



**Testimony of Professor Robert C. Boruchowitz,
Senate Judiciary Committee, May 13, 2015
On Misdemeanor Public Defense**

Thank you for the opportunity to speak with you about misdemeanor courts and the problems in meeting the constitutional obligation to provide lawyers for people in those courts. I have spent much of the past 12 years working on improving misdemeanor courts and I will draw on that experience here.

**Most People Who Go to Court Go to Misdemeanor Court and the Volume and Cost
are Staggering**

There are approximately ten million cases in misdemeanor courts in the U.S. each year. The cost is staggering, as the full cost of a misdemeanor case is estimated to be \$1679.¹ In many states there is at least one misdemeanor case per year for every 30 residents.²

Misdemeanor courts are where most people who go to court have their experience with American justice. Almost every person in the country knows someone who has been charged with a misdemeanor, whether it is minor in possession of alcohol, shoplifting, driving with a suspended license, or something more serious such as DUI or assault.

In a recent op-ed article, Charles G. Koch and Mark V. Holden addressed a variety of the issues that affect misdemeanor courts.³ They pointed out the overcriminalization of America and that the U.S. has the highest incarceration rate in the world. They discussed the racial disparity in the people who are imprisoned and the connection between poverty and incarceration. And they called for strong public defense:

...we must ensure that all those charged with a crime receive their Sixth Amendment right to representation by a lawyer. Inadequate or no legal

¹ See Robert C. Boruchowitz, Issue Brief, *Diverting and Reclassifying Misdemeanors Could Save \$1 Billion per Year: Reducing the Need For and Cost of Appointed Counsel*, AM. CONST. SOC'Y FOR LAW & POL'Y, Dec. 2010, [hereinafter *Diverting and Reclassifying*], available at http://www.aclaw.org/sites/default/files/Boruchowitz_-_Misdemeanors.pdf.

² See, e.g., “Three-Minute Justice: Haste and Waste in Florida’s Misdemeanor Courts”, National Association of Criminal Defense Lawyers (2011), at 9, “Nearly a half million people, approximately 3% of the state’s adults, pass through Florida’s misdemeanor courts each year.” Available at <https://www.nacdl.org/reports/threeminutejustice/>.

³ Charles G. Koch and Mark V. Holden, “Koch: End overcriminalization of America,” Des Moines Register, January 24, 2015, <http://www.desmoinesregister.com/story/opinion/columnists/2015/01/25/koch-end-overcriminalization-america/22303859/>

THE DEFENDER INITIATIVE

Robert C. Boruchowitz, Director

901 12th Avenue, P.O. Box 222000, Seattle, WA 98122-1090 Tel.: (206) 398-4151 Fax: (206) 398-4036

representation results in devastating consequences for criminal defendants and their families.⁴

There are Systematic Violations of the Right to Counsel in Misdemeanor Courts
Unfortunately, 52 years after the U.S. Supreme Court case of Gideon v. Wainwright⁵ and 43 years after the case of Argersinger v. Hamlin,⁶ in many places people go to court with no lawyers at all, or the lawyers they have are overwhelmed with cases, poorly trained, poorly paid, and operating without necessary support such as investigation and expert witness resources. As a result, many people end up with convictions that result in jail time and heavy fines as well as the consequences of losing jobs, housing, and school opportunities. With capable lawyers, many of those convictions and consequences could be avoided, and in other cases the amount of jail time and fines could be diminished.

The Gideon case established that there is a right to counsel in state felony prosecutions and the Argersinger case applied that right to misdemeanor cases. If a case is important enough to have lawyers to prosecute, it is important enough to have lawyers to defend, as the US Supreme Court made clear in Gideon.⁷ The Argersinger Court emphasized that “Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.”⁸

In Alabama v. Shelton, the Court ruled that a suspended sentence that may “end up in the actual deprivation of a person’s liberty” even for thirty days, as happened in Mr. Shelton’s case, may not be imposed unless the defendant was accorded “the guiding hand of counsel” in the underlying prosecution that led to the suspended sentence.⁹

Yet in many places the right is more an illusion and there are systematic violations of the right to counsel established by the Supreme Court. This means that every day people across the country go to court and end up convicted of crimes without ever having the opportunity to talk with a lawyer and to have the help of a lawyer to negotiate their case with a prosecutor or advocate for them to a judge or jury. The protection that the Sixth Amendment contemplated for the individual against government mistake or abuse is simply not provided in those cases.

The problems of so-called “no counsel courts”, courts with no public defenders to represent accused persons, are not confined to one region of the country. For example, I have documented courts with no defenders at arraignment hearings in New York State, South Carolina, and Arizona. A significant percentage of cases are resolved at

⁴ Id.

⁵ Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

⁶ Argersinger v. Hamlin, 407 U.S. 25, 33, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972),

⁷ “That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.” Gideon, supra, at 344.

