99.

101. Telephone Interview with Lynn Rose, Magistrate Judge, Iowa Sixth Dist. (Mar. 1, 2018).

102. Telephone Interview with Sara Nicholson, *supra* note 84.

103. See, e.g., E-mail from Cathy Riggs, *supra* note 78. Some states give jury trials at the first misdemeanor trial. See, e.g., Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133, 171–73. But many states do not. Although most states theoretically guarantee jury trials in a broader range of misdemeanors than required by the Supreme Court, some of those states only provide a jury trial when an appeal is taken. See, e.g., GA. UNIF. MUN. CT. R. 22.2;

vations and conversations with practitioners, these bench trials are informal and often resemble administrative proceedings. In many of these cases, the judge will dismiss the case, especially if the defendant admits responsibility and promises not to offend again.¹⁰⁴ Cases involving dismissal are generally the most informal, but those resulting in convictions oftentimes are informal too. Some classic procedural protections, like requiring the prosecution to prove guilt beyond a reasonable doubt,¹⁰⁵ are often insisted upon. But judges in multiple states recounted taking a more inquisitorial role. The judge dominates the proceeding by asking questions, though she will usually let the defendant tell his story however he wants, even if, as one Virginia judge explained, “the defendant hangs himself by admitting” he committed the crime.¹⁰⁶ Several judges in different states also confirmed that they will uphold the hearsay rules against the prosecution because unrepresented defendants cannot be expected to understand the rules.¹⁰⁷ As for the prosecution, some states rely on police officers to present the government’s case or answer questions from the judge.¹⁰⁸ The officer will often bring the key witness to testify or, especially in shoplifting cases,

Maryland, CT. STATS. PROJECT, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts/Maryland.aspx [<https://perma.cc/BNX6-JG5T>] (last visited Feb. 17, 2020). States are more likely to provide jury trials for more serious accusations, like DUI, than less serious ones, like criminal speeding. See E-mail from Cathy Riggs, *supra* note 78 (explaining that jury trials in Phoenix are most prevalent for DUI, but that bench trials are generally given for criminal speeding and hunting license cases). *But see* State v. Denelsbeck, 137 A.3d 462, 476–77 (N.J. 2016) (holding that a jury trial is not required until third or subsequent DUI cases).

104. I saw dismissals in a solid majority of the misdemeanor adjudications I witnessed. There is statistical evidence showing that dismissal is common in misdemeanor adjudications, at least in some states. In 2018, Texas had around 1.1 million non-traffic misdemeanor cases in the justice and municipal courts where the defendant could only be punished by fine, and thus was not entitled to appointed counsel. See OFFICE OF COURT ADMIN., *supra* note 7, at Court-Level 42, 50. Only around 54 percent of those cases resulted in convictions. *Id.* at Court-Level 43, 51. Astonishingly, about 40 percent of those cases resulted in dismissals, while less than 1 percent resulted in acquittals. *Id.* Of the 54 percent of convictions, the defendant did not bother to appear in court about 70 percent of the time, while about 25 percent appeared in court to plead guilty; only about 4 percent were formally found guilty by a judge or jury. *Id.* at Court-Level 44, 51.

105. See *In re Winship*, 397 U.S. 358, 364 (1970).

106. See Telephone Interview with Robert Downer, *supra* note 99.

107. See, e.g., Telephone Interview with Lynn Rose, *supra* note 101.

108. See Alexandra Natapoff, Opinion, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), <https://nyti.ms/2GIqV1S> [<https://perma.cc/LP78-CMQ7>].

a video recording of the defendant.¹⁰⁹ Prosecutors are only sometimes involved.

Seventh, jurisdictions take a variety of approaches to sentencing in low-level misdemeanor cases. In the jurisdictions that do not appoint counsel, a judge's sentencing options are limited. A jail sentence is off the table.¹¹⁰ Empirical research confirms that some states are increasingly turning to fines instead of incarceration for misdemeanors, perhaps because states would rather make money than spend it.¹¹¹ Illustrating this fact, Texas collected around \$941,000,000 in criminal fines in 2018,¹¹² and only about 6 percent of all misdemeanors disposed of that year were even punishable by imprisonment.¹¹³ In jurisdictions that do appoint counsel, judges recounted a broader variety of sentences for the small number of cases that go to trial, with fines and short jail sentences being common. Of course, the vast majority of low-level misdemeanors terminate with an open or negotiated guilty plea, with a fine or probation being a typical sanction. Reports of prosecutors offering credit for time served because of an inability to make bail abound.¹¹⁴

B. Overview of State-Law Approaches to the Right to Counsel

The choice to appoint counsel (or not) in misdemeanor cases is crucial to determining how the rest of the proceeding unfolds. It affects the rate of plea bargaining, the frequency of trials, and

109. Cf. Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1325–29 (1998) (identifying problematic elements of prosecutions by police officers).

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

111. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1099 (2015) (“As government budgets shrink around the country, lower criminal courts are being reconceptualized and repurposed as revenue sources.”).

112. See OFFICE OF COURT ADMIN., *supra* note 7, at Detail 50.

113. Compare *id.* at Statewide 22 (showing the number of fine-only misdemeanors disposed of in 2018), with *id.* at Statewide 14 (showing the number of total new misdemeanors filed in 2018).

114. See *id.* at Detail 50 (showing that fines in Texas misdemeanor cases were waived as satisfied by “jail credit” over 532,000 times in 2018); SIXTH AMENDMENT CTR., *supra* note 59, at 5 (“If a defendant is unable to make bail and remains in jail prior to his next court date, prosecutors may offer the defendant a chance to get out of jail for time served if the accused simply pleads guilty. Of course, the defendant may jump at the opportunity to get out of jail.”).

permissible sentences. This Part studies the laws of the fifty States on the appointment of counsel in misdemeanor cases.

There is a substantial diversity of practice among the States. Thirty-four provide protection that is broader than what the Supreme Court mandated in *Scott*, though they do so to varying extents.¹¹⁵ Twenty-seven states guarantee less protection than Justice Brennan's *Scott* dissent would have mandated, including sixteen that do not guarantee a right to counsel beyond *Scott*'s requirement, though judges in these states have varying amounts of discretionary power to appoint counsel.¹¹⁶ Two of those sixteen states offer broader protection than *Nichols*, restricting their use of uncounseled convictions to enhance subsequent sentences.¹¹⁷

It will be useful to categorize the various approaches. There are undoubtedly multiple ways to carve up state practices, and each state's practice in this area is unique. That being said, here are the approaches, ordered from most to least generous.

115. See *infra* Part II.B.1–4.

116. See *infra* Part II.B.3–6.

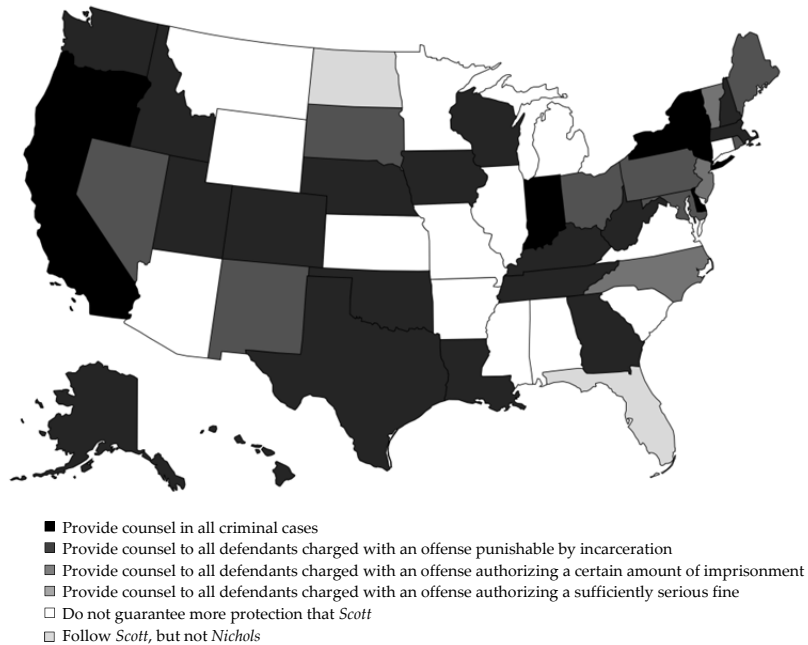
117. See *infra* Part II.B.6.

TABLE 1: STATE APPROACHES TO RIGHT TO APPOINTED COUNSEL IN MISDEMEANOR CASES

APPROACH TO APPOINTED COUNSEL	STATES
Provide appointed counsel in <i>all</i> criminal cases, even when a defendant is charged with a non-jailable offense	Five states: California, Delaware, Indiana, New York, and Oregon
Provide appointed counsel in criminal cases when the defendant is charged with a crime for which imprisonment is authorized, which is Justice Brennan's approach	Eighteen states: Alaska, Colorado, Georgia, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Nebraska, New Hampshire, Oklahoma, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin
Provide appointed counsel in criminal cases where the defendant is charged with a crime for which a certain amount of imprisonment is authorized (for example, longer than six months)	Eight states: Maine, Maryland, Nevada, New Mexico, Ohio, Pennsylvania, Rhode Island, and South Dakota
Provide counsel in criminal cases when the defendant is charged with a crime for which a sufficiently serious fine is authorized or imposed	Three states: New Jersey, North Carolina, and Vermont
Do not guarantee more protection than is required by <i>Scott</i> or <i>Nichols</i>	Fourteen states: Alabama, Arizona, Arkansas, Connecticut, Illinois, Kansas, Michigan, Minnesota, Mississippi, Missouri, Montana, South Carolina, Virginia, and Wyoming
Do not guarantee more appointed counsel than <i>Scott</i> requires, but do not use uncounseled convictions to enhance sentences in some situations	Two states: Florida and North Dakota

The map below illustrates the approaches by state.

FIGURE 1: STATE PROTECTIONS BEYOND SCOTT



1. Providing Counsel in All Criminal Cases

Five states guarantee appointed counsel in all criminal cases: California,¹¹⁸ Delaware,¹¹⁹ Indiana,¹²⁰ New York,¹²¹ and Oregon.¹²² These states guarantee appointed counsel even in cases charg-

118. See, e.g., *Tracy v. Mun. Court*, 587 P.2d 227, 228, 230 (Cal. 1978) (en banc). Because counsel is not guaranteed for “infractions” under California law, *id.* at 229–30, California does not go as far as it theoretically could.

119. See DEL. CODE ANN. tit. 29, § 4602 (2020) (“The Office of Defense Services shall represent, without charge, each indigent person who is under arrest or charged with a crime, if . . . [t]he defendant requests it [or] [t]he court . . . so orders . . .”).

120. See *Bolkovac v. State*, 98 N.E.2d 250, 253 (Ind. 1951) (“Since § 13 of Article 1 [of the Indiana Constitution] makes no distinction between misdemeanors and felonies, the right to counsel must and does exist in misdemeanor cases to the same extent and under the same rules it exists in felony cases.”); *Brunson v. State*, 394 N.E.2d 229, 231 (Ind. Ct. App. 1979).

121. See N.Y. CRIM. PROC. LAW § 170.10(3)(c) (McKinney 2020); see also *People v. Ross*, 493 N.E.2d 917, 919 (N.Y. 1986) (interpreting the statute to require the appointment of counsel in all criminal cases).

122. See *Brown v. Multnomah Cty. Dist. Court*, 570 P.2d 52, 61 (Or. 1977) (en banc) (“Oregon has long provided court-appointed counsel for indigent defendants in criminal prosecutions. Traffic crimes are no exception.” (citation omitted)).

ing one of the many crimes for which the only punishment is a fine. For example, in *Tracy v. Municipal Court*,¹²³ the defendants were charged in California with the possession of less than one ounce of marijuana; at the time, the maximum penalty under state law was a \$100 fine.¹²⁴ Nevertheless, the court concluded that appointed counsel was required.¹²⁵ Because the California Supreme Court had long recognized a state constitutional right to appointed counsel in all criminal cases,¹²⁶ the court affirmed the defendants' right to appointed counsel.¹²⁷

One problem that states in this category confront is the blurriness of the line between "crimes" and mere regulatory infractions, like some traffic offenses. Sometimes the line is clear. For example, an ordinary parking violation is not a criminal offense. But driving while intoxicated or at 125 miles per hour could easily result in criminal charges. As for traffic offenses that plausibly fall on either side of the line, jurisdictions make different choices. For example, a person charged with driving without a license in New York was guaranteed appointed counsel because New York classified that offense as criminal, even though it was not a jailable offense.¹²⁸ In other states, driving with a suspended license is a mere traffic infraction, not a crime.

2. *Adopting the Authorized Imprisonment Test*

In addition to the five states in the previous Part, eighteen more guarantee appointed counsel to indigent defendants charged with jailable offenses. In other words, they adopted the approach advocated by Justice Brennan's *Scott* dissent.¹²⁹

123. 587 P.2d 227.

124. *See id.* at 228.

125. *Id.* at 228, 230.

126. *In re Johnson*, 398 P.2d 420, 422 (Cal. 1965) (en banc) (stating that the right to appointed counsel "is, in California at least, not limited to felony cases but is equally guaranteed to persons charged with misdemeanors in a municipal or other inferior court").

127. *Tracy*, 587 P.2d at 228, 230.

128. *See People v. Ross*, 493 N.E.2d 917, 919 (N.Y. 1986).

129. *Scott v. Illinois*, 440 U.S. 367, 375-76 (1979) (Brennan, J., dissenting).

These states are Alaska,¹³⁰ Colorado,¹³¹ Georgia,¹³² Hawaii,¹³³ Idaho,¹³⁴ Iowa,¹³⁵ Kentucky,¹³⁶ Louisiana,¹³⁷ Massachusetts,¹³⁸ Nebraska,¹³⁹ New Hampshire,¹⁴⁰ Oklahoma,¹⁴¹ Tennessee,¹⁴² Texas,¹⁴³ Utah,¹⁴⁴ Washington,¹⁴⁵ West Virginia,¹⁴⁶ and Wisconsin.¹⁴⁷

130. *See Alexander v. City of Anchorage*, 490 P.2d 910, 913 (Alaska 1971) (recognizing right to counsel under state constitution in all cases in which imprisonment or hefty fines are authorized).

131. COLO. REV. STAT. § 13-10-114.5 (2020) (stating the court shall appoint counsel if “the charged offense includes a possible sentence of incarceration”).

132. GA. CODE ANN. §§ 17-12-1(c), -2(6)(A) (2020).

133. *See State v. Dowler*, 909 P.2d 574, 577 (Haw. Ct. App. 1995).

134. IDAHO CODE § 19-851 to -852 (2020) (recognizing right to counsel in all “serious” cases, defined to include all cases in which imprisonment is authorized, regardless of whether actually imposed).

135. *State v. Young*, 863 N.W.2d 249, 281 (Iowa 2015).

136. KY. REV. STAT. ANN. §§ 31.100(8), .110 (West 2020) (recognizing right to counsel for all “serious” offenses and defining term to include all offenses for which imprisonment is authorized).

137. *State v. Fraychineaud*, 620 So. 2d 338, 340 (La. Ct. App. 1993).

138. MASS. GEN. LAWS ANN. ch. 211D, §§ 2B, 5 (West 2020) (triggering the procedures for appointing counsel when the defendant is charged with an offense for which imprisonment may be imposed); *Commonwealth v. Faherty*, 99 N.E.3d 821, 825 (Mass. App. Ct. 2018) (explaining that counsel does not need to be appointed for offenses like disorderly conduct and shoplifting, for which the maximum penalty for the first offense is a fine only).

139. NEB. REV. STAT. ANN. § 29-3903 (LexisNexis 2020).

140. N.H. REV. STAT. ANN. §§ 604-A:2, 625:9 (2020) (requiring the appointment of counsel for all class A misdemeanors, which are defined to include all offenses for which imprisonment is authorized).

141. OKLA. STAT. ANN. tit. 22, § 1355.6 (West 2020) (requiring appointed counsel for all misdemeanor and traffic cases for which imprisonment is authorized).

142. TENN. CODE ANN. § 40-14-102 (2020); *State v. Wenzler*, No. W2011-00873-CCA-R3-CD, 2013 WL 865333, at 3*-4 (Tenn. Crim. App. Mar. 6, 2013) (interpreting Tennessee Rule of Criminal Procedure 44(a) to require appointed counsel for defendants charged with an offense for which imprisonment is authorized).

143. TEX. CODE CRIM. PROC. ANN. art. 26.04(b)(3) (West 2019).

144. UTAH CODE ANN. § 78B-22-201(1)(a) (West 2020) (requiring the appointment of counsel only if there is “the possibility of incarceration regardless of whether actually imposed”).

145. WASH. SUP. CT. CRIM. R. 3.1(a).

146. W. VA. CODE ANN. § 50-4-3 (West 2020).

147. WIS. STAT. ANN. § 967.06 (West 2020).

3. *Providing Counsel to Defendants Charged with Offenses Allowing Sufficient Lengths of Authorized Incarceration*

In his *Scott* dissent, Justice Blackmun suggested the Sixth Amendment should be understood to require the appointment of counsel to defendants charged with an offense for which they would be entitled to a jury trial, that is, offenses punishable by at least six months of imprisonment.¹⁴⁸ Eight states—Maine,¹⁴⁹ Maryland,¹⁵⁰ Nevada,¹⁵¹ New Mexico,¹⁵² Ohio,¹⁵³ Pennsylvania,¹⁵⁴ Rhode Island,¹⁵⁵ and South Dakota¹⁵⁶—have adopted some variant of this approach, thus offering more protection than *Scott* requires. In other words, these states condition the availability of counsel on the *type of offense* rather than the type of punishment ultimately imposed.

The states in this category sit along a spectrum. At the generous end, South Dakota guarantees counsel when a defendant is charged with an offense for which more than thirty days of imprisonment or more than a five-hundred-dollar fine are authorized.¹⁵⁷ Even in cases charging thirty days' of imprisonment or less, the judge must, at arraignment, state on the record to the defendant that he will not be sentenced to prison if found guilty.¹⁵⁸ The statement must also precede an uncounseled plea.¹⁵⁹

148. *Scott v. Illinois*, 440 U.S. 367, 389–90 (1979) (Blackmun, J., dissenting).

149. ME. CONST. art. I, § 6; ME. REV. STAT. ANN. tit. 15, § 810 (2019); ME. R. UNIF. CRIM. P. 44(a)(1). The Maine Supreme Court recently used language suggesting that the right to appointed counsel in Maine may be narrower than this Article suggests. *See State v. Lipski*, 217 A.3d 727, 729 (Me. 2019) (“When a defendant’s liberty is not at stake . . . there is no constitutional requirement that counsel be provided by the State.”). Because that case involved a crime punishable by only six months’ imprisonment, I do not interpret it to displace the statutory requirement that counsel be provided to defendants charged with a misdemeanor punishable by more than one year in prison.

