

11-2013

Fifty Years After Gideon: It is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own

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Recommended Citation

Boruchowitz, Robert C. (2013) "Fifty Years After Gideon: It is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own," *Seattle Journal for Social Justice*: Vol. 11: Iss. 3, Article 4.
Available at: <http://digitalcommons.law.seattleu.edu/sjsj/vol11/iss3/4>

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**Fifty Years After *Gideon* :
It is Long Past Time to Provide Lawyers for
Misdemeanor Defendants Who Cannot Afford to
Hire Their Own**

Robert C. Boruchowitz*

I. INTRODUCTION

Most Americans understand that people charged with a crime have a right to a lawyer, and a right to have one appointed if they cannot afford one.¹ The routine advice given by police officers to arrested suspects is a frequent part of numerous television shows. What many people do not know is that

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¹ The Sixth Amendment to the United States Constitution gives all accused persons the right to assistance of counsel from arraignment through the conclusion of the case, including any defendant who enters a guilty plea to a misdemeanor offense. *See Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 35 (1972); *Iowa v. Tovar*, 541 U.S. 77 (2004). State court rules and statutes also provide authority for the requirement of providing counsel. *See, e.g.*, KY. R. CRIM. P. 3.05; KY. REV. STAT. ANN. § 31.110 (West 2008); and WASH. CRIM. R. FOR CTS. OF LTD. JURIS. R 3.1. The right attaches at the first appearance before a judge. *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

fifty years after the watershed case of *Gideon v. Wainwright*,² thousands of individuals go to criminal court every year and are convicted without ever speaking with a defense lawyer or being adequately informed of their right to counsel. Most of these “no counsel” cases occur in misdemeanor courts.³ As recently noted by The New York Times, “Contempt for poor defendants is too often the norm. In Kentucky, 68 percent of poor people accused of misdemeanors appear in court hearings without lawyers.”⁴ A Human Rights Watch researcher recently reported that “the majority of Texans charged with misdemeanors still plead guilty without the benefit of the advice of counsel.”⁵

Most people who go to court go to misdemeanor courts.⁶ For example, in Washington State in 2012, 252,808 misdemeanor cases were filed.⁷ That is one case for every twenty-seven of the 6,823,267 people living in the state.⁸ In comparison, there were 39,076 adult felony cases and 14,418 juvenile offender cases filed.⁹ Nationally, there are more than ten million

² In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court established that defendants in state felony cases have the right to appointed counsel if they cannot afford to hire one.

³ 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* 14–15 (2009) [hereinafter BORUCHOWITZ ET AL., *MINOR CRIMES, MASSIVE WASTE*] available at http://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf.

⁴ Lincoln Caplan, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html?_r=0.

⁵ Alba Morales, *‘Too Little Justice’: Misdemeanor Defendants in the US*, JURIST (Mar. 22, 2013, 1:03 PM), <http://jurist.org/hotline/2013/03/alba-morales-misdemeanor-defense.php>.

⁶ Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012).

⁷ *Caseloads of the Courts of Washington: Courts of Limited Jurisdiction, Cases Filed - 2012 Annual Report*, WASH. COURTS, <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&freq=a&tab=&fileID=rpt01> (last visited Oct. 13, 2013).

⁸ This is based on the 2011 population count. *State & County Quickfacts: Washington*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/53000.html> (last visited Jan. 25, 2013).

⁹ *Caseloads of the Courts of Washington: Superior Court Cases Filed by Type of Case - 2012 Annual Report*, WASH. COURTS, <http://www.courts.wa.gov/caseload/?fa=caseload>

misdemeanor cases per year.¹⁰ The cost is staggering—the full cost of adjudicating a misdemeanor case is estimated to be at least \$1,000.¹¹

The impact of misdemeanor prosecution on poor people, who are the majority of misdemeanor defendants,¹² and disproportionately on people of color can be devastating. In addition to jail time and heavy fines, the consequences of prosecution and conviction can include loss of jobs, licenses, housing, student loans, and for non-citizens, the right to be in the country.¹³

The racial disparity in misdemeanor charges in many parts of the country is dramatic. 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.”¹⁴

For example, in Texas, where the population is 50.3 percent black or Latino, seventy-three percent of those arrested for disorderly conduct are black or Latino persons.¹⁵ In New York City, “The Drug Misdemeanor Arrest population is most frequently Black (49.6%) or Hispanic (34.7%).

.showReport&level=s&freq=a&tab=&fileID=filyr (last visited Oct. 13, 2013).

¹⁰ Alexandra Natapoff, *Why Misdemeanors Aren't So Minor*, SLATE (Apr. 27, 2012, 11:33 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html.

¹¹ 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 Boruchowitz, *Diverting and Reclassifying Misdemeanors*], available at http://www.acslaw.org/sites/default/files/Boruchowitz_-_Misdemeanors.pdf.

¹² “This matters because, by well-informed estimates, at least 80 percent of state criminal defendants cannot afford to pay for lawyers and have to depend on court-appointed counsel.” Lincoln Caplan, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html?_r=0.

¹³ Natapoff, *supra* note 6, at 1316–17. See also Bridget McCormack, *Economic Incarceration*, 25 WINDSOR Y.B. OF ACCESS TO JUST. 223 (2007).

¹⁴ Natapoff, *supra* note 6, at 1319.

¹⁵ TX. DEP'T OF PUB. SAFETY, THE TEXAS CRIME REPORT FOR 2011 76, 83–84 (2011), available at <http://www.txdps.state.tx.us/crimereports/11/citCh9.pdf>.

White arrestees account for (13.3%) and Asian Pacific Islanders account for (2.2%)”¹⁶

On any given day, at least 14 percent of a jail’s population is misdemeanor defendants.¹⁷ Many of those defendants spend a week or so in jail prior to sentencing, and those who are sentenced to jail time may be in-custody for several weeks or as long as a year.¹⁸

The failure to protect the right to counsel has significant consequences for individuals accused of a crime, for the integrity of the court, for respect

¹⁶ RAYMOND W. KELLY, N.Y. POLICE DEP’T., CRIME AND ENFORCEMENT ACTIVITY IN NEW YORK CITY: JAN. 1 – JUNE 30, 2012, 13 (2012), *available at* http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/crime_and_enforcement_activity_jan_to_jun_2012.pdf. *See also* Gabriel Sayegh, *New York City’s Massive Marijuana Arrests*, HUFFINGTON POST, Aug. 26, 2009, http://www.huffingtonpost.com/gabriel-sayegh/new-york-citys-massive-ma_b_269384.html. The Huffington Post noted:

Nearly 90% of all those arrested for possession of marijuana are Black and Latino. Whites comprise 35% of the City population, but make up less than 10% of all those arrested for possession of marijuana. These disparities are not indicators of who uses marijuana—over 1/3 of all adults U.S. have tried marijuana, and anyone on a casual weekend stroll through the Upper West Side or Prospect Park will find a number of white people puffing away.

Id.

¹⁷ *See, e.g.*, KING CNTY. DEP’T OF ADULT & JUV. DETENTION, DETENTION AND ALTERNATIVES REPORT (2012), *available at* http://www.kingcounty.gov/courts/detention/DAJD_Stats.aspx. In the King County, Washington Jail in 2012, there was an average daily population of 169 pre-sentence misdemeanants and 115 sentenced misdemeanants in a total population of 1,946 inmates. *Id.* However, during the year there were approximately 12,000 placements of pre-sentenced misdemeanants into the jail. *Id.* By contrast, there were about 10,400 placements of pre-sentenced felons. *Id.* Their average length of stay (LOS) was 44.69 days while the pre-sentenced misdemeanants’ average LOS was 6.2 days. *Id.* Both the percentage of misdemeanor defendants in jail and their average LOS can vary dramatically by location. For example, a study of the Mecklenburg County Jail in North Carolina in 2005 found that 27% of the pretrial only population was charged with misdemeanors only, and the average LOS for misdemeanors was 28 days. Paul C. Friday & Joseph B. Kuhns, *MECKLENBURG COUNTY JAIL PRETRIAL STUDY* (2005), UNIV. OF NORTH CAROLINA AT CHARLOTTE DEPT. OF CRIM. JUST., http://charmec.org/mecklenburg/county/countymanagersoffice/omb/priorbudgets/fy06budget/documents/jailstudy_ptrfinalrpt.pdf.

¹⁸ *See* KING CNTY. DEP’T OF ADULT & JUV. DETENTION, DETENTION AND ALTERNATIVES REPORT *supra* note 17.

for the rule of law, and for individual judges who fail to honor the right to counsel. Giving attention to this problem and developing diversion alternatives to reduce caseloads could result in immediate improvements. Despite the fears of some that providing counsel will increase cost, in fact, effective representation can result in lower costs by persuading judges to release defendants from jail, by resolving cases promptly, and by reducing appeals when trials and other hearings are conducted fairly. As outlined below, diversion and reclassification of misdemeanor offenses can save far more money than it would cost to provide counsel in courts that currently do not always provide counsel.