⁸ Argersinger v. Hamlin, 407 U.S. 25, 34.

⁹ Alabama v. Shelton, 535 U.S. 654 (2002).

arraignment hearings, and despite the U.S. Supreme Court having made clear that arraignment is a critical stage at which counsel is required, many courts proceed without counsel. According to a recent article, “Of the more than 300 municipal courts in South Carolina, only three--Rock Hill, North Charleston, and Charleston--provide public defenders, according to state court officials.”¹⁰ The South Carolina Chief Justice admitted, “I will tell you straight up we [are] not adhering to Alabama v. Shelton in every situation.”¹¹ And in many courts in a number of states, there is no prosecutor present at arraignment, which puts the judge in an untenable position of handling the case with no advocate on either side.

In Kentucky, only 32 per cent of misdemeanor defendants have a public defender.¹² In Texas, 25.4 per cent of the misdemeanor defendants appear without counsel.¹³ The cost of inadequate representation to individuals, families, and local and state governments is in the hundreds of millions of dollars per year.

Very Minor Offenses are treated as Crimes

In many places, very minor offenses are treated as crimes. That can include conduct such as sleeping in a cardboard box, providing food to homeless people in a park, having a dog off a leash.¹⁴ A just-published report found that of 72 Washington State cities, 78 per cent have laws that prohibit or limit sitting, standing, or sleeping in public places. These ordinances tend to be enforced against homeless people. The report noted that in many places, if an individual fails to pay the fine for or respond to a civil infraction, a bench warrant might be issued for their arrest and they can be charged with a misdemeanor.¹⁵

In many states, driving with a suspended license is a crime, and people go to jail every day on those offenses. For example, in Jefferson County, Kentucky in September 2011, among the bookings there were 260 charges for driving while license suspended or revoked. Non-DUI traffic charges were the third most common charge at booking.¹⁶

¹⁰ Tom Barton, ACLU: Equal justice for poor remains unfulfilled in SC municipal courts, THE ISLAND PACKET (Oct. 5, 2013)

<http://www.islandpacket.com/2013/10/05/2723229/aclu-equal-justice-for-poor-remains.html#storylink=cpy>.

¹¹ Chief Justice Jean Hoefer Toal of the Supreme Court of South Carolina, South Carolina Bar Association, 22nd Annual Criminal Law Update (January 26, 2007).

¹² Statistics in chart provided by the Kentucky Department of Public Advocacy, on file with author.

¹³ Data provided to the author by the Texas Indigent Defense Commission.

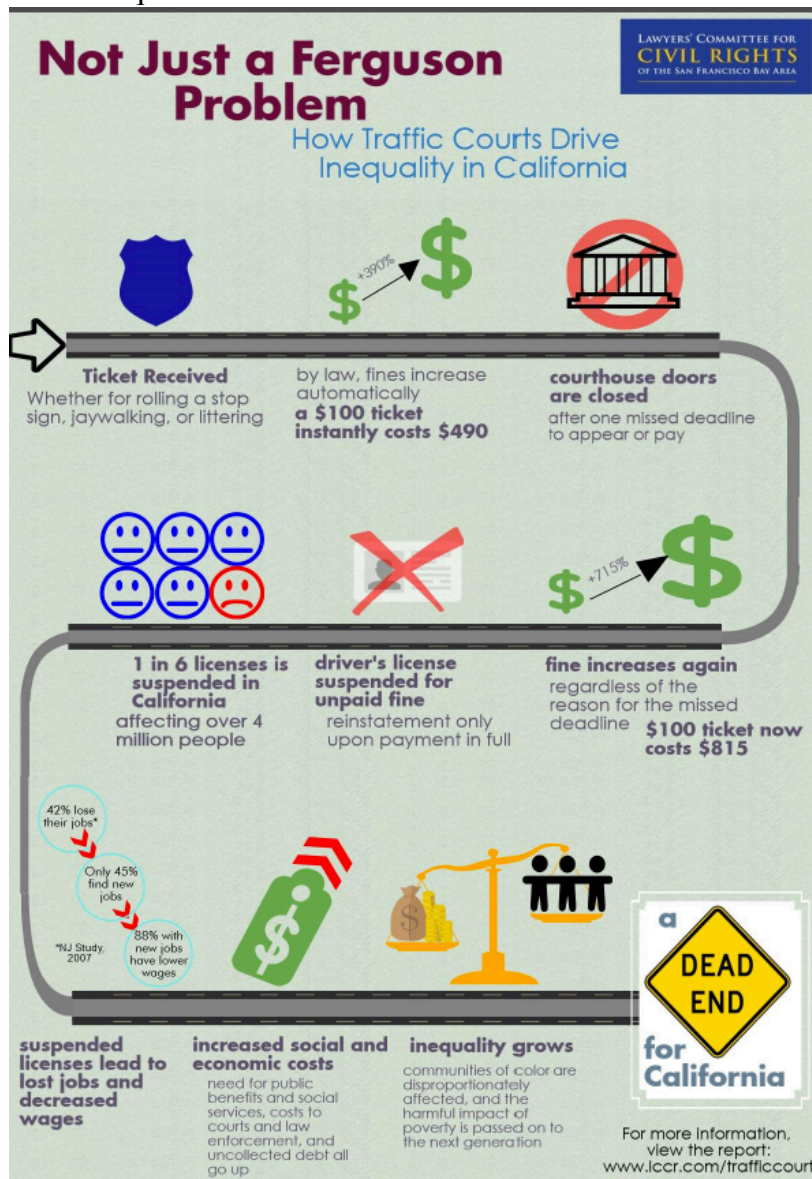
¹⁴ See ROBERT C. BORUCHOWITZ, MALIA N. BRINK, MAUREEN DIMINO, NAT'L ASS'N OF CRIM. DEF. LAWYERS, “MINOR CRIMES, MASSIVE WASTE, THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS” 25(2009). See also, “In Orlando, a Law Against Feeding Homeless — and Debate Over Samaritans’ Rights”, Associated Press (Feb. 3, 2007).

