THE RIGHT TO APPOINTED COUNSEL ON PROSECUTION APPEALS: HARD REALITIES AND THEORETICAL PERSPECTIVES

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I. INTRODUCTION

The Sixth Amendment of the United States Constitution provides a right to legal counsel to individuals facing criminal prosecution.[1] The United States Supreme Court has given a generous interpretation to the Amendment by extending the right to counsel to criminal defendants at trial, as well as in certain pretrial and post-trial proceedings. Thus, regardless of their financial status, defendants are entitled to representation at trial for felonies[2] or misdemeanors resulting in actual imprisonment,[3] at adversarial pretrial proceedings,[4] and at their first appeals as of right.[5] The Supreme Court, however, has never recognized that indigent defendants have a right to appointed counsel on prosecution appeals.[6]

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1. U.S. CONST. amend. VI.

2. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the right of an indigent defendant in a criminal trial to have assistance of counsel is a fundamental right essential to a fair trial, and that petitioner's trial and conviction without assistance of counsel violated the Fourteenth Amendment).

3. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that the right of an indigent defendant in a criminal trial to assistance of counsel is not governed by classification of offense, or by whether a jury trial is required).

4. *See* Coleman v. Alabama, 399 U.S. 1 (1970) (holding that the right to counsel applies to a state preliminary hearing to determine the sufficiency of the evidence for presentation to a grand jury and to set bail). *But cf.* Kirby v. Illinois, 406 U.S. 682 (1972) (holding that the right did not apply to a show-up identification that took place before the defendant was charged).

5. *See* Douglas v. California, 372 U.S. 353 (1963), *reh'g denied*, 373 U.S. 905 (holding that where the merits of an indigent defendant's one and only appeal as of right are decided without the benefit of counsel in a state criminal case, there has been discrimination in violation of the Fourteenth Amendment). Appeals "as of right" may be distinguished from those that are discretionary, in that appellate courts can refuse to hear the latter type but must hear the former. *See generally* State v. Bertram, 685 N.E.2d 1239, 1240 (Ohio 1997).

6. Scholars have paid scant attention to the issue of counsel for prosecution appeals, and most scholarship assumes without discussion that the right to appointed counsel on prosecution appeals exists where the defendant is indigent. *See* Justin Miller, *Appeals by the State in Criminal Cases*, 36 YALE L.J. 486, 501-02 (1927) (discussing a governmental obligation to pay the defendant's legal costs when the prosecution appeals, even when defendant is not indigent). Professor Miller takes an efficiency approach to this issue, arguing that on

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While at one time the Court' s failure to recognize right to counsel on prosecution appeals could be explained as the result of the relative obscurity of prosecution appeals in the criminal justice system, the role played by these appeals has quickly expanded in recent years. In the 1970s, several state constitutions proscribed appeals by the prosecution.[7] Today, every state allows the prosecution to appeal in at least some circumstances.[8]

Moreover, the increased prominence of prosecution appeals has impacted legal practice significantly. Indigent defendants are often not represented on prosecution appeals; frequently, defendants do not even appear at oral argument.[9] Not surprisingly, prosecution appeals lead to more favorable outcomes for the prosecution than would otherwise follow without the appeals.[10]

The efforts of the few courts to address the issue of a right to appointed counsel on prosecution appeals have been insufficient to guarantee protection for all indigent defendants. Most courts addressing the issue have relied on arguments that follow directly from one of three rationales used by the Supreme Court to guarantee the right to counsel to defendants where the defendant is the appellant.

In *United States v. Wade*,[11] the Supreme Court laid out the first of these rationales, which served as the foundation for much of the Court's subsequent Sixth Amendment jurisprudence. The Court held that the right to counsel under the Sixth Amendment attaches not only at trial but also at any "critical" stage of the proceedings, including a proceeding where the

balance the benefits to the administrability of the criminal justice system outweigh the expenses of state appeals; indeed, the costs may serve to deter frivolous appeals. *See also* Jack H. Friedenthal, *Government Appeals in Federal Criminal Cases*, 12 STAN. L. REV. 71, 96 (1959) (adopting a rights-based approach to the issue of appointed counsel on prosecution appeals). "[I]t is vital that the expenses of the defendant be minimized. If the defendant should lose in the appeals court, he must not be so stripped of his financial resources that he cannot adequately prepare his defense at the trial." *Id.*

7. Ellen M. Cappers & Daniel L. Frizzi, *Prosecutor Appeals: A Proposal to Revamp the Law in Ohio,* 4 OHIO N.U. L. REV. 353, 371 (1977) (noting that the constitutions of Texas and Virginia proscribed any appeal by the prosecution).

8. *See* discussion *infra* Part II.

9. *See, e.g.,* People v. Jovani Garcia, 710 N.E. 2d 247 (N.Y. 1999); Blankenship v. Johnson, 106 F.3d 1202, 1203 (5th Cir. 1997) ("Blankenship I"), *rev'd*, 118 F.3d 312 (5th Cir. 1997) ("Blankenship II"); Commonwealth v. Rosario, 635 A.2d 109, 110 (Penn. 1993); Baxter v. Letts, 592 So.2d 1089, 1090 (Fla. 1992); United States ex rel. Thomas v. O'Leary, 856 F.2d 1011, 1013 (7th Cir. 1988) (criticized for other reasons in *United States ex rel. Wilson v. O'Leary*, 709 F. Supp. 837, 843 n.3 (N.D. Ill. 1989)); People v. Carlton, 436 N.E.2d 720, 721 (Ill. App. Ct. 1982). For cases and statistics dealing specifically with New York, see discussion *infra* Part III.

10. For New York statistics, see Table I, Appendix. The prosecution can also use the defendant's lack of representation to its advantage. *See Blankenship II*, 118 F.3d at 317 (discussing how the prosecution can "sandbag" a defendant's victory at trial or appeal from trial by devoting its resources to its own subsequent appeal, at which the defendant would be unrepresented).

11. 388 U.S. 218 (1967).

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"results might well settle the accused's fate and reduce the trial to a mere formality."[12]

The second and third rationales flow from the Fourteenth Amendment, which, like the Sixth Amendment, has been used by the Court to extend the right to counsel to criminal defendants. In *Douglas v. California*,[13] the Court held that the denial of counsel to indigent defendants on their first appeals as of right violated the Equal Protection Clause,[14] since only defendants with resources could retain counsel on appeal, while indigent defendants could not afford counsel.[15] In *Ross v. Moffitt*,[16] the Court adopted a due process basis for the right to counsel instead of an equal protection rationale, and denied indigent defendants seeking discretionary review appointment of counsel. By doing so, the Court in *Ross* was able to preserve the outcome of *Douglas*, even though it denied appointed counsel.

The Court provided two reasons for the doctrinal shift that took place between *Douglas* and *Ross*. First, the government's constitutional duty to appoint counsel on appeals exists "only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process."[17] Once a defendant has taken a direct appeal in which she was provided her guaranteed representation by counsel, the government has discharged its duty. Second, the state's duty arises out of a defendant's need to be "shielded" from prosecution.[18] The Constitution does not mandate appointment of counsel where the defendant seeks to use his or her appeal simply as a "sword" to upset a prior conviction through discretionary review.[19]

Beneath the surface of the *Ross* decision lies the Court's fear that an equal protection justification would open a Pandora's box—representation that only some defendants could afford would have to be provided for those who could not afford such representation.[20] Despite the *Ross*

12. *Id.* at 224-25.

13. 372 U.S. 353 (1963), *reh'g denied*, 373 U.S. 905 (1964).

14. U.S. CONST. amend. XIV.

15. *See, e.g., Douglas*, 372 U.S. at 357-58.

16. 417 U.S. 600 (1974).

17. *Id.* at 616.

18. *Id.* at 610.

19. *Id.*

20. *See* David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 471 (1992) (noting that Justice Harlan's critical dissent in *Griffin v. Illinois*, 351 U.S. 12 (1956), is an early example of the Court's eventual rejection of "the equality principle"). Justice Harlan reiterated his worries about the unlimited nature of an Equal Protection rationale in his dissenting opinion in *Douglas*, 372 U.S. at 361-63. Harlan's argument probably influenced the Court in *Ross v. Moffitt*, which concluded that "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required." *Ross*, 417 U.S. at 616. For a broader discussion on the Supreme Court's evolving attitude toward disparate impact claims under the Fourteenth Amendment, including the

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Court's attempt to limit the reach of *Douglas* beyond first appeals as of right, the *Douglas* rationale is still operative, particularly in situations where *Ross* ceases to apply.[21]

The equal protection, due process, and "critical stage" rationales in *Douglas*, *Ross*, and *Wade*, respectively, do not bar, and, as a few lower courts have concluded, may in fact mandate the appointment of counsel on most appeals by the state. However, the three rationales are limited. The rationales only support a right to counsel in a small number of prosecution appeals. Most importantly, they do not apply to advisory appeals,[22] a type of appeal in which the defendant cannot be affected by the appellate court's decision because there can be no retroactive penalty or retrial. By taking an advisory appeal, the prosecution is permitted to obtain, in effect, a "declaratory judgment that the rulings of the trial court were erroneous."[23]

In this article, I evaluate and discuss the limitations of the above-mentioned legal arguments supporting the appointment of counsel on prosecution appeals, and I propose a legal framework for analyzing appointment of counsel on prosecution appeals that is predicated on a theory of equal representation. Part II will discuss the various types of prosecution appeals. Part III will examine government appeals where counsel is not provided and will also discuss the handful of state laws aimed at providing for appointment of counsel on government appeals. The majority of states as well as the federal government do not provide specifically for the appointment of counsel on prosecution appeals. Moreover, any data, including my own, faces the limitation that cases in which defendants are not represented on appeal tend to evade review.[24] Given this pragmatic difficulty, much of the evidence presented comes from New York, where the issue is prominent in light of the recent decision by the Court of Appeals in *People v.*

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transition from *Douglas* to *Ross*, see Justice Thomas' concurring opinion in *Lewis v. Casey*, 518 U.S. 343, 373-78 (1996) (Thomas, J., concurring).

21. *See, e.g., Blankenship II*, 118 F.3d 312, 317 (5th Cir. 1997) (relying on *Douglas* and noting that the right of indigent criminal defendants to appointed counsel on direct appeal derives from the Equal Protection Clause); Baxter v. Letts, 592 So.2d 1089, 1090 (Fla. 1992) (relying on Douglas to hold that criminal defendant was denied Constitutional right to counsel in state's appeal to district court of trial court's downward departure sentence).

22. Advisory appeals are also referred to as "advisory opinions" and "moot appeals."

23. Stephen R. Shaw, *Prosecution Appeals Taken Midtrial and Following Acquittal: Changing the Trial and Review of Criminal Cases in Ohio*, 22 OHIO N.U. L. REV. 729, 738 (1996).