In the past ten years, I have studied misdemeanor court practice in a number of states.¹⁹ This article will focus on Kentucky in discussing examples of failures to provide counsel and examples of successes—some of which have resulted from advocacy for change. I also will review some of the progress that has happened in Washington and briefly address practices in New Hampshire and South Carolina. I will discuss how changes in prosecution and court practices can make it possible to ensure that every eligible defendant has appointed counsel.

II. SOME OBSERVATIONS: RUSHING HEARINGS WITHOUT LAWYERS

Many misdemeanor courts rush through proceedings so quickly, often without lawyers, that the accused persons have little idea what is happening.²⁰ More than forty years ago, Professor William Hellerstein of the Brooklyn Law School wrote, “the criminal court, the misdemeanor court, is such an abomination that it destroys any myth or notion that I ever had about ... American criminal justice.”²¹ The same could be written about our system today.

¹⁹ See *supra* text accompanying note 17.

²⁰ See Morales, *supra* note 5.

²¹ William Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 LEGAL AID BRIEFCASE 151, 155 (April 1970).

I have seen misdemeanor court judges hurry through giving advice of rights to in-custody defendants who do not understand what is happening.²² One defendant had the courage to say to the court commissioner, “Slow the hell down!” I have seen defendants who have no lawyers plead guilty and get sentenced to jail time and significant financial penalties. I have seen judges advise people of their charges, take “waivers” of the right to counsel, take guilty pleas, and sentence defendants in a total of ninety seconds or less per case. I have talked with a judge who told me that there was a culture in his county of pleading guilty without a lawyer, and another judge who told me he was helping homeless people by taking their guilty pleas and giving them a few days in a warm jail cell. Another judge became hostile when I discussed with him his practice of discouraging defendants from asserting their right to counsel, and he used profanity when telling me to get out of his office.

In some courts, public defenders do not appear at arraignments, either because they are not paid to be there or because they decide to put their resources elsewhere. Often there is no prosecutor present, which leads some judges to adopt that role as well as their own. It also means that if a defendant challenges a charge or seeks discovery about the case, there is no one to respond. In one such Washington State court, I observed the court commissioner suggesting to defendants that they might want to talk to the prosecutor about a possible reduction in the charge and telling them that if they exercised their right to appointed counsel, they would not be able to talk with the prosecutor. The commissioner then gave the defendants a piece of paper with the contact information for the prosecutor at the top and information for obtaining a defender at the bottom of the page.²³ This

²² I made the observations recounted here in Washington, Kentucky, Pennsylvania, and Arizona during the past ten years.

²³ The prosecutor for this jurisdiction, after hearing me and a prosecutor and a judge discuss this problem in light of the ethical rules requiring prosecutors not to talk about important matters with unrepresented defendants who have not waived counsel, told me

practice has a chilling effect on exercising the right to counsel and does not constitute an appropriate advice of rights or waiver of counsel. It also raises ethical issues.

The practice of prosecutors seeking to negotiate guilty pleas with defendants who have not waived their right to counsel violates ethical rules and undermines the right to counsel. The American Bar Association Model Rule of Professional Conduct 3.8, Special Responsibilities Of A Prosecutor, states in part the following:

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;

...²⁴

The problem of prosecutors talking with unrepresented defendants 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

that she would no longer engage in the practice recommended to defendants by the commissioner.

²⁴ MODEL RULES OF PROF'L CONDUCT R. 3.8, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor.html.

practices of doubtful ethical propriety, but they also undermine defendants' right to counsel.²⁵

Without counsel, the process is also open to abuse. The recent Human Rights Watch report quoted a defendant who, when asked why he did not insist on a lawyer, said "that the prosecutor who had handled his plea agreement warned him that if he chose to retain legal representation, she would insist on the maximum penalty (a year in jail) rather than the \$750 fine she was offering him under the plea agreement."²⁶

In many courts, there are no defenders at first court appearances, and often even when they are present many defendants still proceed without counsel. In one court, I observed public defenders sit by and do nothing while unrepresented people who had not properly waived counsel were processed through guilty pleas and sentencing. And in some courts, public defenders are never present, even for trials, and judges do not appoint counsel for eligible people who ask for a lawyer. For example, two judges attending a conference in South Carolina in 2012 acknowledged that they did not have public defenders available at all in their courts. Others suggested that they did not have time or funds to provide defenders to all eligible people.²⁷

I worked with the ACLU of South Carolina on an amicus brief in an appeal from a case in Hilton Head in which the trial court simply failed to rule on the defendant's written motion for appointed counsel and conducted the trial with no lawyer for the defense.²⁸ The trial judge also misunderstood

²⁵ 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>.

²⁶ See Morales, *supra* note 5.

²⁷ Notes from CLE seminar at Charleston School of Law, *Argersinger Undone – The Challenges in Implementing the Right to Counsel in Misdemeanor Courts in South Carolina*, co-sponsored by the Charleston County Bar Association, South Carolina Association of Criminal Defense Lawyers and ACLU of South Carolina. Charleston, S.C., June 15, 2012 (on file with author).

²⁸ Brief for The Defender Initiative & ACLU of South Carolina as Amici Curiae Supporting Appellant, *Town of Hilton Head v. B.M.*, available at

Alabama v. Shelton,²⁹ cited by the defendant, erroneously saying that the holding (that a suspended sentence cannot be implemented unless counsel was provided) applied only in cases in which the defendant faced incarceration of one year or longer. In *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.³⁰ The appellate court reversed, finding that the trial court erred “when it imposed a sentence which included a possibility that the Appellant could be confined.”³¹

Noting that the Hilton Head appellant had requested representation and there was no evidence of a determination of eligibility, the Court of Common Pleas remanded the case for a new trial.³² The judge noted that if the appellant is eligible for counsel and none is appointed, “then, if a new trial is conducted and the Appellant is found guilty, the Appellant may not be sentenced to any sentence in which confinement is awarded.”³³

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.”³⁴

<http://www.law.seattleu.edu/Documents/korematsu/Defender%20Initiative/SCAAmicusBrief3.pdf>

²⁹ *Alabama v. Shelton*, 535 U.S. 654 (2002).

³⁰ *Id.* at 658.

³¹ Order Remanding for New Trials, Court of Common Pleas, County of Beaufort, South Carolina, Nos. 2010-CP-07-00844, 2012-CP-07-00746, Dec. 19, 2012 (on file with author).

³² *Id.*

³³ *Id.*

³⁴ 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>.

In one of the most dramatic examples of the denial of the right to counsel that I observed, I saw a judge in Arizona practically instructing defendants to waive their right to counsel and to trial. The judge said the following:

You are charged with reckless driving. So, I guess basically before we talk about it, let me do a couple preliminaries I want you to waive your right to an attorney. You have a right to have an attorney, but I'm not going to give you the public defender. You would have to go and hire one and I don't think you're going to do that. I think you and I are going to talk about this right here, right now, right?³⁵

The defendant then signed a form waiving his right to counsel.³⁶

A judge in an eastern Washington court was routinely denying counsel to eligible defendants who requested counsel in probation revocation hearings unless she thought that sending the person to jail was a likely outcome.³⁷ This was despite Washington's court rule CrRLJ 7.6 that states "The defendant is entitled to be represented by a lawyer and may be released pursuant to rule 3.2 pending such hearing. A lawyer shall be appointed for a defendant financially unable to obtain one."³⁸

A Texas county recently settled a class action lawsuit, *Heckman v. Williamson Cnty*, in which the lead plaintiff claimed the following:

[T]hat at his first appearance, he was not told about his right to a court-appointed attorney or the standards for determining eligibility for court-appointed counsel, or told how to apply for one. He asserts that he requested a court-appointed attorney, informed the court that he could not afford one on his own, and provided proof of his indigency; in response, the court allegedly implied that Heckman did not look like he would qualify for court-appointed counsel because he looked healthy enough to work and

³⁵ See BORUCHOWITZ ET AL., *MINOR CRIMES, MASSIVE WASTE*, *supra* note 3, at 15–16.

³⁶ *Id.*

³⁷ Recordings and emails from Feb. 2013 (on file with author).