¹⁵ See, “Washington’s War on the Visibly Poor: A Survey of Criminalizing Ordinances & Their Enforcement”, Seattle University School of Law Homeless Advocacy Project (May 2015), available at: <http://ssrn.com/abstract=2602318>.

¹⁶ LOUISVILLE METRO. DEPT OF CORR. 2012 FACT SHEET (2013), available at http://www.louisvilleky.gov/NR/rdonlyres/E881F827-9898-41A0-89194D063AD8F641/0/LMDCFactDocument_2012.pdf. Most of these defendants with license charges had other charges as well, according to data provided to the author by the jail.

Often the reason for the suspension is not dangerous driving but the failure to pay a traffic ticket for a minor traffic citation, usually because the driver cannot afford to pay the fine. The criminalization of driving with a suspended license can lead to devastating impacts on the defendant. The Justice Department’s recent report on Ferguson, Missouri, documented that, describing a “community where local authorities consistently approached law enforcement *not* as a means for protecting public safety, but as a way to generate revenue.... where both policing and municipal court practices were found to disproportionately harm African American residents.”¹⁷

The chart below from the San Francisco Lawyers’ Committee for Civil Rights illustrates the consequences in California.



¹⁷ See, “Investigation of the Ferguson Police Department”, U.S. Department of Justice, Civil Rights Division, March 4, 2015.

Racial Disproportionality in Misdemeanor Cases is Significant

The racial disproportionality in many misdemeanor cases is significant. One scholar has written, “In minority communities where order maintenance policing generates thousands of problematic convictions, the misdemeanor process has become the first formal step in the racialization of crime.”¹⁸

In Texas, where the population is 50.3 percent black or Latino, 73 percent of those arrested for disorderly conduct are black or Latino persons.¹⁹

In Louisville in 2011, nearly 60 percent of those with marijuana charges and about 46 percent of those with suspended driving charges were black defendants, in a county whose population is 21 percent black.²⁰ A study in 2007 found that by 2000, smoking marijuana in public view (MPV) had become the most common misdemeanor arrest in New York City.²¹ The authors found that “most MPV arrestees have been black or Hispanic. Furthermore, black and Hispanic MPV arrestees have been more likely to be detained prior to arraignment, convicted, and sentenced to jail than their white counterparts.”²²

A recent study by the American Civil Liberties Union documented that the disparity is nationwide. The report found that, on average, a Black person is 3.73 times more likely to be arrested for marijuana possession than a white person, even though Blacks and whites use marijuana at similar rates.²³

In Many Courts Proceedings Take Only a Few Minutes, Making Justice Impossible

In many courts, particularly when there are no lawyers available for the accused person, the proceedings are completed in only a few minutes. For example, a study in Florida found that 82 per cent of arraignments lasted three minutes or less.²⁴ I have documented hearings in a Washington State court in which the entire proceeding, from advice of rights through guilty plea and sentencing, took less than a minute and a half. [See Appendix for an example.] There is no way that an accused person can understand their rights, including the right to a lawyer and to a trial and to confront the witnesses against

¹⁸ Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1319 (2012).

¹⁹ Robert C. Boruchowitz, Fifty Years After Gideon: It Is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own, 11 Seattle J. for Soc. Just. 891, 893 (2013).

²⁰ LOUISVILLE METRO. DEP'T OF CORR., 2011 FACT SHEET (2012) (on file with author). Numerous reports have documented the racial disproportionality in American criminal courts. See, e.g., BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE, *supra*, at 47-48.

²¹ Golub, Johnson & Dunlap, *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, abstract available at http://www.sentencingproject.org/detail/clearinghouse.cfm?clearinghouse_id=126.