24. *See* Brief for Defendant-Appellant at 48, People v. Jovani Garcia, 710 N.E. 2d 247 (N.Y. 1997) (on file with the *Review of Law & Social Change*) [hereinafter "Brief for Defendant-Appellant"]:

> For, almost always in such circumstances, there is, obviously, no attorney to seek leave from an unfavorable result. And the defendant is often unaware of the result, or even the appeal, until arrested on a warrant beyond the time to seek leave. Indeed, even if the defendant were aware, he or she would not likely know of the right to seek leave or recognize that his or her right to counsel has been violated.

Id.

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Jovani Garcia.[25] Where possible, I have attempted to include cases from across the nation that involve the denial of counsel on prosecution appeals. Part IV will analyze the traditional arguments or rationales articulated by the Supreme Court supporting the right to counsel, and will discuss key state and federal cases that have applied these arguments to situations involving prosecution appeals. Part V will discuss the limitations of the traditional arguments in cases involving advisory appeals. Finally, Part VI proposes a new legal framework within which to understand the right to counsel on prosecution appeals based on a theory of equal representation.

II.
WHEN THE STATE CAN APPEAL

There is no common law right of appeal by the state.[26] Thus, all types of prosecution appeals derive their authority from statute or judicial interpretation of a statute. The majority of prosecution appeals fall into three categories: pretrial appeals, post-verdict appeals, and mid-trial appeals.[27]

The most common prosecution appeals are pre-trial appeals, which include appeals from both pre-trial orders, such as final judgments[28] and interlocutory orders.[29] Pre-trial appeals are common since they do not subject the defendant to double jeopardy in violation of the Fifth Amendment.[30] Appeals from final judgments are explicitly authorized by statute in at least thirty-seven states and the federal government,[31] and appeals

25. 710 N.E. 2d 247 (N.Y. 1999).

26. *See* United States v. Sanges, 144 U.S. 310, 312 (1892) ("[T]he state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law.").

27. *See infra* note 138 for discussion of two other types of prosecution appeals: those taken from grants of parole and those taken from successful post-conviction appeals by the defendant. Not all statutes distinguish among the various types of appeals, giving broad grants of appellate power to prosecuting attorneys. *See, e.g.*, CONN. GEN STAT. ANN. § 54-96 (West 1994) ("Appeals from the rulings and decisions of the superior courts, upon all questions of law arising on the trial of criminal cases, may be taken by the state."); R.I. GEN. LAWS § 9-24-32 (1956) (allowing that "the attorney general may appeal the findings, rulings, decisions, orders, or judgments to the supreme court at any time before the defendant has been placed in jeopardy"). Statutes giving broad grants of appellate power to the state are not included in the discussion in Part II, which deals only with laws that *explicitly* authorize specific types of prosecution appeals.

28. Final judgments include, but are not limited to, the dismissal of an indictment based upon insufficiency of the accusatory pleading, prior jeopardy, denial of a speedy trial, lack of sufficient evidence to support a bindover, prosecution misconduct, and prosecution under an unconstitutional statute. *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 26.3, at 212-13 (1984).

29. Interlocutory orders include orders suppressing evidence, dismissing arrest warrants, changing venue, and denying non-protective orders for the nondisclosure of witnesses. *Id.* at 218.

30. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life and limb.").

31. 18 U.S.C. § 3731 (1994); ALASKA STAT. § 22.15.240 (Michie 1992); ARIZ. REV. STAT. ANN. § 13-4032 (West 1989); CAL. PENAL CODE § 1238 (West 1982); DEL. CODE

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from interlocutory orders are explicitly authorized in at least thirty-five states and the federal government.[32]

Post-verdict appeals, taken after trials have already been concluded in favor of defendants, are less common, as they raise greater double jeopardy concerns than do pre-trial appeals. Prosecutors taking post-verdict appeals are typically appealing from orders arresting judgment,[33] granting a new

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ANN. tit. 10, § 9902 (1975); FLA. STAT. ANN. § 924.07 (West 1996); GA. CODE ANN. § 5-7-1 (1995); HAW. REV. STAT. ANN. § 641-13 (Michie 1993); IDAHO CODE § 19-4909 (1997); IND. CODE ANN. § 35-38-4-2 (West 1998); IOWA CODE ANN. § 814.5 (West 1994); KAN. CRIM. PROC. CODE ANN. § 22-3602 (West 1973); LA. CODE CRIM. PROC. ANN. art. 912 (West 1997); ME. REV. STAT. ANN. tit. 15, § 2115-A (West 1980); MD. CODE ANN., CTS. & JUD. PROC. § 12-302 (1998); MASS. GEN. LAWS ANN. ch. 278, § 28E (West 1998); MISS. CODE ANN. § 99-35-103 (1999); MO. ANN. STAT. §§ 547.200, 547.210 (West 1987); MONT. CODE ANN. § 46-20-103 (1999); NEV. REV. STAT. § 177.015 (1999); N.H. REV. STAT. ANN. § 606:10 (1986); N.J. CT. R. ANN. 2:3-1 (West 1999); N.M. STAT. ANN. § 39-3-3 (Michie 1998); N.Y. CRIM. PROC. LAW § 450.20 (McKinney 1994); N.C. GEN. STAT. § 15A-1432 (1999); N.D. CENT. CODE § 29-28-07 (1991); OHIO REV. CODE ANN. § 2945.67 (Anderson 1997); OKLA. STAT. ANN. tit. 22, § 1053 (West 1991); OR. REV. STAT. § 138.060 (1997); S.D. CODIFIED LAWS § 23A-32-4 (Michie 1998); TENN. R. APP. P. 3 (Michie 1997); TEX. CODE CRIM. P. ANN. art. 44.01 (West 1979); UTAH CODE ANN. § 77-18a-1 (1953); VT. STAT. ANN. tit. 13, § 7403 (1998); VA. CODE ANN. § 19.2-398 (Michie 1950); WASH. R. APP. P. 2.2 (West 1997); W. VA. CODE § 58-5-30 (1997).

32. 18 U.S.C. § 3731 (1994); ARIZ. REV. STAT. ANN. § 13-4032 (West 1989); ARK. R. APP. P., CRIM. R. 3 (Michie 1987); CAL. PENAL CODE § 1238 (West 1982); COLO. REV. STAT. ANN. § 16-12-102 (West 1986); DEL. CODE ANN. tit. 10, § 9902 (1975); FLA. STAT. ANN. § 924.07 (West 1996); GA. CODE ANN. § 5-7-1 (1995); HAW. REV. STAT. ANN. § 641-13 (Michie 1993); ILL. CT. R. & P., S. CT. R. 604 (West 1998); IND. CODE ANN. § 35-38-4-2 (West 1998); IOWA CODE ANN. § 814.5 (West 1994); KAN. CRIM. PROC. CODE ANN. § 22-3603 (West 1973); ME. REV. STAT ANN. tit. 15, § 2115-A (West 1980); MD. CODE ANN., CTS. & JUD. PROC. § 12-302 (1998); MASS. GEN. LAWS ANN. ch. 278, § 28E (West 1998); MO. ANN. STAT. §§ 547.200, 547.210 (West 1987); MONT. CODE ANN. § 46-20-103 (1999); NEB. REV. STAT. ANN. § 29-116 (1995); NEV. REV. STAT. § 179.510 (Michie 1999); N.H. REV. STAT. ANN. § 606:10 (1986); N.J. R. OF CT. 2:3-1 (West 1999); N.M. STAT. ANN. § 39-3-3 (Michie 1998); N.Y. CRIM. PROC. LAW § 450.20 (McKinney 1994); N.C. GEN. STAT. § 15A-1445 (1999); N.D. CENT. CODE § 29-28-07 (1991); OHIO REV. CODE ANN. § 2945.67 (Anderson 1997); OR. REV. STAT. § 138.060 (1997); PA. R. APP. P. 311 (West 1998); S.D. CODIFIED LAWS § 23A-32-5 (Michie 1998); TEX. CODE CRIM. P. ANN. art. 44.01 (West 1979); UTAH CODE ANN. § 77-18a-1 (1953); VT. STAT. ANN. tit. 13, § 7403 (1998); VA. CODE ANN. § 19.2-398 (Michie 1950); WASH. R. APP. P. 2.2 (West 1997); WIS. STAT. ANN. § 974.05 (West 1998).

33. At least twenty-six states authorize appeals from orders arresting judgment: ALASKA STAT. § 22.15.240 (Michie 1992); ARIZ. REV. STAT. ANN. § 13-4032 (West 1989); CAL. PENAL CODE § 1238 (West 1982) ; DEL. CODE ANN. tit. 10 § 9902 (1975); FLA. STAT. ANN. § 924.07 (West 1996); GA. CODE ANN. § 5-7-1 (1995); HAW. REV. STAT. ANN. § 641-13 (Michie 1993); ILL. CT. R. & P., S.CT. R. 604 (West 1998); IOWA CODE ANN. § 814.5 (West 1994); KAN. CRIM. PROC. CODE ANN. § 22-3602 (West 1973); LA. CODE CRIM. PROC. ANN. art. 912 (West 1997); ME. REV. STAT ANN. tit. 15, § 2115-A (West 1980); MINN. R. CRIM. P. 28.04 (West 1995); MO. ANN. STAT. §§ 547.200, 547.210 (West 1987); MONT. CODE ANN. § 46-20-103 (1999); NEV. REV. STAT. § 177.015 (1999); N.D. CENT. CODE § 29-28-07 (1991); OKLA. STAT. ANN. tit. 22, § 1053 (West 1991); OR. REV. STAT. § 138.060 (1997); S.C. CODE ANN. § 17-27-100 (Law. Co-op. 1985); S.D. CODIFIED LAWS § 23A-32-4 (Michie 1998); TENN. R. APP. P. 3 (Michie 1997); TEX. CODE CRIM. P. ANN. art. 44.01 (West 1979); UTAH CODE ANN. § 77-18a-1 (1953); WASH. R. APP. P. 2.2 (West 1997). *See generally* Commonwealth v. Parmar, 710 A.2d 1083 (Pa. 1998).

