

2016

VAWA 2013's Right to Appointed Counsel in Tribal Court Proceedings—A Rising Tide That Lifts All Boats or a Procedural Windfall for Non-Indian Defendants?

Jordon Gross

Follow this and additional works at: <http://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Jordon Gross, *VAWA 2013's Right to Appointed Counsel in Tribal Court Proceedings—A Rising Tide That Lifts All Boats or a Procedural Windfall for Non-Indian Defendants?*, 67 Case W. Res. L. Rev. 379 (2016)

Available at: <http://scholarlycommons.law.case.edu/caselrev/vol67/iss2/4>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

VAWA 2013'S
RIGHT TO APPOINTED COUNSEL IN
TRIBAL COURT PROCEEDINGS—
A RISING TIDE THAT LIFTS ALL BOATS
OR A PROCEDURAL WINDFALL FOR
NON-INDIAN DEFENDANTS?

Jordan Gross[†]

CONTENTS

INTRODUCTION	380
I. FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL AT PUBLIC EXPENSE	383
A. <i>Sixth Amendment Right to Counsel</i>	383
B. <i>Actual v. Authorized Incarceration Trigger</i>	386
II. MAKING SENSE OF THE RIGHT— WHY DOES THE CONSTITUTION REQUIRE APPOINTED COUNSEL FOR POOR PEOPLE CHARGED WITH MISDEMEANORS ONLY WHEN THEY ARE ACTUALLY INCARCERATED?	411
III. STATUTORY RIGHT TO COUNSEL IN TRIBAL COURT PROCEEDINGS	415
A. <i>Selective Codification— Imposition of Federal Constitutional Rights to Tribal Court Proceedings</i>	415
B. <i>ICRA General Provisions—No Right to Counsel at Public Expense or Explicit Right to Effective Assistance of Counsel for Indian Defendants Sentenced to One Year or Less</i>	421
C. <i>TLOA—Right to Effective Assistance of Bar-Licensed Counsel at Public Expense for Indigent Indian Defendants Sentenced to More than One Year Incarceration</i>	423
D. <i>VAWA 2013—Right to Effective Assistance of Bar-Licensed Counsel at Public Expense if Incarceration of Any Length May be Imposed</i>	425
IV. INTERPRETING ICRA'S RIGHT TO COUNSEL PROVISIONS—DOES ICRA IMPOSE A HIGHER APPOINTED COUNSEL OBLIGATION ON TRIBAL COURTS THAN THE CONSTITUTION PLACES ON STATE COURTS?	429
A. <i>Right to Counsel Independent of the Sixth Amendment</i>	431
B. <i>Co-extensive with the Sixth Amendment</i>	434
CONCLUSION	435

[†] Professor, Alexander Blewett III School of Law at the University of Montana; J.D., Howard University School of Law; B.A., University of Washington. My gratitude to Professor Kevin Washburn of the University of New Mexico School of Law for his helpful comments and feedback.

INTRODUCTION

This Article addresses a question that seems like it would be easy to answer, but is actually quite complex—when is an indigent defendant entitled to counsel at the public’s expense in the United States? The answer is complex because it depends on what the indigent is charged with, what sentence he receives, and who prosecutes him. The Sixth Amendment guarantees an accused the assistance of counsel in “all criminal prosecutions.”¹ The Supreme Court has said that the Sixth Amendment right to counsel includes the right to effective assistance of counsel, and the right to appointed counsel at public expense for indigent defendants.² But the Supreme Court has also said that the right to appointed counsel for indigents does not extend to “all criminal prosecutions,” just prosecutions for felonies and prosecutions for misdemeanors for which a trial court imposes a sentence of incarceration or a suspended sentence of incarceration.³ Thus, even if a charging statute authorizes incarceration as a punishment, an indigent charged with a misdemeanor is not constitutionally entitled to appointed counsel unless the conviction actually results in a sentence of incarceration or a suspended sentence of incarceration.

Who prosecutes the indigent matters because courts in different jurisdictions are subject to different rules. Both state and federal courts, of course, must meet the federal constitutional standard for appointment of counsel, but federal statutory law is more generous than the Constitution in providing appointed counsel to indigents in federal court. The Constitution does not apply in Indian country.⁴ The right to appointed counsel in tribal court, therefore, is governed by tribal code and federal law, not the federal constitutional standard.

The Indian Civil Rights Act (ICRA) is the federal statute that lays down the minimum procedural guarantees tribal courts must extend to defendants, much as the U.S. Constitution sets the floor in state and

-
1. U.S. CONST. amend VI.
 2. *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (establishing the Sixth Amendment right to counsel as a fundamental right); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (holding that indigent defendants have a constitutional right to counsel provided by the government).
 3. *See Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938) (holding that, absent a waiver, no person may be imprisoned for any offense unless he received representation by counsel at trial); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (“[A]bsent 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.”).
 4. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (stating that the Cherokee Nation’s relationship with the United States is more akin to a “domestic dependent nation”).

federal court prosecutions.⁵ ICRA provides for a different right to appointed counsel than the Sixth Amendment for some tribal court defendants depending on the crime charged, whether the crime carries a term of imprisonment and, if it does, how long that term is. Tribal courts have plenary criminal jurisdiction over Indians⁶ who commit crimes in Indian country. Under ICRA's general provisions, which only apply to Indian defendants, a tribal court does not need to provide indigent defendants with counsel at tribal expense when it imposes a sentence of incarceration of one year or less on that defendant.⁷ Under amendments to ICRA made by the Tribal Law and Order Act of 2010, a tribal court cannot impose a sentence of incarceration over one year unless the defendant is provided effective assistance of counsel, as defined by the federal constitution, and, if indigent, a licensed attorney at tribal expense.⁸

Federal law does not recognize tribal courts' criminal jurisdiction over non-Indians who commit crimes in Indian country except in very limited circumstances—under amendments to ICRA made by the Violence Against Women Act Reauthorization of 2013 (VAWA 2013), tribes can only prosecute non-Indians who have some connection to the reservation community for certain domestic violence offenses committed in Indian country against an Indian victim.⁹ To exercise this limited criminal jurisdiction over non-Indians under VAWA 2013, tribes must ensure that VAWA 2013 defendants are provided with effective

5. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 202, 82 Stat. 73, 77 (codified at 25 U.S.C. § 1302(a) (2012)).

6. The term “Indian” has multiple definitions in federal law. This Article uses the term “Indian” to refer to a Native American subject to federal criminal jurisdiction. *See* U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 686 (1997) (“To be considered an Indian, one generally has to have both ‘a significant degree of blood and sufficient connection to his tribe to be regarded [by the tribe or the government] as one of its members for criminal jurisdiction purposes.’ A threshold test, however, is whether the tribe with which affiliation is asserted is a federally acknowledged tribe.”); *but see* *United States v. Zepeda*, 792 F.3d 1103, 1106 (9th Cir. 2015) (en banc) (holding that an element of an Indian Major Crimes Act offense is proof that defendant has “Indian blood,” whether or not that blood tie is to a federally recognized tribe) (citations omitted).

7. *See* 25 U.S.C. § 1302(c) (2012) (establishing the obligation of tribal governments to provide indigent defendants with counsel only for crimes that impose a term of imprisonment of more than one year). Individual tribes, of course, may (and often do) have broader requirements for indigent defense counsel under their own laws than that required under federal law.

8. Pub. L. No. 11-211, § 234(c), 124 Stat. 2258, 2280 (2010) (current version at 25 U.S.C. § 1302(c)).

9. 25 U.S.C. § 1304(c) (Supp. I 2013–2014).

assistance of bar-licensed counsel;¹⁰ and, if a defendant is indigent, they must also provide that counsel at tribal expense if a term of imprisonment of any length may be imposed.¹¹

Thus, in non-VAWA 2013 tribal court prosecutions (limited, by statute, to prosecutions against Indian defendants), under federal law a tribal court need only provide an indigent defendant with appointed counsel if it imposes a sentence of a year or more. In contrast, under Sixth Amendment case law, indigent federal and state court defendants cannot be incarcerated for any length of time if they have not been provided counsel at public expense.¹² In VAWA 2013 tribal court prosecutions (the only criminal prosecutions that can be brought against a non-Indian by tribal authorities for crimes committed in Indian country), a tribal court must provide appointed counsel to indigent defendants who are exposed to a term of incarceration of any length.¹³ In contrast, indigent state and federal court defendants are not constitutionally entitled to appointed counsel for misdemeanors unless they are actually incarcerated, as opposed to exposed to incarceration.¹⁴

ICRA's tiered right to appointed counsel provisions can only be fully appreciated against the backdrop of two major bodies of law. The first is the Supreme Court's long slog towards its current conceptualization of the constitutional right of poor criminal defendants to counsel at public expense in state criminal prosecutions. The second is Congress' and the federal courts' tortured journey towards the current status of tribal court jurisdiction over non-Indians. Part I of this Article explains how the Supreme Court arrived at a constitutional rule that requires state trial courts to provide counsel at public expense to poor defendants in all felony cases, but not in misdemeanor cases unless the defendant is actually incarcerated for the offense. Part II offers an explanation of how the federal constitutional right to appointed counsel became so convoluted. Part III examines the various right to counsel provisions in ICRA and analyzes how they do, or do not, track the federal constitutional right to appointed counsel. Part IV asks what Congress has done. Did Congress really create a right to appointed counsel for the benefit of non-Indian tribal court defendants superior to that required by the Constitution in state and federal courts? Or did it

10. 25 U.S.C. § 1302(c)(2).

11. *Id.* § 1302(c)(2).

12. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (holding that indigent defendants have a constitutional right to counsel provided by the government).

13. § 1304(d)(2).

14. *See Argersinger v. Hamlin*, 407 U.S. 25, 37–38 (1972) (explaining that the federal constitutional assistance of counsel requirement is triggered in cases where “imprisonment actually occurs”).

mean to create a right to appointed counsel under VAWA 2013 that is co-extensive with the Sixth Amendment?

This Article concludes, reluctantly, that Congress did indeed create a more robust right to appointed counsel in tribal court under VAWA 2013 than that required by the Constitution in state and federal court, and one greater than that enjoyed by Indian defendants in tribal court. It is a reluctant conclusion because, if Congress did in fact create a right to appointed counsel under VAWA 2013 beyond that required by the Constitution in state and federal courts and beyond that required for Indian defendants in tribal courts, it could be interpreted as a determination that non-Indian defendants need more procedural protection in tribal court than they would be constitutionally entitled to if they were tried in state or federal court to ensure a fair proceeding. Absent some proof that tribal courts are any less capable than state or federal courts in dealing fairly with indigent defendants, Congress' differential and preferential treatment of indigent VAWA 2013 defendants, this Article submits, is indefensible because it results in an unwarranted procedural windfall for non-Indian tribal court defendants.

I. FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL AT PUBLIC EXPENSE

A. *Sixth Amendment Right to Counsel*

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”¹⁵ The Sixth Amendment has always been understood to guarantee federal court defendants the assistance of counsel in criminal proceedings unless the right is waived.¹⁶ The Supreme Court eventually extended this right to state court defendants under the Fourteenth Amendment.¹⁷ The primary Sixth Amendment constitutional question, thus, is not whether a defendant is entitled to have counsel present to aid in his defense in a criminal prosecution, but rather whether and when the government must provide counsel to indigent defendants to ensure they are not deprived of assistance of counsel because they cannot afford to pay for an attorney. The Supreme Court, of course, answered this question in 1963 in *Gideon v. Wainwright*, where it held that the Sixth Amendment requires courts to provide counsel at

15. U.S. CONST. amend. VI.

16. See *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (“The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.”) (citations omitted).

17. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

public expense to poor people prosecuted with serious offenses.¹⁸ In a federal system in which most crimes are prosecuted on the state level and most defendants prosecuted by the states are poor, this holding had (and continues to have) substantial resource implications for states.¹⁹

Indigent defendants in federal prosecutions have had the right to appointed counsel at public expense in federal felony cases since 1938,²⁰ in federal capital cases since 1940,²¹ and in federal non-petty misdemeanor cases since 1964.²² The primary federal statute governing appointment of counsel in federal court is the Criminal Justice Act

-
18. *See id.* at 339 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)) (rejecting the proposition that denial of counsel at trial “is to be tested by an appraisal of the totality of facts in a given case”).
 19. *See* Lincoln Caplan, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html> [<https://perma.cc/L9PL-NE3F>] (“While the constitutional commitment [to provide appointed counsel to indigent defendants] is generally met in federal courts, it is a different story in state courts, which handle about 95 percent of America’s criminal cases. This matters because, by well-informed estimates, at least 80 percent of state criminal defendants cannot afford to pay for lawyers and have to depend on court-appointed counsel.”).
 20. *See Johnson*, 304 U.S. at 462–63 (holding that the Sixth Amendment guarantees criminal defendants the right to retain counsel in federal court and requiring the federal government to appoint an attorney in felony cases if a defendant cannot afford one).
 21. *See* 18 U.S.C. § 3005 (2012) (providing for appointed counsel in federal capital cases). Congress enacted 18 U.S.C. § 3005 in 1948 and amended it in 1994. Act of June 25, 1948, ch. 645, 62 Stat. 814; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, § 60026, 108 Stat. 1796, 1982. Its predecessor statute, 18 U.S.C. § 563, governed the matter before that; it was similar to the pre-1994 amendment version of 18 U.S.C. § 3005. *Compare* 18 U.S.C. § 563 (1946) (discussing counsel for capital crime indictees) *with* 18 U.S.C. § 3005 (1988) (also discussing counsel for capital crime indictees); *see also* 18 U.S.C. § 3599(a)(1) (2012) (“Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—(A) before judgment; or (B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment; shall be entitled to the appointment of one or more attorneys . . .”).
 22. 18 U.S.C. § 3006A, enacted through the federal Criminal Justice Act of 1964 (CJA), requires appointment of counsel for indigent federal defendants charged with felonies or Class A misdemeanors. 18 U.S.C. § 3006A(a)(1)(A) (2012). Congress passed the CJA on the heels of the Court’s 1963 decision in *Gideon v. Wainwright*. Criminal Justice Act of 1964, Pub. L. 88–455, 78 Stat. 552.

(CJA).²³ It requires appointment of counsel at public expense to indigent federal defendants in specific proceedings and under specific circumstances.²⁴ And the CJA provides that the statutory entitlement to appointed counsel in federal cases is co-extensive with the Sixth Amendment right to counsel.²⁵ Since Congress linked the statutory right to the constitutional right in federal court, issues concerning the constitutional entitlement to counsel at public expense will almost invariably arise in the context of challenges to state court, not federal court, convictions. As a result, most Sixth Amendment jurisprudence fixing the parameters of the right to counsel at public expense has

23. 18 U.S.C. § 3006A (2012).

24. The CJA requires federal district courts to “place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section.” 18 U.S.C. § 3006A(a). The plan must cover “counsel and investigative, expert, and other services necessary for adequate representation” for any financial eligible defendant who—

(A) is charged with a felony or a Class A misdemeanor;

(B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title;

(C) is charged with a violation of probation;

(D) is under arrest, when such representation is required by law;

(E) is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;

(F) is subject to a mental condition hearing under chapter 313 of this title;

(G) is in custody as a material witness;

(H) is entitled to appointment of counsel under the sixth amendment to the Constitution;

(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel; or

(J) is entitled to the appointment of counsel under section 4109 of this title [covering extradition to and from other countries].

Id. See also FED. R. CRIM. P. 44(a) (stating defendant is entitled to appointed counsel from initial appearance through appeal unless waived).

25. As noted above, under the CJA, federal district court indigent defense plans must provide counsel to any financially eligible person who “is entitled to appointment of counsel under the sixth amendment to the Constitution[.]” 18 U.S.C. § 3006A(a)(1)(H) (2012). This catch-all provision essentially requires federal district courts to ensure that their district plans expand and contract with the U.S. Supreme Court’s evaluation of when an indigent is entitled to counsel at public expense without further statutory intervention by Congress.

evolved in the context of federal habeas review of state court convictions. The law in this area, therefore, is best understood through a habeas corpus federalism filter as a series of installments in the Supreme Court's ongoing assessment of the extent to which the Fourteenth Amendment dictates or constrains the level of procedural protection that state courts must provide in criminal prosecutions.

B. Actual v. Authorized Incarceration Trigger

As explained below, the federal constitutional right to counsel at public expense applies only where a defendant is prosecuted for a felony, or is convicted of a misdemeanor for which the defendant receives a sentence of incarceration or a conditional sentence of incarceration. An indigent charged with a misdemeanor for which a term of imprisonment is authorized by the charging statute, but who does not actually receive a sentence of incarceration or conditional sentence of incarceration, has no federal constitutional right to counsel at public expense. As a practical matter, since the constitutional right to appointed counsel is triggered by actual or conditional incarceration, this requires state trial courts to either: (1) provide all indigent defendants who *could* face incarceration with counsel at public expense to preserve incarceration as a sentencing option, or (2) forgo incarceration as a sentencing option in individual cases altogether.

Explaining how the *Gideon* right to appointed counsel came to incorporate an actual or conditional incarceration trigger for misdemeanors requires understanding the Supreme Court jurisprudence leading up to it. The starting point for that discussion is *Powell v. Alabama*,²⁶ decided thirty-one years before *Gideon*.²⁷ In 1931, nine

26. 287 U.S. 45 (1932).

