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RIGHT TO COUNSEL: THE IMPACT OF GIDEON v. WAINWRIGHT IN THE FIFTY STATES

I. INTRODUCTION

A recurring problem in criminal procedure is the extent of the indigent's Sixth Amendment guarantee of right to counsel.1 Gideon v. Wainwright,2 a 1963 United States Supreme Court decision, held that the right to counsel, retained or appointed, is a "fundamental right, essential to a fair trial" for anyone "charged with crime" in a state court.3

Lower courts have been sharply divided in determining whether the narrow holding of Gideon should be extended. Since Gideon was charged with a felony,4 the case has been taken by some courts as requiring appointment of counsel only for indigent felons.5 Others courts have looked to language in Gideon which makes generic reference to "crime" and to "any person haled into court, who is too poor to hire a lawyer" to conclude that the right should be extended to all defendants in "any criminal proceeding."6 A third view takes a middle position, holding that the right exists for misdemeanants where the punishment might be serious.7 That Gideon should have had such an uncertain effect may not have been unintended by the Court if Justice Harlan's statement, in concurrence, that it was unnecessary at that time to decide whether the guarantee would extend to nonfelony cases,8 is reflective of the Court's opinion.

Obviously, Gideon has not laid to rest all questions concerning right to counsel for indigents. As noted above, the extent of the indigent's right to counsel is largely dependent upon the fortuitous circumstances of the location of his arrest and trial. However,

1. The pertinent language of the Sixth Amendment is as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."
3. Id.
4. Id. at 336-37.
5. E.g., City of Toledo v. Frazier, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967); Cortinez v. Flournoy, 249 La. 741, 190 So. 2d 909 (1966).
8. 372 U.S. at 351.
the practical implementation of a constitutional right should be uniform throughout the country. Consequently, the purpose of this article will be two-fold. First, to show that since most states provided counsel to indigent felons prior to Gideon, the effect of the narrow holding of Gideon has been minimal, and second, to show that if that narrow holding is extended, the effect of such extension will also be minimal since many states now provide counsel to defendants accused of crimes of a lesser degree than felonies.

An analysis of prior decisions suggests that Gideon was actually not a radical departure from previous Supreme Court rulings. Even though Gideon expressly overruled Betts v. Brady, a 20 year old decision which held that the right to counsel existed only when the crime charged was a capital offense or when there were present other "exceptional circumstances," the Betts case had been continually circumvented by later decisions. After Betts, non capital felony convictions were often overturned because of the "exceptional circumstances" in the case at bar. The practical result was that Betts v. Brady had been in gradual demise since the day it was handed down.

In addition, although the fact seems to have been overlooked by many critics, Gideon would have been provided with counsel if charged with a felony in 45 states. Thus, Gideon, constricted to

10. Id.
12. In Gideon, Justice Harlan, in concurrence, stated:
    In noncapital cases, the "special circumstances" rule has continued to exist in form while its substance has been substantially and steadily eroded. . . . The Court has come to recognize . . . that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the Betts v. Brady rule is no longer a reality.
its narrow holding as demanding that counsel be appointed only for those defendants accused of felonies, was at best of moderate impact both in terms of decisional consistency and practical effect.

Within a short period of time after the Gideon decision each of the states which had denied the right to accused felons revised its laws to include noncapital offenses. An examination of the law operative in the remaining states at the time of Gideon reveals that not more than five states consistently provided appointed counsel for crimes less serious than felonies. Thus, even though sometimes in contravention of statutory provisions, prior to Gideon 40 states furnished appointed counsel to indigent felons only.


However, in some of these states counsel was provided for defendants charged with crimes of a lesser degree than felonies on a county or city wide basis or in extenuating circumstances.\(^{17}\)

Seven years after *Gideon*, right to counsel appointment has radically changed in most of the fifty states. In contrast to 1963 when only a scattering of states supplied appointed representation as a matter of course to defendants charged with crimes less than felonies, today no less than 31 states regularly assign counsel in less serious criminal cases.\(^{18}\)

Thus, if the intent of the Supreme Court in *Gideon* was to urge, without expressly commanding, the states to extend the Sixth Amendment guarantee of counsel to defendants other than accused felons,\(^{19}\) the results have been very satisfactory. Conceivably, *Gideon* has not been the sole factor prompting the transition, perhaps just as important is the realization in many states that "justice for all" demands representation in court for the indigent as well as for the more affluent individual who can afford to pay an attorney.\(^{20}\)

The remainder of this article will be devoted to an examination

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17. Silverstein notes that in some states appointment of counsel for misdemeanants is discretionary dependent upon locality, e.g., Nebraska, 3 *Silverstein* 440; and that in other states counsel is assigned for misdemeanants only on rare occasions, e.g., Hawaii, 2 *Silverstein* 176.\(^{18}\)


19. A justice of the Minnesota Supreme Court noted this possibility in *State v. Borst*, 278 Minn. 388, 154 N.W.2d 888, 897 (1967): The apparent reticence of the United States Supreme Court to consider cases demanding furnished counsel for misdemeanants, I am convinced, has been an exercise in "creative ambiguity," the court wishing more time and experience to assess the probable consequences of extending constitutional requirements for counsel. (Peterson, concurring). *See also* text at note 8 supra.

20. *See* 1 *Silverstein* 127.
of the impact of Gideon on state law in terms of the level of crimes for which appointment of counsel is required in the individual state. Each state will be studied from the standpoint of the requirements for appointment of counsel within that state both immediately before Gideon and at the present time.

Before proceeding, the statement of several initial caveats is necessary. First, since the classifications of the various levels of crimes are not at all consistent throughout the states, rather arbitrary categories must be established. Critics have asserted that present legal classifications of the various crimes to which the right to counsel attaches are inadequate, that rather, the right should be dependent solely upon the seriousness of the consequences. However desirable such classifications or other categories might be, for purposes of this article, some semblance of order must be made out of those classifications used by the various states.

As an aid, a useful comparison can be made between the classifications of federal offenses and those of the states. Whereas federal crimes are divided into three categories, felonies, misdemeanors, and petty offenses, most state laws presently encompass only the common law dichotomy, felony and misdemeanor. However, some states provide for "serious crimes" the penalties which lie somewhere between those for felonies and misdemeanors. Numerous states categorize certain lesser offenses as "petty" where the potential penalties are generally a relatively small fine and possible jail sentence of short duration. It would appear that many misdemeanors and petty offenses under state law are roughly the equivalent of petty offenses under federal law, at least in

21. See text at notes 24-26 infra.
22. Among the numerous legal writers discussing the right to counsel, there apparently is a unanimity of opinion that the right should be extended. See, e.g., Polur, Retained Counsel: Why the Dichotomy? 55 A.B.A.J. 254 (1969); Siegal, Gideon and Beyond: Achieving an Adequate Defense for the Indigent, 59 J. Crim. L. 73 (1968). The divergence of opinion lies not in argument as to whether the right to counsel should be extended for crimes less serious than felonies but as to how far the right should be extended. For a recent analysis of the varying positions asserted, see Junker, The Right to Counsel in Misdemeanor Cases, 43 WASH. L. REV. 685, 703-15 (1968).
1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
2) Any other offense is a misdemeanor.
3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.
For purposes of this article, the established state categories of felony, serious crime, and misdemeanor will be employed. However, each state class will be defined according to the definition given the corresponding federal class of crime.\textsuperscript{27} As a result, the state classifications will be given the following definitions as indicated:

(a) **Felony**—any offense punishable by death or imprisonment for a term exceeding one year (a federal felony).\textsuperscript{28}

(b) **Serious Crime**—any offense not a felony, but punishable by imprisonment for a period of six months or more or a fine of $500 or more, or both (a federal misdemeanor).\textsuperscript{29}

(c) **Misdemeanor**—any offense for which the punishment is less than that for a serious crime, i.e., imprisonment not exceeding six months or a fine not exceeding $500 (a federal petty offense).\textsuperscript{30}

As a second caveat, it should also be noted that although most states clearly fall within a particular classification, the lack of clarity of the information available on the provisions for right to counsel as practiced by several states makes categorization of those states difficult.\textsuperscript{31} Although the authors have assigned each state

\textsuperscript{27} It is virtually impossible to attempt any precise definitions within which each state offense would easily fit. Accordingly, the federal definitions appear to be a workable model from which to compare all fifty states since most of the lower court decisions seem to fall generally within one of these categories. (see text at notes 4-6 supra)

\textsuperscript{28} No attempt has been made herein to distinguish between the varying minimum sentences that may exist in the states. Thus state definitions of felony have been adhered to strictly, so that, for purposes of this paper, it is inconsequential that in one state the minimum sentence for a felony conviction is one year while in another state it may be three or five years.

