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THE RIGHT TO APPOINTED COUNSEL:
ARGERSINGER AND BEYOND

STEVEN DUKE*

I. INTRODUCTION

Half a generation ago the Supreme Court in *Gideon v. Wainwright*\(^1\) found the Sixth Amendment right to counsel "fundamental and essential to a fair trial."\(^2\) Mr. Justice Black, speaking for an unanimous Court, referred to lawyers as "necessities, not luxuries."\(^3\) He said the "noble ideal" of fair trials "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him," and declared that "any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."\(^4\) One might therefore have expected *per curiam* reversals, following *Gideon*, of criminal convictions where assistance of counsel was denied. Instead, several courts upheld such convictions for misdemeanors, and the Court repeatedly denied *certiorari*.\(^5\)

The rights of the misdemeanant remained confused. Frequently, state courts read *Gideon* as not requiring counsel in misdemeanor cases only to have the local federal court void the convictions on a different reading of *Gideon*.\(^6\) Nonetheless, most states in the decade after *Gideon*

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2 Id. at 343.

3 Id. at 344.

4 Id.

5 *E.g.*, Heller v. Connecticut, 389 U.S. 902 (1967); DeJoseph v. Connecticut, 385 U.S. 982 (1966); Winters v. Beck, 385 U.S. 907 (1966). The court further limited its *Gideon* decision in *Mempa v. Rhay*, 389 U.S. 128 (1967), when it referred to *Gideon* as holding that there "was an absolute right to appointment of counsel in felony cases." (emphasis added) Id. at 134. See also *In re Gault*, 387 U.S. 1, 36 (1967). *Gideon* was in fact convicted of a felony and sentenced to five years in prison. There was nothing in the Court's rationale, however, which relied on the significance of a "felony" charge.

did extend the right to counsel to some misdemeanants.\textsuperscript{7} A few even went all the way, extending the right to every indigent accused of any offense, petty or serious.\textsuperscript{8}

\section*{II. ARGERSINGER V. HAMLIN}

Finally, in June, 1972 the Court returned to the problem. In \textit{Argersinger v. Hamlin},\textsuperscript{9} 19 year old Jon Argersinger had pled guilty\textsuperscript{10} in a Florida court to carrying a concealed weapon, an offense punishable by up to six months in jail and a $1000 fine, without being informed of his right to counsel. He was sentenced to a $500 fine or 90 days in jail.\textsuperscript{11} Alleging that he had been indigent and unable to afford counsel, he sought habeas corpus. The Florida Supreme Court reluctantly brought state law into line with that of the United States District Court for the Southern District of Florida,\textsuperscript{12} and extended the right of appointed counsel to offenses “punishable by more than six months imprisonment.”\textsuperscript{13} Since Argersinger’s offense was just under the line, however, the writ was dismissed by the Florida Court.

Mr. Justice Douglas wrote the opinion for the Supreme Court. As in \textit{Gideon}, the State of Florida was held to have denied the petitioner his Constitutional right to counsel.

Mr. Justice Douglas noted that the Sixth Amendment contains standards for “all criminal prosecutions.” Among the rights guaranteed by that amendment are the right to a speedy and public trial, the right to know the charge, the right of confrontation, and the right to compulsory process.\textsuperscript{14} Yet the only right guaranteed by the Sixth Amendment which has been limited by type of offense is the right to trial by jury.


\textsuperscript{9} 407 U.S. 25 (1971).

\textsuperscript{10} Brief for Appellant, \textit{Argersinger supra} note 9, Appendix at 5.

\textsuperscript{11} \textit{Id.} at 7. Nowhere in the Supreme Court’s opinion was it noted that Argersinger had pleaded guilty, nor that his sentence had been \textit{a fine} or imprisonment. Instead, the Court said in its statement of facts, “The trial was to a judge, and petitioner was . . . sentenced to serve 90 days in jail . . . .” 407 U.S. at 26.


\textsuperscript{13} State \textit{ex rel. Argersinger v. Hamlin}, 236 So. 2d 442, 444 (Fla. 1970).

\textsuperscript{14} The sixth amendment provides,

\begin{quote}
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.
\end{quote}
Duncan v. Louisiana\textsuperscript{15} restricted such right to offenses punishable by six months or more.\textsuperscript{16} Justice Douglas then disposed of Duncan with the observation that the right to jury trial "has a different genealogy and is brigaded with a system of trial to a judge alone."\textsuperscript{17} "While there is historical support for limiting . . . trial by jury to 'serious criminal cases', there is no such support for a similar limitation on the right to assistance of counsel."\textsuperscript{18} The Court therefore rejected "the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer."\textsuperscript{19}

The Court then quoted Powell v. Alabama\textsuperscript{20} and Gideon\textsuperscript{21} on the essential role of a lawyer in the adversary process, and noted that the rationale of those cases "has relevance to any criminal trial, where an accused is deprived of his liberty" (emphasis supplied).\textsuperscript{22} Petty offense trials may be as complex as those for felonies,\textsuperscript{23} and "the volume of misdemeanor cases . . . may create an obsession for speedy dispositions, regardless of the fairness of the result."\textsuperscript{24} Citing a study, the Court said "[m]isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel."\textsuperscript{25}

Putting aside the right to counsel where "loss of liberty is not involved,"\textsuperscript{26} the Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial."\textsuperscript{27}

\textsuperscript{15} 391 U.S. 145 (1968).
\textsuperscript{16} Actually, Duncan merely held that a defendant charged with an offense punishable by statute with a sentence up to two years and who actually was sentenced to 60 days was entitled to a jury trial. The Court said, however, that crimes "carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses." \textit{Id.} at 159.
\textsuperscript{17} 407 U.S. at 29.
\textsuperscript{18} \textit{Id.} at 30.
\textsuperscript{19} \textit{Id.} at 30–31.
\textsuperscript{20} 287 U.S. 45, 68–69 (1932).
\textsuperscript{21} 372 U.S. at 344.
\textsuperscript{22} 407 U.S. at 32.
\textsuperscript{23} \textit{Id.} at 33.
\textsuperscript{24} \textit{Id.} at 34.
\textsuperscript{25} \textit{Id.} at 36. See A.C.L.U., \textit{Legal Counsel for Misdemeanants, Preliminary Report} 1 (1970). For similar findings, see L. Herman, \textit{The Right to Counsel in Misdemeanor Court} 18–20 (1973) (hereinafter cited as \textit{Herman}).
\textsuperscript{26} \textit{Id.} at 37.
\textsuperscript{27} \textit{Id.}
In a lengthy concurring opinion, Mr. Justice Powell argued that the requirement of counsel for all defendants imprisoned was too rigid. He correctly noted that petty offenses not involving imprisonment are often complex, carry stigma, and have severe collateral consequences, such as loss of driver's licenses. On the other hand, he claimed, it is possible for a layman to obtain a fair trial without counsel, even if the result is imprisonment. Surely, he argued, counsel should not automatically be appointed in cases where counsel would seldom be employed by non-indigents.

Instead of the Court's "inflexible rule," Mr. Justice Powell urged a determination of the right on "a case-by-case basis," taking into account "the complexity of the offense charged," whether the state is represented by counsel, the "probable sentence" upon conviction, and other "individual factors," such as the competence of the defendant and the attitudes of the community toward the defendant or the offense.

In making clear that no person can be imprisoned for a criminal offense without counsel, the Court clarified little else. Probably more than 95 percent of persons charged with misdemeanors are not sent to jail. What are their rights, after Argersinger? Before Argersinger, a substantial number of courts, state and federal, had held that counsel was required for an offense where the statutorily prescribed maximum penalty exceeded six months in jail. Some had also held that an offense-by-offense evaluation should be made of petty offenses and counsel appointed whenever, by reason of the authorized jail sentence, the probable jail sentence, the authorized or probable fines, or other col-

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28 Id. at 47 (Powell, J., concurring).
29 Id. at 48.
30 Id. at 50.
31 Id. at 49-50.
32 Id. at 63.
33 Id. at 65. Mr. Justice Powell did not attempt to apply his proposed test to the virtually non-existent Argersinger record. His concurrence was presumably based upon the failure of the appointing judge to exercise any discretion in the matter.
34 In New Jersey during 1961-62, of 122,000 misdemeanor complaints, 18,000 (15%) resulted in direct jail sentences and another 6000 defendants (5%) went to jail in lieu of fine payments. L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts 123 (1965) (hereinafter cited as Silverstein). But in New York, in 1969, almost two million people were convicted of traffic offenses. Only 40 were imprisoned or given suspended sentences. Criminal Court of the City of New York Annual Report of 1969 at 13, Table 3, line 11. See further data in Argersinger, 407 U.S. at 38 n.10.
lateral consequences, the charge was serious. Argersinger has been read by many as replacing or nullifying these standards. Such interpretations are erroneous.

