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Collateral Consequences to Misdemeanor Offenses: Arizona Law and the Need for Reform

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A Thesis in the Field of Government

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Abstract

Individuals charged with or convicted of a crime in the United States may also be subjected to other penalties that are triggered into effect strictly because of the criminal case. These consequences are separate from the criminal justice system and are not part of the sentence imposed by the criminal court. Thus, they are commonly referred to as "collateral consequences."

This thesis presents research on collateral consequences, their intersections with the criminal justice system in Arizona specifically, and the prospective resulting inequities suffered by self-represented misdemeanor defendants.

This thesis conducts a case study of one collateral consequence law in Arizona—the Fingerprint Clearance Card Program—a statewide, standardized background check program that requires individuals employed in numerous fields to obtain a fingerprint clearance card "prior to or as a condition of licensure, certification, or employment."[1] The laws regulating the Fingerprint Clearance Card Program allow an individual's fingerprint clearance card to be suspended immediately upon arrest, and revoked upon conviction, for various criminal offenses.[2] This thesis also reports findings from public records requests from the Arizona Department of Public Safety, the government agency that administrates the Fingerprint Clearance Card Program. These requests show that the Fingerprint Clearance Card Program impacts a significant portion of the Arizona

[1] "Fingerprint Clearance Card," Arizona Department of Public Safety, accessed September 22, 2022. https://www.azdps.gov/services/public/fingerprint%20.
[2] Ariz. Rev. Stat. §41-1758.04 (2022).

population's employability, exemplifying how severe the impacts of collateral consequences can be on individuals charged with or convicted of misdemeanor crimes.

Furthermore, this thesis reports data from public records requests from every misdemeanor court in Arizona to illustrate how frequently misdemeanor defendants in Arizona were represented by an attorney versus those who represented themselves. These results indicated that most municipal and justice courts in Arizona did not track the number of misdemeanor criminal defendants who represented themselves in criminal prosecutions. However, from the limited available data, it is likely that a majority of misdemeanor defendants represented themselves throughout their criminal prosecution.

This thesis examines the Sixth Amendment right to counsel, as interpreted by the United States Supreme Court, and applied in Arizona. The current legal threshold to determine who is entitled to the appointment of counsel depends exclusively on if the accused is facing jail time.[3] Consequently, individuals charged with misdemeanor offenses who are not facing jail time are not entitled to a court-appointed attorney. The research in this thesis shows that the existing legal threshold for when a misdemeanor defendant should be constitutionally appointed counsel is likely no longer sufficient, and instead, suggests the adoption of a more holistic approach that considers the impacts of collateral consequences. Additionally, the research presented in this thesis demonstrates that Arizona lacks transparency surrounding collateral consequences and calls for Arizona to implement collateral consequence reform efforts.

[3] *Scott v. Illinois*, 440 U.S. 367 (1979).

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Chapter I.

Introduction

When we think of legal punishments imposed as the result of a crime, we may think of jail, fines, or counseling. These are all court-ordered punishments that are directly part of the criminal case against the accused. However, aside from these punishments, there is an entirely separate system of punishments that criminal defendants are exposed to when charged with or convicted of a crime that can surpass the court-mandated orders in the criminal case. Generally, these extrajudicial punishments are types of restrictions or penalties that can be imposed on someone charged with or convicted of a crime, and they would not have been triggered into effect but for the existence of the criminal case. Because they are entirely separate from the criminal justice system, they are called "collateral consequences."

As a Deputy County Attorney in Arizona, I witnessed the imposition of these collateral consequences. As a prosecutor, I represented the state in prosecuting crimes. When I started this position, I was assigned to a Domestic Violence Misdemeanor Court at a county courthouse in southern Arizona. The courtroom functioned as one would expect: one attorney represented the state (me), and another, the defense attorney, represented the criminally accused. Part of my job in prosecuting crimes was to review the evidence, determine the appropriate criminal charges for the case, and decide what, if any, plea should be offered to the accused. Frequently, I received requests from defense attorneys asking that I modify my position on the case, whether it be a change in the

criminal charges I brought against the defendant or a modification to the plea offer. The defense attorneys would support their request by explaining how the criminal case impacted the accused beyond anything ordered by the criminal court.

For example, I received requests from defense attorneys asserting immigration concerns for their clients. These requests stated how their clients, if convicted, could face removal proceedings. Sometimes these requests explained that the criminally accused was the family's primary source of income, thus arguing that the impacts from the criminal case could significantly affect these family members. Another example of a request I frequently received from defense attorneys was for a modification in my position on the case because the criminal charges were impacting defendants' careers in some capacity. Unlike the immigration concerns that could potentially be imposed upon the accused after a conviction in the case, the defense attorneys explained that these defendants were already suffering employment consequences due to the criminal charges. I learned that in Arizona there are a wide variety of career fields that require employees to pass and maintain a certain level of background check as a condition for employment. Defense attorneys notified me that, because of the arrests alone, these defendants no longer passed the background check, having lost the necessary credentials for their jobs. Thus, even though the criminal case was still pending and the defendants had not yet been found guilty, they suffered employment consequences. These examples were just two types of requests I received from defense attorneys claiming that other factors outside the criminal case were imposing restrictions on the accused because of the criminal case itself.

A common theme among all these requests was that the additional impacts that defendants were facing made the overall punishment for the offense more severe than warranted, given the facts of the case. Effectively, the punishment did not fit the crime. Furthermore, defense attorneys stressed that the out-of-court consequences were inevitable unless I changed my position in some capacity. It was not necessarily that defense attorneys were asking to have the cases dismissed or have their clients avoid taking responsibility for their alleged criminal actions that resulted in the criminal charges. Instead, they were requesting that I tailor the terms of the plea to the specific facts of the case while accounting for the out-of-court consequences that would be suffered by the accused as a result of the case. They asked me to assess all the impacts that would stem from the case and to craft a plea agreement accordingly, such as modifying the criminal charge listed on the plea agreement so that the conviction on the defendant's record would not trigger the collateral consequences. Their requests were not an attempt to circumvent the plea's punitive or restorative terms (such as fines, restitution, treatment, and counseling) but to mitigate or avoid the out-of-court consequences. I reviewed these requests case by case. I often found that if I took a holistic approach to consider all the circumstances surrounding the case, the defense attorneys' requests were not unreasonable, especially since these requests rarely suggested I change anything I was doing substantively on the case. Instead, they were most often simply requests to change the statute numbers of the crimes charged to a different, yet still factually appropriate, criminal statute, so that the case no longer triggered the collateral consequences.

After about one year in the Domestic Violence Specialty Court, I transitioned within my office to prosecute cases in the general misdemeanor courts. However, the structure of these courtrooms was very different. In Arizona, a person is only entitled to an attorney if facing the potential of being sentenced to jail.[4] In the Domestic Violence Specialty Court, the state sought jail in every case. Thus, every defendant had an attorney. However, in normal criminal misdemeanor courts, the state rarely sought jail; therefore, defendants were not usually provided a court-appointed attorney.

Upon moving to the regular criminal misdemeanor court, I noticed inconsistencies in how cases were defended. I still received mitigation requests for cases in which there were defense attorneys. Yet, for cases in which the accused did not have an attorney and were required to represent themselves, these requests were rarely presented to me. Common sense told me that these unrepresented individuals likely did not know that these penalties outside the court existed or how to articulate this information to me as a mitigation request or as part of a plea negotiation.

Acting as an attorney on a criminal case is like a legal game of chess. As such, there is often back and forth between attorneys with the exchange of e-mails, motions, and discussion or debate regarding the trajectory of the case. Counsels participate in witness interviews, disclosure exchanges, and other pretrial litigation. However, for cases in which the defendant was self-represented, active participation in their defense was minimal. This was especially noticeable because I rarely received the kind of requests I was used to receiving from defense attorneys; I was, however, frequently asked by the self-represented defendants for guidance on what to do in their criminal cases. I ethically

[4] *Campa v. Fleming*, 134 Ariz. 330, 656 P.2d 619 (1982).

could not give them advice, as I was the government representative bringing charges against them. They often did not know how to navigate the criminal justice system. They were even less aware of the penalties that they could be exposed to, separate from the criminal justice system. Over the seven years that I exclusively prosecuted misdemeanor cases in Arizona, I prosecuted several thousand criminal misdemeanor cases, during which most defendants represented themselves. During this time, I observed that self-represented defendants were far less likely to craft their defense based on potential out-of-court consequences. Likewise, I was more likely to receive these requests for cases in which an attorney represented the accused.

***

Criminal defendants are exposed to a host of penalties that can be imposed upon them that are entirely outside the realm of the criminal justice system, such as the deportation and employability issues described previously. These consequences are not part of the prosecution or the court's sentence. They are part of a separate system of punishments, which is why they are commonly referred to as "collateral" consequences. However, these collateral consequences can be even more impactful on the accused than any punishment imposed by the criminal court. In Chapter Two, this thesis looks at the definition of the term "collateral consequence," its origin, and efforts that have been made to make information on collateral consequences more accessible.

Since collateral consequences are entirely separate from the criminal justice system, they are not part of the legal analysis of the severity of a crime and, thus, not accounted for when determining whether the criminally accused is entitled to the appointment of counsel. Chapter Three of this thesis reviews the history of the right to

counsel and the evolution of the United States Supreme Court's punishment-based calculus to determine which crimes warrant the appointment of an attorney. This chapter reviews three Sixth Amendment standards: the federally mandated minimum, those applied throughout a majority of jurisdictions in the United States, and those specifically applied in Arizona.

Chapters Four, Five, and Six examine Arizona laws. Chapter Four reviews the structure of the Arizona court system and data on how frequently criminal misdemeanor defendants are self-represented. Chapter Five studies one specific collateral consequence law in Arizona and its widespread impacts on the employability of Arizonans—the Fingerprint Clearance Card Program. By studying this one collateral consequence, we can see in detail just how impactful collateral consequences can be. Chapter Six studies efforts that Arizona has made to mitigate the long-term impacts of employment-related collateral consequences.

This thesis exposes an oversight in the Arizona criminal justice system—the system almost entirely ignores collateral consequences, and this likely causes inequitable results for self-represented defendants. Accordingly, this thesis presents a multi-pronged approach for collateral consequence reform in Arizona: first, the state should directly connect collateral consequences to their triggering charges within the criminal codebooks, allowing information on collateral consequences to be more transparent; second, Arizona should require judges in all criminal cases to tell defendants that they may also be subjected to collateral consequences; third, prosecutors should account for collateral consequences in their assessment of the criminal case; fourth, Arizona should

re-examine the Sixth Amendment right to counsel standards to incorporate collateral consequences and determine if the current standards are still sufficient.

The research in this thesis shows that collateral consequences can be more severe than punishments mandated by the court in the criminal case, as evidenced by the study of the Fingerprint Clearance Card Program presented in Chapter Five. As such, Arizona should adopt a more comprehensive approach to the Sixth Amendment right to counsel analysis, which accounts for potential collateral consequences as part of the existing, punishment-based calculus to determine who has the right to an attorney. With this thesis, I hope to bring attention to the lack of transparency surrounding collateral consequences in Arizona and to bring awareness to the impacts that collateral consequences have on the self-represented criminal misdemeanor defendants in the Arizona court system.

Chapter II.

Collateral Consequences to Criminal Offenses

When an individual is charged with a crime in the U.S., they can also be subjected to other restrictions that are outside of those directly ordered by the criminal court, such as limitations on employability, driver's license restrictions, and even deportation.[6] These consequences may be imposed without the criminal court considering whether they are appropriate in the case, without the accused being advised that they are being imposed, or without the judge, prosecutor, or defense even being aware that they exist.[7] Since they are entirely separate from the criminal justice system, these legal status changes are commonly referred to as "collateral consequences." There are more than forty-thousand potential collateral consequences in the U.S. today.[8] However, despite their potentially severe impacts, they remain entirely separate from the criminal justice system. This section explores the definition of the term collateral consequence, its origin, and efforts that have been made to make information on collateral consequences more accessible.

[6] Gabriel Jackson Chin and Margaret Colate Love, "Status as Punishment: A Critical Guide to Padilla v. Kentucky," Criminal Justice 25, no. 3 (Fall 2010): 21.
[7] American Bar Association. "Chapter 19—Collateral Sanctions and Discretionary Disqualification of Convicted Persons—Introduction."
[8] "National Inventory of the Collateral Consequences of Conviction," Justice Center: The Counsel of State Governments, accessed December 13, 2022, https://niccc.nationalreentryresourcecenter.org/consequences.

Collateral Consequences—Definitions(s)

Different entities and scholars have varying definitions of what qualifies as a collateral consequence, but most are consistent in defining them as encompassing restrictions imposed on an individual that are not part of a sentence or order from the criminal court. In recent years, collateral consequences have been addressed by numerous government agencies, private entities, and legal scholars. For example, Congress used the term collateral consequence to describe two subgroups: "collateral sanctions" and "collateral disqualifications."[9] Similarly, the American Bar Association (ABA) has published standards to help guide "policymakers and practitioners working in the criminal justice system."[10] In the ABA's third edition of *Standards for Criminal Justice* (Standards), they set forth guidelines to address "Collateral Sanctions and Discretionary Disqualification of Convicted Persons," and suggested using the terms "collateral sanction" and "discretionary disqualification."[11] Both Congress and the ABA differentiated the subgroups of collateral consequences by how such consequences are imposed. Collateral sanctions are automatically imposed upon an individual due to a criminal offense, whereas discretionary/collateral disqualifications may be imposed upon an individual due to a criminal case, but are not automatically imposed. Also, in the landmark U.S. Supreme Court case of *Padilla v. Kentucky*, the Court discussed the legal issue of collateral consequences, describing them as, "…those matters not within the sentencing authority of the state trial court."[12] The United States Supreme Court

[9] 28 U.S.C. § 510 (2008).
[10] American Bar Association. "Criminal Justice Standards."
[11] American Bar Association, "Chapter 19—Collateral Sanctions and Discretionary Disqualification of Convicted Persons—1.1."
[12] *Padilla v. Kentucky*, 559 U.S. 356 (2010).

(SCOTUS) recognized that there is, "…some disagreement among the courts over how to distinguish between direct and collateral consequences," but ultimately declined to articulate their opinion on the matter any further.[13]

In academia, most legal scholars use the term "collateral consequence." However, this is not absolute. Legal scholar McGregor Smyth suggests using the term "enmeshed penalties" instead of collateral consequence because the former term shows the "intimate relationship" the penalties have with the criminal charges. Conversely, he suggests that the term collateral consequence has the "opposite purpose and effect."[14] For the purposes of this thesis, the term collateral consequence is used to refer to any legal status change, including any penalty, disadvantage, punishment, disability, or restriction that is not part of the criminal court sentence and that an individual would not otherwise experience were it not for their criminal case.

Collateral Consequences—History

The origin of collateral consequences stems from the European legal concept of "civil death."[15] Historically, some European countries imposed civil death on individuals convicted of severe offenses, including the loss of the right to vote and the loss of the ability to enter into contracts and to inherit or bequeath property.[16] The U.S. never fully adopted the European concept of civil death, but, historically, did impose limited civil consequences as a result of some criminal convictions, such as "the automatic dissolution

[13] *Padilla v. Kentucky*, 559 U.S. 356 (2010).
[14] McGregor Smyth, "From 'Collateral' to 'Integral': The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties beyond Deportation," *Howard Law Journal* 54, no. 3 (2011): 795.
[15] Demleitner, Nora V. "Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences." *Stan. L. & Pol'y Rev.* 11 153 (1999): 153.
[16] Demleitner, "Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences."

of marriage, the denial of licenses ranging from employment to fishing permits, and the inability to enter into contracts or to engage in civil litigation."[17] However, in the 1950s, there was a movement to improve conditions for individuals released from incarceration, which resulted in a reduction in the laws that imposed collateral consequences and a lessening of the restrictiveness of the collateral consequences that remained in effect.[18]

Conversely, in the mid-1980s, laws requiring the imposition of collateral consequences began to increase in popularity.[19] Congress was one major contributor to the rapid increase of collateral consequences.[20] Congress imposed numerous laws that resulted in individuals becoming ineligible for federal benefits upon conviction of certain crimes.[21] Furthermore, Congress encouraged states to enact laws imposing similar collateral consequences by relating the adoption of such laws to the state's eligibility for specific federal funding sources.[22] Legal scholar Jeremy Travis describes the movement of increased collateral consequences as an "easier" way for elected officials to be tough on crime and to increase the "quantum of punishment" for crimes while avoiding the "enormous social and fiscal costs" associated with increased prison sentences.[23]

Over the past several decades, the number of potential collateral consequences has dramatically increased.[24] Today, tens of thousands of possible collateral consequences

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[17] Demleitner, "Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences."
[18] Demleitner, "Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences."
[19] Jeremy Travis, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New York: The New Press, 2003).
[20] Travis, "Invisible Punishment the Collateral Consequences of Mass Imprisonment."
[21] Travis, "Invisible Punishment the Collateral Consequences of Mass Imprisonment."
[22] Travis, "Invisible Punishment the Collateral Consequences of Mass Imprisonment."
[23] Travis, "Invisible Punishment the Collateral Consequences of Mass Imprisonment."
[24] Margaret Colgate Love, Jenny Roberts, and Wayne A. Logan, *Collateral Consequences of Criminal Conviction: Law, Policy and Practice*, 2018th-2019 edition ed. (Eagan, MN: Thomson Reuters, 2018), 6.

can be imposed on an individual as a result of a criminal charge.[25] Some examples of current collateral consequences in the U.S. are the loss of the rights to become a naturalized citizen, vote, or possess firearms; the eligibility to hold appointed or elective office, serve in the military, obtain a security clearance, serve on a jury, or have a driver's license; the eligibility to receive pension benefits, public housing, federal student aid, welfare, loans, or insurance; the ability to become a foster or adoptive parent; and the ability to volunteer at educational facilities or coach school sports.[26] Criminal convictions can trigger deportation proceedings and may be considered in family court proceedings for child custody and parental rights cases.[27]

Collateral consequences exist in almost every area of law and are codified throughout different state and federal laws, administrative regulations, and local ordinances.[28] In the following statement, legal scholar Jenny Roberts describes such treatment of collateral consequences:

> They affect almost every aspect of personal and civic life, limiting the vocational, educational, charitable, financial, political, and domestic opportunities available to people who have been convicted of crimes (and sometimes even to those merely arrested or charged), often in unanticipated ways.[29]

Not only are there a wide variety of collateral consequences in place in the U.S. today, but they also have not traditionally been organized or cataloged in a conveniently accessible, user-friendly manner, both for scholars and legal practitioners.[30] Arizona is no

[25] "National Inventory of the Collateral Consequences of Conviction," Justice Center: The Counsel of State Governments, accessed December 13, 2022, https://niccc.nationalreentryresourcecenter.org/consequences.
[26] Chin and Love, "Status as Punishment," 21.
[27] J.D. King, "Beyond 'Life and Liberty': The Evolving Right to Counsel," *Harvard Civil Rights-Civil Liberties Law Review* 48 (2013).
[28] Love, Roberts, and Logan, 43.
[29] Love, Roberts, and Logan, 43.
[30] Love, Roberts, and Logan, 4.

different. Thus, studying collateral consequences has generally not been a straightforward task. The inconsistent approach to the treatment of collateral consequences and the lack of transparency surrounding collateral consequences has made it difficult to understand and identify specific collateral consequences that can stem from particular criminal offenses.[31]

Efforts to Make Information More Accessible

Throughout the U.S., very few jurisdictions have made efforts to collect information on collateral consequences or to pair them with the crimes that trigger their implementation within the criminal codebooks.[32] However, various government agencies and private entities have recently made information on collateral consequences more readily available, and the results show how wide-reaching collateral consequences are throughout the U.S.