\textsuperscript{29} In some states the possible penalty is but one factor considered in determining whether a crime is serious; e.g., Arizona: see the discussion in notes 134-37 infra. In these states, when the penalty is not the exclusive test, it is possible for a serious crime, as defined herein, to provide for a maximum sentence of less than 180 days or $500.

\textsuperscript{30} In some states traffic infractions and violations of municipal ordinances are designated petty offenses and consequently are excluded from the right-to-counsel guarantee; e.g., New York: see textual discussion at notes 182-85 infra.

\textsuperscript{31} For example, Maine (discussed in notes 81-83 infra) and Montana (discussed in notes 86-98 infra) statutorily require counsel appointment for accused felons, while stating that an attorney may be appointed in misdemeanor cases. The authors could find no data indicating whether in practice appointment is made for indigent misdemeanants.
to a particular category, in all cases the statutes, court decisions, and other relevant information used by the authors in categorizing a particular state have been noted for the reader's own consideration.

Third, in several states the current practice as to appointment of counsel for indigents is rendered uncertain by the pronouncements of federal courts applying state law.\textsuperscript{32} In contrast to state court interpretations, federal courts in the Fifth Circuit have repeatedly held that the right to counsel cannot be constitutionally limited to felons only.\textsuperscript{33} In addition, federal courts in other sections of the United States have also begun making inroads into traditional counsel appointment practice.\textsuperscript{34} For instance, the Eighth Circuit Court recently reversed the conviction of the celebrated Charlie Winters whose conviction, without legal representation, for violating a municipal ordinance, resulted in a substantial jail sentence.\textsuperscript{35}

The federal court decisions of the past two or three years evi-
dence a trend toward rejection of state provisions for appointment of counsel in favor of the standard adopted in the Federal Criminal Procedure Act of 1964 for punishment of federal offenses. Under that Act counsel must be furnished if the possible imprisonment can be of longer duration than six months or if a possible fine can be greater than $500.36

Outside the Fifth Circuit other federal courts have been instrumental in causing state courts—notably Connecticut37 and North Carolina38—to extend the scope of right to counsel to “serious” misdemeanor offenses. Consequently, the Eighth Circuit’s holding in Beck v. Winters39 may be taken by the states in that circuit now providing counsel solely in felony cases—Arkansas,40 Missouri,41 Nebraska,42 and South Dakota43—as persuasive authority for extension of the right to counsel in their jurisdictions.

Fourth, it should be noted that repeatedly, amid vigorous dissent from some justices, the United States Supreme Court has declined to review post Gideon right to counsel decisions in which the ultimate issue was whether the right should be absolute in misdemeanor cases.44 The reasons underlying the Court’s failure

36. An examination of all the federal decisions suggests that the test to be applied has undergone a gradual shift. The earlier decisions seemed to include all misdemeanants within the scope of absolute right to counsel. See, e.g., McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965); Rutledge v. City of Miami, 267 F. Supp. 885 (S.D. Fla. 1967); Petition of Thomas, 261 F. Supp. 263 (W.D. La. 1966), aff’d sub nom. Goslin v. Thomas, 400 F.2d 594 (5th Cir. 1968). Later cases seemed to employ a “serious consequences” standard whereby a variety of factors were considered to determine whether counsel should be appointed. See, e.g., Brinson v. State of Florida, 273 F. Supp. 840 (S.D. Fla. 1967); Arbo v. Hegstrom, 261 F. Supp. 397 (D. Conn. 1966); Creighton v. State, 237 F. Supp. 806 (E.D.N.C. 1966). More recently, the federal “petty offense” rule has been relied upon as the guide to follow. See, e.g., Beck v. Winters, 407 F.2d 125 (8th Cir. 1969); Boyer v. City of Orlando, 291 F. Supp. 1005 (M.D. Fla. 1968). However the latest decision from the Fifth Circuit holds that whenever a defendant’s liberty can be deprived or when the offense charged is “serious” (e.g., loss of driver’s license), counsel must be appointed. James v. Headley, 410 F.2d 325 (5th Cir. 1969).

37. See text at notes 138-47 infra.

38. See text at notes 162-69 infra.

39. 407 F.2d 125 (8th Cir. 1969).

40. See text at notes 56-60 infra.

41. See text at notes 91-95 infra.

42. See text at notes 99-101 infra.

43. See text at notes 117-19 infra.

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to review such decisions are, of course, matters for speculation only. However, at the present time, no valid constitutional reason has been suggested that would justify limiting an indigent's right to appointed counsel solely to felony cases. The only arguments proposed against further extension of the right have been practical. For instance, the impossibility, in terms of numbers of attorneys and funds available, for the states to effectively grant counsel in "all criminal cases." The results of the following fifty-state survey suggest that even this "impossibility" argument is no longer tenable.

II. FELONY-ONLY STATES

Of the nineteen states currently providing counsel only for persons charged with a felony, fifteen are virtually identical to


45. The primary constitutional arguments advanced in favor of extending the right to counsel are: 1) that the right to counsel in all criminal proceedings is fundamental and thus must apply to the states through the Fourteenth Amendment, see Junker, The Right to Counsel in Misdemeanor Cases, 43 WASH. L. REV. 685, 687-93 (1968); 2) that an indigent who is not furnished with counsel is denied equal protection of the laws in violation of the Fourteenth Amendment, see Junker, supra, 693-95.

Examples of policy arguments favoring appointment of counsel are: 1) smaller chance of reversible error in the proceedings and 2) expeditious disposition of the case, see McIntyre, Law Enforcement in the Metropolis (a working paper on the criminal law system in Detroit), 127. See also 1 SILVERSTEIN 125-26.

46. The predominant arguments against extending the right to counsel to misdemeanants is that the increased costs, when balanced with the increased benefits to accused misdemeanants, are too burdensome to society as a whole. This problem is further compounded by the fact that in most areas the number of attorneys available is not nearly sufficient to supply all misdemeanants with adequate counsel. See, e.g., Kamisar and Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 MINN. L. REV. 1, 84-88 (1963); Manson, The Indigent in Virginia, 51 VA. L. REV. 163, 174-75 (1965). See also Report of the Conference on Legal Manpower Needs of Criminal Law, 41 F.R.D. 389 (1966).