150. MD. CONST. DECL. OF RTS. art. 21; MD. CODE ANN., CRIM. PROC. § 16-204 (LexisNexis 2020).

151. NEV. CONST. art. I, § 8; NEV. REV. STAT. §§ 178.397, 193.120 (2017).

152. N.M. CONST. art. II, § 14; N.M. STAT. ANN. § 31-16-3 (2019).

153. OHIO CONST. art. I, § 10; OHIO REV. CODE ANN. §§ 120.01 to .03 (West 2020).

154. PA. CONST. art. I, § 9; PA. R. CRIM. P. 122(A).

155. R.I. DIST. CT. R. CRIM. P. 44.

156. S.D. CODIFIED LAWS § 23A-40-6.1 (2020).

157. *See id.* (explaining that appointed counsel is not required when defendant is charged with Class 2 misdemeanor or petty offense); *id.* § 22-6-2 (defining boundary between Class 1 and Class 2 misdemeanors).

158. *See id.* § 23A-40-6.1.

159. *See id.*

Maryland and Pennsylvania are at the middle of the spectrum. Pennsylvania guarantees appointed counsel for all cases charging offenses punishable by more than ninety days' imprisonment.¹⁶⁰ Although Pennsylvania gives its judges discretion to appoint counsel, Pennsylvania trial judges have consistently reported that they almost never appoint counsel in summary offense cases.¹⁶¹ Maryland has essentially the same system, requiring counsel in cases where the defendant is charged with an offense where more than three months of imprisonment or a \$500 fine are authorized.¹⁶²

Additionally, four states follow Justice Blackmun's proposed approach, requiring the appointment of counsel to defendants charged with crimes for which more than six months of imprisonment are authorized: New Mexico,¹⁶³ Nevada,¹⁶⁴ Ohio,¹⁶⁵ and Rhode Island.¹⁶⁶

On the spectrum's least generous end, Maine requires the appointment of counsel only if the defendant is charged with a crime for which at least one year of imprisonment or more than a \$2,000 fine is authorized.¹⁶⁷

160. PA. R. CRIM. P. 122(A) (stating counsel must be appointed for all court cases and all "summary cases" only "when there is a likelihood that imprisonment will be imposed"); 18 PA. STAT. AND CONS. STAT. ANN. § 106(c) (West 2020) (defining "summary offense" as having maximum imprisonment of ninety days).

161. See, e.g., Telephone Interview with Albert Masland, *supra* note 88.

162. MD. CODE ANN., CRIM. PROC. § 16-204 (LexisNexis 2020) (requiring the appointment of counsel when a defendant is charged with a "serious offense"); *id.* § 16-101(h) (defining "serious offense").

163. N.M. STAT. ANN. § 31-16-3 (2019) (entitling defendants charged with "a serious crime" to appointed counsel); *id.* § 31-16-2(d) (defining "serious crime" to refer to an offense for which at least six months of imprisonment is authorized).

164. NEV. REV. STAT. § 178.397 (2017) (granting counsel to any indigent defendant "accused of a gross misdemeanor or felony"); *id.* § 193.120 (defining "gross misdemeanor" and "felony" to exclude crimes punishable by, inter alia, less than six months of imprisonment).

165. OHIO R. CRIM. P. 44(A)–(B) (requiring the appointment of counsel for "serious offenses" but not "petty offenses," so long as no sentence of imprisonment is imposed); OHIO R. CRIM. P. 2(C)–(D) (defining "serious" and "petty offense," with the line drawn at six months of imprisonment).

166. R.I. DIST. CT. R. 44 ("If the offense charged is punishable by imprisonment for a term of more than six months or by a fine in excess of \$500, the court shall advise the defendant of his or her right to assignment of counsel . . .").

167. ME. R. UNIF. CRIM. P. 44(a)(1) (not requiring the appointment of counsel for Class D and E crimes); *Criminal Justice System*, OFF. ME. ATT'Y GEN., https://www.maine.gov/ag/crime/criminal_justice_system.shtml [<https://perma.cc/4D9Y->

4. *Providing Counsel to Defendants Based on Fine Levels*

Three states tether the appointment of counsel to particular fine amounts: New Jersey,¹⁶⁸ North Carolina,¹⁶⁹ and Vermont.¹⁷⁰ For example, North Carolina law requires the appointment of counsel when a fine of “\$500 or more is likely to be imposed.”¹⁷¹ As another example, New Jersey relies on the courts to develop standards, requiring appointed counsel in all cases where imprisonment or “any other consequence of magnitude” will occur upon conviction.¹⁷² The state’s intermediate appellate court has held that a fine of \$1,800 for multiple municipal ordinance violations triggers the right to counsel.¹⁷³ On the other hand, it has also held that counsel was not required in an illegal U-turn case in which a \$95 fine was imposed.¹⁷⁴ Many other states also effectively limit the amount of fines that can be imposed without appointed counsel by setting maximum fines for low-level offenses (those for which counsel is not provided under state law).¹⁷⁵

5. *States Not Guaranteeing More Protection than Scott*

Scott allowed federalist experimentation in providing counsel beyond the actual imprisonment rule. But that ability also implied the option *not* to expand the right beyond the federal floor. Indeed, some scholars argue that states are incentivized to pursue this option; by convertingailable offenses into finable ones, the state can save money by not having to pay for a defense lawyer and add money to its coffers from the defendant’s

GRWZ] (last visited Mar. 17, 2020) (explaining the distinction between Class C, D, and E crimes).

168. N.J. STAT. ANN. § 2A:158A-5.2 (West 2020).

169. N.C. GEN. STAT. § 7A-451(a)(1) (2020) (requiring the appointment of counsel where a fine of \$500 or more or imprisonment is “likely to be imposed”).

170. VT. R. CRIM. P. 44(a) (requiring the appointment of counsel for defendants charged with a “serious crime”); VT. STAT. ANN. tit. 13, § 5201(4) (2019) (defining “serious crime” to include a crime for which imprisonment or a fine of \$1000 is imposed).

171. N.C. GEN. STAT. § 7A-451(a)(1).

172. N.J. STAT. ANN. § 2A:158A-5.2.

173. *State v. Hermanns*, 650 A.2d 360, 366 (N.J. Super. Ct. App. Div. 1994).

174. *State v. Smith*, 975 A.2d 523, 527–28 (N.J. Super. Ct. App. Div. 2009).

175. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 16-204 (LexisNexis 2020) (requiring the appointment of counsel when a defendant is charged with a “serious offense”); *id.* § 16-101(h)(2) (defining “serious offense” as “a misdemeanor or offense punishable by confinement for more than 3 months or a fine of more than \$500”).

pocket.¹⁷⁶ Sixteen states take this path: Alabama,¹⁷⁷ Arizona,¹⁷⁸ Arkansas,¹⁷⁹ Connecticut,¹⁸⁰ Florida,¹⁸¹ Illinois,¹⁸² Kansas,¹⁸³ Michigan,¹⁸⁴ Minnesota,¹⁸⁵ Mississippi,¹⁸⁶ Missouri,¹⁸⁷ Montana,¹⁸⁸

176. See, e.g., Darryl K. Brown, *Decriminalization, Regulation, Privatization: A Response to Professor Natapoff*, 69 VAND. L. REV. EN BANC 1, 7 (2016); Natapoff, *supra* note 111, at 1058 (“[E]liminating incarceration for misdemeanors looks like a kind of win-win: it relieves defendants of the threat of imprisonment while saving the state millions of dollars in defense, prosecution, and jail costs.”).

177. ALA. R. CRIM. P. 6.1(a).

178. *Campa v. Fleming*, 656 P.2d 619, 621 (Ariz. Ct. App. 1982) (“[T]here is no authority holding that Arizona has standards which are stricter in this area than the U.S. Constitution.”). The language of Arizona Rule of Criminal Procedure 6.1 potentially suggests a broader right to counsel. ARIZ. R. CRIM. P. 6.1(b)(1) (“An indigent defendant is entitled to a court-appointed attorney . . . in any criminal proceeding that may result in punishment involving a loss of liberty . . .”). However, a practitioner I spoke with confirmed that the right to counsel only applies when the prosecutor is seeking jail time. E-mail from Michael Kielsky, Partner, Udall Shumway PLC, to author (May 14, 2020, 1:50 PM EST) (on file with author).

179. *Calloway v. State*, No. CACR00-1317, 2001 WL 651359, at *1–2 (Ark. Ct. App. June 13, 2001).

180. CONN. GEN. STAT. ANN. § 51-296(a) (West 2020).

181. FLA. R. CRIM. P. 3.111(b).

182. 725 ILL. COMP. STAT. ANN. 5/113-3(b) (West 2020) (“In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel.”). This statute can arguably be read to condition counsel based on the *authorized* penalty. It has been interpreted, however, to condition counsel on the *imposed* penalty, consistent with *Scott*. See *People v. Wigginton*, No. 2-13-1036, 2015 WL 4511932, at *1–2 (Ill. App. Ct. July 27, 2015). The law in Illinois is currently unsettled. The Appellate Court of Illinois recently created, apparently unwittingly, an appellate split by recognizing a right to appointed counsel in a case where the defendant was charged with aailable offense but merely fined. See *People v. Rogers*, No. 3-18-0088, 2020 WL 2216195, at *2 (Ill. App. Ct. May 7, 2020).

183. See KAN. STAT. ANN. § 22-4503 (West 2020); *State v. Delacruz*, 899 P.2d 1042, 1047 (Kan. 1995) (“Prior uncounseled misdemeanor convictions under *Scott* are constitutional where no jail time is imposed.”).

184. MICH. CT. R. 6.610(D)(2); *People v. Richert*, 548 N.W.2d 924, 927 (Mich. Ct. App. 1996) (“We find no justification to construe [the Michigan right to counsel provision] more broadly than its federal analogue in the present context.”).

185. See MINN. R. CRIM. P. 5.04, 23.04.

186. MISS. CODE ANN. § 99-15-15 (2020).

187. MO. ANN. STAT. § 545.820 (West 2019) (requiring the appointment of counsel only for felony defendants); *State v. Pike*, 162 S.W.3d 464, 471–72 (Mo. 2005) (en banc) (affirming the legality of an uncounseled conviction that did not result in incarceration under *Scott*); *State v. Keeth*, 203 S.W.3d 718, 727 (Mo. Ct. App. 2006) (“[T]he current state of the law in Missouri is that as decided in *Scott*.”).

188. MONT. CODE ANN. § 46-8-101 (West 2019); *State v. Allen*, 206 P.3d 951, 953 (Mont. 2009) (“Th[e] fundamental right to counsel extends only to cases in which a sentence of imprisonment is actually imposed . . .”).

North Dakota,¹⁸⁹ South Carolina,¹⁹⁰ Virginia,¹⁹¹ and Wyoming.¹⁹²

These states face an administrability challenge, as Justice Brennan pointed out in his dissent in *Scott*.¹⁹³ Judges in states using the “actual imprisonment” standard must decide at the start of the case whether they want the option of sentencing the defendant to imprisonment. Of course, in jurisdictions where guilty pleas predominate over trials, this argument has little force. The parties can easily strike a bargain that complies with *Scott*.

When a trial occurs, or is at least a realistic possibility, some jurisdictions rely on the prosecutor to indicate whether she will seek a prison sentence for the defendant. Minnesota, for example, makes this expectation explicit by requiring the prosecutor to announce *ex ante* that she will not seek a prison sentence in a case, thus obviating the need for counsel.¹⁹⁴ In other jurisdictions, there is an unwritten expectation that prosecutors will make clear whether counsel is needed by stating an intention to seek a prison sentence. For example, in Cumberland County, Pennsylvania, there is a presumption that appointed counsel will not be assigned for summary offense cases unless the prosecutor states an intention to seek a prison sentence at the start of the process.¹⁹⁵ In Phoenix, Arizona, the justices of the peace generally appoint counsel only when the state indicates it will seek jail time.¹⁹⁶

Other states allow the judge to eliminate the need to appoint counsel in cases where the defendant is charged with an offense punishable by incarceration if she formally decides before trial that she will not sentence the defendant, if convicted, to

189. N.D. R. CRIM. P. 44(a).

190. S.C. CODE ANN. § 17-3-10 (2014) (stating counsel shall be appointed to “[a]ny person entitled to counsel under the Constitution of the United States”).

191. VA. CODE ANN. § 19.2-160 (West 2020).

192. WYO. STAT. ANN. § 7-6-102(a)(v)(A) (2020).

193. See *Scott v. Illinois*, 440 U.S. 367, 383 (1979) (Brennan, J., dissenting).

194. See, e.g., MINN. R. CRIM. P. 23.04; see also *Campa v. Fleming*, 656 P.2d 619, 619–21 (Ariz. Ct. App. 1982) (reversing the appointment of counsel because the prosecutor promised he would not seek a prison sentence for the defendant).

195. See Telephone Interview with Jonathan Birbeck, *supra* note 88.

196. E-mail from Michael Kielsky, Partner, Udall Shumway PLC, to author (Sept. 25, 2019, 3:56 PM EST) (on file with author); E-mail from Cathy Riggs, *supra* note 78.

prison. Connecticut,¹⁹⁷ Florida,¹⁹⁸ Montana,¹⁹⁹ Virginia,²⁰⁰ and Wyoming²⁰¹ have variations on this approach. For example, Florida allows its trial judges to decline to appoint counsel, or dismiss appointed counsel, if they file a written order taking imprisonment off the table for the defendant at least fifteen days before the trial.²⁰² The frequency with which these provisions will be invoked largely depends on the individual judge. One Florida judge said she only used it a couple of times in about two years,²⁰³ while a Florida prosecutor estimated it is used in 5 to 10 percent of possible cases.²⁰⁴ It is also worth noting that some states that recognize a broader, but less than complete, entitlement to appointed counsel have similar procedural requirements.²⁰⁵

These states also give their trial judges varying amounts of discretion to appoint counsel. For example, Arizona and South Carolina explicitly give their trial judges discretion to appoint counsel in any case.²⁰⁶ Mississippi, in contrast, gives its trial judges less discretion, allowing appointment of counsel *only* when the defendant is charged with an offense for which at least ninety days of imprisonment are authorized.²⁰⁷ Similarly, if a Montana judge declares at arraignment that the defendant will not be imprisoned, then she lacks discretion to appoint counsel for the defendant.²⁰⁸

Whether judges will use this discretion to appoint counsel is a different question and likely depends on local factors. For ex-

197. CONN. GEN. STAT. ANN. § 51-296(a) (West 2020).

198. FLA. R. CRIM. P. 3.111(b)(1).

199. MONT. CODE ANN. § 46-8-101(3) (West 2019) (allowing the court to decline to appoint counsel if it declares at arraignment that no term of imprisonment will be imposed).

200. VA. CODE ANN. § 19.2-160 (West 2020).

201. WYO. STAT. ANN. § 7-6-102(a)(v)(A) (2020).

202. FLA. R. CRIM. P. 3.111(b)(1).

203. See Telephone Interview with Meredith Charbula, Cty. Judge, Duval County, Florida (Mar. 29, 2019).

204. See Telephone Interview with L.E. Hutton, *supra* note 93.

205. See, e.g., ME. UNIF. R. CRIM. P. 44(a)(1); VT. STAT. ANN. tit. 13, § 5201(4)(B) (2018).

206. ARIZ. R. CRIM. P. 6.1(b)(2) (“In any other criminal proceeding, the court may appoint an attorney for an indigent defendant if required by the interests of justice.”); S.C. CODE ANN. § 17-3-100 (2014) (recognizing that “the discretionary authority of a judge to appoint counsel in any case” is not limited).

207. MISS. CODE ANN. § 99-15-15 (2020).

208. MONT. CODE ANN. § 46-8-101 (West 2019).

ample, trial judges in Cumberland County, Pennsylvania, rarely use their discretion to appoint counsel in summary offense cases.²⁰⁹ In contrast, one Virginia trial judge told me that he and at least some of his colleagues “bend over backwards” to appoint defense lawyers, because not having them can slow cases down.²¹⁰ Similarly, judges in Columbus, Ohio, generally exercise discretion to appoint counsel for jailable misdemeanors, though judges in some rural counties often do not.²¹¹

6. *Following Scott but Rejecting Nichols*

Two states, North Dakota and Florida, reject *Nichols* but follow *Scott*.²¹² In *State v. Orr*,²¹³ the North Dakota Supreme Court highlighted the state’s historical commitment to the right to counsel and, rejecting *Nichols*, it held that uncounseled convictions could not be used to enhance sentences in subsequent cases.²¹⁴ Similarly, in *State v. Kelly*,²¹⁵ the Florida Supreme Court interpreted the Florida Constitution to provide more protection than *Nichols*, holding that prior uncounseled convictions could only be used to enhance a sentence in a subsequent prosecution if the crime charged in the first case carried a potential prison sentence of less than six months.²¹⁶

C. *How the States Arrived at their Present Laws*

The previous Section documented what the law among the fifty states is. This Section focuses on *how* they got there. Which actors within the states were responsible for expanding (or not) the right to counsel? This question sheds light on the operation of our federalist system and legal development at the state level—issues of interest especially to those who wish to follow

209. See Telephone Interview with Jonathan Birbeck, *supra* note 88; Telephone Interview with Albert Masland, *supra* note 88.

210. See Telephone Interview with Edward Hogshire, Judge, Charlottesville Circuit Court (Feb. 26, 2019).

211. Telephone Interview with Richard Frye, *supra* note 95.

212. On the adherence to *Scott*, see FLA. R. CRIM. P. 3.111; N.D. R. CRIM. P. 44(a).

213. 375 N.W.2d 171 (N.D. 1985).

214. *Id.* at 178–79.

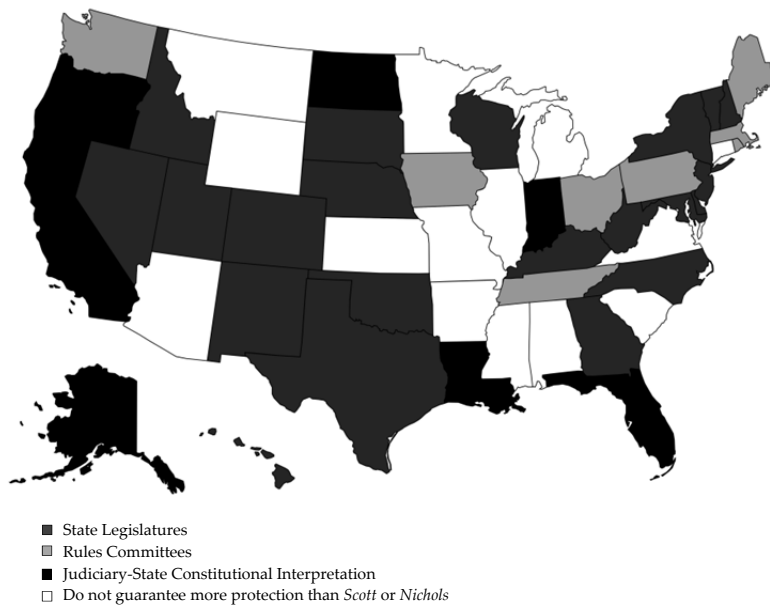
215. 999 So. 2d 1029 (Fla. 2008).