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trial,[34] acquitting a defendant whom a jury has found guilty,[35] or imposing an illegal or too lenient sentence.[36] Although in these cases, the defendant has already been prosecuted, double jeopardy is less troubling since a reversal by an appellate court will result in no more than either reinstatement of the jury's verdict (and not a new trial) or an alteration of the defendant's sentence.[37]

Mid-trial appeals raise the greatest double jeopardy concerns, since the defendant will be retried if the appeal is successful. In *United States v. Scott*,[38] the Supreme Court addressed the question of when double jeopardy would bar retrial of a defendant pursuant to mid-trial government appeals. *Scott* involved a government appeal from a district court order which dismissed two counts of a three-count indictment charging distribution of narcotics because of prejudice to the defendant's case from pre-

34. Thirty-three states and the federal government: 18 U.S.C. § 3731 (1994); ARIZ. REV. STAT. ANN. § 13-4032 (West 1989); CAL. PENAL CODE § 1238 (West 1982); COLO. REV. STAT. ANN. § 16-12-102 (West 1986); DEL. CODE ANN. tit. 10, § 9902 (1975); FLA. STAT. ANN. § 924.07 (West 1996); HAW. REV. STAT. ANN. § 641-13 (Michie 1993); ILL. CT. R. & P., S.CT. R. 604 (West 1998); IND. CODE ANN. § 35-38-4-2 (West 1998); IOWA CODE ANN. § 814.5 (West 1994); KAN. CRIM. PROC. CODE ANN. § 22-3602 (West 1973); ME. REV. STAT ANN. tit. 15, § 2115-A (West 1980); MD. CODE ANN., CTS. & JUD. PROC. § 12-302 (1998); MASS. GEN. LAWS ANN. ch. 278, § 28E (West 1998); MISS. CODE ANN. § 99-35-103 (1999); MO. ANN. STAT. §§ 547.200, 547.210 (West 1987); MONT. CODE ANN. § 46-20-103 (1999); NEB. REV. STAT. § 29-2315.01 (1995); NEV. REV. STAT. § 177.015 (1999); N.H. REV. STAT. ANN. § 606:10 (West 1999); N.J. R. OF CT. 2:3-1 (West 1999); N.M. STAT. ANN. § 39-3-3 (Michie 1998)); N.Y. CRIM. PROC. LAW § 450.20 (McKinney 1997); N.C. GEN. STAT. § 15A-1432 (1999); N.D. CENT. CODE § 29-28-07 (1991); OHIO REV. CODE ANN. § 2945.67 (Anderson 1997); OR. REV. STAT. § 138.060 (1997); S.D. CODIFIED LAWS § 23A-32-4 (Michie 1998); TEX. CODE CRIM. P. ANN. art. 44.01 (West 1979); UTAH CODE ANN. § 77-18a-1 (1953); VT. STAT. ANN. tit. 13, § 7403 (1998); VA. CODE ANN. § 19.2-398 (Michie 1950); WASH. R. APP. P. 2.2 (West 1997); WIS. STAT. ANN. § 974.05 (West 1998).

35. Eleven states and the federal government: FED. R. CRIM. P. 29 (1998) (Advisory Notes); ARIZ. REV. STAT. ANN. § 13-4032 (West 1989); DEL. CODE ANN. tit. 10, § 9902 (1975); FLA. STAT. ANN. § 924.07 (West 1996); HAW. REV. STAT. ANN. § 641-13 (Michie 1993); IND. CODE ANN. § 35-38-4-2 (West 1998); MASS. GEN. LAWS ANN. ch. 278, § 28E (West 1998); MINN. R. CRIM. P. 28.04 (West 1995); MISS. CODE ANN. § 99-35-103 (1999); MO. ANN. STAT. § 547.200 (West 1987); NEV. REV. STAT. § 177.015 (1999); N.J. R. OF CT. 2:3-1 (West 1999). *See generally* State v. Dasher, 297 S.E.2d 414 (S.C. 1982).

36. Twenty-two states and the federal government: 18 U.S.C. § 3742 (1994); ALASKA STAT. § 22.15.240 (Michie 1992); ARIZ. REV. STAT. ANN. § 13-4032 (West 1989); CAL. PENAL CODE § 1238 (West 1982); DEL. CODE ANN. tit. 10, § 9902 (1975); FLA. STAT. ANN. § 924.07 (West 1996); HAW. REV. STAT. ANN. § 641-13 (Michie 1993); KY. R. CRIM. P. 11.42 (1998); MD. CODE ANN., CTS. & JUD. PROC. § 12-302 (1998); MINN. R. CRIM. P. 28.04 (1999); MONT. CODE ANN. § 46-20-103 (1999); NEB. REV. STAT. § 29-2320 (1995); N.J. R. OF CT. 2:3-1 (West 1999); N.Y. CRIM. PROC. LAW § 450.20 (McKinneys 1997); N.C. GEN. STAT. § 15A-1445 (1999); OHIO REV. CODE ANN. § 2945.67 (Anderson 1997); OR. REV. STAT. § 138.060 (1997); 42 PA. CONS. STAT. § 9781 (West 1989); S.D. CODIFIED LAWS § 23A-32-4 (Michie 1998); TENN. CODE ANN. § 40-35-402 (1997); TEX. CODE CRIM. P. ANN. art. 44.01 (West 1979); WASH. R. APP. P. 2.2 (West 1997); WIS. STAT. ANN. § 974.05 (West 1998).

37. *See generally* LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 28, at 220.

38. 437 U.S. 82, 98-99 (1978).

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indictment delay. In holding that the Double Jeopardy Clause was not offended by the government's appeal of that dismissal, the Court distinguished between a defendant who seeks to terminate proceedings against him on a basis unrelated to guilt or innocence and a defendant who receives an acquittal: "[a defendant who] deliberately choos[es] to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no cognizable injury under the Double Jeopardy Clause if the Government is permitted to appeal."[39] The Court concluded that since Scott sought to have his trial terminated with respect to the two dismissed counts of the indictment without submitting to either the judge or jury his guilt or innocence, the Double Jeopardy Clause was not violated. Thus, *Scott* seems to adopt the position that appeals taken mid-trial are barred by the Double Jeopardy Clause only if retrial would constitute a second determination of the defendant's guilt or innocence.[40]

Many states, however, have circumvented this rationale. Rather than recognize an absolute bar to prosecution appeals in certain instances, several states attempt to balance the defendant's right to protection against double jeopardy against the government's "advisory" objective, which involves resolving issues of law that may have an impact upon future prosecutions. In order to achieve this "advisory" objective and avoid the double jeopardy problems attendant with mid-trial appeals, these states authorize prosecution appeals taken mid-trial, so long as the holding of the appellate court has no retroactive effect upon the defendant.[41]

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39. *Id.*

40. *Id.* The *Scott* holding has provided a functional test that, in practice, can be difficult to apply. *See, e.g.,* United States v. Sisson, 399 U.S. 267 (1970) (holding, pre-*Scott*, that the trial court's order arresting judgment was actually an acquittal, thus barring appeal by the state under the Double Jeopardy Clause).

41. Such "moot" appeals are authorized by at least seven states: ARK. CODE ANN. § 16-91-112 (Michie 1987); IOWA CODE ANN. § 814.5 (West 1994); KAN. CRIM. PROC. CODE ANN. § 22-3602 (West 1973); MISS. CODE ANN. § 99-35-103 (1999); NEB. REV. STAT. § 29-2319 (1995) (1995); OHIO REV. CODE ANN. § 2945.67 (Anderson 1997); WYO. STAT. ANN. § 7-12-102 (Michie 1977) (calling advisory appeals the "taking of exceptions"). Due to a lack of a "case or controversy" before federal courts on these appeals, the Supreme Court declared long ago that federal courts lack the power to hear them. *See* United States v. Evans, 213 U.S. 297 (1909) (discussing the absence of counsel as a factor in holding that federal courts were not constitutionally authorized to issue advisory opinions). A few states have followed the Supreme Court's lead. *See, e.g.,* State v. Viers, 469 P.2d 53 (Nev. 1970); *Ex Parte* Ruiz, Jr., 750 S.W.2d 217 (Tex. 1988). Further, several state courts addressing the question of advisory appeals have found absence of counsel to be a significant factor. *See* State v. Keep, 409 P.2d 321, 325 (Alaska 1965) (noting absence of counsel and defense on previous state appeal in decision to deny right of state to take advisory appeal). *See generally* State v. Martin, 658 P.2d 1024 (Kan. 1983); State v. Bistricky, 555 N.E.2d 644, 645 (Ohio 1990); State v. Arnett, 489 N.E.2d 284, 287 (Ohio 1986); City of Euclid v. Heaton, 238 N.E.2d 790, 795 (Ohio 1968).

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III.
APPOINTMENT OF COUNSEL ON PROSECUTION APPEALS

At least eight states have statutory provisions that explicitly provide for either the appointment of counsel or the payment of attorney's fees for the defendant on appeals by the state.[42] Procedures for appointment of counsel vary among states. New Mexico, for example, places the burden of ensuring that the defendant's rights are enforced on the defendant's trial counsel.[43] Illinois, by contrast, places the burden on the trial court.[44] Wyoming has one of the more stringent of state laws with respect to prosecution appeals, and authorizes only advisory appeals, referred to as the "taking of exceptions."[45] Wyoming provides that that there be appointment of counsel to "argue the case against the state" and, like Illinois, places the burden for appointing that counsel on the trial judge.[46]

In *People v. Jovani Garcia*,[47] New York's highest court resolved the issue of the denial of counsel to defendants on prosecution appeals, and

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42. ILL. CT. R. & P., S.CT. R. 607 (a) (West 1998); ME. R. CRIM. P. 37B(d) (West 1997) (allowing the defendant "reasonable counsel fees" on prosecution appeals); MINN. R. CRIM. P. 28.04(Subd. 2)(6) (West 1999) (allowing for "reasonable attorney's fees" on prosecution appeals); N.M. R. APP. P. § 12-303(C) (Michie 1998); N.C. GEN. STAT. § 7A-451(b)(6) (Michie 1999) (referring to "Subchapter XIV of Chapter 15A of the General Statutes," which authorizes prosecution appeals); OHIO REV. CODE ANN. § 2945.67(B) (Anderson 1997); WASH. REV. CODE ANN. § 10.73.150 (West Supp. 1998); WYO. STAT. ANN. § 7-12-103 (Michie 1999). *But cf.* R.I. GEN. LAWS § 9-24-32 (1997) (awarding attorney's fees only if the defendant-respondent wins on the state's appeal).

While Alabama does make provision for paying counsel on prosecution appeals *once appointed*, ALA. CODE § 15-12-22(d), it is not clear that it requires the initial appointment. *See* ALA. R. CRIM. P. 6.1(a) (mandating that counsel must be appointed whenever "constitutionally required"). Given the open-ended nature of the Alabama Rules of Criminal Procedure, it is important for higher courts to establish a constitutional right to counsel on prosecution appeals.

43. N.M. R. APP. P. § 12-303(C) mandates:

> If the notice of appeal has been filed by the state, trial counsel for the respondent in a delinquency or need of supervision case or for the defendant in a criminal case, shall be responsible for representing the respondent or defendant on appeal unless, within five (5) days after service of the notice of appeal, trial counsel obtains and files in the district court the order appointing the appellate division of the public defender department.

44. ILL. COMP. STAT. ANN., S. CT. R. 607(a) mandates:

> [In] cases in which the State appeals, the trial court shall determine whether the defendant is represented by counsel on appeal. If not so represented, and the court determines that the defendant is indigent and desires counsel on appeal, the court shall appoint counsel on appeal.

45. The strictness of Wyoming's authorization of state appeals is open to debate, as advisory appeals are sanctioned when taken from "any opinion or decision of the court made during the prosecution of a criminal case." WYO. STAT. ANN. § 7-12-102 (Michie 1999).