47. Arkansas: see notes 56-60 infra; Florida: see notes 61-64 infra; Georgia: see notes 65-67 infra; Hawaii: see notes 68-69 infra; Indiana: see notes 70-75 infra; Kansas: see note 76 infra; Louisiana: see notes 77-80 infra; Maine: see notes 81-83 infra; Mississippi: see notes 84-90 infra; Missouri: see notes 91-95 infra; Montana: see notes 96-98 infra; Nebraska: see notes 99-101 infra; Ohio: see notes 102-04 infra; Oklahoma: see notes 105-07 infra; Rhode Island: see notes 108-11 infra; South Carolina: see notes 112-16 infra; South Dakota: see notes 117-19 infra; Tennessee: see notes 120-22 infra; Virginia: see notes 123-24 infra.
the pre-\textit{Gideon} days,\footnote{Arkansas, Georgia, Hawaii, Indiana, Kansas, Louisiana, Maine, Missouri, Montana, Nebraska, Ohio, Oklahoma, Rhode Island, South Dakota, Virginia. \textit{See} note 16 \textit{supra}.} while Florida, Mississippi, and South Carolina formerly required that counsel be provided only for defendants charged with capital crimes.\footnote{\textit{See} note 13 \textit{supra}.} Tennessee, which previously provided appointed counsel for some misdemeanants,\footnote{\textit{See} note 15 \textit{supra}.} has amended its laws so that at the present time only felony charges bring one within the scope of the statute.\footnote{\textit{In} text at notes 120-22 \textit{infra}.}

States within this category typically limit the right to counsel by statute\footnote{\textit{E.g.}, \textit{Ark. Stat. Ann.} \textsection 43-1203 (Repl. 1964); \textit{Neb. Rev. Stat.} \textsection 29-1803.01 (Reissue 1965).} or by rule of criminal procedure.\footnote{\textit{E.g.}, \textit{Fla. R. Crim. P.} 1.160(e) (1968); \textit{La. Crim. Pro. Code Ann. art. 513} (West 1987).} South Carolina, while its statutes specify appointment of counsel only in capital cases,\footnote{\textit{Ark. Stat. Ann.} \textsection 43-1203 (Repl. 1947); \textit{see also} 2 \textit{Silverstein} 49.} has extended the right to noncapital cases by judicial ruling.\footnote{\textit{Ark. Stat. Ann.} \textsection 43-2415 (Repl. 1964): \textit{In} all counties where said appropriation has been made any attorney at law appointed by the Circuit Court to defend a person charged in said Court with the commission of a crime, whether misdemeanor or felony, shall receive for his services . . . \textit{Cableton v. State}, 243 \textit{Ark.} 351, 420 \textit{S.W.2d} 534 (1967); \textit{Winters v. Beck}, 239 \textit{Ark.} 1151, 397 \textit{S.W.2d} 364, \textit{cert. denied}, 393 U.S. 907 (1969).} In the felony-only states, since the laws of the jurisdiction are written so as not to require the assignment of counsel for indigent misdemeanants, the normal practice is not to do so.

\textit{Arkansas.} An indigent “about to be arraigned upon an indictment for a felony” is entitled to counsel by Arkansas statute.\footnote{\textit{Ark. Stat. Ann.} \textsection 43-1203 (Repl. 1964); \textit{Winters v. Beck}, 239 \textit{Ark.} 1151, 397 \textit{S.W.2d} 364, \textit{cert. denied}, 393 U.S. 907 (1966).} Although there is statutory language indicating that an attorney may be appointed for defendants accused of lesser offenses,\footnote{\textit{Ark. Stat. Ann.} \textsection 43-2415 (Repl. 1964): \textit{In} all counties where said appropriation has been made any attorney at law appointed by the Circuit Court to defend a person charged in said Court with the commission of a crime, whether misdemeanor or felony, shall receive for his services . . . \textit{Cableton v. State}, 243 \textit{Ark.} 351, 420 \textit{S.W.2d} 534 (1967); \textit{Winters v. Beck}, 239 \textit{Ark.} 1151, 397 \textit{S.W.2d} 364, \textit{cert. denied}, 393 U.S. 907 (1969).} case law has emphasized the fact that the guarantee of counsel does not extend to such offenses.\footnote{\textit{Ark. Stat. Ann.} \textsection 43-1203 (Repl. 1964).} Also, the effect of the Eighth Circuit’s recent recision in \textit{Beck v. Winters}\footnote{\textit{407 F.2d} 125 (8th Cir. 1969).} upon Arkansas state court procedure is not clear at this time. The state practice prior to \textit{Gideon} extended appointment of counsel to indigent felons only.\footnote{\textit{Ark. Stat. Ann.} \textsection 43-1203 (1947); \textit{see also} 2 \textit{Silverstein} 49.}

\textit{Florida.} In Florida, where the \textit{Gideon} case arose, the statutory language still makes provision for appointment of counsel only for
defendants accused of capital crimes. However, a rule of criminal procedure includes felons within the protection. Federal courts, applying Florida law, have further extended the right but the state courts persist in applying the rules only to felons.

**Georgia.** Prior to 1963, Georgia made no provision for appointment of counsel except in capital cases. By statute Georgia now provides for appointment of attorneys for accused felons. One state court of appeals decision has stated in dictum that a misdemeanor does have an absolute right to have counsel appointed for his defense.

**Hawaii.** The statutes of Hawaii, both before and after Gideon have granted the right to appointed counsel to defendants charged with felonies.

**Indiana.** A law passed in 1953 authorized the appointment of public defenders in the larger counties to defend any poor person accused of the commission of a crime. No other statute compelled counsel appointment in the remaining counties, although the actual practice was to do so. A 1951 decision construing a state constitutional provision held that "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." However, a survey made shortly following the Supreme Court's determination of Gideon indicated that a misdemeanor's right to counsel existed only in certain counties. The public defender law currently in force does not appear to have extended the right to counsel any further than it existed in 1965.

Kansas. The Kansas legislature in recently revising its laws has retained the right to counsel guarantee only for those charged with felonies.

Louisiana. As in pre-Gideon days, Louisiana's statutes require that the courts furnish counsel only in "felony cases." State decisions have not extended the protection any further. However, a federal district court, applying Louisiana law, held that Gideon requires that counsel be appointed for accused misdemeanants in "all criminal cases." Since a District Court has jurisdiction over misdemeanors and a Superior Court also has jurisdiction over felonies, apparently "any criminal case" in the above statute includes misdemeanors. However, the authors could find no information to indicate whether counsel is in fact appointed for any misdemeanants.

Mississippi. When Gideon was decided Mississippi assigned counsel exclusively in capital cases. Today, by virtue of statutory

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74. 2 SILVERSTEIN 216-20.
77. LA. REV. STAT. § 1543 (1950).
78. LA. CODE CRIM. P. tit. 14, art. 513 (1968).
79. State v. Rockeymore, 253 La. 101, 216 So. 2d 828 (1968) (indigency was not a factor); State v. Angelo, 251 La. 250, 203 So. 2d 710 (1967) (indigency was not a factor); Cortinez v. Flournoy, 249 La. 741, 190 So. 2d 909, cert. denied, 385 U.S. 925 (1966).
82. ME. REV. STAT. ANN. tit. 15, § 810 (Supp. 1968-69); ME. R. CRIM. P. 44 (Supp. 1968-69).
83. ME. REV. STAT. ANN. tit. 15, § 1 n.2 (1965).
84. MISS. CODE ANN. § 2505 (1957).
amendment, accused felons also have the right to counsel. A recent decision stated that the right existed for defendants charged with "serious crimes" but the crime in question was a felony. Thus, Mississippi courts are apparently not obligated to furnish counsel for lesser offenses.

However, as previously noted, the Fifth Circuit Court held in 1965 in Harvey v. State of Mississippi that even one accused of a misdemeanor must have counsel if he is indigent. A federal district court in 1968 reaffirmed the right of indigent misdemeanants to be furnished with counsel, noting that the ultimate problem lay in the fact that the legislature had failed to establish any procedure for compensating the attorneys appointed.