²² *Id.*

²³ *The War on Marijuana in Black and White; Billions of dollars wasted on racially biased arrests*, ACLU 4 (June 2013), <http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.

²⁴ “Three Minute Justice”, FN 2 *supra*, at 4.

them, make a meaningful decision about whether to exercise those rights, and present their perspective on the case for the judge to consider, when the entire proceeding takes less than 90 seconds. And there is no way for the judge to know whether the person has made a knowing, intelligent, and voluntary waiver of their rights to counsel and to trial or is making a knowing, intelligent, and voluntary plea of guilty, or to know anything about the defendant and what an appropriate sentence should be when the entire proceeding takes less than 90 seconds.

In many ways the misdemeanor courts resemble the description in the 1972 Supreme Court case of Argersinger v. Hamlin, in which the Court noted that the volume of misdemeanor cases may create an obsession for speedy dispositions, regardless of the fairness of the result. The Court cited a Presidential Commission report that noted:

The calendar is long, speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. The frequent result is futility and failure. As Dean Edward Barrett recently observed:

“Wherever the visitor looks at the system, he finds great numbers of defendants being processed by harassed and overworked officials. Police have more cases than they can investigate. Prosecutors walk into courtrooms to try simple cases as they take their initial looks at the files. Defense lawyers appear having had no more than time for hasty conversations with their clients. Judges face long calendars with the certain knowledge that their calendars tomorrow and the next day will be, if anything longer, and so there is no choice but to dispose of the cases.

“Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous.

“Very little such observation of the administration of criminal justice in operation is required to reach the conclusion that it suffers from basic ills.”

The Court continued:

That picture is seen in almost every report. ‘The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush.’ Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 *The Legal Aid Brief Case* 151, 152 (1970).

There is evidence of the prejudice which results to misdemeanor defendants from this ‘assembly-line justice.’ One study concluded that ‘(m)isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel.’ American Civil Liberties Union, Legal Counsel for Misdemeanants, Preliminary Report 1 (1970).²⁵

I have noted that in the City of Seattle Municipal Court, where defenders are provided from the beginning of the case and have limited caseloads and investigators on staff, 25 per cent of cases are dismissed.²⁶

Recent Federal Case Highlights Many of the Factors Contributing to the Denial of Effective Representation

A recent Federal Court decision in a Washington State case against two cities highlights many of the problems in misdemeanor courts around the country. Judge Robert Lasnik, who had been a prosecutor and state trial court judge before joining the federal bench, found as follows:

Plaintiffs have shown, by a preponderance of the evidence, that indigent criminal defendants in Mount Vernon and Burlington are systematically deprived of the assistance of counsel at critical stages of the prosecution and that municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation.²⁷

The Court continued:

The period of time during which Richard Sybrandy and Morgan Witt (hereinafter, Sybrandy and Witt) provided public defense services for the Cities was marked by an almost complete absence of opportunities for the accused to confer with appointed counsel in a confidential setting. Most interactions occurred in the courtroom: discussions regarding possible defenses, the need for investigation, existing physical or mental health issues, immigration status, client goals, and potential dispositions were, if they occurred at all, perfunctory and/or public. There is almost no evidence that Sybrandy and Witt conducted investigations in any of their thousands of cases, nor is there any suggestion that they did legal analysis regarding the elements of the crime charged or possible defenses or that they discussed such issues with their clients. Substantive hearings and trials during that era were rare. In general, counsel presumed that the police officers had done their jobs correctly and negotiated a plea bargain based on that assumption. The appointment of counsel was, for the most part, little more than a formality, a stepping stone on the way to a case

²⁵ Argersinger, supra, at 2011-12.

²⁶ Fifty Years After Gideon, FN 17 supra, 11 Seattle J. for Soc. Just. 891, 920 (2013).

²⁷ Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013).

closure or plea bargain having almost nothing to do with the individual indigent defendant. To the extent that “adequate representation” presumes a certain basic representational relationship, there was a systemic failure in the Sybrandy and Witt era. Adversarial testing of the government’s case was so infrequent that it was virtually a non-factor in the functioning of the Cities’ criminal justice system.²⁸

The Court found that this was the natural and foreseeable result of the caseloads that the attorneys carried. Each of the two lawyers had about 1000 cases a year and they only devoted part-time to the practice.²⁹ They often spent less than an hour per case. This denial of effective representation was the responsibility of the two cities.