The Florida Supreme Court in Argersinger had read Duncan v. Louisiana, although dealing with the right to trial by jury, as requiring counsel in cases where the maximum authorized penalty exceeded six months in jail. Mr. Justice Douglas' opinion in Argersinger, in distinguishing the right to jury trial from other Sixth Amendment rights, said nothing which could fairly be construed as a retreat from the notion that any offense punishable by law with more than six months is a "criminal offense" within the meaning of the Sixth Amendment, regardless of the sanction actually imposed, and requires both a jury trial and counsel. Mr. Justice Powell, in concurrence, addressed himself to this issue, moreover, and said that, at a minimum, when the Constitution guarantees a jury trial—as it does for offenses punishable in law by more than six months—it *a fortiori* guarantees the right to appointed counsel. That a layman might adequately defend himself in a trial before a judge may be debatable, but it is ludicrous to conceive of a fair jury trial without a defense lawyer.

There is language in Mr. Justice Douglas' opinion however, which, if lifted from its context, can be read as reopening the question of the right to counsel in offenses punishable in law by more than six months. In the last paragraph of his opinion, Mr. Justice Douglas enigmatically states:

The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guiding hand of counsel" so necessary when one's liberty is in jeopardy.

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39 "It is clear that wherever the right-to-counsel line is to be drawn, it must be drawn so that an indigent has a right to appointed counsel in all cases in which there is a due process right to a jury trial." 407 U.S. at 45–46.

40 See 407 U.S. at 46. See also State v. Borst, 278 Minn. 388, 398, 154 N.W.2d 888, 894 (1967).

41 407 U.S. at 40.
If read without the background of the jury trial cases, this paragraph could be thought an invitation to deny counsel in "the run of" cases merely by foregoing imprisonment.\footnote{See Miller and Lefcoe, \textit{Gideon's Encore: The Argersinger Decision in Virginia}, 30 \textit{WASH. & LEE L. REV.} 431, 434 (1973). It has unfortunately been so misconstrued by other authorities. See note 37 \textit{supra} and accompanying text.}

Such an interpretation would draw support from the confusing concurrence of the Chief Justice. In attempting to supply some guidance to judges and prosecutors "sitting in petty and misdemeanor cases,"\footnote{43 407 U.S. at 42 (Burger, C.J., concurring).} he opined that in "jury cases," the prosecutor should help the judge decide in advance of trial, if imprisonment is "a significant likelihood."\footnote{44 Id.} Since the Court in \textit{Argersinger}, as well as in other cases, uses the term "petty offense" to include all offences punishable by six months or less,\footnote{45 18 U.S.C. § 1 (1970) subdivides misdemeanors, providing that those for which the penalty "does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense." This is the meaning given to "petty offense" by Mr. Justice Douglas in \textit{Argersinger} (407 U.S. at 36) and substantially that employed by the Court in Duncan v. Louisiana, 391 U.S. 145, 161 (1968) and Baldwin v. New York, 399 U.S. 66, 69 (1970).} it is hard to understand how the question of imprisonment-in-fact should arise in determining the right to counsel in a non-petty misdemeanor case—unless the six month penalty line was eroded by \textit{Argersinger}. Similarly, since the Constitution rarely requires a jury trial for offenses not punishable in law by more than six months\footnote{46 There are exceptions, where offenses not punishable by more than six months have been held "serious" and requiring jury trials, e.g., District of Columbia v. Colts, 282 U.S. 63 (1930), but these are rare.}—and most states grant no more than the Constitution requires\footnote{47 \textit{See} Brief for Appellant, Duncan v. Louisiana, 391 U.S. 145 (1968) (Appendix A).}—the same question arises with respect to the Chief Justice's reference to "jury cases." How can the trial judge legitimately be doubtful about the right to counsel in a case to be tried by jury—unless the six month rule no longer obtains?

It is clear, however, that the Constitution requires a jury trial and counsel for a defendant charged with an offense punishable in law by more than six months in prison. In \textit{Baldwin v. New York},\footnote{48 399 U.S. 66 (1970).} the Court said, "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."\footnote{49 Id. at 69.} Is a penalty of more than six months "authorized" if the relevant statute permits it but the trial judge determines in advance of trial that it will not be imposed? \textit{Duncan} makes clear that the answer is yes:
... the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. District of Columbia v. Clawans, 300 U.S. 617 (1937). The penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments,' 300 U.S. at 628 of the crime in question. In Clawans the defendant was jailed for sixty days, but it was the 90-day authorized punishment on which the Court focused in determining that the offense was not one for which the Constitution assured trial by jury.50

The Court in Duncan also expressly rejected the argument that "the critical factor is not the length of the sentence authorized but the length of the penalty actually imposed."51 Instead, the Court said, when "a legislative judgment as to the seriousness of the crime is embedded in the statute in the form of an express authorization to impose a heavy penalty," it is this judgment, rather than that of the sentencing judge, which determines the applicability of the Sixth Amendment.52

Thus, Argersinger, Baldwin, and Duncan together establish that where a defendant is charged with an offense punishable by statute with more than six months, or where he is entitled to a jury trial, or he is to be imprisoned in fact for any length of time, however short, he has a Constitutional right to appointed counsel. Those who have read Argersinger as approving denial of appointed counsel merely because a jail sentence is not imposed are plainly wrong.53 Argersinger expressly did not decide the right to counsel where "loss of liberty is not involved."54 It should not be construed as if it held the right inapplicable in such a case.

The Sixth Amendment states that in "all criminal prosecutions the accused shall enjoy" a panoply of specified rights. Most of them, as Mr. Justice Douglas noted in Argersinger, have never been limited.55 Only

50 391 U.S. 159-60. See also, Baldwin v. New York, 399 U.S. 66, 68 (1970): "In deciding whether an offense is 'petty', we have sought objective criteria reflecting the seriousness with which society regards the offense . . . and we have found the most relevant such criteria in the severity of the maximum authorized penalty."
51 391 U.S. at 162 n.35.
52 Id. This was reaffirmed in dictum in Codispoti v. Pennsylvania, 414 U.S. 1063 (1974).
54 407 U.S. at 37.
55 The Court quotes approvingly (407 U.S. at 28) the observation of Professor Junker, that "It is simply not arguable, nor has any court ever held, that the trial of
one, the right to jury trial, has been confined to "serious", i.e. non-petty offenses. Prior to Argersinger, the Court had never decided whether the right to counsel, like the right to trial by jury, should be confined to non-petty offenses or whether the literal meaning of the Sixth Amendment should apply to the right to counsel along with the other Sixth Amendment rights. A possibility not mentioned by the Court is that the right to counsel is in a third category, applicable in some "petty" offense cases but, unlike the right to confrontation, or the right to a public trial, not applicable in all. The failure to acknowledge this possibility accounts for much of the confusion in the opinion, but also, gives a clear clue to the future direction of the right to counsel.