216. *Id.* at 1053.

Judge Sutton's advice to "take both shots" in asserting legal rights.²¹⁷

This Part is divided according to the different institutions of government that have regulated the entitlement to appointed counsel in the several states: state legislatures, rules committees, and state courts. In the states that offer broader legal protection than *Scott* or *Nichols*, the legislature led the way in twenty-one states, the rules committee in eight, and the judiciary in seven. The following map reflects these numbers:

FIGURE 2: INSTITUTIONS THAT EXPANDED ENTITLEMENT FIRST IN THE STATES



1. State Legislatures

The state legislatures have been active in regulating the entitlement to appointed counsel. Among the thirty-six states that recognize a broader right to counsel than *Scott* or *Nichols* require, legislatures led the way in twenty-one. These states are:

217. See SUTTON, *supra* note 12, at 7–10 (counseling lawyers to lodge challenges on behalf of clients under both the Federal Constitution and state constitutions).

Colorado,²¹⁸ Delaware,²¹⁹ Georgia,²²⁰ Hawaii,²²¹ Idaho,²²² Kentucky,²²³ Maryland,²²⁴ Nebraska,²²⁵ Nevada,²²⁶ New Hampshire,²²⁷ New Jersey,²²⁸ New Mexico,²²⁹ New York,²³⁰ North Carolina,²³¹ Oklahoma,²³² South Dakota,²³³ Texas,²³⁴ Utah,²³⁵ Vermont,²³⁶ West Virginia,²³⁷ and Wisconsin.²³⁸ Additionally, California's legislature codified a right previously recognized under its constitution.²³⁹ On the other hand, the state legislatures in seven states codified a statutory requirement that does not guarantee more protection than *Scott*. These states are: Illinois,²⁴⁰ Kansas,²⁴¹ Mississippi,²⁴² Missouri,²⁴³ South Carolina,²⁴⁴ Virginia,²⁴⁵ and Wyoming.²⁴⁶

Most recently, the Colorado legislature passed a bill in 2016 extending the right to appointed counsel to all defendants

218. See Act of June 11, 2016, ch. 366, § 2, 2016 Colo. Sess. Laws 1540, 1540–41.

219. See Act of Jan. 7, 1964, ch. 227, § 1, 54 Del. Laws 738, 738–39.

220. See Act of May 3, 2006, no. 749, § 4(5)(A), 2006 Ga. Laws 752, 753–54.

221. See Act of May 15, 1973, act 76, § 1, 1973 Haw. Sess. Laws 101, 101–02.

222. See Act of Mar. 21, 2005, ch. 93, § 1, 2005 Idaho Sess. Laws 313, 313–14.

223. See Act of Mar. 29, 1978, ch. 155, § 27, 1978 Ky. Acts 396, 410.

224. See Act of Apr. 29, 1971, ch. 209, § 1, 1971 Md. Laws 485, 486–87.

225. See Act of Apr. 8, 1972, L.B. 1463, § 2, 1972 Neb. Laws 1295, 1296.

226. See Act of May 28, 1981, ch. 350, §§ 1–3, 1981 Nev. Stat. 651, 652.

227. See Act of June 28, 1973, ch. 370, § 23, 1973 N.H. Laws 341, 344–45.

228. See Act of May 31, 1974, ch. 33, 1974 N.J. Laws 103, 103–04.

229. See Act of Feb. 27, 1968, ch. 69, §§ 59–61, 1968 N.M. Laws 334, 355–58.

230. See Act of May 20, 1970, ch. 996, § 1, 1970 N.Y. Laws 3117, 3168.

231. See Act of June 23, 1969, ch. 1013, § 1, 1969 N.C. Sess. Laws 1154, 1154.

232. See Act of May 24, 1991, ch. 238, § 7, 1991 Okla. Sess. Laws 1688, 1694.

233. See Act of Mar. 12, 1983, 1983 S.D. Sess. Laws ch. 190 § 1 384, 385.

234. See Act of June 18, 1965, ch. 722, § 1, 1965 Tex. Gen. Laws 317, 425.

235. See Act of Feb. 1, 1980, ch. 14, § 1, 1980 Utah Laws 86, 208.

236. See Act of Apr. 17, 1995, no. 21, § 3, 1995 Vt. Acts & Resolves 67, 68–69.

237. See Act of Mar. 13, 1976, ch. 33, 1976 W. Va. Acts 186, 206–07.

238. See Act of June 30, 1977, ch. 29, § 1593, 1977 Wis. Sess. Laws 35, 412.

239. See CAL. CONST. art. 1, § 15, cl. 3; *Tracy v. Mun. Court*, 587 P.2d 227, 230 (Cal. 1978) (en banc); *In re Smiley*, 427 P.2d 179, 184 (Cal. 1967) (“Under . . . the California Constitution, there can be no doubt that the fundamental right to the assistance of counsel is guaranteed to all persons . . . charged with a misdemeanor . . .”).

240. See Code of Criminal Procedure of 1963, 1963 Ill. Laws 2836, 2861.

241. See Act of Apr. 18, 1969, ch. 291, § 3, 1969 Kan. Sess. Laws 786, 787.

242. See Act of Apr. 5, 1971, ch. 490, § 2, 1971 Miss. Laws 604, 604–05.

243. See MO. REV. STAT. § 4140 (1889).

244. See Act of June 17, 1969, no. 309, § 1, 1969 S.C. Acts 374, 374–75.

245. See Act of Mar. 14, 1983, ch. 97, 1983 Va. Acts 107, 107–08.

246. See Act of Feb. 24, 1999, ch. 95, § 1, 1999 Wyo. Sess. Laws 189, 190.

charged with a jailable offense.²⁴⁷ The bill was politically contested, with divided votes in both houses of the state legislature.²⁴⁸ Although a higher percentage of Democrats than Republican legislators ultimately supported the bill, the bill had bipartisan support, including the strength to make it through the Republican-controlled state senate. During the hearings of the House Committee on the Judiciary (which approved the bill by a 6-5 vote),²⁴⁹ the opposing parties aired some of the policy arguments surrounding this issue, which will be explored more fully below. For example, the attorney for the City of Fort Morgan testified that the bill would impose unnecessary costs on rural municipalities.²⁵⁰

2. Rule Promulgation

Rules committees, generally composed of judges and practitioners, have regulated the right to counsel in eight states. These states are: Iowa,²⁵¹ Maine,²⁵² Massachusetts,²⁵³ Ohio,²⁵⁴ Pennsylvania,²⁵⁵ Rhode Island,²⁵⁶ Tennessee,²⁵⁷ and Washington.²⁵⁸ Seven states promulgated rules that do not guarantee more protection than *Scott* requires, including Alabama,²⁵⁹ Arizona,²⁶⁰

247. Act of June 11, 2016, ch. 366, § 2, 2016 Colo. Sess. Laws 1540, 1540–41.

248. The Colorado House of Representatives approved the bill by a 42-22-1 vote. *HB16-1309 House Vote*, COLO. GEN. ASSEMBLY (Apr. 29, 2016, 12:45 PM), <https://leg.colorado.gov/content/hb16-1309vote6707bc> [<https://perma.cc/89VM-CKT8>]. The Senate approved the bill 29-6. *HB16-1309 Senate Vote*, COLO. GEN. ASSEMBLY (Apr. 26, 2016, 11:09 PM), <https://leg.colorado.gov/content/hb16-1309vote5e4768> [<https://perma.cc/QB3E-X7ZC>]; see also H.B. 16-1309, 69th Gen. Assemb., Reg. Sess. (Colo. 2016).

249. *Hearing on H.B. 16-1309 Before the H. Comm. on Judiciary*, 2016 Leg., 69th Colo. General Assemb. (Colo. 2016).

250. *Id.* (statement of Jason Meyers, City Attorney for City of Fort Morgan).

251. IOWA R. CRIM. P. 2.61(2).

252. ME. R. CRIM. P. 44(a)(1).

253. MASS. R. CRIM. P. 8.

254. OHIO R. CRIM. P. 44.

255. PA. R. CRIM. P. 122(A).

256. R.I. DIST. CT. R. CRIM. P. 44.

257. TENN. R. CRIM. P. 44(a).

258. WASH. SUP. CT. CRIM. R. 3.1(a).

259. ALA. R. CRIM. P. 6.1(a).

260. ARIZ. R. CRIM. P. 6.1(b)(1)(A).

Arkansas,²⁶¹ Florida,²⁶² Michigan,²⁶³ Minnesota,²⁶⁴ and North Dakota.²⁶⁵

3. *State Judiciaries and State Constitutional Law*

Seven states recognizing broader rights than required by *Scott* or *Nichols* have done so through judicial interpretation of their state constitutions. The judiciaries of Alaska,²⁶⁶ California,²⁶⁷ Indiana,²⁶⁸ Louisiana,²⁶⁹ and Oregon²⁷⁰ recognized a broader right than *Scott*. The Florida and North Dakota judiciaries recognized broader state constitutional rights than required by *Nichols*.²⁷¹ Additionally, Iowa's and Hawaii's judiciaries constitutionalized more generous rules first recognized by another branch.²⁷²

The following Parts analyze these state court decisions by focusing on the ingredients on which the state judiciaries have relied.

a. *State Constitutional Texts*

Almost all state constitutions recognize the right to counsel, but sometimes with wording quite different from the Sixth Amendment. Some state courts have therefore relied on textual differences to interpret the right more expansively. The Louisiana Constitution, for example, guarantees a person the right to court-appointed counsel "if he is indigent and charged with an offense punishable by imprisonment," and the state's courts have consequently recognized a right to appointed counsel in

261. ARK. R. CRIM. P. 8.2(a).

262. FLA. R. CRIM. P. 3.111.

263. MICH. CT. R. 6.610(D)(2).

264. MINN. R. CRIM. P. 5.04, 23.04.

265. N.D. R. CRIM. P. 44(a).

266. *Pananen v. State*, 711 P.2d 528, 532 (Alaska Ct. App. 1985).

267. *In re Smiley*, 427 P.2d 179, 184 (Cal. 1967).

268. *Bolkovac v. State*, 98 N.E.2d 250, 253 (Ind. 1951).

269. *State v. Haley*, 538 So. 2d 679, 680 (La. Ct. App. 1989).

270. *See Brown v. Multnomah Cty. Dist. Court*, 570 P.2d 52, 55, 61 (Or. 1977) (en banc).

271. *See State v. Kelly*, 999 So. 2d 1029, 1053 (Fla. 2008); *State v. Orr*, 375 N.W.2d 171, 178–79 (N.D. 1985).

272. *See State v. Dowler*, 909 P.2d 574, 577 (Haw. App. Ct. 1995); *State v. Young*, 863 N.W.2d 249, 277–78 (Iowa 2015).

all jailable cases.²⁷³ The Hawaii judiciary also relied on a broader state constitutional text to expand the right.²⁷⁴ Other broader state constitutional provisions are identified below.²⁷⁵

b. State Histories

Some state judiciaries have relied on unique state histories in defining the right to counsel. For example, in *State v. Young*,²⁷⁶ in which the court held that the state constitution requires the appointment of counsel to indigent defendants charged with a jailable offense, the Iowa Supreme Court noted that the state's right-to-counsel provision was "hotly debated" by the framers of the Iowa Constitution because of the controversy over the Fugitive Slave Act.²⁷⁷ As the court explained, slave removal proceedings were civil rather than criminal, and the Iowa framers wanted their constitution to reach broadly enough to cover those proceedings.²⁷⁸ More generally, the court said the framers wanted Iowa to "have the best and most clearly defined Bill of Rights."²⁷⁹ This history helped justify the court's holding that the state constitution guaranteed the right to counsel to all defendants charged with a jailable offense.²⁸⁰

c. State Precedents

The variety of precedent among the various state judicial systems is immense. This variety has doubtless influenced the different approaches taken by state judiciaries toward the scope of the right to counsel.

For example, by the time the New Mexico Supreme Court considered a *Nichols*-type issue in 1997, it had previously bor-

273. LA. CONST. art. I, § 13; *State v. Deville*, 879 So. 2d 689, 690 (La. 2004) ("In this respect, Louisiana law provides broader protection than the Sixth Amendment requires.").

274. *See Dowler*, 909 P.2d at 577.

275. *See infra* Table 2.

276. 863 N.W.2d 249.

277. *Id.* at 278.

278. *See id.* at 278–79.

279. *Id.* at 278 (quoting *State v. Baldon*, 829 N.W.2d 785, 810 (Iowa 2013) (Appel, J., specially concurring)).

280. Indeed, the Iowa Supreme Court gave a far longer discourse on the history of this provision in a more recent case deciding when the right to counsel attaches. *See State v. Senn*, 882 N.W.2d 1, 13–16 (Iowa 2016).

rowed the U.S. Supreme Court's *Mathews v. Eldridge*²⁸¹ framework of balancing the defendant's right, the risk of inaccurate deprivation of that right, and the state's interest.²⁸² Thus in considering whether to bar the use of an uncounseled first-time DUI conviction to enhance a defendant's sentence in a subsequent prosecution under the state constitution, the New Mexico Supreme Court analyzed the question under its state due process clause, instead of a direct state-level analog to the Sixth Amendment.²⁸³ The court ultimately balanced the factors in the state's favor, concluding due process did not require appointed counsel under the state constitution.²⁸⁴

d. Different Approaches to U.S. Supreme Court Precedent

State courts often react to federal decisions in their own state-level criminal procedure jurisprudence, including on the right to counsel. Among the states that have not provided more protection than *Scott* or *Nichols*, some state courts have hewed closely to the U.S. Supreme Court's doctrinal moves.²⁸⁵ After the Court's decision in *Baldasar*, several state courts expanded the right to counsel or applied its holding under their state constitutions.²⁸⁶ Likewise, after the Court overruled *Baldasar*, several of these states' judiciaries reversed their post-*Baldasar* decisions.²⁸⁷ In doing so, they relied heavily on the U.S. Supreme

281. 424 U.S. 319 (1976).

282. *State v. Woodruff*, 951 P.2d 605, 613–14 (N.M. 1997) (citing *Eldridge*, 424 U.S. at 334–35).

283. *Id.*

284. *Id.* at 616.

285. See, e.g., *In re Advisory Opinion to the Governor*, 666 A.2d 813, 816 (R.I. 1995) (overruling earlier decision under Rhode Island Constitution guaranteeing counsel in all cases where charged offense authorized more than six months in prison after *Scott*).

286. See, e.g., *State v. Oehm*, 680 P.2d 309, 312 (1984), overruled by *State v. Delacruz*, 899 P.2d 1042 (Kan. 1995); *State v. Armstrong*, 332 S.E.2d 837, 840 (W. Va. 1985) ("Under the sixth amendment of the federal constitution and article III, section 14 of the West Virginia Constitution, unless an individual convicted of a misdemeanor was represented by counsel or knowingly and intelligently waived the right to counsel, such prior conviction may not be used to enhance a sentence of imprisonment for a subsequent offense."), overruled by *State v. Hopkins*, 453 S.E.2d 317 (W. Va. 1994).

287. See, e.g., *Delacruz*, 899 P.2d at 1047 (overruling two state-law decisions based on *Baldasar* and embracing the reasoning of the U.S. Supreme Court in *Nichols*); *State v. Porter*, 671 A.2d 1280, 1282 (Vt. 1996) (overruling a decision based on *Baldasar* and declining to provide broader right under Vermont Constitution, rea-

Court's decisions, mostly eschewing independent state-law reasoning.²⁸⁸ State constitutional law theorists call this approach "lockstepping."²⁸⁹

Other states have been less deferential to the Supreme Court's reasoning. For example, in *State v. Young*, the Iowa Supreme Court harshly criticized Justice Rehnquist's "short" opinion in *Scott*, accusing it of "[h]arkening back to the aberrant and overruled *Betts* [*v. Brady*]."²⁹⁰ The court further criticized both *Scott* and *Nichols* as inconsistent with earlier federal precedent, arguing both "departed from the traditional Sixth Amendment reliability rationale."²⁹¹ The court then rejected the results reached in *Scott* and *Nichols*, holding that the Iowa Constitution required the appointment of counsel in all cases involving offenses for which incarceration is authorized.²⁹²

D. *The Reality on the Ground: Is the Right Being Honored?*

Parts II.A through C have focused on the laws of the States and how they got there. But anyone experienced with the criminal justice system might be wondering whether these state-law rights are worth anything. Are the States *actually* providing counsel broader than what the Supreme Court requires? If they do provide counsel, does it meet a minimum standard of competence? In short, the evidence suggests some states and localities routinely fail to fulfill their federal constitutional obligations to provide effective counsel, or even to provide counsel at all.²⁹³

soning that it provides a "right similar to" the Sixth Amendment); *Hopkins*, 453 S.E.2d at 324 (overruling a post-*Baldasar* decision based on West Virginia Constitution without any independent state constitutional law reasoning), *overruled on other grounds* by *State v. Nichols*, 541 S.E.2d 310 (W. Va. 1999).

288. For example, in *State v. Delacruz*, the Kansas Supreme Court acknowledged the defendant's argument that it was free to provide more protection than the U.S. Supreme Court and that it should prevent unreliable convictions. *Delacruz*, 899 P.2d at 1046–47. But the court dodged this argument. "In response to similar arguments," the court block-quoted three paragraphs from *Nichols*, and then summarily concluded it "agree[d] with and adopt[ed]" the U.S. Supreme Court's rationale. *Id.*

289. See, e.g., SUTTON, *supra* note 12, at 174.

290. *State v. Young*, 863 N.W.2d 249, 267 (Iowa 2015).

291. *Id.* at 270.

292. *Id.* at 281.

293. See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1564 (2018) ("The authors conclude that our patchwork system of public defense for the poor remains disturbingly dysfunctional.").