In 2008, Congress passed The Court Security Improvement Act and ordered the National Institute of Justice to compose a list of collateral consequences contained in the "Constitutions, statutes, and administrative rules" of all 50 states, the federal government, and the District of Columbia.[33] Under this act, the National Institute of Justice solicited proposals for a nationwide study to create a comprehensive compilation of collateral consequences at the state and federal levels.[34] The ABA, having been awarded the National Institute of Justice's grant[35], conducted the National Inventory of Collateral

[31] Love, Roberts, and Logan, 4.
[32] Love, Roberts, and Logan, 4.
[33] 28 U.S.C. § 510 (2008).
[34] "NIJ FY 09 ORE Collateral Consequences," National Institute of Justice, accessed December 7, 2022, https://nij.ojp.gov/funding/opportunities/nij-2009-1935.
[35] "ABA Study of Collateral Consequences for Criminal Convictions," National Institute of Justice, accessed December 7, 2022, https://nij.ojp.gov/funding/awards/2009-ij-cx-0102.

Consequences (NICC) with the Department of Justice.[36] The NICC determined that of the more than 40,000 collateral consequences in the United States, approximately 13,000 specifically relate to "business licensure and participation" or "occupational and professional license and certification."[37] Additionally, the NICC found approximately 700 collateral consequences per state or territory.[38]

In response to their findings, and to help make information on collateral consequences more accessible, the NICC created an interactive website on which collateral consequences can be searched by jurisdiction, offense charged, consequence type, duration of the consequence, or category of consequence. The results from the NICC compilation showed 15 different categories of collateral consequences, each impacting different areas of life.[39] Specifically, the NICC set forth the following broad categories of collateral consequences: employment; occupational and professional license and certification; business license and other property rights; government contracting and program participation; government loans and grants; judicial rights; government benefits; education; political and civic participation; housing; family/domestic rights; recreational license (including firearms); registration, notification and residence restrictions; motor vehicle licensure; and general relief provision.[40] Though groundbreaking in compiling such data, there remains a lack of transparency and access to information on what

[36] "About the NICCC," Justice Center: The Counsel of State Governments, accessed December 13, 2022. https://niccc.nationalreentryresourcecenter.org/node/127.
[37] "National Inventory of the Collateral Consequences of Conviction," Justice Center: The Counsel of State Governments.
[38] "Letter from Eric H. Holder, Jr. U.S Att'y Gen., to Attorneys General (Apr. 18 2011)," Justice Center: The Counsel of State Governments.
[39] "National Inventory of the Collateral Consequences of Conviction," Justice Center: The Counsel of State Governments.
[40] "National Inventory of the Collateral Consequences of Conviction," Justice Center: The Counsel of State Governments.

specific collateral consequences can result from specific criminal offenses. Thus, when someone is charged with a specific criminal offense, the NICC website does not allow that person to input the crime with which they were charged and then see a potential resulting list of the collateral consequences that could stem from it.

Even with the efforts made by the NICC, generally, the laws imposing collateral consequences maintain an "unstructured and ad hoc" nature, both in terms of their implementation and presentation.[41] In response, the ABA's Standards recognizes the severity of these separated processes of penalties, claiming the following:

> …it is neither fair nor efficient for the criminal justice system to label significant legal disabilities and penalties as "collateral" and thereby give permission to ignore them in the process of criminal sentencing, when in reality those disabilities and penalties can be the most important and permanent results of a criminal conviction.[42]

Accordingly, the ABA suggested that legislatures codify all collateral consequences "…in a single chapter or section of the jurisdiction's criminal code."[43] Specifically, the ABA recommended that the codification include a "chapter or section" that identifies "the type, severity and duration of collateral sanctions applicable to each offense, or to a group of offenses specifically identified by name, section number, severity level, or other easily determinable means."[44] Cataloging collateral consequences, as the ABA has suggested, would make information on specific collateral consequences readily available. Additionally, it would incorporate the collateral consequences into the criminal code,

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[41] Gabriel Jackson Chin, "Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction (April 14, 2011)," *Journal of Gender, Race & Justice* 6 (2002): 253.
[42] American Bar Association. "Chapter 19—Collateral Sanctions and Discretionary Disqualification of Convicted Persons—Introduction."
[43] American Bar Association. "Chapter 19—Collateral Sanctions and Discretionary Disqualification of Convicted Persons—2.1."
[44] American Bar Association. "Chapter 19—Collateral Sanctions and Discretionary Disqualification of Convicted Persons—2.1."

which would provide transparency as to which consequences actually can result from which criminal offenses.

In a similar vein, the Uniform Law Commission, a nonpartisan attorney organization, drafted the Uniform Collateral Consequences of Conviction Act (hereafter referred to as "Act") in 2009 as a template for proposed legislation to help promote the understanding of collateral consequences. One function of the Act specifically calls for jurisdictions to catalog their collateral consequences.[45] According to the Uniform Law Commission website, two states, New Mexico and Vermont, have enacted legislation based on this model Act, and two states, Florida and Massachusetts, have introduced the proposed Act to their legislatures.[46]

By looking at the efforts made in Vermont and New Mexico, we can see how, even in states that have made movements towards reform around collateral consequences, such efforts are insufficient. In Vermont, the Act was passed in 2008 and required the Vermont Attorney General to catalog all the collateral consequences in the state and update the catalog annually.[47] The Vermont Attorney General's website provides a link to a "searchable collection of state and federal laws regarding collateral consequences."[48] However, the link, as of the date of this thesis, does not work. Instead, the Attorney General's website provides a link that when clicked upon either produces an error code and no webpage appears, or it directs the user to an information page about programs at

[45] "Collateral Consequences of Conviction Act," National Conference of Commissioners on Uniform State Laws, accessed December 7, 2022, https://www.uniformlaws.org/committees/community-home?communitykey=74d9914f-f15e-49aa-a5b0-f15f6e5f258a.
[46] "Collateral Consequences of Conviction Act," National Conference of Commissioners on Uniform State Laws.
[47] Vt. Stat. Ann. tit. 13, § 8004 (2016).
[48] "Collateral Consequences of Conviction," Office of the Vermont Attorney General, accessed December 7, 2022, https://ago.vermont.gov/about-the-attorney-generals-office/divisions/criminal-justice/collateral-consequences-conviction/.

the Vermont Law School—none of which include further information on the purported catalog of collateral consequences.[49] The unorganized nature of collateral consequences is likewise evident in the New Mexican legislature's position on collateral consequences. In a PowerPoint presentation available on the state legislature's website that advocates for collateral consequence reform and for the adoption of the Act, one slide poses the question, "In 2017, how many laws and regulations imposing a collateral consequence are in place in New Mexico?"[50] On the same slide, the answer to this question is provided as "an educated guess" of 680 collateral consequences.[51] If the government itself cannot accurately account for how many collateral consequences are in effect within its territory, then it cannot reasonably be expected that individuals charged with crimes can accurately determine the collateral consequences applicable to their criminal case.

The widespread impacts of collateral consequences have received public attention from government leaders. For example, in 2011, the U. S. Attorney General spoke on the severity of collateral consequences, having written a letter to the Attorney Generals of each state, imploring them to assess the collateral consequences in their respective states and determine whether they imposed unnecessary hardships upon convicted persons without actually increasing public safety.[52] Also, as explored in Chapter Six, Arizona Governor Doug Ducey passed an Executive Order in 2017 to help mitigate employment-related collateral consequences and the employability and professional licensing barriers

[49] "Innovative Criminal Justice Programs in Vermont," Vermont Law School, accessed December 13, 2022. http://forms.vermontlaw.edu/criminaljustice/index.
[50] "Collateral Consequences: A Life Sentence for Families," New Mexico Legislature, accessed December 22, 2022. https://www.nmlegis.gov/handouts/CJRS%20102717%20Item%206%20collateral%20consequences%20slides.pdf.
[51] "Collateral Consequences: A Life Sentence for Families," New Mexico Legislature.
[52] "Letter from Eric H. Holder, Jr. U.S Att'y Gen., to Attorneys General (Apr. 18 2011)," Justice Center: The Counsel of State Governments.

they impose on Arizonans. In response to the passing of the Executive Order, Governor Ducey stated the following:

> The opportunity to earn a living and pursue the American dream is a right promised to every citizen… but too often, government stands in the way, imposing unnecessary barriers meant only to serve entrenched interests. … As I've said before, professional licensing exists for one purpose and one purpose only – to keep the public safe. We need real root and branch reform of boards and commissions that stifle economic opportunity and keep individuals from achieving their full potential. I look forward to continuing to work with the Legislature to achieve that goal.[53]

The statements by the U.S. Attorney General and by the Arizona Governor illustrate the recognition of the widespread impacts caused by collateral consequences and the need to adopt collateral consequence reform efforts. Additionally, while some efforts have been made to catalog collateral consequences throughout the U.S., oversights still remain, and work needs to be done to ensure full transparency on behalf of the state regarding the full spectrum of punishments that defendants can be subjected to. In the sections below, this thesis suggests reform efforts to provide transparency as to collateral consequences by adopting measures that formally incorporate collateral consequences into the criminal justice system.

Furthermore, despite their "intimate relationship" with the criminal justice system, collateral consequences are still entirely separate from the criminal justice system, regardless of how impactful collateral consequences are upon the criminally accused. As such, they are not accounted for in determining whether the case invokes the constitutional protections of the Sixth Amendment right to counsel. Accordingly, this

[53] "Governor Ducey Signs Bill Guaranteeing Right to Earn a Living," Office of the Arizona Governor, accessed December 7, 2022, https://azgovernor.gov/governor/news/2017/04/governor-ducey-signs-bill-guaranteeing-right-earn-living.

thesis also calls for this right to counsel legal threshold to be re-examined and account for collateral consequences.

Chapter III

The Sixth Amendment Right to Counsel

Between the 1930s and the 1970s, SCOTUS heard several cases addressing the right to counsel established by the Sixth Amendment. Consequently, this timeframe is when SCOTUS determined the majority of the right to counsel jurisprudence. Throughout these rulings, SCOTUS consistently emphasized that the right to counsel was essential to ensuring that a criminal conviction is fair, accurate, and legitimate.[54] Nonetheless, despite the repeated recognition of the importance of counsel for a criminally accused, SCOTUS has not extended the right to counsel to be an absolute right applicable in all criminal cases. By looking at the evolution of SCOTUS interpretations of the Sixth Amendment, we can see that the Court used a punishment-based analysis to determine whether the sentence imposed by the court was severe enough to warrant the appointment of counsel.

The Sixth Amendment Right to Counsel—Supreme Court Rulings

SCOTUS has analyzed the scope of the Sixth Amendment right to counsel on many occasions, frequently finding that representation by counsel is fundamental to due process.[55] The Sixth Amendment of the United States Constitution states: "In all criminal prosecutions, the accused shall… have the Assistance of Counsel for his defence."[56] A literal reading of this text would indicate an absolute right to counsel in *all* criminal

[54] King, "Beyond 'Life and Liberty': The Evolving Right to Counsel."
[55] King, "Beyond 'Life and Liberty': The Evolving Right to Counsel."
[56] U.S. Const. Amend VI.

prosecutions. However, SCOTUS has not interpreted the Sixth Amendment right to counsel so strictly. In the 1932 case of *Powell v. Alabama*, SCOTUS ruled on the first case specifically addressing the right to counsel, as provided by the Sixth Amendment.[57] Thus, starting the evolution of modern jurisprudence relating to the right to counsel.[58]

In *Powell*, five individuals who were not represented by counsel were convicted of a capital offense in an Alabama state court and sentenced to death. The Alabama Supreme Court confirmed their convictions. SCOTUS granted review of the case to address the application of the Sixth Amendment right to counsel. Throughout its ruling in *Powell*, SCOTUS extensively emphasized that representation by counsel is fundamental to due process, stating the following:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[59]

In *Powell*, SCOTUS clearly recognized the importance of an accused being represented by counsel in order to receive a fair trial. Nonetheless, SCOTUS conducted further analysis as part of their interpretation of the Sixth Amendment. The Court

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[57] *Powell v. Alabama*, 287 U.S. 45 (1932).
[58] Michael Milroy, "Court Appointed Counsel for Indigent Misdemeanants," *Arizona Law Review* 6, no. 2 (1965): 280.
[59] *Powell v. Alabama*, 287 U.S. 45 (1932).

considered the history of the legal concept of the right to counsel—looking at the right to counsel under English common law and the right to counsel as adopted by the 13 original colonies. Under English common law, individuals charged with misdemeanor offenses were provided counsel to represent them; however, individuals accused of capital offenses were generally denied representation by counsel. SCOTUS also reviewed the constitutions and laws of the colonies and concluded that the English common law rule for the widespread appointment of counsel was "definitely rejected" by 12 of the 13 original colonies, finding that the colonies had limited their extension of the right to counsel to "capital offenses or to the more serious crimes."[60]

Despite the Court's strong emphasis on the importance of the right to counsel and their finding that a plain reading of the Sixth Amendment guarantees a right to counsel, SCOTUS reached a narrow ruling in *Powell* and held that the right to counsel was limited to cases meeting all three of the following criteria: where the accused was charged with a capital offense; unable to hire counsel; and "incapable of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like…."[61] The Court expressly declined to address whether the Sixth Amendment right to counsel extended to other types of criminal prosecutions or under different circumstances.

Six years later, in 1938, SCOTUS heard *Johnson v. Zerbst*, where the defendant was convicted of multiple federal felony charges.[62] Although initially represented by counsel for the preliminary hearings, the defendant was not represented by counsel for the trial phase of his prosecution. Upon conviction, the defendant was sentenced to a

[60] *Powell v. Alabama*, 287 U.S. 45 (1932).
[61] *Powell v. Alabama*, 287 U.S. 45 (1932).
[62] *Johnson v. Zerbst*, 304 U.S. 458 (1938).

period of incarceration in federal prison. The defendant appealed, claiming that his right to counsel was violated, and consequently, that his imprisonment was illegal. The case was ultimately heard by SCOTUS, where the Court addressed whether the defendant's Sixth Amendment right to counsel had been violated.

In its analysis, the Court, again, looked at the historical context of the Sixth Amendment, stating that the right to counsel is one of the safeguards of the Sixth Amendment deemed necessary to ensure fundamental human rights of life and liberty. The Court emphasized the importance of the Sixth Amendment right to counsel for the criminally accused and the inherent unfairness in a criminal prosecution when counsel represents the state, but the accused is not represented by counsel. SCOTUS ruled that the Sixth Amendment "…embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself… That which is simple, orderly, and necessary to the lawyer-to the untrained layman-may appear intricate, complex, and mysterious."[63] SCOTUS found that if an accused is not represented by counsel, and the accused has not properly waived their right to counsel, the trial court is prohibited from proceeding, as compliance with the Sixth Amendment is a "jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or his liberty."[64] However, SCOTUS did not address the issue of extending the Sixth Amendment right to counsel to the state court systems, thus limiting the applicability of the ruling in *Johnson* only to individuals charged with federal crimes.

[63] *Johnson v. Zerbst*, 304 U.S. 458 (1938).
[64] *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Then in 1942, SCOTUS heard *Betts v. Brady*, where SCOTUS placed limitations on their previous ruling in *Johnson*.[65] In *Betts*, the defendant was convicted of a felony offense in a Maryland state court. At trial, the defendant's request to be represented by counsel was denied. Convicted of the charges and sentenced to prison, the defendant appealed, claiming that his right to counsel had been violated. SCOTUS granted review of the case to address two main issues regarding the Sixth Amendment right to counsel: whether the Sixth Amendment guarantees an absolute right to counsel "in every case, whatever the circumstances" for any individual charged with a criminal offense and whether the Sixth Amendment was "so essential to a fair trial… that it is made obligatory upon the states by way the Fourteenth Amendment."[66] Rather than interpreting the Court's prior ruling in *Johnson* to have created an absolute right to counsel under the Sixth Amendment, the Court ruled that the determination of whether counsel needs to be appointed should be made on a case by case basis. Additionally, SCOTUS ruled that a defendant in a state court was not entitled to the appointment of counsel in order for a fair trial to be conducted.[67]

However, in 1963, SCOTUS made the seminal ruling in the case of *Gideon v. Wainwright* where the Court significantly extended the right to counsel protections provided by the Sixth Amendment.[68] In *Gideon*, a defendant was convicted of a felony offense in a Florida state court and sentenced to a period of incarceration. The defendant filed for relief through the appellate process, and the case was ultimately heard by

[65] *Betts v. Brady*, 316 U.S. 455 (1942).
[66] *Betts v. Brady*, 316 U.S. 455 (1942).
[67] *Betts v. Brady*, 316 U.S. 455 (1942).
[68] *Gideon v. Wainwright,* 372 U.S. 335 (1963).