46. WYO. STAT. ANN. § 7-12-103 (Michie 1999).

47. 710 N.E. 2d 247 (N.Y. 1999). The facts of *Jovani Garcia* show that, at its peripheries, the case is about valid waiver of the right to counsel. *See* Brief for Defendant-Appellant, *supra* note 24, at 42-44. But the possibility of a waiver presupposes an underlying right that can be waived. *Cf. Blankenship II*, 118 F.3d at 316 (holding that defendants cannot

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settled the split between the First and Second Departments with respect to the procedural rules for appointing counsel. After the trial court set aside the jury's conviction of Garcia, the state appealed and sent notice to Garcia's retained trial counsel, who unsuccessfully attempted to inform Garcia of this appeal. Garcia could not be reached, no counsel was appointed, and the Appellate Division First Department reinstated the jury's verdict with only the district attorney's brief and the record at trial before it. The Court of Appeals reversed the Appellate Division, holding that Garcia's right to counsel had been violated.[48]

In doing so, the Court of Appeals resolved a procedural disparity between the First and Second Departments of the Appellate Division. The Second Department had established reasonably clear guidelines for the appointment of counsel for indigent defendant-respondents on prosecution appeals. Pursuant to court rules, the state was required to notify the defendant's last attorney of record of its appeal. That attorney, in turn, had to inform the defendant of her right to appellate counsel, and take affirmative action to insure the client an indigency hearing, which could be granted either upon request or *sua sponte*, if "the attorney was the defendant's assigned counsel in the court in which the order or sentence being appealed was entered."[49]

Although the Second Department thus required assigned trial counsel to secure an indigency hearing for her client, the First Department required only that assigned counsel, upon receiving the prosecution's appellate brief, make a "diligent" effort to find and notify a defendant of her rights on appeal.[50] Although the right to appointed counsel on appeal was listed as one of these rights,[51] there remained a number of glaring deficiencies in the rule. First, since the prosecution could take up to nine months to notify trial counsel of the appeal,[52] it was possible that counsel no longer had contact with her client. Second, and more specific to the facts of *Garcia*, there was no requirement that *retained* trial counsel take steps to notify a defendant of the prosecution's appeal.[53] Although seemingly trivial, these flaws often resulted in defendants going without counsel on prosecution

claim ineffective assistance of counsel if there is no "underlying right to the assistance of counsel").

48. *See* People v. Jovani Garcia, 710 N.E. 2d 247, 249 (N.Y. 1999). Garcia's case has been remitted for a de novo appeal before the Appellate Division.

49. N.Y. COMP. CODES R. & REGS. tit. 22, § 671.3(d), (e), (f) (1999).

50. N.Y. COMP. CODES R. & REGS. tit. 22, § 606.5(d)(3); Section 606.5(d)(2) places a similar burden of notification upon any appellate counsel *already* retained.

51. N.Y. COMP. CODES R. & REGS. tit. 22, § 606.5(d)(3).

52. N.Y. COMP. CODES R. & REGS. tit. 22, § 600.8(f).

53. A recent amendment to § 600.8 (f) requires the prosecution to serve its appellate brief on either appellate counsel or "the attorney who last appeared for [the defendant] in the trial court." *Court Notes, New Court Notice, Appellate Division,* N.Y. L.J., June 29, 1998, at 17. Inexplicably, however, no duty is imposed upon trial counsel to notify the defendant unless counsel was assigned. N.Y. COMP. CODES R. & REGS. tit. 22, § 606.5 (d) (3).

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appeals, and often failing to appear at the appeal at all. Moreover, a significant percentage of such respondents lost on these appeals.[54] Statistics on the failure to appoint counsel for the three-year period from 1995 through 1997 are shown in Table I in the Appendix.[55]

Thus, the Court of Appeals in *Jovani Garcia* ended a critical disagreement between Departments by alleviating the burden placed on trial counsel to notify a defendant of her rights, instead charging the state with that responsibility. After acknowledging a right to counsel on prosecution appeals, the Court stated, "The ultimate duty of informing the defendant of his right to have counsel on appeal rests with the State."[56] More specifically, the burden falls on the Appellate Division judges: "When it was discerned that defendant was unrepresented on appeal, absent record evidence that defendant was informed of his right to counsel and that he waived that right, the court should not have proceeded to consider and decide the People's appeal."[57]

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54. Although N.Y. COMP. CODES R. & REGS., tit. 22, § 671.3, the rule in the Second Department, also does not guarantee the appointment of appellate counsel, research discloses no instances where counsel has not been appointed to an indigent defendant on an appeal by the prosecution. *Cf.* N.Y. COMP. CODES R. & REGS. tit. 22, § 800.14(b) and N.Y. COMP. CODES R. & REGS. tit. 22, § 1000.3(f) (rules for the Third and Fourth Departments, respectively, both of which provide for service on the defendant, but not necessarily for the appointment of counsel).

55. Statistics on the representation of criminal defendants in the New York Appellate Division are rare. In one interesting study, David Wasserman, a former attorney for the Legal Aid Society Criminal Appeals Bureau, reviewed a random sampling of cases in the First and Second Departments from 1980-1985. While the focus of his study was on defendants' first appeals as of right, his sample included 62 prosecution appeals, of which 56 had "known outcomes." Of the latter, Wasserman distinguishes only between cases in which defendants were represented by Legal Aid attorneys, 18b counsel, or privately-retained counsel. However, this categorization only accounts for 47 of the appeals (after correcting for his miscalculation of 48). Who represented the other nine defendants—if anyone—is not discussed. *See* DAVID T. WASSERMAN, A SWORD FOR THE CONVICTED: REPRESENTING INDIGENT DEFENDANTS ON APPEAL 92, 105-07 (1990).

56. People v. Jovani Garcia, 710 N.E.2d 247, 249 (N.Y. 1999).

57. *Id.* One First Department case occurring prior to those cases included in Table I deserves specific mention due to its unique procedural history. In *People v. Smith*, the Appellate Division overturned the dismissal of the defendant's indictment with no appearance by the defendant or any appellate counsel for the defendant. *See* People v. Smith, 614 N.Y.S.2d 532 (N.Y. 1994), *vacated and recalled*, 616 N.Y.S.2d 181 (N.Y. 1994), *upon de novo consideration*, 621 N.Y.S.2d 4 (N.Y. 1994). After recalling its order so as to permit defense participation, the court affirmed the dismissal of the indictment. *Id.*

Unfortunately, this turn of events is not statistically surprising given a defendant's chances of losing at the appellate level when not represented by counsel as compared to the defendant's chances of losing when represented. As the statistics in Table I illustrate, in 1995, only one year following *Smith*, a defendant had a 125% greater chance of losing on an appeal by the state when not represented. Note that a defendant's chance of losing without counsel, as compared to his or her chance of losing with counsel, has decreased since 1995. However, this fact represents only a pyrrhic victory for defendants, as the primary reason for the decrease is the vast increase in the state's chances of success on appeal when a defendant is represented. *See* Table 1.

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Like the New York Court of Appeals, a small number of other state and federal courts have resolved the issue of a right to appointed counsel on prosecution appeals from either pretrial or post-verdict orders, and they have done so in favor of the defendant.[58]

IV.
Traditional Arguments for a Constitutional Right to Counsel

A. *Supreme Court Arguments*

The Equal Protection, Due Process, and "critical stage" analyses applied in *Douglas v. California*, *Ross v. Moffitt*, and *United States v. Wade*, respectively, are what I refer to as the "traditional arguments" for the constitutional right to counsel. This section discusses these arguments and explains how they have been applied by state and federal courts to prosecution appeals. Part V of this article discusses the ways in which these arguments are insufficient to support a right to counsel on all prosecution appeals, and, in particular, on advisory appeals.

Of the three arguments, only *Wade*'s critical stage approach invokes the Sixth Amendment right to counsel. In *Wade*, the Supreme Court concluded that the Sixth Amendment guarantees the right to counsel not only at trial but also at any critical confrontation by the prosecution at pretrial proceedings where the results might determine a defendant's fate. Therefore, under *Wade*, if the Sixth Amendment right to counsel attaches at prosecution appeals, it must be shown that such appeals are "critical," which depends on the nature of defendants' interests which are at stake. Thus, the rationale underlying *Wade* is that the right to counsel under the Sixth Amendment does not exist primarily to provide the defendant with a fair trial but rather to protect the interests of a defendant as long as those interests are "substantial."[59]

Unlike the critical stage argument, the equal protection and due process arguments are concerned with the fairness of proceedings against the defendant. The equal protection argument derives from the Supreme Court's opinion in *Douglas*, where the Court concluded that deprivation of counsel to an indigent defendant on his or her only appeal as of right violates the Equal Protection Clause. Many state and federal courts have

58. *See Blankenship I*, 106 F.3d 1202, *rev'd*, 118 F.3d 312 (5th Cir. 1997) (holding that defendant was deprived of right to counsel on state's appeal of a reversal of defendant's conviction); Commonwealth v. Rosario, 635 A.2d 109 (Pa. 1992) (holding on rehearing that defendant was deprived of his right to counsel on state's appeal of his sentence on leniency grounds); Baxter v. Letts, 592 So.2d 1089 (Fla. 1992) (holding that defendant was deprived of his right to counsel on state's appeal of trial court's downward departure of defendant's sentence); United States v. O'Leary, 856 F.2d 1011 (7th Cir. 1988) (holding that defendant was deprived of his right to counsel on state's appeal of a suppression order).

59. *See generally Blankenship I*, 106 F.3d at 1208 (quoting Mempha v. Rhay, 389 U.S. 128 (1967)).

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cited *Douglas* as authority for the proposition that the Equal Protection Clause of the Fourteenth Amendment guarantees indigent defendants the right to counsel on prosecution appeals.[60] Some courts have also relied on the Due Process Clause of the Fourteenth Amendment to support a right to counsel on prosecution appeals,[61] although this approach is less common. The due process argument derives from *Ross*, where the Court concluded that defendants have a constitutional right to "meaningful access" to the courtroom, understood as an "adequate opportunity to present [their] claims fairly in the context of the State's appellate process."[62] Although the due process argument is concerned with fairness to the defendant, the argument affords defendants little protection, as many courts have found that due process is satisfied as long as the proceedings as a whole are fair, even if any one of the proceedings is unbalanced in favor of the state.[63]

B. *Cases Applying the Traditional Arguments*

1. *Equal Protection*

Cases adopting the *Douglas* equal protection rationale can be found at both the state and federal levels. An important case at the state level is *Baxter v. Letts*,[64] which involved a defendant's petition to the Florida Supreme Court for habeas corpus relief on the grounds that he was not represented in the State's appeal. Baxter was serving his sentence in prison when he learned that the prosecution had successfully appealed the trial court's downward departure of his sentence, resulting in an additional three years of incarceration. With little discussion of the issue of appointment of counsel, the Court concluded that Baxter's right to counsel was violated. The Court relied on *Douglas*, as well as two Florida cases. However, they did not distinguish between situations where defendants appeal and those where the government appeals.

A key case at the federal level is *Blankenship v. Johnson* ("Blankenship II").[65] There, the Fifth Circuit Court of Appeals, upon a petition for rehearing, relied on *Douglas* in its discussion of the right to counsel on prosecution appeals. On this reasoning, the court and concluded that the defendant had a right to counsel rooted in the Equal Protection and Due Process Clauses during discretionary review by state's criminal court where the state appeals. The Fifth Circuit had previously denied the defendant

60. *See* cases cited *infra* notes 64-65.