But first, it is worth acknowledging that some jurisdictions honor broader state-law rights to counsel and make those rights meaningful. Practitioners from Philadelphia, Iowa, Indianapolis, and Kentucky insisted counsel is usually appointed for all jailable offenses.²⁹⁴ For example, in Louisville, Kentucky, one judge explained that indigent defendants regularly get counsel for the lowest-level jailable offenses at their preliminary hearings.²⁹⁵ And although plea bargaining terminates about 95 percent of the cases in her county, the judge reported that plea bargains are not usually struck immediately before or during the preliminary hearing, as in some other jurisdictions.²⁹⁶

But that rosy picture does not extend to the entire country. First, when jurisdictions do provide counsel, there are serious questions about whether they are providing minimally effective counsel. Extreme caseloads spread across too few attorneys may be the biggest problem.²⁹⁷ The most recent round of statistics from the Federal Bureau of Justice Statistics presents a grim picture, with public defenders in many states forced to close more than one case per day.²⁹⁸ For example, the average Arkansas defender reportedly closed 590 cases in 2013.²⁹⁹ Similar situations exist in a large number of other states.³⁰⁰ Moreover, workloads might even be worse in states that rely on contracts with defense firms to handle indigent defense, because the lowest bidding firm might get stuck with massive amounts of cases.³⁰¹ For example, one county recently contracted with a three-person firm to handle half of its caseload for \$400,000, which

294. See Telephone Interview with Sara Nicholson, *supra* note 84; E-mail from Katherine Robinson, Public Defender, retired, Marion County, Indiana, to author (Oct. 6, 2019) (on file with author); Telephone Interview with Lynn Rose, *supra* note 101; Interview with David Rudovsky, Founding Partner, Kairys, Rudovsky, Messing & Feinberg, LLP (Feb. 18, 2019).

295. See Telephone Interview with Sara Nicholson, *supra* note 84.

296. See *id.*

297. See Erica Hashimoto, *Motivating Constitutional Compliance*, 68 FLA. L. REV. 1001, 1019–20 (2016).

298. SUZANNE M. STRONG, U.S. DEP'T OF JUSTICE, STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013, at 1–3 (2017), <https://www.bjs.gov/content/pub/pdf/saids13.pdf> [<https://perma.cc/6LB7-8AKS>].

299. *Id.* at 5.

300. *Id.*

301. See BARTON & BIBAS, *supra* note 8, at 27 (“Contract attorneys have it worst of all.”).

boiled down to 1,523 felonies and 3,587 misdemeanors that year.³⁰²

So how do defense lawyers close out multiple cases per workday? The evidence suggests caseload pressures are helping transform our criminal justice system into an assembly line that relies on plea deals to function.³⁰³ As Justice Kennedy noted in *Lafler v. Cooper*,³⁰⁴ our criminal justice system has evolved into “a system of pleas, not a system of trials.”³⁰⁵ About 95 percent of cases terminate in guilty pleas.³⁰⁶ And these pleas come fast; “meet ‘em and plead ‘em” lawyering is increasingly common.³⁰⁷ This phenomenon is likely to be particularly common in misdemeanor cases, which are far more numerous than felonies, and where indigent defendants often face a choice between waiting in jail for a trial (because they cannot afford bail) or pleading guilty.³⁰⁸ And even in jurisdictions where plea bargains generally come *after* the preliminary hearing, there is, as one Kentucky judge explained, a “market” for “cookie-cutter plea deals,” raising serious questions about whether individualized dispositions are achieved.³⁰⁹

Additionally, serious questions exist about whether some jurisdictions are consistently providing *any* counsel in misdemeanor cases when required to do so under *Argersinger* or *Shelton*. National statistical evidence is difficult to come by, especially because many states do not maintain records in this area.³¹⁰ But

302. *See id.*

303. *See, e.g.,* State v. Miller, 76 A.3d 1250, 1269 (N.J. 2013) (Albin, J., dissenting) (bemoaning the treatment of a defendant as “just another fungible item to be shuffled along on a criminal-justice conveyor belt” with “the right to effective assistance of counsel [being] nothing more than the *presence* of an appointed attorney at counsel’s table”).

304. 566 U.S. 156 (2012).

305. *Id.* at 170.

306. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1118–19 (2011).

307. *See, e.g.,* BARTON & BIBAS, *supra* note 8, at 28 (calling it a “common practice” and citing examples).

308. *See, e.g., id.*; Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1753 (2013) (“Overwhelmingly, misdemeanor defendants cannot make bail even where it is set at \$1000 or less. In the majority of misdemeanor cases, the defendant pleads guilty at arraignment or soon after, the judge imposes a light, agreed upon sentence, and the defender’s representation of the client concludes.” (footnote omitted)).

309. *See* Telephone Interview with Sara Nicholson, *supra* note 84.

310. *See* SIXTH AMENDMENT CTR., *supra* note 59, at 7.

statewide statistics suggest the problem is serious. For example, in Texas, a state that ostensibly guarantees appointed counsel in all cases where the defendant is charged with a jailable crime, three quarters of Texan counties only appointed counsel in fewer than 20 percent of misdemeanor cases in 2009.³¹¹ Anecdotal accounts also abound on the failure of states to provide *any* counsel in misdemeanor cases when prison or suspended sentences are imposed.³¹² A few recent examples:

1. In Tennessee, observers watched courts give many misdemeanor defendants suspended sentences without informing them of their right to counsel.³¹³
2. In Utah, an eighteen-month study concluded that around 62 percent of misdemeanor defendants statewide were not being appointed counsel.³¹⁴
3. In 2009, Chief Justice Jean Hofer Toal of the South Carolina Supreme Court publicly rebuked the Supreme Court's decision in *Shelton*: "*Alabama v. Shelton* [is] one of the more misguided decisions of the United States Supreme Court, I must say . . . so I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation."³¹⁵ Chief Justice Donald Beatty circulated a memo in 2017 to the state's trial judges rebuking the common practice of sentencing defendants to prison without appointing constitutionally required counsel.³¹⁶

311. See BORUCHOWITZ ET AL., *supra* note 83, at 15.

312. See, e.g., Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1020 (2013).

313. See STEPHEN F. HANLON, THOMAS B. HARVEY & NORMAN LEFSTEIN, AM. BAR ASS'N, DENIAL OF THE RIGHT TO COUNSEL IN MISDEMEANOR CASES: COURT WATCHING IN NASHVILLE, TENNESSEE 8 (2017), <https://www.courthousenews.com/wp-content/uploads/2017/08/NashvilleMisdemeanor.pdf> [<https://perma.cc/RC6Z-VMMD>].

314. SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN UTAH: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES, at III (2015), https://sixthamendment.org/6ac/6AC_utahreport.pdf [<https://perma.cc/Y33Y-WRRF>].

315. See BORUCHOWITZ ET AL., *supra* note 83, at 17 (alterations in original) (internal quotation marks omitted).

316. Memorandum from Donald W. Beatty, Chief Justice, S.C. Supreme Court, to Magistrates and Municipal Judges, Sentencing Unrepresented Defendants to Imprisonment (Sept. 15, 2017), <https://www.sccourts.org/summaryCourtBenchBook/MemosHTML/2017-09.htm> [<https://perma.cc/ZN7Q-JKMJ>].

4. In 2010, the New York Supreme Court allowed a lawsuit to proceed alleging a systematic failure to provide *any* counsel in a range of cases in several counties.³¹⁷
5. In Indiana, a state that guarantees appointed counsel in all misdemeanor cases, a recent government report concluded that only 36 percent of misdemeanor defendants receive appointed counsel.³¹⁸

Further, some states use other methods to avoid appointing counsel to indigent defendants. For example, jurisdictions are increasingly pressuring indigent defendants to pay fees for the appointment of counsel.³¹⁹ One judge in Michigan estimated that 95 percent of misdemeanor defendants were waiving their right to counsel because of these fees.³²⁰ Additionally, some state court systems pressure defendants to waive their constitutional rights.³²¹ This pressure is a common practice in a substantial number of states.³²² Pressure may be unnecessary, however. A judge and a prosecutor in Jacksonville, Florida, explained that a substantial percentage of misdemeanor defendants will happily waive their right to counsel in exchange for probation and a suspended sentence.³²³ Finally, some states impose very demanding indigence standards that prevent the vast majority of poor people from qualifying for appointed counsel.³²⁴

In states that do not consistently provide effective counsel in felony cases or provide *any* counsel in misdemeanor cases where imprisonment or suspended sentences are imposed, it is hard to imagine they consistently honor state-law rights to

317. See *Hurrell-Harring v. State*, 930 N.E.2d 217, 219, 228 (N.Y. 2010).

318. See IND. TASK FORCE ON PUB. DEF., *supra* note 67, at 34.

319. See Backus & Marcus, *supra* note 293, at 1588.

320. ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 12 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [<https://perma.cc/C59X-JKWZ>].

321. See SIXTH AMENDMENT CTR., *supra* note 59, at 6 (describing the frequency of this practice in Delaware misdemeanor courts and estimating that 75 percent of misdemeanor defendants proceed through the Delaware courts without ever speaking to a lawyer).

322. See, e.g., *id.* at 16–17. Practitioners I spoke with also confirmed this fact. See, e.g., Telephone Interview with David Heilberg, *supra* note 77.

323. See Telephone Interview with Meredith Charbula, *supra* note 203; Telephone Interview with L.E. Hutton, *supra* note 93.

324. See, e.g., Marcus, *supra* note 8, at 153–54.

counsel going beyond what the U.S. Constitution requires. In short, it may be easier to recognize a right than to make it real.

III. LAW AND POLICY: SHOULD THERE BE A RIGHT TO APPOINTED COUNSEL BEYOND WHAT *SCOTT* REQUIRES?

With existing law on the table, this Article turns to what the law is and should be. This Part considers two conceptually distinct questions. First, should either the U.S. Supreme Court or state courts recognize a broader *constitutional* right to counsel? Second, should policymakers codify a broader right to counsel? Regarding the first question, this Article argues *Scott v. Illinois* was rightly decided. The constitutional text does not mandate appointed counsel in all criminal cases, and federalism concerns militate against imposing a uniform requirement on all of the states. The answer, however, might be different under some state constitutions.

To answer the second question, Part III.B marshals the arguments on both sides of the question. Ultimately, this Article concludes there is no one-size-fits-all answer, and that a jurisdiction's optimal approach should depend on its particular characteristics.

A. *Is There a Constitutional Right to Appointed Counsel in All Criminal Cases?*

Numerous scholars argue the Supreme Court should overrule *Scott v. Illinois* and require the appointment of counsel in all criminal cases.³²⁵ Although the Sixth Amendment does not recognize such a right, some state constitutions likely do.

1. *Federal Constitution*

The Federal Constitution should not be interpreted to require the appointment of defense counsel in all criminal cases for several reasons.

First, the Constitution's original public meaning does not mandate the appointment of counsel in all criminal cases. The Sixth Amendment says, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel

325. See *supra* note 8.

for his defence.”³²⁶ Justice Brennan’s *Scott* dissent focused on the word “all.”³²⁷ Thus, he argued that “the plain wording of the Sixth Amendment . . . compel[led] the conclusion” that counsel is required in all cases in which a defendant is charged with an offense for which imprisonment is authorized.³²⁸

But originally, the Sixth Amendment was not understood to provide a right to appointed counsel, but rather a right to retained counsel acquired without the government’s assistance.³²⁹ For a long time in England, there was no right to appear with retained counsel during felony cases.³³⁰ Indeed, it was innovative when Parliament allowed those charged with *treason* to appear with retained counsel.³³¹ Further, the first Congress passed a statute requiring appointed counsel for defendants in capital cases but not other crimes in federal court.³³² Because this statute coexisted with the ratified Sixth Amendment, government officials in the 1790s apparently did not understand the Sixth Amendment to require a broad right to appointed counsel. For originalists, that should be enough to reject Justice Brennan’s argument.

Of course, Justice Brennan was not an originalist,³³³ and he was likely arguing the Sixth Amendment’s modern meaning

326. U.S. CONST. amend. VI.

327. See *Scott v. Illinois*, 440 U.S. 367, 375, 378 (1979) (Brennan, J., dissenting).

328. *Id.* at 376.

329. See, e.g., *Bute v. Illinois*, 333 U.S. 640, 661 n.17 (1948) (“It is probably safe to say that from its adoption in 1791 until 1938, the right conferred on the accused by the Sixth Amendment . . . was not regarded as imposing on [federal courts] the duty to appoint counsel for an indigent defendant.” (quoting Alexander Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L.Q. REV. 1, 7–8, 10 (1944)) (internal quotation marks omitted)); WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 27–30 (1955); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 107 (2010) (“It was no part of the original understanding that the government might have to hire a lawyer for a defendant who could not afford one.”).

330. See *Garza v. Idaho*, 139 S. Ct. 738, 756–58 (2019) (Thomas, J., dissenting) (discussing the original public meaning of the right to counsel and citing historical evidence).

331. See Erica J. Hashimoto, *An Originalist Argument for a Sixth Amendment Right to Competent Counsel*, 99 IOWA L. REV. 1999, 2004 (2014) (discussing the Treason Act and calling it “remarkable for its time”).

332. See Federal Crimes Act of 1790, ch. 9, § 29, 1 Stat. 112, 118–19.

333. See Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 13, 14 (1990) (“Justice Brennan has not pretended that the constitutional revolution in which he has played a leading role was dictated by the text of the Constitution or by the intentions of its framers.”).

supported his view.³³⁴ When interpreting legal documents, the strong traditional rule is that the original meaning must trump the modern meaning.³³⁵ Some scholars think that conventional meaning should trump in the constitutional context for various pragmatic or policy-based reasons, including that the original public meaning is often difficult to identify or leads to an undesirable result.³³⁶

But departing on these grounds from the original public meaning of the Sixth Amendment in this context is unwarranted. First, the original public meaning is not obscure in this case. Although Professor David Strauss favors a broad right to appointed counsel, even he acknowledges that the original public meaning of the Sixth Amendment clearly did not require the government to appoint counsel for indigent defendants.³³⁷ Interpreting the Sixth Amendment to require appointed counsel based on an arguable present-day meaning thus seems about as sensible as interpreting the Constitution's Domestic Violence Clause to empower the federal government to combat spousal abuse.³³⁸

Further, trying to regulate the right to appointed counsel through the Sixth Amendment's text seems like an unwise task. Historical evidence makes clear the Sixth Amendment was not designed to regulate the right to appointed counsel; it was adopted in a historical context where public prosecutors and even retained defense lawyers were rare.³³⁹ States would not develop systems to regularly appoint defense counsel until the

334. Cf. STRAUSS, *supra* note 329, at 107 (observing that "it is just a coincidence" that *Gideon* "happens to fit nicely with the language of the Sixth Amendment").

335. See ANTONIN SCALIA & BRIAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78–92 (2012).

336. See STRAUSS, *supra* note 329, at 106–08.

337. See *id.* at 107.

338. See U.S. CONST. art. IV, § 4 ("The United States shall . . . protect each of [the states] . . . on Application of the Legislature . . . against domestic Violence."); Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 298 (2019) ("Today [domestic violence] is almost always used to refer to 'violent or aggressive behavior within the home, esp[ecially] violent abuse of a partner.' Yet at the founding, this phrase apparently carried a different meaning; it was understood as a reference to insurrection, rebellion, or rioting within a state . . ." (footnote omitted) (second alteration in original)).

339. See, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 16 (2012) (documenting how prosecutors and defense lawyers only became common in the late eighteenth century); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 262–65 (1979).

early 1900s.³⁴⁰ Because the Sixth Amendment was not designed to regulate the right to appointed counsel, we should not expect it to be a well-calibrated vehicle for defining the optimal scope of appointed counsel.

Another potential textual hook for the right to appointed counsel is the Due Process Clause,³⁴¹ which the Supreme Court has interpreted to require each state to uphold principles of “fundamental fairness.”³⁴² In many criminal cases, fundamental fairness may require the appointment of counsel. After all, as Justice Sutherland observed in *Powell*, the criminal justice system had undoubtedly become quite complex by the twentieth century, creating the risk that innocent defendants would be frequently convicted under it.³⁴³ Under this doctrine, the Court’s decision in *Gideon* may be justified.³⁴⁴

But the Court’s fundamental fairness doctrine does not provide a solid footing to ground a broad right to appointed counsel. As Justice Kennedy explained in *Medina v. California*,³⁴⁵ the Court has “defined the category of infractions that violate fundamental fairness very narrowly based on the recognition that, beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.”³⁴⁶ The Court is cautious because “the expansion of . . . constitutional guarantees under the open-ended rubric of the Due Process

340. See BIBAS, *supra* note 339, at 16.

341. See U.S. CONST. amend. V; Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 707–08 (1996) (“[T]he indigent’s right to appointed counsel could also be derived from the innocence-protecting spirit of the Due Process Clause.”).

342. See, e.g., *Medina v. California*, 505 U.S. 437, 443 (1992).

343. See *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

344. See Amar, *supra* note 341, at 707–08. *But see* Sessions v. Dimaya, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (arguing the Due Process Clause requires governments to adhere to the “customary procedures to which freemen were entitled to by the old law of England” before depriving an individual of life, liberty, or property (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring in the judgment)) (internal quotation marks omitted)); *Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004) (Thomas, J., dissenting) (suggesting that the original public meaning of the Due Process Clause only requires that the government “proceed according to the ‘law of the land’” (quoting *In re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting)) (internal quotation marks omitted)).

345. 505 U.S. 437.

346. *Id.* at 443 (alteration adopted) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)) (internal quotation marks omitted).

Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.”³⁴⁷

There are good reasons for this rule. First, the Court is usually ill-equipped to make judgements about what is optimal criminal justice policy. As Justice Byron White recognized in *Patterson v. New York*,³⁴⁸ “preventing and dealing with crime is much more the business of the States than it is of the Federal Government,”³⁴⁹ meaning that the Court “should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.”³⁵⁰ Second, constitutionalizing additional areas and removing them from the processes of democratic governments risks unduly concentrating power in the Supreme Court, which undermines representative government.³⁵¹ Third, concentrating power in the Supreme Court undermines *good* government. The Justices and their limited staff may not have access to the information and time they would need to wisely create a misdemeanor justice system for all fifty states.

Finally, federalism principles go a long way in supporting the Court’s refusal to extend the right to counsel in *Scott*. The Court’s inaction enables our country to reap the benefits of federalism. As Justice Brandeis once noted, federalism means that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”³⁵² As discussed in Part IV.B, our system desperately needs some experimentation and innovation in the area of misdemeanor justice. Preserving room for the States to act as laboratories of democracy is therefore essential.

Additionally, Supreme Court inaction allows state governments to better cater to their citizens’ priorities and values. As Part III.B.2 makes clear, mandating more appointed counsel for indigent defendants would have to come at the expense of other

347. *Id.*

348. 432 U.S. 197 (1977).

349. *Id.* at 201 (citing *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion)).