27. See Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2243 (2013) (“The major pre-*Gideon* development in right-to-counsel jurisprudence was *Powell v. Alabama*[.]”).

young black men²⁸ were charged with raping two white teenage girls.²⁹ At the state's request, the proceedings were severed; some defendants were tried in groups, others individually.³⁰ On the morning of their respective trials, which came less than a week after they were arraigned, and which lasted only one day, the defendants were appointed counsel.³¹ Sort of. Rather than designate specific attorneys for each defendant, the trial court appointed members of the local bar, generally and collectively, to provide representation.³²

At the time in Alabama, the punishment for the crime of rape was determined by the jury and ranged from ten years' incarceration to death.³³ Eight of the nine *Powell* defendants were convicted and

-
28. Alabama charged Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery, Eugene Williams, Charlie Weems, Clarence Norris, Haywood Patterson, and Roy Wright (Andy's brother) and tried them in Scottsboro, Alabama, the Jackson County seat. These defendants became known as the "Scottsboro Boys." See Alan Blinder, *Alabama Pardons 3 'Scottsboro Boys' After 80 Years*, N.Y. TIMES (Nov. 21, 2013), <http://www.nytimes.com/2013/11/22/us/with-last-3-pardons-alabama-hopes-to-put-infamous-scottsboro-boys-case-to-rest.html> [<https://perma.cc/M7KW-43CF>] (discussing the story of the "Scottsboro Boys"). The defendants' ages were not clear in the record, but they all appeared to be teenagers at the time of the offense. See *Powell*, 287 U.S. at 51–52 ("The record does not disclose their ages, except that one of them was nineteen; but the record clearly indicates that most, if not all, of them were youthful, and they are constantly referred to as 'the boys.'").
29. *Powell*, 287 U.S. at 49.
30. Powell, Roberson, Andy Wright, Montgomery, and Williams were tried together, Weems and Norris were tried together, and Patterson was tried alone. *Powell v. State*, 141 So. 201 (Ala. 1932); *Weems v. State*, 141 So. 215 (Ala. 1932); *Patterson v. State*, 141 So. 195 (Ala. 1932). See also *Powell*, 287 U.S. at 49 (noting the severance of the cases).
31. *Powell*, 287 U.S. at 49–50 ("[U]pon the arraignment they were represented by counsel. But no counsel had been employed, and aside from a statement made by the trial judge several days later during a colloquy immediately preceding the trial, the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed. . . . There was a severance upon the request of the state, and the defendants were tried in three several groups . . . Each of the three trials was completed within a single day."). See also *id.* at 53 (noting that the trials began six days after indictment).
32. *Id.* at 56 ("It thus will be seen that until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants. Prior to that time, the trial judge had 'appointed all the members of the bar' for the limited 'purpose of arraigning the defendants.' Whether they would represent the defendants thereafter if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court.").
33. *Id.* at 50.

sentenced to death.³⁴ The eight defendants appealed their convictions to the Supreme Court of Alabama, which upheld seven of the convictions.³⁵ The remaining seven defendants petitioned, and were granted certiorari in the U.S. Supreme Court, consolidated under the *Powell* matter.³⁶ The Supreme Court reversed their convictions and remanded their cases for new trials, holding that the state trial court's untimely and haphazard appointment of counsel violated the defendants' federal constitutional right to due process.³⁷

Powell is one of the most significant events in the unfolding story of American legal federalism. Never before had the Court reversed a state criminal conviction under the Fourteenth Amendment due process clause based on the deprivation of a criminal procedure guarantee found in the federal Bill of Rights.³⁸ *Powell* was momentous, but not all

-
34. Powell, Roberson, Andy Wright, Montgomery, Williams, Weems, Patterson, and Norris were convicted and sentenced to death. *Powell v. State*, 141 So. 201, 214 (Ala. 1932); *Weems v. State*, 141 So. 215, 221 (Ala. 1932). Roy Wright's jury hung. See *Powell*, 287 U.S. at 74 (Butler, J., dissenting) ("Nine defendants including Patterson were accused in one indictment, and he was also separately indicted. . . . Weems and Norris were tried first. Patterson was tried next on the separate indictment. Then five were tried. These eight were found guilty. The other defendant, Roy Wright, was tried last and not convicted. The convicted defendants took the three cases to the state supreme court, where the judgment as to Williams was reversed and those against the seven petitioners were affirmed.").
35. The Supreme Court of Alabama reversed Williams' conviction because the state did not establish that Williams was at least sixteen years old at the time of the offense and thereby subject to the jurisdiction of the state trial court. *Powell*, 141 So. at 213.
36. *Powell v. Alabama*, 286 U.S. 534, 540 (1932) (granting certiorari).
37. *Powell*, 287 U.S. at 57 ("In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.") (citations omitted).
38. Before *Powell*, the Court had only reversed state criminal convictions under the Equal Protection Clause of the Fourteenth Amendment based on racial discrimination in jury selection procedure. See Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 65 (2000) (stating how through 1934, the Court had barred race discrimination in jury selection). Two Justices dissented in *Powell*, noting that the majority had gone further than it needed to and, in so doing, encroached on the authority of the States. *Powell*, 287 U.S. at 76 (Butler, J., dissenting) ("[T]he ruling that the failure of the trial court to give petitioners time and opportunity to secure counsel was denial of due process is enough, and with this the opinion should end. But the Court goes on to declare that 'the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.'")

encompassing. Its holding, for example, did not require appointment of counsel for all indigent state court defendants, not even all state court defendants facing death sentences. Rather, the Court cabined its holding by tethering its due process analysis to a case-by-case, fact-specific inquiry:

[U]nder the circumstances³⁹ . . . the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.⁴⁰

Powell, thus, established a facts and circumstances inquiry for federal constitutional right to appointed counsel claims. Under *Powell*, a state court defendant in a death penalty case who needed counsel, but who was not appointed counsel sufficiently in advance of trial to allow for effective assistance of counsel could, for the first time, challenge a state conviction as a violation of due process guaranteed by the Fourteenth Amendment.

Six years later, in *Johnson v. Zerbst*,⁴¹ the Court extended the principle established in *Powell* to federal non-capital felony prosecutions.⁴² The Court decided *Johnson* under the Sixth Amendment right to counsel provision, not the Fourteenth Amendment due process clause—which was the basis for the *Powell* decision—because *Johnson*

This is an extension of federal authority into a field hitherto occupied exclusively by the several States.”).

39. The “circumstances” recited by the Court in *Powell* were “the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives” *Powell*, 287 U.S. at 71.

40. *Id.*

41. 304 U.S. 458 (1938).

42. *Id.* at 463.

was a federal, not a state, prosecution.⁴³ John Johnson and a companion, Monroe Birdwell, were enlisted men in the U.S. Marine Corps.⁴⁴ They were charged with several federal felonies involving passing and possessing counterfeit twenty-dollar bills.⁴⁵ Both men were detained pending indictment because they could not afford bail.⁴⁶ Both were represented by counsel in preliminary hearings.⁴⁷ Two months later, they were indicted, arraigned, tried, convicted, and sentenced to four and a half years in a federal penitentiary without the assistance of counsel.⁴⁸ Like the *Powell* defendants, Johnson and his co-defendant were uneducated, poor, and far from home.⁴⁹

Johnson's challenge to his conviction eventually ended up before the Supreme Court. Reviewing Johnson's conviction, the Court interpreted the Sixth Amendment right to counsel guarantee as a mechanism for leveling the playing field between the defendant and the prosecution in federal criminal cases; the Sixth Amendment, it stated, "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."⁵⁰ Under the Sixth Amendment, the Court held that federal courts lack "the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."⁵¹ The Court, with two Justices dissenting, and one taking no part in the consideration of the case, remanded Johnson's case to the district court to evaluate whether he had waived his right to assistance of counsel.⁵²

43. *Id.* at 459.

44. *Id.* at 459–60.

45. *Id.*

46. *Id.* at 460.

47. *Id.*

48. *Id.*

49. *Id.* ("Both petitioners lived in distant cities of other states and neither had relatives, friends, or acquaintances in Charleston. Both had little education and were without funds.") (citation omitted).

50. *Id.* at 462–63.

51. *Id.* at 463. The *Johnson* Court interpreted a violation of the Sixth Amendment right to counsel as a jurisdictional defect—unless a criminal defendant validly waives the right to assistance of counsel, the Court held, the trial court's failure to appoint counsel to a defendant facing the loss of life or liberty in federal court deprives it of jurisdiction and renders the conviction void. *Id.* at 467–68.

52. The district court had dismissed Johnson's habeas petition without making any findings on waiver because it concluded that the remedy was not available to Johnson. *Id.* at 469. On remand, the Court instructed the district

Four years later, in *Betts v. Brady*,⁵³ the Court considered whether the Fourteenth Amendment requires appointment of counsel at public expense in all state court proceedings in which the *Powell* factors were met, or whether *Powell* was limited to state capital cases—i.e. whether a state court’s failure to provide counsel, whether requested or not, to a defendant “unable to employ counsel, and . . . incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like”⁵⁴ violates due process only in capital cases, or if the Fourteenth Amendment due process right to appointed counsel also reaches non-capital state court criminal prosecutions.⁵⁵

Smith Betts was indicted for robbery in a Maryland trial court.⁵⁶ He lacked money to hire an attorney and requested that the court appoint one for him.⁵⁷ The trial court denied Betts’s request, explaining that the county only provided counsel at public expense to indigent defendants charged with murder or rape.⁵⁸ Without waiving the right to counsel, Betts pleaded not guilty and proceeded to a bench trial.⁵⁹ At the bench trial, witnesses were summoned for him, he examined witnesses, and he was given the opportunity to testify on his own behalf.⁶⁰ The trial court found Betts guilty and sentenced him to eight years in prison.⁶¹

Betts challenged his conviction on Fourteenth Amendment grounds, asserting that the trial court’s refusal to appoint counsel deprived him of “liberty without due process of law.”⁶² Betts sought a categorical ruling from the Court requiring state courts to appoint counsel to indigent defendants as a matter of federal constitutional law in all criminal cases.⁶³ In addressing Betts’s claim, the Court discussed

court to grant the writ if Johnson established that he had not competently and intelligently waived the right to counsel, and to deny the writ if he did not sustain that burden. *Id.*

53. 316 U.S. 455 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

54. *See supra* note 40 and accompanying text.

55. *Betts*, 316 U.S. at 461.

56. *Id.* at 456.

57. *Id.* at 456–57.

58. *Id.* at 457.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 461.

63. *Id.* at 462. (“The petitioner, in this instance, asks us, in effect, to apply a rule in the enforcement of the due process clause. He says the rule to be

the relationship between the right to counsel under the Sixth Amendment—which only applies in federal court and which, at this juncture, had not been incorporated into the Fourteenth Amendment—on one hand, and the due process clause of the Fourteenth Amendment on the other.⁶⁴ The Court explained that although the specific guarantees in the Sixth Amendment were not, at this time, incorporated into the Fourteenth Amendment's due process clause, a state's denial of rights and privileges set out in the first eight amendments to the Constitution could, in some circumstances, result in a denial of due process under the Fourteenth Amendment.⁶⁵

The difference between the guarantees under the Bill of Rights and the protections afforded by the due process right, the Court explained, is that the latter is “less rigid and more fluid” than the former.⁶⁶ As such, evaluating a claim of a constitutional violation under due process is “less a matter of rule,” and is “tested by an appraisal of the totality of facts in a given case.”⁶⁷ Thus, what may amount to a denial of due process under one set of facts, under other facts may not.⁶⁸ Relying on an originalist and historical analysis, a divided Court rejected Betts's argument that a right to counsel at public expense in all state criminal proceedings was “dictated by natural, inherent, and fundamental principles of fairness.”⁶⁹ Rather than a fundamental right essential to a fair trial, the Court concluded, in the great majority of the states at the

deduced from our former decisions is that, in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State.”).

64. *Id.* at 461–62.

65. *Id.*

66. *Id.* at 462.

67. *Id.*

68. *Id.*

69. *Id.* at 464–65 (“The question we are now to decide is whether due process of law demands that in every criminal case, whatever the circumstances, a State must furnish counsel to an indigent defendant. Is the furnishing of counsel in all cases whatever dictated by natural, inherent, and fundamental principles of fairness? . . . Though, as we have noted, the [Sixth] Amendment lays down no rule for the conduct of the States, the question recurs whether the constraint laid by the [Sixth] Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment. Relevant data on the subject are afforded by constitutional and statutory provisions subsisting in the colonies and the States prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date. These constitute the most authoritative sources for ascertaining the considered judgment of the citizens of the States upon the question.”).

founding, the appointment of counsel was a legislative, not a constitutional, matter.⁷⁰

Having rejected Betts's argument that the Fourteenth Amendment supported a categorical approach to the right to appointed counsel in state court proceedings, the majority analyzed Betts's claim under the totality of the circumstances.⁷¹ Betts's conviction, the majority noted, followed a bench trial, which, the record showed, was much more informal than a jury trial in Maryland.⁷² Further, there was no question that the charged crime had occurred—the issue was whether Betts was the perpetrator, an accusation Betts defended with an alibi.⁷³ To defend his case, Betts was permitted to call and examine witnesses, which, according to the majority, reduced the trial to the “simple issue [of] the veracity of the testimony for the State and that for the Defendant.”⁷⁴ Relying on the trial judge's observations in the record, the majority noted that Betts was “not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue,” and who had prior experience with the criminal justice system as a criminal defendant.⁷⁵ Finally, the majority noted that under Maryland law, Betts would have been entitled to appointed counsel had a judge determined he was incapable of protecting his interests.⁷⁶

The *Betts* majority's rejection of a categorical rule requiring states to appoint counsel in all criminal trials, regardless of the seriousness of the offense, reflects the federalism concerns that, explicitly or implicitly, inform the Court's incorporation jurisprudence in the criminal justice context generally—namely the far-reaching implications of imposing a federal constitutional rule of criminal procedure (and its attendant

70. *Id.* at 471–72 (“[I]n the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence, we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.”).

71. *Id.* at 471–73.

72. *Id.* at 472.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 472–73 (“It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction.”).

costs) on states in a system in which most crime is prosecuted at the state and local level. The result *Betts* sought, the majority noted, would impose upon states a “requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction” requiring appointment of counsel in small crimes and even traffic court.⁷⁷ Indeed, the majority asserted, because the Fourteenth Amendment protects property as well as life and liberty, taken to its logical end, *Betts*’s argument would require appointment of counsel even in civil cases involving property.⁷⁸

Following *Betts*, the Fourteenth Amendment due process clause required state courts to provide counsel at public expense where the absence of counsel may result in a trial “offensive to the common and fundamental ideas of fairness and right.”⁷⁹ The Fourteenth Amendment due process clause, the Court held, simply could not be interpreted to mean that state court criminal defendants can never obtain fair and just results in any state court criminal proceedings without the assistance of counsel.⁸⁰ Under *Betts*, therefore, state court defendants had a federal constitutional right to appointed counsel in non-capital cases subject to *Powell*’s facts and circumstances test. Or, stated in the negative, absent special circumstances like illiteracy or a complex trial, state courts were not constitutionally required to provide counsel at public expense to indigent defendants.

Justices Black, Douglas, and Murphy dissented in *Betts*.⁸¹ They disagreed with the majority’s conclusion that the Fourteenth Amendment did not incorporate the Sixth Amendment right to counsel. And they took issue with the majority’s conclusion that a failure to appoint counsel in *Betts*’s case did not violate his right to due process.⁸² Both

77. *Betts*, 316 U.S. at 473 (quoting the Chief Judge of the Court of Appeals of Maryland, the majority asserted that such a ruling would require appointment of counsel for “[c]harges of small crimes tried before justices of the peace and capital charges tried in the higher courts Presumably it would be argued that trials in the Traffic Court would require it.”).

78. *Id.*

79. *Id.*

80. *Id.* (explaining that the Fourteenth Amendment does not embody an “inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel”).

81. *Id.* at 474 (Black, J., dissenting).

82. *Id.* at 474–75 (Black, J., dissenting) (“If this case had come to us from a federal court, it is clear we should have to reverse it, because the Sixth Amendment makes the right to counsel in criminal cases inviolable by the Federal Government. I believe that the Fourteenth Amendment made the Sixth applicable to the states. But this view, although often urged in dissents, has never been accepted by a majority of this Court and is not accepted today. . . . I believe, however, that under the prevailing view of due process, as

were points, as it turned out in subsequent cases, on which the *Betts* dissenters would prove to have the better of the argument.

In 1961, in *Hamilton v. Alabama*,⁸³ almost two decades after *Betts* and two years before *Gideon*, the Court re-visited the issue of the federal constitutional test for determining when a state court must appoint counsel to indigent defendants in death penalty cases. As noted, *Powell* established a case-by-case facts and circumstances test.⁸⁴ The question in *Hamilton* was whether a state court capital defendant had a constitutional right to counsel at all critical stages of prosecution, regardless of whether he was prejudiced by the absence of counsel.⁸⁵ Stated another way, whether appointment of counsel in state death penalty proceedings was a categorical federal constitutional requirement. Or, whether, as the Court held in *Powell*, the right is subject to a case-by-case inquiry. The *Hamilton* Court, in a very short and unanimous opinion, held that assistance of counsel is constitutionally and categorically required at all critical stages of a state death penalty prosecution: “[w]hen one pleads to a capital charge without benefit of counsel,” the Court held, “we do not stop to determine whether prejudice resulted.”⁸⁶ In so holding, the *Hamilton* Court effectively abandoned *Powell*'s case-by-case approach for evaluating the federal constitutional right to counsel in state death penalty cases.

At this juncture, which is shortly before the Court decided *Gideon*, Fourteenth Amendment jurisprudence categorically required assistance of counsel at all critical stages of state capital cases.⁸⁷ But it didn't always require appointment of counsel at public expense in non-capital cases, as those were still subject to the *Betts* case-by-case, facts, and circumstances inquiry.⁸⁸ And that was the issue in *Gideon*—whether the Court should continue to adhere to a case-by-case approach to the right to appointed counsel in state non-capital cases. Or whether it should extend the categorical approach it had just adopted for state

reflected in the opinion just announced, a view which gives this Court such vast supervisory powers that I am not prepared to accept it without grave doubts, the judgment below should be reversed.”) (citation omitted).

83. 368 U.S. 52 (1961).

84. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

85. *Hamilton*, 368 U.S. at 53.

86. *Id.* at 55. *Hamilton* was arraigned and entered a plea at his arraignment without the assistance of counsel. *Id.* at 52. On review, it was conceded that arraignment was a critical proceeding under Alabama law. *Id.* at 53–54.

87. *Id.* at 54–55.

88. *Betts v. Brady*, 316 U.S. 455, 471–72 (1942), *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963).

capital cases in *Hamilton* to state non-capital cases.⁸⁹ *Gideon*, of course, overruled *Betts*, holding that, at least in felony cases, states must provide indigent defendants with counsel at public expense.⁹⁰

Gideon produced a unanimous opinion with a clear holding, but elusive reasoning. Justice Black, the reader will recall, was one of three dissenters in *Betts*. He disagreed both with the *Betts* majority's conclusion that the Fourteenth Amendment did not incorporate the Sixth Amendment right to counsel and the majority's conclusion that a failure to appoint counsel in *Betts*'s case did not violate his right to due process.⁹¹ Now writing for the majority in *Gideon*, Justice Black offered two reasons for overruling *Betts*. One, *Betts* represented a departure from precedent—Justice Black characterized *Betts*'s position on incorporation (that is, whether appointment of counsel is a fundamental right incorporated into the Fourteenth Amendment) as an “abrupt break with [the Court’s] own well-considered precedents.”⁹² According to Justice Black, the *Gideon* Court was simply “returning to these old precedents, sounder we believe than the new,” and restoring “constitutional principles established to achieve a fair system of justice.”⁹³ The second rationale Justice Black offered was that *Betts* was wrongly decided because it was contrary to obvious truth—“[n]ot only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”⁹⁴

Neither reason is entirely satisfying. Fairly read, *Betts* was a logical and natural application of *Powell*'s case-by-case analysis in the non-capital context.⁹⁵ And Justice Black's second rationale—that *Betts*

89. *Gideon*, 372 U.S. at 337–38 (“Since 1942, when *Betts v. Brady* was decided by a divided Court, the problem of a defendant’s federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. To give this problem another review here, we granted certiorari.”) (citations omitted).