61. *See, e.g., Blankenship I*, 106 F.3d 1202 (5th Cir. 1997).

62. *See* Ross v. Moffitt, 417 U.S. 600, 616 (1974).

63. *Id.* (holding that defendants have no right to appointed counsel on discretionary review because they were given meaningful access to the courts on their first appeal as of right).

64. 592 So.2d 1089 (Fla. 1992) (citing the Florida cases *Hooks v. State*, 253 So.2d 424 (Fla. 1971), and *McDaniel v. State*, 212 So.2d 814 (Fla. 1968)).

65. 118 F.3d 312 (5th Cir. 1997).

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relief ("Blankenship I"), holding that the right to counsel on discretionary review by the prosecution was neither "clearly established" nor "contrary to clearly established law"—the standards used by federal courts for reviewing state habeas petitions set forth under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[66] However, the Fifth Circuit was able to rehear Blankenship's claims after the Supreme Court held in *Lindh v. Murphy*[67] that AEDPA was not applicable to non-capital habeas petitions filed prior to AEDPA's effective date.

After successfully arguing for his client on a direct appeal, Blankenship's attorney was elected county prosecutor, so he could no longer represent a criminal defendant.[68] The state appealed this decision, however, and Blankenship was neither notified nor represented when the case came before the Texas Court of Criminal Appeals. Judge Smith wrote for the Fifth Circuit in *Blankenship II*, "It came as a considerable shock to [Blankenship] when, some fifteen months after the reversal of his conviction by the intermediate court, the police arrived to arrest him."[69]

Like the Florida Supreme Court in *Baxter*, Judge Smith made no reference in *Blankenship II* to direct authority on the issue of the right to counsel on prosecution appeals. Instead, he relied on *Douglas*, which guarantees counsel under the Equal Protection Clause for indigent defendants on their first appeals as of right. Indeed, Judge Smith even called the issue before the Court of Appeals "a matter of first impression."[70] However, the Fifth Circuit, unlike the Florida Supreme Court, discussed its reliance upon *Douglas* in some detail:

> Finally, we find the words of the Supreme Court [in *Douglas*] informative: "But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." In the instant case, Blankenship was without counsel the only time the merits of his only appeal were decided against him.[71]

66. 106 F.3d at 1204 (citing the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1)).

67. 521 U.S. 320 (1997).

68. The *Blankenship* case involved a state appeal from a reversal at the intermediate appellate level. Despite this temporal difference from cases like *Baxter*, which involved the state's appeal of a trial court's sentence, the *Blankenship* opinions are still relevant because the court made similar arguments about the right to counsel on prosecution appeals.

69. 118 F.3d at 315.

70. *Id.* The Fifth Circuit held that the state had waived its *Teague* defense. However, after declining to apply *Teague* sua sponte, the court held that its "decision does not imply that *Teague* would have barred Blankenship's claim, had we reached that issue." *Id.* at 316-17. *See generally* Teague v. Lane, 489 U.S. 288 (1989) (holding that the application of new rules of law in the context of habeas petitions is ordinarily prohibited).

71. *Blankenship II*, 118 F.3d at 317.

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While the *Blankenship* court's holding in favor of a right to counsel on state-requested discretionary review is admirable, its reasoning is subject to criticism. Judge Smith, who also wrote the majority opinion in *Blankenship I*, pointed out in that earlier proceeding that Blankenship, like the defendant in *Ross v. Moffitt*, already "had one full appeal in which he was represented by competent counsel."[72] The Supreme Court in *Ross* emphasized this fact in its decision to deny defendants the right to appointed counsel under *Douglas* beyond their first appeals as of right. The constitution, it was held, does not mandate the appointment of counsel when fairness exists in the totality of the judicial proceedings.[73] Thus, it would seem to follow from *Ross* that Blankenship should have no right to counsel beyond his first appeal of right.

Judge Smith's opinion in *Blankenship II* never explained why *Douglas*, rather than *Ross*, governed the case before him; indeed, he never discussed *Ross* at all. Fortunately, another member of his court, Judge Parker, had distinguished *Ross* in his *Blankenship I* dissent. Judge Parker stated that *Ross* limited *Douglas* only where a court "judged an attorney to be unnecessary for meaningful access to the process of seeking discretionary review."[74] Since the Texas Code of Criminal Procedure mandated appointment of counsel on appeals by defendants for discretionary review, Judge Parker felt that the court should credit the legislature's judgment with respect to the need for counsel beyond a defendant's first appeal as of right. Judge Parker reasoned that since the Texas legislature found appointment of counsel to be a necessary part of the appellate criminal process, Blankenship retained an Equal Protection right to "meaningful access" to the appellate process guaranteed by *Douglas*.[75]

Of course, even if right, Judge Parker's reasoning in *Blankenship I* may be too dependent on state law for its widespread applicability. It is plausible, however, that a more universally applicable point is implicit in Judge Parker's opinion: if, as his opinion suggests, the appointment of counsel is necessary for a defendant to have meaningful access to courts whenever the state appeals, then *Ross* has no effect on *Douglas* with respect to prosecution appeals. So long as only defendants with resources can afford meaningful access to courts on prosecution appeals, then indigent defendants have an equal protection right to counsel on these appeals under the constitution. Table I's statistics demonstrate the increased chances of reversal a defendant faces in New York when she goes unrepresented in a prosecution appeals, making it clear that appointment of counsel is necessary to provide meaningful access to courts.

72. *Blankenship I*, 106 F.3d at 1205.

73. Ross v. Moffitt, 417 U.S. 600, 616 (1974) ("The duty of the State under our cases is . . . only to assure the indigent defendant an adequate opportunity to present his claim fairly in the context of the State's appellate process.").

74. *Blankenship I*, 106 F.3d at 1209 (Parker, J., dissenting).

75. *Id.*

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2. Due Process

The Court in *Blankenship II* also found that defendant's right to counsel on an appeal by the state derives from the Due Process Clause. However, it could be argued that the *Blankenship* court's conclusion is wrong in light of *Ross*, since Blankenship was not deprived of counsel *until after his direct appeal.* Due process is satisfied, per *Ross*, as long as the defendant has an adequate opportunity to present his claims in the context of the state's appellate process as a whole. As Judge Smith reasoned in *Blankenship I*, the defendant may lack a right to counsel on the state's appeal pursuant to *Ross* because the defendant already "had one full appeal in which he was represented by competent counsel."[76]

However, the argument that *Ross* would foreclose a due process right to counsel when the state appeals is flawed in several respects. Although the Supreme Court refused in *Ross* to extend the right to appointed counsel from a defendant's first appeal as of right to an appeal for discretionary review by the North Carolina Supreme Court, it reasoned that the right to counsel ought only to apply to defendants who need attorneys "as a shield," and not "as a sword to upset the prior determination of guilt."[77] However, when the government appeals, a key premise of the *Ross* opinion ceases to exist. That is, despite the fact that the appeal may be discretionary, the defendant no longer seeks to upset a prior holding by a lower court; it is the government that does so, and the defendant needs to be "shielded" from the new attempt at prosecution.[78]

Certainly, Judge Smith later recognized this fact when he distinguished *Ross* on the grounds that it involved an appeal by the defendant (as opposed to the state) and declared in *Blankenship II* that the defendant did have a right to counsel on the *state's* discretionary review. Moreover, he may have even realized this in his previous decision when he conceded in dictum that "one might reasonably have concluded, from [*Ross*], that a defendant should be afforded a lawyer to *defend* a state-initiated petition."[79]

Still, one might interpret *Ross* strictly as denying a right to counsel on any appeal for discretionary review, regardless of which party initiated it. Since the state in *Blankenship* appealed only after the defendant had already taken his own appeal at which counsel was present, it could be argued that the defendant was entitled to no additional protection under the constitution. Responding to this concern, however, Judge Smith himself noted in *Blankenship II* that the right to counsel on a defendant's direct appeal would lose its value should the government then be able to appeal

76. *Blankenship I*, 106 F.3d at 1205.

77. *Ross*, 417 U.S. at 610-11. *See also* Pennsylvania v. Finley, 481 U.S. 551 (1987) (holding that the right to counsel does not extend to collateral attacks on convictions).

78. Judge Parker pursued a similar line of reasoning in his dissent in *Blankenship I*. *Blankenship I*, 106 F.3d at 1209-11 (Parker, J., dissenting).

79. *Id.* at 1206 (emphasis added).

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that decision without the threat of opposing counsel. Defendants would surely lose on the government's appeal in this circumstance "in all but the most compelling cases."[80]

The facts of *Blankenship* illustrate this eventuality particularly well. On Blankenship's direct appeal, the district attorney filed a four-page brief. Yet, when arguing before the Court of Criminal Appeals without opposition, the district attorney filed two briefs that together totaled sixteen pages. As Judge Smith observed, "The later briefs [were] incomparably more thorough and well researched."[81] This disparity seemed too coincidental to be anything but an attempt to "sandbag" the defendant's direct appeal.[82] A defendant could not possibly have meaningful access—the foundation of the due process rationale for the right to counsel—to the appellate process if her success on appeal could be reversed in a proceeding in which she was not guaranteed representation by counsel.

3. Critical Stage Analysis

In his dissenting opinion in *Blankenship I*, Judge Parker also argued that prosecution appeals may constitute critical stages of criminal proceedings to which Sixth Amendment protections apply.[83] Like the Supreme Court in *United States v. Wade*, Judge Parker reasoned that the Sixth Amendment right to counsel is determined by the "interests at stake in such proceedings"[84] and does not attach simply to provide defendants meaningful access to the court, irrespective of the substantiality of the interests at stake. Given the resources that the state must expend to provide counsel for indigent defendants, only those proceedings so critical as to threaten defendants' "substantive rights" constitutionally mandate the appointment of counsel.[85]

Applying *Wade* to the prosecution's appeal against Blankenship, Judge Parker compared Blankenship's situation to that of *Gideon v. Wainwright*'s defendant,[86] who faced criminal prosecution without the benefit of counsel. Blankenship's conviction was reinstated following the state's appeal, resulting in his re-arrest. Thus, it was clear to Judge Parker that "Blankenship had the same liberty interest [on appeal] as in any preliminary hearings he may have had and at the trial itself."[87] In essence, Blankenship was convicted without counsel to represent him, and so, as in Gideon's case, the

80. *Blankenship II*, 118 F.3d at 317.
81. *Id.*
82. *Id.*
83. *Blankenship I*, 106 F.3d at 1208 (Parker, J., dissenting).
84. *Id.* at 1207-08.
85. *Id.* at 1208 (listing as "non-critical" procedures like "the taking of fingerprints, blood, hair, and post-arrest photographs").
86. 372 U.S. 335 (1963).
87. *Blankenship I*, 106 F.3d at 1208.

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state denied Blankenship his fundamental constitutional right to counsel at a "critical stage" of the proceedings against him.