350. *Id.*

351. See SUTTON, *supra* note 12, at 17.

352. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

priorities and values. In other words, there is a difficult values-based choice to make. It is not an easy choice. Federalism allows the States (and localities) to adopt different answers to such choices. For those who wish to impose uniform solutions on the country in the style of a central planner, this may be a downside.³⁵³ But the Framers saw it as a benefit. As “Federal Farmer” wrote in a 1787 pamphlet, “[O]ne government and general legislation alone, never can extend equal benefits to all parts of the United States: Different laws, customs, and opinions exist in the different states, which by a uniform system of laws would be unreasonably invaded.”³⁵⁴ In other words, the people of different states have different political preferences, and federalism allows elected officials in state and local governments to tailor policies to those preferences more easily than the federal government.³⁵⁵

In short, federalism-based decisions are worth defending. As Part IV.A discusses, the right-to-counsel area has been a federalism success story, at least on paper. But to the extent it has not been a success story, federalism gives the States desperately needed room to innovate in this area, as discussed in Part IV.B. If the Supreme Court had sided with the plaintiffs in *Scott*, a particular form of the adversarial model (which is not working even for more serious cases in many parts of the country) would have been frozen in place for misdemeanors.

2. State Constitutions

The argument for a broader right to counsel is stronger under some state constitutions than under the Federal Constitution. Litigants can look to several state-specific sources to support their legal arguments.

First, some state constitutional texts appear to require the appointment of counsel in a broader range of criminal cases than does the text of the Sixth Amendment. The following table reproduces state constitutional provisions that arguably articulate a broader right to counsel than the Sixth Amendment does:

353. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 914 (1994).

354. Letters from the Federal Farmer, Letter I (Oct. 8, 1787), in 2 THE COMPLETE ANTI-FEDERALIST 223, 230 (Herbert J. Storing ed., 1981).

355. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987) (book review).

TABLE 2: STATE CONSTITUTIONS WITH ARGUABLY BROADER RIGHTS TO APPOINTED COUNSEL

STATE	STATE CONSTITUTIONAL LANGUAGE
Georgia	"Every person charged with an offense against the laws of this state shall have the <i>privilege and benefit</i> of counsel"356
Hawaii	"The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment." ³⁵⁷
Louisiana	"When any person has been arrested or detained in connection with the investigation or commission of any offense . . . [he has the] right to the assistance of counsel and, if indigent, his right to court appointed counsel. . . . At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment." ³⁵⁸
New Hampshire	"Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown"359
North Dakota	"In criminal prosecutions <i>in any court whatever</i> , the party accused shall have the right to . . . appear and defend in person and with counsel." ³⁶⁰
Ohio	"In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel"361
West Virginia	"In all [trials of crimes and of misdemeanors] the accused . . . <i>shall have</i> the assistance of counsel"362

356. GA. CONST. art I, § 1, para. 14 (emphasis added).

357. HAW. CONST. art. I, § 14.

358. LA. CONST. art. I, § 13.

359. N.H. CONST. pt. I, art. XV.

360. N.D. CONST. art. I, § 12 (emphasis added).

361. OHIO CONST. art I, § 10.

362. W. VA. CONST. art. III, § 14 (emphasis added).

Although the Sixth Amendment was adopted in an era where appointed counsel was almost unheard of, several of these state constitutions were adopted or amended during the twentieth century.³⁶³ Of these states, only Hawaii and Louisiana have recognized a broader state-law right to counsel than *Scott* requires.³⁶⁴ The North Dakota Supreme Court relied on its unique right-to-counsel provision to limit the use of uncounseled convictions to enhance sentences in subsequent prosecutions.³⁶⁵

Most state constitutions, however, articulate the right to counsel in language that is identical, or nearly identical, to the Sixth Amendment. Moreover, some state constitutional provisions appear on their face less amenable than the Sixth Amendment to an interpretation requiring appointed counsel in all criminal cases. The following table reproduces such provisions:

363. See, e.g., GA. CONST. (adopted in 1983); HAW. CONST. (adopted in 1950); LA. CONST. (adopted in 1974); N.H. CONST. (amended in 1966 to provide the right to counsel at state expense if need is shown).

364. See *State v. Dowler*, 909 P.2d 574, 577 (Haw. Ct. App. 1995); *State v. Deville*, 879 So. 2d 689, 690 (La. 2004) (“In this respect, Louisiana law provides broader protection than the Sixth Amendment requires.”).

365. *State v. Orr*, 375 N.W.2d 171, 178–79 (N.D. 1985).

TABLE 3: STATE CONSTITUTIONS WITH APPARENTLY NARROWER RIGHTS TO APPOINTED COUNSEL

STATE	STATE CONSTITUTIONAL PROVISION
California	"In criminal cases the rights of a defendant . . . to the assistance of counsel . . . shall be construed by the courts of this State in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States." ³⁶⁶
Nevada	"[A]nd in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, <i>as in civil actions</i> ." ³⁶⁷
Maryland	"That in all criminal prosecutions, every man hath a right . . . to be <i>allowed</i> counsel . . ." ³⁶⁸
New York	"In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel <i>as in civil actions</i> . . ." ³⁶⁹
Pennsylvania	"In all criminal prosecutions the accused hath a right to be heard by himself and <i>his</i> counsel . . ." ³⁷⁰
South Carolina	"Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by <i>his</i> counsel or by both." ³⁷¹
Virginia	The Virginia Constitution does not have a right-to-counsel provision.

In summary, litigants arguing for or against a broader right to appointed counsel under state constitutions should be mindful of the varying constitutional texts among states.

366. CAL. CONST. art I, § 24.

367. NEV. CONST. art. I, § 8 (emphasis added).

368. MD. CONST., Declaration of Rights, art. XXI (emphasis added).

369. N.Y. CONST. art. I, § 6 (emphasis added).

370. PA. CONST. art. I, § 9 (emphasis added).

371. S.C. CONST. art. I, § 14.

Second, as discussed in Part II.C.3.b, the States have different histories that litigants may be able to use to their advantage. Indeed, the Iowa Supreme Court partially relied on statements by the framers of the Iowa Constitution when adopting the authorized imprisonment rule.³⁷² Litigants and scholars favoring a broader right to counsel might have some success if they mine state histories for similar evidence.³⁷³

Third, state judiciaries have different sets of precedent to call upon than does the U.S. Supreme Court. For example, some states analyze due process claims in the criminal context under the three-part framework developed in *Mathews v. Eldridge*.³⁷⁴ In contrast, the U.S. Supreme Court has adopted a less rights-protective standard, explicitly rejecting the *Mathews* framework in the criminal context.³⁷⁵ Thus, litigants might have more success in arguing for an expanded right to counsel in state courts than in federal courts.

Finally, litigants seeking remedies under state law must reckon with the states' varying separation-of-powers constraints. For example, West Virginia has traditionally been very strict with its separation-of-powers doctrine, whereas New Jersey has been more relaxed.³⁷⁶ In general, judiciaries in states with stricter separation-of-powers traditions may be more hesitant to expand the state-law right to counsel, in large part because those judges will anticipate the difficulties of making the other branches of state government fulfill and fund the right.

In sum, litigants should remember that they can vindicate their claims under state constitutions, perhaps with better chances of success than under the Federal Constitution.³⁷⁷

372. *State v. Young*, 863 N.W.2d 249, 278 (Iowa 2015).

373. Cf. SUTTON, *supra* note 12, at 17 ("Might the state courts of Utah and Rhode Island and Maryland construe a free exercise clause differently than other state courts given their histories?").

374. See, e.g., *State v. Woodruff*, 951 P.2d 605, 613 (N.M. 1997) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)).

375. See *Medina v. California*, 505 U.S. 437, 443 (1992).

376. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 15 & nn.37–38 (1998).

377. See SUTTON, *supra* note 12, at 8–10.

B. *Policy Arguments For and Against a Broader Right to Counsel than Scott Requires*

Of course, the courts are not the only government actors capable of regulating rights. On paper at least, state legislatures and rules committees have been significantly more important in expanding the right to appointed counsel than state courts. So how should policymakers decide whether to expand the entitlement to appointed counsel? This Part explores various arguments on both sides of the issue. Ultimately it is a close question, and there is no one-size-fits-all answer. Instead, a jurisdiction's optimal policy approach should depend on the specific characteristics of the state or locality.

1. *Policy Arguments in Favor of a Broader Right*

Gideon itself makes the primary argument for a broader constitutional right to counsel: fairness. In *Gideon*, Justice Black observed, “[t]hat government hires lawyers to prosecute . . . indicat[es] . . . that lawyers in criminal courts are necessities, not luxuries.”³⁷⁸ As one scholar observed, *Gideon*'s logic is not tethered to the seriousness of the offense; it seems to apply to all criminal trials.³⁷⁹ If the state elects to spend resources to criminally prosecute, the argument goes, fairness requires that it also furnish an indigent defendant with counsel.³⁸⁰ Relatedly, if rich defendants would hire a lawyer in misdemeanor cases, it may be unfair to withhold counsel from poor defendants.³⁸¹

But these arguments from fairness do not necessarily support the conclusion that the state should guarantee counsel in all criminal proceedings. In some jurisdictions, prosecutors are not always present to prosecute low-level criminal offenses. For example, a Pennsylvania trial judge estimated that the police stand in for the prosecutor in about 90 percent of the summary offense trials in his county.³⁸² Similarly, in Virginia, the police sometimes face off against uncounseled defendants in sus-

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

379. See Kitai, *supra* note 8, at 45.

380. See Marcus, *supra* note 8, at 161–62; Kitai, *supra* note 8, at 46.

381. Kitai, *supra* note 8, at 39 (“The principle of equality is violated when defendants who cannot afford counsel are exposed to a greater risk of an unreliable verdict than their affluent counterparts.”).

382. See Telephone Interview with Jonathan Birbeck, *supra* note 88.

pendent license prosecutions.³⁸³ Furthermore, misdemeanor trials are rare.³⁸⁴ And, as discussed below, it is not clear how much value a defense lawyer adds during misdemeanor plea bargaining.

Second, defense lawyers are arguably necessary to prevent inaccurate adjudications. The modern criminal trial, dominated by the public prosecutor, is complex. There is, for example, little hope that a layman will be able to understand the rules of evidence. Misdemeanor cases can produce complicated legal questions, despite their seemingly lower stakes, and having a defense lawyer in every case could produce more accurate adjudications.³⁸⁵ But judges can assist defendants in simple cases. For example, one Iowa magistrate judge explained that, before Iowa adopted the authorized imprisonment test, she would have to enforce the rules of evidence against the prosecution, because one cannot expect the defendant to understand the hearsay rule.³⁸⁶ As she put it, she “had to be careful to vindicate the rights of defendants when the defendant could not recognize them.”³⁸⁷

Third, criminal fines and forfeitures are burdensome criminal penalties, so appointing counsel is arguably necessary to protect defendants. At the center of Justice Rehnquist’s *Scott* analysis was the premise that incarceration is a far more serious punishment than criminal fines.³⁸⁸ But some scholars have argued to the contrary that criminal fines are more serious penalties than many believe.³⁸⁹ The problem for many poor defendants is that they cannot afford the fines, and that failure to pay them may result in additional fees and interest charges.³⁹⁰ It is also

383. See Telephone Interview with David Heilberg, *supra* note 77. But see Kitai, *supra* note 8, at 39 (“We can just imagine the possible damage to law enforcement if the presiding judge were authorized to ask the prosecutor to leave the court since the case is not complex and could be presented by the victim without wasting the prosecuting attorney’s time and money.”).

384. See King & Heise, *supra* note 89, at 1940.

385. See Roberts, *supra* note 8, at 303–06, 333.

386. Telephone Interview with Lynn Rose, *supra* note 101.

387. *Id.*

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

389. See Buskey & Lucas, *supra* note 8, at 2319–20.

390. See Katherine Beckett & Alexes Harris, *On cash and conviction: Monetary sanctions as misguided policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 516–17 (2011).

easy to imagine the abuse of forfeiture proceedings in these cases, especially in jurisdictions that do not limit civil forfeitures.

Fourth, in addition to the burden of fines and forfeitures, there are serious collateral consequences flowing from criminal convictions.³⁹¹ Possibly the most significant collateral consequence is that having a criminal conviction often creates serious problems for a person's ability to find or keep employment.³⁹² A misdemeanor conviction may preclude obtaining various types of professional licenses in areas like police work, nursing, or law.³⁹³ Further, because of internet-based databases of criminal records, employers can easily check to see if a job applicant has a criminal record.³⁹⁴ And, rightly or wrongly, employers often consider hiring applicants with criminal records relatively risky.

Although employment discrimination is the most frequent collateral consequence, there are others. For example, having a misdemeanor conviction can make it more difficult to gain admittance into schools and colleges.³⁹⁵ Further, a misdemeanor conviction can affect eligibility for public benefits, like public housing.³⁹⁶ Finally, a criminal conviction can cause particularly serious problems for noncitizens.³⁹⁷ Being convicted of a crime involving moral turpitude (CIMT) during the naturalization statutory period automatically renders an alien ineligible for naturalization if the maximum *possible* penalty for the offense

391. See, e.g., Natapoff, *supra* note 1, at 1323–27 (suggesting the collateral consequences transform the person into a criminal, and that “a significant psycho-social line has been crossed”).

392. See Marcus, *supra* note 8, at 173–75.

393. See *id.* at 174–75 (documenting various types of licenses that are harder to obtain because of a misdemeanor conviction).

394. See, e.g., *Instant Access to Pennsylvania State, County and Municipal Records*, PA. ST. RECORDS, <https://pennsylvania.staterecords.org> [<https://perma.cc/S9NS-BXKK>] (last visited Mar. 17, 2020) (allowing individuals to search for Pennsylvania criminal records); see also Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), <https://nyti.ms/1C8KVBq> [<https://perma.cc/4G8E-KF9T>].

395. Although the Common Application, which many students use to apply to college, recently stopped asking about criminal convictions, many schools still individually ask applicants if they have criminal records. See Scott Jaschik, *Common App Drops Criminal History Question*, INSIDE HIGHER ED (Aug. 13, 2018), <https://www.insidehighered.com/admissions/article/2018/08/13/common-application-drops-criminal-history-question-although-colleges> [<https://perma.cc/7J9L-5UTB>].

396. See Marcus, *supra* note 8, at 182–83.

397. For a thorough discussion, see Clapman, *supra* note 8, at 586–88.

was more than one year.³⁹⁸ Although most misdemeanors are not CIMTs, some can be, including petty theft, drug possession, and turnstile jumping, which can involve potential sentences of a year or more, thereby subjecting noncitizens to potential deportation.³⁹⁹ Moreover, the Board of Immigration Appeals has held that it will consider uncounseled convictions for immigration law purposes.⁴⁰⁰

Fifth, although the U.S. Supreme Court prohibits the States from directly imprisoning an uncounseled defendant, it allows them to do so indirectly by using uncounseled convictions to enhance sentences in subsequent cases.⁴⁰¹ Many state legislatures have authorized harsher prison sentences for repeat offenders.⁴⁰² Uncounseled misdemeanors can trigger these sentencing schemes, thus leading to more time in prison for subsequent convictions. For example, in *Nichols* itself, counting the uncounseled conviction increased the defendant's criminal history score by one point, thus causing his maximum possible sentence to increase by twenty-five months.⁴⁰³ Of course, states that do not offer more appointed counsel than *Scott* requires can limit the use of uncounseled misdemeanors under their sentencing schemes. Florida and North Dakota follow this approach.⁴⁰⁴

Sixth, appointing counsel in all criminal cases could deter states from prosecuting minor crimes. Many scholars have decried the trend toward overcriminalization in our society, arguing that it effectively gives the police and prosecutors a vast discretionary power that threatens rule-of-law principles.⁴⁰⁵ This trend extends to misdemeanors. In *Scott*, Justice Brennan

398. 8 U.S.C. § 1182(a)(2)(A) (2018).

399. See Cade, *supra* note 308, at 1754 (“Turnstile jumping, petty shoplifting, and misdemeanor marijuana possession, among many other low-level offenses, can trigger deportation, sometimes with almost no possibility of discretionary relief.”).

400. See *Matter of Cuellar-Gomez*, 25 I. & N. Dec. 850, 851–55 (B.I.A. 2012) (interim decision) (holding municipal marijuana violation constitutes conviction for immigration purposes where defendant was not afforded right to counsel or advised of potential immigration consequences).

401. See *supra* Part I.D.

402. See Lisa Eaton, *Three Strikes and You're Out: Enhanced Sentences for Repeat Offenders Research Pathfinder*, 22 LEGAL REFERENCE SERVICES Q., no. 4, 2003, at 55.

403. See *Nichols v. United States*, 511 U.S. 738, 740–41 (1994).

404. See *supra* Part II.B.6.

405. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506–09 (2001).

suggested that requiring the States to appoint counsel in a broader set of cases “would lead state and local governments to re-examine their criminal statutes [because they] might determine that [they] no longer desired to authorize incarceration for certain minor offenses in light of the expense of meeting the requirements of the Constitution.”⁴⁰⁶ Of course, whether courts should push for substantive criminal law reforms by manipulating procedure is controversial. But forcing the States to provide appointed lawyers in all misdemeanor cases would make prosecuting these cases less economically feasible, and some may see that as positive development.

2. Policy Arguments Against a Broader Right

There are persuasive arguments against expanding the right to appointed counsel. First, it would be expensive. As Justice Rehnquist noted in *Scott*, it may be difficult to estimate exactly what these costs would be, but they would be “necessarily substantial.”⁴⁰⁷ At the same time, state budgets are very limited—many are still recovering from the 2008 financial crisis⁴⁰⁸—and under significant pressure. Although some states have raised taxes, most have focused on spending cuts.⁴⁰⁹ This may help explain why some states have cut their indigent defense budgets.⁴¹⁰ Some states are failing to make budget appropriations.⁴¹¹ State budgets will likely be under even more pressure due to the COVID-19 outbreak across the country.

406. *Scott v. Illinois*, 440 U.S. 367, 388 (1979) (Brennan, J., dissenting).

407. *See id.* at 373 (majority opinion).

408. *See* Barb Rosewicz & Daniel Newman, *Tax Revenue Has Recovered in 31 States, Despite Flat Q3*, PEW CHARITABLE TR. (May 17, 2017), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2017/05/17/tax-revenue-has-recovered-in-31-states-despite-flat-q3> [<https://perma.cc/6A7N-9FP6>].

409. *See* Tracy Gordon, *State and Local Budgets and the Great Recession*, BROOKINGS (Dec. 31, 2012), <https://www.brookings.edu/articles/state-and-local-budgets-and-the-great-recession/> [<https://perma.cc/KE9P-SCAU>].

410. *See, e.g.*, ERINN HERBERMAN & TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, STATE GOVERNMENT INDIGENT DEFENSE EXPENDITURES, FY 2008–2012—UPDATED 1, 5 (2015), <https://www.bjs.gov/content/pub/pdf/sgide0812.pdf> [<https://perma.cc/KKR3-TSD7>].