SCOTUS. The Court analyzed the applicability of the Sixth Amendment, and again, emphasized the importance of the right to counsel, stating the following:

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[69]

In *Gideon*, SCOTUS overruled its previous decision in *Betts* and determined that the Sixth Amendment right to counsel was applicable to all individuals charged with felony offenses in state courts. However, *Gideon* stopped short of extending the Sixth Amendment protections to individuals charged with misdemeanor offenses in state courts.

Nine years later, SCOTUS heard *Argersinger v. Hamlin*, where the court extended the right to counsel even farther than the standards established in *Gideon*.[70] In *Argersinger*, the defendant was convicted of a misdemeanor in a Florida state court and sentenced to a period of incarceration, and the defendant appealed. The Florida Supreme Court ruled that an accused is only entitled to the appointment of counsel for a non-petty offense where the person could be sentenced to more than six months in jail. SCOTUS granted review of the case. In its ruling, SCOTUS relied upon the reasoning previously presented in *Powell* and *Gideon*, although the Court acknowledged that both those cases involved felony offenses and *Argersinger* involved a misdemeanor offense. In *Argersinger*, SCOTUS made two important extensions to the right to counsel: that an

[69] *Gideon v. Wainwright,* 372 U.S. 335 (1963).
[70] *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

individual cannot be "deprived of his liberty," i.e., sentenced to any period of imprisonment, without the representation of counsel, and that petty offenses may require the appointment of counsel.[71] The Court's ruling was not contingent upon whether the charge was a felony or a misdemeanor; rather, the analysis hinged on whether the accused was actually sentenced to a period of incarceration. SCOTUS declined to extend the ruling of this case to all misdemeanor prosecutions and limited their ruling only to cases in which incarceration was involved, recognizing that misdemeanor defendants who are not facing incarceration, and are thus not afforded an attorney, may potentially be prejudiced by not having the assistance of counsel.[72]

Then in 1979, in *Scott v. Illinois*, SCOTUS further clarified their previous ruling in *Argersinger* and established the currently used Sixth Amendment right to counsel minimum standard.[73] In *Scott*, the defendant was convicted in an Illinois state court for shoplifting, where the potential legal maximum for the crime of shoplifting was a $500 fine or up to one year in jail. The defendant was sentenced to a $50 fine and no jail time. The defendant appealed, claiming that the denial of his request for counsel violated the Sixth Amendment. SCOTUS clarified its ruling in *Argersinger* and held that since the accused had not actually been sentenced to a period of incarceration, even though the potential punishment for the offense included the option of incarceration, the defendant was not entitled to an attorney under the Sixth Amendment.[74] Conversely, had the defendant been sentenced to a jail term, then he would have had a right to representation by counsel. The ruling in *Scott* set a "minimum standard for the Sixth Amendment right

[71] Argersinger v. Hamlin, 407 U.S. 25 (1972).
[72] Argersinger v. Hamlin, 407 U.S. 25 (1972).
[73] *Scott v. Illinois*, 440 U.S. 367 (1979).
[74] *Scott v. Illinois*, 440 U.S. 367 (1979).

to counsel applicable to the states," which is that the Sixth Amendment right to counsel protections are invoked only if the accused is actually facing a "loss of liberty."[75] In other words, they are not automatically invoked if the defendant is charged with a crime that statutorily allows for the punishment of jail, only if the defendant is actually facing a sentence of incarceration. Since its ruling in *Scott*, SCOTUS has not modified its interpretation of the right to counsel in the Sixth Amendment. Thus, SCOTUS's growth of the right to counsel stopped with *Scott*.

The Sixth Amendment Right to Counsel—The Majority of States

Looking to the different standards adopted throughout the U.S. is helpful to contextualize Arizona's need to expand the right to counsel, as argued for later in this thesis. While SCOTUS has not extended the protections of the Sixth Amendment to all individuals charged with criminal offenses, a majority of states have expanded the right to counsel beyond SCOTUS's minimum standard.[76] Thirty-five states and the District of Columbia have adopted right to counsel standards that are broader than the SCOTUS minimum.[77] Furthermore, all 36 of these jurisdictions have expanded the right to counsel using a punishment-based analysis rather than hinging their decision on "the fairness of the trial preceding imposition of the penalty."[78] Such an approach remains consistent with SCOTUS's punishment-based approach used throughout the evolution of their Sixth Amendment jurisprudence.

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[75] *Scott v. Illinois*, 440 U.S. 367 (1979).
[76] Mitchell Simpson, "A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?" *Roger Williams University Law Review* 5, no. 2 (2000).
[77] Simpson, "A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?"
[78] Simpson, "A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?"

Of the jurisdictions that have expanded the right to counsel, 20 states and the District of Columbia have established standards that invoke the right to counsel if the misdemeanor crime statutorily allows for jail to be imposed upon conviction; that is, if the law allows for the crime to be punished by jail, then it is serious enough to invoke the Sixth Amendment protections. Ten states follow a similar, though slightly scaled back, approach requiring the extension of right to counsel protections to any misdemeanor crime statutorily allowing for a jail term that "exceeds a certain minimum."[79] Two states extend the right to counsel, in addition to any potential imposition of jail time, if the misdemeanor crime charged statutorily allows for a "substantial fine" to be imposed.[80]

Lastly, of the jurisdictions that have expanded the right to counsel, one state, New Jersey, extends the right to counsel to any misdemeanor offense where "the defendant faces a consequence of magnitude or is otherwise constitutionally or by law entitled to counsel."[81] The New Jersey Supreme Court has clarified this right to counsel by defining a "consequence of magnitude" as: "(1) Any sentence of imprisonment; (2) Any period of (a) driver's license suspension, (b) suspension of the defendant's non-resident reciprocity privileges, or (c) driver's license ineligibility; or (3) Any monetary sanction imposed by the court of $800 or greater in the aggregate…."[82] Thus, New Jersey builds upon the SCOTUS minimum standard by including, in addition to imprisonment, a minimum monetary punishment that is considered serious enough to warrant the appointment of

[79] Simpson, "A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?"
[80] Simpson, "A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?"
[81] "Guidelines for Determination of Consequence of Magnitude (See Rule 7:3-2)," New Jersey Courts, accessed December 7, 2022. https://www.njcourts.gov/attorneys/rules-of-court/guidelines-determination-consequence-magnitude-see-rule-73-2.
[82] "Guidelines for Determination of Consequence of Magnitude (See Rule 7:3-2)," New Jersey Courts.

counsel. New Jersey also includes driver's license penalties as punishments that are serious enough to invoke Sixth Amendment right to counsel protections. As a result, New Jersey is the only state that has expanded the right to counsel based on a potential punishment not imposed by the criminal court, driver's license penalties (i.e., a collateral consequence).

While an exhaustive comparative analysis of the right to counsel protections throughout the U.S. is outside the scope of this thesis, it is nonetheless important to understand that most jurisdictions have expanded right to counsel past the SCOTUS minimum standard. The following section specifically looks to the right to counsel as applied in Arizona. In Chapter Seven, this thesis addresses how the jurisdictions mentioned in this section can serve as models for Arizona should Arizona decide to readdress its right to counsel standards.

The Sixth Amendment Right to Counsel—Arizona Law

While most states have extended the right to counsel, Arizona has not. It is one of only 13 states that uses the SCOTUS minimum standard.[83] In Arizona, the right to counsel is established in the Arizona Constitution, as follows: "In criminal prosecutions, the accused shall have the right to…counsel…."[84] However, this text, as with the U.S. Constitution's articulation of the right to counsel, is not a comprehensive text on the subject. Rather, any meaningful guidance as to the protections of the right to counsel can be found throughout different court interpretations of this constitutional text. By looking

[83] Simpson, "A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?"
[84] Ariz. Const. art. II § 24.

to Arizona-specific jurisprudence, we can see how more than twenty years later, the right to counsel was expanded and contracted by the courts, with Arizona ultimately reverting back to the minimum standard established by SCOTUS in *Scott*.[85]

In 1964, one year after SCOTUS heard *Gideon* and extended the right to counsel to all felony defendants, the Arizona Supreme Court heard *State v. Anderson,* which established some direction for when the right to counsel is necessary in misdemeanor cases.[86] In *Anderson*, the Arizona Supreme court went beyond SCOTUS' ruling in *Gideon* and held that the right to counsel was applicable to all individuals charged with "serious" misdemeanor offenses.[87] The court did not define a "serious" misdemeanor offense, but did offer guidance for lower courts to determine if an offense should be classified as "serious."[88] The Arizona Supreme Court stated that factors to consider in determining if a misdemeanor offense is "serious" are "the nature of the offense, the extent of the potential penalty, and the complexity of the case."[89] The court found that a maximum possible punishment of a $1,000 fine and a possibility of up to two years in jail was sufficient to categorize the crime as "serious" and warrant the appointment of counsel, though it remained largely unclear as to what qualified as a serious misdemeanor.[90]

Just five years later, the Arizona Supreme Court provided more clarity as to what qualifies as a "serious" misdemeanor offense. In *Burrage v. Superior Court,* two co-defendants were convicted of misdemeanor drug offenses.[91] Their requests to be

[85] *Campa v. Fleming*, 134 Ariz. 330, 656 P.2d 619 (1982).
[86] *State v. Anderson*, 96 Ariz. 123, 392 P.2d 784 (1964).
[87] *State v. Anderson*, 96 Ariz. 123, 392 P.2d 784 (1964).
[88] *State v. Anderson*, 96 Ariz. 123, 392 P.2d 784 (1964).
[89] *State v. Anderson*, 96 Ariz. 123, 392 P.2d 784 (1964).
[90] *State v. Anderson*, 96 Ariz. 123, 392 P.2d 784 (1964).
[91] *Burrage v. Superior Court*, 105 Ariz. 53, 459 P.2d 313 (1969).

represented by counsel were denied. After being convicted of the charges and sentenced to five months of hard labor, the defendants appealed, claiming that their right to counsel had been violated. After a review of the applicable drug laws for which the defendants were convicted, the court found their cases to be serious enough to have required representation by counsel, but the court qualified their finding by stating that their decision rested "…solely on the complexity of the defense," and that "…a fair trial might be impossible without legal counsel."[92] However, despite the court stating that their finding was exclusively based on the complexity of the defense, the court also determined that misdemeanor crimes with a maximum possible punishment of "$500 in fines or six months imprisonment, or both" in and of themselves should be considered serious and require the appointment of counsel.[93]

Then, in 1982, an Arizona appellate court heard the seminal case of *Campa v. Fleming* and retracted the recent right to counsel expansions established in *Anderson* and *Burrage*.[94] In *Campa,* the defendant was an undocumented immigrant who was arrested for misdemeanor shoplifting and was also on felony probation for a separate offense. The defendant requested the appointment of counsel in the shoplifting case because he was concerned about potential collateral consequences that could result from a conviction in the shoplifting case, such as a petition to revoke his probation case or potential immigration concerns. In its ruling, *Campa* contradicted the Arizona Supreme Court's ruling in *Anderson*, stating that classifying "…a misdemeanor as 'serious' does not create a right to appointed counsel."[95] Furthermore, *Campa* conclusively held that, "…the facts

[92] *Burrage v. Superior Court*, 105 Ariz. 53, 459 P.2d 313 (1969).
[93] *Burrage v. Superior Court*, 105 Ariz. 53, 459 P.2d 313 (1969).
[94] *Campa v. Fleming*, 134 Ariz. 330, 656 P.2d 619 (1982).
[95] *Campa v. Fleming*, 134 Ariz. 330, 656 P.2d 619 (1982).

that appellee is on probation and an alien seeking to remain in this country are collateral, and neither necessitates the appointment of counsel."[96]

As part of its analysis, the appellate court heavily relied upon Arizona Rule of Criminal Procedure 6.1, which was issued by the Arizona Supreme Court on September 1, 1973.[97] Since this postdated *Burrage*, the court in *Campa* held that, by issuing Rule 6.1, the Arizona Supreme Court had, in effect, overruled their prior holding in *Burrage*, and as a result, Rule 6.1 was now the controlling law on the subject of the right to counsel. Furthermore, the ruling in *Campa* pointed out that Rule 6.1(b) specified that the right to counsel attached in a case "…which may result in punishment by loss of liberty"[98] Thus, *Campa* concluded, based on the wording in Rule 6.1, that there was "no authority" that Arizona standards on the right to counsel were "more strict" than the U.S. Constitution, and therefore, abandoned the recent right to counsel expansions, reverting back to the SCOTUS minimum standard of whether the accused was facing a "loss of liberty."[99] As such, the right to counsel minimum standard in Arizona, as established by *Campa* through an interpretive ruling of Rule 6.1, amounts to the same standard established by SCOTUS in *Scott*, which is that the right to counsel is only applicable if the accused is directly facing a "loss of liberty."[100] To fully appreciate the enormity of this standard's implications, the next section studies the Arizona court system and how the right to counsel standard is applied throughout the state.

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[96] *Campa v. Fleming*, 134 Ariz. 330, 656 P.2d 619 (1982).
[97] *Campa v. Fleming*, 134 Ariz. 330, 656 P.2d 619 (1982).
[98] *Campa v. Fleming*, 134 Ariz. 330, 656 P.2d 619 (1982).
[99] *Campa v. Fleming*, 134 Ariz. 330, 656 P.2d 619 (1982).
[100] *Campa v. Fleming*, 134 Ariz. 330, 656 P.2d 619 (1982).

Chapter IV.

The Arizona Court System

Before moving on to further analysis, let us take a step back to consider the general context by breaking down the Arizona court system as a whole. The vast Arizona state court system is composed of many different individual courts throughout the state. There are five levels to the Arizona court system: the Supreme Court, the Court of Appeals, the Superior Courts, and two different lower courts.[101] Both the Supreme Court and the Court of Appeals are appellate courts that can only hear misdemeanor cases in an appellate capacity.[102] For criminal cases, the Superior Courts have original jurisdiction in felony charges and can only hear misdemeanor cases under two circumstances: they are part of a felony case[103] or in an appellate capacity.[104] Thus, misdemeanor prosecutions are primarily heard in two different lower courts: justice of the peace courts and municipal courts.[105] By examining the structure of the lower court levels, we can see how extensive the misdemeanor court system is in Arizona.

Overall, there are 167 courts in Arizona that have original jurisdiction over misdemeanor prosecutions—85 justice of the peace courts and 82 municipal courts.[106] Arizona has 15 counties, all of which are sub-divided into different precincts, which in turn, have individual courts, referred to as justice precincts or justice of the peace

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[101] "The Future of Arizona Courts," The Commission on Courts, https://www.ojp.gov/pdffiles1/Digitization/120923NCJRS.pdf.
[102] "The Future of Arizona Courts," The Commission on Courts.
[103] Ariz. Const. art. VI § 14.
[104] Ariz. Const. art. VI § 16.
[105] "Today's Court System Has Three Levels," Arizona Judicial Branch, accessed December 7, 2022, https://www.azcourts.gov/guidetoazcourts/Todays-Court-System-Has-Three-Levels.
[106] "Arizona Judiciary Annual Report Fiscal Year 2018," Arizona Judiciary, https://www.azcourts.gov/Portals/38/pdf/AnnualReport%20FY2018.pdf.

courts.[107] The justice courts have jurisdiction over misdemeanor offenses that occurred within their precincts and are, generally, "…larger than city or town limits and typically incorporate an entire city or town as well as pieces of other communities and unincorporated areas of the county."[108] Additionally, each incorporated city or town in Arizona has its own court, which is called a municipal court or city court.[109] Municipal courts have jurisdiction over misdemeanor offenses committed within their city or town.[110] However, justice courts also have concurrent jurisdiction with municipal courts because they are located within their jurisdiction; thus, justice courts have jurisdiction over offenses committed within the city or town that is located within their precinct.[111] Below is a table listing each of the 167 misdemeanor courts in Arizona and their respective locations within Arizona's 15 different counties.

[107] "Limited Jurisdiction Courts," Arizona Judicial Branch, accessed December 7, 2022, https://www.azcourts.gov/guidetoazcourts/Limited-Jurisdiction-Courts.
[108] "Limited Jurisdiction Courts," Arizona Judicial Branch.
[109] Ariz. Rev. Stat.§22-402 (2022).
[110] "Limited Jurisdiction Courts," Arizona Judicial Branch.
[111] Ariz. Rev. Stat.§22-402 (2022).

Table 1. Arizona Counties and Their Respective Misdemeanor Courts.

County	Justice of the Peace Judges/Courts	Municipal Courts	
		Judges	Courts
Apache	4	3	3
Cochise	6	3	4
Coconino	4	5	4
Gila	2	5	6
Graham	2	3	3
Greenlee	2	1	1
La Paz	3	2	2
Maricopa	26	59	22
Mohave	5	5	4
Navajo	6	4	4
Pima	10	13	5
Pinal	6	9	9
Santa Cruz	1	2	2
Yavapai	5	9	9
Yuma	3	5	4

Table 1 shows each of the 15 counties in Arizona and how many misdemeanor courts and judges are located within each county. [112]

As illustrated by the above table, the Arizona court system has numerous courts where misdemeanor cases can be heard. Understanding exactly how many misdemeanor courts there are in Arizona, as well as how many cases are heard each year throughout the state, contextualizes the enormity of the Arizona misdemeanor court system. In Arizona during 2016, 2017, and 2018, there were more than 500,000 criminal cases prosecuted annually, of which more than 400,000 cases each year were misdemeanors.[113] For these three years cumulatively, there were more than 1.2 million misdemeanor cases prosecuted in Arizona, making up between 75% and 80% of all the criminal cases in

[112] "Arizona Judiciary Annual Report Fiscal Year 2018," Arizona Judiciary.
[113] "CSP STAT Criminal," Court Statistics Project, accessed December 7, 2022, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal.

Arizona.[114] Thus, the misdemeanor caseload in Arizona makes up a substantial majority of the criminal justice system in Arizona. Table 2 details the total number of annual statewide cases, both felony and misdemeanor, prosecuted for the years 2016, 2017, and 2018. Table 2 also shows the total number of misdemeanor cases prosecuted statewide for those same years and the percentages of how many cases each year were misdemeanor cases. Based on these numbers, it is clear that most criminal cases in Arizona are misdemeanor cases.

Table 2. Arizona Statewide Misdemeanor Caseloads and Rates.