90. *Id.* at 342.

91. *Betts*, 316 U.S. at 474 (Black, J., dissenting).

92. *Gideon*, 372 U.S. at 344.

93. *Id.*

94. *Id.* This “obvious truth” language is found in the *Johnson* opinion, where the court held that the outcome there “embodie[d] a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.” *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938).

95. See *Gideon*, 372 U.S. at 349–50 (Harlan, J., concurring) (“I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded, at least on the part of those of us who were

should be overturned because its result is contrary to “obvious truth”—is a debatable, if not alarming, basis for overturning an established Supreme Court precedent. Although *Gideon* presents a compelling result as a matter of justice and fair play, faithfulness to the rule of law ostensibly requires high courts to follow prior case law until it is shown to be contrary to positive law or based on faulty factual premise, not simply because a different set of jurists later concludes it is contrary to an “obvious truth.” This should be particularly so when the result of a federal court ruling forces states to standardize their criminal justice procedures around a newly recognized federal constitutional right.⁹⁶

Gideon involved a state felony conviction and it imposed a categorical requirement under the Sixth Amendment, applied to the states under the Fourteenth Amendment, to provide indigent defendants charged with felonies counsel at public expense.⁹⁷ The next issue presented was whether the Constitution imposed the same requirement in misdemeanor cases. And, if it did, was the requirement a categorical

not on the Court when that case was decided. I cannot subscribe to the view that *Betts v. Brady* represented ‘an abrupt break with its own well-considered precedents.’ In 1932, in *Powell v. Alabama*, a capital case, this Court declared that under the particular facts there presented . . . the state court had a duty to assign counsel for the trial as a necessary requisite of due process of law. It is evident that these limiting facts were not added to the opinion as an afterthought; they were repeatedly emphasized, and were clearly regarded as important to the result. Thus when this Court, a decade later, decided *Betts v. Brady*, it did no more than to admit of the possible existence of special circumstances in noncapital as well as capital trials, while at the same time insisting that such circumstances be shown in order to establish a denial of due process.” (citations omitted).

96. In his concurrence, Justice Harlan offered a different take on whether categorical rules threaten state autonomy more than case-by-case inquiries—he thought that *Gideon*’s categorical holding was probably more aligned with federalism concerns than *Betts* because *Betts*’s case-by-case approach had resulted in significant federal court oversight over state court criminal proceedings. *Id.* at 350–51 (“In noncapital cases, the ‘special circumstances’ rule has continued to exist in form while its substance has been substantially and steadily eroded.” Noting that no decision since 1950 had found a lack of special circumstances and that “there have been not a few cases in which special circumstances were found in little or nothing more than the ‘complexity’ of the legal questions presented, although those questions were often of only routine difficulty. The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts v. Brady* rule is no longer a reality. This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights. To continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system.”) (citations omitted).

97. *Id.* at 342.

constitutional imperative, like the rule in *Gideon*? Or would it be determined on a case-by-case basis, the approach the Court initially embraced in *Powell* for state capital cases, but later abandoned in *Hamilton*, and initially adopted in *Betts*, but later abandoned in *Gideon*?

This was the issue in *Argersinger v. Hamlin*,⁹⁸ decided in 1972, nine years after *Gideon*.⁹⁹ Jon Richard Argersinger was charged with carrying a concealed weapon in violation of Florida law.¹⁰⁰ At the time, the offense was punishable by up to six months in jail and a fine of up to \$1000.¹⁰¹ Argersinger was indigent and was not appointed counsel.¹⁰² Following a bench trial, the trial court sentenced him to ninety days incarceration.¹⁰³ He appealed his conviction on the ground that he had been deprived his federal constitutional right to counsel.¹⁰⁴ The Florida Supreme Court, in a closely divided opinion, held that Argersinger was not entitled to counsel at public expense.¹⁰⁵ The Court held that the Sixth Amendment right to counsel was co-extensive with the Sixth Amendment right to a jury trial,¹⁰⁶ a right the U.S. Supreme Court had recently extended to some, but not all, state court criminal proceedings in *Duncan v. Louisiana*.¹⁰⁷ In *Duncan*, the Court held that the Fourteenth Amendment requires states to provide criminal defendants a jury only in prosecutions for non-petty offenses.¹⁰⁸ The Florida Supreme Court concluded that the right to appointed counsel tracked

98. 407 U.S. 25 (1972).

99. *Id.*

100. *Id.* at 26.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 26–27. The Florida high court split 4–3 in upholding Argersinger’s conviction. *Id.*

106. *Id.*

107. 391 U.S. 145, 159 (1968).

108. *Id.* at 154 (“[T]he right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction.”). The *Duncan* Court declined to define the line between petty and serious offenses, leaving that question for another day because the authorized penalty in the case before it clearly qualified the crime involved as a serious offense. *Id.* at 161–62 (“We need not . . . settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense.”) (citations omitted).

the right to a jury trial—that is, it was only constitutionally required in prosecutions for non-petty offenses.¹⁰⁹

The U.S. Supreme Court rejected the Florida Supreme Court's analogy between the right to a jury trial and the right to appointed counsel, holding that the latter is broader than the former.¹¹⁰ The Court concluded that the Sixth Amendment was intended to extend the right to counsel beyond limitations in the common law, and noted that even at common law defendants enjoyed the right to counsel for petty offenses.¹¹¹ The Court further suggested that the right to counsel was more fundamental to a fair proceeding than the right to a jury trial.¹¹² The issues in misdemeanor cases, the Court noted, are no less complex than those in a felony trial.¹¹³ Focusing on the danger an indigent defendant faces of being deprived of liberty without counsel to assist in his defense, the *Argersinger* Court formulated a categorical rule—imposition of any sentence of incarceration for a misdemeanor offense, regardless of its seriousness, on a defendant who has not been represented by counsel or waived his right to counsel, violates the Sixth Amendment, applicable to states through the Fourteenth Amendment.¹¹⁴

The next question the Court addressed was whether the right to counsel at public expense extended to proceedings other than a criminal

-
109. *State ex rel. Argersinger v. Hamlin*, 236 So. 2d 442, 443 (Fla. 1970).
110. *Argersinger*, 407 U.S. at 30 (“While there is historical support for limiting the ‘deep commitment’ to trial by jury to ‘serious criminal cases,’ there is no such support for a similar limitation on the right to assistance of counsel[.]”).
111. *Id.* at 30–31 (“The Sixth Amendment thus extended the right to counsel beyond its common-law dimensions. But there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided. We reject, therefore, 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.”) (citation omitted).
112. *Id.* at 31, 46 (Powell, J., concurring).
113. *Id.* at 33 (“The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.”).
114. *Id.* at 37. Justice Powell concurred. Citing a deep and well-documented concern for the burden the Court’s categorical rule would impose on state and local government budgets, he advocated for a revitalized *Betts*-style facts and circumstances inquiry. *Id.* at 63 (Powell, J., concurring) (“I would hold that the right to counsel in petty-offense cases is not absolute but is one to be determined by the trial courts exercising a judicial discretion on a case-by-case basis.”) (citation omitted).

prosecution in which a person's liberty was at stake, and, if so, under what circumstances. In *Gagnon v. Scarpelli*,¹¹⁵ decided in 1973, a year after *Argersinger*, the Court addressed whether the *Argersinger* categorical right to counsel at public expense extended to probation revocation hearings.¹¹⁶ Gerald Scarpelli pleaded guilty to armed robbery in Wisconsin in 1965.¹¹⁷ He was sentenced to fifteen years, but the trial court suspended his entire sentence and placed him on probation for seven years.¹¹⁸ Scarpelli's supervision was transferred to Illinois, where he was later arrested for burglary.¹¹⁹ Wisconsin revoked Scarpelli's probation without a hearing and he was subsequently remanded into custody to serve the fifteen-year sentence on the underlying felony.¹²⁰

The Court took up two issues. One, was Scarpelli entitled to a hearing before having his probation revoked? And, two, if so, would he be entitled to appointed counsel at a probation revocation hearing?¹²¹ In answering the first question, the Court held that probation revocation is not a stage of criminal prosecution.¹²² This matters because once the Court designates a proceeding a "stage of criminal prosecution," the subject of the proceeding is entitled to the full complement of constitutional trial rights and protections available to criminal defendants under the Constitution.¹²³ The Court considered the second

115. 411 U.S. 778 (1973).

116. *Id.*

117. *Id.* at 779.

118. *Id.*

119. *Id.* at 779–80.

120. *Id.* at 780.

121. *Id.* at 779.

122. *Id.* at 782.

123. *See Morrissey v. Brewer*, 408 U.S. 471, 480, 485–88 (1972) (holding that revocation of parole is not a part of a criminal prosecution because it involves deprivation of conditional liberty, but the parolee is nonetheless entitled to minimal due process at a preliminary hearing to determine whether probable cause exists and a final hearing to adjudicate alleged violation because loss of liberty is a serious deprivation). The process due a parolee at a preliminary hearing is notice of the alleged violation; opportunity to appear and present evidence; a conditional right to confront adverse witnesses; an independent decision-maker; and a written report of the hearing. *Id.* at 486–87. The parolee's final hearing is less summary and it requires similar elements—written notice of the alleged violation; disclosure of evidence; "opportunity to be heard in person" and present evidence; "right to confront and cross-examine adverse witnesses" (unless good cause is found for not allowing confrontation); "a 'neutral and detached' hearing body;" and a "written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Id.* at 487–89. *Morrissey* involved a revocation of parole, not probation (the proceeding at issue in *Gagnon*). The *Gagnon* Court found

issue—whether an indigent probationer or parolee has a due process right to be represented by appointed counsel at these hearings—to be the more difficult question of the two.¹²⁴

As noted, the anchor for the *Argersinger* Court's categorical rule requiring appointment of counsel before a defendant can be incarcerated was the threat of an unjust loss of liberty faced by indigent defendants forced to defend criminal charges without the assistance of counsel.¹²⁵ The *Gagnon* Court, in contrast, focused on the nature of a probation revocation to determine whether it was similar enough to an adversarial criminal proceeding in all instances to require appointment of counsel.¹²⁶ Engaging in somewhat circular reasoning, the *Gagnon* Court concluded that it wasn't. Justice Powell, who concurred in *Argersinger* and who would have adopted a *Betts*-style facts and circumstances test in *Argersinger*,¹²⁷ authored the Court's unanimous opinion in *Gagnon*.¹²⁸ Reasoning that the primary state actor in a revocation proceeding (the probation or parole officer) is a non-lawyer whose mission usually is to rehabilitate the offender, not a law-trained prosecutor who is seeking to punish the offender, the *Gagnon* Court held that not every subject of a revocation will require assistance of counsel to protect his due process rights.¹²⁹ In other words—the process doesn't necessarily need attorneys unless attorneys are inserted into the process, even if the end result is

no meaningful distinction between parole and probation for due process purposes. *Gagnon*, 411 U.S. at 782.

124. *Gagnon*, 411 U.S. at 783.

125. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

126. *Gagnon*, 411 U.S. at 787–89.

127. *See supra* note 114 (noting Justice Powell's preference for use of case-by-case discretion).

128. Justice Douglas dissented on the application of the case-by-case analysis to Scarpelli's hearing because of his claim that his confession was made under duress. *Gagnon*, 411 U.S. at 791 (Douglas, J., dissenting in part). The Court, however, unanimously adopted a case-by-case test over a categorical approach in the parole/probation revocation context. *Id.* at 790.

129. *Id.* at 783–85. (“Our first point of reference is the character of probation or parole. . . . [T]he ‘purpose [of parole] is to help individuals reintegrate into society as constructive individuals as soon as they are able’ [and t]he duty and attitude of the probation or parole officer reflect this purpose: ‘While the parole or probation officer recognizes his double duty to the welfare of his clients and to the safety of the general community, by and large concern for the client dominates his professional attitude. . . .’ The parole officer’s attitude toward these decisions reflects the rehabilitative rather than punitive focus of the probation/parole system[.]” (first quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972); then quoting F. REMINGTON ET AL., CRIMINAL JUSTICE ADMINISTRATION: MATERIALS AND CASES 910–11 (1969))).

a deprivation of the revokee's¹³⁰ liberty.¹³¹ The Court allowed that sometimes this relationship between probation/parole officers and a potential revokee isn't always harmonious¹³²—for example, where a probation/parole officer and the person subject to revocation don't see eye-to-eye on the factual basis or circumstances surrounding an alleged violation.¹³³ In those instances, the Court noted that due process may require appointment of counsel for the revokee.

Explicitly acknowledging that it was departing from the *Gideon* and *Argersinger* categorical approach, the *Gagnon* Court held that in the parole/probation revocation context, the right to appointed counsel

130. I was unable to find the word “revokee” in any standard English dictionary. At least one federal court and the Harvard Law Review, however, have used the term. See *Young v. McKune*, 280 F. Supp. 2d 1250 (D. Kan. 2003) (referring to Plaintiff in a section 1983 case as the “former parole revokee”); see also *Right to Hearing at Parole Revocation*, 86 HARV. L. REV. 95, 101 (1972) (“Perhaps this language foreshadows a willingness to exclude those already incarcerated from the reach of due process. However, some courts have found the loss of liberty of a prisoner who is placed in solitary confinement or whose sentence is effectively increased through loss of ‘good time’ to be as ‘grievous’ as that of a parole revokee.”) (citations omitted). Thus, at least two reputable sources agree that even if “revokee” is not a word, it ought to be.

131. *Gagnon*, 411 U.S. at 787–88 (“The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients’ positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself . . . may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. . . . Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial.”) (citations omitted).

132. *Id.* at 785 (“But an exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification in attitude which is likely to take place once the officer has decided to recommend revocation. Even though the officer is not by this recommendation converted into a prosecutor committed to convict, his role as counsellor to the probationer or parolee is then surely compromised.”).

133. *Id.* (“When the officer’s view of the probationer’s or parolee’s conduct differs in this fundamental way from the latter’s own view, due process requires that the difference be resolved before revocation becomes final. Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion—the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.”).

would be evaluated on a case-by-case basis.¹³⁴ In so doing, the *Gagnon* Court weighed the costs to the states and the benefits to the potential revokee of inserting counsel into the process.¹³⁵ There can be little doubt that the financial and administrative burden of imposing a categorical right to appointed counsel in revocation hearings would have been considerable, and that this cost would be absorbed on the state level, where most criminal proceedings in the U.S. occur. This resource consideration did not sway the majorities in *Gideon* or *Argersinger*.¹³⁶ But it mattered in *Gagnon*.¹³⁷ Thus, in this round of federalism chicken, pragmatism and concerns about upsetting state budgets and autonomy with categorical federal constitutional mandates won out over consistency and the interests promoted by blanket rules of federal constitutional criminal procedure.¹³⁸

134. *Id.* at 788–89 (“In so concluding, we are of course aware that the case-by-case approach to the right to counsel in felony prosecutions adopted in *Betts v. Brady*, was later rejected in favor of a *per se* rule in *Gideon v. Wainwright*. We do not, however, draw from *Gideon* and *Argersinger* the conclusion that a case-by-case approach to furnishing counsel is necessarily inadequate to protect constitutional rights asserted in varying types of proceedings: there are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences.”) (citations omitted).

135. *Id.* at 790 (“We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.”).

136. See *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963) (deciding the issue without any reference to resource considerations); *Argersinger v. Hamlin*, 407 U.S. 25, 37 n.7 (1972) (finding the country has sufficient legal resources to represent the offenders affected by the case).

137. See *Gagnon v. Scarpelli*, 411 U.S. at 788 n.11 (“The scope of the practical problem which would be occasioned by a requirement of counsel in all revocation cases is suggested by the fact that in the mid-1960’s there was an estimated average of 20,000 adult felony parole revocations and 108,000 adult probation revocations each year.”) (citing PRESIDENT’S COMM’N ON LAW ENF’T AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 56 n.28 (1967)).

138. The Seventh Circuit had concluded that Scarpelli was entitled to appointed counsel at his revocation hearing. Given the Supreme Court’s 1963 holding in *Gideon*, the Seventh Circuit could perhaps be forgiven for concluding in 1971 that there was a categorical right to counsel in probation revocation proceedings. According to the *Gagnon* Court, a categorical approach in this context fails to account for the costs to the states of this added requirement

The next issue the Court tackled in its ongoing effort to flesh out *Argersinger* was whether the right to appointed counsel in misdemeanor cases is triggered only when a trial court actually imposes a sentence of incarceration on an indigent defendant, or whether the mere possibility of receiving a sentence of incarceration for a misdemeanor conviction gives rise to the right to appointed counsel. The Court addressed this issue in 1979 in *Scott v. Illinois*.¹³⁹ Scott was convicted of shoplifting under a theft statute authorizing a jail sentence of up to one year and up to a \$500 fine.¹⁴⁰ Following a bench trial in which he was not represented by counsel, Scott was fined \$50, but did not receive any jail time.¹⁴¹ Scott sought review of his uncounseled conviction, arguing that he should have been provided counsel at public expense because the statute of conviction authorized a potential penalty of incarceration, even if he was not actually sentenced to a term of incarceration—that is, the right to appointed counsel under *Argersinger* attaches when an indigent is charged with a crime that authorizes incarceration as a punishment, not only when the trial court imposes a term of incarceration.¹⁴²

A divided Court rejected Scott's argument and declined to extend *Argersinger* to cases in which incarceration was merely authorized, rather than actually imposed.¹⁴³ The *Scott* majority confirmed *Argersinger's* holding that actual incarceration, not just the threat of incarceration, triggers the right to appointed counsel.¹⁴⁴ Five justices

without a (according to the Court) discernable benefit to the potential revokee. *Id.* at 787 (“By the same token, we think that the Court of Appeals erred in accepting respondent’s contention that the State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases. While such a rule has the appeal of simplicity, it would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel.”).

139. 440 U.S. 367 (1979).

140. *Id.* at 368.