411. *See, e.g.*, Matt Byrne, *State funding for court-appointed attorneys runs out*, PORTLAND PRESS HERALD (May 3, 2017), <http://www.pressherald.com/2017/05/03/state-funding-for-court-appointed-attorneys-runs-out/> [<https://perma.cc/8ELP-83J9>] (documenting the failure of the Maine Legislature to appropriate money for indigent defense so attorneys had to work without pay for two months).

Second, requiring the appointment of defense lawyers in low-level criminal cases could increase the time costs of all parties involved.⁴¹² Admittedly, there is compelling scholarship suggesting that defense lawyers actually accelerate the disposition of criminal cases by greasing the wheels of plea bargaining.⁴¹³ But lawyers are capable of clogging the system of justice, as Justice Powell argued in *Argersinger*.⁴¹⁴ Delays caused by lawyers may actually prejudice defendants, who have an interest in getting proceedings “over with.”⁴¹⁵ In Montgomery County, Pennsylvania, one judge explained that his “worst cases” are those where defendants bring lawyers in, because they slow things down and usually make bad arguments. Delaying adjudication is particularly bad for defendants unable to make bail because they must await trial in jail. In the meantime, they might lose their job and be unable to provide for their family.

Third, appointed lawyers may not be essential in a misdemeanor system dominated by plea bargaining. Trials are rare, with some estimating that 95 percent of misdemeanor defendants plead guilty.⁴¹⁶ Most defendants do not want to contest their guilt; they just want to get the process “over with” and move on with their lives.⁴¹⁷ This problem is aggravated if the court sets bail for an indigent defendant, who might be incentivized to plead guilty to get out of pretrial detention.⁴¹⁸ For the relatively few defendants who do not plead guilty at the first appearance, it is questionable how helpful appointed lawyers are in negotiating misdemeanor plea bargains. Because prosecutors are generally incentivized to secure quick convictions,⁴¹⁹

412. See, e.g., BARTON & BIBAS, *supra* note 8, at 108–09.

413. See MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 89–90 (1978).

414. *Argersinger v. Hamlin*, 407 U.S. 25, 58 (Powell, J., concurring in the result) (noting the “common tactic of counsel of exhausting every possible legal avenue, often without due regard to its probable payoff”).

415. See HEUMANN, *supra* note 413, at 89–90.

416. See, e.g., Bibas, *supra* note 306, at 1118. Of course, this will vary by jurisdiction. For example, one Iowa magistrate judge estimated that about 30 percent of summary offense defendants obtain trials in her county. Telephone Interview with Lynn Rose, *supra* note 101.

417. See BARTON & BIBAS, *supra* note 8, at 58.

418. See Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <https://nyti.ms/1IJKXjS> [<https://perma.cc/PZ98-VTES>].

419. See BARTON & BIBAS, *supra* note 8, at 86 (“Most prosecutors are interested in maximizing their conviction rates as efficiently as possible.”); HEUMANN, *supra*

they may offer generous terms (like low fines or credit for time served) to uncounseled defendants that are similar to what they would offer represented ones. This dynamic may extend even to retained lawyers. One Florida defense lawyer told me that prosecutors in Palm Beach County typically offer all misdemeanor defendants the same deals, regardless of whether they are represented.⁴²⁰ Admittedly, lawyers could theoretically be useful in these cases as advisors on the collateral consequences of guilty pleas.⁴²¹ As the former Chief Public Defender of Montgomery County, Pennsylvania, explained to me, “most criminal defendants don’t think about collateral consequences; they’re only concerned with the here and now.”⁴²² But lawyers are not the only actors that can tell defendants about collateral consequences; judges can too.

Fourth, lawyers may not be essential in the relatively small number of misdemeanor trials that do occur. Misdemeanor trials often play out differently than typical felony trials. They often resemble inquisitorial hearings, with the judge taking an active role in asking questions and helping enforce the rules against the prosecution.⁴²³ Moreover, in some states, prosecutors are usually not involved. For example, in Cumberland County, Pennsylvania, the police appear on the state’s side instead of a prosecutor in about 90 percent of summary offense trials.⁴²⁴ And although anti-*Scott* scholars have correctly observed that some misdemeanor cases involve complex substantive or procedural issues,⁴²⁵ certain types of offenses make for straightforward adjudications. For example, in prosecutions for driving with a suspended license, the prosecution will usually

note 413, at 103 (“If it is a nonserious matter, [prosecutors] are amenable to defense requests for a small fine in the circuit court . . .”).

420. Interview with Scott Richardson, *supra* note 94.

421. See Buskey & Lucas, *supra* note 8, at 2318 (“Left alone to negotiate with the prosecutor, the defendant has no way of knowing that the prosecutor’s seemingly generous offer of no jail time may prove ruinous.”).

422. Telephone Interview with Dean Beer, Chief Pub. Def., retired, Montgomery County, Pennsylvania (Mar. 7, 2019).

423. See Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1290 (2013).

424. See, e.g., Telephone Interview with Jonathan Birbeck, *supra* note 88.

425. See Kitai, *supra* note 8, at 45 (“The prospective penalty makes no substantial difference regarding the complexity of the trial.”).

not struggle to prove its case because it can rely on databases.⁴²⁶ And the defendant may also be able to effectively defend herself by disputing the prosecutor's attempt to prove the actus reus of a simple offense.⁴²⁷

Professor Erica Hashimoto considers empirical evidence on this issue and concludes that the "empirical evidence currently available supports the proposition that lawyers who are appointed in federal misdemeanor cases provide no significant advantage to their clients."⁴²⁸ Quite the contrary: she finds that pro se defendants were convicted at lower rates and got better sentencing outcomes by statistically significant margins.⁴²⁹ Although most of Professor Hashimoto's data comes from the federal system, she concludes that the limited state court data suggests "the outcomes of pro se defendants in state court may actually be better—rather than worse—than the outcomes of their federal counterparts."⁴³⁰ In the end, Professor Hashimoto's empirics are a good reminder that more lawyers do not guarantee more justice.

Fifth, it does not make sense to expand the right to counsel in jurisdictions that are not meeting their existing constitutional obligations. As discussed in Part II.D, many jurisdictions across the country are consistently failing to provide effective counsel, or any counsel, in a broad variety of cases. This is reflected in the failure of the States to fund the right to appointed counsel. Nationwide, between 1982 and 2005, the States increased their collective allocation for indigent defense from one billion dollars to three and a half billion dollars, a 75 percent increase after adjusting for inflation.⁴³¹ Simultaneously, the total number of cases where indigent defense is legally required has doubled or

426. See Natapoff, *supra* note 1, at 1348 ("Driving on suspended license charges are presumably triggered by the existence of DMV records.").

427. Cf. Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 482–83 (1992) (arguing that the adversarial trial system often incentivizes the defendant not to testify even though she may be "the most important witness in the case").

428. See Hashimoto, *supra* note 8, at 489.

429. *Id.* at 490–91.

430. *Id.* at 495.

431. *Id.* at 485–86.

tripled.⁴³² In short, “[I]ndigent defense budgets nationwide have not come close to keeping pace with the caseload increases”⁴³³

For states that are not meeting their federal constitutional obligations to appoint counsel in more serious cases, it makes little sense to advocate for a broader right to counsel. If felony defendants, or even capital defendants, cannot receive adequate representation,⁴³⁴ jurisdictions should prioritize those problems rather than allocating money to fund appointed counsel for minor misdemeanor cases. As Professor Hashimoto argues, “In a world of limited indigent defense resources, states must make a choice: They can provide minimal representation to all indigent defendants, or they can deny counsel to defendants facing low-level misdemeanor charges and focus those resources on the representation of defendants facing charges of the greatest severity.”⁴³⁵ Every intake nurse who has ever had to triage at a hospital understands that the latter option might make more sense.

Sixth, mandating a broader right to counsel denies the States flexibility to cater to their varying geographical needs. Justice Brennan’s *Scott* dissent did not acknowledge this difficulty. For him, Justice Rehnquist’s concern about imposing costs on the States was not significant because “public defender systems have proved economically feasible, and the establishment of such systems to replace appointment of private attorneys can keep costs at acceptable levels even when the number of cases requiring appointment of counsel increases dramatically.”⁴³⁶

But the public defender model is more realistic for cities, which have large enough volumes of cases to enable economies of scale. In contrast, it would be difficult for rural states and localities to adapt, because they would likely have to rely on appointments of private practitioners and at rates close enough

432. *Id.* at 484–85.

433. *Id.* at 485.

434. 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, 1836 (1994) (describing the lack of effective lawyering for poor capital defendants).

435. See Hashimoto, *supra* note 8, at 513; see also BARTON & BIBAS, *supra* note 8, at 11 (“America will never be able to offer every criminal defendant facing any amount of jail time a criminal defense lawyer equal to what the wealthy can afford. But we can focus our effort on the cases that so desperately need our attention and care: serious felonies.”).

436. See *Scott v. Illinois*, 440 U.S. 367, 385 (1979) (Brennan, J., dissenting).

to what a lawyer could earn in private practice to ensure people are willing to serve.⁴³⁷ Indeed, this is how Iowa decided to provide counsel for low-level criminal defendants after the Iowa Supreme Court adopted the authorized imprisonment test. Although estimating costs is difficult, an Iowa judge told me that at least one town attempted to circumvent the ruling by reclassifying several offenses as fine-only offenses, and that magistrate judges in some rural counties were not informing low-level defendants about their right to counsel. Relatedly, in the legislative debates on whether to expand the scope of the right to counsel in Colorado, one individual testifying against the bill, a lawyer for a rural Colorado town, argued that the bill would disproportionately affect rural jurisdictions.⁴³⁸ Similarly, an Ohio judge told me that the rural counties are less likely to appoint counsel in misdemeanor cases because of cost.⁴³⁹

Seventh, and counterintuitively, not requiring jurisdictions to appoint counsel in low-level misdemeanor cases may actually be better for defendants because it incentivizes the States not to impose harsher penalties for minor offenses. As discussed above, mandating the appointment of counsel for all criminal cases may deter jurisdictions from enforcing low-level offenses. It just might not be worth it for a state to devote taxpayer dollars to punishing minor crimes. But low-level crimes exist for a reason, so jurisdictions will want to enforce them, even if mandatory appointment of counsel in all cases made it more expensive. As one Florida judge explained, she uses her discretion under Florida law to appoint counsel (rather than certify that imprisonment will not be imposed to avoid the necessity of appointing counsel) because she wants to preserve the option to punish the defendant with jail time.⁴⁴⁰ Thus, the legislature could just increase the penalties available under the relevant statutes.

By not forcing jurisdictions to pay for defense lawyers in minor cases, one might be giving the States room to enforce low-level statutes in a gentle and sensible way. The status quo may en-

437. Although judges can compel practitioners to serve, rates must be high enough to avoid unconstitutional takings. *See, e.g., State v. Lynch*, 796 P.2d 1150, 1163 (Okla. 1990).

438. *See supra* note 250 and accompanying text.

439. Telephone Interview with Richard Frye, *supra* note 95.

440. Telephone Interview with Meredith Charbula, *supra* note 203.

courage mercy. Statistical evidence in Texas suggests that, in 2018, charges were dismissed in over 40 percent of the misdemeanor cases where defendants were not entitled to counsel.⁴⁴¹ In Norristown, Pennsylvania, I observed one judge dismiss most of his criminal docket in a morning, explaining that it is enough that the defendants “came in and took responsibility for their actions.” As another example, in Virginia, the prosecution routinely takes prison off the table for defendants charged with driving with a suspended license.⁴⁴² The motivation for this move, according to one local defense lawyer, is to facilitate the easier and quicker disposition of these cases, usually involving the payment of some sort of fine.⁴⁴³ Additionally, a Pennsylvania trial judge explained to me that counsel is rarely appointed in summary offense cases because judges generally issue minor fines, often far below the \$300 maximum.⁴⁴⁴ Several scholars have also documented how the States are incentivized to transform jailable offenses into finable ones to save money.⁴⁴⁵ By denying lawyers to low-level offenders, the States might provide quicker, cheaper, and gentler justice.

3. *Assessment*

In summary, there are strong policy arguments both for and against a broader right to appointed counsel. On the one hand, it is difficult to endorse a system where prosecutors routinely face off against uncounseled defendants. In such instances, the fairness argument made in *Gideon* seems strong. If the state is willing to pay to prosecute such offenses, perhaps it should pay for a defense lawyer. Moreover, the individual faces sub-

441. In 2018, Texas had around 1.1 million non-traffic misdemeanor cases in the justice and municipal courts where the defendant could only be punished by fine, and thus was not entitled to appointed counsel. See OFFICE OF COURT ADMIN., *supra* note 7, at Court-Level 42, 50. About 40 percent of these cases were terminated by dismissals. *Id.* at Court-Level 43, 51.

442. Telephone Interview with David Heilberg, *supra* note 77.

443. See *id.*

444. Telephone Interview with Albert Masland, *supra* note 88 (explaining how judges in Cumberland County often issue fines of around \$25 or \$50 to cut poor defendants some slack).

445. See Brown, *supra* note 176, at 7; Natapoff, *supra* note 111, at 1058 (“[E]liminating incarceration for misdemeanors looks like a kind of win-win: it relieves defendants of the threat of imprisonment while saving the state millions of dollars in defense, prosecution, and jail costs.”).

stantial consequences if convicted, both direct and collateral. We can rightly worry that an innocent person could be convicted.

On the other hand, guaranteeing counsel in all criminal cases could be costly and potentially ineffective. Many of these cases are factually straightforward and rarely go to trial. Expanding the right may mean little more than paying a lawyer to spend a few minutes with an arrestee to advise her to take a canned plea deal the prosecutor would probably be willing to offer anyway. The only truly empirical article on this subject suggests the States should hesitate. As Professor Hashimoto summarizes: "Although it may appear that denying counsel to some misdemeanor defendants will prejudice their interests, empirical evidence suggests that counsel in misdemeanor cases do not typically provide significant benefits to many of their clients."⁴⁴⁶

As the above discussion indicates, there is no universal answer in this policy debate.⁴⁴⁷ And these "universal" considerations may not matter as much as jurisdiction-specific ones. In other words, whether more counsel should be guaranteed should likely vary by state, and even within states. Two factors seem particularly relevant.

First, is the jurisdiction failing to provide effective counsel, or any counsel, in cases where the Supreme Court has held it is required? If so, it makes little sense to recognize a broader right. The right would be meaningless and make a mockery of the law. Although Part II.D has emphasized the jurisdictions that do not meet their legal obligations, it is worth remembering that some jurisdictions *do* consistently provide counsel when required to.⁴⁴⁸ For example, a prominent defense attorney insisted that Philadelphia consistently provides effective defense lawyers in all criminal cases.⁴⁴⁹ It makes more sense for jurisdictions like these to expand the right to counsel.

Second, a jurisdiction's geographical character may be essential. In general, urban jurisdictions can more easily offer a

446. See Hashimoto, *supra* note 8, at 463.

447. *Contra* Kitai, *supra* note 8, at 49 (arguing that it is "virtually impossible to produce any principled competing interests" against requiring the appointment of counsel in all criminal cases).

448. For example, an Iowa magistrate judge opined that, at least in her county, lawyers are consistently appointed when they are supposed to be, and that the quality of representation is pretty good. Telephone Interview with Lynn Rose, *supra* note 101.

449. Interview with David Rudovsky, *supra* note 294.

broader right to appointed counsel because economies of scale are more feasible in large cities than in rural areas. Wyoming would face a heavier burden in guaranteeing counsel in all criminal cases than Rhode Island. There will also be variation within states. For example, an Iowa magistrate judge explained to me that the relatively urban counties around Des Moines and Iowa City have more easily handled the broader right to appointed counsel mandated by the Iowa Supreme Court than the rural counties.⁴⁵⁰ A similar dynamic plays out in Ohio.⁴⁵¹

Of course, there are an infinite variety of factors that will influence a jurisdiction's optimal policy outcome. Voters in one jurisdiction might have different preferences than those in another. Policymakers might want to focus more on healthcare or infrastructure in some jurisdictions. The bar association in one jurisdiction could be stronger than in another. This Article cannot enumerate all the variables. The point is that there is no one-size-fits-all solution. Allowing states and localities to experiment with different approaches will allow policymakers to account for their jurisdiction's specific needs. This experimentation is one of the great benefits of federalism.⁴⁵²

IV. HOW A BETTER FEDERALISM IS ESSENTIAL TO FIXING MISDEMEANOR JUSTICE

Federalism is essential to building a better misdemeanor indigent defense system. The surface-level point made clear by Part II is that we should not assume the States will be less generous than the U.S. Supreme Court in protecting the rights of criminal defendants. Part IV.A emphasizes this point: the scope of appointed counsel in misdemeanor cases is, on paper, a federalism success story. But Part IV.B suggests the reality is more complicated. Our misdemeanor justice system, including indigent defense, is broken in many jurisdictions across the United States.

Moreover, our academic discourse is stuck in a rut, with most scholars arguing that the status quo is a "travesty, and demand[ing] that courts or legislatures spend more money on

450. Telephone Interview with Lynn Rose, *supra* note 101.

451. Telephone Interview with Richard Frye, *supra* note 95.

452. See McConnell, *supra* note 355, at 1494.

individual lawyers for individual cases.”⁴⁵³ Scholars also consistently demand that the Supreme Court force the States to honor a broader right to counsel. Part IV.C therefore seeks to reorient the conversation away from the Supreme Court and the assumption that we should be trying to perfect the adversarial system in misdemeanor cases. Instead, it suggests that the States should use the room given to them by *Scott* to act as laboratories of democracy. In particular, the States should consider experimenting with three non-adversarial models: declination, diversion, and inquisitorial prosecution. Finally, Part IV.D acknowledges the barrier of inertia, arguing our criminal justice system desperately needs a better federalism.

A. *A Federalist Success Story on Paper*

There is an oft-repeated narrative that the States cannot be trusted to protect individual rights, and that the Supreme Court must therefore occupy the field if justice is to be done. As Judge Sutton put it: “Convention suggests that only life-tenured federal judges, not elected state court judges, only the national government, not the States, can be trusted to enforce constitutional rights.”⁴⁵⁴ Anthony Lewis, who told the story of Gideon and the Supreme Court’s right-to-counsel revolution in *Gideon’s Trumpet*, apparently believed this.⁴⁵⁵

That standard account has not played out in the right-to-counsel context. As discussed in Part III.B, thirty-four states voluntarily provide more protection than the Supreme Court required in *Scott*. Even among the sixteen less protective states, there is a diversity of procedural mechanisms that give judges discretion to appoint counsel. This flexibility also allows judges to decline to appoint counsel in cases where it makes sense, like Virginia typically does in suspended license cases.