It is, of course, anomalous to hold that some rights guaranteed in "all criminal prosecutions" are only guaranteed in some, whereas other rights in the same sentence of the Sixth Amendment are unqualified. This requires that two meanings be given to the very same words. The anomaly would be compounded if the Court were explicitly to locate the right to counsel on a continuum between the other Sixth Amendment rights. Moreover, the pull of purse, personnel, and politics, as well as the claims of history,\(^{56}\) compelled the Court to acknowledge the double meaning of "criminal prosecutions" where the right to jury trial is concerned. The right to jury trial is too expensive and burdensome on the courts and the public to warrant its recognition in petty cases where the stakes are small. And there is nothing inherently unfair about a bench trial (at least if the accused has counsel). As the Court recognized in Argersinger, this is not true of the right to counsel. Jury trials are more expensive than appointed counsel, and involve greater tolls on the time of the court, prosecutors, witnesses, and the public. The right of appointed counsel also applies only to indigents, who make up a small fraction of defendants in misdemeanor cases,\(^{57}\) whereas trial by jury is not conditioned on indigency. In sum, the right of appointed counsel is less burdensome to the state and more important to a fair trial than trial by jury. Still, the burden would be considerable were the Court explicitly to hold the right applicable in all criminal cases and, given

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\(^{57}\) It has been estimated that the number of alleged misdemeanants unable to afford an adequate defense is "probably not more than 25%." Silverstein, supra note 34, at 125. This estimate apparently excluded traffic offenses. If these are included in the calculation, the percentage would probably be far lower since traffic offenses are surely committed, for the most part, by the relatively affluent.
the resistance of legislators and courts to recognition of the right in the past, such an abrupt decision could wreak temporary chaos. Hence, the Court eschewed adoption of the third possibility, from which retreat would have been difficult, and deliberately obscured its rationale. The obscurity gives the States a chance to gear up for the next advance and leaves the Court free in the future to hold the right of counsel applicable "in all criminal prosecutions."

After Argersinger, there should be a two-dimensional determination of right to counsel. The first, which has been largely ignored of late but was in no way discarded by Argersinger, focuses on the offense itself. The other, a secondary backstop, centers on the sanction actually imposed. The former is far more important for the future than the latter. Indeed, the latter "imprisonment-in-fact" test is merely an interim benchmark the importance of which should disappear as more liberal determinations of the right to counsel are developed under the first test.

III. THE TWO-DIMENSIONAL DETERMINATION OF THE RIGHT TO COUNSEL

A. A Significant Offense Test

Any offense which is not "petty" for purposes of determining right to trial by jury is an offense for which the indigent accused is entitled to appointed counsel. There are no precise boundaries between "petty" and "serious" offenses. Not only is any offense for which the legislature has authorized a jail sentence of more than six months a "serious" one, an offense for which a large fine is the only sanction may also be non-petty. Furthermore, the Court has held, even a traffic offense, reckless driving, for which thirty days in jail and a $100 fine were authorized, may be "an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense."

The Court clearly held in Argersinger, however, that the line between "petty" and "serious" for jury trial purposes is not determinative of right to counsel. This right attaches far lower on a scale of seriousness. In referring to the loss of liberty as "serious," the Court used the word in its ordinary sense, not as a technical concept. The Court's meaning

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61 District of Columbia v. Colts, supra note 58, at 73.
62 407 U.S. at 28, 37.
would better have been communicated by a different adjective, such as "significant." In holding that, absent all else, a loss of liberty for however short a period is a sufficient deprivation to require counsel, the Court provided a new criterion, albeit a vague one, for determining significance. If the probable consequences of a conviction are deprivations equivalent to a loss of liberty, then the stakes are high enough to require counsel. That, it seems, is the major implicit and eminently sound premise of Argersinger. Departures from this premise will mark the occasions for future Court decisions on the matter.

An abstract evaluation of offense categories for purposes of determining right to counsel is greatly superior to the "case-by-case" approach suggested by Mr. Justice Powell. The circumstances-of-the-case test was a failure under Betts v. Brady, and is even more certain to be such in misdemeanor cases.

The four or five million or more misdemeanor cases in this country every year are usually disposed of on an assembly-line basis, often by judges who aren't even lawyers, frequently without a transcript. To expect a magistrate or minor court judge effectively and conscientiously to consider all the relevant circumstances in advance of pleading

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63 See ABA PROJECT FOR STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 4.1, Commentary at 40 (1968) [hereinafter cited as DEFENSE SERVICES] ("... the standard does not recommend a determination of the need for counsel in terms of the facts of each particular case; it draws a categorical line at ... types of offenses ... "). This standard was quoted approvingly in Mr. Justice Douglas' Argersinger opinion. 407 U.S. at 39.


65 It is estimated that "there are between 4 and 5 million adult misdemeanor cases each year, exclusive of traffic cases." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 55 (1967) [hereinafter cited as TASK FORCE REPORT]. Estimates of traffic offenses have been as high as 50 million per year. Katz, Gideon's Trumpet: Mournful and Muff/ed, 55 IOWA L. REV. 523 (1970).

66 HERMAN, supra note 25, at 15.

67 TASK FORCE REPORT, supra note 65, at 32.

68 "There is usually no court reporter unless the defendant can afford to pay one." TASK FORCE REPORT, supra note 65, at 30. In Mayer v. City of Chicago, 404 U.S. 189 (1971), the Court unanimously held that an indigent convicted of nonfelony violations of municipal ordinances and fined $250 on each of two counts was entitled under the Equal Protection Clause to a free trial transcript or a record of "sufficient completeness" to permit proper consideration of his claims and to assure "as effective an appeal as would be available to the defendant with resources to pay his own way." Chicago's distinction between felonies and misdemeanors, providing free transcripts only for appeals of felonies, was declared an "unreasonable distinction." Id. at 196. The City also argued that defendant was not entitled to a transcript since he had not been sentenced to jail. The Court responded, "The invidiousness of the discrimination that
is to expect the impossible. To require him to place these circumstances on the record, together with his “reasons” for denying counsel, “so that the issue could be preserved for review,” is to require him to spend more time and money than would likely be expended by appointment of counsel.

It is futile to expect a trial judge at the early stages of the case, before counsel has been appointed, to evaluate “the complexity of the offense charged.” Legal complexity depends on the skill and imagination of a defense lawyer. There is no way in which a judge can reliably determine—even in a traffic case—that the offense is legally simple or uncomplicated. Similarly, factual complexity cannot be known before the judge has heard the case. This, too, will often be a product of the knowledge, skill and preparation of the defense lawyer, and is closely intertwined with the legal defense. A determination that counsel is not needed because a case is “simple” is nothing more than a self-sustaining prophecy. Questions of complexity ought to be permanently excised from determinations of the right to trial counsel.

Another factor, taken into account under the Betts regime, and urged for misdemeanor cases by Mr. Justice Powell, is “the competency of the individual defendant to present his own case.” How the judge can be expected to make this determination before the trial is a mystery. Moreover, “competence” of the accused is related to the complexity of the case. There is a sense in which one may be “competent” to offer no defense, or an impenetrable alibi, but this surely signals no competence to offer something in between. Competence, like complexity, is beyond the capacity of a trial judge to determine even after a lawyerless trial. Finally, we are dealing with people who cannot afford the often modest price of a lawyer. A person so disadvantaged, in our affluent society, as to be indigent is virtually always poorly educated. It borders on the fatuous to speak of an indigent as competent “to present his own case.” If he had the skill and learning to present a defense in court, qualities

exists when criminal procedures are made available only to those who can pay is not erased by any difference in the sentences that may be imposed.... The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an indigent accused as forced confinement.” Id. at 197. Is it conceivable that an indigent defendant could have a constitutional right to a transcript on appeal from a petty offense conviction not involving loss of liberty but have no right to a court reporter at trial or arraignment? Is it conceivable that such an accused could be entitled to a free trial transcript but not a free lawyer?

69 407 U.S. at 63.
70 Id. at 64.
72 407 U.S. at 64.
possessed by a distinct minority of the legal profession, he would almost certainly not be indigent. It is time to forget about “competency” as a factor determining the right to counsel.

Requiring the trial judge to predict the probable sentence upon conviction is also troublesome. There are doubtless many classes of misdemeanors for which jail is virtually never imposed, even for a confirmed, resolute criminal. It is easy enough to isolate such offenses by category, but this is a determination of offenses rather than “case-by-case.” Where likelihood of a substantial penalty depends on the facts of the offense, the defendant’s record, and other individual criteria, it undermines the prospect of a fair trial to arm the trial judge with adverse information in advance of trial, and it places a time-consuming, if not impossible, burden on both the prosecutor and the judge. Moreover, if a judge determines that jail is a likelihood upon conviction and therefore appoints counsel, a subsequent jail sentence will appear to have been the product of a pre-trial determination, and not the result of what the evidence, tested at trial, disclosed. This would cast doubt on the impartiality of the judge. And if a judge other than the one who appointed counsel accepts a plea or tries the case, the appointment of counsel by the first judge will be a signal that a jail sentence is appropriate, undermining the objectivity of the second judge.