141. *Id.*

142. *Id.*

143. *Id.* at 369. Justice Rehnquist wrote the majority opinion, which was joined by four Justices. *Id.* at 367. Justice Powell concurred in the result, noting for the record his continued objection to the *Argersinger* categorical holding. *Id.* at 374 (Powell, J., concurring). Justice Brennan filed a dissent, joined by Justices Marshall and Stevens. *Id.* at 375 (Brennan, J., dissenting). Justice Blackmun filed a separate dissenting opinion. *Id.* at 389 (Blackmun, J., dissenting).

144. I say “confirmed” because there was considerable bickering between the *Scott* majority and dissenters about whether *Argersinger* left the actual versus authorized incarceration question open (the dissenters’ view) or whether *Argersinger* conclusively decided the issue (the majority’s view). *Id.* at 373,

joined the *Scott* majority. Justice Powell, who dissented in *Argersinger* and who authored the majority opinion in *Gagnon* (which, the reader will recall, rejected a categorical approach in the probation/parole context), concurred in *Scott* to point out that he still objected to *Argersinger's* categorical approach and was only grudgingly joining in the *Scott* opinion because the doctrine of stare decisis left him no choice.¹⁴⁵ Justice Brennan, who concurred in *Argersinger*, wrote a dissenting opinion, joined by Justices Marshall (who was in the *Argersinger* majority) and Stevens (who was not on the Court when *Argersinger* was decided). Justice Blackmun (also in the *Argersinger* majority) dissented separately.¹⁴⁶

Justice Rehnquist—who had joined Powell's concurrence in *Argersinger*—wrote the *Scott* majority opinion affirming *Argersinger*, but not before coming out swinging at the notion that a right to appointed counsel even exists under the Sixth Amendment. Justice Rehnquist opened his review of the case law by commenting “[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense.”¹⁴⁷ And, for good measure, he described the right to appointed counsel jurisprudence as confused and a departure from the literal meaning of the Sixth Amendment. In other words, regardless of what the Constitution required, it was time to slam on the federalism brakes in the Court's right to appointed counsel joyride:

The number of separate opinions in *Gideon*, *Duncan*, *Baldwin*,¹⁴⁸ and *Argersinger*, suggests that constitutional line drawing becomes more difficult as the reach of the Constitution is extended further, and as efforts are made to transpose lines from one area of Sixth Amendment jurisprudence to another. The process of incorporation creates special difficulties, for the state

379. In defense of the dissenters, the issue did confound the lower courts, so perhaps *Argersinger* was not quite as clear as the *Scott* majority supposed. *Id.* at 368 (noting that the Court granted certiorari in *Scott* “to resolve a conflict among state and lower federal courts regarding the proper application of our decision in *Argersinger v. Hamlin*”).

145. *Id.* at 374–75 (Powell, J., concurring).

146. See *supra* note 143 (outlining the disposition of each Justice in *Scott*).

147. *Scott*, 440 U.S. at 370. Justice Rehnquist cited a lone authority written over twenty years before the *Scott* opinion—WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 27–30 (1955)—in support of this assertion. *Id.*

148. *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (“[N]o offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized.”).

and federal contexts are often different and application of the same principle may have ramifications distinct in degree and kind. . . . As a matter of constitutional adjudication, we are, therefore, less willing to extrapolate an already extended line when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so. We have now in our decided cases departed from the literal meaning of the Sixth Amendment. And we cannot fall back on the common law as it existed prior to the enactment of that Amendment, since it perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors.¹⁴⁹

The *Scott* majority felt that *Argersinger* was clear, although allowing that it was perhaps not “unmistakably” so.¹⁵⁰ Further, the majority concluded, even if the issue were one of first impression, actual imprisonment is different enough from other types of punishments to make it the constitutionally defensible line for the right to appointed counsel in misdemeanor cases.¹⁵¹ Finally, the majority added, although the *Argersinger* rule was working well enough, any extension of the constitutional right to appointed counsel would impose additional indefensible burdens on the states.¹⁵²

As noted, three Justices who signed off in *Argersinger* (Brennan, Marshall, and Blackmun) dissented in *Scott*, joined by one Justice who was not on the Court when *Argersinger* was decided (Stevens).¹⁵³ Brennan’s dissent, joined by Marshall and Stevens, advocated for an authorized imprisonment, instead of an actual imprisonment, standard on three grounds. One, the authorized imprisonment standard is more

149. *Scott*, 440 U.S. at 372.

150. *Id.* at 373 (“Although the intentions of the *Argersinger* Court are not unmistakably clear from its opinion, we conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings.”) (citation omitted).

151. *Id.* (“Even were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.”).

152. *Id.* at 373–74 (“*Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States. We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.”) (citation omitted).

153. *See supra* note 143 (outlining the disposition of each Justice in *Scott*).

faithful to the Sixth Amendment as interpreted in *Gideon* (in which Brennan had participated and joined the majority)—the penalty attached to a crime by a state accurately reflects its seriousness and it drives the procedure associated with its prosecution. And it was those serious, complex proceedings, the Brennan dissent argued, that *Gideon* found required assistance of counsel to ensure due process.¹⁵⁴ Second, as a practical matter, the Brennan dissent argued that the “authorized imprisonment” test does not present the administrative and fairness concerns that the “actual imprisonment” standard presents—looking to the authorized imprisonment eliminates the need to predict before trial whether a particular defendant should be incarcerated, and it addresses the potential for unequal treatment and biased decision-making inherent in that process.¹⁵⁵ Third, the Brennan dissent argued that the “authorized imprisonment” test avoids the separation of powers problem created by the actual imprisonment test because it doesn’t artificially constrain trial courts’ authority to impose a term of imprisonment deemed appropriate by the legislature.¹⁵⁶

Justice Blackmun’s dissent in *Scott* propounded a hybrid categorical rule—the *Argersinger* right (the right to appointed counsel

154. *Scott*, 440 U.S. at 382–83 (Brennan, J., dissenting) (“[T]he ‘authorized imprisonment’ standard more faithfully implements the principles of the Sixth Amendment identified in *Gideon*. The procedural rules established by state statutes are geared to the nature of the potential penalty for an offense, not to the actual penalty imposed in particular cases. The authorized penalty is also a better predictor of the stigma and other collateral consequences that attach to conviction of an offense. . . . Imprisonment is a sanction particularly associated with criminal offenses; trials of offenses punishable by imprisonment accordingly possess the characteristics found by *Gideon* to require the appointment of counsel. By contrast, the ‘actual imprisonment’ standard . . . denies the right to counsel in criminal prosecutions to accuseds who suffer the severe consequences of prosecution other than imprisonment.”).

155. *Id.* at 383 (“[T]he ‘authorized imprisonment’ test presents no problems of administration. It avoids the necessity for time-consuming consideration of the likely sentence in each individual case before trial and the attendant problems of inaccurate predictions, unequal treatment, and apparent and actual bias.”).

156. *Id.* at 383–84 (“Finally, the ‘authorized imprisonment’ test ensures that courts will not abrogate legislative judgments concerning the appropriate range of penalties to be considered for each offense. Under the ‘actual imprisonment’ standard, [t]he judge will . . . be forced to decide in advance of trial—and without hearing the evidence—whether he will forgo entirely his judicial discretion to impose some sentence of imprisonment and abandon his responsibility to consider the full range of punishments established by the legislature. His alternatives, assuming the availability of counsel, will be to appoint counsel and retain the discretion vested in him by law, or to abandon this discretion in advance and proceed without counsel.” (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 53 (1972) (Powell, J., concurring))).

before any term of imprisonment for any offense can be imposed by a trial court), plus a right to appointed counsel in all other prosecutions extending as far as the jury right. Stated another way, Justice Blackmun's right to counsel, in addition to including cases falling under *Argersinger*, would require appointed counsel in all misdemeanor prosecutions for offenses whose authorized penalty exceeds six months (i.e. serious misdemeanors), but exclude prosecutions for misdemeanor offenses whose authorized penalty includes a term of incarceration of less than six months (i.e. petty offenses), even if no actual incarceration results.

The Court's next installment in its right to appointed counsel case law was *Alabama v. Shelton*,¹⁵⁷ decided in 2002. There the Court considered whether a state trial court can impose a suspended sentence of incarceration (i.e. a term of imprisonment that will only be activated if a defendant fails to comply with the terms of his conditional release) without first appointing counsel.¹⁵⁸ Or, as the Court framed the issue, whether a suspended sentence, which does not expose a defendant to either immediate or inevitable incarceration, is a "term of imprisonment" within the meaning of *Argersinger* and *Scott*. A divided Court in *Shelton* said "yes," categorically—a suspended or conditional sentence that may result in a term of incarceration of any length is a "term of imprisonment" that triggers the right to appointed counsel even if no actual imprisonment ever results.¹⁵⁹ The upshot of *Shelton* is that a trial court may never impose a conditional or suspended sentence of incarceration on an indigent without first appointing counsel, a rule that effectively sweeps away not only the trial court's ability to incarcerate the defendant at some later date, but its ability to put a defendant on post-conviction probation to the extent probation is linked to a term of potential incarceration.¹⁶⁰

Everyone in *Shelton*, including the State of Alabama, agreed that the Sixth Amendment bars *activation* of a suspended sentence of incarceration for an uncounseled conviction without more.¹⁶¹ The issue

157. 535 U.S. 654 (2002).

158. LeReed Shelton was convicted of third-degree assault, a misdemeanor punishable by up to one year incarceration, following a jury trial. *Id.* at 658. The trial court sentenced Shelton to a jail term of thirty days, but suspended the sentence and placed him on two years of unsupervised probation, conditioned on his payment of court costs, a \$500 fine, reparations of \$25, and restitution in the amount of \$516.69. *Id.*

159. *Id.* at 656–58.

160. As a practical matter, *Shelton* forecloses the trial court's option of attaching probation to an imposed and suspended sentence for an indigent unless it provides appointed counsel. *Id.* at 662.

161. *Id.* at 660–61 ("Alabama now concedes that the Sixth Amendment bars activation of a suspended sentence for an uncounseled conviction, but

was whether it also bars a trial court from *imposing* a suspended or conditional sentence of incarceration without appointing counsel at the outset. The *Shelton* majority, focusing on the reliability of the conviction corresponding to the prison sentence, held that under *Argersinger* and *Scott* it does.¹⁶² In doing so, *Shelton* confirmed that the primary concern of right to appointed counsel analysis remains the threat of an unjust deprivation of liberty, so it takes more than just a statute authorizing incarceration to trigger an indigent's right to appointed counsel in misdemeanor prosecutions. But it moved the line at which that threat of an unjust deprivation of liberty will be said to have materialized for constitutional purposes by holding that something short of actual incarceration will be considered actual incarceration for the *Argersinger* inquiry. The court placed the line at a specific term of imprisonment that is identified, but that will only potentially be imposed on the defendant if he doesn't fly right on conditional post-conviction release¹⁶³ (a potential actual incarceration test?).

Shelton produced a 5–4 split, with the dissenters disagreeing entirely, and vehemently, with the majority's application of the *Argersinger* line of cases.¹⁶⁴ According to the dissent, the trigger for the right to counsel at public expense is an actual deprivation of liberty; imposition of a sentence that does not actually deprive a defendant of liberty, the dissent reasoned, does not implicate the constitutional right

maintains that the Constitution does not prohibit imposition of such a sentence as a method of effectuating probationary punishment.”) (emphasis omitted).

162. *Id.* at 667 (“We think it plain that a hearing [to impose a conditional or suspended sentence after violation of the terms or conditions of suspension] so timed and structured cannot compensate for the absence of trial counsel, for it does not even address the key Sixth Amendment inquiry: whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration. Deprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant in *Shelton*’s circumstances faces incarceration on a conviction that has never been subjected to ‘the crucible of meaningful adversarial testing.’ The Sixth Amendment does not countenance this result.” (quoting *United States v. Cronin*, 466 U.S. 648, 656 (1984))).
163. *Id.* at 674 (“Satisfied that *Shelton* is entitled to appointed counsel at the critical stage when his guilt or innocence of the charged crime is decided and his vulnerability to imprisonment is determined, we affirm the judgment of the Supreme Court of Alabama.”).
164. Justice Scalia wrote the dissent, joined by Chief Justice Rehnquist (the only *Argersinger* holdover still on the Court), and Justices Kennedy and Thomas. *Id.*

to counsel.¹⁶⁵ That right is only implicated, according to the dissent, at the time a sentence of incarceration is imposed, and no sooner.¹⁶⁶

To recap¹⁶⁷—*Gideon* requires state trial courts to appoint counsel to indigents in all prosecutions for serious offenses (i.e. felony offenses,

165. *Id.* at 675 (Scalia, J., dissenting) (“[T]he central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. We have repeatedly emphasized actual imprisonment as the touchstone of entitlement to appointed counsel. . . . Today’s decision ignores this long and consistent jurisprudence, extending the misdemeanor right to counsel to cases bearing the mere threat of imprisonment. Respondent’s 30-day suspended sentence, and the accompanying 2-year term of probation, are invalidated for lack of appointed counsel even though respondent has not suffered, and may never suffer, a deprivation of liberty.”) (emphasis omitted) (citation omitted).

166. *Id.* at 676 (Scalia, J., dissenting) (“In the future, if and when the State of Alabama seeks to imprison respondent on the previously suspended sentence, we can ask whether the procedural safeguards attending the imposition of that sentence comply with the Constitution. But that question is not before us now.”) (emphasis omitted).

167. Included at the end of this Article for the reader’s reference is a chart tracking the various holdings and opinions in the Court’s primary right to appointed counsel cases. Outside of adult criminal trial proceedings, the Court has extended the *Gideon* right to a defendant’s first appeal of right in criminal cases, and to some juvenile delinquency proceedings. *See* *Halbert v. Michigan*, 545 U.S. 605, 606 (2005) (holding that the due process and equal protection clauses require appointment of counsel for indigent defendants in first-tier review); *see also In re Gault*, 387 U.S. 1, 41 (1967) (finding that the Fourteenth Amendment “requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child”). A companion issue to the question of whether and when a trial court must provide indigents appointed counsel is whether and how uncounseled prior misdemeanor convictions (i.e. prior prosecutions in which the trial court was not constitutionally required to appoint counsel) can be used in subsequent proceedings either as a sentencing factor or as a predicate offense element for a subsequent offense (such as a repeat offender charge). *See Nichols v. United States*, 511 U.S. 738 (1994) (holding that an uncounseled prior misdemeanor conviction, valid due to absence of imposition of prison term, is also valid when used to enhance punishment for subsequent conviction); *Burgett v. Texas*, 389 U.S. 109, 115 (1967) (holding that a state or federal conviction obtained in violation of the Sixth Amendment right to counsel cannot be used in subsequent proceeding “to support guilt or enhance punishment for another offense”). These issues are of tremendous importance in Indian country criminal prosecutions. *See United States v. Bryant*, 136 S. Ct. 1954 (2016) (using uncounseled prior tribal court domestic abuse convictions as predicate offenses in subsequent federal prosecution does not offend Constitution). But they are beyond the scope of this Article.

traditionally defined as offenses whose penalty includes a term of incarceration of over a year). In addition, *Argersinger* entitles all indigent defendants to appointed counsel in misdemeanor prosecutions before they can be imprisoned for any length of time, making no distinction between petty misdemeanors (i.e. offenses punishable by no more than six months imprisonment) and serious misdemeanors (i.e. offenses punishable by over six months, but less than one year, imprisonment). The Brennan dissenters in *Scott* read *Argersinger* to extend to all misdemeanor offenses—petty or serious—whose statutes authorize any term of imprisonment as a penalty, regardless of length, even if no actual term of imprisonment results. Justice Blackmun would have had the right to appointed counsel include all prosecutions for offenses with an authorized punishment over six months incarceration, whether imprisonment results or not, but exclude prosecutions for petty misdemeanors even if they are jailable offenses (unless, of course, they result in actual incarceration, which is covered by *Argersinger*). *Shelton* is the Court's last word on this subject. In *Shelton*, a sharply divided Court held that, in addition to misdemeanor cases covered by the *Argersinger* actual imprisonment trigger, the Sixth Amendment requires state trial courts to appoint counsel in misdemeanor prosecutions of indigents before they can impose a conditional or suspended sentence that includes any term of imprisonment.¹⁶⁸

II. MAKING SENSE OF THE RIGHT— WHY DOES THE CONSTITUTION REQUIRE APPOINTED COUNSEL FOR POOR PEOPLE CHARGED WITH MISDEMEANORS ONLY WHEN THEY ARE ACTUALLY INCARCERATED?

Regardless of whether one agrees that the Sixth Amendment's guarantee of the right to assistance of counsel in criminal cases includes the right to counsel at public expense for indigents, rather than just the right to retain counsel for those who can afford it,¹⁶⁹ a more convoluted interpretation of the Sixth Amendment right to assistance of counsel than the Court's current one would be hard to concoct. If one allows (even if just for the sake of argument) that the Sixth Amendment requires appointment of counsel to indigent defendants, and that this requirement applies with full force to the states via the Fourteenth

168. Given the fractured jurisprudence in this area, the sharp divide in *Shelton*, the Court's most recent major right to appointed counsel holding, and the significant turnover in personnel on the Court since it decided *Shelton* in 2002 (only four of the *Shelton* justices, two from the majority—Ginsburg and Breyer, and two from the dissent—Kennedy and Thomas—remain on the Court), some of these issues may be up for reexamination if and when they reach the Court again.

169. *See supra* notes 19–20 and accompanying text.

Amendment, it would not be unreasonable to insist that “in all criminal prosecutions” means, well, in all criminal prosecutions.¹⁷⁰ If an indigent’s right to counsel at public expense attached to “all criminal prosecutions,” the natural trigger for appointment of counsel would be the beginning of adversarial criminal proceedings, a constitutionally defensible line (and, incidentally, when the right to assistance of retained counsel attaches).¹⁷¹ But the Court has never even suggested going this far. Alternatively, the Court could have linked the right to appointed counsel to the seriousness of the offense, as reflected in the penalty the legislature has assigned to it, as it has done with the federal constitutional right to a jury trial. But, as noted, the Court explicitly rejected this approach in *Argersinger*.

Instead, the Court has used different approaches to slicing and dicing the state court indigent’s right to appointed counsel. In *Gideon* it looked to the nature and seriousness of the charged offense, and adopted seriousness as a proxy for complexity, and complexity (and the lay defendant’s concomitant inability to protect his interests) as the reason counsel is constitutionally required in felony cases. But under the *Argersinger* line of cases, the Court looked to the actual versus authorized incarceration faced by the indigent defendant and settled on preventing an unjust loss of liberty as the reason a trial court cannot incarcerate an indigent defendant for a misdemeanor offense unless she has been provided appointed counsel, regardless of the seriousness of the offense or complexity of the case—although *Shelton* might be viewed as a bit of a fudge on this point.