Year	Misdemeanor Caseload	Statewide Criminal Caseload	Misdemeanor Proportion to Total Criminal Caseload
2016	421,971	537,068	79%
2017	423,174	563,274	75%
2018	419,028	522,532	80%

Table 2 shows how many misdemeanor cases per year were filed in Arizona compared to the overall statewide data of criminal cases filed.[115]

As established in Chapter Three, misdemeanor defendants are not necessarily entitled to have an attorney represent them during their criminal case. Given the large number of misdemeanor cases prosecuted annually in Arizona, research for this thesis was conducted to find out how many of these hundreds of thousands of misdemeanor defendants were self-represented each year. Accordingly, this thesis reports findings from public records requests sent to every lower court in Arizona for data on how frequently misdemeanor defendants were represented by an attorney versus how often they

[114] "CSP STAT Criminal," Court Statistics Project.
[115] "CSP STAT Criminal," Court Statistics Project.

represented themselves. Public records requests were sent to all 167 justice and municipal courts in Arizona. One hundred twenty-four courts responded to the public records requests, and 43 courts failed to respond. Of the 124 courts that responded, three would not research whether were able to provide the requested information unless a processing fee was paid. Thus, of the 121 courts that responded and were willing to provide the data freely, only 37 courts stated that they actually tracked data on whether misdemeanor defendants were represented by an attorney or not. Of these 37 responding courts, 26 were the justice courts for Maricopa County, whose records were all retained and provided by one point of contact, and eight were justice courts that Pima County had consolidated into one operational courthouse. Thus, there were effectively five individual responses to the public records requests that yielded results for self-represented data. The results from these requests showed that, for the years 2016, 2017 and 2018, most courts did not track how many misdemeanor defendants were self-represented. To see the itemized results from the public records requests sent to all 167 misdemeanor courts (viz., whether the court responded to the public records request, and if they did respond, whether they tracked the requested data), see Appendix 1.

Table 3 shows the results from the courts that tracked self-represented data for the years 2016, 2017, and 2018. The courts that tracked the data were Marana Municipal Court, Yuma Municipal Court, Pima County Consolidated Court (PCCJC), Sahuarita Municipal Court, and all 26 justice courts for Maricopa County. For the purpose of consolidating Table 3, the data for the Maricopa Justice Courts is aggregated together. The self-represented data for the individual Maricopa County justice courts can be found

in Appendix 2. Additionally, since the PCCJC is a consolidated justice courthouse that hosts eight precincts, the data for the PCCJC is presented in the aggregate for Table 3.

Table 3. Self-Represented Data.

Court	Year	Total Cases	Total Self-Represented Cases	% of Cases Self-Represented
Marana Municipal	2016	767	759	98.95%
	2017	1,426	1,412	99.01%
	2018	1,461	1,437	98.35%
PCCJC	2016	13,710	10, 151	74.04%
	2017	13,718	10,343	75.39%
	2018	12,476	9,294	74.49%
Maricopa County	2016	27,983	23,327	83.36%
	2017	27,248	23,120	84.85%
	2018	27,817	23,209	83.43%
Yuma Municipal	2016	3,227	1,413	43.78%
	2017	3,689	1,607	43.56%
	2018	7,318	4,184	57.17%
Sahuarita Municipal	2016	2,373	2,317	97.64%
	2017	2,602	2,220	85.31%
	2018	2,204	2,089	94.78%

Table 3 shows how many misdemeanor cases per year were filed in each jurisdiction compared to how many of these cases were cases where the criminally accused was self-represented.[116]

As Table 3 shows, most defendants in these reporting courts were not represented by an attorney. The two courts with the highest percentage of self-represented defendants were the Marana Municipal Court and the Sahuarita Municipal Court, with the Marana Municipal Court having an average of 98% of misdemeanor defendants being self-represented and the Sahuarita Municipal Court with an average of 92% of misdemeanor

[116] Marana Municipal Court, email message to author, Oct 22, 2020; PCCJC, email message to author, October 8, 2020; Maricopa County Justice Courts, email message to author, October 6, 2020; Yuma Municipal Court, email message to author, December 3, 2020; Sahuarita Municipal Court, phone call to author, October 21, 2022.

defendants being self-represented. The Maricopa County Justice Courts had an average of 83% of misdemeanor defendants being self-represented. The PCCJC had an average of 74% of misdemeanor defendants being self-represented. The court with the highest number of individuals represented by attorneys was the Yuma Municipal Court, with an average of 52% of misdemeanor defendants being represented by an attorney. Inversely, 48% of the misdemeanor defendants were self-represented. Overall, this available data shows that most misdemeanor defendants tend to be self-represented. However, this data also shows that, depending on the specific jurisdiction, there is a wide range in representation rates for misdemeanor defendants, as shown by the 50% difference in representation rates from the Marana Municipal Court and the Yuma Municipal Court. Such a differences in representation rates could be caused by many factors, some of which are seemingly simple. For example, both the judge and the prosecutor have the ability to take a position on the case that would determine whether an accused was appointed an attorney. Accordingly, a jurisdiction could have higher representation rates caused by a liberal judge who appoints attorneys more frequently than other judges in other jurisdictions, as by appointing an attorney in the interests of justice and even when the defendant is not constitutionally entitled to appointment of an attorney. On the other hand, a particularity draconian prosecutor who often seeks jail as a punishment to cases could thus contribute to higher numbers of misdemeanor defendants in that jurisdiction being constitutionally entitled to an attorney. Another explanation for differences in representation rates could be caused by the income inequalities in the underlying jurisdictions. For instance, higher representation rates could be caused if a jurisdiction is located within a higher income area, thus allowing for more defendants to afford to retain

private counsel. Moreover, even if the area is not necessarily higher income, representation rates may be impacted if, in that particular geographical area, criminal defendants just tend to hire counsel more frequently. However, understanding the true nature of the driving factors that cause differences in representation rates is probably not so simple. Table 4 highlights data published in the 2020 census reports for the municipalities of Marana and Yuma demonstrating the complex nature of the factors contributing to differences in representation rates.

Table 4. 2020 Census Data for the Municipalities of Yuma and Marana.

	Yuma	**Marana**
Population	97,093	54,895
Median Household Income	$52,183	$89,689
Per Capita Income (past 12 months)	$26,679	$39,007
Persons in Poverty	16.7%	5.6%
Bachelor's degree or higher, age 25+	19.9%	46.5%
Foreign born persons	20.9%	8.7%

Table 4 compares data drawn from the 2020 census, for the years of 2016–2020, for the cities of Yuma, Arizona, and Marana, Arizona.[117]

As shown in the above table, Marana is a higher income area when compared to Yuma, as Marana has a higher median household income, higher per capita income, and a lower poverty rate. Yet, the Marana Municipal Court has much lower representation rates. So, the assertion that representation rates may be driven up in higher income areas, here, is not correct. Even though Marana's overall income rate is higher than Yuma, perhaps it just is not high enough to drive up representation rates or the average income of the underlying jurisdiction does not impact representation rates. Additionally, Marana

[117] "U.S. Census Bureau QuickFacts: Yuma City, Arizona," U.S. Census Bureau, accessed December 7, 2022, https://www.census.gov/quickfacts/fact/table/maranatownarizona,yumacityarizona/PST045221.

also has higher rates of individuals with higher levels of education, with 46.5% of individuals over the age of 25 having a bachelor's degree, compared to the 19.9% in Yuma, giving a total split of 26.6%.[118] This data could indicate that individuals with higher degrees of education choose to represent themselves in court rather than retaining an attorney, or inversely, that individuals without higher education are more likely to retain counsel. Another notable difference between Yuma and Marana is the difference in the number of individuals who are foreign born. Yuma has 12.2% more individuals who are foreign born,[119] which is consistent with Yuma being geographically located approximately 10 miles from the closest port of entry into Mexico.[120] Assuming that those two factors cause members of the local population to be more vulnerable to immigration collateral consequences, this could cause individuals charged with crimes to retain counsel more frequently in an attempt to mitigate any potential exposure that may threaten their immigration status. This could possibly explain why the Yuma Municipal Court has a much higher rate of misdemeanor defendants represented by an attorney.

However, to fully study the differences in representation rates, the first step is to obtain more comprehensive data than what is currently available, as demonstrated by the lack of data provided to the public records requests conducted for this thesis. Additionally, the courts also need to stratify representation data based on whether the individuals retained their attorney or the attorney was court appointed. Once there is a

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[118] "U.S. Census Bureau QuickFacts: Yuma City, Arizona."
[119] "U.S. Census Bureau QuickFacts: Yuma City, Arizona."
[120] "International Border Control Mexico —Los Algodones to Yuma, Arizona," Google Maps, accessed December 7, 2022, https://www.google.com/maps/dir/International+Border+Control+Mexico+-+Los+Algodones,+Calle+Mariano+Lee+150,+Vicente+Guerrero,+B.C.,+Mexico/Yuma,+Arizona/@32.7199047,-114.7388307,12z/am=t/data=!3m1!4b1!4m14!4m13!1m5!1m1!1s0x80d6f9c50dd3e47f:0xfe0d50f95a28572!2m2!1d114.7285295!2d32.718016!1m5!1m1!1s0x80d66287214dadd9:0xcfa93a07f59e4258!2m 2!1d-114.6276916!2d32.6926512!3e0.

more complete data set, the numbers could then be ran in a regression model to estimate the relationships between representation rates and other variables. Such analysis could potentially shed light on what causes differences in representation rates throughout Arizona jurisdictions. Ultimately, what causes the differences in representation rates is currently unknown and cannot be estimated without more data. However, based on the data that is available and the above comparison, it is likely that the driving factors are multifaceted and future research would benefit from studying what contributes to such disparities in representation rates.

Even though the underlying reasons for the differences in representation rates throughout Arizona is currently unknown, what is known, from the data collected in this thesis, is that misdemeanor defendants tend to be self-represented. Furthermore, for the years studied in this thesis, there were cumulatively more than 1.2 million misdemeanor cases prosecuted in Arizona. If the data collected is representative of the entire state, this means that hundreds of thousands of people during this time were prosecuted for misdemeanor crimes and not represented by an attorney. As discussed throughout this thesis, the criminal justice system generally fails to provide transparency about collateral consequences, yet collateral consequences can hugely change the course of the defense of the case. Thus, understanding the enormity of self-represented individuals within the criminal justice system in Arizona contextualizes the gravity of the need for an unbiased system, one that ensures that misdemeanor defendants are given a fair opportunity within the system whether or not they are represented by an attorney. Below, this thesis conducts a case study of just one of the collateral consequences in effect in Arizona, the

Fingerprint Clearance Card Program, and its widespread implications on individuals charged with and convicted of misdemeanor crimes.

Chapter V.

The Fingerprint Clearance Card Program

Of the 827 potential collateral consequences in Arizona,[121] this section conducts a case study of one—the Fingerprint Clearance Card Program. This single collateral consequence provides a glimpse into just how impactful collateral consequences can be. Specifically, the Fingerprint Clearance Card Program is a statewide, centralized background check program that determines the employability of a significant portion of Arizonans.[122] Since its enactment, the Arizona legislature has progressively expanded the breadth of the Fingerprint Clearance Card Program, increasing both the categories of persons who are required to have a fingerprint clearance card and increasing the number of criminal offenses that can disqualify a person from having a fingerprint clearance card.[123] Additionally, the Fingerprint Clearance Card Program is uniformly applied to all individuals required to have a fingerprint clearance card and is not tailored specifically to the security needs of each career field requiring a fingerprint clearance card. With more than 54 career fields in Arizona now requiring a fingerprint clearance card as a prerequisite to employment,[124] the Fingerprint Clearance Card Program has become a major collateral consequence to criminal charges in Arizona. Specifically, this thesis conducts a case study of the Arizona Fingerprint Clearance Card Program and its impacts on employability. By looking at the evolution of the Fingerprint Clearance Card Program

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[121] "Arizona Snapshot of Employment-Related Collateral Consequences," Justice Center: the Counsel of State Governments, January 2021, https://csgjusticecenter.org/wp-content/uploads/2021/02/collateral-consequences-arizona.pdf.
[122] "Fingerprint Clearance Card," Arizona Department of Public Safety.
[123] "Board of Fingerprinting (Board)," Arizona State Library, accessed December 7, 2022, https://azlibrary.gov/sla/agency_histories/board-fingerprinting-board.
[124] "Fingerprint Clearance Card," Arizona Department of Public Safety.

and current cardholder statistics, we can see the far-reaching nature of the Fingerprint Clearance Card Program. Accordingly, we see how it is an impactful collateral consequence in Arizona.

Fingerprint Clearance Card Procedures

Arizona law requires certain individuals to obtain a fingerprint clearance card from the Arizona Department of Public Safety (DPS) "prior to or as a condition of licensure, certification, or employment."[125] Individuals seeking a fingerprint clearance card are required to submit an application to DPS, which then conducts a criminal history records check to determine if the individual is suitable to be issued a fingerprint clearance card.[126] If the individual has been convicted of certain disqualifying criminal offenses, their application for the fingerprint clearance card will be denied.[127] For individuals who have already been issued a fingerprint clearance card, DPS conducts ongoing criminal history records checks to ensure that the applicant is still eligible to hold the fingerprint clearance card.[128] If an individual who already has a fingerprint clearance card is arrested for any disqualifying offenses (listed later in this section), their fingerprint clearance card is suspended immediately upon their arrest.[129] Thus, in Arizona, the collateral consequences imposed by the Fingerprint Clearance Card Program are imposed not when the individual is convicted of the crime, but they go into effect automatically at the time of the arrest. Suspension of the fingerprint clearance card is not made on a case-by-case

[125] "Fingerprint Clearance Card," Arizona Department of Public Safety.
[126] "Fingerprint Clearance Card," Arizona Department of Public Safety.
[127] Ariz. Rev. Stat. §41-1758.04(A) (2022).
[128] "Fingerprint Clearance Card," Arizona Department of Public Safety.
[129] Ariz. Rev. Stat. §41-1758.04(A) (2022).

analysis, dependent on the nature and scope of the employment nor is the implementation of the suspension differentiated by the severity of the crime. Additionally, the Fingerprint Clearance Card Program fails to specifically tailor disqualifying offenses to each specific career field. Instead, the cards are regulated in a categorical manner and not by an individualized approach that regulates each career field based on its particular security needs.

Furthermore, if an individual is arrested or convicted of a misdemeanor crime that is not one considered to be a disqualifying offense, the arrest or conviction would not impact their fingerprint clearance card. However, if someone is arrested for a disqualifying offense, but within their criminal prosecution they are able to negotiate the dismissal of the disqualifying offense, then their fingerprint clearance card would be reinstated. This is true even if the state proceeds forward on the other charges, as long as they are not disqualifying offenses. Additionally, a person's fingerprint clearance card would be reinstated if the defendant resolved their case by entering a plea to a criminal charge and obtaining a criminal conviction, as long as it is not a conviction to a disqualifying offense. Thus, one's fingerprint clearance card status can directly be mitigated by their defense strategy in their criminal prosecution.

Legislation

The Arizona Fingerprint Clearance Card Program was established in 1998 through House Bill 2585 (HB2585)[130] as an effort to standardize background checks in Arizona for persons who worked with children or vulnerable populations.[131] HB2585 was

[130] "House Bill 2585," Pub. L. No. 2585 (2011).
[131] "Board of Fingerprinting (Board)," Arizona State Library.

an extensive bill with 32 sections, many of which amended existing Arizona Statutes to incorporate them into the Fingerprint Clearance Card Program's requirements and standards for card issuance.[132] Additionally, HB2585 established the structure for oversight of this program by creating the Fingerprinting Division of the DPS.[133] Overall, the study of HB2585 shows how it was more narrowly tailored to specifically regulate individuals who worked with children or vulnerable populations, when compared to the current Fingerprint Clearance Card Program.

HB2585 enumerated the categories of persons required to have a fingerprint clearance card and further enumerated which criminal offenses were disqualifying offenses for their respective career fields. HB2585 established 16 categories of persons who were required to have a fingerprint clearance card as part of their employment. Additionally, for 15 categories of persons, HB2585 enumerated 23 total disqualifying criminal offenses, both felony and misdemeanor. Of these 23 total disqualifying offenses, only four were misdemeanors. The single category of persons who required a stricter level of background check under HB2585 were those working or volunteering "…at a facility…to provide services to persons with developmental disabilities." For these individuals, they were subjected to 96 total disqualifying offenses, both felony and misdemeanor, most of which were felony offenses. As such, persons subject to HB2585 generally faced limited exposure for employment collateral consequences due to a misdemeanor arrest or conviction. Overall, HB2585 was applicable to fewer categories of career fields and enumerated fewer disqualifying misdemeanor offenses when compared to the current Fingerprint Clearance Card Program.

[132] House Bill 2585.
[133] House Bill 2585.

However, the Arizona legislature has modified the fingerprint clearance card laws numerous times since HB2585 was passed, amending the legislation in 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2012, 2014, and 2017.[134] These progressive modifications expanded the Fingerprint Clearance Card Program substantially. The current fingerprint clearance card laws now require 54 categories to have a fingerprint clearance card as part of their employment,[135] which is 38 more categories of persons than in HB2585. The categories of persons regulated by the current legislation are not as narrowly tailored to individuals who work with children or vulnerable populations, as was HB2585; and the current legislation enumerates substantially more disqualifying offenses than HB2585. These expansions to the Fingerprint Clearance Card Program have increased the impact of criminal history on employability. Not only are more individuals required to have a fingerprint clearance card for "licensure, certification, or employment,"[136] but there are more offenses that can disqualify individuals from obtaining or keeping their fingerprint clearance card.

The table below illustrates the expansion of the Fingerprint Clearance Card Program since HB2585 was passed in 1998. The "Law" column lists the applicable Arizona laws that require individuals to have a fingerprint clearance card and gives a brief description of the type of activities that the listed law regulates. As shown by the statute descriptions, all of the original laws requiring a fingerprint clearance card specifically regulated individuals who had contact with children or vulnerable individuals. While that underlying sentiment of protecting children and vulnerable

[134] "Board of Fingerprinting (Board)," Arizona State Library.
[135] Ariz. Rev. Stat. §41-1758 (2022).
[136] "Fingerprint Clearance Card," Arizona Department of Public Safety.

individuals remains with the current fingerprint clearance card legislation, the number of statutes requiring fingerprint clearance cards is much higher and the statutes encompass many more career fields, some of which would seemingly would have a less direct connection to children and vulnerable individuals than other listed career fields. For example, current legislation now requires individuals that volunteer or work for juvenile probation departments, nursing care institutions, or drive a school bus to have a fingerprint clearance card. These career fields patently have close contact with children, and their regulation under the Fingerprint Clearance Card Program makes sense. Current legislation also requires denturists, individuals owning a traffic school, and real estate appraisers to have the same type of fingerprint clearance card. On their face, individuals in these career fields would not have contact with children or vulnerable individuals in the same capacity as a juvenile probation employee, a school bus driver, or nursing institution employee. Nonetheless, they are subjected to the same standards under the Fingerprint Clearance card Program. Applying the same standards to a nursing institution employee and a real estate appraiser exemplifies the extreme uniform application of the Fingerprint Clearance Card Program.