...the services they offered to their indigent clients amounted to little more than a “meet and plead” system. While this resulted in a workload that was manageable for the public defenders, the indigent defendants had virtually no relationship with their assigned counsel and could not fairly be said to have been “represented” by them at all. The Cities, which were fully aware of the number of public defenders under contract, remained wilfully blind regarding their overall caseloads and their case processing techniques.³⁰

The judge found that the cities did not allow appointed counsel to give each case “the time and effort necessary to ensure constitutionally adequate representation for the client and to retain the integrity of our adversarial criminal justice system.” He added:

Timely and confidential input from the client regarding such things as possible defenses, the need for investigation, mental and physical health issues, immigration status, client goals, and potential dispositions are essential to an informed representational relationship. Public defenders are not required to accept their clients’ statements at face value or to follow every lead suggested, but they cannot simply presume that the police officers and prosecutor have done their jobs correctly or that investigation would be futile. The nature and scope of the investigation, legal research, and pretrial motions practice in a particular case should reflect counsel’s informed judgment based on the information obtained through timely and confidential communications with the client. A failure of communication precludes the possibility of informed judgment. If actual, individualized representation occurs—as opposed to a meet and plead system—the systemic result is likely to be more adversarial testing of the prosecutor’s case throughout the proceeding and a healthier criminal justice system overall.³¹

In language that could apply to many misdemeanor courts across the nation, the judge wrote:

²⁸ Wilbur, *supra*, at 1124.

²⁹ Defenders in numerous other cities in the U.S. carry more than 1000 cases per year. See *Minor Crimes*, at 21.

³⁰ Id.

³¹ Id., at 1126-1127.

The point here is that the system is broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned. Advising a client to take a fantastic plea deal in an obstruction of justice or domestic violence case may appear to be effective advocacy, but not if the client is innocent, the charge is defective, or the plea would have disastrous consequences for his or her immigration status. It is the lack of a representational relationship that would allow counsel to evaluate and protect the client's interests that makes the situation in Mount Vernon and Burlington so troubling and gives rise to the Sixth Amendment violation in this case.³²

The judge noted that even when the cities contracted with a new law firm to provide public defense, the attorney caseloads often prevented the attorneys from meeting their clients before court. When the attorneys meet the client for the first time in court, with a plea offer in hand, “there is really no opportunity for a confidential interview, the client may or may not understand the proceedings, and the public defender is unprepared to go forward on the merits of the case.”³³

The U.S. Supreme Court has emphasized the importance of adversarial testing of the government's case:

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors-- the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.³⁴

Judge Lasnik concluded:

Mere appointment of counsel to represent an indigent defendant is not enough to satisfy the Sixth Amendment's promise of the assistance of counsel. While the outright failure to appoint counsel will invalidate a resulting criminal conviction, less extreme circumstances will also give rise to a presumption that the outcome was not reliable. For example, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, if there is no opportunity for appointed counsel to confer with the accused to prepare a defense, or circumstances exist that make it highly unlikely that any lawyer, no matter how competent,

³² Id., at 1127.

³³ Id., at 1128.

³⁴ United States v. Cronin, 466 U.S. 648, 657 (1984).

would be able to provide effective assistance, the appointment of counsel may be little more than a sham and an adverse effect on the reliability of the trial process will be presumed. *Cronic*, 466 U.S. at 658–60, 104 S.Ct. 2039; *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 84 L.Ed. 377 (1940).³⁵

The judge concluded that the two cities’ defender system had systemic flaws “that deprive indigent criminal defendants of their Sixth Amendment right to the assistance of counsel.” He emphasized the failure of the defenders to provide real representation.

Although counsel are appointed in a timely manner, the sheer number of cases has compelled the public defenders to adopt case management practices that result in most defendants going to court for the first time—and sometimes accepting a plea bargain—never having had the opportunity to meet with their attorneys in a confidential setting. The attorney represents the client in name only in these circumstances, having no idea what the client's goals are, whether there are any defenses or mitigating circumstances that require investigation, or whether special considerations regarding immigration status, mental or physical conditions, or criminal history exist. Such perfunctory “representation” does not satisfy the Sixth Amendment.³⁶

Judge Lasnik emphasized the cost to the defendants and to the community of such a flawed system:

A system that makes it impossible for appointed counsel to provide the sort of assistance required by the Sixth Amendment works irreparable harm: the lack of an actual representational relationship and/or adversarial testing injures both the indigent defendant and the criminal justice system as a whole.³⁷

Diversion and Reclassification of Misdemeanors Can Save \$1 Billion a Year and Reduce the Workload for Defenders

There literally are hundreds of thousands of cases heard in misdemeanor courts that could be reclassified or diverted without adversely affecting public safety. In 2013, for example, nationally there were 356,427 arrests for drunkenness, 372,202 for disorderly conduct, 21,354 for vagrancy, and 5055 for gambling.³⁸ There were 1,501,043 arrests for drug

³⁵ *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1131.

³⁶ *Id.*, at 1131-32.

³⁷ *Id.*, at 1133.