If the Sixth Amendment guarantees an accused the right to assistance of counsel in all criminal prosecutions, and if *Gideon* is correct that the Sixth Amendment assistance of counsel guarantee is meaningless unless it includes the right to appointed counsel if you are poor, why has the question of when and whether state trial courts must appoint counsel to represent poor people charged with crimes so bedeviled the Court? And why has it provided such an awkward response to that question—that poor people charged with felonies are always entitled to appointed counsel, but poor people charged with

170. Of course, what is included in a “criminal prosecution” can be an issue. *Cf. Betterman v. Montana*, No. 14-1457, slip op. at 1 (S. Ct. May 19, 2016) (sentencing is not part of criminal trial for Sixth Amendment speedy trial purposes). But once that is determined, arguing that “all” means something less than “all” might be a harder case to make.

171. *Right to Counsel*, 32 GEO. L. J. ANN. REV. CRIM. PROC. (SPECIAL ISSUE) 455, 455–56 (2003) (“The right to counsel attaches at or after the initiation of adversarial judicial proceedings whether by way of formal charge, preliminary hearing, indictment, information, or arraignment, and no request for counsel need be made by the accused.”) (citations omitted) (internal quotations removed).

misdemeanors are only entitled to appointed counsel if they go to jail,¹⁷² even though penalties short of incarceration can have equally disastrous results for a defendant, results that could be avoided or ameliorated with the assistance of counsel?¹⁷³

The answer, I submit, can be found in the interrelated concerns of federalism and funding, the level of angst those topics inspire in federal Justices, and the Court's efforts to strike a practical balance in the economics of justice. Every new rule of federal constitutional criminal procedure infringes on states' autonomy to prosecute and punish conduct they deem criminal. It also potentially stifles innovation and flexibility at the local level, where the overwhelming number of criminal cases in the United States are prosecuted. And every new rule of federal constitutional criminal procedure carries a potential cost that must be borne by state and local governments, who must either find new resources, or re-allocate existing ones within their individual criminal justice systems, to meet federal constitutional mandates.¹⁷⁴ This is

172. This, of course, creates a lesser right to assistance of counsel for poor people since indigents only have a constitutional right to appointed counsel in some criminal prosecutions, whereas a person who can afford retained counsel can avail herself of assistance of counsel in all criminal prosecutions. *Id.* at 460–62.

173. Monetary penalties (such as fines and restitution) and collateral consequences of conviction (such as loss of eligibility for government benefits or privileges, or impairment of employment and educational opportunities) resulting from a misdemeanor conviction can have potentially longer-lasting and more severe impacts on defendants—especially indigent defendants—than a short jail term.

174. Professor John Pfaff, of Fordham Law School, and author of the forthcoming book “Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform,” recently described this dynamic in a New York Times op-ed piece. John Pfaff, *A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 29, 2016), <http://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html> [<https://perma.cc/U87C-J77J>]. He calls Gideon “no minor decision” in terms of resources, noting that approximately eighty percent of all state criminal defendants in the United States qualify for appointed counsel. *Id.* Notwithstanding, “state and county spending on lawyers for the poor amounts to only \$2.3 billion—barely 1 percent of the more than \$200 billion governments spend annually on criminal justice.” *Id.* He describes “public defense [as] starved of resources while facing impossible caseloads that mock the idea of justice for the poor.” *Id.* He advocates that the federal government start ponying up a little more and provide more federal funding for public defense, which he reports is currently just a few million dollars a year nationally. *Id.* As a general proposition, I agree the federal government should fund its mandates to state and local governments, whether legislative or judicial. In my view, however, salvation lies not in more federal funding and more lawyers, but in state criminal justice reform initiatives aimed at producing fewer criminals at the front end. The United States simply produces more criminals than the criminal justice system it is willing to fund can constitutionally prosecute and punish. Decriminalizing conduct that can be better managed through civil and regulatory systems, and actively diverting individuals whose conduct might be better addressed

federalism's predicament in a resource-hungry system. Most criminal cases are prosecuted at the state, not the federal, level. When the Supreme Court lays down a new constitutional rule of criminal procedure, its implementation can often involve significant costs that will be borne most heavily, if not exclusively, at the state and local level.

Perhaps nowhere are the effects of this type of unfunded federal judicial mandate better illustrated, or more acutely felt, than with the right to counsel at public expense—a federal constitutional imperative with an enormous price tag at the front end (paying for attorneys to represent defendants) whose violation is vindicated at the back end (by overturning state criminal convictions). In an effort to contain the potentially enormous resource costs of requiring states to provide appointed counsel to indigents in misdemeanor cases, the Court linked the constitutional right to counsel at public expense to actual incarceration—purportedly because a loss of liberty is different in kind and effect from any other penalty a state court can mete out for a misdemeanor. But in doing so, it has created a post-conviction test whose application pretrial is counterintuitive to say the least.¹⁷⁵ By linking a trial court's ability to incarcerate a misdemeanant to the provision of appointed counsel, the Court forces state trial courts to evaluate, pretrial, whether that individual's case will warrant incarceration as a penalty before even considering the merits of the case. As a result, jurisdictions may end up simply providing appointed counsel to all indigents accused of crimes that carry potential jail sentences, or adopt a policy of never imposing jail sentences for certain offenses. When a trial court doesn't impose jail time as a matter of court policy for a category of offenses, regardless of an individual defendant's conduct, this undercuts legislative mandate and raises significant separation of powers issues¹⁷⁶ because it encourages or requires state trial courts to

through the mental health system than the criminal justice system are just two starting points.

175. Justice Brennan thoroughly explored some of the dynamics described in this paragraph in his *Scott* dissent. *See supra* notes 154–156 and accompanying text.

176. Of course, a cynic could argue that this allows a tough on crime legislature to have its cake and eat it too—it can pass criminal misdemeanor laws with high potential jail terms penalties, but decline to adequately fund indigent defense knowing that courts will likely forgo incarceration in most cases to avoid the expense of providing counsel. Cf. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 54 (1997) (“Countermajoritarian criminal procedure tends to encourage legislatures to pass overbroad criminal statutes and to underfund defense counsel. These actions in turn tend to mask the costs of procedural rules, thereby encouraging courts to make more such rules. That raises legislatures' incentive to overcriminalize and underfund. So the circle goes. This is a necessary consequence of a system with extensive, judicially defined regulation

forgo a punishment authorized by the legislature to avoid the expense associated with providing appointed counsel. So much for striking a federalism blow on the states' behalf by drawing the constitutional line at actual incarceration, something the *Scott* majority hoped it was doing.

The deep problem reflected by the Court's right to appointed counsel jurisprudence is that the Court has never reached consensus on whether states' ability or willingness to expend resources is an appropriate consideration in delineating the individual federal rights of defendants. Whether constitutional analysis is properly driven by pragmatic considerations like this, or whether it should be followed wherever it might lead, is a fundamental question that permeates constitutional criminal procedure jurisprudence, and it has indelibly shaped the federal right to appointed counsel.¹⁷⁷ The extent to which this should be considered may be fairly debated. But it is part of the equation and this background is critical to understanding and interpreting the statutory right to appointed counsel in tribal court, discussed below.

III. STATUTORY RIGHT TO COUNSEL IN TRIBAL COURT PROCEEDINGS

A. *Selective Codification*—

Imposition of Federal Constitutional Rights to Tribal Court Proceedings

As noted in the Introduction, the right to appointed counsel in tribal court is governed by the Indian Civil Rights Act (ICRA),¹⁷⁸ as amended by the Tribal Law and Order Act (TLOA)¹⁷⁹ and the Violence Against Women Act Reauthorization of 2013 (VAWA 2013).¹⁸⁰

of the criminal process, coupled with extensive legislative authority over everything else.”).

177. Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After 'Gideon,'* THE ATLANTIC (Mar. 13, 2013), <http://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/> [https://perma.cc/5GG6-ZGRV] (“Today, sadly, the *Gideon* ruling amounts to another unfunded mandate—the right to a lawyer for those who need one most is a constitutional aspiration as much as anything else. And the reasons are no mystery. Over the intervening half-century, Congress and state lawmakers consistently have refused to fund public defenders’ offices adequately. And, as it has become more conservative since 1963, the United States Supreme Court has refused to force legislators to do so.”).

178. Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified at 25 U.S.C. § 1301 (2012)).

179. Pub. L. No. 11-211, § 234(c)(1), 124 Stat. 2258, 2261 (2010) (codified at 25 U.S.C. §§ 2801–2815 (2012)).

180. Pub. L. No. 113-4, § 904, 127 Stat. 120 (2013) (codified at 25 U.S.C. § 1304 (2012)).

Understanding the TLOA and VAWA 2013 amendments to the ICRA requires a short primer on the nature and extent of tribal court jurisdiction over crimes committed in Indian country. At the founding, tribes were understood to be separate sovereigns, like the states, with criminal jurisdiction over anyone, Indian or non-Indian, who violated tribal law within their jurisdictions. Early in United States' history, the federal government asserted jurisdiction over non-Indians who commit crimes in Indian country.¹⁸¹ Tribes, however, were understood to still possess inherent authority over Indians who committed crimes on tribal land. This understanding was confirmed by the Supreme Court in 1883 in *Ex parte Crow Dog*,¹⁸² where the Supreme Court held that under federal treaty and statutory law, tribes had inherent authority over violations of tribal law committed by Indians on tribal land.¹⁸³

181. See *United States v. Bruce*, 394 F.3d 1215, 1218 (2005) (stating that tribal authority over crime in Indian Country “continued until shortly after the ratification of the Constitution, when Congress extended federal jurisdiction to non-Indians committing crimes against Indians in Indian territory”); see also CARRIE E. GARROW & SARAH DEER, *TRIBAL CRIMINAL LAW AND PROCEDURE* 42 (Jerry Gardner et al., eds., 2d ed. 2015) (discussing the gap in prosecution of non-Indians who commit crimes on tribal nation reservations). Congress began legislating tribes’ post-treaty criminal jurisdiction with the Trade and Intercourse Act of 1790, Pub. L. No. 1-33, 1 Stat. 137. The 1790 Act and amendments to it formed the foundation for the current version of the Indian Country Crimes Act (ICCA), 18 U.S.C. § 1153 (Supp. I 2013–2014). The 1790 Act placed all interactions with Indians under federal law and provided for federal jurisdiction over crimes committed by non-Indians against Indians in Indian country. § 5, 1 Stat. at 138. The Indian Country Crimes Act of 1817 subsequently reaffirmed federal jurisdiction over all crimes committed by non-Indians in Indian country and explicitly acknowledged that tribes retained jurisdiction over crimes committed in Indian country by one Indian against the person or property of another Indian. Pub. L. No., § 2, 3 Stat. 383 (repealed 1834). The relevant provisions of the 1817 Act are now codified in the General Crimes Act, 18 U.S.C. § 1152 (2012). The Indian Trade and Intercourse Act of 1834, Pub. L. No. 23-161, § 25, 4 Stat. 729, 733, repealed the Indian Country Crimes Act of 1817, but incorporated the latter’s criminal jurisdiction provision. § 29, 4 Stat. at 733.

182. 109 U.S. 556 (1883).

183. *Id.* at 572.

In direct response to *Crow Dog*,¹⁸⁴ Congress passed the Indian Major Crimes Act in 1885.¹⁸⁵ The Major Crimes Act provides that Indians who commit an enumerated offense in Indian country “shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.”¹⁸⁶ The Major Crimes Act, thus, grants the federal government jurisdiction over Indians who commit a listed offense¹⁸⁷ in Indian country, regardless of whether the victim is an Indian or non-Indian.¹⁸⁸ As a result of the Major Crimes Act, the federal government assumed primary responsibility for prosecuting serious offenses of personal violence committed in Indian country.

184. See *Keeble v. United States*, 412 U.S. 205, 209–11 (1973) (“The prompt congressional response—conferring jurisdiction on the federal courts to punish certain offenses—reflected a view that tribal remedies were either non-existent or incompatible with principles that Congress thought should be controlling.”); *United States v. Kagama*, 118 U.S. 375, 382–83 (1886) (“The passage of the act now under consideration was designed to remove that objection, and to go further by including such crimes on reservations lying within a State.”).

185. Act of March 3, 1885, ch. 341, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. §§ 1153, 3242 (2012 & Supp. I 2013–2014)). 18 U.S.C. § 3242 provides: “All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.”; Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 803–04 (2006) (describing the role of the Interior Department, which had been seeking federal jurisdiction over crimes in Indian Country, in securing the passage of the Major Crimes Act: “Armed with the defeat in the Supreme Court, federal Interior Department officials promptly returned to Congress. In seeking a law to allow them to punish ‘major crimes,’ federal officials claimed that tribal laws were inadequate. In a report to Congress in 1884, the Secretary of the Interior cited *Crow Dog* in portraying Indian country as a lawless place. . . . Motivated by the Secretary’s entreaties, Congress soon enacted the Major Crimes Act.”) (citations omitted).

186. *Id.* at § 1153(a).

187. Major Crimes Act, § 9. The current version of the Major Crimes Act enumerates fifteen offenses. See *infra* note 188 and accompanying text. These enumerated offenses are, for the most part, defined by distinct federal statutes. Offenses that are not defined by federal law are defined and punished in accordance with the law of the state where the crime was committed. 18 U.S.C. § 1153(b).

188. The Major Crimes Act places specific crimes committed by an Indian in Indian country within federal jurisdiction. 18 U.S.C. § 1153(a). The crimes are offenses against the person, such as murder and assault that, if committed in a state jurisdiction, have traditionally and historically been left to state governments to prosecute and punish. *Id.*

Under contemporary federal law, tribes have inherent authority to prosecute and punish both member and non-member Indians for crimes committed on tribal land.¹⁸⁹ Absent an explicit grant from Congress, tribes do not have criminal jurisdiction to prosecute non-Indians who commit offenses on tribal land.¹⁹⁰ Tribal jurisdiction to prosecute and punish criminal conduct on tribal land is governed by tribal constitutions or charters, tribal codes, and federal statutory law. Tribal governments, however, are not constrained by the federal Constitution because the various Indian nations are separate sovereigns who did not participate in the ratification of the Constitution. Thus, the Bill of Rights does not apply to defendants in tribal court proceedings.¹⁹¹

Congress passed ICRA in 1968. ICRA governs a wide range of both criminal and civil law and procedure, and imposes a number of requirements on tribal courts in the exercise of their jurisdiction. ICRA

-
189. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 9 (2012); 42 C.J.S. *Indians* § 180 (2016) (“A tribe has the inherent power to punish its members, as an aspect of its sovereignty. Further, Congress enacted legislation specifically authorizing a tribe to prosecute Indian members of a different tribe. Thus, under the statutory definitions regarding constitutional rights of Indians, ‘powers of self-government’ means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians. Accordingly, an Indian tribe may exercise inherent sovereign judicial power in criminal cases against nonmember Indians for crimes committed on the tribe’s reservation. The source of an Indian tribe’s power to prosecute and punish an Indian, who is not a member of the tribe is, in view of this federal statute, inherent tribal sovereignty rather than delegated federal authority.”) (citations omitted).
190. *Id.* (“[T]he inherent sovereignty of Indian tribes does not extend to criminal jurisdiction over non-Indians who commit crimes on a reservation. Tribal courts have no criminal jurisdiction over non-Indians unless specifically authorized to assume such jurisdiction by Congress.”) (citations omitted).
191. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 198 (2002) (“ICRA was designed to impose by statute on the operation of tribal governments many of the constitutional guarantees found in the Bill of Rights, as a well as an equal protection clause. This statute, of course, was thought necessary because of the Court’s decision in *Talton*, holding that Bill of Rights limitations did not apply to tribal government since their sovereignty derived from aboriginal sources and did not constitute an exercise of federal power.”) (citing *Talton v. Mayes*, 163 U.S. 376, 384 (1896)); *Duro v. Reina*, 495 U.S. 676, 693 (1990); Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 428 (2014) (“Since Indian tribes did not participate in the Constitutional Convention and did not ‘sign on’ by joining the federal union, they are not bound by the Constitution, absent affirmative congressional action to the contrary. Rather, federal and state courts have recognized that tribal courts generally retain inherent civil and criminal jurisdiction over Indian reservations by virtue of their sovereign status.”) (citations omitted) (internal quotation marks omitted).

extends some, but not all, of the guarantees in the Bill of Rights to tribal court criminal defendants.¹⁹² As discussed below, although ICRA provides for a right to the assistance counsel in all criminal proceedings, it does not require appointment of counsel to indigents at public expense on the same terms as the Sixth Amendment.¹⁹³

ICRA limits the sentencing authority of tribal courts.¹⁹⁴ With some exceptions, even for serious offenses, ICRA generally limits the penalty a tribal court can impose for a single offense to one year incarceration

192. Like the Bill of Rights, ICRA provides for the right to be free from unreasonable searches and seizures; requires probable cause and particularity for warrants; prohibits double jeopardy and compelled self-incrimination; provides rights to a speedy and public trial, notice of charges, confrontation of witness, compulsory process, and counsel; prohibits excessive bail, fines, and cruel and unusual punishment; requires equal protection and due process; prohibits bills of attainder and ex post facto laws; and provides for six person juries. 25 U.S.C. § 1302(a) (2012). *See also* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 478 (2005) (identifying “the two primary rights ‘missing’ from ICRA [as] free representation for indigent defendants and a jury that includes nonmembers”). Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 425–26 (2004) (“[ICRA] was enacted toward the end of the period of seemingly interminable litigation spawned by the ambiguous language of the Fourteenth Amendment. The Incorporation Controversy, as this litigation is collectively known, reached a crescendo during the Warren Court era. . . . [I]t was not long after enactment of the Indian Civil Rights Act that state courts were held to all of the same high standards of due process required of tribal courts. But the timing is noteworthy and it bears emphasis: tribal courts were required by Congress to provide numerous protections to criminal defendants while state courts were still arguing in the Supreme Court that some of these same protections need not be provided.”).