The tests employed under Betts and proposed for petty offenses by Mr. Justice Powell are either irrelevant or impossible to administer. Determining whether an offense is significant has the virtue of relevance. It is the consequences of a conviction which determine whether denial of counsel to an indigent is consistent with a fair trial. Moreover, determination by offense is a one-time operation and need not be repeated with each new case. If it had no other superiority this would be enough to compel it over a case-by-case approach.

B. Some Significance Factors

In determining whether an offense is significant, a court should surely consider the maximum penalty authorized by statute. That penalty is a

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74 See Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685, 711 (1968); Defense Services, supra note 63, at 40.


76 “Frequently, it is physically impossible for the deputy city attorney to know anything about the details of the charge, the background of the defendant, or his record.” Nutter, The Quality of Justice in Misdemeanor Arraignment Courts, 53 J. Crim. L.C. & P.S. 215 (1962).
rough gauge of the strength of legislative disapproval of the underlying conduct and a gross predictor of the social stigma likely to attach to a conviction.\textsuperscript{77} Arguably, an offense for which any jail penalty is authorized ought to be considered significant, since jail is an inherently degrading sanction, however short its duration.\textsuperscript{78} If the legislature has seen fit to authorize such degradation, the offense is unlikely to be wholly free of stigma or collateral consequences to the defendant over the course of his lifetime, even if he escapes a jail sentence.

In many states, of course, this would result in virtually all offenses being judged significant. Legislatures, however, are free to withdraw their authorization of jail sentences wherever they don't mean it.\textsuperscript{79} They ought to be forced to make a determination—is the cost of appointed counsel worth maintaining the authorized jail penalty? Unless there is strong disapproval of the conduct, unless a jail sentence is a sincere rather than ornamental sanction, the answer ought clearly to be no. If it is yes, counsel should be required.

Even if a court is unwilling to require counsel whenever jail is authorized, it should take the authorization and its length into account with other factors. Moreover, it should determine the likelihood of jail sentences, by class of offense, and determine significance by discounting the average jail term by its statistical likelihood.\textsuperscript{80}

A related factor is pre-trial detention. If an offense is of sufficient importance to warrant pre-trial arrest or detention as a common practice, then it is an offense warranting counsel. A loss of liberty is no less a substantial deprivation before conviction than afterward. Arrest and pre-trial detention will ordinarily have only two functions: assuring the defendant's appearance at trial or punishment in advance of or in lieu of conviction. If the function is the former, it reflects a judgment that the offense is significant, if not serious. If the latter, subversion of the right to counsel would be permitted if counsel were denied because the accused had in effect served his sentence before conviction.

It seems, therefore, that absent all other indicia of significance, if the accused was arrested for the charge \textit{or} it is customary to arrest for the charge, the offense is a significant one.

\textsuperscript{77} See text accompanying notes 49–51 supra.


\textsuperscript{79} For a helpful description of a legislative reaction to \textit{Argersinger}, by the Virginia Attorney General and the Assistant Attorney General, see Miller and Lefcoe, \textit{Gideon's Encore, the Argersinger Decision in Virginia}, 30 Wash. & Lee L. Rev. 431, 453 (1973).

If there is no pre-trial detention and no authorized jail sentence, *i.e.* if the only possible penalty is a fine, the amount of the maximum authorized fine is a similar gauge of the significance of the offense. Determining how high an authorized fine must be to suggest stigma seems inherently arbitrary, but surely there is a figure which clearly removes an offense from the *de minimus* category.81

Virtually the only direct sanctions for misdemeanor convictions in this country are jail, fines, or a combination of the two. Statutes typically provide, moreover, that a defendant who fails to pay a fine shall be imprisoned until the fine is paid.82 There is usually a rate of credit of so much per day, thus placing a limitation on the length of imprisonment. Some jurisdictions add further outside limits, *e.g.* 90 days in Michigan,83 eleven months in Maine,84 two years in Mississippi.85 What bearing do these “work-off” provisions have in determining the right to counsel? Some pre-*Argersinger* cases held that in calculating the maximum authorized jail sentence, from which “seriousness” would be inferred, the total possible jail time should include any jail time which could be served if the accused failed to pay the fine.86 Thus, if the applicable statute authorizes a fine up to $100 and 90 days in jail and provides for the “work-off” of fines at the rate of $2 per day, the total authorized jail term would be 50 plus 90 or 140 days.

If this approach is combined with that earlier suggested—that *any* authorized jail term should result in the right to counsel, then even an offense for which a fine was the only permissible direct sanction would be a significant one and the right to appointed counsel would attach to *every* case in a jurisdiction retaining work off-procedures. This arguably goes too far.87 It is reasonably clear after *Tate v. Short*,88 that only one having the means to pay a fine can be jailed. It seems odd to suggest

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81 Alexander v. City of Anchorage, 490 P.2d 910, 916 (Alas. 1971) (finding a right to counsel in any misdemeanor case where “the penalty on conviction . . . may result in incarceration . . . loss of a valuable license, or a fine so heavy as to indicate criminality.”); 18 U.S.C. § 1 (1970) (classifying as non-petty offenses misdemeanor the penalty for which does not exceed six months or a $500 fine); N. H. REV. STAT. §§ 604-A:1-2 (Supp. 1973) (entitling defendant to counsel for a misdemeanor providing for imprisonment or a fine exceeding $500) (emphasis added). See also United States v. R. L. Polk & Co., 438 F.2d 377 (6th Cir. 1971); Mayer v. City of Chicago, supra note 68.


83 MICH. COMP. LAWS ANN. § 600.4815 (1968).


85 MISS. CODE ANN. § 47-1-1 (1972).

86 Matthews v. Florida, 422 F.2d 1046 (5th Cir. 1970); James v. Headley, 410 F.2d 325, 326 (5th Cir. 1969).

87 Cf. note 106 infra.

that a court, determining the right of an indigent to appointed counsel, should take into account a penalty provision applicable in the main only to nonindigents. Yet the authorized jail term is still an index of the seriousness of the offense. Whether the jail term is authorized as a direct sanction or in lieu of fine payment, it still embodies the legislative judgment that the offense merits a sometimes lengthy jail term. If such is not the legislative intent, the “work-off” provisions can be repealed or confined to significant offenses.

Misdemeanor convictions frequently constitute occupational disabili­ties. They may even be a legal bar to occupational licenses. If so, the offense should probably be judged significant, regardless of the direct penalty authorized by statute.

Convictions also have other collateral consequences of varying directness. They may reflect on “good character” or other vague licensing criteria. Here, the appropriate inquiry would seem to require consulting the case law and applicable regulations, if any, to determine whether conviction of the particular offense can be considered as derogating from “good character.” If so, then the offense should be classified as significant, even if there is no present expectation that the defendant will seek such a license. He ought to be free to do so, unless given the right to counsel.

Misdemeanor convictions may also warrant revocation of probation or parole. Surely, any conviction which could be considered a ground for revocation is significant, even for a defendant who is neither a probationer nor a parolee. An offense which would suffice to make a law breaker out of a parolee is significant for anyone convicted of it.

Other convictions, although carrying little stigma and having no possible effect on occupational licensing, may have severe consequences nonetheless. Speeding or reckless driving may result in virtually automatic loss of driver’s licenses. In many states, moreover, speeding and other traffic offenses are on a “point system” under which a driver, after

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90 In New York, one must be of “good character” to be a pawnbroker, a hairdresser, a barber, a photographer, a junk dealer, or a street musician; to operate a motion picture theatre, a pool hall, a newsstand, a laundry, a garbage removal service, among others. Brief for Appellant at Appendix C-5, Baldwin v. New York, supra note 89.

accumulating a specified number of "points" during a fixed time period may have his license revoked or suspended. Moving vehicle offenses also characteristically result in higher insurance rates or even uninsurability. Given the substantial adverse consequences of such schemes, many such offenses can hardly fail a test of significance.

Other offenses may fail all the foregoing tests of significance, yet be such because they are occupationally related. Selling merchandise without a license, for example, may be morally neutral and carry a minor monetary penalty, but a valid conviction may destroy a defendant's business or occupation if the license is unobtainable, and the conviction may make it so.