Additionally, there is no clear correlation between a state’s approach to this issue and the state’s general political leanings. Some conservative states, like Indiana and Texas, provide broader protection than federally required. In contrast, some progressive states, like Illinois and Connecticut, have elected not to guarantee more protection than required by *Scott*.

453. See BARTON & BIBAS, *supra* note 8, at 7.

454. See SUTTON, *supra* note 12, at 203.

455. See LEWIS, *supra* note 13, at 211–12.

At first glance, this diversity of approaches is cause for celebration. States have different characteristics that should affect their decisions. It may be easier for urban jurisdictions to offer an expanded entitlement than rural ones. It makes more sense for states that have functioning right-to-counsel systems to offer expanded entitlements than for states which already have a rotten reputation in this area. There are many variables that could lead states and localities to different results.

This Article thus provides partial reinforcement for Judge Sutton's argument that we should place more trust in the States to protect individual rights. This area of the law, like those covered in Judge Sutton's book, "provide[s] a healthy counterweight to the received wisdom" that is hostile to empowering the States.⁴⁵⁶

B. *Hold the Applause*

But this Article does not celebrate the status quo. Our misdemeanor justice system is failing. As discussed in Part II.D, many states and localities are consistently failing to meet their constitutional obligations. Accounts of routine failures to provide *any* counsel in some jurisdictions abound. Further, scholars and practitioners have documented that states use a variety of mechanisms, like indigence determination and waivers, to legally cut down on the need to appoint counsel.⁴⁵⁷ And even when states spend the money to appoint counsel, it is not clear how much good that is doing. Because defense lawyers in many jurisdictions face crushing workloads, there has been a mass movement toward plea bargaining. Reports of "meet 'em and plead 'em" lawyering are now common, particularly in misdemeanor cases.⁴⁵⁸ And for the few misdemeanor cases that do go to trial, our system is plagued by complaints of ineffective assistance of counsel. Anecdotal accounts of defense lawyers being "asleep, drunk, unprepared, or unknowledgeable"

456. See SUTTON, *supra* note 12, at 204.

457. For example, judges in Virginia allegedly push defendants to waive their right to appointed counsel quite frequently. See, e.g., Telephone Interview with David Heilberg, *supra* note 77. Of course, defendants may have good incentives to waive counsel, especially because many states charge even indigent defendants fees and try to recoup costs. See Telephone Interview with Edward Hogshire, Judge, Charlottesville Circuit Court (Feb. 26, 2019).

458. See BARTON & BIBAS, *supra* note 8, at 28 (discussing this problem); Hashimoto, *supra* note 8, at 473–74 (discussing the extent of the problem).

abound.⁴⁵⁹ The system is failing, creating a grave risk that millions of Americans every year will confront an inefficient, intimidating, frustratingly bureaucratic, and inaccurate system of misdemeanor justice.

Additionally, our discourse on how to fix these problems is “stuck in a *Groundhog Day* loop.”⁴⁶⁰ The vast majority of scholars writing about misdemeanor justice argues that the Supreme Court should overrule *Scott* and require appointed counsel in all criminal cases.⁴⁶¹ As for existing unfunded mandates, a chorus of scholars has demanded that states and localities provide more money for indigent defense to make our promised adversarial system a reality.⁴⁶² In tandem, a group of devoted advocates has brought systemic litigation throughout the country seeking court orders for more allocations of resources.⁴⁶³ In other words, the stereotypical solution is: more money, more lawyers, more justice.⁴⁶⁴ All of these accounts focus on perfecting our adversarial system, on making *Gideon* a reality in all criminal cases.

Even if the Supreme Court did overrule *Scott*, there are reasons to be cynical that it would make any difference. It is easy to say states should allocate more money to indigent defense, and much harder to actually lobby a state legislature to make it happen. The massive number of misdemeanors processed every year would require funds unlikely to be allocated.⁴⁶⁵ And it would also require a herculean effort from judges, prosecutors,

459. See, e.g., Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1.

460. See BARTON & BIBAS, *supra* note 8, at 7.

461. See *supra* note 8.

462. For a particularly thoughtful example of an article falling into this category, see Backus & Marcus, *supra* note 293. Professors Mary Sue Backus and Paul Marcus argue that “drastic underfunding” was and is “a root cause of the intractable problems plaguing the patchwork of state indigent defense systems in the United States.” *Id.* at 1578–80.

463. See, e.g., *Kuren v. Luzerne County*, 146 A.3d 715, 723–25 (Pa. 2016).

464. Cf. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 968 (2012) (“If appointing some lawyers is good, then appointing more lawyers must be better. At least that seems to be the logic of the civil *Gideon* movement . . .”).

465. See, e.g., Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1158 (2004) (“American lower criminal courts have long been structurally incapable of adjudicating legal and factual disputes in the vast majority of the cases that come before them.”).

and defense lawyers, all of whom are incentivized to quickly dispose of misdemeanor cases.⁴⁶⁶ Rather than make that effort, it seems more likely that all three groups would push for more waivers of the right to counsel, something that is already used to circumvent the Supreme Court's requirements.⁴⁶⁷

Some advocates are trying to improve misdemeanor justice through systemic litigation, but problems plague these efforts. Such suits are difficult to bring because "they can be incredibly protracted and expensive."⁴⁶⁸ Because it is challenging to litigate highly individualized claims of ineffective assistance of counsel via aggregate litigation, mass or class actions are only viable in those states and localities where counsel is routinely denied altogether.⁴⁶⁹ Standing doctrines may stand in the way as well. These lawsuits are hard to win, and even if litigants are successful, it is not clear how much relief they will get for their efforts.

Louisiana illuminates the problem. In 1966, Louisiana established its public defender system, relying primarily on local funding and oversight.⁴⁷⁰ In 1993, the Louisiana Supreme Court rebuked the funding system, established a presumption of ineffective assistance of counsel in part of New Orleans, and threatened to take more intrusive measures if the legislature did not act.⁴⁷¹ When the legislature did not act quickly, in 1994,

466. See HEUMANN, *supra* note 413, at 38.

467. For example, some states have figured out how to effectively issue suspended sentences without appointing counsel. One Florida prosecutor explained to me that the most common sentence for an uncounseled defendant who pleads guilty to his first DUI is a probationary sentence, with jail risked if the defendant violates the probation terms. See Telephone Interview with L.E. Hutton, *supra* note 93. The reason this practice does not violate *Shelton* is because judges ensure that defendants waive their right to counsel, thus preventing a constitutional problem if the defendant is later imprisoned for violating the probation conditions. See *id.*

468. See Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 449 (2009).

469. See, e.g., *Hurrell-Harring v. State*, 930 N.E.2d 217, 221 (N.Y. 2010) ("[E]ffective assistance is a judicial construct designed to do no more than protect an individual defendant's right to fair adjudication; it is not a concept capable of expansive application to remediate systemic deficiencies.").

470. ANDREA M. MARSH, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, STATE OF CRISIS: CHRONIC NEGLECT AND UNDERFUNDING FOR LOUISIANA'S PUBLIC DEFENSE SYSTEM 9 (2017), <https://www.nacdl.org/getattachment/dfc14b97-099b-45d6-89e6-d7e9b652feac/state-of-crisis-chronic-neglect-and-underfunding-for-louisiana-s-public-defense-system-report-final.pdf> [[https://perma.cc/8N\]6-V2XB](https://perma.cc/8N]6-V2XB)].

471. *Id.* at 10; *State v. Peart*, 621 So. 2d 780, 783 (La. 1993).

the Louisiana Supreme Court ordered the creation of the Louisiana Indigent Defense Assistance Board.⁴⁷² Although the legislature begrudgingly codified the Board, it only allocated five million dollars to it, even though twenty million were needed.⁴⁷³ In 2005, the Louisiana Supreme Court again rebuked the legislature, threatened to halt prosecutions and called for reform.⁴⁷⁴ In 2007, the legislature authorized a new public defense board and authorized more funding.⁴⁷⁵ But by 2010, twenty-eight of Louisiana's forty-two defender offices were financially underwater.⁴⁷⁶ Even after dramatic cost-cutting measures and serious layoffs, Louisiana's defender offices were still running a collective deficit of three million dollars in 2015.⁴⁷⁷ By 2016, thirty-three out of forty-two defender officers had formally begun restricting services.⁴⁷⁸ In response, Louisiana judges continued to scold the legislature, began forcing private attorneys to represent defendants, and forced large numbers of defendants to wait in pretrial detention until counsel could be appointed.⁴⁷⁹ The crisis is ongoing.

The Louisiana story should not be that surprising. The courts have limited power within state governments. Separation-of-powers doctrines in various states will limit what courts can order legislatures to do. And even if there are not formal limits, judges will hesitate to wade into the appropriations process. Indeed, these separation-of-powers limitations have repeatedly frustrated attempts by courts to enforce positive state-law rights.⁴⁸⁰ And although judges could take more drastic steps like halting prosecutions, they will likely hesitate to do so, particularly if they are elected by voters, many of whom dislike "soft on crime" judges.

In light of these practical considerations, we should stop to question whether right-to-counsel advocates are supporting the right goals. The allure of the *Gideon* vision is undeniable. We

472. MARSH, *supra* note 470, at 10.

473. *Id.* at 11.

474. *See* State v. Citizen, 898 So. 2d 325, 336–39 (La. 2005).

475. MARSH, *supra* note 470, at 11–12.

476. *Id.* at 14.

477. *See id.* at 16.

478. *Id.*

479. *See id.* at 17.

480. *See* SUTTON, *supra* note 12, at 32–35.

would undoubtedly do great justice if we provided effective counsel and an effective adversarial system in all cases, often including a jury trial. On paper, the “accused has every advantage” in the American criminal justice system.⁴⁸¹ But this vision is not real in many parts of the country. In a large percentage of cases, for legal and illegal reasons, no counsel is provided. In the vast majority of cases, there is no real adversarial system.

C. *Pursuing New Ideas Within Our Federalist System*

So maybe we should rethink the adversarial system, at least in some cases. This Part proposes, but does not endorse, alternatives to the adversarial system for low-level crimes. None of them involve the appointment of counsel. This list is not exhaustive, and some scholars have proposed other interesting ideas.⁴⁸² My ambition is not to endorse any single approach, but to highlight the necessity of new ideas and the importance of using our federalist system to try them out. Federalism could help break the current “*Groundhog Day* loop” of rehashing the same arguments about the right to counsel.

1. *Non-Prosecution or Reclassification*

Some jurisdictions could simply decriminalize or stop enforcing low-level crimes. Indeed, several scholars have argued for decriminalization.⁴⁸³ This approach would have several advantages.

First, non-prosecution of low-level offenses allows law enforcement to prioritize more serious offenses. Especially in urban jurisdictions, which are rightly focused on punishing felons, it may not be feasible for the police to vigorously enforce all mis-

481. See *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (Hand, J.).

482. See, e.g., BARTON & BIBAS, *supra* note 8, at 110–37 (offering several interesting ideas, including the use of online dispute resolution and non-lawyer mediation to quickly resolve some low-level cases); Natapoff, *supra* note 1, at 1372–74 (suggesting we raise the evidentiary standard for police to arrest suspects for low-level crimes); John Rappaport, *Criminal Justice, Inc.*, 118 COLUM. L. REV. 2251 (2018) (suggesting the conditions under which it may make sense to delegate criminal justice in certain cases to a privately run system that imposes penalties on violators).

483. See, e.g., Kitai, *supra* note 8, at 57; Lucas, *supra* note 8, at 109.

demeanor laws.⁴⁸⁴ For example, California reclassified low-level drug possession as a civil offense rather than a criminal one.⁴⁸⁵ As then-Governor Arnold Schwarzenegger explained, “In 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.”⁴⁸⁶

Second, it may not be efficient for the States to enforce these low-level offenses. Prosecutors are unlikely to seek prison sentences in many of these cases. For the few that go to trial, one can question whether it is efficient for the state to pay a prosecutor, judge, and perhaps a defense lawyer for at least several hours of time to secure a small fine that provides little deterrence. As one Pennsylvania trial judge bluntly put it, “you can’t usually justify the cost of trial for minor offenses like public intoxication.”⁴⁸⁷ Similarly, Professor Milton Heumann documented that most judges, prosecutors, and defense lawyers feel that these cases are “not worth extensive time in trial or even in plea negotiations.”⁴⁸⁸ Professor Robert Boruchowitz has estimated that the States could save billions per year by reclassifying some misdemeanors as civil infractions.⁴⁸⁹

Third, there may be better ways to enforce these low-level offenses than criminal prosecution. Professor David Rudovsky, for example, suggests that we treat low-level offenses more like traffic offenses.⁴⁹⁰ At a recent hearing on the subject, Senate

484. See, e.g., Memorandum from Kenneth P. Thompson, Dist. Attorney, Kings County, New York, to District Attorney’s Office for King’s County, New York, Policy Regarding the Prosecution of Low-Level Possession of Marijuana Cases 1–2 (July 8, 2014), <http://nylawyer.nylj.com/adgifs/decisions14/070914policy.pdf> [https://perma.cc/7MP2-82D2] (announcing a general policy of non-prosecution for marijuana possession to ensure, in part “the limited resources of this Office are allocated in a manner that most enhances public safety”).

485. Act of Sept. 30, 2010, ch. 708, 2010 Cal. Stat. 3994.

486. See Letter from Arnold Schwarzenegger, Governor, California, to Members, Cal. State Senate (Sept. 30, 2010), <http://www.salem-news.com/articles/october012010/schwarzenegger-marijuana.php> [https://perma.cc/8AX6-5A4F].

487. See Telephone Interview with Albert Masland, *supra* note 88.

488. See HEUMANN, *supra* note 413, at 38.

489. See *Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) [hereinafter *Misdemeanor Hearing*] (statement of Robert C. Boruchowitz, Professor, Seattle University School of Law), <https://www.judiciary.senate.gov/imo/media/doc/05-13-15%20Boruchowitz%20Testimony.pdf> [https://perma.cc/EBP2-JQ4R].

490. See Interview with David Rudovsky, *supra* note 294.

Judiciary Committee Chairman Chuck Grassley made a similar suggestion.⁴⁹¹ You would get a ticket, but the offenses would not be deemed criminal. It is worth acknowledging that the police already enforce some low-level public order offenses by means other than criminal prosecution. The classic example is drunk and disorderly conduct. The police rarely enforce it. And if someone is particularly obnoxious, the police are more likely to hold the person in jail over night until he sobers up than to charge him with an offense.⁴⁹²

One counterargument lies in broken windows policing theory. In brief, that theory suggests that failure to curb disorder and low-level crimes will result in the proliferation of more serious crimes.⁴⁹³ As James Wilson and George Kelling put it in their famous article: “[A]t the community level, disorder and crime are usually inextricably linked, in a kind of developmental sequence. Social psychologists and police officers tend to agree that if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken.”⁴⁹⁴

Broken windows theory has proven both very influential and very controversial.⁴⁹⁵ This Article does not express either agreement or disagreement with it. But to the extent that the theory is persuasive, it counsels against a systemic refusal to enforce public order laws.

Furthermore, the public may have a strong interest in seeing low-level offenses enforced. Philadelphia’s decision not to prosecute petty larceny has earned severe criticism, as it arguably puts shop owners at the mercy of petty thieves.⁴⁹⁶ Shoplifting

491. See *Misdemeanor Hearing*, *supra* note 489 (statement of Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary), <https://www.judiciary.senate.gov/imo/media/doc/05-13-15%20Grassley%20Statement1.pdf> [<https://perma.cc/7MP6-BHPF>].

492. See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457, 476 (2000) (finding that many order maintenance arrests resulted in a night in jail and then release).

493. See George L. Kelling & James Q. Wilson, *Broken Windows: The police and neighborhood safety*, *ATLANTIC MONTHLY*, Mar. 1982, at 29.

494. *Id.*

495. See, e.g., Nick Malinowski, *Useful or Not, Broken Windows Policing Remains Morally Indefensible*, *HUFFINGTON POST* (Dec. 6, 2017), https://www.huffingtonpost.com/nick-malinowski/useful-or-not-broken-wind_b_10742902.html [<https://perma.cc/47EN-SK7B>].

496. See Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, *N.Y. TIMES MAG.* (Oct. 30, 2018), <https://nyti.ms/2CPjBOP> [<https://perma.cc/5KJ2-DPJ6>] (“[P]rosecutors were instructed to handle

has been called the “nation’s most expensive crime,”⁴⁹⁷ and retailers’ losses from shoplifting were around eighteen billion dollars nationwide in 2016.⁴⁹⁸ Even with something that sounds relatively harmless, like drunk and disorderly conduct, parents might not want to raise children in a neighborhood where obnoxious drunks are given free rein to wander the streets at night.

2. *Diversion*

A second option is to offer low-level offenders diversion agreements. Agreements can be reached either before filing criminal charges (a deferred charge agreement) or after (a deferred prosecution agreement). Under such terms, a defendant would not be brought to trial if he complied with the terms of the agreement. Such terms could include a commitment not to commit any more crimes, restitution, or community service.

Of course, diversion is common in many jurisdictions, and it is used in at least 9 percent of criminal cases.⁴⁹⁹ It is often used for drug offenses, and successful completion of a rehabilitation program is often required by diversion agreements.⁵⁰⁰ In that context, diversion agreements are seen as particularly promising because the system hopes to prevent future crime by helping people stop using drugs. It is not clear whether diversion offers similar benefits for, say, petty larceny offenders. Diversion would not “cure” offenders. And it is questionable whether it would deter the commission of future offenses, because it

any retail theft with a value of less than \$500 with a citation, the lowest possible offense under Pennsylvania law.”).

497. See Susan Konig, *Helping Shoplifters to Reform*, N.Y. TIMES (Sept. 29, 1996), <https://nyti.ms/3bOznIr> [<https://perma.cc/T42W-7MZK>].

498. See RICHARD HOLLINGER, NAT’L RETAIL FED’N, 2017 NATIONAL RETAIL SECURITY SURVEY 6, 8 (2017), <https://cdn.nrf.com/sites/default/files/2018-10/NRSS-Industry-Research-Survey-2017.pdf> [<https://perma.cc/MU4A-UUQ8>] (stating inventory shrinkage accounts for \$48.9 billion, of which shoplifting is accountable for 36 percent).

499. ACLU KANSAS, CHOOSING INCARCERATION: KANSAS PROSECUTORS’ REFUSAL TO USE DIVERSION AND THE COST TO COMMUNITIES 8–9 (2018), https://www.aclukansas.org/sites/default/files/field_documents/choosing_incarceration_-_aclu_report_on_diversion_in_kansas_-_updated_january_2018_0.pdf [<https://perma.cc/NF2D-PPHE>].