193. *Cf. Talton v. Mayes*, 163 U.S. 376, 384–85 (1896) (finding that the Bill of Rights does not constrain tribal courts); *see also* *United States v. Doherty*, 126 F.3d 769, 777 (6th Cir. 1997), *abrogated by* *Texas v. Cobb*, 532 U.S. 162 (2001) (“Of course, *Talton* was decided decades before most of the protections of the Bill of Rights were held to be binding on the states through the Fourteenth Amendment. Furthermore, the specific provision at issue in *Talton*, the right to indictment by a grand jury, to this day has not been held to operate on the states, and the Court relied on its prior decision in *Hurtado v. California*, 110 U.S. 516 (1884), to that effect to buttress its holding. Nonetheless, *Talton* has come to stand for the proposition that neither the Bill of Rights nor the Fourteenth Amendment operates to constrain the governmental actions of Indian tribes, and the Supreme Court has consistently decided cases with that understanding. ‘As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. . . . [T]he lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.’” (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (citations omitted))).

194. 25 U.S.C. §§ 1301–1304 (2012 & Supp. I 2013–2014).

and a \$5,000 fine.¹⁹⁵ In two recent legislative enactments, Congress carved out some narrow exceptions to these long-standing federal policies. In 2010, under TLOA, Congress authorized tribal courts to go beyond ICRA's one year/\$5,000 punishment cap in some circumstances.¹⁹⁶ A tribal court may now impose a sentence over one year and up to three years if: (1) the defendant has been previously convicted of, or is being prosecuted for, the same or a comparable offense or if the defendant is convicted of a felony-type offense,¹⁹⁷ and (2) the tribal court extends specific procedural protections to the defendant.¹⁹⁸ For multiple offenses, ICRA limits a tribal court sentence to imprisonment of no more than nine years.¹⁹⁹

Under VAWA 2013, for the first time since tribes were divested of criminal jurisdiction over non-Indians, Congress authorized tribes to exercise criminal jurisdiction over non-Indians for enumerated domestic violence offenses committed on tribal land, in certain circumstances.²⁰⁰ The cases are subject to TLOA's three year/\$15,000 sentencing cap for

195. *Id.* § 1302(a)(7)(B).

196. Pub. L. No. 111-211, § 234, 124 Stat. 2261, 2279–82 (2010) (codified at 25 U.S.C. § 1302 (2012)).

197. 25 U.S.C. § 1302(b). Prior to enactment of the Tribal Law and Order Act of 2010, tribal court sentencing authority was capped at one year for all offenses. *See infra* Part IV. § 1302(b) provides: “A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.”

198. *Id.* § 1302(c) (requiring tribes to provide all defendants who receive a sentence of more than one year with the right to effective assistance of counsel, at public expense, if the defendant is indigent).

199. *Id.* § 1302(a)(7)(D).

200. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 204, 127 Stat. 54, 120–21. VAWA 2013 added a section to ICRA titled “Tribal Jurisdiction Over Crimes of Domestic Violence,” authorizing “participating” tribes “to exercise special domestic violence criminal jurisdiction over all persons”—over both Indians and non-Indians—who commit specific offenses in Indian country. 25 U.S.C. § 1304(b)(1) (Supp. I 2013–2014). The driving force behind these VAWA 2013 amendments was the federal government's failure to adequately prosecute domestic violence crimes in Indian country. *See* Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 315–16 (2015) (citing under-enforcement of crimes of sexual violence as the impetus for VAWA 2013 provisions for special domestic violence jurisdiction in tribal courts over some non-Indians).

single offenses and nine year “stacking” cap for multiple offenses.²⁰¹ As discussed below, if a tribal court is exercising jurisdiction over a domestic violence offense under VAWA 2013, it is required to provide the procedural protections in the TLOA amendments to ICRA to all defendants facing incarceration (not just those sentenced to more than one year) and to provide additional procedural protections.²⁰²

Exercising TLOA’s enhanced sentencing and VAWA 2013’s expanded jurisdiction is optional for tribes. But not all tribes can participate. As discussed below, tribes seeking to exercise these sentencing and jurisdictional powers must first extend specific procedural protections to criminal defendants like those guaranteed to state and federal criminal defendants under the federal Constitution. As noted, ICRA affords some, but not all, of the criminal procedural protections found in the Bill of Rights. And, as further discussed below, it provides for “tiered” protection to defendants that is tied to the extent of the authority a tribe seeks to exercise.

B. ICRA General Provisions—No Right to Counsel at Public Expense or Explicit Right to Effective Assistance of Counsel for Indian Defendants Sentenced to One Year or Less

Under the general provisions of ICRA, a defendant in a tribal court proceeding has the right to assistance of counsel at his own expense.²⁰³ Congress enacted ICRA in 1968, five years after *Gideon* established that the Sixth Amendment required trial courts to appoint counsel to indigents at public expense in felony cases, but before the Court considered whether the constitutional right to appointed counsel extended to misdemeanor prosecutions. Against this backdrop, by explicitly stating that tribal courts may not deny a defendant counsel retained at

201. 25 U.S.C. § 1302(b).

202. *Id.* § 1304(d) (Supp. I 2013–2014).

203. 25 U.S.C. § 1302(a)(6) provides: “No Indian tribe in exercising powers of self-government shall . . . deny to any person in a criminal proceeding . . . at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b) [sic—‘c’]).” However, the reference to “subsection (b)” in 25 U.S.C. § 1302(a)(6) appears to be a typo. 25 U.S.C. §§ 1302 (b)–(c) were added after the enactment of TLOA; 25 U.S.C. § 1302(b) is an enhanced sentencing provision, while § 1302(c) covers the procedural protections (including the right to counsel at public expense for indigents) that a tribal court seeking to exercise the enhanced sentencing powers described in § 1302(b) must provide. *See also* Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 340 (2013) (noting that until 1961, the Code of Federal Regulations prohibited attorneys in tribal court) (citing 25 C.F.R. § 11.9 (1958) (repealed by 26 Fed. Reg. 4360–61 (May 19, 1961))).

his own expense, Congress excluded tribal courts from a *Gideon*-like requirement to provide appointed counsel to indigent defendants.²⁰⁴

As a practical matter, this limitation did not result in a different right to counsel at public expense in tribal courts. As enacted in 1968, ICRA limited the punishment a tribal court could impose to misdemeanor-type penalties—a maximum of six months imprisonment and/or a \$500 fine.²⁰⁵ In 1968, *Gideon* was understood to apply only in felony cases. Thus, when Congress enacted ICRA and did not provide for counsel at tribal expense, indigent state court defendants did not have a constitutional right to counsel at public expense outside the felony context. As a result, indigent tribal court defendants, at this time limited to Indians,²⁰⁶ were in no different position than indigent state defendants as a matter of federal law under ICRA.²⁰⁷

204. *United States v. Doherty*, 126 F.3d 769, 778 (6th Cir. 1997) (“ICRA provides for a right to counsel, but does not extend that right to the limits of the Sixth Amendment. . . . Thus, the tribes are not required to provide counsel to the indigent accused in felony prosecutions, despite the Sixth Amendment holding to the contrary in *Gideon*” (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963), *abrogated on other grounds by Texas v. Cobb*, 532 U.S. 162 (2001))).

205. As enacted, ICRA provided: “No Indian tribe in exercising powers of self-government shall . . . impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both[.]” 25 U.S.C. § 1302(7) (1976). Congress amended ICRA in 1986 to increase the maximum sentence to one year of imprisonment and a \$5,000 fine. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 § 4217, 100 Stat. 3207–146. Following enactment of TLOA in 2010, section (a)(7) was revised to raise the one year incarceration cap for each offense to three and the \$5,000 fine cap to \$15,000, and to allow tribal courts to stack offenses to impose a term of incarceration of up to nine years for some offenses in proceedings complying with TLOA’s procedural requirements, including the provision of bar-licensed counsel at public expense. 25 U.S.C. § 1302(a)(7)(B)–(D) (2012). These ICRA provisions currently read: “No Indian tribe in exercising powers of self-government shall . . . (B) *except as provided in subparagraph (C)*, impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both; (C) *subject to subsection (b)* [providing for enhanced penalties in specific cases], *impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years.*” *Id.* § 1302(a)(7)(B)–(D) (2012) (TLOA amendments in italics).

206. Under the 1968 version of ICRA, this provision applied only to Indians since, as noted, tribal courts were completely divested of jurisdiction over non-Indians until VAWA 2013 restored tribal court jurisdiction over some non-Indians under limited circumstances.

207. Creel, *supra* note 203, at 347 (“While the debate regarding tribal members’ right to counsel under the ICRA ensued, the indigent defendant’s right to counsel in state and federal court was still unfolding. Senator Ervin began his investigative hearings in 1961, before *Gideon* had been decided. During

After Congress enacted ICRA, the *Argersinger* line of cases erased the misdemeanor/felony distinction that developed following *Gideon* and extended the right to counsel at public expense to indigents in all criminal proceedings that result in either actual imprisonment, no matter how brief, or in a suspended sentence that includes a term of imprisonment. When Congress amended ICRA in 1986 it increased tribal court sentencing authority from six months imprisonment and a \$500 fine, to one year imprisonment and a \$5,000 fine. Although these amendments occurred after the Court decided *Argersinger* in 1972, ICRA's right to counsel at public expense provisions were not revised to reflect the "actual imprisonment" trigger developed by the Court in the federal constitutional realm.

Thus, under current law, the federal statutory right to counsel of indigent tribal court defendants subject to the general provisions of ICRA (i.e. non-TLOA and non-VAWA 2013 prosecutions and limited to Indians) remains unchanged. Unlike indigent state and federal court defendants who, since *Argersinger* and *Scott*, are entitled to counsel at public expense in any proceeding that results in actual imprisonment or a suspended sentence of imprisonment, indigent tribal court defendants outside TLOA and VAWA 2013 have the right to the assistance of retained counsel only. As a result, an indigent Indian defendant in tribal court can be incarcerated for up to one year without appointment (or assistance) of counsel. It should be noted, this just describes the ICRA procedural floor—tribal courts, of course, can and do provide indigent defendants with advocates to assist them in defending against criminal prosecutions even though not mandated to do so by ICRA.

C. TLOA—Right to Effective Assistance of Bar-Licensed Counsel at Public Expense for Indigent Indian Defendants Sentenced to More than One Year Incarceration

Congress made a number of changes to ICRA and other statutes when it passed TLOA. The relevant changes for purposes of this Article are the amendments to ICRA that increased tribal court's sentencing authority in specific cases from the one year/\$5,000 sentencing cap to a three year/\$15,000 cap for a single offense, and permit tribal courts

the seven years of Senate [ICRA] hearings from 1961 and continuing after the passage of ICRA in 1968, the Supreme Court had not yet extended the right to counsel to defendants facing jail time for misdemeanor offenses. At that time, the Sixth Amendment guaranteed a criminal defendant the right to counsel in federal court, but that right was not made applicable to state court trials until 1963; even then, it was only for felonies, not misdemeanors. Thus, with regard to the right to counsel debate of the time, ICRA's provision of a right to counsel at the Indian's own expense was equivalent to the right to counsel in the states. Tribes were in synchronicity with the state and federal judicial interpretation of the late 1960s and early 1970s.") (citations omitted).

to stack offenses to impose a total sentence of incarceration of up to nine years, but only if tribal courts extend defendant's procedural protections above those required under the general provisions of ICRA. Specifically, to exercise the enhanced sentencing authority under the TLOA amendments to ICRA, a tribal court must:

provide all defendants “the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution;”²⁰⁸

provide indigent defendants “the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys” at tribal expense;²⁰⁹

supply a judge with “sufficient legal training to preside over criminal proceedings” who is licensed to practice law;²¹⁰

before charging a defendant, make the tribe’s “criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances)” publicly available;²¹¹ and

“maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.”²¹²

Thus, with respect to the right to counsel, the TLOA amendments to ICRA require tribal courts to provide all defendants with effective assistance of counsel, as defined by the Constitution, and to provide indigent defendants a licensed attorney at public expense before it imposes a sentence over the one year/\$5,000 sentencing cap contained in the general provisions of ICRA. The language used in the TLOA amendments to ICRA to identify when an indigent tribal court defendant's right to effective assistance of counsel at tribal expense is triggered mirrors the *Argersinger* “actual incarceration” standard—under the TLOA amendments to ICRA, the right to effective assistance

208. 25 U.S.C. § 1302(c)(1). The general provisions of ICRA provide for the right to assistance of counsel; they do not contain a right to effective assistance of counsel. *Id.* § 1302(a)(6).

209. *Id.* § 1302(c)(2). The general provisions of ICRA do not require that counsel be bar-licensed. *Id.* § 1302(a).

210. *Id.* §§ 1302(c)(3)(A)–(B).

211. *Id.* § 1302(c)(4).

212. *Id.* § 1302(c)(5).

of counsel and the right of indigent defendants to assistance of bar-licensed counsel at public expense are triggered when a tribal court “imposes” a TLOA sentence: “In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall [provide the enumerated protections imposed by TLOA].”²¹³

*D. VAWA 2013—Right to Effective Assistance of Bar-Licensed
Counsel at Public Expense if
Incarceration of Any Length May be Imposed*

For the first time since the Congress divested tribal courts of criminal jurisdiction over non-Indians, in VAWA 2013 it partially restored tribal court criminal jurisdiction over particular non-Indians in a limited class of domestic violence offenses committed in Indian country, subject to certain requirements. VAWA 2013 authorized qualifying tribes to exercise criminal jurisdiction over some non-Indians who commit certain crimes in Indian country—to wit: “domestic violence[,] dating violence,” and “violations of protection orders” involving an Indian victim.²¹⁴ However, for a tribe to exercise VAWA 2013 criminal jurisdiction over a non-Indian defendant, the defendant must have some connection to the tribe—such as working or living in the community; or being married to, or in an intimate or dating relationship with an Indian who is a member of the tribe, or with a non-member Indian living in the community.²¹⁵ Indians are also subject to prosecution for domestic violence offenses enumerated in VAWA 2013. However, the primary aim of the “special domestic violence criminal jurisdiction”²¹⁶ created by VAWA was to authorize tribal courts to exercise jurisdiction

213. *Id.* § 1302(c).

214. *Id.* Tribal court jurisdiction under VAWA 2013 is limited to cases involving an Indian victim; thus, tribes cannot exercise jurisdiction over domestic violence offenses committed in Indian country if both the victim and defendant are non-Indians. *Id.* § 1304(b)(4)(A)(i).

215. *Id.* § 1304(b)(4)(B).

216. The VAWA 2013 amendments to ICRA are codified at 25 U.S.C. § 1304 (Supp. I 2013–2014). 25 U.S.C. § 1304(b)(1) describes the nature of tribal courts’ VAWA 2013 jurisdiction “to exercise special domestic violence criminal jurisdiction” as extending “over all persons” (that is, not just Indians): “Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.” 25 U.S.C. § 1304(a)(6) defines “special domestic violence criminal jurisdiction” as “the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.”

over non-Indians who commit domestic violence offenses against Indian victims in tribal communities.

Congress enacted a new section under ICRA to implement and authorize tribal courts' restored criminal jurisdiction over non-Indians. This new section imposes heightened procedural requirements on tribal courts seeking to exercise "special domestic violence criminal jurisdiction" under VAWA 2013. In exercising VAWA 2013 jurisdiction, tribal courts must provide defendants with all of the procedural protections required under the general provisions of ICRA (found in 25 U.S.C. § 1302(a)). In addition, tribal courts must extend all the protections under the TLOA amendments to ICRA discussed above (found in 25 U.S.C. § 1302(c)) to defendants if a term of imprisonment of any length may be imposed as a result of conviction. In contrast, in prosecutions outside of VAWA 2013—prosecutions limited to Indian defendants—tribal courts are only required to appoint counsel for indigent defendants on whom they impose a sentence greater than one year.²¹⁷

Tribal courts seeking to exercise VAWA 2013 jurisdiction must provide defendants with two additional rights guaranteed under the Constitution to state and federal defendants, but not found in either ICRA's general provisions or the TLOA amendments to ICRA (which, as noted, only authorize prosecutions against Indian defendants). First, the right to an "impartial jury," which Congress specifically defined for purposes of VAWA 2013 jurisdiction using the language the Supreme Court developed to define an impartial jury under the Constitution: a jury drawn from a "fair cross section of the community" using a

217. 25 U.S.C. § 1304(d) (Supp. I 2013-2014) sets the "Rights of defendants" in VAWA 2013 prosecutions in tribal courts, providing: "In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant— (1) all applicable rights under this Act [i.e. the rights set out in the general provisions of ICRA found at 25 U.S.C. § 1302(a)]; (2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title [the TLOA amendments to ICRA]; (3) the right to a trial by an impartial jury that is drawn from sources that—(A) reflect a fair cross section of the community; and (B) do not systematically exclude any distinctive group in the community, including non-Indians; and (4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant." As discussed in Part III.C, the TLOA amendments to ICRA incorporated into the VAWA 2013 provisions of ICRA require tribal courts to provide all defendants the right to constitutionally effective assistance of counsel, and to provide indigent defendants licensed counsel at tribal expense; to provide a licensed and trained judges; to make tribal laws and rules publically available before prosecuting a defendant under VAWA 2013 provisions; and to ensure that VAWA 2013 are *courts* of record. 25 U.S.C. § 1302(c)(3)–(5).

procedure that “do[es] not systematically exclude any distinctive group in the community;”²¹⁸ and second, tribal courts must provide VAWA 2013 defendants “all other rights whose protection is necessary under the Constitution . . . in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction. . . .”²¹⁹

Pertinent to the premise of this Article—that VAWA 2013 creates greater procedural benefits for the benefit of non-Indian tribal court defendants—the jury right under VAWA 2013, like the right to appointed counsel under VAWA 2013, is more expansive than that for Indian defendants and, in some instances, than that found in the Constitution. Under the Constitution, state and federal defendants are entitled to a jury in prosecutions for felonies and non-petty offenses—those punishable by six months or more incarceration—and they are entitled to an impartial jury. The general provisions of ICRA and the TLOA provisions—the ones that apply only to Indian defendants—*inter alia*, require juries only in cases in which the tribal court imposes a sentence over one year imprisonment, and they contain no requirement that the defendant’s jury be impartial. In contrast, VAWA 2013 requires tribal courts to provide defendants with an impartial jury, which it defines by reference to the federal constitutional standard, if a term of imprisonment of any length may be imposed. Thus, a non-VAWA 2013 tribal court defendant (limited to Indians) has a right to a jury only if the tribal court imposes a sentence over a year; a VAWA 2013 tribal court defendant (which Congress anticipated to be non-Indians) has a right to a constitutionally impartial jury if any length of imprisonment is authorized, whereas state and federal court defendants are entitled to a jury only if tried for an offense punishable by over six months imprisonment.²²⁰

218. *Id.* § 1304(d)(3).