Table 5. Individuals Required to Have Clearance Cards 1998 versus 2020.

Applicable Law	**1998**	**2020**
§3-314—Industrial Hemp License		✓
§8-105—Preadoption Certificate		✓
§8-322—Juvenile Probation	✓	✓
§8-463—Department of Child Safety Employees		✓
§8-509—Licensing of Foster Homes		✓
§8-802—Child Safety Worker		✓
§15-183—Charter Schools		✓

Applicable Law	1998	2020
§15-503—Superintendents or Principals		✓
§15-512—School District Employees, noncertified	✓	✓
§15-534—Certified Teachers	✓	✓
§15-763.01—Surrogate Parent for Ward of State		✓
§15-782.02—Person over 22 years old attending a vocational school		✓
§15-1330—Personnel for the Arizona State School for the Deaf and Blind	✓	✓
§15-1881—Secondary institutions that require training in hospitals, health care facilities		✓
§17-215—Arizona Fish and Game employees and volunteers who have contact with children or vulnerable adults		✓
§28-3228—School Bus Drivers		✓
§28-3413—Traffic Survival School Owner		✓
§32-122.02—Home Inspector		✓
§32-122.05—Alarm Businesses		✓
§32-122.06—Alarm Agents		✓
§32-1232—Dentists/Dental Surgery		✓
§32-1276.01—Dental Therapist		✓
§32-1284—Dental Hygienist		✓
Table 5 (continued)		
§32-1297.01—Denturist		✓
§32-1904—Pharmacist and Pharmacy Interns		✓
§32-1941—Providers of prescriptions or over the counter drugs or dangerous drugs		✓
§32-2022—Physical Therapist		✓
§32-2108.01—Real Estate, cemetery, and membership camping salesperson and broker		✓
§32-2123—Real Estate Broker or Salesperson		✓
§32-2371—Owners of Licensed Schools		✓

Applicable Law	1998	2020
§32-3620—Real Estate Appraiser		✓
§32-3668—Real Estate Appraisal Management Company		✓
§32-3669—Owner of Appraisal Management Company		✓
§36-113—Information Technology Person with the Department of Health Services who inspects facilities with children or vulnerable adults		✓
§36-207—Arizona State Hospital Employee or Volunteer		✓
§36-411—Employees and Owners of Residential Care Institutions, Nursing Care Institutions or Home Health Agencies		✓
§36-425.03—Children's Behavioral Health Program Personnel and Volunteers	✓	✓
§36-446.04—Nursing Care Institution Administrator and Assisted Living Facility Manager		✓
§36-594.01—Employee or Volunteer with The Division of Developmental Disabilities	✓	✓
§36-594.02—Adult Developmental Home Licensee, applicant or adult household member		✓
§36-882—Applicant for a Child Care Facility	✓	✓
§36-883.02—Personnel and Volunteers at Child Care Centers	✓	✓
§36-897.01—Child Care Group Home Certificate Holder	✓	✓
§36-897.03—Personnel and Volunteers at Child Care Group Homes	✓	✓
§36-3008—Personnel and Volunteers with Domestic Violence Services	✓	✓
§41-619.52—Member of the Board of Fingerprinting		✓
§41-619.53—Personnel Employed by the Board of Fingerprinting		✓

Applicable Law	1998	2020
§41-1954.01—Substance Abuse Treatment for Minors	✓	
§41-1964—Child Care Personnel	✓	✓
§41-1967.01—Child Care Home Provider		✓
§41-1968—Department of Economic Security (DES) employees having contact with children or vulnerable adults		✓
§41-1969—DES employees in an information technology position or with access to federal tax data		✓
§41-2814—Department of Juvenile Corrections Employees	✓	✓
§46-141—DES employee providing services to juveniles or vulnerable adults; Employee licensed by the Department of Child Safety, a Department of Child Safety contractor who had contact with juveniles or vulnerable adults, or an adult working in a group home, residential treatment center or other congregate care setting	✓- Subsection A	✓- Subsection A or Subsection B
§46-321—Child Care Food Program Sponsors	✓	✓

Table 5 compares the individuals initially required to have a Fingerprint Clearance Card to those currently required to have a Fingerprint Clearance Card.

Fingerprint Clearance Card Statistics

In recent years, the number of applications for fingerprint clearance cards received by DPS has increased.[137] This could be attributed to many factors, such as population growth in Arizona, job trends in Arizona, or because of the expansion of the Fingerprint Clearance Card Program. Why the numbers increase is not as important as the

[137] Arizona Department of Public Safety to Patrice Werlin, September 9, 2020.

fact that now a significant portion of Arizona's population's employability is regulated by the Fingerprint Clearance Card Program. As of January 2019, there were a total of 762,811 fingerprint clearance cards active and in use in Arizona.[138] The 2020 census showed that the population in Arizona was 7,151,502.[139] Assuming that the Arizona population was approximately the same for the year 2019 as it was in 2020, this means that approximately 10.6% of the Arizona population was required to have a fingerprint clearance card in 2019. In recent years, the requests for fingerprint clearance cards submitted to DPS dramatically increased each year. In 2016, DPS received 149,001 applications for fingerprint clearance cards; in 2017, DPS received 155,174 applications for fingerprint clearance cards; and in 2018, DPS received 173,371 applications for fingerprint clearance cards.[140] The overall increase in the requests for fingerprint clearance cards shows a trend that the Fingerprint Clearance Card Program is impacting more Arizonans annually.

Each year, thousands of Arizonans who apply for a fingerprint clearance card are denied the issuance of a fingerprint clearance card because of their criminal history. A public records request was submitted to Arizona's Department of Public Safety for the number of denied fingerprint clearance cards for the years 2016, 2017, and 2018 due to a misdemeanor conviction or a pending misdemeanor case. In 2016, 3,684 individuals were denied a fingerprint clearance card entirely due to having a misdemeanor conviction or a pending misdemeanor case; in 2017, 3,873 individuals were denied a fingerprint clearance card entirely due to a misdemeanor conviction or pending misdemeanor case;

[138] "Fingerprint Clearance Card," Arizona Department of Public Safety.
[139] "U.S. Census Bureau QuickFacts: Arizona," U.S. Census Bureau, accessed December 7, 2022, https://www.census.gov/quickfacts/fact/table/AZ/POP010220#POP010220.
[140] Arizona Department of Public Safety to Patrice Werlin, September 9, 2020.

and in 2018, 4,624 individuals were denied a fingerprint clearance card entirely due to having a misdemeanor conviction or pending misdemeanor case.[141] In just the three years of 2016, 2017 and 2018, over 12,000 Arizonans were denied a fingerprint clearance card because they had a disqualifying misdemeanor conviction on their record or because of an open misdemeanor disqualifying criminal case.[142]

In addition to individuals being denied the issuance of a fingerprint clearance card due to a disqualifying misdemeanor conviction or arrest on their record, individuals who already have an active fingerprint clearance card can have their card suspended immediately upon arrest for a disqualifying misdemeanor crime. In 2016, DPS suspended 1,131 active fingerprint clearance cards due to arrests for misdemeanor offenses; in 2017, DPS suspended 914 active fingerprint clearance cards due to arrests for misdemeanor offenses; and in 2018, DPS suspended 726 active fingerprint clearance cards due to arrests for misdemeanor offenses.[143] Thus, in these three years from 2016, 2017 and 2018, over 2,700 Arizonans had their fingerprint clearance card suspended immediately upon their arrest for a disqualifying misdemeanor offense.[144] With approximately 10% of the Arizona population having an active fingerprint clearance card, and thousands more each year who are denied a card or who have had their card taken away due to a criminal conviction or arrest, the Fingerprint Clearance Card Program has developed into a weighty collateral consequence in Arizona.

[141] Arizona Department of Public Safety to Patrice Werlin, September 9, 2020.
[142] Arizona Department of Public Safety to Patrice Werlin, September 9, 2020.
[143] Arizona Department of Public Safety to Patrice Werlin, September 9, 2020.
[144] Arizona Department of Public Safety to Patrice Werlin, September 9, 2020.

Types of Fingerprint Clearance Cards

In addition to the Arizona legislature expanding the breadth and applicability of the Fingerprint Clearance Card Program, they have also modified the Fingerprint Clearance Card Program to have two different categories of cards: standard cards and level one cards. The level one card has more total disqualifying offenses, but most of the additional disqualifying offenses for a level one card are felony offenses. Thus, level one cards and standard cards have approximately the same amount of disqualifying misdemeanor offenses. This means that individuals charged with a misdemeanor offense are subjected to approximately the same level of scrutiny, whether they have a level one card or a standard card, and face approximately the same amount of exposure for potential employability issues whether they have a level one card or a standard card.

Standard Fingerprint Clearance Card

Standard fingerprint clearance cards (standard cards) are regulated under A.R.S. § 41-1758.03.[145] This statute enumerates 105 categories of offenses, both felony and misdemeanor, that can preclude an individual from receiving a standard card.[146] Of the 105 offenses, 39 are specific criminal misdemeanor offenses, and two are broad categories that could encompass a variety of misdemeanor offenses that cannot be quantified.[147] Many of the listed disqualifying offenses should ostensibly preclude an individual from working with children or vulnerable populations such as: offenses that are sexual in nature, involve drugs, or are crimes of dishonesty (e.g., shoplifting, theft).

[145] Ariz. Rev. Stat. §41-1758.03 (2022).
[146] Ariz. Rev. Stat. §41-1758.03 (2022).
[147] Ariz. Rev. Stat. §41-1758.04(C) (2022).

However, some of the statutes listed below can be broadly applied to include conduct that may have no bearing on one's ability to responsibly and safely interact with children or vulnerable populations.

The 39 specific misdemeanor offenses that can disqualify an individual from obtaining a standard card are:

1. §13-1201 Endangerment.*
2. §13-1202 Threatening or intimidating.*
3. §13-1203 Assault.
4. §13-1208(c) Assault by vicious animals.
5. §13-1402 Indecent exposure.*
6. §13-1403 Public sexual indecency.*
7. §13-1802 Theft.*
8. §13-1805 Shoplifting.*
9. §13-2005 Obtaining a signature by deception.
10. §13-2103 Receipt of anything of value obtained by fraudulent use of a credit card.*
11. §13-2105 Fraudulent use of a credit card.*
12. §13-2106(a)(1) Possession of any machinery, plate or other contrivance or incomplete credit card.
13. §13-2108 Fraud by persons authorized to provide goods or services.*
14. §13-2109 Credit card transaction record theft.*
15. §13-3102 Misconduct involving weapons.*
16. §13-3103 Misconduct involving explosives.
17. §13-3102 Concealed weapon violation.*
18. §13-3402 Possession and sale of a vapor-releasing substance containing a toxic substance.*
19. §13-3404.01 Sale of precursor chemicals.*
20. §13-3405 Possession, use or sale of marijuana, dangerous drugs or narcotic drugs.*
21. §13-3456 Possession or possession with intent to use an imitation controlled substance.
22. §13-3457 Possession or possession with intent to use an imitation prescription-only drug.
23. §13-3458 Possession or possession with intent to use an imitation over-the-counter drug.
24. §13-3459 Manufacture of certain substances and drugs by certain means.
25. §13-1502 Trespass.
26. §13-1503 Trespass.
27. §13-1504 Trespass.*
28. §13-2315 Racketeering.*

29. §13-1602 Criminal damage.*
30. §13-2910 Cruelty to animals.
31. §13-3214 Prostitution.
32. §13-1302 Custodial Interference, Domestic Violence.*
33. §13-1303 Unlawful Imprisonment, Domestic Violence.*
34. §13-1425 Unlawful Distribution of Images, Domestic Violence.
35. §13-2810 Interfering with Judicial Proceedings, Domestic Violence.
36. §13-2904 Disorderly Conduct, Domestic Violence.*
37. §13-2915 Preventing Use of Telephone in an Emergency, Domestic Violence.
38. §13-2916 Use of an Electronic Communication to Terrify, Domestic Violence.
39. §13-2921 Harassment, Domestic Violence.*

[148]

In addition to the 39 specific misdemeanor offenses listed above that can disqualify an individual from obtaining a standard card, there are two broad categories of offenses that can disqualify a person from obtaining a standard card. The two broad categories listed in A.R.S. § 41-1758.03 (C) are "child neglect" and "misdemeanor offenses involving contributing to the delinquency of a minor."[149] These two categories make certain conduct disqualifying, conduct which could be prosecuted through various criminal statutes. Since these categories of conduct do not specifically articulate which statutes they encompass, it is impossible to quantify the number of criminal offenses that could possibly be considered to fall into their category and, consequently, making them a disqualifying offense. Total, A.R.S. § 41-1758.03 (C) contains at least 39 different misdemeanor offenses that would disqualify an individual from obtaining a standard card and two broad categories of potential disqualifying offenses.[150]

[148] Ariz. Rev. Stat. §41-1758.03(C) (2022). The criminal offenses marked with an * indicate that the articulated statute allows for that crime to be prosecuted either as a felony or a misdemeanor.
[149] Ariz. Rev. Stat. §41-1758.03(C) (2022).
[150] Ariz. Rev. Stat. §41-1758.03(C) (2022).

Level One Fingerprint Clearance Cards

Level one fingerprint clearance cards (level one card) are regulated under A.R.S. § 41-1758.07 and this statute also enumerates the offenses that preclude an individual from obtaining a level one card.[151] A.R.S. §41-1758.07 has 116 categories of offenses, both felony and misdemeanor, that can preclude an individual from being issued a level one card.[152] This statute contains the exact same 39 enumerated misdemeanor disqualifying offenses and two broad categories as the standard card statute. Additionally, the level one card statute includes five more misdemeanor offenses that will disqualify an individual from obtaining a level one card. These five additional misdemeanor offenses are:

1. §13-1213 Aiming a laser pointer at a peace officer or an occupied aircraft; classification; definitions.
2. §13-3402 Misdemeanor possession and misdemeanor sale of peyote.
3. §13-3453 Misdemeanor manufacture or misdemeanor distribution of an imitation controlled substance.
4. §13-3454. Misdemeanor manufacture or misdemeanor distribution of an imitation prescription-only drug.
5. §13-3455 Misdemeanor manufacture or misdemeanor distribution of an imitation over-the-counter drug.

[153]

Thus, A.R.S. § 41-1758.07 contains at least 44 specifically enumerated misdemeanor offenses that would disqualify an individual from obtaining a level one card and two broad categories of offenses.[154]

[151] Ariz. Rev. Stat. §41-1758.07 (2022).
[152] Ariz. Rev. Stat. §41-1758.07 (2022).
[153] Ariz. Rev. Stat. §41-1758.07 (2022). Offenses numbered two through five are statutorily designated as felony offenses, but potentially could later be designated as a misdemeanor offense. Thus, it possible for the offenses numbered two through five to result in a misdemeanor conviction under the listed statute numbers.
[154] Ariz. Rev. Stat. §41-1758.07 (2022).

Studying these laws that govern the Fingerprint Clearance Card Program evidences the breadth of the program, both with the categories of persons who are required to have a fingerprint clearance card and the number of criminal offenses that can disqualify a person from having a fingerprint clearance card.[155] Furthermore, as established in Chapter Two, collateral consequences, such as the Fingerprint Clearance Card Program explored in this chapter, are not part of the criminal justice system nor are they disclosed to the accused during the criminal case. Accordingly, this thesis studies whether the separation of these systems of punishments causes inequitable impacts on self-represented individuals. However, before exploring the intersections of collateral consequences and the criminal justice system, first it is important to recognize reform efforts attempted thus far in Arizona.

[155] "Board of Fingerprinting (Board)," Arizona State Library, accessed December 7, 2022, https://azlibrary.gov/sla/agency_histories/board-fingerprinting-board.

Chapter VI.

Employment-Related Collateral Consequence Reform Efforts

Critics of this thesis may claim that Arizona has been relatively progressive in implementing reformatory efforts that address employment-related collateral consequences. Yes, Arizona has adopted measures to help mitigate these collateral consequences. In 2021, Arizona received the Collateral Consequences Resource Center Reintegration Champion Award, recognizing that Arizona "…enacted eight new laws, including a broad new record clearing law, two laws improving its occupational licensing scheme, and a judicial 'second chance' certificate."[156] However, these efforts address separate issues from those raised in this thesis. This thesis calls for reform efforts before the collateral consequences are imposed upon the individual accused or convicted of a crime by adopting measures to provide transparency about potential collateral consequences and taking collateral consequences into account when assessing an individual's Sixth Amendment right to counsel. Conversely, the reform efforts thus far in Arizona have only helped people already suffering employment-related collateral consequences.

The current measures in Arizona help facilitate the reintegration of individuals with a criminal history back into the workforce and have somewhat mitigated the impacts of certain collateral consequences that affect employability. Approximately 1.5 million Arizonan adults have a criminal arrest or conviction on their record, which critically

[156] "Arizona," Collateral Consequences Resource Center, accessed December 7, 2022, https://ccresourcecenter.org/tag/arizona/.

affects their employability.[157] In 2017, Governor Ducey signed Executive Order 2017-07 to help the employability of individuals with criminal records, arguing that, "Every Arizonan should have the opportunity to participate in the workforce, including those with a criminal background."[158] The Executive Order established hiring procedures for all State Agencies applicable for the initial stages of the hiring process. The Executive Order specifically prevents a criminal record from, in and of itself, disqualifying someone from initially getting the interview and forbids the agency from asking the applicant whether they have a criminal record.