³⁸ WASH. CRIM. R. FOR CTS. OF LTD. JURIS. R. 7.6. As of May 13, 2013, I was advised that a judge is occasionally appointing counsel in this situation, following a letter from me and my students, and a conversation with me.

was wearing nice clothes. Heckman claims that the court did not ask him any questions about his ability to pay for an attorney. The court allegedly threatened Heckman that it would raise his bond if he did not have an attorney at his next appearance. Notwithstanding his request, at the time of filing Heckman had not been appointed an attorney and the charges against him were still pending. Defendants have not offered any evidence to refute these jurisdictional facts.³⁹

The county agreed in the settlement that judges would advise defendants of their right to counsel in plea proceedings and “defendants would not be directed or encouraged to waive the right to counsel or communicate” with the prosecutor “until pending requests for counsel have been ruled upon.”⁴⁰ It should not take a court settlement reached after more than six years of litigation to get judges to follow these basic constitutional requirements.

III. SHAKING THE BLUES IN THE BLUEGRASS STATE

Each year in Kentucky there are approximately 138,000 misdemeanor cases, which is roughly one case for every thirty people in the Commonwealth.⁴¹ Despite a clearly established right to counsel, in fiscal year 2011, only 29.3 percent of all misdemeanor defendants were appointed a lawyer.⁴² Most of the remaining defendants had no counsel at all.⁴³

³⁹ Heckman v. Williamson Cnty., 369 S.W.3d 137, 156–57 (Tex. 2012).

⁴⁰ Joint Motion to Dismiss, Heckman v. Williamson Cnty., No. 06-453-C277, District Court of Williamson Cty., Tx. Jan. 14, 2013.

⁴¹ Email from Kentucky Public Advocate to author (Mar. 3, 2013) (on file with author). The U.S. Census Bureau reported a 2011 population of 4,366,814 in Kentucky. *State & County Quickfacts: Kentucky*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/21000.html> (last visited Jan. 25, 2013). Kentucky Administrative Office of the Courts reported the following number of misdemeanor, or “M,” cases: 152,280 for 2009 fiscal year; 148,703 for the 2010 fiscal year; and 143,406 for the 2011 fiscal year. *Id.*

⁴² The Kentucky Department of Public Advocacy Annual Reports indicate court appointments for misdemeanor, “M” cases, as follows: 37,333 for 2009 fiscal year; 41,086 for 2010 fiscal year; 42,039 for 2011 fiscal year. *Id.* The statistics indicate that, while some counties appoint lawyers in half or more of the cases, many appoint in only a quarter or less of the cases. Statistics also indicate the vast majority of misdemeanor defendants are poor. For example, a recent study of the jail population in Spokane,

Over a period of about sixteen months in 2010-12, I met with judges, visited courts, and listened to and watched recordings of hearings in seven counties in different parts of Kentucky. I met with public defenders who worked in every county in the state. While there was a wide spectrum of practices across the state, my research and observations indicated that many courts were not following the requirements of either the United States Supreme Court or the Kentucky Supreme Court when advising people of their right to have a lawyer and to have one appointed for them if eligible, when determining waivers of counsel, or when accepting guilty pleas from people without a lawyer.⁴⁴ As outlined below, some judges were inattentive to providing careful advice to misdemeanor defendants about the right to counsel and took inadequate waivers of counsel from these defendants.

With leaders from the Department of Public Advocacy (DPA), I focused my work on several counties. Education and advocacy made a difference in court practices, as indicated in the accompanying chart, which demonstrates increases in appointments after my visit. In those counties in which I had direct contact with the judges, the appointment rate went up dramatically (an average of 32 percent) compared to the increase in appointments state-

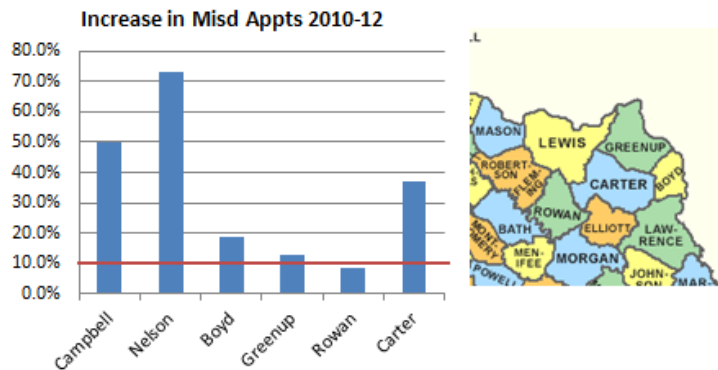
Washington, found that in 2010 seventy-five percent of the inmates were unemployed. Jail Population Breakdown, Spokane County 2011 (charts on file with author). Twenty-five percent of the pre-trial prisoners were held on misdemeanors and forty-six percent of the post-trial prisoners were misdemeanants. *Id.* A 2000 Justice Department Study reported that less than a quarter of state misdemeanor defendants had private representation. BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/ascii/dccc.txt>. The same study found that “[o]ver a quarter of jail inmates charged with a misdemeanor had no attorney....” *Id.*

⁴³ This conclusion is based on actual observations plus discussions with defender attorneys and managers across Kentucky about their observations of the courtrooms in which they practice.

⁴⁴ The U.S. Supreme Court set minimum waiver requirements in *Iowa v. Tovar*, 541 U.S. 77 (2004) (holding that if a defendant wishes to waive the right to counsel, he must do so knowingly, intelligently, and with knowledge of the relevant circumstances).

wide (9.6 percent).⁴⁵ I worked with the DPA in Campbell, Nelson, Boyd, and Carter counties, which are represented on the chart below:

Misdemeanor Appointments



Source: This chart was provided by the Kentucky Department of Public Advocacy.

A. Observations of Flawed Practices

While some courts I have reviewed were careful about protecting the right to counsel, others were not as careful. I have observed the following practices in misdemeanor cases in a number of courts, and lawyers practicing in other courts have advised that they have seen these as well:

1. Judges make a distinction at arraignment between felony cases, in which they routinely enter not guilty pleas and discuss appointment of counsel, and misdemeanor cases, in which they discuss fines and tell defendants they can resolve the case that day by talking with the prosecutor.

⁴⁵ Email from Deputy Public Advocate to author (June 27, 2012) (on file with author).

2 The atmosphere in the court is one in which the prosecutor discussing a guilty plea with unrepresented defendants at arraignment is accepted and sometimes encouraged.

3. Judges do not routinely conduct an individual colloquy with defendants about their right to counsel or enter required findings about waiver of counsel before those defendants meet with prosecutors to discuss their cases.⁴⁶

4. Judges do not always conduct individual plea colloquies with defendants to make sure they understand the rights they are waiving or the sentence they are risking, even when the defendants are being sentenced to jail, except in DUI cases, which some courts treat as more serious than other misdemeanors.

5. Judges frequently impose jail time for defendants who are accused of “contempt” for failing to comply with conditions of probation, without fully advising the defendants of their right to counsel or conducting the required fact finding hearing on the allegations of contempt.⁴⁷

The Kentucky Judicial Conduct Commission (KJCC) recently reprimanded a judge because he did not do the following:

[U]tilize procedures which were adequate to assure that some defendants who appeared before his court understood and were able to exercise their procedural rights, including the right to counsel, trial by jury, and not to incriminate themselves.⁴⁸

⁴⁶ The importance of counsel to assist in plea bargaining is increasingly being recognized following the U.S. Supreme Court decisions in *Missouri v. Frye*, 132 S. Ct. 1399, 1404 (2012), *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012), and *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). See Roberts, “Effective Plea Bargaining Counsel,” 122 *YALE L.J.* 100, 123 (2013) (“Yet as with *Gideon*, the overarching theme of the Court’s recent plea bargaining jurisprudence is the need for counsel—and the unfairness of proceeding without effective counsel—in a complex criminal justice system.”).

⁴⁷ See *Gormley v. Jud. Conduct Comm’n*, 332 S.W.3d 717 (Ky. 2010) (upholding discipline of a judge who held a person in contempt for conduct occurring outside of the courtroom without holding a hearing and providing due process including right to assistance of counsel).

⁴⁸ Agreed Order of Public Reprimand, *In re The Matter of Gregory T. Popovich* (Ky. Jud. Conduct Comm’n Dec. 2, 2011), *KY. BENCH & BAR*, Mar. 2012, 64.

Among the practices I observed in that judge's court [before the reprimand] were the following: 1) telling defendants that if they pled guilty, they would give up the right to counsel; 2) telling defendants that, even if they are appointed a public defender, they will be assessed a public defender fee at some stage in the proceedings; 3) telling defendants they should "assume that the charge or charges against you will be enhanceable. There are too many of them to go through all of them at this time. If it happens that a charge is not enhanceable, you are not harmed. But if it is, you cannot say you didn't know";⁴⁹ and 4) telling defendants that if they are thinking about the possibility of entering a guilty plea the following may occur:

I will tell you in advance exactly what the sentence will be. However, understand that if you reject an offer from the Court and you subsequently plead or are found guilty of said charge, I will not restrict myself to the penalty offered today. So in other words, if you reject today's offer, the offer is off the table.⁵⁰

In one case involving an alleged failure to comply with a previous order, a defendant started to say, "The way I understood it . . . ," whereupon the court cut him off by saying it requires a second grade understanding, and that the judge would be happy to sign papers to put the defendant in a place where adults are treated like one-year-olds. The defendant pled guilty and the judge sent him to jail for fifteen days.