Finally, offenses may have little or none of the consequences described above, yet carry stigma. Minor sex offenses and drunkenness fit this category.

In considering all these possible consequences, the judge will be guided, of course, by his experience. If he is unwilling to consider a legally authorized consequence enough in itself to warrant the offense's characterization as significant, he may discount the severity of any conceivable but uncertain disadvantage flowing from the conviction by its improbability. Having done so, his job is finished if he finds in favor of the right to counsel. If he doesn't, he must move on to the next inquiry, whether the charge threatens a "deprivation in fact."

C. Deprivations in Fact

If the significance of offense test is intelligently and generously applied, there will rarely be a need to examine the particular circumstance of the case. Argersinger makes clear, however, that if the judge is unwilling to classify the offense as significant, he must be sensitive to the special circumstances. Not only is he precluded from imposing a jail sentence on an uncounseled accused, he is disabled from imposing any equivalent sanction.

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95 See note 89 supra.
The conviction, apart from the sanction, may appear *de minimus* and non-stigmatizing, yet peculiar circumstances may make it otherwise. The defendant's driver's license may be jeopardized by a traffic charge because of his prior driving record.\(^7\) His job may be lost if he is convicted, because of its peculiar sensitivity, or because his employer has indicated as much. There may be an abnormal stigma attached to the offense in the defendant's community or place of work, which does not ordinarily adhere to such offenses.

It is difficult to see how a judge can structure a routine inquiry to flush these matters out. And it is unlikely that the uncounseled accused will both be aware of such special circumstances and knowledgeable enough about their relevance to the right to counsel to call them to the court's attention. Still, in that rare case where, by all objective criteria, the offense itself is not significant, and such factors appear, the judge should certainly appoint counsel.\(^8\)

D. Second Stage Inquiries: Post Conviction Deprivations

The significance of offense tests may not result in a determination of the right to counsel and the sentence imposed upon conviction may be *a de minimus* one. Conviction without counsel may therefore be presumptively valid. Subsequently, however, the conviction may be relied upon to impeach the accused as a witness in a trial, to deny a license, to revoke probation or parole, to enhance a sentence on a later conviction, or to impose a jail sentence for non-payment of a fine originally imposed upon conviction. The conviction ought to be open to challenge whenever and wherever the legal system seeks to rely on it as a justification for imposing a significant deprivation on the defendant who was denied counsel. This is to be the prevailing approach with respect to felony convictions where counsel was denied;\(^9\) it seems equally sensible with respect to misdemeanors.\(^10\)

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\(^7\) See text accompanying note 92–93 *supra.*


\(^10\) Cf. Clay v. Wainwright, 470 F.2d 478 (5th Cir. 1972); Comment, *Will the Trumpet of Gideon Be Heard in All the Halls of Justice?*, 25 U. MIAMI L. REV. 450, 474 (1971). But see Cottle v. Wainwright, 477 F.2d 269, 275 (5th Cir.), vacated on other grounds, 414 U.S. 895 (1973), holding that an uncounseled misdemeanor conviction which resulted in imprisonment could not be used in parole revocation, but such a conviction which resulted only in a suspended sentence could be, the theory apparently being that a conviction is valid for all purposes if not followed directly by a prison sentence. For an even more niggardly interpretation of *Argersinger*, see
Minor court magistrates and judges will be understaffed, undertrained, and overworked for the foreseeable future. Many are therefore hostile to expansive rights to counsel. Not only does the warning and inquiry take valuable time, actual appointment of counsel results in delays and time-consumption. The counsel-appointing process will almost certainly be a drain on the resources of any court administering misdemeanors. There is less reason, therefore, to presume validity of a trial judge's denial of counsel or determination of waiver in a misdemeanor case than such a determination in a court of general jurisdiction administering felony cases. Not only is the pressure to disregard the defendant's interests stronger in the misdemeanor case, there is far less reason for a judge to anticipate that his decision will be reviewed. One convicted of a felony without counsel will often be motivated, after the conviction, to seek counsel and appeal his conviction, causing the denial of counsel to be reviewed before another court. This is less likely for a misdemeanant who is not sent to jail for a long time.

Erroneous denials of the right to counsel will almost certainly be routine during the foreseeable future. The first occasion for the error to come to a court's attention may be long after the conviction, in collateral proceedings. There is no cogent reason for precluding an attack at this stage. Not only is this approach consistent with the principle that no significant deprivation can be imposed on an accused who has been denied counsel, but the opportunity to challenge the original conviction is also essential if abuses in the original process are to come to light.\textsuperscript{101}

Under this approach, an indigent who is denied counsel can be convicted of an insignificant offense, but the conviction will have only presumptive or provisional validity; it cannot be the predicate at any time for a significant deprivation by the legal process. A probationer or parolee should be permitted to challenge the conviction in his revocation proceedings, for example, and, if counsel was denied, the conviction should be a nullity.

This also means that magistrates cannot avoid \textit{Argersinger} by imposing a suspended sentence or probation upon an uncounseled defendant, then revoking it later. Even if counsel is appointed for the revocation proceeding,\textsuperscript{102} the original conviction should be disregarded. The Court

\textsuperscript{101} See S. Bing \& S. Rosenfeld, \textit{The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston} 24–28 (1970) [hereinafter cited as \textit{Quality of Justice}].

held in *Argersinger* that no person can be "imprisoned for any offense . . . unless he was represented by counsel at his trial." It would be sheer formalism to hold that this may be done provided it occurs in two or more stages.

Fines are more troublesome. If jail or suspended sentences cannot be imposed upon an indigent without counsel, can he be fined, then jailed for nonpayment of the fine? It is reasonably clear that one who receives a perfectly valid fine, predicated upon a conviction obtained with all due process, may not be jailed for failure to pay the fine if he has no means to pay. This would be *a fortiori* true of an indigent who was denied counsel and was unable to pay the fine. But what of a misdemeanant who was financially unable to employ counsel but able to pay a small fine? Suppose he is denied counsel, fined $20, then willfully refuses to pay? Would it be consistent with *Argersinger* to send him to jail? If, as in many states, a fine is automatically converted to a jail sentence upon nonpayment, or the sentence is expressly in the alternative, the answer should clearly be in the negative. But if there is a hearing, with right of counsel, and proof that the failure to pay was willful, the answer is not so easy. The proceeding is then analogous to a contempt proceeding for failure to obey a court order to pay a debt. If the fine is "valid," why cannot jail be employed as a collection device? To hold that it may not is to deprive the states of their customary means of enforcing fines and comes close to claiming that no sanctions whatever can be enforced against an indigent accused while denying him counsel. Yet I think that is where we must come out, for whatever label is given it, the jailing of the accused rests upon his conviction, and the conviction cannot constitutionally bear such weight. The defendant would still be "imprisoned for [the] offense" and the Court has said this cannot be done if the accused was denied counsel at his trial.

This doesn't necessarily preclude the levying of fines upon indigents who are denied counsel, but it does mean that no such fines can be

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103 407 U.S. at 37.
106 State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967). The Commonwealth of Virginia argued in *Argersinger* that an imprisonment-in-fact standard would invalidate jail-for-nonpayment statutes unless counsel was appointed in fine-only cases and that this would make it impossible to impose any sanctions. Brief of Commonwealth of Virginia as Amicus Curiae at 3, *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972). The Court avoided this issue, failing even to note that *Argersinger* himself was sentenced to jail only on the condition that he failed to pay a $500 fine. See note 11 supra.
107 407 U.S. at 37.
108 Id.
enforced by imprisonment, whether the judgment is labelled a "sentence" or a "contempt sanction." 109

IV. WAIVER

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." 110 Accordingly, an effective waiver of counsel requires a record showing that the defendant understands

the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. 111

Before there can be a waiver, the accused must be expressly offered counsel and his rejection of the offer must be intelligent and understanding. "Anything less is not waiver." 112

The Second Circuit has declared that the trial judge must not only explain in detail the defendant's rights, he must tell the accused "that it is advisable to have a lawyer, because of his special skill and training in the law, and that the judge believes it is in the best interest of the defendant to have a lawyer . . . ." 113 This advice must be coupled with a clear statement to the accused that "if he has no means to retain a lawyer of his own choice, the judge will assign a lawyer to defend him, without expense or obligation to him." 114