³⁸ Crime in the United States 2013, Available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-43>

abuse violations, nearly 41 percent of which were for possession of marijuana.³⁹ The racial disparity in those arrests is dramatic—34.8 per cent of the disorderly conduct, 31.8 per cent of the vagrancy, and 66.5 per cent of the gambling arrests were of African-American persons.⁴⁰

Some states do not treat drunkenness as a crime but view it as a health problem. Colorado law, for example, states:

It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society. The general assembly hereby finds and declares that alcoholism and intoxication are matters of statewide concern.... public intoxication and alcoholism are health problems that should be handled by public health rather than criminal procedures.⁴¹

A University of Oregon study in 2010 found that the marginal cost of prosecuting and convicting a misdemeanor in Oregon was \$1,679.⁴² At that rate, if the 356,427 drunkenness arrests were avoided, approximately \$598 million would be available for treatment and other uses. Savings easily would exceed \$1 billion if disorderly conduct cases and even a small percentage of the possession of marijuana cases were diverted or treated as non-criminal violations.⁴³

The ACLU report cited above found that between 2001 and 2010, there were more than 8 million marijuana arrests in the United States, 88% of which were for possession. In 2010, there was one marijuana arrest every 37 seconds, and states spent more than \$3.6 billion enforcing marijuana possession laws.⁴⁴

In some courts, the combination of driving with a suspended license, possession of marijuana, and minor in possession of alcohol cases can total between 40% and 50% of the caseload.⁴⁵ The day I observed a court in a university town in Washington, Lower Kittitas District Court, the court heard 29 cases. Twelve were third degree driving with license suspended cases and six were minor in possession of alcohol cases. So, 62 per cent of the cases could have been diverted out of the court without any impact on public safety.⁴⁶

³⁹ Id., at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/persons-arrested/persons-arrested>

⁴⁰ Id., table 43 A. The racial disproportionality is found in the juvenile arrest statistics as well. Of 47,622 arrests for curfew and loitering law violations, 21,351, or 44.8 per cent, were of Black or African American youth.

⁴¹ Colo. Rev. Stat. Ann. § 27-81-101.

⁴² HEIDI BLAINE ET AL., UNIV. OF OR., DEP'T OF PLANNING, PUB. POLICY & MGMT., THE COSTS ASSOCIATED WITH PROSECUTING CRIME IN OREGON 11 (2010), available at <http://library.state.or.us/repository/2010/201007161627305/index.pdf>.

⁴³ See, *Diverting and Reclassifying*, FN 1 *supra*, at 4 et seq.

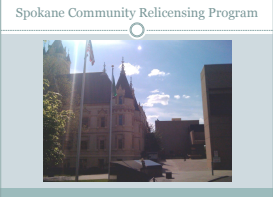
⁴⁴ *The War on Marijuana*, FN 21 *supra*, at 4.

⁴⁵ *Diverting and Reclassifying*, FN 1 *supra*, at 1.

⁴⁶ See *Minor Crimes*, *supra*, at 25-26.

Probably the most common misdemeanor offense, and likely the one most easily removed from the system, is driving with a suspended license when the suspension is caused for failure to pay a traffic fine. Most of the people charged with that offense are poor. A Seattle study in 1999 found that of 184 people with suspended licenses, the average person had \$2,095 in unpaid fines and a monthly income of \$810.⁴⁷

Even if states do not wish to re-classify minor crimes as non-criminal violations, it is possible to reduce the volume and cost of cases through diversion programs. The City of Spokane Prosecutor developed a diversion program for suspended license cases that not only reduced the defender caseload by one-third, it also saved hundreds of thousands of dollars and, by combining with a re-licensing program, yielded millions of dollars in revenue as people paid their fines.⁴⁸ The slides below from the Spokane Prosecutor highlight the benefits.⁴⁹



DWLS3 Diversion

- ALL jurisdictions benefit from directly interfacing with the defendants through our Diversion Programs
- Both City and County Prosecutors have diversion programs specifically for handling DWLS3 cases.
- These are both designed to reduce potential jail time and assist defendants with reinstating their privilege.
- The diversion programs help alleviate court congestion and compliance with defender case load standards.
- In 2014 the City diverted 948 DWLS3 cases.
 - All of these are set to meet with the CRP staff on a docket.

Payments Received From Participants

	<u>2014</u>	<u>2008-2014</u>
• Spokane County	\$ 377,625	\$2,303,862
• Spokane City	\$ 364,853	\$2,224,221
• Pend Oreille	\$ 5,826	\$ 29,770
• Cheney	\$ 6,437	\$ 27,939
• Medical Lake	<u>\$ 2,560</u>	<u>\$ 20,141</u>
	\$757,301	\$4,605,933
• Total received in 2014:	<u>\$757,301</u>	

Because of a combination of the use of diversion programs and a slight amendment to the statute, Washington State as a whole reduced third degree suspended driver license

⁴⁷ EVALUATION OF SEATTLE RE-LICENSING PROGRAM (2002), available at <http://www.cityofseattle.net/courts/PDF/RelicensingEval.pdf>.