The judge's statements have a chilling effect on the exercise of the right to counsel and are incorrect as a matter of law. A person negotiating or entering a guilty plea and facing sentencing has a right to counsel.⁵¹ Reimbursement fees for a public defender can only be imposed if the person is able to pay them.⁵² The discussion about enhanceable offenses is likely incomprehensible to most laypersons and provides no meaningful advice

⁴⁹ Transcript by author of video recording from Campbell County, Kentucky, District Court (prepared Mar. 2011) (notes and recording on file with author).

⁵⁰ *Id.*

⁵¹ *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

⁵² *Fuller v. Oregon*, 417 U.S. 40 (1974).

about possible sentences. When a judge makes plea offers, he improperly places himself in the position of the prosecutor, and this compromises the judge's impartiality.⁵³ The implied threat about not taking the judge's plea offer chills the exercise of the right to trial and abuses the power of the court. The treatment of the defendant discussed above who said he did not understand was intimidating. Such treatment violated his due process right to a hearing, and would have been far less likely to have occurred had counsel been present to assert the defendant's rights. Not surprisingly given these practices, in Fiscal Year 2011 counsel was appointed in only 5.8 percent of the misdemeanor cases in that judge's county.⁵⁴

This is not the first time a Kentucky judge has been disciplined for failing to observe the right to counsel. In 2008, a judge was suspended for thirty days for, among other things, failing to accord fundamental rights.⁵⁵ The judge "frequently failed to follow orderly procedures to safeguard fundamental rights to counsel and notice and right to be heard and interrogated individuals in open court without regard to their privilege against self-incrimination."⁵⁶

⁵³ See *State v. Messier*, 549 A.2d 270, 273 (Conn. 1988) ("Active involvement by trial judges in plea negotiations has frequently been criticized.") (citation omitted).

⁵⁴ NAT'L LEGAL AID & DEFENDER ASSOC., AVERAGE DPA APPOINTMENT TO M CASES IN DISTRICT COURT OVER THREE YEARS, FROM LARGEST TO SMALLEST, *available at* http://www.nlada.net/sites/default/files/ky_dpamisdappointments_fy09-fy11.pdf.

⁵⁵ Order of Suspension, *In re* The Matter of Frank H. Wakefield II (Ky, Jud. Conduct Comm'n May 23, 2008), KY. BENCH & BAR, July 2008, 39–40.

⁵⁶ *Id.* at 39. Judges in other states have been disciplined for failing to honor the right to counsel. See, e.g., *In re Michels*, 75 P.3d 950, 957 (Wash. 2003):

Every person charged with a crime possesses certain constitutional and due process rights. Most fundamental of these rights include the right to an attorney and the right to be advised of your rights in a way to be able to make informed decisions regarding your case No shortcuts exist and any judicial officer, be he or she part-time, pro tempore, or full-time must adhere to these principles in order that individuals who are charged with crimes are afforded the constitutional protections they are entitled to The rights of the poor and indigent are the rights that often need the most protection. Each county or city operating a criminal court holds the responsibility of adopting

In one court, from which I reviewed recordings of initial proceedings, the judge advised accused persons of their right to counsel and typically did not accept a guilty plea at the first appearance. But the court did not provide for counsel at that hearing, at which critical decisions about release and bail were made.⁵⁷ While the judge routinely appointed counsel, no counsel was available to advocate at the hearing for release or bail, and the defendants typically did not speak for themselves. Impliedly making a distinction between the importance of a lawyer for felony and misdemeanor cases, the judge told defendants that if they are charged with a felony, “it is extremely important that you apply today for the public defender.”⁵⁸ This procedure does not comply with the clear mandate that a defendant is entitled to be represented by counsel at arraignment whether the charge is a felony or a misdemeanor.⁵⁹

certain standards for the delivery of public defense services, with the most basic right being that counsel shall be provided.

Id.

⁵⁷ Lawyers at first appearances can make a real difference, as is seen in the following excerpt from an article by Professor Douglas Colbert:

For eighteen months at bail hearings, the Baltimore City Lawyers at Bail Project (“LAB”) defended the liberty of nearly 4,000 lower-income defendants accused of nonviolent offenses. The study showed that more than two and one half times as many represented defendants were released on recognizance from pretrial custody as were unrepresented defendants. Additionally, two and one half times as many represented defendants had their bail reduced to an affordable amount. Indeed, delaying representation until after the pretrial release determination was the single most important reason for lengthy pretrial incarceration of people charged with nonviolent crimes. Without counsel present, judicial officers made less informed decisions and were more likely to set or maintain a pretrial release financial condition that was beyond the individual’s ability to pay.

Douglas L. Colbert, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1720. (2002).

⁵⁸ Transcription by author from a Kentucky court recording of a hearing Aug. 29, 2011.

⁵⁹ An arraignment is a critical stage at which the defendant has a right to counsel. *See supra* note 1 and accompanying text (discussing *Rothgery*, *Argersinger*, and other cases).

In that same court, the judge heard cases of defendants who had been arrested on bench warrants, and without ever discussing the right to counsel, ordered them to pay the amount owed or serve it out in jail at fifty dollars per day. In one case, the public defender in the court asked the judge to “probate” the amount, or to have a hearing on the amount owed, but the judge declined. There was no opportunity in those situations for the defendant to explain why he missed a hearing or a payment, and there was no finding by the court of a willful failure to pay. According to public defenders across the state, this “pay or stay” practice is common in a number of courts, even though it denies defendants their right to have a hearing on the issue.⁶⁰

The right to counsel also applies to probation revocation hearings, which in many courts are conducted with minimal process despite the case law requirement that “in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay.”⁶¹ Courts should make clear that a defendant is entitled to counsel and to a hearing before simply ordering him to serve out the fine in jail.

B. Jefferson County Example of Providing Counsel

One county that offers an example of how a court can function properly, efficiently, and effectively while observing constitutional requirements is Jefferson County, Kentucky.⁶² The defender meets with the group of defendants detained in the holding area before court, advising them of their right to counsel and that the defender will be in court for them if they do not have retained counsel. The judge routinely accepts the defender’s advocacy for the defendants when they ask for counsel. The County Attorney’s office and the private bar support and endorse this practice. The Kentucky

⁶⁰ This observation is based on conversations with a number of public defender attorneys during my visits to Kentucky.

⁶¹ *Mauk v. Commonwealth*, 700 S.W.2d 803, 804 (Ky. App. 1985). (citation omitted).

⁶² These comments are based on my own observations in 2011 in a Jefferson County court, as well as discussions with local defenders, a judge, and a law professor.

Association of Criminal Defense Lawyers (KACDL) passed a resolution to that effect.⁶³

C. Court Rules Can Be Strengthened

In addition to providing a defender at all arraignments, Kentucky's court rules on appointment of counsel could be made even stronger. Kentucky Criminal Procedure Rule 3.05 now states "if the crime of which the defendant is charged is punishable by confinement and the defendant is financially unable to employ counsel, the judge shall appoint counsel to represent the defendant unless he or she elects to proceed without counsel."⁶⁴

The rules could be amended to require the court to make a "thorough inquiry" of the defendant's understanding of the right to counsel and make clear the dangers and disadvantages of waiving counsel.⁶⁵ These rules could require the judge to follow the guidelines set forth by the Kentucky

⁶³ Resolution of the Kentucky Association of Criminal Defense Lawyers in Support of Advisement of Right to Counsel by Public Defenders (Nov. 29, 2011) (on file with author). The Resolution stated in part: KACDL supports the practice of public defenders meeting with inmates prior to first appearance and/or before the arraignment docket is called, and communicating the following information to inmates: You are entitled to an attorney if you want one; An attorney can provide you with confidential advice *Id.*

⁶⁴ KY. R. CRIM. P. 3.05.

⁶⁵ See *Von Moltke v. Gillies*, 332 U.S. 708, 722 (1948) (plurality opinion). Washington State's Rules for Courts of Limited Jurisdiction provide an example of these requirements:

(d) Waiver of Counsel.