Missouri. Apparently now, as before Gideon, in Missouri only defendants charged with a felony have a right to court appointed counsel. A 1965 decision, although stating that the right

86. Scott v. State, 208 So. 2d 754 (Miss. 1968). See also Capler v. City of Greenville, 207 So. 2d 339 (Miss. 1968).
88. 340 F.2d 263 (5th Cir. 1965).
89. Id.
90. Phillips v. Cole, 298 F. Supp. 1049, 1052-53 (N.D. Miss. 1968). The court's language is particularly relevant to the problem considered herein:

In the light of the foregoing conclusions, the court is brought to the ultimate problem in this case of State law, apparently, failing to provide a method of clearly employing and compensating court-appointed counsel in other than felony cases. Of what relevancy, one may ask, is it that State judicial officers, such as defendants here, who are acting in good faith in the discharge of their duties, lack the authority to compensate counsel they might appoint in misdemeanor cases? The answer must, and can only, be that constitutional rights must be recognized and upheld, regardless of consequences. This court recognizes that the lack of hiring authority may cause real concern, as well as undoubted confusion, to State law enforcement officers and State judges. It is fair to observe that if there is a dilemma which here results, it is not caused by recognition of Sixth Amendment rights as consistently interpreted in the Fifth Circuit in the three years since the Harvey decision. Any legal vacuum resulting in the State criminal proceedings is a situation for which responsibility can not be laid at the door of this court. The State of Mississippi, in undertaking to define crime and prosecution thereof, must, at all events, comply with the demands of the Constitution of the United States. Inaction, or failure to act in passing necessary legislation to meet this problem, will not militate against the maintenance of the constitutional right. In those terms, continued local inertia will be the root cause of bringing to a grinding halt prosecutions of misdemeanors and like offenses because of procedural constitutional infirmity. The practical effects of the holding today cannot become a matter of concern, for my obligation is to uphold the United States Constitution, upon practically undisputed facts, in accordance with the decided, controlling decisions on the subject.
exists for "serious crime," cannot be taken as conclusively extending the right further because the petitioner was convicted of a felony. However, an attorney general's opinion promulgated shortly after Gideon was announced, suggests that the right for appointed counsel exists in misdemeanor cases which are "of more than minor significance and when prejudice might otherwise result."

Montana. Since 1967 the Montana statutes have prescribed that counsel must be assigned in felony cases and may be assigned by the court in misdemeanor cases. The statutes prior to Gideon were somewhat vague as to the extent of the right but the practice had been to assign counsel not only in felony cases but in "high misdemeanor" cases as well.

Nebraska. Seven years after Gideon, the statutes in Nebraska still require appointment of counsel only in felony cases. However, the Eighth Circuit's extension, under Arkansas law, of counsel to misdemeanants in Beck v. Winters may provide the impetus needed to bring about an extension of the present right to appointed counsel under state law.

Ohio. Before Gideon was decided, Ohio authorized the appointment of counsel in felony cases. The post Gideon Ohio statute did not call for any extension of the right and the Ohio Court of Appeals has declared that the law would not be judicially altered unless the United States Supreme Court should command otherwise:

It is our considered judgment that the law of Ohio should be followed in this state until a mandate comes from the Supreme Court of the United States that the concept of

93. State v. Moreland, 396 S.W.2d 589 (Mo. 1965).
94. Id. at 590.
95. As quoted in Simeone and Richardson, The Indigent and His Right to Legal Assistance in Criminal Cases, 8 St. Louis U. L.J. 15, 23 (1963).
If the defendant appear for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him.
98. 36 Mont. L. Rev. 1, 3 (1964); cf. 3 Silverstein 309-12.
100. 407 F.2d 125 (8th Cir. 1969).
101. See note 35 supra.
102. Ohio Rev. Code Ann. § 2941.50 (1954); see also 3 Silverstein 583-92.
the right to counsel at public expense under the Sixth Amendment should be embraced within the due process clause of the Fourteenth Amendment, which applies to criminal procedure in the states in misdemeanor cases, thereby coercing the Legislature of Ohio to implement such change in accordance with the decision of such court.104

Oklahoma. The applicable law in Oklahoma is that when a defendant appears for arraignment without counsel on a felony charge, the court must ascertain whether he desires the aid of counsel; if he is financially unable to employ an attorney, the court must assign one.105 Prior to Gideon several cases apparently extended the right to defendants other than felons,106 however, instances of such extension were apparently isolated.107

Rhode Island. Present practice in Rhode Island is substantially similar to that prior to Gideon.108 Under Rhode Island laws the public defender is under an obligation “to represent and act as attorney for indigent defendants in those criminal cases referred to him by the supreme and superior courts.”109 Generally the superior courts have original jurisdiction for felony offenses, while misdemeanor trials are held in district courts.110 Thus, the practical effect is that accused misdemeanants are hardly ever granted assistance from the public defender.111

106. Hunter v. State, 288 P.2d 425 (Okla. Cr. 1955). The defendant Hunter, a full-blooded Indian, was convicted in a jury trial for driving an automobile while under the influence of alcohol. Construing Art. II, § 20 of the state constitution, the court held that counsel should have been appointed in this misdemeanor proceeding. However, the decision, taken as a whole, seemed to rest its conclusion upon the fact that the record clearly showed that Hunter’s trial was not fair. Nevertheless, six years later the same court relied upon Hunter and held in In re Cannon, 351 P.2d 756 (Okla. Cr. 1961) that the defendant charged with a misdemeanor of “aggravated assault and battery” (see OKLA. STAT. tit. 21 §§ 646 (2), -647 (1961) where the maximum penalty resulting from conviction was imprisonment for one year in a county jail or a fine of not more than $500 or both) was denied his fundamental right to counsel when the court did not provide him with representation upon arraignment. 3 SILVERSTEIN 611, 621.
107. See 3 SILVERSTEIN 611, 621.
110. Compare R.I. GEN. LAWS ANN. § 8-2-15 (Spec. Supp. 1968): “The superior court shall have original jurisdiction of all crimes, offenses and misdemeanors, except as otherwise provided by law . . .” (emphasis added) with section 12-3-1 (1956) which states that a district court has jurisdiction of all crimes “punishable by a fine not exceeding five hundred dollars ($500) or by imprisonment not exceeding one (1) year or both . . . .” Section 11-1-2 (1956) defines crimes as misdemeanors where the fine cannot exceed $500 and imprisonment cannot exceed one year or both.
111. But see 1 SILVERSTEIN 264. Perhaps the public defender may be
South Carolina. Although a state statute speaking in terms of one “accused or indicted for any capital offense” has not undergone any revision since 1963, a 1964 state supreme court decision held that the right extends to noncapital offenses as well. A more recent case held that the right exists for a defendant in a “criminal prosecution.” The phrase “criminal prosecution,” in itself, may suggest that crimes less serious than felonies are included within the right, however, since the crime involved was a felony, the above phraseology is less than conclusive support for further extension of the right.

South Dakota. South Dakota’s statute providing for appointment of counsel for indigent defendants, speaking in terms of “any criminal action,” suggests that provision for appointment of counsel extends to lesser crimes as well as to felonies but the opposite seems to be true. This statute is strikingly similar to prior law, and a national report in 1963 noted that at that time it was an “extreme rarity” for counsel to be appointed for misdemeanor charges in South Dakota.

Tennessee. The Tennessee laws currently provide for appointment of counsel “in all felony cases.” Before 1965 a statute called for the appointment of an attorney for “every person accused of any crime or misdemeanor whatsoever.” A commentary published shortly after Gideon suggested that, even though the high court had not so ruled up to that time, even misdemeanants had a

assigned in a case that is appealed from the district to the superior court; the superior court does not merely review the case but hears all district court appeals de novo.