219. *Id.* § 1304(d)(4).

220. It appears that Congress may consider correcting this anomaly—on May 11, 2016, Senators Barrasso and McCain introduced federal legislation that would, among other things, amend ICRA to make the jury right under both the general provisions and the VAWA 2013 provisions applicable to prosecutions for offenses punishable by six months or more. S. 2920, 114th Cong. § 108(a)–(b) (2016) (proposing to amend 25 U.S.C. 1302(a)(10) “by inserting ‘for 180 days or more’ after ‘punishable by imprisonment’” and to amend section 25 U.S.C. 1304(d)(3) “in the matter preceding subparagraph (A), by striking ‘the right’ and inserting ‘if a term of imprisonment of 180 days or more may be imposed, the right’”). If successful, this amendment will put all tribal court defendants on equal footing with state and federal defendants by making the seriousness of the charged crime as determined by the relevant law makers (i.e. anything punishable by imprisonment of six months or more) the trigger for the right to trial by jury. *See supra* note 108 and accompanying text. As of March 2017, this proposed legislation had been reported by Committee and placed on the Senate Legislative Calendar.

VAWA 2013 defendants are also entitled to the right to counsel as defined by the TLOA amendments to ICRA. TLOA specifies what type of assistance of counsel is required: effective assistance of bar-licensed counsel. And that right to counsel, as noted, is defined by reference to federal constitutional standards. However, with respect to identifying *when* a tribal court defendant's right to counsel under ICRA attaches, there is an important difference between the TLOA provisions and the VAWA 2013 provisions. Under the TLOA amendments to ICRA, a tribal court must provide an indigent defendant counsel at public expense if it "imposes a total term of imprisonment of more than 1 year on a defendant."²²¹ The use of the word "imposes" mirrors the *Argersinger* "actual incarceration" standard that applies to state and federal court proceedings. Under this provision, therefore, even if a tribal court defendant is charged with an offense that authorizes incarceration over one year—that is, a felony-level offense—a tribal court can, presumably, opt to forgo providing an indigent defendant counsel at tribal expense as long as it does not actually sentence that defendant to a term of incarceration over one year. This is analogous to the *Argersinger* constitutional standard for misdemeanors under which a state trial court can deny an indigent defendant counsel at public expense even if that defendant is charged under a statute that authorizes incarceration, as long as it does not actually sentence that defendant to a term of incarceration or a suspended sentence of incarceration.

The VAWA 2013 appointed counsel provisions in ICRA are worded quite differently from the TLOA appointed counsel provisions. The VAWA 2013 provisions require a tribal court to provide "all rights described in section 1302(c)"—the TLOA provisions, which include the right to constitutionally effective assistance of counsel, and, for indigent defendants, the right to licensed counsel at tribal expense—"if a term of imprisonment of any length *may be imposed* . . ."²²² In providing for the right to counsel at public expense for a term of imprisonment of "any length," the VAWA 2013 provisions—like the *Argersinger* standard, and unlike the TLOA provisions—do not distinguish between misdemeanor and felony length sentences as a factor for the appointment of counsel. Unlike the *Argersinger* actual imprisonment standard—which the TLOA provisions appear to mirror—the VAWA 2013 provisions require tribal courts to appoint counsel to indigent tribal court defendants "if a term of imprisonment . . . may be imposed" The phrase "may be imposed" is conditional and it tracks the

S.2920—Tribal Law and Order Reauthorization and Amendments Act of 2016, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/2920/all-actions?overview=closed#tabs> [<https://perma.cc/3XDG-BDT7>] (last visited Mar. 5, 2017).

221. See *supra* note 198 and accompanying text.

222. 25 U.S.C. § 1304(d)(2) (Supp. I 2013–2014) (emphasis added).

“authorized incarceration” standard the *Argersinger* majority rejected in favor of the “actual incarceration” standard. Thus, VAWA 2013 tribal court defendants—which Congress anticipated to be non-Indians—are entitled to: (1) effective assistance of counsel at public expense if the tribal law under which they are charged authorizes any incarceration as a punishment; (2) an impartial jury (defined by reference to the Sixth Amendment standard) in any case in which imprisonment is authorized; and (3) every other (unspecified) federal constitutional right necessary for Congress to recognize and affirm its jurisdiction over non-Indians.²²³

It seems apparent that Congress intended the VAWA 2013 amendments to ICRA to ensure that non-Indian defendants subject to tribal criminal jurisdiction would not be procedurally disadvantaged by being tried in tribal court, rather than state or federal court (where they would otherwise be prosecuted) for domestic violence offenses committed against Indians in Indian country.²²⁴ But with respect to the right to counsel at public expense, Congress overshot the mark. Whether intentionally or inadvertently, under the VAWA 2013 provisions of ICRA, indigent non-Indian tribal court defendants have a more robust right to counsel at public expense than other tribal court defendants (namely, Indians) and even state and federal court indigent defendants under the Constitution.²²⁵

IV. INTERPRETING ICRA’S RIGHT TO COUNSEL PROVISIONS— DOES ICRA IMPOSE A HIGHER APPOINTED COUNSEL OBLIGATION ON TRIBAL COURTS THAN THE CONSTITUTION PLACES ON STATE COURTS?

There is little case law interpreting the criminal procedural requirements of ICRA specifically.²²⁶ However, courts that have considered the question have concluded that Congress did not intend for ICRA to be generally co-extensive with the Constitution.²²⁷ Where the

223. See *supra* note 217.

224. See *supra* note 215 and accompanying text.

225. See *United States v. Bryant*, 136 S. Ct. 1954, 1960 n.4 (2016) (noting that the VAWA 2013 amendments to ICRA grant an “unqualified right of an indigent defendant to appointed counsel” but “express[ed] no view on the validity of those provisions”); *United States v. Flett*, No. CR-12-132-FVS-1, 2013 WL 1742269, at *2 (E.D. Wash. Apr. 23, 2013) (noting that an Indian defendant raised a federal equal protection challenge to this statutory discrepancy and that the district court rejected the challenge with little analysis).

226. *United States v. Swift Hawk*, 125 F. Supp. 2d 384, 387 (D.S.D. 2000) (observing that “[t]here is almost no case law on the ICRA”).

227. *Groundhog v. Keeler*, 442 F.2d 674, 682 (10th Cir. 1971) (noting that ICRA’s legislative history “makes it clear that Congress intended that the provisions

text of an ICRA provision tracks the language of a Constitutional counterpart, however, some courts have found ICRA is co-extensive with the Constitution and looked to federal decisional law to interpret it.²²⁸ But similarity in textual language alone is an insufficient basis for concluding that a statutory provision should be interpreted co-extensively with the Constitution.²²⁹ With respect to the VAWA 2013 amendments to ICRA, it is not clear whether Congress intended them to be co-extensive with their constitutional counterparts and whether

of the Fifteenth Amendment, certain procedural provisions of the Fifth, Sixth, and Seventh Amendments, and in some respects the equal protection requirement of the Fourteenth Amendment should not be embraced in the Indian Bill of Rights"); *White Eagle v. One Feather*, 478 F.2d 1311, 1313 (8th Cir. 1973) ("The particular clause of the Act before us requiring interpretation, as we have noted, is the equal protection clause. Appellant is correct in arguing that it does not here embrace in entirety all of its content in our applicable constitutional law. Thus we note that the Congressional hearings elicited information concerning practices of tribal governments at variance with the Anglo-American tradition."). *But see Means v. Navajo Nation*, 432 F.3d 924, 935 (9th Cir. 2005) ("Although the U.S. Constitution does not bind the Navajo tribe in the exercise of its own sovereign powers, [ICRA] confers all the criminal protections on Means that he would receive under the Federal Constitution, except for right to grand jury indictment and right to appointed counsel if he cannot afford an attorney.").

228. *See* 19 JOHN J. DVORSKE ET AL., FED. PROC., L. ED. § 46:989 (2016) ("In light of the legislative history and the striking similarity between the Fourth Amendment of the United States Constitution and the governing provision of the Act, constitutional standards govern the conduct of tribal officials in making an arrest on an Indian reservation and in making a search pursuant to the arrest." (citing *United States v. Clifford*, 664 F.2d 1090, 1091–92 n.3 (8th Cir. 1981) ("In light of the legislative history of the Indian Civil Rights Act and the similarity between § 1302(2) and the Constitution, this court has determined that fourth amendment standards govern the conduct of tribal officials." (citation omitted))); *United States v. Lester*, 647 F.2d 869, 872 (8th Cir. 1981) ("In light of the legislative history of the Indian Civil Rights Act and its striking similarity to the language of the Constitution . . . we consider the problem before us under fourth amendment standards." (citation omitted)). *See also* *People v. Ramirez*, 56 Cal. Rptr. 3d 631, 638 (Cal. Dist. Ct. App. 2007) (noting that whether Congress intended the exclusionary rule—as opposed to the Fourth Amendment itself—to be incorporated into ICRA as a remedy for Fourth Amendment violations was a question of first impression).
229. *United States v. Doherty*, 126 F.3d 769, 779 (6th Cir. 1997) ("Absent the *Gideon* qualifier, § 1302(6) substantially tracks the language of the Sixth Amendment, and it could fairly be argued that, outside of the context of the right to appointed counsel, Congress intended Indian tribes to be subject to the full scope of Sixth Amendment law However, the mere fact that a statute's language is similar to that found in the Constitution has never been considered to be conclusive proof that Congress intended the statute to have the same meaning as the Constitutional provision." (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494–95 (1983) (emphasis in original), *abrogated on other grounds by* *Texas v. Cobb*, 532 U.S. 162 (2001))).

federal courts should, therefore, rely on federal Sixth Amendment jurisprudence to delineate the rights of VAWA 2013 defendants on review.²³⁰

By tying a tribe's ability to exercise criminal jurisdiction over non-Indians to its adoption of procedural protections that mimic the Constitution, Congress has explicitly identified constitutional criminal procedure as a limitation on tribal court sovereignty. Thus, the recent amendments to ICRA could be read as be procedural equalizers as among tribal, state and federal courts. However, by providing for more protection to VAWA 2013 defendants vis-à-vis other tribal court defendants generally—and in some instances, extending greater procedural protections to VAWA 2013 defendants than required in state or federal court by the Constitution—this suggests that the rights of Indians and non-Indians are based on their respective tribal and state citizenship, not generally on their federal citizenship.

This matters because it will inform how courts interpret ICRA in reviewing tribal court convictions. As explained below, in the context of ICRA's right to appointed counsel provisions, this is more than an academic exercise. It is a question whose resolution has direct and quantifiable impacts on the scope of criminal procedural protection available to tribal court defendants. And in the context of the right to counsel at tribal expense, as has been the case in state courts, this has direct and potentially significant impacts on tribal resources.

A. Right to Counsel Independent of the Sixth Amendment

As noted, ICRA requires tribes to provide a defendant counsel at tribal expense whenever a tribal court is exercising VAWA 2013 jurisdiction and a sentence of incarceration *may* be imposed. As discussed, federal constitutional law and other parts of ICRA look to the actual incarceration, rather than the authorized penalty, to determine when a trial court must appoint counsel to indigent defendants. Further, the non-VAWA 2013 provisions of ICRA only require tribal courts

230. *Doherty*, 126 F.3d at 779–80 (“There is a paucity of case law under ICRA. . . . [h]owever, those courts that have considered ICRA have held that constitutional law precedents applicable to the federal and state governments do not necessarily apply ‘jot-for-jot’ to the tribes.” (citing *Tom v. Sutton*, 533 F.2d 1101, 1104–05 (9th Cir. 1976) (noting that the right to due process under ICRA does not require appointment of counsel for indigent defendants))); *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1081 (8th Cir. 1975) (holding the ICRA does not incorporate the Twenty-Sixth Amendment's requirement that eighteen-year-olds be afforded the right to vote); *Groundhog*, 442 F.2d at 678 (concluding that although there is a right to due process under ICRA, this right does not establish the same rights as the federal constitution absent a specific congressional enactment). In *Bryant*, the Supreme Court observed that the right to appointed counsel under ICRA for Indian defendants “is not coextensive with the Sixth Amendment right” because in tribal court, unlike federal or state court, “a sentence of imprisonment up to one year may be imposed without according indigent defendants the right to appointed counsel.” 136 S. Ct. at 1962 (2016).

to appoint counsel to indigent Indian defendants in cases where it imposes a sentence of imprisonment over a year, whereas the Constitution requires state trial courts to appoint counsel before a term of imprisonment of any length is imposed. The use of a standard to trigger a tribal court's duty to appoint counsel under VAWA 2013 different from the constitutional standard suggests ICRA's right to appointed counsel provision should be interpreted independently of the Sixth Amendment. The result, however, in the context of the right to counsel at tribal expense, is that tribal courts may be required to carry a heavier fiscal burden than state courts in order to invoke VAWA 2013 jurisdiction because tribal courts, under this reading, must provide appointed counsel to all VAWA 2013 defendants, even those who do not receive a sentence of incarceration, not just defendants who are actually incarcerated.

Arguably, different treatment of tribal courts under ICRA vis-à-vis state courts under the Constitution is defensible on two grounds. First, it is consistent with the treatment of tribes as separate sovereigns not subject to the Constitution. Thus, it could be argued, there is no structural political reason why a statutory floor imposed on tribal courts under ICRA should necessarily be the same as the constitutional floor imposed on states. It is entirely consistent with a citizenship-based notion of rights in defining the relationship of tribes to Indians, on one hand, and non-Indians, on the other. Consistent with this, one could argue that as a separate sovereign with trust authority over tribal nations, the federal government has an overriding interest in protecting federal non-Indian citizens over whom it has authorized a tribal court to exercise criminal jurisdiction.²³¹ This could be viewed as a citizenship-based portable notion of procedural rights under which defendants not

231. The notion of portable citizenship-based rights is one I have explored in the context of state citizens tried in federal court for concurrent jurisdiction crimes. Jordan Gross, *The Upside Down Mississippi Problem: Addressing Procedural Disparity Between Federal and State Criminal Defendants in Concurrent Jurisdiction Prosecutions*, 38 *HAMLIN L. REV.* 1 (2015). In that context, I submit that state citizens being tried in federal court for crimes over which a state could also exercise jurisdiction (i.e. concurrent jurisdiction offenses) should be entitled to the same level of procedural protection they would enjoy if tried in state court because of the states' superior interest in prosecuting and punishing crimes that have primarily or exclusively local impacts—which describes most state/federal concurrent jurisdiction crimes. *Id.* 29–30 (“Where a federal defendant is prosecuted for conduct over which a state also has criminal jurisdiction this may result in an indefensible procedural disparity in a federal system that purports to defer to the supremacy of the states in matters of distinctly local concern. Ignoring this procedural disparity undermines federalism, unjustifiably disadvantages persons over whom the state has a superior claim to bring to justice, and encourages forum shopping, all with no discernable benefit to either the federal or the state criminal justice systems.”).

otherwise subject to tribal court jurisdiction (i.e. non-Indians) are entitled to all the procedural protections they would receive if they were tried in federal or state court for the same offense.²³²

If VAWA 2013's right to appointed counsel provisions are construed independently of the Sixth Amendment, then, unlike state courts, tribal courts cannot avoid the added expense of providing counsel at public expense to VAWA 2013 defendants by deciding beforehand to forgo incarceration as a punishment.²³³ The only way for a tribe to avoid this expense is to forgo altogether prosecution of domestic violence offenses committed by indigent²³⁴ non-Indians on its reservation. So construing the VAWA 2013 right to appointed counsel provisions is unsatisfying as a matter of constitutional and statutory analysis for a number of reasons. Putting tribes to this all-or-nothing choice, when states are not forced to make the same trade-off, undermines the entire *Argersinger* right to counsel at public expense rationale, which ties the federal constitutional right to the defendant's liberty interest. Further, and more importantly from a practical standpoint, requiring tribal courts to forgo all prosecutions of non-Indian defendants for domestic violence offenses committed on tribal land under statutes that authorize a term of incarceration undermines Congress' intent in pass-

232. The analogy ends there, however. Unlike a state's superior interest in a concurrent state/federal jurisdiction crime, arguably stemming from the local impact of the criminal conduct, the federal government cannot claim a superior interest in the prosecution and punishment of on-reservation crimes of domestic violence, crimes of particularly local impact.

233. Tribal exercise of VAWA 2013 jurisdiction is optional. Thus, tribal courts can avoid this additional burden by forgoing jurisdiction over non-Indians. See 25 U.S.C. § 1304(b)(2)–(3) (Supp. I 2013–2014) (reiterating that affording tribal courts with power to prosecute limited domestic violence offenses does not impair the concurrent jurisdiction of state or federal authorities). To the extent VAWA 2013 usurps tribal sovereignty and self-determination by requiring tribal courts to provide non-Indian defendants with greater protections than Indian defendants, this limitation and its attendant fiscal burden is voluntarily self-imposed. This is not unlike states, which can avoid the financial costs of providing counsel at public expense to indigents by forgoing incarceration as an option under the *Argersinger* actual incarceration standard. See *supra* notes 110–114.

234. As under the Constitution, the right to counsel at public expense, of course, is available only to defendants who can establish indigency. See *supra* notes 1–2, 12. Thus, as a technical matter, tribes could still prosecute non-Indian VAWA 2013 defendants who do not qualify for appointed counsel, or indigents who validly waive the right to counsel at tribal expense. See 25 U.S.C. § 1302(c)(1)–(2) (2012) (discussing the rights of a defendant in tribal court).

ing VAWA 2013 because it limits, rather than expands, tribal jurisdiction over crimes of domestic violence committed by non-Indians in Indian country.²³⁵

B. Co-extensive with the Sixth Amendment

The alternative is to construe ICRA's VAWA 2013 right to appointed counsel provisions co-extensively with the Sixth Amendment. In other words, construing the indigent VAWA 2013 defendant's right to counsel the same as an indigent state and federal court defendant's constitutional right to counsel—i.e. a right to counsel at public expense triggered by the actual imposition of a term of incarceration or a conditional sentence of incarceration. This construction would allow tribal courts to exercise jurisdiction over qualifying indigent non-Indian domestic violence offenders without providing counsel at tribal expense in all cases, just like state courts. Like a state trial court, a tribe could prosecute and punish this conduct with penalties other than incarceration without providing counsel at tribal expense. This creates space for more expansive tribal court jurisdiction over domestic violence offenses committed on tribal land, one of VAWA 2013's stated aims. And it bolsters tribal sovereignty by recognizing tribal authority to prosecute qualifying non-Indians and impose alternative punishments short of incarceration without incurring the fiscal burden of providing counsel at tribal expense in every case, an approach that could be more compatible with a traditional, non-adversarial approach to criminal justice.²³⁶

The strongest argument for construing ICRA's VAWA 2013 amendments co-extensively with the Constitution is Congress' clear intent to import all of the constitutional criminal procedural rights afforded to state and federal court defendants into tribal court VAWA 2013 prosecutions. As noted, Congress granted VAWA 2013 tribal court defendants impartial jury rights that track Sixth Amendment jurisprudence. Congress codified the Sixth Amendment right to effective

235. See Jodi Gillette & Charlie Galbraith, *President Signs 2013 VAWA—Empowering Tribes to Protect Native Women*, WHITE HOUSE BLOG (Mar. 7, 2013, 7:07 PM), <http://www.whitehouse.gov/blog/2013/03/07/president-signs-2013-ava-empowering-tribes-protect-native-women> [<https://perma.cc/845Y-LHTJ>] (describing the goals of VAWA 2013 pertaining to enhanced provisions for tribal jurisdiction). Similarly, among Congress' stated goals in enacting the TLOA were “to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country [and] to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women[.]” Pub. L. No. 111-211 § 202(b)(3)–(4), 124 Stat. 2258, 2263 (2010).