If the defendant chooses to proceed without counsel, the court shall determine on the record whether the waiver is made voluntarily, competently, and with knowledge of the consequences. The court shall make a thorough inquiry of the defendant's understanding before accepting the waiver. If the court finds the waiver valid, an appropriate finding shall be entered in the record. Unless the waiver is valid, the court shall not proceed with the arraignment until counsel is provided. Waiver of counsel at arraignment shall not preclude the defendant from claiming the right to counsel in subsequent proceedings in the cause, and the defendant shall be so informed.

WASH. CRIM. R. FOR COURTS. OF LTD. JURIS. R. 4.1(d) (2010).

Supreme Court in *Commonwealth v. Terry*⁶⁶ and utilize the court's suggested colloquy, which includes the following warning:

I must advise you that in my opinion [,] you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself I would strongly urge you not to try to represent yourself.⁶⁷

The “thorough inquiry” language can be traced to the US Supreme Court’s plurality opinion more than sixty years ago in *Von Moltke v. Gillies*, in which the court reversed a guilty plea of a German national charged with espionage because she did not validly waive counsel.⁶⁸ The court wrote: “The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge’s responsibility.”⁶⁹ The Court said it is a solemn duty for a federal judge “to make a thorough inquiry and to take all steps necessary to ensure the fullest protection of this constitutional right at every stage of the proceedings.”⁷⁰ The Court, three years earlier in *Williams v. Kaiser*, noted the reasons for having counsel are:

[A]s pertinent in connection with the accused’s plea as they are in the conduct of a trial Only counsel could discern from the

⁶⁶ *Commonwealth v. Terry*, 295 S.W.3d 819, 824 (Ky. 2009) (relying on language in FED. JUD. CTR., BENCHBOOK FOR UNITED STATES DISTRICT COURT JUDGES § 1.02-2 (3d ed. 1986)). The Fifth Edition of the Benchbook has a similar approach. See FED. JUD. CTR., BENCHBOOK FOR UNITED STATES DISTRICT COURT JUDGES (5th ed. 2007).

⁶⁷ *Commonwealth v. Terry*, 295 S.W.3d 819, 824 (Ky. 2009).

⁶⁸ *Von Moltke*, 332 U.S. 708. See also *State v. Chavis*, 644 P.2d 1202 (Wash. Ct. App. 1982). In *Chavis*, the Washington Court of Appeals reversed a conviction because of an invalid waiver of counsel. *Id.* The court wrote the following:

Although questions were asked of Mr. Chavis regarding his understanding of the right to counsel and regarding prior experience, his passive responses were not adequate for the trial judge to adequately weigh the character of his waiver[.]. . . . An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused’s comprehension of the offer and capacity to make the choice intelligently and understandably has been made. *Id.* at 1204–1205.

⁶⁹ *Von Moltke*, 332 U.S. at 724.

⁷⁰ *Id.* at 722.

facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment.⁷¹

D. Defenders and Judges Can Make Changes Now

Defenders and judges in Kentucky can make a difference now by ensuring defendants are fully informed of the right to counsel and by implementing the requirements of *Commonwealth v. Terry*. Some defenders have met with judges to discuss the issue and are also raising the issue in motions. For example, one defender moved to set aside a guilty plea entered by a young client without counsel. The judge, emphasizing the youth of the defendant, granted the motion over the objection of the prosecutor.⁷²

In July 2012, a joint project by Kentucky District Court judges, county attorneys, public defenders, and private criminal defense lawyers published “*Recitation of rights in Criminal Cases—A Kentucky Best Practices Guide*,” which includes examples of short, but clear, advice of rights.⁷³

⁷¹ *Williams v. Kaiser*, 323 U.S. 471, 475–76 (1945).

⁷² Hearing from Apr. 18, 2011, recorded on video (on file with author).

⁷³ This guide was presented at the Kentucky District Court Judges’ judicial college. Among the examples given in the “Best Practices Guide” is the following:

The first right you have when you are charged with a crime is the right to a lawyer. You do not have to handle this case by yourself and you should not feel pressured to handle the case yourself if you want a lawyer to help you. A lawyer can go over the evidence against you, listen to your side of the story, and then help you decide which options may be best for you. A lawyer may be able to tell you whether you have a defense to the crime or whether you should have been charged with a less serious offense to begin with. If you want to try to settle your case, a lawyer may be better skilled at negotiating with the prosecutor than you on your own. Also, a lawyer may help you understand other consequences of a conviction, such as problems in areas of immigration or eligibility for public benefits like housing or student loans. If you do not have a lawyer, no one else in the court system has the job of helping you with these matters or acting only in your interest. I cannot give you advice.

Change is possible. After DPA attorneys and I visited a judge in northeast Kentucky and discussed the right to counsel, the judge changed his advice to defendants, and appointments in his court increased by 37 percent.⁷⁴

III. SOME WASHINGTON COURTS HAVE MADE MAJOR CHANGES

During the course of my work in Washington State, a number of courts have changed their practices and now routinely provide counsel to the majority of defendants at their arraignments.⁷⁵ Judges find that having counsel makes hearings go more smoothly and helps to resolve cases

If you can afford a lawyer but do not have one with you today, I will give you time to hire one. If you cannot afford a lawyer, I will appoint one from the Public Defender's office to assist you at either no cost or at a reduced cost based on how much you are able to pay. If you do not have a lawyer with you when your case is called, my first question to you will be whether you want to have one. Let me know at that time if you plan to hire one or want me to consider appointing a lawyer for you. If you want to go ahead with your case without a lawyer, you may do so, but only after I make sure that you understand your rights.

"Best Practices Guide" (on file with author).

⁷⁴ Email from Deputy Public Advocate, Ky. Dep't of Public Advocacy, to author (June 27, 2012) (on file with author).

⁷⁵ I began my practice in Seattle Municipal Court, where counsel at arraignment has been provided for more than thirty years. A number of other courts, however, still do not consistently provide counsel at arraignment. See, Robert C. Boruchowitz, *You (Might) Have a Right to a Lawyer*, KING CNTY. BAR BULLETIN, July 2010. This is despite the fact that Washington's Criminal Court Rule on this subject is quite clear:

RULE CrR 3.1: RIGHT TO AND ASSIGNMENT OF LAWYER

(a) Types of Proceedings. The right to a lawyer shall extend to all criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors, or otherwise.

(b) Stage of Proceedings.

(1) The right to a lawyer shall accrue as soon as feasible after the defendant has been arrested, appears before a committing magistrate, or is formally charged, whichever occurs earliest

(2) A lawyer shall be provided at every critical stage of the proceedings.

WASH. CRIM. R. FOR CTS. OF LTD. JURIS. R. 3.1 (2012).

appropriately. That is similar to what a Kentucky district court judge said at a seminar held in Louisville in January 2012—that it raises her comfort level when both sides are well represented. She also said that most county attorneys would prefer dealing with another attorney than with a *pro se* defendant.⁷⁶

In one municipal court in Washington, the judge began to require defense counsel at arraignment after I contacted him and urged him to do so. After the court adopted this practice, I asked the judge for an assessment of how the new procedure was working. The judge responded with the following:

Since going all public defender, I have noticed two things: 1) many more defendants are represented by counsel, and 2) as a result, things move more smoothly at both the arraignment and pre-trial stages The presence of the public defender improves communication between the sides greatly.⁷⁷

I watched a video recording of the new procedure. No one proceeded without counsel, and no one pled guilty at that arraignment hearing. The judge sent me an email saying the following:

Having the public defender present for the arraignment calendar continues to be a fine thing for myself of course, but perhaps especially for the defendant who has no experience with The System This turned out to be a change I wish we had made long ago . . . and yes, ‘your papers are not in order’ a/k/a DWLS 3rd, continues to be a nuisance. The prosecutor has yet to implement a diversion program, but with the public defender guidelines kicking in, he may well have to adopt one.⁷⁸

⁷⁶ These comments were made at a seminar entitled “Right to Counsel, Why It’s Important and How It Serves the Interests of all the Stakeholders in the Criminal Justice System,” Jan. 27, 2012, at the Louisville, KY, Bar Association.

⁷⁷ Email from municipal court judge to author (Apr. 13, 2011) (on file with author).

⁷⁸ Email from municipal court judge to author (June 27, 2012) (on file with author). “DWLS 3rd” refers to prosecutions for driving while license suspended in the third degree, which can constitute up to forty percent of some misdemeanor court dockets. See BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE, *supra* note 3, at 25–26. The “defender guidelines” to which the judge referred require defenders to certify compliance

When I began observing hearings in another Washington municipal court, there were no defenders at arraignment, and often prosecutors did not appear either. After two meetings and several email exchanges, the court significantly changed its procedures, as outlined in this email from the judge:

There is always at least one, and often two or three [defenders], present for video arraignment and in court for out of custody arraignment. As a result of your involvement, defense attorneys are appointed more often, and fewer pleas of guilty are taken at arraignment.