⁴⁸ Presentation, Spokane City Prosecutor, Defender Initiative Conference, *Diversion for Relicensing*, (Feb. 25, 2011), available at <https://www.regonline.com/custImages/260000/269600/845am%20Diversion%C20for%20Relicensing.pdf>. See also JOEL M. SCHUMM, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, A.B.A., NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED 9 (2012), available at http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_national_indigent_defense_reform.authcheckdam.pdf. At a national focus group to explore cost-effective innovations to improve the overall caliber of the nation's public defense, former Spokane City Prosecutor Mary Muramatsu discussed a highly successful diversion program for suspended drivers that allows relicensing while aggregating all prior judgments into a single payment. *Id.*

⁴⁹ While there has been some increase in theft (shoplifting) and domestic violence offenses in Spokane in the past few years, the increase has not been as great as the number of DWLS 3rd cases the prosecutor no longer prosecutes. The Prosecutor says, "Sadly, the increases we've seen seem to be economically induced by the fallout from the 2008 economic collapse. Diversion has been an overwhelming success. The evidence of this was certainly shown when the city public defender's office was only required to hire two attorneys to deal with the imposition of caseload standards. ...without diversion, [they] would've needed to hire four attorneys instead of two." Email from Justin Bingham to author April 27, 2015.

(DWLS 3) criminal filings by 41.5 per cent from 2009-2014.⁵⁰

Seattle's City Attorney charged 94% fewer DWLS3 filings in 2013 than in 2009.⁵¹ In its annual report, the City Attorney noted that the "crime of DWLS 3 has a disproportionate impact on Seattle's African-American community. Although the current census shows Seattle's African-American population is roughly 8 percent, the data shows they have historically been charged with DWLS 3 at a rate of 40+ percent of the overall charges filed."⁵²

Another program in King County, Washington, Law Enforcement Assisted Diversion, designed by Seattle's Defender Association's Racial Disparity Project in partnership with local prosecutors and law enforcement, diverts drug and prostitution suspects directly to a social service intervention program in the community in lieu of jail booking and prosecution. An evaluation found that participants in LEAD were 58% less likely than people in the control group to be arrested.⁵³

Financial Impact of Suspended License Cases Can Be Overwhelming

The financial impact of criminalizing driving with a suspended license can be overwhelming. Two Seattle University School of Law professors have criticized the practice: "the entire enterprise of using driver's license suspensions to collect fines from low-income individuals is seriously misguided." They concluded:

Whatever solution one arrives at for the problem of collecting fines, society should never revoke a driver's license for non-safety related issues. Using revocation to collect revenue is the functional heir of the debtor's prison. Most low-income individuals need to drive to continue working. But if they continue to drive, they will go to jail, avoidable only by paying the monies owed -- monies they do not have. This current variant on what is basically a medieval theme replicates that same futility and resultant harm to the interests of the wider society that debtor's prison has always borne.⁵⁴

Reclassifying or diverting these offenses has enormous benefits. The American Bar Association passed a resolution calling for governments to review misdemeanor provisions and, where appropriate, allow the imposition of civil fines or nonmonetary civil remedies, as opposed to criminal penalties.⁵⁵

Some Prosecutors Negotiate Pleas with Unrepresented Defendants

In many courts, prosecutors negotiate pleas with unrepresented defendants who have not

⁵⁰ Spreadsheet from Washington Administrative Office of the Courts, on file with author.

⁵¹ Seattle City Attorney Annual Report 2013, at 58, available at www.seattle.gov/documents/departments/cityattorney/annualreport2013.pdf

⁵² *Id.*, at 59.

⁵³ Evaluation available at <http://leadkingcounty.org/lead-evaluation/>.

⁵⁴ John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. FOR SOC. JUST. 439, 440, 470-71(2005).

⁵⁵ AM. BAR. ASS'N, CRIM. JUSTICE SECTION COMM'N ON HOMELESSNESS & POVERTY, 102C: REPORT TO THE HOUSE OF DELEGATES (2010), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102c.pdf.

waived counsel. This was documented in a national study conducted by the National Right to Counsel Committee, JUSTICE DENIED:

There also is considerable evidence that, in many parts of the country, prosecutors play a role in negotiating plea arrangements with accused persons who are not represented by counsel and who have not validly waived their right to counsel. Not only are such practices of doubtful ethical propriety, but they also undermine defendants' right to counsel.⁵⁶

The American Bar Association Model Rule of Professional Conduct 3.8, Special Responsibilities Of A Prosecutor, states in part:

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; ...⁵⁷

Federal Funding to the States Provides Relatively Little for Public Defense

The Federal government provides a great deal of funding for criminal justice to state and local governments, most of it through the Edward Byrne Memorial Justice Assistance Grant (JAG) Program. The great bulk of it, 64 per cent, goes to law enforcement.⁵⁸