If the accused persists in his waiver efforts, the judge must conduct an "inquiry bearing upon the defendant’s capacity to make an intelligent choice." 115 The accused must not only understand the broad factual and legal aspects of the case, he must possess the "mental condition, age,

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109 A state may seek to recover fines by ordinary collection mechanisms and may permit payment in installments. See Ex Parte Scott, 471 S.W.2d 54 (Tex. Ct. Crim. App. 1971).
110 Schaefer, Federalism and State Criminal Procedure, 70 HARV. L. REV. 1, 8 (1956).
111 Von Moltke v. Gillies, 332 U.S. 708, 724 (1948). For a slightly different formulation, see ABA Project on Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge § 6.6 (1972) [hereinafter cited as Trial Judge].
113 United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964).
114 Id.
115 Id.
education, experience” to warrant an inference that his waiver is knowing, voluntary, and intelligent.116

A fair application of these criteria will rarely result in a waiver in a felony case, since efforts at waiver will almost always be based upon false premises or ignorance.117 It has even been held, for example, that an attorney of nearly thirty years’ experience, claiming reasonable familiarity with the criminal law, was incompetent to waive counsel and represent himself in a relatively simple prosecution for failure to file income tax returns.118 It has also been cogently suggested that no one should be found capable of making an intelligent waiver unless he first consults a lawyer.119

These standards have no kinship with the counsel-appointing practices in most minor criminal courts.120 In a study of criminal court practices in Metropolitan Boston, defendants arraigned before courts having general jurisdiction to try misdemeanors were rarely told of their right, if indigent, to have court appointed counsel,121 even though state law guaranteed the right to virtually all misdemeanants.122

In one case, the colloquy consisted of a single question by the judge, “Do you have any money?” and an answer, “Yes.”123 Another defendant was asked how much money he had in his pocket. He replied, “forty cents.” The judge, presumably in jest, told the defendant he “should hire a forty-cent lawyer.” Missing the joke, the Spanish-speaking accused was tried and convicted without a lawyer.124

In another encounter, an accused who loudly asserted his innocence was told to behave himself or the court would find he could afford his own lawyer.125 One judge, in the teeth of the law, categorically refused to appoint counsel in minor traffic and drunkenness cases.126

Judges were commonly observed to bargain with the accused, implyingly promising a lenient sentence if counsel was waived. Defendants

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118 United States v. Harrison, 451 F.2d 1013 (2d Cir. 1971).
119 DEFENSE SERVICES, supra note 63, at § 7.3.
120 For a dated but comprehensive study, see Silverstein, supra note 34, at 89–102.
121 Few judges make an “effort to explain that a lawyer will be assigned free of charge if the defendant [is] indigent.” QUALITY OF JUSTICE, supra note 101, at 51.
122 Mass. Sup. Jud. Ct. R. 3: 10 provides for the right to appointed counsel for all offenses “for which a sentence of imprisonment may be imposed.”
123 The accused had $10 in his pocket. QUALITY OF JUSTICE, supra note 101, at 51.
124 Id.
125 Id. at 52.
126 Id.
were assured their rights would be protected without a lawyer or that they would be “satisfied” with the results if they proceeded pro se.\textsuperscript{127}

The Boston judges apparently kept their word, for persons without lawyers were acquitted in 37 percent of the cases compared to an acquittal rate of 17 percent for those with assigned counsel.\textsuperscript{128} Of those convicted, defendants without lawyers went to jail in only 12 percent of the cases; those with assigned counsel were jailed in 35 percent. Twenty-six percent of unrepresented defendants received a fine only, compared with only ten percent who had assigned counsel.\textsuperscript{129}

In a post-\textit{Argersinger} study of the Municipal Court of Toledo,\textsuperscript{130} the practices of three judges presiding over a court with misdemeanor but non-traffic jurisdiction were observed. The first observation was a week after the \textit{Argersinger} decision. The second was six months later. In the first observation, one judge said nothing about the right of appointed counsel and the question of waiver did not arise. Twenty-two of 29 defendants appeared without counsel. Seven of the 22 were sentenced to jail.\textsuperscript{131}

Another judge sent 44 of 271 unrepresented defendants to jail. None had been asked if he wanted a lawyer.\textsuperscript{132}

Six months after \textit{Argersinger}, the two judges observed did at least mention the right to appointed counsel. One, however, gave only a group instruction at the opening of court.\textsuperscript{133} When individually called before the bench, none of the defendants were asked by this judge whether he wanted or could afford an attorney. The failure to request an attorney was considered a waiver.\textsuperscript{134} Of the 84 persons unrepresented, 14 were sentenced to jail.\textsuperscript{135}

The other judge gave group instructions about the right to counsel, then asked each defendant, as his case was called, if he wanted counsel appointed.\textsuperscript{136} If the accused said no, the judge would tell him that there was an attorney from the Bar Association who would be appointed if the defendant desired. If the accused said he did not want the lawyer, the judge declared a waiver. Under this procedure, 38 percent of un-

\textsuperscript{127} Id. at 53.
\textsuperscript{128} Id. at 54.
\textsuperscript{129} Id.
\textsuperscript{130} Comment, \textit{The Effect of Argersinger v. Hamlin on The Municipal Court of Toledo, Ohio}, 4 U. \textit{TOLEDO L. REV.} 577 (1973) [hereinafter cited as \textit{TOLEDO}].
\textsuperscript{131} Id. at 579.
\textsuperscript{132} Id. at 580-81, 584.
\textsuperscript{133} Id. at 592.
\textsuperscript{134} Id. at 593.
\textsuperscript{135} Id. at 588.
\textsuperscript{136} Id.
represented defendants requested counsel,\textsuperscript{137} as compared to eight percent before another judge\textsuperscript{138} and about three percent before a third, who gave only a group instruction.\textsuperscript{139}

Unlike Boston, there was apparently no bargaining in Toledo between judge and accused over the right to counsel. There was almost no occasion for bargaining before two of the three judges observed since failure to request counsel after a group instruction was considered a waiver by default. The third judge seemed to make a conscientious effort to follow the law, but even he failed to conduct an examination which would support a finding that waiver was informed or intelligent under prevailing standards.

It is unconstitutional to sentence an accused more severely because he requests appointment of counsel.\textsuperscript{140} Yet this was the effect of practices in Boston. To a judge who is harried by the counsel-appointing process or wishes to compensate for what he knows are procedural inadequacies in waiver-determination, such rewards for "waiver" have a strong attraction.

The surest solution for the inadequacies in the appointment process is the same as that for most of the graver ills of the criminal process: decriminalization,\textsuperscript{141} more courts, and more personnel. The Supreme Court may be right in thinking that there are plenty of lawyers in the profession to service needy misdemeanants,\textsuperscript{142} but they will be there only if fairly compensated or conscripted. And to the extent that the appointment or appearance of counsel slows or complicates the process, imple-

\textsuperscript{137} Id. at 586–87.
\textsuperscript{138} Id. at 584.
\textsuperscript{139} Id. at 593. In a post-\textit{Argersinger} study in New Mexico, of 2,000 defendants in magistrate's courts, only two had court-appointed counsel. Apparently, no mention was made at arraignment of the right to counsel and a few defendants who were interviewed after conviction indicated that they had not been aware of a right to appointed counsel. S. Blake & G. Farrah, \textit{The Impact of the Argersinger Decision: Providing Counsel for Indigent Misdemeanants} 5, 7 (1972) [hereinafter cited as Blake & Farrah]. A survey of prosecutors in 280 counties in all fifty states suggests \textit{Argersinger} has had little impact on the misdemeanor criminal process. Ingraham, \textit{The Impact of Argersinger—One Year Later}, 8 \textit{Law & Soc. Rev.} 615 (1974).
\textsuperscript{141} See generally Task Force Report, \textit{supra} note 65, at 97–107; Packer, \textit{The Limits of the Criminal Sanction} 249 (1968); Kadish, \textit{The Crisis of Overcriminalization}, 374 \textit{Annals} 157 (1967). The Court in \textit{Argersinger} explicitly suggested, as a "partial solution," the decriminalization of victimless conduct (e.g. public drunkenness, narcotics addiction, vagrancy, and deviant sexual behavior) and other "non-serious offenses, such as housing code and traffic violations." 407 U.S. at 38 n.9.
\textsuperscript{142} 407 U.S. at 37 n.7. See generally La France, \textit{Criminal Defense Systems for the Poor}, 50 \textit{Notre Dame Lawyer} 41, 100–01 (1974) [hereinafter cited as La France].
mentation of Argersinger places burdens on all court personnel and physical facilities as well. 143 These must be met by appropriations.