The Seventh Circuit Court of Appeals has also applied *Wade*'s critical stage analysis to prosecution appeals. In *United States ex rel. Thomas v. O'Leary*,[88] Thomas and his attorneys were sent notice that the state of Illinois sought to appeal from the trial court's pretrial suppression of statements at Thomas' murder trial. After a short time, having received no brief from Thomas, the appellate court sent a letter to the prosecution stating that the court would issue a decision based only upon the record and the state's brief. The court reversed, no oral argument ever taking place, and Thomas was tried and sentenced to twenty-five to fifty years incarceration.[89]

As Thomas had had appellate counsel, the primary issue before the Seventh Circuit Court of Appeals was whether the conduct of his attorneys constituted ineffective assistance of counsel.[90] However, the court could not reach this issue without first declaring that Thomas had a right to counsel on the prosecution's appeal. Holding that a pretrial suppression hearing qualified as a critical stage of the proceedings under *Wade*, the Court of Appeals concluded that the state's appeal from the pretrial hearing is "equally as critical," given the similar consequences to the defendant should she lose at either proceeding.[91] Logically, then, the Sixth Amendment guarantee of counsel applied equally at both proceedings.

The New York Court of Appeals followed a similar line of reasoning in *People v. Jovani Garcia*. As described in Part III, Garcia's conviction was reinstated after a successful prosecution appeal at which Garcia was neither represented nor even present. Unlike the defendant in *O'Leary*, who had not yet been tried when the prosecution appealed, Garcia faced imminent imprisonment following the state's appeal. Since the risks of criminal prosecution at appeal and trial were the same for Garcia, the Court of Appeals argued that he was entitled to representation at both proceedings. Even though the Court of Appeals did not rely explicitly on *United States v. Wade* (since the case was decided solely under the New York Constitution), its reasoning parallels closely the critical stage analysis of *Wade*. Because imprisonment awaits a defendant at the conclusion of an appeal by the state, the defendant will have an interest in innocence at stake in that appeal, which is sufficiently substantial to warrant appointment of counsel under *Wade*.

88. 856 F.2d 1011 (7th Cir. 1988).
89. *O'Leary*, 856 F.2d at 1013.
90. *Id.* at 1014.
91. *Id.* at 1014-15. *Cf.* Commonwealth v. Rosario, 635 A.D.2d 109, 110 (Pa. 1993) (holding that an appeal from sentencing proceeding, a post-verdict event, constituted a critical stage under state law, as derived from *Wade*).

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V.
LIMITATIONS OF THE TRADITIONAL ARGUMENTS

The three traditional arguments for providing counsel to indigent defendants on appeals by the prosecution are not generally applicable to all prosecution appeals, particularly advisory appeals. When a prosecutor takes an advisory appeal, she does not actually appeal the trial court's judgment of conviction or evidentiary ruling. Since the appellate court's decision will not be retroactive, the defendant's personal stake in the appeal is greatly reduced, if not eliminated altogether. Arguably, then, neither *Ross* nor *Douglas* will support appointment of counsel since it will be difficult to show that defendants must have meaningful access to appellate proceedings where the appellate court's decision is not retroactive; nor is there any reason to suppose that an advisory appeal marks a "critical stage" of the proceeding, the outcome of which threatens substantial interests of a defendant.

Further, many scholars have argued that the trial record will present the issues sufficiently for an appellate court to review without the aid of counsel. In his recent article on prosecution appeals in Ohio, Judge Stephen R. Shaw contended that for most advisory appeals, the contents of the trial record would be capable of "furnish[ing] the desired adversarial context."[92] Remarking on the perceived adequacy of the trial record and the absence of an immediate threat to the defendant, Judge Shaw concluded: "There is certainly no requirement, constitutional or otherwise, that there be counsel opposing the prosecution in such cases."[93]

92. Shaw, *supra* note 24, at 754.

93. *Id.* at 753. Note that Judge Shaw advocates giving trial courts an "inherent discretion to appoint counsel," which should only be exercised when trial records are insufficient. *Id.*

Other courts and scholars that have discussed advisory appeals have not discussed the right to counsel at these proceedings. In fact, most courts and scholars never reach this question of counsel at advisory appeals since they have questioned the constitutionality of advisory appeals in the first instance. Most scholars focus on the absence of any "case or controversy" before a court hearing an advisory appeal, or on the practical concern with allowing appellate courts to decide issues of law with only the state's brief to consider. *See, e.g.,* United States v. Evans, 213 U.S. 297 (1908); State v. Bistricky, 555 N.E.2d 644 (Ohio 1990); State v. Arnett, 489 N.E.2d 284 (Ohio 1986); Euclid v. Heaton, 238 N.E. 2d 790 (Ohio 1968). *See also* STANDARDS RELATING TO CRIMINAL APPEALS, Prosecution Appeals, § 1.4(c) (Am. Bar Ass'n, Approved Draft 1970) (stating that "the concept of a 'moot appeal' is not sound. . . . The quality of litigation engendered and the absence of the cutting edge of the adversary system suggests that decisions so obtained would not be of the highest order."); 13 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE §3529.1 (1984) ("The important concern is that courts not be required to render decisions that, without more, can be set aside in the discretionary exercise of executive or legislative power."); Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARVARD L. REV. 1002, 1007 (1924) (arguing that advisory opinions are inherently undemocratic: "Perhaps the most costly price of advisory opinions is the weakening of legislative and popular responsibility. It is not merely the right of the legislature to legislate; it is its duty."). *But cf.* Neal Kumar Kaytal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1803-07 (1998) (arguing that there is a less objectionable and more common type of advisory

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Judge Shaw's simplified depiction of the advisory appeal process fails to consider the severe consequences facing defendants as a result of advisory appeals. There are two ways in which a defendant may be immediately affected by an advisory appeal: (1) indirectly through a debasement of the original trial decision, or (2) directly through a finding of no double jeopardy bar to re-prosecution. An example of the debasement of the trial decision is presented in the facts of *State v. Martin*.[94] In *Martin*, the Kansas Supreme Court decided an advisory appeal in favor of the state without hearing argument from the defense. In its concluding remarks, the Court stated firmly that it believed that the defendant's behavior was both "immoral" and "criminal."[95] Although these comments did not directly impact the disposition of the case, the Court nevertheless passed judgment on the defendant's case. Even if Martin did not feel humiliated by the court's pronouncement—his victory at trial was cheapened.

Professor James Strazzella of Temple University Law School discusses the second major problem with advisory appeals: that courts may find that there is no double jeopardy bar. Referring to prosecution appeals in general, he states:

> [T]he preliminary jurisdictional issue is whether a double jeopardy bar to further prosecution actually does exist, for example whether there is the functional equivalent of an acquittal. Until the double jeopardy point is finally resolved in the defendant's favor (with all levels of prosecution appeal exhausted), the defendant actually does maintain a stake in the appellate proceedings.[96]

That is, even when the state claims to seek an advisory appeal, a real possibility remains that the appellate court will find that there is no double jeopardy bar to prosecution of the defendant upon remand.

The traditional arguments could support appointment of counsel in the scenario discussed by Professor Strazzella. Since the defendant requires shielding from the very real threat of conviction upon remand to the trial court, it may be argued pursuant to *Ross* and *Douglas* that "meaningful access" to the appellate process is important; moreover, it may be fundamentally unfair that only defendants with sufficient resources can obtain such access. Similarly, since there is at least some threat to a defendant's interest in innocence, the advisory appeal could be considered a "critical" stage in the litigation pursuant to *Wade*.

However, the traditional arguments are much less likely to protect against the harm suffered by defendants in the first scenario. The threat of

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opinion that occurs whenever judges, still in the presence of an Article III "case or controversy," give advice to other branches of governments).

94. 658 P.2d 1024 (Kan. 1983).

95. *Id.* at 1027.

96. James A. Strazzella, *The Relationship of Double Jeopardy to Prosecution Appeals*, 73 NOTRE DAME L. REV. 1, 22 (1997).

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humiliation from an appellate court's statement that a defendant is a "criminal" or that his or her acts were "immoral"[97] hardly rises to the level of the constitutional violation contemplated by *Wade* in requiring the appointment of counsel at critical proceedings. Nor, without a great stretch of the imagination, would such a situation be one at which an indigent defendant truly requires government-appointed shielding from the prosecution as discussed in *Ross* and *Douglas.*

VI.
PROPOSED PARADIGM FOR APPOINTMENT OF COUNSEL ON STATE APPEALS

As discussed in Part V, the traditional arguments for appointing counsel on prosecution appeals are limited in that they do not support appointment of counsel on advisory appeals. This section proposes a new paradigm for looking at appointment of counsel predicated on a theory of equal representation in a democratic society that derives from John Hart Ely's *Democracy and Distrust.*[98]

In *Democracy and Distrust*, John Hart Ely proposed a new theory of judicial review based on the need to reinforce representation in a democratic society. One of the primary contentions of Ely's "representation-reinforcement" argument is that courts should step in to protect the rights of minorities who face prejudice at the hands of a ruling majority. This prejudice, according to Ely, occurs in two ways. One type of prejudice is "pre-electorate," which occurs where the ruling majority deprives minorities of representation in the lawmaking process itself, and blocks the channels of political change in order to maintain the status quo. The second type of prejudice is "post-electorate" and refers to discriminatory applications of laws already passed. Post-electorate prejudice occurs where the ruling majority targets minority groups such that minority groups receive disparate protection under the law.[99]

Ely's representation-reinforcement theory is readily applicable to issues of criminal justice. In his dissenting opinion in *McCleskey v. Kemp*, Justice Brennan reflected on the role of the courts as protectors of defendants' rights in the criminal justice system:

> Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that

97. *Martin*, 658 P.2d at 1027.

98. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

99. *Id.* at 103.

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the majoritarian chorus may not alone dictate the conditions of social life.[100]

The "voices" Justice Brennan refers to are likely those of racial and ethnic minorities, since a majority of the two million people behind bars are members of minority groups. Indeed, the Bureau of Justice Statistics announced that "[a]t year end 1996 there were 1,571 sentenced black inmates per 100,000 blacks in the United States, compared to 688 sentenced Hispanic inmates per 100,000 Hispanics and 193 white inmates per 100,000 whites."[101] More recently, the Criminal Justice Institute announced that as of January 1, 1998, only 43.3% of all inmates in adult correctional facilities were white, while 47.4% were black and 16.0% were Hispanic.[102] The racial asymmetry of the prison population, coupled with the fact that many states deny voting privileges to convicted criminals,[103] is a situation likely to lead to pre-electorate prejudice.

An example of post-electorate prejudice occurs in the context of search and seizure laws, which have a significant potential for discriminatory application by law enforcement personnel.[104] Scholars have noted that statutorily authorized unconstitutional searches under the Fourth Amendment reflect a legislature that is willing to "sacrifice the privacy interests of those most likely to commit criminal offenses in order to gain popularity with voters."[105]

Additionally, Ely himself found a substantiation of his theory in the Supreme Court's treatment of capital punishment. Published for the first

100. *See* McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (holding that evidence of racial disparity in the implementation of Georgia's capital punishment statute did not invalidate the law under either the Equal Protection Clause or the Eighth Amendment's proscription of cruel and unusual punishment).

101. Bureau of Justice Statistics, U.S. Dep't of Justice, Prison Statistics-Summary Findings (visited Feb. 15, 2000) <http://www.ojp.usdoj.gov/bjs/prisons.html>.