On the prosecutor side, the City hired a part-time recent law school graduate. So we hold no hearings without at least one lawyer present in court from each side.

Finally, perhaps the biggest change I made in my own practice is I ask in every case if the defendant would like to be represented by a lawyer, and if not, why not. Then I review with them a waiver of the right to counsel. And, as you know, the waiver of counsel form was expanded at your request to advise that ‘a lawyer may be able to help [them in ways] that are not immediately, readily apparent.’ This colloquy is done after the defense attorney has spoken individually with each defendant, prior to coming before the judge.⁷⁹

IV. LITIGATION CAN LEAD TO CHANGE

In addition to informal advocacy with judges and local governments, litigation remains an option to effect change, although, as in the Texas case cited above, some systemic litigation can take a long time.⁸⁰ In New

with standards approved by the Washington State Supreme Court. WASH. CRIM. R. FOR CTS. OF LTD. JURIS. R. 3.1 Stds (2012). Beginning January 1, 2015, the court rule will require numerical caseload limits for defenders in misdemeanor cases. *In re Adoption of New Standards for Indigent Defense and Certification of Compliance*, No. 25700-A-1004 (Wash. 2012).

⁷⁹ Email from municipal court judge to author (Jan. 28, 2013) (on file with author).

⁸⁰ *Heckman*, 369 S.W.3d at 156–57.

Hampshire, I consulted with law professors who brought a writ of mandamus asking the superior court to order a district court to provide court-appointed counsel for indigent defendants at Class A misdemeanor arraignments.⁸¹ The court denied the request because it found that the petitioners had other means to obtain relief, and that they had no standing to request relief for other persons in the future.⁸² The New Hampshire Supreme Court affirmed the trial court on March 16, 2012, finding that the plaintiffs did not have standing to assert the rights of individuals other than themselves and that they had an adequate appeal remedy, and mandamus relief was not available to them.⁸³ The Court concluded, however, with the following paragraph:

We note that the parties do not dispute the well-established right of indigent defendants to representation by appointed counsel at arraignment. Given the potential systemic procedural issues involved in assuring the availability of such representation, we are

⁸¹ Simple assault is an example of a Class A misdemeanor. *See* Order, Nygn v. Manchester District Court, Hillsborough, NH., Superior Court, Northern District, No. 11-cv-260, May 26, 2011. The New Hampshire definitions of Class A and B misdemeanors are as follows:

CLASS A - a person who is charged with a class A misdemeanor may be sentenced to jail upon conviction. In addition, a fine and probation may be imposed. For this reason, a person who is charged with a class A misdemeanor is entitled to apply for a court appointed lawyer.

CLASS B - a person who is charged with a class B misdemeanor may *not* be sentenced to jail upon conviction, although a fine and probation may be imposed. For this reason, a person who is charged with a class B misdemeanor may not apply for a court appointed lawyer.

Circuit Court District Division-Criminal-Basic Definitions, NEW HAMPSHIRE JUDICIAL BRANCH available at <http://www.courts.state.nh.us/district/criminal/> (last visited Nov. 4, 2013).

⁸² *See* Order, Nygn v. Manchester District Court *supra* note 81.

⁸³ Nygn v. Manchester District Court, No. 2011-0464 (N.H. Mar. 16, 2012), available at <http://www.ils.ny.gov/files/Nygn%20v%20Manchester%20District%20Court.pdf>.

referring this matter to the Supreme Court's Advisory Committee on Rules.⁸⁴

The New Hampshire Supreme Court has announced its intention to adopt new Circuit Court-District Division Rules 2.20 to 2.23, relating to the availability of counsel at arraignment. The Court is considering whether to implement the rules on a pilot basis in a limited number of courts or on a statewide basis.⁸⁵ The new rules will require courts to advise both in-custody and out-of-custody defendants at arraignment of their right to have counsel appointed prior to the arraignment.⁸⁶ In addition, if a person is released with a summons to return to court, the summons must advise of the right to appointed counsel and the process for obtaining appointed counsel.⁸⁷ If the defendant appears at arraignment without counsel, unless the person waives counsel, the court shall enter a not guilty plea, advise the person of the charges, and inform the person that no decision on bail will be made until counsel is present.⁸⁸

⁸⁴ *Id.*

⁸⁵ Notice of intent available at <http://www.courts.state.nh.us/supreme/docs/5-6-13-notice-of-intent-to-adopt-District-Division-Rules.pdf>.

⁸⁶ *Id.* The rule provides in part:

In any case where a person is arrested for a Class A misdemeanor or felony and appears before a bail commissioner, prior to the defendant's release or detention, the bail commissioner shall provide the defendant with oral and written notice that, if he/she is unable to afford counsel, counsel will be appointed prior to the arraignment, if requested, subject to the State's right of reimbursement for expenses related thereto.

In any case where a person is arrested for a Class A misdemeanor or felony is released with a written summons, the summons shall provide the defendant with written notice that, if he/she is unable to afford counsel, counsel will be appointed prior to the arraignment, if requested, subject to the State's right of reimbursement for expenses related thereto. The summons shall also provide the person with written notice of the process for obtaining court-appointed counsel.

Id.

⁸⁷ *Id.*

⁸⁸ *Id.*

Litigation for individual defendants can produce favorable results even if it does not immediately produce systemic change. For example, with my clinic students I successfully brought a habeas corpus petition in 2012 for a defendant whose probation had been revoked in a district court with no discussion of the right to counsel.⁸⁹

V. WE CAN AFFORD TO PROVIDE MORE LAWYERS BY DIVERTING AND RECLASSIFYING OFFENSES

In this time of budget challenges, people may ask why we should allocate more resources to lawyers in misdemeanor courts and how we can afford to do so. There are at least four answers: 1) providing defenders is as important as providing prosecutors; 2) fair treatment of defendants will enhance respect for the law; 3) provision of defenders can save money; and 4) diversion of non-violent driving and marijuana possession cases can make available large sums of money, some of which can be used to provide counsel. The reality is that having lawyers can make the system more efficient and fairer, and that there are many cases that simply do not need to be prosecuted in a traditional incarceration-oriented way. It is possible to respond to problems in the society without criminalizing non-threatening conduct.

A. Providing Defenders is as Important as Providing Prosecutors

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*.⁹⁰ Trial court judges have the responsibility to ensure that the right is respected and that the theory is implemented in practice.⁹¹

⁸⁹ Order Granting Writ of Habeas Corpus, Snohomish County Superior Court, No. 12-2-02468-1 (May 2, 2012) (on file with author). *See also supra* note 28 et. Seq. and accompanying text.

⁹⁰ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread

The Kentucky Supreme Court has emphasized the importance of an individual colloquy with the accused person before taking a waiver of counsel.⁹² And Kentucky statutory requirements are clear that waiver of counsel can occur only:

[I]f the court concerned, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education, and familiarity with English, and the complexity of the crime involved.⁹³

B. Fair Treatment of Accused Persons Enhances Respect for the Law

Treating people fairly enhances respect for the law. As a national focus group study found, “a majority of Americans believe, as a society, we should provide legal help to people who need it but cannot afford it. Support for indigent defense is rooted in the American value of fairness.”⁹⁴ In addition to the public impact, individuals who feel that they have been treated fairly in court and had someone advocating effectively for them will have greater respect for the law.

The racial disproportionality in many misdemeanor cases is significant. For example, in Louisville in 2011, nearly 60 percent of those with

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.

Id. at 344.

⁹¹ See MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2011) (“Impartiality and Fairness: A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”). *In re Michels*, 75 P.3d at 957.

⁹² See *Commonwealth v. Terry*, 295 S.W.3d 819 (Ky. 2009); See also *Chavis* 644 P.2d at 1204–05.

⁹³ KY. REV. STAT. ANN. § 31.140 (West 1972).

⁹⁴ BELDEN RUSSONELLO & STEWART, DEVELOPING A NATIONAL MESSAGE FOR INDIGENT DEFENSE: ANALYSIS OF NATIONAL SURVEY 3 (2001), available at <http://www.nlada.org/DMS/Documents/1211996548.53/Polling%20results%20report.pdf>.

marijuana charges and about 46 percent of those with suspended driving charges were black defendants, in a county whose population is 21 percent black.⁹⁵ 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.⁹⁶ 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.”⁹⁷

A recent study by the American Civil Liberties Union documented that the disparity is nationwide:

The report finds that between 2001 and 2010, there were over 8 million marijuana arrests in the United States, 88% of which were for possession. Marijuana arrests have increased between 2001 and 2010 and now account for over half (52%) of all drug arrests in the United States, and marijuana possession arrests account for nearly half (46%) of all drug arrests. In 2010, there was one marijuana arrest every 37 seconds, and states spent combined over \$3.6 billion enforcing marijuana possession laws.