115. See text at note 31 supra.
116. The crime charged was assault and battery of a high and aggravated nature, a felony in South Carolina. See State v. Jones, 133 S.C. 167, 130 S.E. 747 (1925).
117. S.D. Compiled Laws Ann. § 23-2-1 (1969); In any criminal action . . . in the circuit, municipal, or district county court, where it is satisfactorily shown that the defendant is without means and unable to employ counsel, the judge of the circuit, municipal, or district county court or district county or municipal judge acting as committing magistrate shall assign, at any time following arrest, counsel for his defense, whose duty it shall be to appear for and defend the accused upon the charge against him.
119. 3 Silverstein 667.
right to counsel. However, Tennessee appears to be an exception to the liberalization pattern triggered by *Gideon*; whereas previously a misdemeanor had a right to appointed counsel, such right now exists only for accused felons.

**Virginia.** Both before and after *Gideon*, Virginia has statutorily provided counsel exclusively for persons charged with a felony.

### III. SERIOUS-CRIME STATES

Of the twelve states that currently provide counsel for indigents accused of "serious crime," ten were felony-only jurisdictions until after *Gideon*. The remaining states, Alabama and North Carolina, furnished legal representation to indigents only when a capital crime was involved.

There appear to be two differing approaches as to what may constitute "serious crime." Nine of the states employing this classification simply define the offense in terms of possible maximum sentence, while in three states, the courts must examine a variety of factors to determine whether the crime is serious enough to necessitate appointment.

**Alabama.** Until 1963 the right to appointed counsel was limited to capital cases in Alabama. Now, an attorney must be appointed in Alabama in noncapital cases when the defendant is charged with a "serious offense." A 1967 decision held that a number of variables must be considered to determine whether a misdemeanor constitutes a serious offense. The factors to be considered by the court include the potential punishment, the ex-

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125. Alabama: see notes 130-33 infra; Arizona: see notes 134-37 infra; Connecticut: see notes 138-47 infra; Idaho: see notes 148-50 infra; Kentucky: see notes 151-52 infra; Maryland: see notes 153-55 infra; Nevada: see notes 156-58 infra; New Mexico: see notes 159-61 infra; North Carolina: see notes 162-69 infra; Utah: see notes 170-71 infra; Vermont: see notes 172-73 infra; Wisconsin: see notes 174-76 infra.
126. Arizona, Connecticut, Idaho, Kentucky, Maryland, Nevada, New Mexico, Utah, Vermont, Wisconsin; see note 16 supra.
127. See note 13 supra.
128. Idaho, Kentucky, Maryland, Nevada, New Mexico, North Carolina, Utah, Vermont, Wisconsin.
pense to the accused, and whether the crime is one involving moral turpitude.\textsuperscript{133}

Arizona. According to Arizona law a defendant in "a criminal action" is entitled to have appointed representation.\textsuperscript{134} Prior to Gideon, this statutory language was construed as providing counsel only to indigent felons.\textsuperscript{135} However, a 1964 Arizona supreme court decision defined the provision as extending counsel to indigent defendants charged with a "serious offense under the particular circumstances."\textsuperscript{136} Factors used to determine whether an offense is "serious" include the nature of the offense, the extent of the penalty, and the complexity of the case.\textsuperscript{137}

Connecticut. At the time of Gideon, counsel was appointed only in felony cases in Connecticut.\textsuperscript{138} Since then the state practice has changed significantly. According to statute, anyone arraigned before a circuit court in Connecticut must be advised by the judge that he has a right to counsel.\textsuperscript{139} When the accused is an indigent the circuit court judge shall, "if he determines that the interests of justice so require," designate a public defender to represent the defendant.\textsuperscript{140} A circuit court has jurisdiction of all crimes and municipal violations "which are punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year or both."\textsuperscript{141}

In 1966, in De Joseph v. State,\textsuperscript{142} the Circuit Court of Connecticut, Appellate Division, held that the right to appointed counsel for accused misdemeanants was not an absolute fundamental right.\textsuperscript{143} The misdemeanor charged was nonsupport, carrying with it a potential penalty of not more than one year's confinement in jail.\textsuperscript{144}

Later in the same year a federal district court, sitting in Connecticut, concluded that a defendant who was charged with the same crime as De Joseph was entitled to state appointment of counsel to prepare his defense.\textsuperscript{145} The court declared that the

\begin{itemize}
\item \textsuperscript{133} Id., 203 So. 2d at 287.
\item \textsuperscript{134} Ariz. Rev. Stat. § 13-161 (2) (1956); Ariz. R. Crim. P. 163 (1956).
\item \textsuperscript{135} See 2 Silverstein 35.
\item \textsuperscript{136} State v. Anderson, 96 Ariz. 123, 392 P.2d 784 (1964).
\item \textsuperscript{137} Id., 392 P.2d at 790.
\item \textsuperscript{138} Conn. Gen. Stat. Rev. § 54-81 (1958); see also 2 Silverstein 113.
\item \textsuperscript{140} Conn. Gen. Stat. Rev. § 54-81(a) (Supp. 1969).
\item \textsuperscript{142} 3 Conn. Cir. 624, 222 A.2d 752, cert. denied, 385 U.S. 982 (1966).
\item \textsuperscript{143} Id.
\item \textsuperscript{145} Arbo v. Hegstrom, 261 F. Supp. 397, 401 (D. Conn. 1966).
\end{itemize}
critical considerations were the possibility of a substantial prison sentence and the inability of the defendant to fend for himself without benefit of a trained attorney. 146  

In 1968 the court which had handed down the De Joseph opinion, in another misdemeanor case, applied the above mentioned test which had been sanctioned by the federal court. 147 Thus, since part of that test is whether the punishment for the particular crime could result in a substantial prison sentence, the right apparently has been extended to defendants charged with a serious offense.

**Idaho.** In contrast to the practice before Gideon, 148 the right to counsel in Idaho is no longer provided exclusively for felons. Rather, statutory law in Idaho now specifies that right to counsel exists for “serious crimes,” 149 which term the legislature has defined as “any offense which has a greater penalty than confinement for six months or a fine of $300.” 150

**Kentucky.** The Kentucky Rules of Criminal Procedure require counsel be appointed in cases where the accused may be fined more than $500, confined one year in a county jail, or imprisoned in the penitentiary. 151 At the time Gideon was decided only defendants arraigned on a felony charge were accorded the right. 152

**Maryland.** Prior to Gideon only felony charges necessitated appointment of counsel in Maryland. 153 Today in Maryland a defendant is entitled to counsel if the maximum punishment possible under the crime charged is imprisonment for six months or more or a fine of $500 or more. 154 In addition, the court may assign counsel in any other case if “the complexity of the case, the youth, inexperience and mental ability of the accused and any other relevant consideration” indicate that representation for the accused is needed to assure fair treatment. 155

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155. Id. See also Manning v. State, 237 Md. 349, 206 A.2d 563 (1965) where the state supreme court held that an accused was entitled to court-
Nevada. Although in the early 1960's Nevada furnished counsel only for indigent felons, by statute Nevada presently affords counsel for indigents accused of a "gross misdemeanor" or felony. A gross misdemeanor encompasses those crimes which are punishable by imprisonment in the county jail for not more than a year or by a fine of not more than $1,000 or both.

New Mexico. The New Mexico statutes make provision for counsel appointment for a "needy person" charged with a "serious crime." By statutory definition, "serious crime" includes felonies and any misdemeanor which carries a possible penalty of incarceration for more than six months. Under law prior to Gideon, the right to counsel in New Mexico was limited to defendants in capital and felony cases.