Some interim measures and efficiencies may nonetheless be feasible. It is hard to see, for example, why a court clerk or a law student can't be employed to pass out instruction forms and give individual explanations of rights to defendants. And in major urban areas, a public defender, or several, can be on hand to consult with defendants prior to their arraignment, without being first appointed. 144 These procedures should improve the process of informing defendants of their rights and could, if coupled with a group instruction from the judge, suffice to educate the accused in a general way about his right to counsel prior to arraignment. The judge's role in determining waiver could then become less an educational process and more of a testing and probing one. He could engage in a meaningful dialogue with the accused which would minimize rote repetition of rituals and focus on individual understanding.

The Supreme Court has not passed upon the legitimacy of less formal, flexible approaches to waiver in misdemeanor cases. It is an open question, therefore, whether precisely the same record showing is required for relatively non-serious misdemeanor cases as for felonies. If the right is the same, does it follow that the identical presumption against waiver holds in less serious cases? The California Supreme Court has said no. In In re Johnson, 145 the court held that while a waiver of counsel in a misdemeanor case must affirmatively appear on the record, this may be achieved in ways short of the elaborate inquiry required in felony cases. Questionnaires and forms filled out in advance of arraignment can serve the educational purpose and facilitate determination of the intelligence of waiver. 146

The sheer volume of cases disposed of in misdemeanor courts may arguably warrant some streamlining, even where constitutional rights are concerned. Beyond that, the fact that the stakes are usually smaller in misdemeanor than felony cases may justify some relaxation of the

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143 In many minor courts, it is apparently not uncommon for the prosecution to be presented by a policeman, or the judge himself, rather than a prosecutor. See Argersinger v. Hamlin, 407 U.S. 25, 49 (Powell, J., concurring); Blake & Farrah, supra note 139, at 4; Quality of Justice, supra note 101, at 22–23.
144 La France, supra note 142, at 77.
no-waiver presumption. As the probable consequences to an accused diminish, his willingness to spend his time in court and conferring with a lawyer will also tend to diminish. As the right to counsel is broadened, therefore, it makes more sense for a court to consider the possibility that a fully informed accused will wish to waive counsel. An accused felon who tries to waive his right to appointed counsel is at best a fool; one charged with failure to stop at a traffic light who says he wants to waive may just still be in a hurry.

No procedure should survive, however, which does not permit a reasonable inference of informed, intelligent waiver. In considering whether a mechanism meets that test, the gravity of the offense the potential and probable direct and collateral consequences of a conviction should be considered. At a minimum, in any case in which the right to counsel exists, the accused should be made to understand that if he is indigent, a lawyer will be appointed without cost and without penalty of any kind; indigency should be clearly and liberally defined, and the accused should individually be asked if he wants a lawyer appointed. If he says no, and he meets the indigency tests, he should be asked if he has consulted a lawyer. If he replies in the negative, he should be directed to consult public counsel, if available in the courtroom, before making a final decision. If no such counsel is available, the court should engage him in a colloquy the length, specificity, and nature of which should vary with the charge, the probable range of penalties, such facts as are known to the judge, and the apparent intelligence and sophistication of the accused. If the defendant has filled out a waiver form, the judge should question him about it to ascertain he fully understands it.

The right to appointed counsel is meaningless if the accused fails to exercise it through ignorance, misunderstanding, or fear.

V. Indigence

The right of poor persons to be represented by counsel is a four-legged throne which will collapse unless all legs are strong and of equal length. The two legs previously discussed, the right itself and presumptions against waiver, have no function without the other two, the meaning of "indigency" and the procedures for determining its existence. As the right to counsel is strengthened and waiver doctrine implemented, courts must concentrate on the rest of the support to get and keep the throne erect. Thus far, the Supreme Court has never dealt with the definition of indigency nor seriously evaluated determination procedures.\textsuperscript{147}

A. The Concept

The values which guide the giving of meaning to questions of "indigency" are similar to those with which we determine the rates by which we graduate income tax, the minimum wage, and social security benefits. They are decisions about the sharing of affluence.

Special considerations, however, support provisions to assure that the accused in a criminal case is equipped with the means of contest. First is the question of innocence. It is an outrage that an innocent accused should be made to pay any part of the cost of his own defense, yet there is no mechanism by which a defendant, declared innocent, can recoup his loss. Since we know that a substantial fraction of defendants in criminal cases are factually and legally innocent, we magnify the outrage in proportion to our insistence that accused persons pay for their own defense. Apart from unfairness to persons ultimately found innocent, moreover, we ignore our ideal of presumed innocence whenever we require an accused in advance of trial to bear any costs connected with the process. If we were serious about this ideal, we would offer free defense counsel to every criminal accused. Furthermore, defense counsel performs an essential role in the adversary process. His role, no less than that of the judge, the jury, and the prosecutor, serves the public interest and permits the system to function. One would be thought deranged who suggested that an accused pay not only for a defense lawyer but a portion of the salaries of the prosecutor, the judge, and jury. The state pays for these participants for the same reason it supplies the courtroom: the criminal process is quintessentially a public function. Yet the defense lawyer performs a public function no less than they when he participates in the process. It is far from clear that a principled distinction can be drawn between the defense lawyer and the other functionaries in the process—why the state should pay for some of them but not all. This should make us uneasy about imposing costs on any criminal accused; it should preclude us from doing so against those in our society least able to afford it.

The criminal process, among other things, is a mechanism for dispute settlement. It seeks to displace, in large measure, private remedies and revenge on the part of persons who feel abused by others. It likewise restricts, by a maze of sanctions (e.g. those against extortion, obstruction of justice, intimidation of witnesses, bribery, subornation of perjury), the avenues of relief otherwise open to a person accused of wrongdoing. Disputes between private persons, therefore, when they fall into the realm of criminal law, are funnelled into a process which substantially monopolizes modes of resolution. Having drawn a circle around the dispute, the system cannot rationally take sides but must
provide all participants with a fair opportunity to present their case. No such opportunity exists for a defendant if he is made to pay a price for participation that dwarfs in significance the stakes of the dispute. Thus, fairness requires that the costs of his participation be kept below the values at issue, since there is otherwise no meaningful opportunity to be heard.\textsuperscript{148}

The imposition of costs or disadvantages as a condition of the exercise of Constitutional rights may also be an infringement of the Constitutional rights involved.\textsuperscript{149} The exercise of the right may be "needlessly chilled" if the state's pecuniary interests are treated as paramount to the Constitutional rights of the accused. A state's interest in saving itself the modest cost of a defense lawyer to represent a person whom the state has elected to prosecute for crime must be inferior to the Constitutional rights of any accused who is deterred by the cost of defense counsel from participating meaningfully in the contest.\textsuperscript{150} Monetary barriers must not deprive an accused of freedom of choice. He has no such freedom if the cost of the contest, though within his grasp, is too dear. So long as waiver is regarded as legitimate, the Constitution does not prevent an accused from foregoing a contest, but the system must be so structured as to assure that the cost of a mainstay of the system—defense counsel—not be the overriding consideration in his decision to surrender.\textsuperscript{151}

When an accused is charged with a felony, the mere request for appointed counsel is a strong indication of indigency. The stakes are so high, most defendants would not forego the retention of counsel if it were reasonably within their means.\textsuperscript{152} The request itself becomes a less reliable indicator of indigence, however, as the seriousness of the charge diminishes. An accused could feel he has nothing substantial to gain or lose by counsel and might request counsel simply because it is offered. It is therefore imperative that lower court judges adopt relevant standards of indigency and follow procedures calculated to permit a reasoned judgment of eligibility. The failure to offer counsel, the promise


\textsuperscript{151} Although equal protection principles have been held to create a right to appointed counsel on appeal, Douglas v. California, 372 U.S. 353 (1963), the Court has never employed them in determining the right to trial counsel. Logically applicable, \textit{a fortiori}, such principles are unnecessary at the trial level; due process can do the job. \textit{See} Kamisar and Choper, \textit{The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations}, 48 MINN. L. REV. 1 (1963). \textit{See generally} note 68 supra.

of leniency if counsel is waived, the implicit threat of a more severe sentence if counsel is claimed, or pre-trial detention coupled with delay for those requesting counsel, are subversions rather than substitutes.