The report also finds 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. Such racial disparities in marijuana possession arrests exist in all regions of the country, in counties large and small, urban and rural, wealthy and poor, and with large and small Black populations. Indeed, in over 96% of counties with more than 30,000 people in which at least 2% of the residents are Black,

⁹⁵ 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* note 3, at 47–48.

⁹⁶ 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 (last visited Nov. 8, 2013).

⁹⁷ *Id.*

Blacks are arrested at higher rates than whites for marijuana possession.⁹⁸

Denying lawyers to defendants who are disproportionately of color aggravates racial differences. Providing effective assistance of counsel to those defendants can reduce the adverse impact of the disproportionate involvement in the courts.

C. Effective Advocates Can Save Resources

Providing counsel can save resources. If a defendant has a lawyer to advocate for release and to provide the judge reliable information about the accused and about alternatives to incarceration, a court is more likely to release a defendant pre-trial and to impose an alternative sentence without jail time. This type of practice reduces jail costs. Also, when no lawyers are testing the government's case, cases that might be dismissed, proceed and often result in jail and probation. In my experience in Seattle Municipal Court, as many as 25 percent of cases were dismissed after lawyers worked on them.⁹⁹ If people plead guilty at arraignment without a lawyer, cases that should be dismissed go forward and result in unnecessary costs and life-altering disadvantages to the accused persons.

D. Diversion Can Save Millions of Dollars

Perhaps the most compelling argument for officials juggling budgets is that it is possible to implement policies that save money that can then be used to provide counsel. For example, diversion of minor cases before charges are filed can reduce caseloads, save precious court and prosecution time, avoid jail costs, and help accused persons resolve the matter without

⁹⁸ *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>.

⁹⁹ The Defender Association in Seattle reported that in the Seattle Municipal Court cases the Association closed in 2012, twenty-five percent resulted in dismissals. Email from Defender Association supervisor to author (Jan. 28, 2013) (on file with author).

losing jobs, housing, and school loans, and prevent them from facing other adverse consequences of a conviction, including deportation for non-citizens.

Examples from Jefferson County, Kentucky, illustrate the scope of the possible benefit of removing minor cases from the criminal courts. Jail cost per inmate in Jefferson County is \$64.35 per day, or \$23,488 per year, for one person.¹⁰⁰ Many people are booked on what could be considered minor charges. For example, about 3,000 people a year are jailed in Jefferson County with charges of possession of marijuana.¹⁰¹ Among bookings in September 2011, there were 267 charges for possession of marijuana and 260 charges for driving while license suspended or revoked.¹⁰² Non-DUI traffic charges were the third most common charge at booking.¹⁰³

Depending on the jurisdiction, the total cost of prosecuting a misdemeanor is estimated to be between approximately \$1,000 and \$1,679 a case.¹⁰⁴ Imagine if even half of the Jefferson County marijuana misdemeanors were diverted out of the system—a great deal of money could be saved, and 1,500 people a year would not have a criminal record for those cases.¹⁰⁵

1. Alternatives to Traditional Prosecution Have Been Successful in Reducing Workloads and the Need to Appoint Counsel

Alternatives to traditional prosecution for minor offenses can achieve dramatic savings. In King County, Washington, defenders, prosecutors,

¹⁰⁰ LOUISVILLE METRO. DEP'T OF CORR., 2011 FACT SHEET (2012) (on file with author).

¹⁰¹ *Id.*

¹⁰² Most of these defendants had other charges as well, according to data provided to the author by the jail.

¹⁰³ LOUISVILLE METRO. DEP'T OF CORR. 2012 FACT SHEET (2013), available at http://www.louisvilleky.gov/NR/rdonlyres/E881F827-9898-41A0-8919 4D063AD8F641/0/LMDCFactDocument_2012.pdf.

¹⁰⁴ See Boruchowitz, *Diverting and Reclassifying Misdemeanors*, *supra* note 11.

¹⁰⁵ A number of people charged with marijuana in Jefferson County also are charged with other offenses, so that the cost savings might be less than the full per case costs for stand-alone charges.

judges, and county officials were able to establish a diversion and relicensing program by building a coalition of political and judicial leaders that began with an alliance between the defenders and the prosecutors.¹⁰⁶ An evaluation after the first year of the program found that it returned two dollars for every dollar spent, cut the jail population, and helped people get their licenses back.¹⁰⁷ As a National Public Radio report explained:

The prosecutor agrees to hold off filing a criminal charge if the defendant agrees to a repayment plan. ‘We understand that some people get themselves so far into debt that getting out of debt is extremely difficult,’ says Maggie Nave, head of the District Court unit of the King County Prosecutor’s office. She says relicensing court frees up prosecutors for more serious cases. But it also gives a suspended driver a way to get their license back sooner. ‘After he has started to make some payments, then the holds on his license are released by the court,’ Nave explains. ‘And that means he can get his license reissued while he’s paying off his tickets.’¹⁰⁸

The city prosecutor in Spokane, Washington, has developed a similar program, and in the process, reduced the municipal court caseload by one-third.¹⁰⁹ The program operates in tandem with a relicensing program.¹¹⁰ The prosecutor reported the following:

¹⁰⁶ The King County program was the product of an initial collaboration between The Defender Association and the King County Prosecutor’s office, and they helped to develop the program with officials in the court and in the county government. See Boruchowitz, *Diverting and Reclassifying Misdemeanors*, *supra* note 11, at 8.

¹⁰⁷ Presentation, Christopher Murray & Assocs., *Costs & Benefits of the King County District Court Relicensing Program* (2004) (on file with author).

¹⁰⁸ Austin Jenkins, *Nearly 300,000 Wash. Drivers Suspended For Failure To Pay Tickets*, *NPR* (July 22, 2011), <http://www.npr.org/templates/story/story.php?storyId=138627811>. See also, KING COUNTY DISTRICT COURT, <http://www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx> (last updated Nov. 4, 2013).

¹⁰⁹ Presentation, Spokane City Prosecutor, Defender Initiative Conference, *Diversion for Relicensing*, (Feb. 25, 2011), available at <https://www.regonline.com/custImages/260000/269600/845am%20Diversion%20for%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>

Since our relicensing program began in June of 2008, \$8,926,987.68 has been pulled out of collections and people in the program since that time are *paying toward* those previously uncollectable fines. Spokane District Court has actually collected \$968,664.20; Spokane Municipal has collected \$946,678.09; Pend Oreille has collected \$13,112.14 and so on.¹¹¹

This effort reduced defender caseloads by one-third and saved considerable prosecutorial and judicial resources, all while providing a conviction-free path for many defendants.¹¹²

One could apply the Spokane lesson to other jurisdictions. For example, consider a hypothetical city where defenders are carrying 600 misdemeanor cases a year, and the court is not providing counsel at arraignment. The city adopts a diversion and relicensing program that generates \$180,000 a year in revenue. The city then hires a public defender to handle the arraignments, full-time, five days a week, at a salary of \$65,000 a year plus benefits totaling 31%, for a total of \$85,150. Even adding an overhead cost equivalent to the lawyer's salary and benefits, the city would pay \$170,300 for the arraignment attorney, leaving a surplus from its \$180,000 in revenue. And in most medium and smaller sized cities, the arraignment calendar likely would not require a full-time attorney.¹¹³ And if people in

_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.*

¹¹⁰ Presentation, *The City of Spokane's Third Degree Strategy: An Approach to Case Prioritization*, available at http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2013/l_sclaid_def_8th_summit_spokane_diversion_program.authcheckdam.pdf (last visited Nov. 8, 2013).

¹¹¹ *Id.*

¹¹² SCHUMM, *supra* note 109.

¹¹³ As an example of defender attorney salaries, the Missouri Public Defender attorney salaries range from \$38,040/year to \$77,809/year with additional salary differentials for APDs handling exclusively death-penalty work. *Employment Salaries*, MO. STATE PUB. DEFENDER, <http://www.publicdefender.mo.gov/employment/salaries.htm> (last visited May 15, 2013). Managing attorneys start at \$69,888/year. *Id.* In King County,

this hypothetical city are pleading guilty at arraignment without counsel, it is likely, considering the Seattle experience, that a significant percentage of those cases could be resolved without jail costs or conviction records for the defendants. Even if cases were not dismissed, it is likely that fewer people would go to jail because defenders would present alternatives that courts would accept.