However, the Executive Order still allows State Agencies to "…inquire into the criminal record of an applicant after the applicant has submitted a job application and provided an initial interview."[159] The Executive Order also allows "convictions of particular crimes" to "…preclude the applicant from employment in the particular job to which the person has applied."[160] Consequently, this Executive Order does not stop an employer from refusing to hire someone based on their criminal history. Instead, it just ensures that the applicant gets an interview before their criminal record is considered. Furthermore, the Executive Order carves out several exceptions that allow for the protections of the Executive Order to be avoided. One such exception is its applicability when a "state or federal law prohibits a person from holding a job due to prior criminal conduct."[161] Thus, the Executive Order is not binding upon the Fingerprint Clearance Card Program.

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[157] Douglas A. Ducey, State of Arizona Governor, "Second Chance Employer," 2017–07 Executive Order.
[158] Douglas A. Ducey, State of Arizona Governor, "Second Chance Employer."
[159] Douglas A. Ducey, State of Arizona Governor, "Second Chance Employer."
[160] Douglas A. Ducey, State of Arizona Governor, "Second Chance Employer."
[161] Douglas A. Ducey, State of Arizona Governor, "Second Chance Employer."

Arizona offers protections for individuals with a criminal history seeking public employment. §A.R.S. 13-904 requires that no person be "…disqualified from employment by this state or any of its agencies or political subdivisions solely because of a prior conviction for a felony or misdemeanor within or without this state"'[162] However, this statute still allows a person to be "…denied employment by this state or any of its agencies or political subdivisions by reason of the prior conviction for a felony or misdemeanor if the offense has a reasonable relationship to the functions of the employment sought."[163] Thus, this statute tightens the relationship between one's criminal history and its ability to disqualify someone from employment. However, as a consequence to this exception, Arizona or "any of its agencies or political subdivisions" broadly maintain the authority to deny employment to individuals with a criminal history.[164] Thus, programs such as the Fingerprint Clearance Card Program avoid the public employment protections afforded by this statute.

Arizona has also passed legislation allowing individuals to submit a request to find out if their criminal history will impact their ability to get a job. Under A.R.S. § 41-1093.04, applicants may petition licensing boards for a preliminary determination to see if their criminal history will impact their employability.[165] However, the statute exempts the Fingerprint Clearance Card Program. Thus, consistent with the other reform efforts in Arizona, individuals requiring a fingerprint clearance card are excluded from the protections of this statute.

[162] Ariz. Rev. Stat. §13-904 (2015).
[163] Ariz. Rev. Stat. §13-904 (2015).
[164] Ariz. Rev. Stat. §13-904 (2015).
[165] Ariz. Rev. Stat. §41-1093.04 (2018).

Overall, collateral consequences persist in causing employability problems in Arizona. A 2020 National Conference of State Legislatures publication, "Arizona Snapshots of Employment-Related Consequences," details the extensive impact collateral consequences still have on employment in Arizona.[166] Below are two figures from this publication. While they are not limited to showing consequences specifically for misdemeanor offenses, they are still striking in their display of how much employability is impacted by collateral consequences in Arizona.

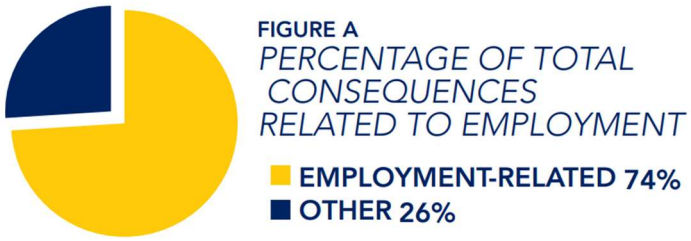


Figure 1. Collateral Consequence Percentages— Overall versus Employment.

Figure 1 shows how many collateral consequences in Arizona are employment-related compared to the total amount of collateral consequences in the state.[167]

[166] "Arizona Snapshot of Employment-Related Collateral Consequences," Justice Center: the Counsel of State Governments.
[167] "Arizona Snapshot of Employment-Related Collateral Consequences," Justice Center: the Counsel of State Governments.



Figure 2. Number of Employment-Related Consequences by Type.

Figure 2 breaks down the numbers for the specific sub-types of employment-related collateral consequences that are in effect in Arizona.[168]

As demonstrated in these figures, the widespread employability issues due to collateral consequences in Arizona continue. Figure 1 demonstrates that employment-related consequences are 74% of all the collateral consequences in the state, and Figure 2 then shows that 376 of which are related to occupational licensing, of which: 261 are related to business licensing, and 172 are directly related to employment. Therefore, despite the collateral consequence reform efforts discussed earlier in this section, employment-related consequences remain the dominant type of collateral consequences in the state. Furthermore, it seems that the collateral consequence reform efforts taken thus far in Arizona were insufficient to substantially mitigate employment-related collateral consequences given the prevalence of employment-related consequences in the Arizona that remain. This thesis suggests that the reform efforts adopted thus far in Arizona are too little, too late. They attempt to help people after the state has already imposed detrimental restrictions on their employability.

[168] "Arizona Snapshot of Employment-Related Collateral Consequences," Justice Center: the Counsel of State Governments.

Nonetheless, all of these efforts in Arizona have been steps in the right direction for collateral consequence reform, as they do mitigate employment-related collateral consequences for some individuals. Furthermore, the fact that Arizona has adopted these reform efforts shows Arizona's recognition of the importance of employment-related collateral consequences. However, all reform efforts are structured to avoid addressing collateral consequences head-on. Instead, their mitigation efforts are only applicable after the collateral consequences have already been imposed and the individual suffers from employability issues due to their criminal history. Therefore, there is still a need in Arizona to make reform efforts regarding collateral consequences before they are ever imposed upon an individual, as this thesis proposes.

Chapter VII.

Collateral Consequence Reform—A Multi-Pronged Approach

When a person is charged with a misdemeanor crime, the punishments imposed by the criminal court can be just a small fraction of the overall punishments the criminally accused might ultimately suffer. Like the rest of the U.S., Arizona has an entire shadow system of additional punishments—collateral consequences. Even though collateral consequences are triggered by the criminal case and may be just as impactful on the accused as the punishments from the criminal court, they still are not formally part of the criminal justice system. Historically, the criminal justice system has not been legally obligated to notify defendants of their exposure to collateral consequences. Additionally, since collateral consequences are not considered part of the sentence from the criminal case, they are not taken into consideration as part of the court's determination for if a criminal defendant gets an attorney. Overall, collateral consequences remain an ambiguous, separate system of punishments that the criminal justice system is, generally, allowed to overlook. Therefore, criminal defendants may not even know that these additional punishments exists. By bifurcating the criminal justice system from collateral consequences, Arizona is withholding information from criminal defendants, and self-represented defendants are likely prejudiced due to this lack of information. Accordingly, Arizona should adopt reform efforts to officially incorporate collateral consequences into the criminal justice system such as implementing measures to provide transparency about collateral consequences and by adopting a more holistic approach to the Sixth Amendment right to counsel analysis that accounts for the impacts of collateral consequences.

The Need for Transparency

Arizona should be forthright about collateral consequences so that criminal defendants are aware of the complete spectrum of punishments that can result from their case. As demonstrated in the previous sections, it is likely that most misdemeanor defendants in Arizona represent themselves against their charges. As such, there is no good-faith reason for the government to withhold telling the criminally accused about the potential of collateral consequences. By failing to fully inform defendants, the system circumvents their ability to accurately assess the potential impacts of their case and, thus, their ability to present a capable defense. To address this, Arizona can provide transparency by directly connecting collateral consequences to their triggering criminal charges within the criminal codebooks, and by requiring judges in all criminal cases to tell defendants that they may be subjected to collateral consequences. By adopting these measures, Arizona can shed light on the shadow system of punishments operating within the state, and by doing so, can help ensure that self-represented defendants are not prejudiced due to this lack of information.

Cataloging Collateral Consequences

If a person is charged with a crime, they should be able to easily locate the potential consequences, both criminal and collateral, that they are exposed to because of their criminal case. However, as it stands, Arizona does not include collateral consequences within the criminal codebooks where the punishments for crimes can be found. Thus, if someone charged with a crime looks up the law to see exactly what punishments they are facing, it will not be readily apparent that there exist collateral consequences that can stem from that particular criminal offense. Arizona should include

potential collateral consequences within the criminal codebook so that they are directly linked to the criminal statutes that trigger their implementation and are readily accessible. By doing so, Arizona can make sure that information about collateral consequences is apparent and readily accessible. If the system is going to expect individuals to represent themselves in a criminal court and make informed decisions on how to handle their case, the system should not hide the realities that the criminal defendants are exposed to because of their case.

To include collateral consequences within the criminal codebooks, Arizona first needs to comprehensively catalog all collateral consequences in effect in the state. As discussed in the Collateral Consequences section, the NICC has already created a nationwide catalog of collateral consequences, including collateral consequences in effect in Arizona. Thus, the NICC has collected the bulk, if not all, of the data that Arizona needs for compiling collateral consequences. Arizona could take this information and publish it within their criminal codebooks so that the punishments of collateral consequences are apparent as potential punishments that can be mandated by the criminal court.

However, while the NICC collateral consequences inventory website is an informative tool, it is not linked to the Arizona criminal justice system. If someone were charged with a crime in Arizona, they would not be directed to this website to research if there would be any collateral consequences associated to their case. Furthermore, as noted earlier in this thesis, even if the criminally accused found this website and used it to research their criminal charges, the website is limited in that it does not allow one to search for specific criminal charges or statute numbers in such a way that the specific

collateral consequences they trigger are evident. Therefore, the NICC website is not a sufficient resource for Arizona to rely upon to provide transparency as to collateral consequences. Going forward, Arizona needs to link collateral consequences to the criminal codebook so that Arizona, in its own capacity, provides transparency around collateral consequences in effect in the state.

Collateral Consequences and Prosecutorial Discretion

Adopting transparency measures is also necessary so that prosecutors can account for them in their "disposition considerations."[169] As explained previously, collateral consequences operate outside the criminal justice system. Thus, publishing collateral consequences within the criminal codes will also render crucial information on collateral consequences readily accessible for prosecutors. Moreover, prosecutors should receive training on collateral consequences to acquire a comprehensive understanding of the full spectrum of punishments the accused may suffer as a result of the criminal case. Adopting these measures will assist the prosecutor assessing criminal cases and seeking appropriate outcomes with collateral consequences being factored into their decision making.

As illustrated in the introduction to this thesis, prosecutors have significant power in criminal cases. The power of a prosecutor exists by virtue of their role as the government representative vested with the ultimate authority to decide the official criminal charges to be brought against someone.[170] The power of prosecutorial discretion

[169] Catherine A. Christian, "Collateral Consequences: Role of the Prosecutor," *Howard Law Journal* 54 (Spring 2011): 749.
[170] Ariz. Rev. Stat. §11-532. Prosecutors have the ability to modify the charges against an individual though their authority to "draw indictments and informations."

was recognized by former Attorney General of the United States, Robert H. Jackson, who argued the following:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous…If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other motives, he is one of the worst.[171]

In addition to the innate power of the prosecutorial role, such power has only expanded due to the rise in collateral consequences. For example, a prosecutor can modify criminal charges in a case for the purpose of directing whether collateral consequences are imposed. Furthermore, because of "ubiquitous plea bargaining … prosecutors can deliberately exercise discretion to trigger or avoid" important collateral consequences.[172] Thus, by virtue of the prosecutor's authority in the criminal case, they can exercise their power to alter the criminal case, to direct the course of collateral consequences. Accordingly, given this structure of the criminal justice system, prosecutors should receive training on collateral consequences so that they have independent knowledge of them and their applicability and so they can be accounted for in their assessments of the case.

Without information as to collateral consequences, a prosecutor cannot comprehensively assess the impacts the accused will suffer because of the criminal case and, thus, cannot accurately ensure that the punishments suffered are in fact proportional to the facts of the alleged crime. This ignorance conflicts with the function of a

[171] Christian, "Collateral Consequences: Role of the Prosecutor."
[172] Eisha Jain, "Prosecuting Collateral Consequences," *Georgetown Law Journal*, 104 (2016): 1197.

prosecutor. According to the Arizona Supreme Court Ethical Rules, a prosecutor must act "not simply [in the role] of an advocate" but as that "of a minister of justice."[173] To effectively administer justice, prosecutors should ensure the totality of the punishments imposed, both civil and criminal, are appropriate. Thus, they need to account for collateral consequences.

Some legal scholars have expressed concern about prosecutors accounting for collateral consequences, arguing that they "…are not necessarily within prosecutors' expertise."[174] Instead, according to the argument, "Collateral consequences represent a legislative judgment about the appropriate sanction for certain conduct that prosecutors should not second guess."[175] However, legislative judgment is not a convincing reason for prosecutors to not consider collateral consequences. The legislature is also the body of law that determines the statutory minimums and maximums for which a person can be sentenced upon conviction of a crime. As a matter of course, prosecutors use their discretion to implement those punishments outlined by the legislature given the facts of individual cases. Collateral consequences are no different. Therefore, the position that prosecutors should not consider collateral consequences because it circumvents legislative judgment is less than convincing. However, there is a valid concern that prosecutors may not have expertise on collateral consequences, especially given the lack of transparency and training surrounding collateral consequences.

For example, in Arizona, current measures for attorneys, especially prosecutors, to acquire knowledge on collateral consequences is limited. Arizona has the Arizona

[173] Ariz. R. Sup. Ct. ER 3.8.
[174] Robert M.A. Johnson, "Prosecutors Should Consider Collateral Consequences," *Criminal Law Practitioner* 2, art. 9 (2015): 83.
[175] Johnson, "Prosecutors Should Consider Collateral Consequences."

Prosecuting Attorneys' Advisory Council (APAAC), which "…provides a variety of services to prosecutors, the primary mission," being "...to coordinate and provide training and education to prosecutors throughout Arizona."[176] Thus, APPAC seems to be the logical starting point for offering training to prosecutors on collateral consequences. The APAAC website only allows members to search their catalog of continuing legal education trainings. However, a general search in the search tab of the APAAC website for the term "collateral consequence" did not yield any results. Though information as to whether APAAC offers any trainings on collateral consequences is not readily available to the public, it does not appear to be likely. Furthermore, a search of the Arizona State Bar continuing legal education catalog shows only two courses that address collateral consequences in their course content: "Criminal Justice Reforms" a three-hour class, and "A Survey of Criminal Misdemeanor Law: A Modest Means Project Series Seminar," a 90-minute class. Both only contain training on collateral consequences as just one of many topics discussed during the brief courses. Thus, while these classes are steps in the right direction in offering training on collateral consequences, they are not sufficient to fully train on collateral consequences. They are especially insufficient for training prosecutors, considering how they require an understanding of the full spectrum of collateral consequences as punishments to the crimes which they are bringing against individuals.

In summation, there remains a need in Arizona for prosecutors to transparently account for collateral consequences. To do so first requires that prosecutors be trained on collateral consequences, without which they cannot make a full, comprehensive

[176] Arizona Prosecuting Attorneys' Advisory Council. "About APAAC." Accessed December 15, 2022. https://www.apaac.az.gov/about-apaac.

assessment of their cases. Furthermore, without accounting for collateral consequences, prosecutors cannot determine what disposition results in a fair set of punishments, given the facts of the underlying case.

Judicial Advisement

Another means to provide transparency on potential collateral consequences is for Arizona to require judges in criminal cases to advise the accused that they could also be subjected to collateral consequences. As shown in the research presented in the Collateral Consequences section of this thesis, it is possible for the accused to go through the entire criminal case without ever knowing that their case exposes them to collateral consequences.[177] Thus, there is a need to implement measures that provide more transparency about the potential of collateral consequences. Requiring all judges of criminal cases to notify the accused of collateral consequences provides a uniform approach that addresses these concerns.

Currently, Arizona already requires judges to read a judicial advisory to defendants notifying them of the potential for immigration collateral consequences. Arizona Rule of Criminal Procedure 17.2(B)(1) requires judges to specifically state the following in every criminal case:

> If you are not a citizen of the United States, pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the United States, or could prevent you from becoming a United States citizen.[178]

[177] American Bar Association. "Chapter 19—Collateral Sanctions and Discretionary Disqualification of Convicted Persons—Introduction."
[178] Ariz. R. Crim. P. 17.2(B)(1).

The adoption of Arizona Rule of Criminal Procedure 17.2(B)(1) shows a recognition of the severity of immigration collateral consequences. In addition to Arizona, at least 27 other jurisdictions in the U.S. require a judge to advise the criminally accused of the potential for immigration collateral consequences.[179] This movement of requiring an immigration advisory in criminal cases illustrates the growing acknowledgment of how important it is that the accused be aware of potential collateral consequences, in this case, immigration consequences, before they can make an informed decision on how to handle their criminal case.

Arizona also requires that a judge only accept a plea in a case if the defendant has made the plea "voluntarily and intelligently."[180] Arizona Rule of Criminal Procedure 17.1 states that part of the assessment of whether the plea was voluntary and intelligent is the court making sure that rule 17.2, the immigration advisory was read to the accused. This concept should be extended to all collateral consequences, as the logic is the same—a person cannot make a voluntary and intelligent decision on how to handle their case if potential consequences are unknown. While immigration consequences are severe, so are other collateral consequences, as exemplified by the Fingerprint Clearance Card Program case study. Therefore, Arizona should adopt an additional judicial advisory requiring the court to notify all defendants about their overall potential exposure to these other out-of-court punishments.

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[179] Nikki Reisch and Sara Rosell, "Ensuring Compliance With Padilla v. Kentucky Without Compromising Judicial Obligations Why Judges Should Not Ask Criminal Defendants About Their Citizenship/Immigration Status" (Immigrant Defense Project, New York University School of Law, November 2010), https://www.immigrantdefenseproject.org/wp-content/uploads/2011/11/IDP_Judicial_Inquiry_Into_Status_Jan20111.pdf.
[180] Ariz. R. Crim. P. 17.1.