North Carolina. To change the prior law under which counsel was provided only in capital cases, shortly after Gideon was decided the North Carolina legislature revised the right to appointed counsel statute to include accused felons within the scope of the right and to provide that defendants charged with misdemeanors would be furnished legal assistance "if in the opinion of the judge such appointment is warranted." The early decisions were inconclusive in defining what criteria a judge should utilize in determining whether counsel should be appointed. However, in 1966 a federal district court sitting in North Carolina prescribed a test:

Rather than lay down an inflexible rule that an indigent is entitled to counsel in all misdemeanors other than traffic-appointed counsel when conviction for a series of petty offenses resulted in imprisonment.

158. Nev. Rev. Stat. § 193.140 (1967). By contrast a misdemeanor is a crime, conviction of which can result in up to six months' incarceration or a fine of up to $500 or both (see Nev. Rev. Stat. § 193.120 (1967)).
164. In State v. Sherron, 268 N.C. 694, 151 S.E.2d 599 (1966) the court merely paraphrased § 15-4-1. However, in State v. Bennett, 266 N.C. 755, 147 S.E.2d 237, 238 (1966) the court said: "Some misdemeanors and some circumstances might justify the appointment of counsel. . . . The facts of an individual case would determine the action of the court . . . ."; and in State v. Hayes, 261 N.C. 648, 135 S.E.2d 653, 654 (1964) the court said that a serious misdemeanor was "a misdemeanor of such gravity that the judge in the exercise of sound discretion deems that justice so requires [appointment of counsel]."
fic violations, this court thinks it wiser to follow the lead of Mr. Justice Douglas [Bate v. Illinois, 333 U.S. 640, 682 (1948) (dissenting opinion)] when he said that the need for counsel is measured by the nature of the charge (which would include possible penalty) and the ability of the average man to face it without the aid of counsel, and use this standard as a partial guide to aid the trial judge in the exercise of his discretion.\footnote{165}

The state supreme court re-examined North Carolina's right to counsel statute in 1969 and concluded that it was unconstitutional.\footnote{166} In overruling its previous decisions,\footnote{167} the court substituted a test based upon the federal right to counsel rule that requires the assignment of counsel in all criminal proceedings in which punishment can exceed six months' imprisonment or a $500 fine.\footnote{168} The court reaffirmed this position in later cases.\footnote{169}

\textbf{Utah.} An indigent is entitled to assigned counsel in Utah if the penalty for the crime with which he is charged could be confinement for greater than six months in jail or prison.\footnote{170} When \textit{Gideon} was decided Utah law provided for counsel appointment in felony cases only.\footnote{171}

\textbf{Vermont.} Prior to \textit{Gideon}, Vermont courts appointed counsel for accused felons only.\footnote{172} Currently a person in Vermont charged with a crime that is "punishable by imprisonment for more than sixty days or a fine of more than $1,000" is entitled to assigned counsel if he is indigent.\footnote{173}

\textbf{Wisconsin.} A Wisconsin statute provides that "in any case when
required by the United States or Wisconsin constitution, counsel . . . will be appointed” for an indigent defendant. The state supreme court has held that the right to counsel exists when incarceration of more than six months is possible. Felons only were accorded the right in Wisconsin prior to Gideon.

IV. MISDEMEANOR STATES

The remaining nineteen jurisdictions have provisions for appointment of counsel in most misdemeanor cases. In three of these states there have been no substantial changes since Gideon, while in thirteen the scope of inclusion has enlarged from the felony-only classification. In Minnesota the right to appointed representation previously existed for felonies and serious offenses. Although Colorado and North Dakota both had previously granted the right to apply to misdemeanants in certain courts, those states have now modified their procedures so as to encompass all misdemeanants.

Apparently, in nine states virtually all misdemeanants have the right to appointed counsel, the only possible exceptions being traffic offenses, which traditionally have been held to be quasi-criminal and thus not technically within the definition of crime,

175. State ex rel. Plutshack v. Dept. of Health and Social Services, 37 Wis. 2d 713, 155 N.W.2d 549 (1968).
176. Wis. Stat. § 957.26 (1961); 3 Silverstein 787-801.
177. Alaska: see notes 188-90 infra; California: see notes 191-94 infra; Colorado: see notes 195-98 infra; Delaware: see notes 199-201 infra; Illinois: see notes 202-04 infra; Iowa: see notes 205-07 infra; Massachusetts: see notes 208-10 infra; Michigan: see notes 211-17 infra; Minnesota: see notes 218-22 infra; New Hampshire: see notes 223-25 infra; New Jersey: see notes 226-30 infra; New York: see notes 231-36 infra; North Dakota: see notes 237-38 infra; Oregon: see notes 239-42 infra; Pennsylvania: see notes 243-46 infra; Texas: see notes 247-49 infra; Washington: see notes 250-52 infra; West Virginia: see notes 253-54 infra; Wyoming: see notes 255-58 infra.
178. Delaware, Iowa, West Virginia. See note 14 supra.
179. Alaska, California, Illinois, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Texas, Washington, Wyoming. Of course, in many of these states counsel was appointed for indigent misdemeanants in some localities, e.g., California: see 2 Silverstein 68-69; New York: see 3 Silverstein 531; Pennsylvania: see 3 Silverstein 637-39.
180. See notes 218-19 infra.
181. See text at notes 195-98 infra.
182. See text at notes 237-38 infra.
and municipal violations. Six states have established the possibility of imprisonment as the criterion to employ in deciding whether state paid attorneys should be furnished. In four of the states a maximum penalty—fine or incarceration, is the ultimate guideline.

Alaska. Before the Gideon decision, only indigent felons were provided with counsel in Alaska. The Alaska Rules of Criminal Procedure currently make provision for appointed counsel at the request of a defendant who states that he desires the assistance of counsel, if the court determines that he is in fact financially unable to employ an attorney. The rule applies exclusively in Superior Courts, the right to appointed counsel in misdemeanor proceedings specifically having been excluded from District Courts. Thus, the situation in Alaska appears to be that counsel is furnished only in those misdemeanor cases that are tried in a Superior Court.

California. A California statute, substantially similar to the pre-Gideon law, appears to require the appointment of counsel in almost any case that an individual is unable to pay. A state
court has held that the right to appointed counsel exists for "misdemeanors in a municipal or other inferior court."¹⁹³ Those charged with traffic violations are likewise included.¹⁹⁴

Colorado. During the intervening time since the decision of Gideon the practice of appointing counsel for indigent misdemeanants, which had been within the court's discretion,¹⁹⁵ has become uniform, at least in Colorado's most populous counties.¹⁹⁶ According to Colorado Rule of Criminal Procedure 44, which became operative January 1, 1963:

In any felony case, if . . . the court finds that the defendant is financially unable to obtain counsel, an attorney shall be assigned to represent him at every stage of the trial proceedings. In any misdemeanor case, upon such a showing of indigency, an attorney may be assigned to represent the defendant at every stage of the trial proceedings.¹⁹⁷

Also, during the 1963 legislative session, Colorado enacted a public defender act whereby the scope of right to counsel was expanded to include juveniles and persons charged with municipal code violations.¹⁹⁸

Delaware. The scope of the right to counsel in Delaware is rather extensive in the coverage of misdemeanants. The pre-Gideon¹⁹⁹ law was the same as that now which requires legal representation "in every case in which the law requires or in any other case

or justice court, a person who desires but is unable to employ counsel, when it appears that such appointment is necessary to provide an adequate and effective defense for defendant. Yet, prior to Gideon, the general practice was not to appoint counsel in misdemeanor cases. See 2 Silverstein 88-89.