500. See CTR. FOR PRISON REFORM, DIVERSION PROGRAMS IN AMERICA’S CRIMINAL JUSTICE SYSTEM 5–6 (2015), <https://centerforprisonreform.org/wp-content/uploads/2015/09/Jail-Diversion-Programs-in-America.pdf> [<https://perma.cc/K4CF-FSLH>].

may be impracticable for law enforcement to monitor compliance with such agreements. Undoubtedly, most misdemeanors go undetected.

However, states could use diversion agreements to impose noncriminal punishments on offenders. Florida, for example, offers deferred prosecution for many of its misdemeanors (including some traffic offenses), whereby defendants attend classes, pay restitution, and do community service.⁵⁰¹ Seen that way (and not relying on rehabilitation), this option could make sense for some jurisdictions. The state is spared the expenses of prosecution. The defendant benefits by being spared the stigma and collateral consequences of a criminal conviction. At the same time, this option dodges the most serious objections against the previous option: it does not abdicate enforcement of low-level criminal offenses.

3. *An Inquisitorial System*

Unlike the previous two suggestions, this third proposal keeps criminal convictions, but without a traditional adversarial process. Instead, some states should consider experimenting with an inquisitorial system.

Inquisitorial legal systems exist throughout the world. In fact, they are far more common than adversarial ones.⁵⁰² In brief, inquisitorial systems rely more heavily on judges to develop the factual record than adversarial ones. In inquisitorial proceedings, judges develop the record by interrogating the involved parties.⁵⁰³ Although lawyers can certainly play a role, that role is less important than in an adversarial system.

In American legal discourse, the inquisitorial system has long been considered heretical. Ever since abuses by the judges of the Stuart kings in seventeenth century England, the Anglo-American system has distrusted inquisitorial processes.⁵⁰⁴ The

501. Telephone Interview with L.E. Hutton, *supra* note 93.

502. BARTON & BIBAS, *supra* note 8, at 152 (“Most courts in the world, including virtually all of the courts in continental Europe and most of the courts in Asia, South America, and Africa, run on an inquisitorial system.”).

503. *Id.* at 151.

504. See Langbein, *supra* note 339, at 269. Although the jury was undoubtedly a powerful institution in early American history, it is worth acknowledging that some evidence points to broad judicial power in certain instances. See, e.g., Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 213–14 (2000) (describing the common practices of judges

Founders also distrusted judges because of their association with the English colonial administration.⁵⁰⁵ To counter judicial power, our Constitution enshrines the right to a jury trial both in Article III and the Sixth Amendment.⁵⁰⁶ Indeed, it is the only constitutional right enshrined in both the original Constitution and the Bill of Rights. Historically, the States long resisted the move toward optional bench trials.⁵⁰⁷

But perhaps that extreme distrust is no longer rational. Continental Europe has managed to keep trials because of the inquisitorial system's efficiency, whereas we have lost them.⁵⁰⁸ Moreover, our system largely already *is* inquisitorial as administrative proceedings routinely proceed in an inquisitorial manner.⁵⁰⁹ In the federal system, entitlement to Social Security Disability, veterans' benefits, and asylum are all largely determined through a partially inquisitorial process.⁵¹⁰ The Federal Social Security Disability system is the largest system of adjudication in the western world.⁵¹¹ State administrative agencies across the country likewise use inquisitorial processes to determine eligibility for various public benefits.⁵¹² Small claims courts around the country also use these procedures. Many Americans are most familiar with the inquisitorial system through television shows like *Judge Judy* and *The People's Court*.⁵¹³

commenting on evidence to juries in both civil and criminal cases in early American history).

505. See Langbein, *supra* note 339, at 269.

506. U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.

507. See Langbein, *supra* note 339, at 269; see also *Cancemi v. People*, 18 N.Y. 128, 138 (1858) (disallowing defendants to waive the presence of even one juror's presence, lest the "ancient and invaluable institution of trial by jury" be threatened).

508. See Langbein, *supra* note 339, at 267.

509. See, e.g., BARTON & BIBAS, *supra* note 8, at 151–52; Michael Asimow, *Inquisitorial Adjudication and Mass Justice in American Administrative Law*, in *THE NATURE OF INQUISITORIAL PROCESSES IN ADMINISTRATIVE REGIMES: GLOBAL PERSPECTIVES* 93, 93–94 (Laverne Jacobs & Sasha Baglay eds., 2013).

510. See Asimow, *supra* note 509, at 98–108.

511. See JERRY J. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 18 (1983).

512. For example, Pennsylvania determines eligibility for unemployment benefits primarily through an inquisitorial system. See 43 PA. STAT. AND CONS. STAT. ANN. § 753 (West 2020). Indeed, I advocated on behalf of pro bono clients as a law student during some of these hearings. But many individuals proceed through this system pro se.

513. See BARTON & BIBAS, *supra* note 8, at 151.

One could reply that criminal proceedings are different because they involve higher stakes, but that is not always true.⁵¹⁴ Denial of unemployment benefits by a state agency can produce devastating collateral consequences, including a spiral into poverty. For asylum claimants appearing before hearing officers, a rejection may well lead to eventual deportation. A criminal conviction, attended by some punishment and later collateral consequences, may be similar in severity to many matters we already determine through partially inquisitorial proceedings.

Besides, in states where there is no right to counsel in low-level misdemeanor cases, practitioners suggested that judges by necessity act in a more inquisitorial fashion. For example, one Iowa magistrate judge explained that, before Iowa adopted the authorized imprisonment test, she had to enforce the rules of evidence against the prosecution, because one cannot expect the defendant to understand the rules.⁵¹⁵ As she put it, she “had to be careful to vindicate the rights of defendants when the defendant could not recognize them.”⁵¹⁶ Because trials with uncounseled defendants frequently occur in some jurisdictions, our misdemeanor system is already by necessity partially inquisitorial.

A non-adversarial system would have some benefits. First, it would save the States money (a helpful argument to make when seeking reforms), sparing them the expense of paying a prosecutor and a defense lawyer. Second, a speedier system would enable defendants to actually insist on their trial right. For those detained pretrial, it might not make a difference. But for non-jailed individuals who just want to “get it over with,” the prospect of a quick hearing might help an innocent defendant persevere. That, in turn, would help protect the innocent and produce more acquittals than our system currently obtains. Third, although American judges would initially be uncomfortable

514. *See, e.g.,* Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (“[T]oday’s civil laws regularly impose penalties far more severe than those found in many criminal statutes[.]”).

515. Telephone Interview with Lynn Rose, *supra* note 101.

516. *Id.*

performing inquisitorial functions,⁵¹⁷ they might actually provide more assistance to defendants than many state-appointed lawyers currently do. And from the defendant's perspective, this system would be an improvement on the prospect of going to trial without a lawyer in a jurisdiction where the trial judge will not help you.

Of course, there are undoubtedly disadvantages to the inquisitorial system.⁵¹⁸ Just one is that it places a tremendous amount of faith in judges, something at odds with our nation's historical distrust of unchecked judicial power.⁵¹⁹ Explicitly shifting toward an inquisitorial system could also lead to the weakening of other rights associated with the adversary system. For example, it could undermine the defendant's right not to self-incriminate by incentivizing her to testify at trial.⁵²⁰ State courts could also undertake less sweeping inquisitorial-style reforms, like revising court rules to encourage its trial judges to assist pro se litigants.⁵²¹ But it could be worthwhile for a state to try out an inquisitorial mode of adjudication, serving as a laboratory of democracy.

Constructing a non-adversarial adjudicative system for low-level misdemeanors is no small task, and its feasibility will vary widely depending on the state. Ironing out the precise parameters of such a system is beyond the scope of this Article. Rather, anticipating the possibility of future scholarship, I will lay out some specific issues that a design proposal must take into account.

517. A state could cultivate expertise by assigning particular judges to only handle inquisitorial cases or by offering continuing legal education to its judges. See, e.g., BARTON & BIBAS, *supra* note 8, at 154.

518. See, e.g., *id.* at 152–53.

519. See, e.g., *Blakely v. Washington*, 542 U.S. 296, 305–08 (2004) (discussing the Framers' distrust of unchecked judicial power).

520. See Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d'Assises*, 2001 U. ILL. L. REV. 791, 824–25 (describing how the French inquisitorial trial system incentivizes defendants to take the stand and testify).

521. See BARTON & BIBAS, *supra* note 8, at 145–50 (discussing simple ways that judges could make proceedings easier for pro se litigants, like relaxing procedural and evidentiary rules).

a. Jury Trial

The role of the jury trial in misdemeanors is understudied. The U.S. Supreme Court has held that the Sixth Amendment requires the States to offer jury trials whenever the defendant is charged with an offense jailable for more than six months.⁵²² As with the right to counsel, that means that the Supreme Court has given the States a substantial amount of room to experiment beyond the jury trial. Because of the logistical burdens of convening juries, it could be difficult to incorporate juries into a non-adversarial system for misdemeanors. One can question whether defendants would exercise a broader jury trial right. A judge in Ohio, where defendants have a jury trial right for all jailable offenses, explained that the right is almost never exercised in misdemeanor cases.⁵²³

However, the law may require jury trials. Scholars have issued serious challenges to the Supreme Court's jury trial jurisprudence.⁵²⁴ Considering the Anglo-American legal system's strong tradition of providing juries, the federal constitutional right to a jury trial may cover a broader range of misdemeanors than is currently recognized.⁵²⁵ Moreover, all state constitutions offer a jury trial right, and around 80 percent of the states, at least theoretically, guarantee a broader jury trial right than the U.S. Supreme Court.⁵²⁶

b. Plea Bargaining

Anyone designing a system of misdemeanor adjudication must consider the role of plea bargaining. Although empirical work is limited, the importance of plea bargaining in resolving misdemeanors is broadly recognized.⁵²⁷ Indeed, some have identified a link between greater procedural protections, like

522. See *Baldwin v. New York*, 399 U.S. 66, 69 (1970).

523. Telephone Interview with Richard Frye, *supra* note 95.

524. See, e.g., *Murphy*, *supra* note 103.

525. For example, New Jersey does not guarantee a jury trial to all DUI defendants. See *State v. Denelsbeck*, 137 A.3d 462, 477 (N.J. 2016). And this rule clashes with the tradition of using juries for offenses to which the community attaches moral blameworthiness. See *Murphy*, *supra* note 103, at 135–39. One can argue under the Due Process Clause or, alternatively, the Privileges or Immunities Clause. U.S. CONST. amend. XIV, § 1.

526. See *Murphy*, *supra* note 103, at 171–73.

527. See *Bibas*, *supra* note 306, at 1118.

the right to counsel, and an increased rate of plea bargaining.⁵²⁸ Anecdotally, my conversations with practitioners support that link.⁵²⁹ The relationship between procedural protections and plea bargaining deserves careful academic attention. And those proposing a broader right to counsel should consider the possibility that plea bargaining will become more common as the States are incentivized to avoid the costs of prosecution through quick deals, perhaps offered en masse, as sometimes occurs in Florida.⁵³⁰

c. Dual Trial Court Systems

Perhaps the most bizarre part of America's current system for adjudicating misdemeanors is the structure of our state courts. There is an extraordinary diversity of structures. Only a few states are structured like the federal courts, with one trial court, an intermediate appellate court, and a supreme court. The vast majority of states have at least two trial courts. Maryland's structure is typical.⁵³¹ At the bottom of the hierarchy are the District Courts, which handle misdemeanors and small-value civil cases.⁵³² If a misdemeanor defendant is convicted at the District Court, he can appeal to the Circuit Court.⁵³³ The Circuit Courts are the trial courts of general jurisdiction, and felonies and serious civil cases start there.⁵³⁴ Oddly, the defendant appealing from the District Court is entitled to a *de novo* review of the case by the Circuit Court.⁵³⁵ And from there, the defendant can appeal up to the intermediate appellate court and, perhaps, the state supreme court.⁵³⁶

528. Cf. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) (endorsing a system where bench trials are offered to reduce the dominance of plea bargaining).

529. See, e.g., Telephone Interview with Lynn Rose, *supra* note 101 (arguing that the rate of plea bargaining rose dramatically in Iowa after the Iowa Supreme Court expanded the right to counsel in 2016).

530. See, e.g., Telephone Interview with Scott Richardson, *supra* note 94 (asserting misdemeanor plea bargains are negotiated in "cattle calls").

531. See *Maryland*, *supra* note 103.

532. See *id.*

533. See *id.*

534. See *id.*

535. See *Kleberg v. State*, 568 A.2d 1123, 1124 (Md. 1990).

536. See *Maryland*, *supra* note 103.

The value of a dual trial court system is open to question. Why should a misdemeanor defendant get two *de novo* examinations of his case, especially when a felony defendant only gets one trial? Perhaps states are concerned, for good reason, about the accuracy of highly informal proceedings when there is no right to counsel. Historically, this system appears to have arisen in medieval England to avoid the necessity of convening juries for low-level crimes.⁵³⁷ And a fair number of states reflect that tradition by guaranteeing a jury trial for a relatively broad set of cases, but only offering a jury at the second trial.⁵³⁸

d. Appeals

Closely related to the dual trial court system is the question of appeals. How should appellate review work for an inquisitorial proceeding? Perhaps review should be *de novo* or at least more searching than for a jury trial. With fewer procedural protections at the initial adjudication, stronger appellate review could allay due process concerns.

But one must also consider the cost and potentially limited benefits of robust appellate review for low-level misdemeanors. As Justice Jackson once remarked in the federal habeas context, “reversal by a higher court is not proof that justice is thereby better done.”⁵³⁹ And defendants may be unlikely to take advantage of appeal rights if they have been merely fined a small amount. That dynamic appears to play out in the status quo. In states with two trial courts and a *de novo* appeal, limited statistical evidence suggests that defendants *almost never* take that *de novo* appeal.⁵⁴⁰ Stand-alone articles could undoubtedly address the reasons for that data, and the insights gained from such studies could inform the task of designing a misdemeanor adjudication system.

537. For the most important scholarship on this issue, see Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

538. See, e.g., *Georgia*, CT. STATS. PROJECT, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts/Georgia.aspx [<https://perma.cc/J9SW-GVTE>] (last visited Feb. 18, 2020).

539. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

540. King & Heise, *supra* note 89, at 1940.

e. Personnel

Another difficult question is *who* should adjudicate misdemeanors. A fair number of states do not use lawyers to staff their lower trial courts. Texas, for example, does not require its justice and municipal court judges to be lawyers.⁵⁴¹ This practice raises serious system design questions. And scholars should be asking whether non-lawyers are running misdemeanor adjudications in a manner consistent with the rule of law rather than the rule of men. Can non-lawyers properly enforce the rules of evidence, interpret statutes,⁵⁴² and guarantee a defendant's constitutional rights? Personally, I witnessed misdemeanor trials in different parts of Pennsylvania conducted by non-lawyers in a highly informal fashion that varied greatly depending on the particular judge. Some of these proceedings took place without oaths, formal evidence, or any lawyers in the room. Although this phenomenon has received limited attention, the California Supreme Court forced a transition away from a dual trial court system after holding that non-lawyer judges presiding over criminal proceedings violated due process.⁵⁴³ This topic certainly needs more scholarly attention.

D. A Better Federalism

This Article does not endorse a one-size-fits-all approach to misdemeanors. This Part has introduced some alternatives to an adversarial adjudication system: non-prosecution, diversion, and an inquisitorial system. With an inquisitorial system in particular, the previous Part introduced several difficult variables that would need to be addressed. This Part's primary goal is to raise new questions for study and to reorient the conversation away from convincing the Supreme Court to force a uniform approach on fifty diverse states. We need experimentation. Federalism, rather than a universally mandated procedure frozen in place, is the key for enabling innovation in the right-to-counsel area.

541. See E-mail from Emily Miskel, Dist. Judge, 470th Tex. Judicial Dist., to author (Jan. 25, 2019, 5:17 PM EST) (on file with author).

542. See Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897 (2013) (asking this question).

543. See *Gordon v. Justice Court*, 525 P.2d 72, 79 (Cal. 1974).

But federalism may not be sufficient. Federalism will not inevitably lead to innovative solutions to difficult problems. Inertia and herd mentality are powerful forces that will counteract innovation. When suggesting to practitioners various new ideas for adjudicating misdemeanors, like an inquisitorial system, many responded that these ideas were not feasible. When I asked why, I repeatedly got the same response: "That's just not the way our system works." Inertia and tradition are powerful forces.⁵⁴⁴ Further, lawyers and bar associations have anti-innovation reputations, perhaps because lawyers are benefiting from the status quo.⁵⁴⁵

So letting federalism run its course will often not be good enough to spur innovation among the States. But that is where academics and legal crusaders can help. By proposing, advocating, and lobbying for new ideas in a single state, they can help make innovative reform a real possibility. If scholars concerned about the state of misdemeanor justice in America can shift their focus and move beyond demanding more one-size-fits-all solutions from the Supreme Court, it is not far-fetched to think that policymakers in individual jurisdictions can be convinced to try out new solutions. By curbing our obsession with the Supreme Court, we might be able to create a better, more dynamic federalism in the process.

CONCLUSION

The *Gideon* revolution has faltered. Some scholars think *Scott v. Illinois* was partially responsible for slowing it down. But those experienced in the criminal justice system should realize that *Scott* is not the real problem. In too many parts of the nation, our system of misdemeanor justice is not working.

As a matter of constitutional law, this Article has argued that *Scott* was rightly decided. Indeed, Justice Rehnquist's invocation of federalism proved prescient. The States, at least on paper, have innovated in this area. In thirty-four states, criminal de-

544. See, e.g., Asimow, *supra* note 509, at 94 (arguing that the American insistence on the adversarial model is largely because of "path dependence—it has always been done that way").

545. See BARTON & BIBAS, *supra* note 8, at 75 ("Courts, court processes, and the regulation of the legal profession effectively benefit the repeat players: judges, clerks, prosecutors, public defenders, and lawyers.").

fendants have a broader right to counsel than required by *Scott*. Some jurisdictions have taken steps to make those rights real. Others have not, and do not even honor the U.S. Supreme Court's existing mandates.

On paper, the States have proven the merits of federalism in this area. But we should hold our applause. Although some jurisdictions have gotten pretty close to actualizing America's traditional adversarial system for misdemeanors, it is unrealistic to expect the entire country to replicate that. Our misdemeanor justice system is in desperate need of experimentation. Inertia is undoubtedly a major obstacle to federalism reaching its full potential. We need new ideas.

The best reason to celebrate *Scott* was that it left room for the States to experiment in more meaningful ways. Had the Supreme Court adopted Justice Brennan's proposed authorized imprisonment test, no state would have room to innovate. The system would have been ossified, consistent with the vision of robed central planners. Instead, we have at least fifty shots to build a better misdemeanor justice system in America.