Proponents for collateral consequence reform have provided suggestions on how to provide criminal defendants with general knowledge of potential collateral consequences. For example, the Act, previously discussed in Chapter Two, suggests that the accused be read a "Notice of Collateral Consequences" during the pretrial phase of their case and prior to sentencing.[181] Furthermore, the Act articulates that, "The court shall confirm that the individual received and understands the notice…and had an opportunity to discuss the notice with counsel," prior to entering a plea in the case.[182] However, the "method of notification is deliberately flexible" as to who notifies the accused of potential collateral consequences and how they do so.[183] The Act only requires that a "designated governmental agency or official" notice the accused of the possibility of collateral consequences.[184] The Act does not specifically require that the judge tell the defendant or that the defendant be advised in open court in any capacity about collateral consequences. Furthermore, the Act assumes that the accused is represented by counsel, which, in Arizona, is likely not the case. While this Act is a step in the right direction, nonetheless, its intentional ambiguity with how defendants can be notified and the assumption that the defendant is represented by counsel, both leave room for the adoption of notification methods that do not fully resolve the transparency issues surrounding collateral consequences within the criminal justice system.

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[181] "Collateral Consequences of Conviction Act," National Conference of Commissioners on Uniform State Laws.
[182]"Collateral Consequences of Conviction Act," National Conference of Commissioners on Uniform State Laws.
[183] "Collateral Consequences of Conviction Act," National Conference of Commissioners on Uniform State Laws.
[184] "Collateral Consequences of Conviction Act," National Conference of Commissioners on Uniform State Laws.

Similarly, legal scholar Jenny Roberts suggests that courts impose a reasonableness standard in determining whether there is a duty to inform the accused of the potential of collateral consequences.[185] That is, the court should require, according to Roberts, that warnings be read about consequences whenever a reasonable person in the position of the accused would find the knowledge of the collateral consequences to be an important factor in deciding how to plea in the case.[186] However, this sort of judicial case-by-case analysis creates an unnecessary burden on the court to determine when to inform a defendant about the potential of collateral consequences, and it exposes the case to appellate issues if the court does not read the advisory but should have. Instead, a more uniform approach is needed, according to which the advisory is read in all cases. This eliminates the potential error factor of a judge not reading it when perhaps the judge should and circumvents appellate issues if collateral consequences were imposed and the judge did not read the advisory.

This thesis suggests, further, that the judicial advisory specifically be read to the accused on two different occasions. First, the judicial advisory should be read at the arraignment so that the accused is put on notice as to the issue of collateral consequences as soon as the case commences. This upright advisement provides transparency at the beginning of the case as to what the actual implications of the case may be. As discussed in the Introduction and below in the Defense Attorneys and Collateral Consequences subsection, collateral consequences can impact a person's defense to their criminal case,

[185] Jenny Roberts, "The Mythical Divide between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of 'Sexually Violent Predators,'" Minnesota Law Review 93 (2008): 670.
[186] Roberts, "The Mythical Divide between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of 'Sexually Violent Predators.'"

and, thus, fairness dictates that the government be upfront about the overall potential punishments that can result from a criminal case.

Second, the advisory should be reread as part of the plea colloquy. Including the judicial advisory as part of the plea colloquy mirrors the requirement of Arizona Rule of Criminal Procedure 17.2(B)(1), which is already required to be read as part of a plea colloquy. Therefore, requiring the general collateral consequence judicial advisory to be read again is a simple addition to the plea colloquy and ensures that the accused is aware of the potential of collateral consequences before changing their plea in the case. Again, this reinforces the government to be transparent about potential extrajudicial punishments.

Any convictions obtained by the government should always be obtained through the highest means of integrity possible, which should include the government being forthright with the accused about the full spectrum of potential punishments. Even if notifying the accused of collateral consequences does not actually change how they prepare their defense, it, nonetheless, should be required upon the government to disclose the truth of the full spectrum of punishments to criminal cases. The shadow system of punishments is unfair, if not deceitful. As such, Arizona needs to adopt measures to provide transparency as to collateral consequences.

Arizona Courts and the Right to Counsel

Distinct from the issue of transparency, Arizona courts further ignore collateral consequences by not accounting for them in the Sixth Amendment right to counsel analysis. As demonstrated by the example of the Fingerprint Clearance Card Program, collateral consequences can impose severe, long-lasting punishments on individuals

charged with or convicted of crimes. Thus, collateral consequences should no longer be bifurcated into a separate system of punishments and ignored when assessing how seriously a case impacts the criminally accused. By looking at collateral consequences, we can see that the current right to counsel threshold is likely no longer sufficient. Accordingly, Arizona should reexamine the right to counsel standard and adopt a more holistic approach that considers the impacts of collateral consequences.

The Sixth Amendment right to counsel has been interpreted on many occasions by SCOTUS, which has consistently emphasized the importance of the accused being represented by an attorney during a criminal prosecution. Nonetheless, throughout its rulings, SCOTUS used a punishment-based analysis to determine whether the severity of the sentence imposed by the court warranted the appointment of counsel. In 1979, SCOTUS adopted the currently used Sixth Amendment minimum standards in *Scott v. Illinois*, where the Court established actual incarceration as the threshold for when counsel must be appointed.[187] Though the nationwide rise of collateral consequences started in the mid-1980s (see Chapter Two), SCOTUS has not substantively readdressed the right to counsel despite the proliferation of collateral consequences. The legal concept of collateral consequences is no longer new. It is time they are accounted for.

Basing the seriousness of the impacts of a case just on the potential sentence from the court also ignores the fact that collateral consequences can be even more impactful on the accused than the sentence imposed by the court. If someone were facing 24 hours in jail, they would be appointed an attorney. However, if someone were facing deportation or a lifetime of disqualification from their career, they would not be entitled to an

[187] *Scott v. Illinois*, 440 U.S. 367 (1979).

attorney. “In some ways, the enmeshed penalties of a criminal conviction are worse than a temporary loss of liberty through incarceration because many of them are permanent.”[188] It is quite possible that, for many individuals, spending a stint in jail is less impactful than being fired or deported. Though this measurement was perhaps appropriate at one time, incarceration as the measurement of seriousness is no longer an appropriate tool. Since the court has used a punishment-based approach thus far in determining the threshold for the right to counsel, a natural extension to this suggests that collateral consequences should be accounted for in assessing the severity of the punishments of a criminal case. Indeed, this thesis predicts that once they are accounted for, the right to counsel will extend far beyond just those cases in which the accused is facing jail. Furthermore, this thesis calls for Arizona to explicitly overturn the ruling in *Campa v. Fleming* in which the Arizona appellate court held that collateral consequences, in that case deportation and probation revocation proceedings, were collateral to the criminal justice system, and consequently, did not necessitate the protections of the Sixth Amendment right to counsel protections.[189] This thesis contends the opposite of the ruling in *Campa*- —collateral consequences are punishments to crimes and should be recognized as such by the criminal justice system and certainly within the right to counsel analysis.

As indicated in the introduction, defense attorneys can, and do, help criminal defendants mitigate collateral consequences though their defense strategies in the criminal case. However, this thesis’ recommendation is that collateral consequences be

[188] John P. Gross, “What Matters More: A Day in Jail or a Criminal Conviction?” *William & Mary Bill of Rights Journal* 30, no. 3 (October 2013): 55.
[189] *Campa v. Fleming*, 134 Ariz. 330, 656 P.2d 619 (1982).

taken into account in the punishment-based Sixth Amendment right to counsel analysis is separate from the consideration as to how or if defense attorneys actually address collateral consequences within their scope of representation. Collateral consequences should be considered in the right to counsel analysis strictly because they, too, are punishments that result from crimes. Even if a defense attorney entirely ignored the reality of collateral consequences, that does not change the fact that the collateral consequences are still punishments triggered into effect because of the criminal case and, consequently, should be accounted for when calculating the severity of the punishment that results from the criminal case. The added fact that a defense attorney can mitigate collateral consequences through their defense strategy merely strengthens the argument.

Defense Attorneys and Collateral Consequences

Though defense attorneys, generally, are not legally required to advise on collateral consequences, they often do, regardless. This is reflected in the Arizona defense bar's habit of accounting precisely for them to mitigate their impacts upon their clients. The following statement by an Arizona defense attorney reflects this existing tendency: "In Arizona, the list of collateral consequences imposed upon someone convicted of a crime is extensive. Unfortunately, there is no actual list of every collateral consequence that you may face. You need an experienced criminal defense attorney that really understands the potential consequences 'outside the courtroom.'"[190] This statement illustrates the lack of transparency with collateral consequences, and accordingly, how defense attorneys address them throughout their representation of their clients. By

[190] "Collateral Consequences of Criminal Conviction in Arizona," Snader Law Group, accessed December 7, 2022, https://snaderlawgroup.com/collateral-consequences-of-a-criminal-conviction-in-arizona/.

studying the actual practices of defense attorneys in Arizona, we can thus see that incorporating collateral consequence considerations into the defense strategy is common practice.

A simple internet search was conducted to further showcase the common practice of defense attorneys addressing collateral consequences. For example, when searching for "DUI Tucson attorney" in Google, six law firms would appear on the first page of search results (My AZ Lawyers, The Behan Law Group, The Law Offices of Charnesky and Dieglio, Nesci and St. Louis Attorneys at Law, Michael Harwin Attorneys, and the Tucson DUI Lawyers). Similarly, when searching for "DUI Phoenix attorney" in Google, six law firms would appear on the first page of search results (Salwin Law Group; Gordon Thompson DUI & Defense Attorney; Arizona DUI Team; Law Office of Aaron M. Black, P.L.L.C.; Law Offices of Alcock and Associates, P.C.; and the Cantor Law Group). On each of these twelve websites, the defense attorneys discussed collateral consequences to a DUI criminal case as part of their argument why hiring a defense attorney is important. For example, attorney Aaron Black argues how "Collateral Consequences Could Negatively Impact Your Life" and why it is "essential" to "hire an experienced DUI lawyer to handle your case from the beginning," stating:

> In addition to the penalties a judge could impose after a conviction, you will also face collateral consequences that could negatively impact your life long after your sentence is finished…No matter your age, occupation or financial status, collateral consequences can significantly alter the course of your life. It is essential for you to hire an experienced DUI lawyer to handle your case from the beginning. He or she can help you protect your future by minimizing or completely avoiding the collateral consequences that could restrict your power to make your own personal decisions and control the quality of your life.[191]

[191] "Phoenix DUI Attorney Aaron Black | Best DUI Lawyer in Arizona," Aaron Black Law, accessed December 7, 2022, https://www.aaronblacklaw.com/.

This simple Google search provides a glimpse into the general practices of defense attorneys in Arizona, their recognition of the importance of collateral consequences, and their incorporation of them into their defense strategy.

Below is an advertisement placed in the May 2017 Tucson Lifestyle magazine. In this advertisement, defense attorney Janet Altschuler points out the importance of collateral consequences as a result of misdemeanor crimes. This advertisement addressed the need for a defense attorney to defend the criminal charge and associated collateral consequences as part of this process. In this ad, Altschuler states that collateral consequences "…may, in fact, disqualify you from certain jobs, may stop you from having firearms, and trigger life-altering consequences not imposed by a court. It is critical to know all the rules surrounding a domestic violence charge— and its consequences."[192]

[192] "Janet Altschuler PC," *Tucson Lifestyle*, May 2017.



[193]

These examples illustrate the intimate relationship collateral consequences have with the criminal cases and their status as something recognized and addressed by defense attorneys through the scope of their representation. Similarly, a different Phoenix-based defense attorney explains how his practice reflects an awareness of how

[193] "Janet Altschuler PC," *Tucson Lifestyle*.

self-representing clients, unaware of collateral consequences, are disadvantaged by a lack of transparency and right to counsel on his website.

> A couple of years ago, I was retained to help a young man charged with misdemeanor theft. He and his friend were drunk and walking through a hotel in a local city. As a joke, they grabbed the little gift bag that was on a luggage cart from a vendor at a conference in the hotel. Keep in mind, the bags were meant to be "giveaways." But the city elected to prosecute them for theft.
>
> The friend went to court and entered a diversion/deferred prosecution program. He completed the program, and the State dismissed his case. He thought the best outcome would be a dismissal. But to enter diversion he had to enter a contract with the prosecutor. And, as part of the contract, he had to admit the theft. Keep in mind, he was never convicted. But as a result of his admission to the theft, he lost his financial certificates that took him years to earn.
>
> His friend retained me. I knew of the potential risk that entering diversion would entail. Rather than enter diversion, we had him enter a plea to a misdemeanor for disorderly conduct, attend one alcohol class and pay a fine of less than $300. His conviction for the misdemeanor did not affect his licensing. He did not lose his job. And, when it was all over, we had the misdemeanor conviction set aside.[194]

This example clearly illustrates how a self-represented defendant was prejudiced simply because they did not know how to tailor their defense strategy to address collateral consequences. The self-represented person agreed to what seemed like a seemingly favorable result for their case by entirely avoiding having a conviction through entering into a diversionary program. However, because of their ignorance of collateral consequences, as well as the ineptitude of the court system, they suffered employment-related consequences, whereas the individual who retained an attorney was able to avoid the employment-related consequences. This exemplifies an awareness, on the part of

[194] "Collateral Consequences of Criminal Conviction in Arizona," Snader Law Group.

defense attorneys, of how self-represented individuals are disadvantaged within the criminal justice system because of collateral consequences.

The arguments and evidence presented in this section provide convincing reasons to believe that defense attorneys are addressing collateral consequences in their clients' cases, and as a matter of practice, are incorporating collateral consequences as part of their defense strategies. Furthermore, as established in this thesis, self-represented individuals may not even be aware that collateral consequences exist, much less how to incorporate them into their defense strategy. Consequently, self-represented individuals are disadvantaged within the criminal justice system, which is especially concerning given the high number of misdemeanor defendants in Arizona that are self-represented.

Padilla v. Kentucky—A U.S. Supreme Court Case Addressing Collateral Consequences

Even though defense attorneys seem to incorporate collateral consequences into their defense strategy, they are neither necessarily required to do so nor are they required, generally, to even advise the clients as to the potential of collateral consequences. In the landmark SCOTUS case of *Padilla v. Kentucky*, the Court specifically addressed immigration collateral consequences. In this ruling, SCOTUS held that, due to their unique nature, removal proceedings pose as a "particularly severe 'penalty'" to be triggered into effect by a criminal case.[195] Furthermore, SCOTUS established that they are so impactful upon the accused, that criminal defense attorneys are obligated to advise their clients about the potential of immigration consequences, and that a failure to do so amounts to ineffective assistance of counsel.[196] However, the Court only created this rule

[195] *Padilla v. Kentucky*, 559 U.S. 356 (2010).
[196] *Padilla v. Kentucky*, 559 U.S. 356 (2010).

of law for immigration consequences and did not extend this requirement to any other collateral consequences.[197] Thus, defense attorneys only have a legal obligation to tell their clients about the potential of immigration consequences.

Furthermore, the Court refused to deem deportation a collateral consequence, stating that even though "removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence."[198] Thus, deportation was carved out from the rest of collateral consequences because the Court found it to be so potentially impactful upon the criminally accused. Despite the Court's reluctance to call immigration consequences a collateral consequence, they are nonetheless collateral consequences by definition and implementation.

However, notwithstanding the severe nature of immigration consequences, they do not invoke Sixth Amendment right to counsel protections. So, if someone is charged with a crime and has a defense attorney, the defense attorney has an absolute duty to advise the client about the potential of immigration consequences. However, if a person is self-represented, the immigration consequences that are such a "particularly severe 'penalty'" of "intimate" relevance to the criminal case,[199] nonetheless, do not give the accused a right to an attorney. Thus, *Padilla v. Kentucky* proves the argument presented throughout this thesis—collateral consequences, here immigration, can be more serious of a penalty than punishments imposed by the criminal court. However, as shown in earlier parts of this thesis, other collateral consequences too can be quite impactful for the

[197] *Padilla v. Kentucky*, 559 U.S. 356 (2010).
[198] *Padilla v. Kentucky*, 559 U.S. 356 (2010).
[199] *Padilla v. Kentucky*, 559 U.S. 356 (2010).

accused. As such, the right to counsel analysis should be re-examined to account for collateral consequences, categorically, as they are all "intimately related to the criminal process" in their own right.[200]

Economic Impacts of Expanding the Right to Counsel

Expanding the Sixth Amendment right to counsel would undoubtedly be an enormous logistical and financial undertaking for the Arizona judicial system. But it should be done regardless. Inconvenience for the government is not a valid reason to withhold constitutional protections. Additionally, as discussed in Chapter Three, most states have, on their own, extended the applicability of the Sixth Amendment to offer more protections than the minimum standard established by SCOTUS.[201] Understanding that Arizona is in the minority contextualizes the limited scope of protections provided in Arizona and supports this thesis' argument that there is room to expand Arizona's right to counsel laws. Indeed, should Arizona choose to extend the right to counsel, it is encouraging to recognize that Arizona has many other states to look to for logistical and financial examples of how to do so.

In *Alabama v. Shelton*, SCOTUS addressed the *Scott* minimum right to counsel threshold. Former Justice Scalia, in his dissent, argued against extending the right to counsel because of the financial burdens it would impose on states. Justice Scalia claimed the burden imposed by extending the right to counsel "consists not only of the cost of providing state-paid counsel in cases of such insignificance that even financially

[200] *Padilla v. Kentucky*, 559 U.S. 356 (2010).
[201] Simpson, "A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?"

prosperous defendants sometimes forgo the expense of hired counsel; but also the cost of enabling courts and prosecutors to respond to the 'over-lawyering' of minor cases…"[202] Justice Scalia's argument focuses on the fact that states may have to pay for litigation through expenses incurred by paying for the defense attorney, the prosecutor, and the use of the courts, in cases considered petty and not worth the expense of providing such representation. He even goes as far to state that some cases are "of such insignificance" that "financially prosperous defendants" may not even hire a defense attorney for the charge. While it may seem that some criminal charges are petty or insignificant when viewed from the lens of the punishment imposed by the criminal court, they very well may not appear so once collateral consequences are accounted for. Moreover, his argument does not account for the impact such consequences have on defendants who cannot afford a defense attorney to begin with. Furthermore, Justice Scalia's argument is less compelling given that Arizona is in the minority of all jurisdictions in the U.S. with right to counsel standards. Most other states have been able to expand the right to counsel, and Arizona should address whether they should, too.