102. Camille Graham Camp & George M. Camp, Criminal Justice Institute, The Corrections Yearbook 12-13 (1998).

103. *See* Tena Jameson Lee, *A Deafening Silence at the Polls*, 24-SUM Hum. Rts. 12 (1997) (stating that "14 percent or one in seven of the 10.4 million black males of voting age are either currently or permanently barred from voting due to a felony conviction").

104. As I discuss later, this is exactly what has happened in the context of pretextual traffic stops, in spite of the fact that they are judicially sanctioned. *See infra* note 112 and accompanying text.

105. Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 Tex. L. Rev. 49, 84 (1995). *See also* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or Why Legislatures Don't Give a Damn About the Rights of the Accused?*, 44 Syracuse L. Rev. 1079 (1993) (arguing that we can understand legislative discrimination from the perspective of public choice theory; in other words, that elected officials, like all people, choose first to promote their self-interests by seeking votes).

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time in 1980, *Democracy and Distrust* lauded the Supreme Court's protection of minorities in *Furman v. Georgia*,[106] which held that the existing death penalty statutes violated the Equal Protection Clause.[107]

Unfortunately, since *Furman*, courts have been less willing to accept the representation-reinforcing role Ely envisions for them.[108] First, the representation-reinforcement thesis has not been borne out by the Supreme Court's Fourth Amendment jurisprudence over the last three decades, particularly in cases decided by the Warren Court such as *Terry v. Ohio*[109] and *Warden v. Hayden*.[110] More recently, in *Whren v. United States*,[111] the Court unanimously held that pretextual traffic stops do not violate the Fourth Amendment. Although not explicitly addressed in the Court's opinion in *Whren*, a fundamental race issue undeniably lurks beneath the surface of the case. In the words of one scholar, the Court "fail[ed] to consider that police discretion, police perjury, and the mutual

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106. 408 U.S. 238 (1972).

107. Ely persuasively characterizes *Gregg v. Georgia*, 428 U.S. 153 (1976), as an unsuccessful attempt by the Court to protect minorities by approving capital statutes that specified the factors that juries could take into account. ELY, *supra* note 99, at 172-77.

108. *But cf.* Susan N. Herman, *Why the Court Loves* Batson: *Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1814 (1993). Professor Herman argues that the representation-reinforcement thesis can also be understood as the implicit foundation for the Supreme Court's jury selection decisions following *Batson v. Kentucky*, 476 U.S. 79 (1986). However, she notes that the Court's protection of minority rights in this context stands in contrast to its recent attitude toward capital punishment. In reality, then, the Court has opted for a less effective method for addressing the underlying racial bias in the criminal justice system. Professor Herman states: "The cases of the past two terms show that, given a choice between enhancing representation and protecting defendants, the Court is more interested in serving the former goal by enhancing the equal protection rights of prospective jurors." *Id.*

109. 392 U.S. 1 (1968) (holding that the standard for a "stop and frisk" is "reasonable suspicion," a less stringent test than probable cause).

Although I only discuss criminal cases, the tendency of the Court to disown the role Ely has assigned to it may be found in a myriad of legal areas. For example, in *Goldman v. Weinberger*, the Court held that the Air Force's prohibition of wearing headgear indoors did not violate the petitioner's First Amendment right to free exercise of religion. Goldman was a Jewish serviceman who wished to wear a skullcap. *See* Goldman v. Weinberger, 475 U.S. 503, 510 (1986). In his dissent, Justice Brennan adopted a more expansive view of the constitution and the Court's role under it:

> A critical function of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar. It is the constitutional role of this Court to ensure that this purpose of the First Amendment be realized.

Id. at 524.

110. 387 U.S. 294 (1967) (Brennan, J.) (holding that search warrants could be issued for "mere evidence"). For a discussion of the surprising role of the Warren Court in these cases, see, for example, Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383 (1968); Stephen A. Saltzburg, *Criminal Procedure in the 1960s: A Reality Check*, 42 DRAKE L. REV. 179 , 191-94 (1993).

111. 517 U.S. 806 (1996).

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distrust between blacks and the police are issues intertwined with the enforcement of traffic stops."[112] As a result of this omission, "*Whren* assures that minority motorists will continue to feel like second-class citizens on the nation's roads."[113]

Moreover, the Court's stance on capital punishment since *Furman*, particularly in *McCleskey v. Kemp,* which held that racial disparity in application of Georgia's death penalty statute was constitutional, does little to vindicate Ely's theory of courts as protector of minority rights.[114] Indeed, one commentator writes that "*McCleskey* does little to boost Ely's theory. . . . It seemed the ideal opportunity for the Court to champion the political underdog, but the possibility, even probability, of discriminatory application was not enough to convince the Justices to abolish capital punishment."[115] According to Justice Brennan, who dissented in *McKleskey*, the Court allowed the society's demand for punishment to drown out the voices of those who are the least powerful.[116]

Similar concerns underlie prosecution appeals. Appeals by the state—appeals that can only be authorized by statute—are the product of democratically elected legislative bodies. Since democratic minorities are most likely to be affected by these laws,[117] the courts should step in to ensure that laws are administered fairly to minority groups. However, as the above discussion of Fourth Amendment and death penalty jurisprudence shows, courts have been unwilling to respond to Ely's concern about post-electorate bias and to ensure that laws are administered fairly to minority groups. Thus, it is incumbent upon the criminal justice system to provide another means of ensuring equal representation to criminal defendants. This article proposes that appointment of counsel is necessary to fulfill this function in the case of prosecution appeals.

On first impression, this argument is flawed in that it assumes that courts are not acting in minority groups' interests. As the recent examples of capital punishment and Fourth Amendment jurisprudence discussed

112. Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 342 (1998).

113. *Id.* at 393.

114. *See generally* McCleskey v. Kemp, 481 U.S. 279 (1987).

115. Steven H. Jupiter, *Constitution Notwithstanding: The Political Illegitimacy of the Death Penalty in American Democracy*, 23 FORDHAM URB. L.J. 437, 452 n.83 (1996).

116. *McCleskey*, 481 U.S. at 343 (Brennan, J., dissenting).

117. Professor Dripps rightly points out that minority groups are not always unrepresented in the political process, despite the disparate impact that criminal laws have on them. Indeed, African-American politicians frequently make use of the fact that their minority constituents are also the most likely to be victimized by crimes. Even if African-Americans "stand to benefit the most from effective law enforcement," though, Professor Dripps' observation does not undercut a fundamental premise of the representation-reinforcement argument—that neither law enforcement, nor the judicial system that supervises it is fair in practice. *See* Dripps, *supra* note 106, at 1088-89.

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above illustrate, this criticism is easily rebutted.[118] Further, the outlook for democratic minorities is bleaker in states where appellate judges are elected, since elected judges are more likely to yield to majoritarian pressures.[119]

However, a stronger version of the representation-reinforcing argument supporting appointment of counsel on prosecution appeals exists, and is premised on the understanding that judges play a quasi-legislative role. As Oliver Wendell Holmes noted in his discussion of the Anglo-American common law tradition, "Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy."[120] By creating precedent, judges, in Holmes' view, play a quasi-legislative role. Professor Neal Kumar Kaytal[121] made a similar point when he argued that one of the primary functions of judges (as well as legislators and members of the executive branch) is to give "advice" to the other branches of government.[122] Discussing a few of the ways in which courts can "advise" other governmental branches, Professor Kaytal states:

> First, the judiciary "makes" law when it creates federal common law. Its action is legislative, but only because Congress so permits

118. In fact, it might also be argued that courts, *even acting properly*, are not adequate substitutes for representation by counsel. For example, the swelling of court dockets and the adversarial nature of court proceedings are often mentioned as factors that make it difficult for the judge *qua* protector of minority rights to devote as much time to the plight of a criminal defendant as would counsel. The New York Court of Appeals has held:

> There is no substitute for the single-minded advocacy of appellate counsel. Experience has demonstrated that they not infrequently advance contentions which might otherwise escape the attention of judges of busy appellate courts, no matter how conscientiously and carefully those judges read the records before them.

People v. Emmett, 254 N.E. 2d 744, 745 (N.Y. 1969). While the court's statement is probably true due to the current overcrowding of courts, it is not clear that under-representation by judges of minorities would still be a problem in an adversarial system without such overcrowding. Although it may be impossible to parse the two factors—the lack of judicial resources and the demands of an adversarial system—from available data, there seems no reason *a priori* to assume that the factors contribute equally to the "experiences" mentioned by the court in *Emmett*. Imagine, for example, a court presided over by Professor Dworkin's "superhuman" judge, Hercules. *See* RONALD DWORKIN, LAW'S EMPIRE 239 *passim* (1986).

119. In a recent article discussing the changing role of state appellate courts, Justice James H. Coleman of the New Jersey Supreme Court summarized a study on the effects of different judicial selection processes: "[A] 1994 survey of state court judges by the American Judicature Society indicated that 27.6% of judges said that retention elections made them increasingly sensitive to public opinion, while 15.4% conceded that they would avoid controversial rulings and cases[.] . . . The same percentages may apply to supreme court justices because 67.6% of them had prior judicial experience and at least half of the states use some form of judicial elections." Justice James H. Coleman, Jr., *Appellate Advocacy and Decisionmaking in State Appellate Court in the Twenty-First Century*, 28 SETON HALL L. REV. 1081, 1091 (1998).

120. OLIVER WENDELL HOLMES, THE COMMON LAW 35 (Michael Arnheim ed., 1994).

121. Associate Professor of Law, Georgetown University Law Center; Special Assistant to the Deputy Attorney General, U.S. Department of Justice.

122. *See generally* Kaytal, *supra* note 94.

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> it by failing to preempt by statute judicial common law rules. In the absence of statutory legislation, the courts are making law, and the Congress is implicitly sanctioning it. Some statutes, such as the Sherman Act, expressly delegate lawmaking power to the courts.[123]

More importantly, Professor Kaytal argues not only that courts make law, but that all attempts to thwart judicial lawmaking will be futile, if not counter-productive:

> If courts are forbidden from giving open advice, however, they will do so surreptitiously. History has demonstrated this point with considerable force. Although such hidden contacts did not irrevocably damage the legitimacy of government in the past, in this day and age there is no doubt that they could. Even more problematic, if courts do not feel comfortable engaging in behind-the-scenes advice, they might be tempted to usurp the authority of the political branches by striking down legislation with which they do not agree and dressing their policy decisions in constitutional garb—thereby undermining both the Court's legitimacy and separation of powers.[124]

Thus, Professor Kaytal argues that judicial lawmaking is inevitable and, perhaps even desirable.[125] Professor Christopher J. Peters[126] agrees with Kaytal and contends that judicial lawmaking is legitimate.[127] Specifically, Professor Peters posits that judicial lawmaking is similar to a system of parliamentary lawmaking in that judicial lawmaking has a participatory aspect and an "interest representation" aspect, both of which incorporate the role of litigants in the decision-making process: "judgments come from

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123. *Id.* at 1811.