¹⁹⁶. See Quinn, The Wyoming Defender Aid Program: Something for the Tin Cup, 2 LAND AND WATER L. REV. 167, 174 (1967); see also 2 Silverstein 91.
¹⁹⁷. COLO. R. CRIM. P. 44.
¹⁹⁸. COLO. REV. STAT. ANN. § 39-21-3 (1963):
(2) (a) The public defender may represent indigent persons charged in district or county court with crimes which constitute misdemeanors, juveniles upon whom a delinquency petition has been filed, and persons charged with municipal code violations as such defender in his discretion may determine, subject to review by the court, if:
(b) The defendant, or his parent or legal guardian in delinquency actions, requests it; or
(c) The court, on its own motion or otherwise, so orders and the defendant, or his parent or legal guardian in delinquency actions, does not affirmatively reject of record the opportunity to be represented by legal counsel in such proceeding.
¹⁹⁹. See DEL. CODE ANN. tit. 11, § 5103 (1963); cf. note 201 infra.
in which the court deems it appropriate.”200 In actual practice, counsel is appointed when imprisonment can be longer than three months.201

Illinois. As before Gideon,202 appointment of counsel is required by statute in all cases in Illinois, except where the penalty is a fine only.203 Case law has consistently upheld the indigent misdemeanant’s right to appointed representation when imprisonment is a possibility.204

Iowa. According to state statute, if a defendant is arraigned without counsel the court must provide representation for him.205 The protection extends not only to felons but to misdemeanants when the penalty might exceed a fine of $100 or imprisonment for more than 30 days.206 Apparently, even before Gideon was decided, the normal practice was to grant the right to misdemeanants.207

Massachusetts. In contrast to present practice, before Gideon counsel was apparently assigned in Massachusetts only for felons.208 At the present time, if a defendant is charged with a crime for which imprisonment may be imposed, the Massachusetts’ laws entitle him to have assigned counsel.209 Even in municipal court proceedings the controlling factor is the possibility of incarceration.210

Michigan. Under practice in Michigan prior to Gideon the

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201. Regarding the right to counsel in Delaware, Silverstein notes: Whether an individual receives counsel when charged with a misdemeanor is within the sole discretion of the court. However, in every case where the individual is charged with a violation of the narcotics laws, assault and battery, or any other crime that may result in imprisonment for more than three months, it is generally the practice to appoint counsel.
2 Silverstein 122.
207. See 2 Silverstein 240.
right to counsel was absolute only in felony cases. Michigan law now provides that anyone charged with the commission of a felony or "misdemeanor not cognizable by a justice of the peace or magistrate" is entitled to appointed counsel. Misdemeanors that are cognizable by a justice of the peace include offenses that are punishable by a fine not exceeding $100 or imprisonment in the county jail not exceeding three months or both. Accordingly, appointment of counsel would appear to be not required when confinement cannot be longer than three months or the fine cannot be over $100.

Some confusion apparently now exists in Michigan concerning appointment of counsel for defendants charged with only a misdemeanor cognizable by a justice of the peace. In People v. Mallory, the Michigan supreme court held that an indigent defendant charged only with a misdemeanor cognizable by a justice of the peace was entitled to have counsel appointed for appellate assistance. The confusion results from the fact that the penalty imposed in Mallory was in the nature of a felony rather than a misdemeanor. Although one justice in Mallory suggested that to differentiate between rights to trial and appellate counsel might promote a "high stake judicial poker game" and another acknowledged that it would result in a "lack of logical symmetry," one lower court, subsequent to Mallory, has denied right to appointed counsel to an indigent charged only with a misdemeanor cognizable by a justice of the peace.

Although the Michigan Supreme Court would conceivably extend the right to appointed counsel to indigent defendants charged only with a misdemeanor cognizable by a justice of the peace, in any event, it is clear that such right exists for defendants charged with all other misdemeanors.

Minnesota. Pre-Gideon law was virtually identical to the present Minnesota statute which includes within the scope of the right to counsel any person charged with a felony or gross misdemeanor. A gross misdemeanor is punishable by imprison-
ment for not more than a year or payment of a fine of not more than $1,000 or both.\textsuperscript{220}

However, in 1967 the Minnesota Supreme Court declared that the right to counsel was available to a defendant whenever conviction could result in imprisonment.\textsuperscript{221} The court stated that whether a crime was designated as misdemeanor, gross misdemeanor, or felony is irrelevant for purposes of right to counsel:

> We must look to the consequences of conviction rather than the classification. The impact on an accused who suffers loss of liberty by incarceration in a penal institution is the same no matter how the crime of which he was convicted was classified.\textsuperscript{222}

\textit{New Hampshire}. Until after \textit{Gideon} was decided, only accused felons were entitled to appointment of counsel.\textsuperscript{223} Now, when a defendant is charged with a felony or misdemeanor other than a petty offense, he has a right to appointed counsel in New Hampshire.\textsuperscript{224} A petty offense includes offenses for which there is no possibility of imprisonment and for which a fine cannot exceed $500.\textsuperscript{225}

\textit{New Jersey}. According to the New Jersey Revised Rules:

> Every person charged with an indictable offense shall be advised by the court of his right to retain counsel and to have the Office of the Public Defender represent him if he is indigent . . . .\textsuperscript{226}

> Every person charged with a non-indictable offense shall be advised by the court of his right to retain counsel or, if indigent and constitutionally or otherwise entitled by law to counsel, of his right to have counsel assigned without cost.\textsuperscript{227}

In New Jersey, non-indictable offenses are not technically crimes.\textsuperscript{228} Consequently, in New Jersey an absolute right to appointed counsel is apparently extended to anyone charged with

\begin{itemize}
  \item \textsuperscript{220} \textit{Minn. Stat. Ann.} § 609.03 (2) (1964).
  \item \textsuperscript{221} State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967).
  \item \textsuperscript{222} Id., 154 N.W.2d at 894.
  \item The purpose of this chapter is to provide adequate representation for indigent defendants in criminal cases charged with felonies or misdemeanors other than petty offenses or any juvenile charged with being delinquent in any court of this state. For the purpose of this chapter, a petty offense is any misdemeanor, the penalty for which does not provide for imprisonment or a fine exceeding $500 . . . .
  \item \textsuperscript{228} See 3 \textit{Silverstein} 473, 477.
\end{itemize}
any crime, whether felony or misdemeanor. Before the decision of Gideon, only crimes imposing a felony-type sentence were included within the scope of those crimes to which the right to counsel attached.

**New York.** In New York right to appointed counsel exists for any indigent charged with a crime. By statutory definition, crime includes felonies and misdemeanors but excludes most traffic violations.

Case law seems to have applied the strict letter of the law so that an accused misdemeanant, no matter how insignificant the offense and penalty may seem, is always entitled to counsel, but traffic law violators are excluded from the right regardless of the seriousness of the consequences unless the offense has been classified a misdemeanor by the legislature. Not until after Gideon was the practice of appointing counsel for indigent misdemeanants widespread in New York.

**North Dakota.** Before Gideon, whether a misdemeanant in North Dakota had a right to appointed counsel was dependent solely upon the county in which he committed the crime.

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230. Thus, regardless of the designation of the crime, right to counsel extended only to accused felons in New Jersey prior to Gideon. *See text at notes 27-28 supra.*


236. N.Y. Code Crim. Proc. § 308 (1957); cf. 3 Silverstein 531.

237. In North Dakota, the statutes provide for county courts or county courts with increased jurisdiction. Only those counties having a population of 2,000 or more can qualify as a county court having increased jurisdiction; the determination is made by a county-wide election.