To aid in assessing Arizona's right to counsel standards, Arizona may need to turn to outside sources. For example, the Sixth Amendment Center (6AC), a non-profit organization, would be particularly instructive for Arizona in studying different jurisdictions and how they are able to implement their expansions of the right to counsel. The 6AC has already conducted comprehensive research on the right to counsel throughout the U.S. As 6AC puts it, they offer, "…as much information on the right to counsel as possible, so that all of those who are involved in making and carrying out

[202] *Alabama v. Shelton*, 535 U.S. 654 (2002).

policies to ensure the right to counsel have accurate information upon which to base their decisions, and so that residents, taxpayers, and voters can be informed."[203] Recognizing the complex nature of individual jurisdictions' needs for the right to counsel, the 6AC states the following:

> There is no one-size-fits-all model that all jurisdictions must use to deliver the effective right to counsel required by the Sixth Amendment. That is, each jurisdiction must take into account its unique court structures and cultures, geographic expanse and population centers, and criminal procedures, laws, and rules, to create a system that works best for the citizenry of each state…At the same time, policymakers and criminal justice stakeholders should not have to reinvent the wheel to solve every issue, instead being able to learn from what has succeeded and what has failed elsewhere.[204]

Such a comprehensive resource can help Arizona find information to meet the specific needs of the state, including how it should and should not implement changes. In addition to serving as a valuable information resource, the 6AC also provides technical assistance and independent evaluations of jurisdictions and their right to counsel standards.[205] Such services may be useful for Arizona in determining how to implement right to counsel reform efforts.

While finding a perfect correspondence between jurisdictions and their implementations of the right to counsel is unlikely, Arizona can, nonetheless, look to other jurisdictions for guidance. Moreover, Arizona should also look specifically to New Jersey, as it is the only state to consider collateral consequences in their Sixth Amendment right to counsel analysis. Thus, New Jersey should serve as a model

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[203] "Know Your State," Sixth Amendment Center, accessed December 13, 2022. https://sixthamendment.org/know-your-state/.
[204] "National Issues," Sixth Amendment Center, accessed December 13, 2022. https://sixthamendment.org/the-right-to-counsel-in-america-today/national-issues-in-providing-the-right-to-counsel/.
[205] "About Us," Sixth Amendment Center, accessed December 13, 2022. https://sixthamendment.org/about-us/.

jurisdiction for policy standards and case law on how to extend the right to counsel based on punishments imposed outside of the criminal court.

Limiting Collateral Consequences to Counseled Cases

Critics of this thesis may suggest that an alternative to expanding the right to counsel would be to limit the imposition of collateral consequences only to cases where the defendant was represented by an attorney. Adopting this limitation would seemingly address the concerns of self-represented defendants being prejudiced within the criminal justice system, as it would successfully insulate them from unfair exposure to collateral consequences. However, limiting collateral consequences to counseled cases, without additional collateral consequence reform efforts being implemented, would still allow collateral consequences to operate as a separate shadow system of punishments and would not actually solve most of the issues surrounding collateral consequences within the justice system.

Collateral consequences need to be accounted for at their multiple intersection points within the criminal justice system, as this thesis has amply demonstrated. Limiting collateral consequences to counseled cases does not address the need for the government to notify the criminally accused about collateral consequences as extrajudicial punishments. It also fails to ensure that punishments to criminal cases are proportionate to the underlying facts of the case. Moreover, it does not address the need for prosecutors to be able to consider collateral consequences when determining what criminal charges to bring against an individual and what plea terms are appropriate in each particular case. Thus, the court system and the criminal codebooks still need to provide transparency as to collateral consequences.

The inadequacy of the proposed solution to limit collateral consequences to counseled cases is evidenced by the Lautenberg Amendment, a federal law that imposes lifelong collateral consequences on individuals convicted of domestic violence offenses.[206] Under this law, those convicted of a domestic violence offense, whether misdemeanor or felony, become federally prohibited possessors.[207] This means that because of the domestic violence conviction, they forever lose their Second Amendment right to bear arms. However, the Lautenberg Amendment has a self-imposed limitation. It is only applicable to individuals who, in the underlying domestic violence case, were either represented by an attorney or knowingly and intelligently waived their right to counsel. So, the federal government has already used the measure of limiting collateral consequences to counseled cases. However, this collateral consequence is still imposed without the government or defense attorney having any requirement to notify the accused of this potential punishment and without the prosecutor having an obligation to consider it when forming the state's position on the case. So, at least with regard to this particular collateral consequence, the uncounseled defendants actually fair better because they are not exposed to this collateral consequence. Furthermore, because there are no transparency or mandatory disclosure requirements attached to this collateral consequence, counseled defendants may be prejudiced because they could be subjected to this collateral consequence without ever having been told about this possibility, even by their defense attorneys.

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[206] "1117. Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence," U.S. Department of Justice Archives, accessed December 7, 2022, https://www.justice.gov/archives/jm/criminal-resource-manual-1117-restrictions-possession-firearms-individuals-convicted.

[207] "1117. Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence," U.S. Department of Justice Archives.

Such problems surrounding collateral consequences are complex and not just limited to whether the accused has an attorney or not. In fact, these problems are intrinsic to collateral consequences themselves—how they have evolved, how they are imposed, and their continued operation separately, and semi-secretly, to the criminal justice system. As demonstrated by the Lautenberg Amendment, adopting just one collateral consequence reform effort, such as limiting their applicability to counseled cases, is not sufficient to address the numerous problems surrounding collateral consequences. Accordingly, a multi-pronged approach is necessary to address the multifaceted problems of collateral consequences and their relationship to the criminal justice system.

Conclusion

The lack of transparency surrounding collateral consequences is an egregious flaw in the Arizona criminal justice system. Arizona should be forthright about collateral consequences so that criminal defendants are aware of the complete spectrum of punishments that can result from their case. This is especially necessary in Arizona given the amount of self-represented misdemeanor defendants who do not have the "guiding hand of counsel"[208] to help them navigate the criminal justice system. Thus, this thesis calls for Arizona to take action to provide transparency around collateral consequences. Specifically, Arizona should link collateral consequences to the triggering criminal offenses within the criminal codebooks. Furthermore, Arizona should require judges in all criminal cases to advise the defendants that they may be subjected to collateral consequences, in addition to any punishments imposed by the criminal court. Also, prosecutors should receive training on collateral consequences, so that they may appropriately account for them in their assessment and preparation of the criminal case. By adopting these transparency measures, Arizona will no longer ignore collateral consequences and their shadow system of punishments that operates outside the realm of the criminal court. Additionally, providing transparency around collateral consequences can help the system as a whole function with more integrity, especially by addressing this

[208] *Powell v. Alabama*, 287 U.S. 45 (1932).

major source of systemic inequalities imposed upon self-represented misdemeanor defendants.

Furthermore, as the example of the Fingerprint Clearance Card Program's collateral consequences makes evident, in addressing the hundreds of collateral consequences to misdemeanor offenses in Arizona, the state's right to counsel standards should be re-examined to account for collateral consequences. A review of United States Supreme Court cases addressing this legal issue shows that the court already consistently uses a punishment-based analysis to determine if underlying criminal charges are severe enough to require counsel. Consistent with, but extending the Supreme Court's punishment-based analysis, this thesis demonstrates the need for a more comprehensive approach that accounts for collateral consequences as part of the existing, punishment-based calculus. If the analysis for who does and does not get an attorney hinges on the seriousness of the punishments of the case, then collateral consequences should be part of this analysis. Thus, this thesis calls for further investigation as to the Sixth Amendment right to counsel protections in Arizona. It predicts that once such collateral consequences are factored into the equation, the analysis will show that the current threshold is no longer sufficient and that more people than just those individuals facing jail should be represented by an attorney.

With this thesis, I hope to bring awareness to flaws in the Arizona criminal justice system, especially those at the expense of self-represented defendants. Future research would benefit from studying the individual misdemeanor cases in which fingerprint clearance cards were impacted. However, the Arizona Department of Public Safety does not release identifying information for individuals whose fingerprint clearance cards were

impacted due to a criminal offense. Thus, researching the specifics of these cases can only be conducted by DPS. As such, DPS, on its own, should initiate public records requests, similar to those conducted in this thesis, to every misdemeanor court in Arizona and request information on whether the individuals who had their fingerprint clearance cards impacted were represented by an attorney. Such requests would allow DPS to compare the data obtained from the courts to DPS's own data about what ultimately happened with those fingerprint clearance cards. Thus, the analysis and comparison of these data sets would show who was more likely to mitigate their Fingerprint Clearance Card Program collateral consequences—individuals represented by an attorney or self-represented individuals. Collecting and analyzing this data would conclusively show if misdemeanor defendants who were self-represented are suffering disparate collateral consequences, at least with regard to the Fingerprint Clearance Card Program.

Appendix 1. Public Records Requests—Collection of Self-Represented Data

Court Name	Responsive to request?	Collect Data?
Ajo Justice Court	✓	X
Apache Junction Justice Court	X	N/A
Apache Junction Municipal Court	✓	X
Arcadia Biltmore Justice Court	✓	✓
Arrowhead Justice Court	✓	✓
Avondale City Court	X	N/A
Benson Justice Court	✓	X
Bisbee Justice Court	✓	X
Bowie Justice Court	✓	X
Buckeye Municipal Court	✓	X
Bullhead City Justice Court	X	N/A
Bullhead City Municipal Court	X	N/A
Camp Verde Municipal Court	✓	X
Carefree-Cave Creek Municipal Court	✓	X
Casa Grande Justice Court	✓	X
Casa Grande Municipal Court	X	N/A
Central Pinal Justice Court Precinct 3	X	N/A
Chandler Municipal Court	✓	X
Chinle Justice Court	✓	X
Chino Valley Municipal Court	X	N/A
Clarksdale Magistrate Court	✓	X
Clifton Justice Court	✓	X
Clifton Municipal Court	X	N/A
Coolidge Municipal Court	✓	X
Copper Corridor Justice Court	X	N/A
Cottonwood Municipal Court	X	N/A
Desert Ridge Justice Court	✓	✓
Dewey-Humboldt Magistrate Court	✓	X
Douglas Justice Court	✓	X
Downtown Justice Court	✓	✓
Dreamy Draw Justice Court	✓	✓
Duncan Justice Court	✓	X
Eagar Municipal Court	X	N/A
East Mesa Justice Court	✓	✓

Appendix 1 (continued)		
Court Name	**Responsive to request?**	**Collected Data?**
El Mirage City Court	✓	X
Eloy Municipal Court	✓	X
Encanto Justice Court	✓	✓
Flagstaff Justice Court	X	N/A
Flagstaff Municipal Court	✓	X
Florence Municipal Court	X	N/A
Fountain Hills Municipal Court	X	N/A
Fredonia Justice Court	X	N/A
Fredonia Municipal Court	X	N/A
Gila Bend Municipal Court	✓	X
Gilbert Municipal Court	✓	X
Glendale City Court	✓	X
Globe Municipal Court	X	N/A
Globe Regional Justice Court	✓	X
Goodyear Municipal Court	✓	X
Green Valley Justice Court	✓	X
Guadalupe City Court	X	N/A
Hassyampa Justice Court	✓	✓
Hayden Municipal Court	✓	X
Highland Justice Court	✓	✓
Holbrook Justice Court	✓	X
Holbrook Magistrate Court	✓	X
Huachuca City Magistrate Court	✓	X
Ironwood Justice Court	✓	X
Jerome Municipal Court	✓	X
Kayenta Justice Court	✓	X
Kearney Magistrate Court	✓	X
Kingman Municipal Court	X	N/A
Kingman-Cerbat Justice Court	✓	X
Kyrene Justice Court	✓	✓
Lake Havasu City Consolidated Justice	✓	X
Lake Havasu Municipal Court	✓	X
Litchfield Park Municipal Court	✓	X
Mammoth Municipal Court	X	N/A
Manistee Justice Court	✓	✓
Marana Municipal Court	✓	Yes
Maricopa City Court	X	N/A
Mayer Justice Court	✓	X
McDowell Mountain Justice Court	✓	✓
Mesa Municipal Court	X	N/A
Miami Magistrate Court	✓	X

Appendix 1 (continued)		
Court Name	**Responsive to request?**	**Collected Data?**
Moon Valley Justice Court	✓	✓
Nogales City Court	✓	X
North Canyon Consolidated Justice Court	✓	X
North Canyon Municipal Court	✓	X
North Mesa Justice Court	✓	✓
North Valley Justice Court	✓	✓
Oro Valley Magistrate Court	✓	X
Page Justice Court	X	N/A
Page Magistrate Court	✓	X
Paradise Valley Municipal Court	✓	X
Parker Justice Court	✓	X
Parker Magistrate Court	X	N/A
Patagonia Municipal Court	✓	X
Payson Municipal Court	X	N/A
Payson Regional Court	✓	X
Peoria Municipal Court	✓	X
Phoenix Municipal Court	X	N/A
Pima County Consolidated Justice Court	✓	N/A
Pima Justice Court	X	N/A
Pima Municipal Court	✓	X
Pinetop Lakeside Justice Court	✓	X
Pinetop Lakeside Municipal Court	✓	X
Pioneer Justice Court (not open yet)	N/A	N/A
Prescott City Court	✓	X
Prescott Justice Court	✓	X
Prescott Valley Magistrate Court	✓	X
Puerco/Sanders Justice Court	✓	X
Quartzite Justice Court	X	N/A
Quartzite Magistrate Court	X	N/A
Round Valley Justice Court	✓	X
Safford City Court	✓	X
Safford Justice Court	✓	X
Sahuarita Municipal Court	✓	✓
Salome Justice Court	X	N/A
San Luis City Court	✓	X
San Marcos Justice Court	✓	✓
San Tan Justice Court	✓	✓
Santa Cruz Justice Court	✓	X
Scottsdale City Court	✓	X
Sedona Municipal Court	✓	X

Appendix 1 (continued)		
Court Name	**Responsive to request?**	**Collected Data?**
Seligman Justice Court	✓	X
Show Low Justice Court	✓	X
Show Low Magistrate Court	✓	X
Sierra Vista Justice Court	✓	X
Sierra Vista Municipal Court	✓	X
Snowflake Justice Court	X	N/A
Somerton Magistrate Court	✓	X
South County Justice Court	X	N/A
South Mountain Justice Court	✓	✓
South Tucson City Court	✓	X
Springerville Municipal Court	X	N/A
St Johns Justice Court	✓	X
St Johns Municipal Court	X	N/A
Star Valley Municipal Court	X	N/A
Surprise City Court	✓	X
Tempe Municipal Court	✓	X
Thatcher Municipal Court	✓	X
Tolleson City Court	✓	X
Tombstone Magistrate Court	✓	X
Tucson City Court	✓	X
University Lakes Justice Court	✓	✓
Verde Valley Justice Court	✓	X
Wellton Justice Court	✓	X
Wellton Municipal Court	✓	X
West McDowell Justice Court	✓	✓
West Mesa Justice Court	✓	✓
Western Pinal Justice Court Precinct 4	X	N/A
Wickenburg Town Court	✓	X
Willcox Justice Court	✓	X
Willcox Municipal Court	X	N/A
Williams Justice Court	✓	X
Williams Municipal Court	✓	X
Winkleman Municipal Court	✓	X
Winslow Justice Court	X	N/A
Winslow Municipal Court	X	N/A
Yarnell Justice Court	X	N/A
Youngtown Municipal Court	X	N/A
Yuma Justice Court	X	N/A
Yuma Municipal Court	✓	✓

Appendix 1 shows the results from the public records requests submitted to every misdemeanor court in Arizona. An "X" means "No" and a "✓" means "Yes."

Appendix 2. Maricopa County Justice Court Caseload Data

Year	Justice Court	Total Cases	Self-represented Cases
2016	Agua Fria	1235	1076
2017	Agua Fria	858	737
2018	Agua Fria	913	775
2016	Arcadia Biltmore	356	284
2017	Arcadia Biltmore	357	284
2018	Arcadia Biltmore	368	299
2016	Arrowhead	1180	960
2017	Arrowhead	1237	1059
2018	Arrowhead	1104	948
2016	Country Meadows	1287	1026
2017	Country Meadows	1157	946
2018	Country Meadows	1241	987
2016	Desert Ridge	1188	955
2017	Desert Ridge	1296	1038
2018	Desert Ridge	1308	1065
2016	Downtown	1578	1358
2017	Downtown	2222	1982
2018	Downtown	2508	2218
2016	Dreamy Draw	309	247
2018	Dreamy Draw	275	216
2017	Dreamy Draw	361	288
2016	East Mesa	811	656
2017	East Mesa	710	620
2018	East Mesa	746	630
2016	Encanto	1435	1265
2017	Encanto	1774	1568
2018	Encanto	1875	1609
2016	Hassayampa	1004	877
2017	Hassayampa	1249	1095
2018	Hassayampa	788	689
2016	Highland	543	445
2017	Highland	519	436
2018	Highland	533	441
2016	Ironwood	1004	887
2017	Ironwood	1125	1010
2018	Ironwood	1125	1002
2016	Kyrene	1337	1101
2017	Kyrene	1049	891
2018	Kyrene	1316	1085

Appendix 2 (continued)			
Year	**Justice Court**	**Total Cases**	**Self-represented Cases**
2016	Manistee	332	300
2017	Manistee	489	436
2018	Manistee	467	395
2016	Maryvale	495	420
2017	Maryvale	351	286
2018	Maryvale	369	290
2016	McDowell Mountain	325	233
2017	McDowell Mountain	355	279
2018	McDowell Mountain	264	189
2016	Moon Valley	1116	978
2017	Moon Valley	760	638
2018	Moon Valley	905	775
2016	North Mesa	2197	1877
2017	North Mesa	1829	1582
2018	North Mesa	1856	1577
2016	North Valley	804	625
2017	North Valley	764	642
2018	North Valley	658	526
2016	San Marcos	745	587
2017	San Marcos	467	387
2018	San Marcos	559	450
2016	San Tan	1319	1130
2017	San Tan	1207	1043
2018	San Tan	1284	1078
2016	South Mountain	504	396
2017	South Mountain	584	479
2018	South Mountain	562	455
2016	University Lakes	1872	1485
2017	University Lakes	1784	1415
2018	University Lakes	1615	1269
2016	West McDowell	1344	1172
2017	West McDowell	1475	1292
2018	West McDowell	1521	1296
2016	West Mesa	2176	1742
2017	West Mesa	2079	1698
2018	West Mesa	2409	1943
2016	White Tank	1492	1245
2017	White Tank	1190	989
2018	White Tank	1248	1002

Appendix 2 shows the total misdemeanor data and the self-represented data collected from all 26 Maricopa County Justice Courts for the years of 2016, 2017, and 2018.

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