124. *Id.* at 1821. The situation described in Professor Kaytal's counterfactual may now be a reality. A review of the 1998 Supreme Court term by *The New York Times* characterized the Court's opinions in recent federalism cases as follows:

> Those decisions had a subtext with even more far-reaching implications, indicating the Court's unwillingness to credit Congress's own view not only of the way legislation should be written but even of the justification for Federal legislation at all in areas where Congress has deemed it preferable to stitch the states into a uniform, nationwide rule of law.

Linda Greenhouse, *The Justices Decide Who's in Charge*, N.Y. TIMES, June 27, 1999, § 4, at 1.

125. *See* Kaytal, *supra* note 94, at 1799-1800 (endorsing judicial lawmaking to the extent that it "maximizes comity for coordinate branches [of government] by holding out the possibility that they may achieve their sought goals in some other constitutional manner"). *Cf.* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 890 (1999) (arguing that "[c]ourt rulemaking is better suited to the task of inferring general principles from existing practice and designing an integrated system of rules based on those principles").

126. Bigelow Teaching Fellow and Lecturer in Law, University of Chicago Law School.

127. *See generally* Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997).

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cases . . . [that] are the products of disputes among real people, and, not surprisingly, those same real people and their agents tend to be intimately involved in managing them."[128] Thus, inadequate representation of the litigants will adversely impact the quality of judicial decisions.[129] *A fortiori*, lack of representation altogether will lead to poor judicial decisionmaking.[130]

Professor Peters' argument is similar to the application of Ely's representation-reinforcement theory presented here in the context of prosecution appeals. Since pre-electorate bias also arises in the course of judicial lawmaking, just as it does in legislative lawmaking, judicial lawmaking should be held to a democratic standard similar to the one used to evaluate the product of legislatures. An appeal by the state is an opportunity for judicial lawmaking. Thus, it is critical that legal precedent be fashioned to represent the interests of all parties involved, including those connected to the appeal as well as those who are similarly situated; the fact that the appeal is taken from a criminal proceeding requires that the interests of both the state and of defendants be effectively represented. Such representation cannot come from a disinterested third party or from a defendant class frequently untrained in legal proceedings.[131] Rather, representation must come from counsel, an advocate whose sole job it is to promote the rights of defendants.

As argued in Part V, the traditional arguments are limited in that they do not easily support a right to counsel on advisory appeals. The value of

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128. *Id.* at 346-48.

129. *See id.* at 376. Professor Peters contends that adequacy of representation is one of three necessary conditions for legitimate judicial lawmaking. The other two conditions are that the decision is produced "to a significant degree" by the parties to the case, and that the decision bind only those parties whose cases are similar. *Id.* at 375.

130. *Cf.* Strickland v. Washington, 466 U.S. 668, 692 (1984) (holding that "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice").

131. One may wonder why the representation-reinforcement paradigm set forth above would not be better served by requiring defendants to appear *pro se* on appeal. This question is essentially no different than one that asks whether a republican system of government would not be better off if citizens voted for laws instead of electing representatives to vote for them. Of course, this response begs the question, but it also raises a complex issue. Whereas it simply may not be feasible to hold nationwide referendums on every law, criminal appeals are frequently matters involving three discrete parties: a prosecuting attorney, a defendant, and a judge (or groups thereof). On the other hand, unlike the prototypical legislator or lawyer, neither the average citizen nor the average criminal defendant has the knowledge or the time to participate effectively in all issues regarding her rights. *See, e.g.*, John Matosky, *Illiterate Inmates and the Right of Meaningful Access to the Courts*, 7 B.U. PUB. INT. L.J. 295, 301-02 (1998) (pointing out that nearly fifty percent of inmates have neither a high school diploma nor a G.E.D., and a substantial number of them have not progressed beyond an eighth grade education).

Any counterargument to the thesis that appointment of counsel is necessary to reinforce representation must defend the principle that judges either should not or merely do not utilize the arguments of counsel. That is, a counterargument must alternatively defend a non-adversarial system of criminal justice in which the role of counsel is much smaller than it is in ours, or contend that the role of counsel in present litigation is symbolic at best.

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the representation-reinforcement thesis thus comes from its ability to encompass advisory appeals.[132] The thesis also seems to answer some of the Supreme Court's concerns with advisory appeals as enunciated in *United States v. Evans*.[133] Writing the opinion that prohibited federal courts from hearing advisory appeals, Chief Justice Fuller quoted the Court of Appeals below on one of the central problems with advisory appeals:

> The appellee in such a case, having been freed from further prosecution by the verdict in his favor, has no interest in the proceedings on appeal, and may not even appear. Nor can his appearance be enforced. Without opposing argument, which is so important to the attainment of a correct conclusion, the court is called upon to lay down the rules that may be of vital interest to persons who may hereafter be brought to trial. All such persons are entitled to be heard on all questions affecting their rights, and it is a harsh rule that would bind them by decisions made in what are practically "moot" cases, where opposing views have not been presented.[134]

Although the wiser approach may be to follow the Court's lead in prohibiting advisory appeals, not all states follow this approach. Therefore, in order to protect the rights of indigent criminal defendants in our democratic society—in order to ensure that they will be "heard on all questions affecting their rights"[135]—it is necessary that defendants be represented in the course of advisory appeals.[136]

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132. The representation-reinforcement argument can also be applied to appeals by the defendant. Since appeals by defendants fall outside the scope of this Article, they are addressed only briefly here. On appeals as of right, the defendant frequently contends that his or her rights were violated during trial. Thus, a judge in Ely's world would scrutinize the record below to insure the protection of the defendant's rights. Given both the failure of appellate courts to protect minority rights and the quasi-legislative nature of many appellate decisions, counsel must be appointed to ensure that defendant is represented. However, the representation-reinforcement paradigm does not support appointment of counsel on most discretionary appeals. In these cases, the defendant has already been represented on his or her first appeal as of right. Unless counsel at that appeal was ineffective (as legally understood), the defendant deserves no more entitlement to counsel than an individual deserves a new representative in the legislature whenever her elected representative is not successful in passing a piece of desired legislation.

133. 213 U.S. 297 (1908).

134. *Id.* at 300 (quoting Chief Justice Shepard writing for the Appellate Circuit below).

135. This point is especially salient in light of Professor Frankfurter's characterization of advisory appeals as inherently undemocratic. *See generally* Frankfurter, *supra* note 94.

136. Two other types of prosecution appeals merit attention. Like other appeals by the state, prosecution appeals from grants of parole are increasingly common. *See* George Ward, *A New Phenomenon—Prosecution Appeals of Decisions to Parole*, 72 MICH. BAR J. 1058 (1993) (discussing the development of appeals from parole in Michigan and arguing that there is no right to counsel on such appeals). Additionally, counsel has not always been provided for indigent defendants when the state appeals a parole board's findings. *See generally* Sandra Girard, Neal Bush & Stuart Friedman, *Prosecution Appeals of Decisions to Parole—A Different Perspective*, 73 MICH. BAR J. 188, 191 (1994). By not addressing parole appeals in the scope of this note, I am not condoning the failure to appoint counsel in those

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VII.
CONCLUSION

The primary purpose of this article is to develop a legal framework that allows for appointment of counsel on all prosecution appeals, including advisory appeals. The traditional arguments articulated by the Supreme Court supporting the right to counsel—Equal Protection, Due Process, and Critical Stage—are limited in that they do not support the right to counsel on advisory appeals. For states not authorizing advisory appeals, these traditional rationales may be sufficient to support the appointment of counsel on other types of prosecution appeals. However, in states where legislatures have authorized advisory appeals, a new rationale for appointing counsel is required. This article proposes an application of

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cases. Indeed, many of the arguments offered in support of the representation-reinforcement thesis apply in the context of parole appeals as well. For example, illiteracy runs rampant among prisoners, who likely could not respond effectively to a prosecutor's brief, even if they had a basic education. *Id.*

However, I do not address appeals from decisions granting parole for two reasons. First, the available evidence is too scarce to draw definitive conclusions about the legal propriety of these appeals. Second, there are significant substantive differences between appeals of parole decisions and other prosecution appeals, particularly the fact that the parole appeals never involve a trial and that success on appeal by the state offers only a return to the status quo and not a new trial. While there are sufficient similarities among prosecution appeals generally to merit a further inquiry into the usefulness of the representation-reinforcement model as applied to all prosecution appeals, including parole appeals, an approach to counsel in appeals from parole decisions has already been developed. *See, e.g.*, William D. Adams, *The Prosecution Appeal of Parole: The Indigent Prisoner's Right to Counsel*, 41 WAYNE L. REV. 177 (1994) (arguing that a prisoner has a liberty interest under the Due Process Clause in preserving the parole board's decision from attack by the prosecution).

The second type of prosecution appeal not discussed in this note—appeals during post-conviction proceedings—also differs significantly from prosecution appeals directly following trial. First, the Supreme Court has explicitly stated that there is no constitutionally recognized right to counsel where the defendant takes a post-conviction appeal. *See* Pennsylvania v. Finley, 481 U.S. 551 (1987) (extending the holding in *Ross v. Moffitt* to post-conviction appeals); Murray v. Giarratano, 492 U.S. 1 (1989) (holding that *Finley* applies to state post-conviction proceedings in capital cases). Additionally, since a "substantial balance of States" deprive defendants of the right to counsel on their own post-conviction appeals, *Murray*, 492 U.S. at 10 n.5, a denial of counsel on a prosecution appeal subsequent to a successful post-conviction proceeding cannot be considered an attempt to "sandbag" the defendant's appeal. *Cf. Blankenship II*, 118 F.3d at 317.

There may be good reasons for providing counsel on post-conviction appeals. Some members of the *Murray* majority reasoned that the post-conviction proceeding was "a civil action designed to overturn a presumptively valid criminal judgment." *Murray*, 492 U.S. at 13 (O'Connor, J., concurring). The Murray rationale does not apply where the *prosecution* appeals a post-conviction proceeding, since the appeal will always follow a judicial determination that the criminal judgment was not valid in the first instance. Furthermore, the dissent in *Murray* observed that, as a matter of state and federal law, many claims, such as ineffective assistance of counsel, cannot be raised until post-conviction proceedings. *Id.* at 24-25 (Stevens, J., dissenting). Finally, if a state statute entitled a defendant to counsel on a post-conviction appeal, a denial at a subsequent prosecution appeal would then violate the Due Process Clause by "sandbagging" the defendant's success. *See, e.g.*, 21 U.S.C. § 848(q)(4)(B) (1994) (granting capital defendants the right to counsel in post-conviction proceedings brought pursuant to 28 U.S.C. § 2254 and § 2255).

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John Hart Ely's representation-reinforcing model of judicial review to the question of appointment of counsel. Since judges are engaged in quasi-legislative roles when they preside over prosecution appeals generally, and advisory appeals in particular, their lawmaking should be held to a democratic standard similar to that applied to legislatures. That is, the interests of all parties and those similarly situated must be effectively represented during the course of judicial lawmaking arising from prosecution appeals. Appointment of counsel is the only way to ensure that the interests of the criminal defendant are adequately represented.

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