A former statute, N.D. Cent. Code § 27-08-31 (1960), reads as follows: "In all criminal cases in the county court having increased jurisdiction ... the court shall assign counsel. ..." But cf. N.D. Cent. Code § 29-01-27 (1960):

"In all criminal actions when it is satisfactorily shown to the court that the defendant has no means and is unable to employ counsel, the court shall appoint and assign counsel ..."

Although § 29-01-27 was enacted prior to Gideon, 3 Silverstein 575 indicates that this provision was not being applied in the county or justice courts (see note 238 infra) not having increased jurisdiction:

Counsel is provided for misdemeanor defendants only in county courts with increased jurisdiction. In these courts such defendants
Apparently, today counsel will be assigned to indigents in North Dakota in all misdemeanor cases.\textsuperscript{238}

\textit{Oregon.} Although Oregon statutes, which have undergone only minor revision since 1963,\textsuperscript{239} require appointment of counsel only in criminal proceedings in which a felony sentence could be imposed,\textsuperscript{240} a 1969 Oregon supreme court decision extended the right to misdemeanants, including violators of municipal ordinances.\textsuperscript{241} The court noted that the seriousness of the crime is an inappropriate criteria for determining whether counsel should be appointed:

If our objective is to insure a fair trial in every criminal prosecution the need for counsel is not determined by the seriousness of the crime. The assistance of counsel will best avoid conviction of the innocent—an objective as important in the municipal court as in a court of general jurisdiction.\textsuperscript{242}

\textit{Pennsylvania.} According to a Pennsylvania rule of criminal procedure, defendants in noncapital cases are entitled to have assigned counsel.\textsuperscript{243} Shortly after \textit{Gideon} was decided and before the above rule was effectuated, the Superior Court of Pennsylvania ruled:

\textit{We are of the opinion that in all criminal cases, excepting those of a summary nature, the indigent defendant that request counsel is entitled to such assistance.}\textsuperscript{244}

\begin{footnotesize}
\textsuperscript{238} The North Dakota statutes make provision for justice courts, or if none, county courts to handle misdemeanor actions. Cf. N.D. CENT. CODE §§ 27-07-01, -02 (1960), 27-18-01 (Supp. 1969); 27-18-04 (1960); 27-18-04.1 (Supp. 1969) and 33-01-08 (Supp. 1969). Until 1967 the jurisdiction of the justice courts in criminal matters extended to proceedings in which the crime was punishable by fine of not more than \$500 or by imprisonment in the county jail by not more than one year or both. See N.D. Sess. Laws 1963 Ch. 252, § 1.
\textsuperscript{239} OR. REV. STAT. §§ 133.625, 135.320 (Repl. 1967).
\textsuperscript{240} OR. REV. STAT. § 135.320 (Repl. 1967).
\textsuperscript{243} PA. R. CRIM. P. 318 (Supp. 1969).
\end{footnotesize}
Although statutory law operative prior to Gideon gave the right to counsel only to defendants accused of capital crimes,245 actual practice extended the right to felons.246

Texas. By virtue of a 1965 statute, right to appointed counsel exists in Texas for “an accused charged with a felony or misdemeanor punishable by imprisonment.”247 This statute appears to clear up the confusion generated by Texas decisions shortly after Gideon.248 Before Gideon, the right extended to felons only.249

Washington. By statute, both before250 and after Gideon, only one accused of a felony is guaranteed right to counsel in Washington.251 However, following the Gideon decision the state supreme court held that the right must also exist for anyone charged with a misdemeanor.252

West Virginia. Under West Virginia law, whenever an accused so requests, the trial court may appoint counsel to assist him, except for violations of traffic laws and municipal ordinances.253 Even prior to the Gideon decision the practice of providing counsel for indigent misdemeanants was widespread in West Virginia.254

Wyoming. Prior to 1969, Wyoming adhered to the pre-Gideon practice of appointing counsel only for indigents accused of felonies.255 Silverstein notes that in actual practice some “high mis-

245. PA. STAT. ANN. tit. 19, § 783 (1930).
246. 3 SILVERSTEIN 635-39 indicates that many misdemeanants were likewise accorded assigned counsel.
249. TEX. CODE CRIM. PROC. art. 494 (Supp. 1962).
251. WASH. REV. CODE ANN. § 10.01.110 (Supp. 1968).
252. City of Tacoma v. Heater, 67 Wash. 733, 409 P. 867 (1966). The rationale employed by the court was that since the language of the Sixth Amendment and Washington’s Const. art. 1, § 22 (amendment 10) were similar, and since Gideon applied to all criminal actions, misdemeanor and felony alike, the state constitution should receive this definition and interpretation. Id. at 869. See also Hendrix v. City of Seattle, 456 P.2d 696 (Wash. 1969).
The accused shall be allowed counsel in a felony case, and if he desires it in a misdemeanor case to assist him . . . [counsel] shall be furnished . . .
See also 3 SILVERSTEIN 786-87.
A 1969 criminal procedure rule, although not in itself clear, no longer speaks in terms of felonies but states that "every defendant . . . shall be entitled to have counsel assigned . . ."\textsuperscript{257} A law review article published in 1967 lends support to the idea that the indigent misdemeanant in Wyoming is entitled to assignment of counsel.\textsuperscript{258}

V. SUMMARY

The foregoing analysis of the trend of state provisions for appointment of counsel for indigent defendants indicates that in the seven years since the \textit{Gideon} decision, the right has been extended in a pronounced majority of states to defendants charged with crimes of a lesser degree than strictly felonies. The following table provides dramatic evidence of the extent of the trend toward inclusion of defendants other than felons within the scope of the right to counsel protection:

\begin{tabular}{|l|c|c|}
\hline
& at the & December 31, \\
& time of the & 1969 \\
& \textit{Gideon} decision & \\
\hline
1) States appointing counsel for defendants in capital cases only & 5 & -- \\
2) States appointing counsel for felons only & 40 & 19 \\
3) States appointing counsel for felons and defendants accused of "serious crime" & 2 & 12 \\
4) States appointing counsel for most misdemeanants & 3 & 19 \\
\hline
\end{tabular}

The foregoing table reveals that, as respects right to counsel in the fifty states, the pendulum has clearly swung past the mandate of the narrow holding in \textit{Gideon}.

As previously noted, no valid constitutional reason has been advanced in aid of argument against the extension of \textit{Gideon}.\textsuperscript{259} Since \textit{Gideon}, the Court has declined, amid vigorous dissent, to re-

\textsuperscript{256} A 1969 criminal procedure rule, although not in itself clear, no longer speaks in terms of felonies but states that "every defendant . . . shall be entitled to have counsel assigned . . ."\textsuperscript{257} A law review article published in 1967 lends support to the idea that the indigent misdemeanant in Wyoming is entitled to assignment of counsel.\textsuperscript{258}

\textsuperscript{257} WYO. R. CRIM. P. 6 (Supp. 1969).
\textsuperscript{258} See Quinn, The Wyoming Defender Aid Program: Something for the Tin Cup, 2 LAND AND WATER L. REV. 167 (1967).
\textsuperscript{259} See note 45 supra.
view the extent of the right to counsel. Yet, the constitutional mandate is clear: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

In Mapp v. Ohio, the Court noted that a substantial number of states had, prior to Mapp, instituted the very procedures required of the states by that decision. At the time of Gideon, a requirement that the right to counsel be extended to defendants other than felons would have created substantial hardship upon the states, for only five states so extended the right. Today, however, no such hardship would result. If the Court is now delaying extension of Gideon until a substantial number of states have extended the right to appointed counsel to defendants other than felons, it need delay no longer, for thirty-one states have now extended the right to defendants charged with crimes less serious than felonies—the time has arrived for review.

John F. Decker '70
Thomas J. Lorigan '70

260. See note 44 supra.
262. Id. at 651.