A criterion of indigency which focuses merely on the defendant's access to assets or his income is inadequate. Rather, the test should be whether the cost of the defense, considering all aspects of defendant's financial condition, would impose a substantial hardship on the accused or his family. A sum of money which is a "substantial hardship" will vary geographically and with the prevailing costs and standards of living, since the objective is to prevent an accused from foregoing a contest for none other than economic reasons.

Rigid eligibility standards based solely on income, with adjustments for dependents, which are in force in many jurisdictions, are off target. They bear little relationship to substantial hardship.

The fact that an accused is able to make bail, often used as a benchmark for denying counsel, is virtually irrelevant. Bail money is not available for the defense. It may also have been lent by friends or relatives. A defendant's access to funds with which to obtain his pre-trial release is no guaranty of his ability to pay counsel. The converse is true, however. One who is unable to purchase his release ought virtually to be considered eligible for appointed counsel ipso facto.

Since indigency is both relative and functional, a decision is incoherent if it does not take into account the probable cost of counsel. This will, of course, differ from jurisdiction to jurisdiction and will vary with the charge. In determining eligibility, however, the judge should estimate the probable cost of retaining counsel for a trial of the offense. To hold that an accused can afford the average cost of representation for a particular offense is simply to decide he can afford a lawyer to plead him guilty. This is an impermissible prejudgment of the merits and a preclusion of the very choice the right to counsel seeks to preserve.

The judge should add to this figure the cost of obtaining release on bond, if defendant is in jail, estimated costs of investigative services and

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153 Defense Services, supra note 63, at 53–54. See also Iowa Code Ann. § 336A.4 (1965) ("without prejudicing his financial ability to provide economic necessities for himself or his family").

154 An accused is indigent when his "lack of means ... substantially inhibits or prevents the proper assertion of a [particular] right or a claim." Attorney General's Report on Poverty and the Administration of Federal Criminal Justice 9 (1963).

155 Silverstein, supra note 34, at 107; Quality of Justice, supra note 101, at 52.

156 And eligibility should be determined as part of the booking process, subject to review by the court. La France, supra note 142, at 78.

157 See Oaks, supra note 152, at III–90.
witness fees, if there is some reason to suspect they may be needed.\textsuperscript{158} He should add the probable cost of a fine upon conviction, if predictable. Only if defendant is able to furnish all these funds "without substantial hardship" should he be found ineligible.\textsuperscript{159}

In assessing financial hardship, the inquiry should include an inventory of assets, liabilities, and current costs of living. If an accused personally has \textit{net} assets which considerably exceed the estimated costs of his defense, the preliminary inference would be against a finding of financial inability. If, however, it appears that he is unemployed and virtually unemployable; if, for example, he has no skills or is aged or infirm, the inference should vanish. Under such circumstances, if his net assets are insufficient to support him and his family for the indefinite future, he is functionally indigent.

If the accused is not otherwise indigent but has no access to ready cash, \textit{e.g.} if he has no non-necessaries which can quickly be pledged, he should also be eligible for appointed counsel. It seems doubtful, moreover, that an accused should be expected to sell a dilapidated family car or television set before he can be considered financially unable to employ counsel. Families on welfare often have both, and consider them necessaries.

Current income is especially relevant in determining financial hardship in a misdemeanor case where there is no serious prospect that the charge or a conviction will cause loss of employment. But wages cannot be considered without reference to obligations in computing the current income available for the defense. An accused who has large medical bills or many dependents may be strapped even though he earns substantial wages. There is no reason, for example, why one who earns $125 per week should be considered ineligible \textit{per se}.\textsuperscript{160}

It is wrong to include in the computation of available funds the assets of friends, siblings, parents, or children in absence of a legal obligation to support the accused. The court has no basis for assuming that such funds will be forthcoming nor for imposing an obligation upon such persons to pay.\textsuperscript{161}

\textsuperscript{158} Id.
\textsuperscript{160} In an analysis of appointments under the Criminal Justice Act, 18 U.S.C. § 3006A (1970), the Administrative Office of the United States Courts found that 5% of the defendants for whom counsel were appointed earned more than $100 per week. About 3½% of defendants for whom counsel was appointed in Chicago in 1966 earned more than $125 per week (3 were over $175), and 12 had more than $200 in cash. Oaks, supra note 152, at III–99; DEFENSE SERVICES, supra note 63, at 54.
\textsuperscript{161} Oaks, supra note 152, at III–99; Defense Services, supra note 63, at 54.
Indigency in the context of right to counsel is not a synonym for "destitute." Since it has often been given that meaning, however, it should probably be removed from the rhetoric of right to counsel and replaced with more meaningful concepts.

B. The Practice

In those courts where the right to counsel is itself seldom articulated or explained, questions of indigency are evaded by presumptions of waiver. When an accused does request counsel, an apparently common judicial response is not to determine indigency but to continue the case to permit the defendant to try to employ a lawyer. To an accused who is in jail, the coercion is clear.

A judge in Toledo was observed to determine non-indigency by the appearance of defendant's clothing. Another defendant was denied counsel because he owned an eight-year old Ford "in bad shape" on which he owed $42. The judge told him to sell the car. Another accused, although in tattered clothes, was found ineligible because he had $30. Other ineligibles included a man with no money but $25 in accrued wages, two men traveling across the country with no resources other than a 1964 Chevrolet, and a defendant with nothing but a 1960 Pontiac for which he couldn't afford license plates. Judges in Toledo equated inability to hire an attorney with destitution or total absence of assets. So, apparently, do some judges in Boston.

Apparently only a few courts, chiefly in large cities, employ detailed questionnaires or affidavits of a type which would permit an assessment of defendant's financial condition. Such questionnaires or their equivalent in the form of on-the-record questioning should be required by due process. Since waiver of the right to counsel and other constitutional rights cannot be presumed but must be established on the record by detailed inquiry, it is hard to see how a defendant who has asserted

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164 See text accompanying notes 120-39 supra.
165 Oaks, supra note 152, at III-22; Toledo, supra note 130, at 585.
166 Toledo, supra note 130, at 585.
167 Id. at 590.
168 Id. at 591.
169 Id.
170 Id. at 586.
171 Quality of Justice, supra note 101, at 51.
the right to counsel can lawfully be denied the right without clearly establishing his ineligibility on the record. Ineligibility cannot be gleaned without a comprehensive cataloging of defendant's financial resources and obligations.¹⁷⁴

It seems a waste of judicial time to make routine, detailed inquiries into financial resources at arraignment. Non-judicial personnel can hand out questionnaires in advance of arraignment, have them filled out and pass them up to the judges who need then only make supplementary inquiries. The goal is that the facts be gotten, not that they be gathered in the first instance by a judge.

VI. CONCLUSION

Even a Court as inimical to the claims of criminal defendants as the current Court cannot deny Mr. Justice Black's *Gideon* dictum that lawyers are "essential to a fair trial," whether the trial of a misdemeanor or the trial of a felony. It thus seems all but inevitable that the right to appointed counsel will ultimately be extended to all criminal prosecutions, however petty.

If *Argersinger* is read in the context of the jury trial cases which preceded it, moreover, that decision was a great stride toward full recognition of the right to appointed counsel. Rather than approving lawyerless convictions where no imprisonment is imposed, as many have misread it, *Argersinger* suggests that no conviction can be obtained while denying counsel if it involves a significant deprivation, in whatever form or combination. When lower courts and legislatures finally bring themselves to understand the decision, Mr. Justice Black's opinion in *Gideon* will be substantially implemented, albeit with less than all deliberate speed.

¹⁷⁴ See United States v. Cohen, 419 F.2d 1124 (8th Cir. 1969).