236. Creel, *supra* note 203, at 356 (“Tribal sovereign authority was undercut and truncated with the implementation of the adversarial court . . .”).

assistance of counsel in the TLOA amendments to ICRA, and later incorporated those by reference into the VAWA 2013 amendments. And, to the extent anything was missed, Congress included a catch-all residual provision in the VAWA 2013 amendments to ICRA extending to VAWA 2013 tribal court defendants “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.”²³⁷

These provisions, considered together, support a compelling argument that Congress intended to constitutionalize VAWA 2013’s baseline procedural protections. But it does not necessarily mean Congress did not also intend to confer VAWA 2013 tribal court defendants with more procedural protection than required by the Constitution in state and federal prosecutions, as it appears to have done with the right to counsel at public expense provisions in ICRA.²³⁸ Under a plain reading of ICRA, indigent tribal court defendants in non-VAWA 2013 prosecutions, which can only be Indians, are entitled to counsel at tribal expense only if a sentence over one year is actually imposed. This is less than what is required in state or federal court under the Constitution, where an indigent defendant must receive counsel at public expense before he can be sentenced to any term of incarceration, no matter how brief. In contrast, the VAWA 2013 amendments to ICRA—which were clearly intended to benefit and protect non-Indian tribal court defendants—require appointment of counsel at tribal expense when any term of incarceration may be imposed.

CONCLUSION

If ICRA’s statutory language is plain, whether the discrepancies between ICRA’s right to appointed counsel provisions and the federal constitutional right are due to Congressional oversight or intent is immaterial.²³⁹ A plain language reading of ICRA, under which indigent

237. 25 U.S.C. § 1304(d)(4) (Supp. I 2013–2014).

238. *See, e.g.*, *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991) (“Congress is understood to legislate against a background of common-law . . . principles. Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident.’” (citations omitted)); *United States v. Texas*, 507 U.S. 529, 534 (1993) (noting that where a common law principle is established, “Congress does not write upon a clean slate” (citation omitted)).

239. *See, e.g.*, *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (“As with any question of statutory interpretation, our analysis begins with the plain language of the statute. It is well established that, when the statutory

VAWA 2013 tribal court defendants are entitled to appointed counsel where their Indian tribal court, and state and federal court counterparts, are not, is unsettling and unsatisfying. It limits tribal options for prosecuting non-Indians who commit domestic violence offenses on tribal land by imposing an additional cost on every VAWA 2013 prosecution. Ultimately, this can lead to reduced safety for reservation residents if a tribal government forgoes VAWA 2013 prosecutions because it cannot absorb this additional cost. It also makes it hard to escape a conclusion that Congress created a broader right to appointed counsel in tribal courts for the benefit of non-Indian defendants out of fear that tribal courts would not deal fairly or competently with indigent non-Indian defendants. This reflects an unstated premise that the tribal court justice reached without the involvement of counsel is a lesser justice. Given that this is a constitutional assumption the Supreme Court has never made about state court misdemeanor proceedings, Congress should at least substantiate any assumption it has made in mandating differential and preferential treatment of non-Indian tribal court defendants. Better yet, rather than leaving tribes with yet another bitter jurisdictional pill to swallow, Congress should amend ICRA to eliminate the procedural imbalance it has created between Indian and non-Indian tribal court defendants by either: (1) extending the VAWA 2013 right to appointed counsel to all tribal court defendants (and funding it); or (2) tethering the right to appointed counsel for all tribal court defendants to the Sixth Amendment.

language is plain, we must enforce it according to its terms.” (citations omitted)).

Symbol indicates earliest right to appointed counsel case Justice participated in		
# = <i>Powell v. Alabama</i> (1932)	+ = <i>Hamilton v. Alabama</i> (1961)	> = <i>Gagnon v. Scarpelli</i> (1973)
^ = <i>Johnson v. Zerbst</i> (1938)	& = <i>Gideon v. Wainwright</i> (1961)	@ = <i>Scott v. Illinois</i> (1979)
~ = <i>Betts v. Brady</i> (1942)	< = <i>Argersinger v. Hamlin</i> (1972)	% = <i>Alabama v. Shelton</i> (2002)
#Powell v. Alabama (1932) State capital case 7-2		
MAJORITY		
#Charles E. Hughes		
#Benjamin N. Cardozo		
#Willis Van Devanter		
#Louis D. Brandeis		
#George Sutherland	14th A due process clause may require appointment of counsel in state death penalty cases under facts and circumstances	
#Harlan Fiske Stone		
#Owen J. Roberts		
DISSENTING		
#James C. McReynolds		
#Pierce Butler	Agreed denial of consultation with counsel and opportunity of preparation for trial would violate due process; disagreed that factual record established such a denial in this case	
^Johnson v. Zerbst (1938) Federal non-capital case 7-2		
MAJORITY		
#Charles E. Hughes		

Symbol indicates earliest right to appointed counsel case Justice participated in		
# = <i>Powell v. Alabama</i> (1932)	+ = <i>Hamilton v. Alabama</i> (1961)	> = <i>Gagnon v. Scarpelli</i> (1973)
^ = <i>Johnson v. Zerbst</i> (1938)	& = <i>Gideon v. Wainwright</i> (1961)	@ = <i>Scott v. Illinois</i> (1979)
~ = <i>Betts v. Brady</i> (1942)	< = <i>Argersinger v. Hamlin</i> (1972)	% = <i>Alabama v. Shelton</i> (2002)
#Benjamin N. Cardozo	<i>(took no part in consideration or decision of case)</i>	
#Louis D. Brandeis		
#Harlan Fiske Stone		
#Owen J. Roberts		
^Hugo L. Black	6th A right to counsel guarantee may require appointment of counsel in federal non-capital prosecutions under facts and circumstances	
CONCURRING		
^Stanley Reed	<i>(concurred in reversal without elaboration)</i>	
DISSENTING		
#James C. McReynolds	<i>(dissented without elaboration)</i>	
#Pierce Butler	Record shows petitioner waived the right to have counsel, that trial court had jurisdiction, and that judgment of the Circuit Court of Appeals should be affirmed	
~ Betts v. Brady (1942) State non-capital case 6-3		
MAJORITY		
#Harlan Fiske Stone		
#Owen J. Roberts	6th A right to counsel not incorporated into 14th A; 14th A due process clause does not support categorical approach to right to appointed counsel in state court proceedings; under totality of circumstances, Betts was not denied due process	
^Stanley Reed		

Symbol indicates earliest right to appointed counsel case Justice participated in		
# = <i>Powell v. Alabama</i> (1932)	+ = <i>Hamilton v. Alabama</i> (1961)	> = <i>Gagnon v. Scarpelli</i> (1973)
^ = <i>Johnson v. Zerbst</i> (1938)	& = <i>Gideon v. Wainwright</i> (1961)	@ = <i>Scott v. Illinois</i> (1979)
~ = <i>Betts v. Brady</i> (1942)	< = <i>Argersinger v. Hamlin</i> (1972)	% = <i>Alabama v. Shelton</i> (2002)
~Felix Frankfurter		
~James F. Byrnes		
~Robert H. Jackson		
DISSENTING		
^Hugo L. Black	6th A right to counsel was incorporated into 14th and does bind states. If case were in federal court, reversal would be required. But even under facts and circumstances test, Betts was denied due process	
~Frank Murphy		
~William O. Douglas		
+Hamilton v. Alabama (1961) State capital case 9-0		
MAJORITY		
+Earl Warren		
^Hugo L. Black		
~Felix Frankfurter		
~William O. Douglas	Assistance of counsel at all critical stages of a state death penalty prosecution is constitutionally and categorially required (under 14th A?—Court did articulate basis of right, but 6th A not incorporated at this point)	
+Tom C. Clark		
+John M. Harlan II		

Symbol indicates earliest right to appointed counsel case Justice participated in		
# = <i>Powell v. Alabama</i> (1932)	+ = <i>Hamilton v. Alabama</i> (1961)	> = <i>Gagnon v. Scarpelli</i> (1973)
^ = <i>Johnson v. Zerbst</i> (1938)	& = <i>Gideon v. Wainwright</i> (1961)	@ = <i>Scott v. Illinois</i> (1979)
~ = <i>Betts v. Brady</i> (1942)	< = <i>Argersinger v. Hamlin</i> (1972)	% = <i>Alabama v. Shelton</i> (2002)
+William J. Brennan, Jr.		
+Charles E. Whittaker		
+Potter Stewart		
&Gideon v. Wainwright (1961) State non-capital case; non-petty offense 9-0 on result; 8-1 on incorporation		
MAJORITY		
+Earl Warren		
^Hugo L. Black	6th A right to counsel is incorporated into 14th A due process and binds states; defendants entitled to appointed counsel in all prosecutions for non-petty offenses; adopting categorical rule and overruling <i>Betts</i> facts and circumstances test	
+William J. Brennan, Jr.		
+Potter Stewart		
&Byron R. White		
&Arthur J. Goldberg		
CONCURRING		
~William O. Douglas	Incorporated right to counsel is co-extensive with 6th A guarantee; “rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantee,” as suggested by Justice Harlan	

Symbol indicates earliest right to appointed counsel case Justice participated in	
# = <i>Powell v. Alabama</i> (1932)	+ = <i>Hamilton v. Alabama</i> (1961)
^ = <i>Johnson v. Zerbst</i> (1938)	& = <i>Gideon v. Wainwright</i> (1961)
~ = <i>Betts v. Brady</i> (1942)	< = <i>Argersinger v. Hamlin</i> (1972)
> = <i>Gagnon v. Scarpelli</i> (1973)	@ = <i>Scott v. Illinois</i> (1979)
% = <i>Alabama v. Shelton</i> (2002)	
+Tom C. Clark	Constitution does not distinguish between capital and noncapital cases; 14th A requires due process of law “for the deprivation of ‘liberty’ just as for deprivation of ‘life,’ and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved.” Court’s decision merely erases a distinction with no basis in logic and an increasingly eroded basis in authority
+John M. Harlan II	Agreeing that right to counsel in non-capital non-petty offense should be expressly recognized as fundamental right embraced in 14th A, but disagreeing that 14th A incorporates 6th A
<Argersinger v. Hamlin (1972) State prosecution for petty/misdemeanor offense 9-0 on result; 7-2 on categorical v. case-by-case approach	
MAJORITY	
~William O. Douglas	Right to counsel not co-extensive with right to jury—former is more fundamental to fair trial; danger of unjust deprivation of liberty requires categorical rule requiring state trial court so appoint counsel, whether felony or misdemeanor, if it imposes any sentence of incarceration
&Byron R. White	
<Thurgood Marshall	
<Harry A. Blackmun	
CONCURRING	
<Warren E. Burger	Concurred in result; agreed “with much of the analysis in the opinion of the Court and with Mr. Justice Powell’s appraisal of the problems.” If only issue were burden to States in providing counsel, would be inclined to draw line at cases involving

Symbol indicates earliest right to appointed counsel case Justice participated in		
# = <i>Powell v. Alabama</i> (1932)	+ = <i>Hamilton v. Alabama</i> (1961)	> = <i>Gagnon v. Scarpelli</i> (1973)
^ = <i>Johnson v. Zerbst</i> (1938)	& = <i>Gideon v. Wainwright</i> (1961)	@ = <i>Scott v. Illinois</i> (1979)
~ = <i>Betts v. Brady</i> (1942)	< = <i>Argersinger v. Hamlin</i> (1972)	% = <i>Alabama v. Shelton</i> (2002)
	penalties in excess of six months' confinement, but any deprivation of liberty without assistance of counsel is serious matter and misdemeanor prosecution may be as or more complex than felony prosecution	
+William J. Brennan, Jr.	Joined Court's; wrote separate to add observation that law students as well as practicing attorneys may provide an important source of legal representation for the indigent and fill resource gap	
+Potter Stewart	Joined Brennan concurrence; also joined by Douglas	
<Lewis F. Powell, Jr.	Concurred in result. At minimum, trial court required to appoint counsel where defendant entitled to jury trial. Due process also requires appointment of counsel when assistance of counsel necessary to assure a fair trial. Would hold that right to counsel in petty-offense cases is not absolute, but to be determined by trial courts exercising judicial discretion on a case-by-case basis	
<William H. Rehnquist	Joined Powell concurrence	
>Gagnon v. Scarpelli (1973) State parole/probation revocation hearing 9-0 on case-by-case approach; 8-1 on application of test to case		
MAJORITY		
&Byron R. White		
<Thurgood Marshall		
<Harry A. Blackmun		
<Warren E. Burger		

Symbol indicates earliest right to appointed counsel case Justice participated in	
# = <i>Powell v. Alabama</i> (1932)	+ = <i>Hamilton v. Alabama</i> (1961)
^ = <i>Johnson v. Zerbst</i> (1938)	& = <i>Gideon v. Wainwright</i> (1961)
~ = <i>Betts v. Brady</i> (1942)	< = <i>Argersinger v. Hamlin</i> (1972)
> = <i>Gagnon v. Scarpelli</i> (1973)	@ = <i>Scott v. Illinois</i> (1979)
% = <i>Alabama v. Shelton</i> (2002)	
+William J. Brennan, Jr.	
+Potter Stewart	
<Lewis F. Powell, Jr.	Parole/probation revocation hearing not a stage of criminal prosecution. Departing from <i>Gideon</i> and <i>Argersinger</i> categorical approach, in parole/probation revocation context, right to appointed counsel evaluated on a case-by-case basis
<William H. Rehnquist	
DISSENTING IN PART	
~William O. Douglas	Due process required appointment of counsel under circumstances of case
<p>@Scott v. Illinois (1979) Actual incarceration v. authorized incarceration as trigger in state prosecutions 5-4 on actual v. authorized incarceration as sole trigger; 8-1 on whether categorical rule is appropriate standard</p>	
MAJORITY	
<Warren E. Burger	
+Potter Stewart	
&Byron R. White	
<William H. Rehnquist	<i>Argersinger</i> limited the constitutional right to appointed counsel in state misdemeanor proceedings to cases involving actual imprisonment
CONCURRING	
<Lewis F. Powell, Jr.	Reiterated disagreement with <i>Argersinger</i> categorical approach; cases involving sentences other than incarceration can have equally serious consequences,

Symbol indicates earliest right to appointed counsel case Justice participated in		
# = <i>Powell v. Alabama</i> (1932)	+ = <i>Hamilton v. Alabama</i> (1961)	> = <i>Gagnon v. Scarpelli</i> (1973)
^ = <i>Johnson v. Zerbst</i> (1938)	& = <i>Gideon v. Wainwright</i> (1961)	@ = <i>Scott v. Illinois</i> (1979)
~ = <i>Betts v. Brady</i> (1942)	< = <i>Argersinger v. Hamlin</i> (1972)	% = <i>Alabama v. Shelton</i> (2002)
	but are outside rule; rule impairs proper functioning of criminal justice system by forcing trial judges to evaluate punishment before knowing anything about case; preserving incarceration option by providing counsel often impossible or impracticable. Joined Court's opinion despite continuing reservations about <i>Argersinger</i> rule because approved by Court in 1972 and four Justices now reaffirming—"mindful of <i>stare decisis</i> , I join the opinion of the Court. I do so, however, with the hope that in due time a majority will recognize that a more flexible rule is consistent with due process and will better serve the cause of justice."	
DISSENTING		
+William J. Brennan, Jr.	Argersinger established "two dimensional" test for the right to counsel—attaches to any "nonpetty" offense punishable by more than six months in jail and to any offense where actual incarceration is likely regardless of the maximum authorized penalty. Scott's offense was not petty and thus he was entitled to appointed counsel under Argersinger. Further, the 6th and 14th A require appointment of counsel in prosecution where imprisonment for any length time is authorized.	
<Thurgood Marshall	Joined Brennan dissent	
@John Paul Stevens	Joined Brennan dissent	
<Harry A. Blackmun	Right to counsel extends at least as far as right to jury trial; would hold that an indigent defendant in a state criminal case must be afforded appointed counsel whenever defendant is prosecuted for a nonpetty criminal offense (one punishable by more than six months' imprisonment) or whenever defendant is convicted of an offense and is actually subjected to any term of imprisonment	

Symbol indicates earliest right to appointed counsel case Justice participated in		
# = <i>Powell v. Alabama</i> (1932)	+ = <i>Hamilton v. Alabama</i> (1961)	> = <i>Gagnon v. Scarpelli</i> (1973)
^ = <i>Johnson v. Zerbst</i> (1938)	& = <i>Gideon v. Wainwright</i> (1961)	@ = <i>Scott v. Illinois</i> (1979)
~ = <i>Betts v. Brady</i> (1942)	< = <i>Argersinger v. Hamlin</i> (1972)	% = <i>Alabama v. Shelton</i> (2002)
%Alabama v. Shelton (2002) Imposition of suspended sentence of incarceration for uncounseled offense 5-4		
MAJORITY		
@John Paul Stevens		
%Sandra Day O'Connor		
%David H. Souter		
%Ruth Bader Ginsburg	Suspended sentence that may result in incarceration of any length may not be imposed unless counsel appointed at time suspended sentence imposed	
%Stephen G. Breyer		
DISSENTING		
%Antonin Scalia	Central premise of <i>Argersinger</i> is that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment; extends the misdemeanor right to counsel to cases bearing the mere threat of imprisonment	
%Anthony M. Kennedy		
<William H. Rehnquist		
%Clarence Thomas		