The General Accounting Office found in 2012 that for a five year period, "among grant recipients who reported in GAO's surveys that they had allocated funding for indigent defense, allocations as a percentage of total awards ranged from 2 percent to 14 percent."⁵⁹

Recommendations

Judge Lasnik pointed out in his opinion in Wilbur that "Although the right to the assistance of counsel regardless of economic status is established by the Constitution, legislative enactments are required to ensure that the right is maintained, and funding

⁵⁶ NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF THE CONSTITUTIONAL RIGHT TO COUNSEL 8 (2009), available at <http://www.constitutionproject.org/pdf/139.pdf>.

⁵⁷ MODEL RULES OF PROF'L CONDUCT R. 3 .8, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule38special_responsibilitiesofaprosecutor.html.

⁵⁸ "Grant Activity Report, Justice Assistance Grant (JAG) Program, April 2012-March 2013, available at https://www.bja.gov/Publications/JAG_LE_Grant_Activity_03-13.pdf

⁵⁹ INDIGENT DEFENSE: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support This Purpose, GAO-12-569: May 9, 2012. <http://www.gao.gov/products/GAO-12-569>

limitations imposed over the past few years are having a cumulative and adverse impact at both the state and national levels.”⁶⁰

I recommend that the Senate take several steps, both enacting law and providing funding, to help the states meet their constitutional obligations in misdemeanor courts.

1. The Senate should require that some of the existing Justice Department funding to states for criminal justice assistance be devoted to improving misdemeanor public defense in the following ways:

a. Provide funding for pilot projects that have lawyers at every misdemeanor court appearance, reasonable caseload limits for the lawyers, and adequate training and resources for the lawyers.

b. Provide funding for training for judges, defense attorneys, and prosecutors on the right to counsel in misdemeanor courts.

c. Condition some of the funding provided to states for criminal justice purposes on a certification by the state that counsel is provided for eligible defendants at every stage of criminal proceedings, including arraignments and first appearances in court.

d. Require that some of the funding provided for criminal justice research be targeted for misdemeanor public defense.

e. Require that some of the funding be used for developing re-licensing and diversion programs. This could include inviting government and bar leaders to regional education seminars and conferences featuring successful diversion programs.

2. The Senate should provide additional funding targeted at improving misdemeanor public defense services to support pilot projects, training, and research on the implementation of quality defender services.

3. The Senate should adopt the Gideon’s Promise Act proposed by Senator Leahy. This Act would provide technical assistance to state and local governments to help them meet their Sixth Amendment obligations and it would provide \$5 million per year for that purpose. It would authorize the Attorney General to seek relief in civil actions to remedy any pattern or practice by local government that deprives persons of their constitutional right to counsel.

4. The Senate should adopt the National Center for the Right to Counsel Act (H.R. 2063) proposed by Representative Deutch. This Center would provide financial support to supplement funding for public defense systems and provide financial and substantive support for training programs to improve the delivery of public defense services. The Center would be a clearinghouse for information and conduct research.

⁶⁰ Wilbur, supra, at 1129.

The Act would establish state advisory councils. The councils would collect information and monitor compliance by grant recipients. The Center would develop public defense standards that would be used to evaluate the work of grant recipients. The Center would establish regional backup centers to assist state and local public defense systems.

Conclusion

It is a disgrace that 52 years after Gideon and 43 years after Argersinger, thousands of accused persons face the power of the state alone. It is not fair, and it is economically foolish and wasteful. The Congress can help remedy this situation.

These remarks do not necessarily represent the views of Seattle University or its School of Law.

APPENDIX

Court Transcript Trial Date: October 16, 2006

Start Time: 9:46:35

Judge: "...J"

Prosecutor: "Mr. J is represented (inaudible). You are or you're not represented?"

Defendant: "No, uh-uh."

Prosecutor: "I just need to find your file here (inaudible). Case # C748. Defendant is present without counsel. What did I talk to you about doing (inaudible)?"

Defendant: (Inaudible)

Prosecutor: "You want to enter your plea. Uh, Your Honor, my understanding from the defendant is he wishes to enter a plea on the charge and the state offers no jail time and \$150 fine."

Judge: "Well alright, Mr. J, how do you plea to Driving While Suspended third degree?"

Defendant: "Guilty, sir."

Judge: "All right. Twenty-four months unsupervised probation, ninety days jail, all suspended, \$1000.00 fine, \$850 suspended with \$150 fine to pay plus the \$150 monitoring fee and a \$43 assessment. Conditions: no driving in the next twenty-four months unless you have a valid license and insurance and no moving traffic violations or criminal charges are to be filed against you in the next two years. Exonerate bond."

End Time: 9:47:52

Total Time: 1 minute, 17 seconds