Another program, LEAD (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.¹¹⁴ The program has seen preliminary successes, even with very hard to engage individuals, without the costs of utilizing the justice system.¹¹⁵

In many counties, there are a large number of "non-support" cases in which the defendant is accused of failing to make child support payments. Many of the people in jail on those cases are there for warrants for failing to appear in court.¹¹⁶ A recent snapshot of the Jefferson County Jail population in Louisville showed that several people were in custody only for contempt and that some of their cases were resolved without counsel.¹¹⁷

One option to address the need to provide counsel in non-support cases is to develop a "two track" system similar to what is done in King County,

Washington, a starting public defender earns \$56,700.80 annually. See KING COUNTY JOBS, <http://agency.governmentjobs.com/kingcounty/default.cfm?action=viewclassspec&classSpecID=944651&agency=1255&viewOnly=yes> (last visited Oct. 13, 2013).

¹¹⁴ See LAW ENFORCEMENT ASSISTED DIVERSION, <http://leadkingcounty.org/> (last visited Oct. 13, 2013).

¹¹⁵ Robert C. Boruchowitz, *50 Years after Gideon v. Wainwright—County Plan Would End Nonprofit Defender Program*, KING CNTY. BAR BULLETIN, Feb. 2013, available at <https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=02&Year=2013&AID=article11.htm>.

¹¹⁶ This conclusion is based on discussions with officials in Kentucky and jail data provided by the Jefferson County Jail to the author.

¹¹⁷ Spreadsheet of Jefferson County jail population by charge from 2011 (on file with author).

Washington. For the first hearings on allegations of failure to pay, jail is taken off the table, no defender is provided, and the prosecutor seeks to work out a new payment arrangement with the defendant.¹¹⁸ If that does not work, the matter returns to court and counsel is appointed, and nothing the prosecutor learned in the first hearing can be used against the defendant in the later hearing. In the first year of that program, the county saved about \$300,000.¹¹⁹

2. Reclassification of Minor Crimes as Non-Criminal Can Save Money and Reduce the Need for Counsel

Developing diversion programs for possession of small amounts of marijuana, or reclassifying it as non-criminal, are other options. Recognizing the value of this approach, two Washington State legislators wrote an op-ed in 2009 urging an alternative to prosecution:

At a fundamental level, it has eroded our respect for the law and what it means to be charged with a criminal offense: 40 percent of Americans have tried marijuana at some point in their lives. It cannot be that 40 percent of Americans truly are criminals.¹²⁰

Less than two years later, Seattle's City Attorney stopped prosecuting marijuana possession cases.¹²¹ The former US Attorney for the Western District of Washington joined him in an effort led by the American Civil

¹¹⁸ Wash. State Bar Ass'n, *Final Report of the System Efficiencies and Legislative Changes Subcommittee of the Committee on Public Defense*, in MAKING GOOD ON GIDEON'S PROMISE: REPORT ON THE RECOMMENDATIONS OF THE WSBA COMMITTEE ON PUBLIC DEFENSE 154 (2007), available at <http://www.docstoc.com/docs/69719931/Committee-on-Public-Defense—Washington-State-Bar-Associationdoc>.

¹¹⁹ *Id.*

¹²⁰ Jeanne Kohl-Welles & Toby Nixon, *Time for Washington State to Decriminalize Marijuana*, SEATTLE TIMES (Aug. 20, 2009), http://seattletimes.com/html/opinion/2009701673_guests21nixon.html.

¹²¹ Pete Holmes, *Washington State Should Lead on Marijuana Legalization*, SEATTLE TIMES (Feb. 16, 2011), http://seattletimes.com/html/opinion/2014247491_guest17holmes.html.

Liberties Union of Washington to change the state law.¹²² By initiative,¹²³ Washington's voters changed the law in 2012 to make it legal for an adult to possess up to one ounce of marijuana.¹²⁴

Nationally, there were more than 660,000 arrests for marijuana possession in 2011.¹²⁵ To get a sense of what this means in one state, there were 69,770 arrests for possession of marijuana in Texas in 2011.¹²⁶ At an estimated cost of \$1,000 per case, Texas could save \$69 million per year by reclassifying possession of marijuana as a non-criminal violation. That same year in Texas, there were 118,451 arrests for drunkenness.¹²⁷ While these are class C misdemeanors that are not jailable, they still require costly use of court time and can result in \$500 fines and in deportation for non-citizens.¹²⁸ Re-classifying these offenses as non-criminal would free up funds that could be used to make sure that counsel is provided at all

¹²² *Former U.S. Attorney McKay Backs Effort to Legalize Pot in Washington*, SEATTLE TIMES (June 21, 2011), http://seattletimes.com/html/localnews/2015388326_marijuana22m.html.

¹²³ Initiative Measure No. 502 (Wash. 2011), available at <http://www.newapproachwa.org/sites/newapproachwa.org/files/1502%20bookmarked.pdf>.

¹²⁴ Jonathan Martin, *Voters Approve I-502 Legalizing Marijuana*, SEATTLE TIMES (Nov. 6, 2012), http://seattletimes.com/html/localnews/2019621894_elxmarijuana07m.html.

¹²⁵ In 2011, there were an estimated 1,531,251 arrests for drug abuse violations of which 43.3% were for possession of marijuana. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS—CRIME IN THE UNITED STATES 2011, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.2011/persons-arrested/persons-arrested>.

¹²⁶ TX. DEP'T OF PUB. SAFETY, *supra* note 15, at 76.

¹²⁷ *Id.* In Texas, public intoxication is a crime. See TEX. PENAL CODE § 49.02.

These numbers are down from 2009, when there were 77,173 arrests for possession of marijuana and 142,631 for drunkenness. TEX. DEP'T OF PUB. SAFETY, THE TEXAS CRIME REPORT FOR 2011: TEXAS ARREST DATA 76, available at <http://www.txdps.state.tx.us/crimereports/11/citCh9.pdf>; TEX. DEP'T OF PUB. SAFETY, THE TEXAS CRIME REPORT FOR 2009: TEXAS ARREST DATA 66, available at <http://www.txdps.state.tx.us/crimereports/09/citCh8.pdf>.

¹²⁸ See Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, UNIV. OF CA. BERKELEY LAW SCHOOL (Sept. 2009), available at http://www.motherjones.com/files/policybrief_irving_FINAL.pdf.

hearings, and it would avoid the stigma and negative consequences associated with a criminal conviction.

Other states could achieve similar savings. Nationally, there were 534,218 arrests for drunkenness in 2011.¹²⁹ New York State had 419,927 misdemeanor arrests in 2011, of which 105,430 were for drug cases.¹³⁰ A comprehensive effort that, for example, eliminated all drunkenness arrests, could save money and likely would be more effective than arrest and jail in addressing chronic alcoholism. Sarasota, Florida, recently celebrated five years of such a program.¹³¹ According to the *Sarasota Herald-Tribune*, the county established treatment programs instead of traditional prosecution for “frequent flier” alcohol and drug addicts arrested either on minor crimes or because they were dangerous to themselves.¹³² The Sarasota newspaper reported, “Police and judicial leaders are calling the Community Alternatives Residential Treatment initiative a success” The jail population is down, arrests are down, and the program reports that 50 to 60

¹²⁹ FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS—CRIME IN THE UNITED STATES 2011, Table 29, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested/persons-arrested>. The number is down dramatically from 1,485,562 arrests in 1966. *Id.* The criminalization of public intoxication has been recognized as a problem at least since 1969 when Raymond T. Nimmer wrote, “the inclusion of public intoxication as a criminal offense creates an overload in the criminal court system. The result is frequently a mass production model of criminal justice.” Raymond T. Nimmer, *Public Drunkenness: Criminal Law Reform*, 4 VAL. U. L. REV. 85, 87 (1969). See also Robert C. Boruchowitz, *Victimless Crimes, A Proposal to Free the Courts*, 57 JUDICATURE 69 (1973).

¹³⁰ See ADULT ARRESTS: 2002-2011, available at <http://ypdcrime.com/pdf/AdultArrests.pdf>. The Associated Press reported in 2011 that there were more arrests for low-level marijuana possession in New York City – about 50,000 a year – than any other crime, accounting for about one of every seven cases in the criminal courts. *Of 50,000 Marijuana Arrests In New York City A Year, Most Are Black And Hispanic Men*, THE HUFFINGTON POST, Nov. 5, 2011, http://www.huffingtonpost.com/2011/11/05/of-50000-marijuana-arrest_n_1078023.html. The Wall Street Journal reported in 2012 that arrests had dropped after an order from the Police Chief. *Pot Arrests Drop 25% Across City*, WALL ST. J., June 5, 2012, <http://online.wsj.com/article/SB10001424052702303918204577448872635807602.html>.

¹³¹ See Todd Ruger, *‘Drunk Tank’ Out and Treatment In*, SARASOTA HERALD-TRIBUNE (Oct. 11, 2010), <http://www.heraldtribune.com/article/20101011/ARTICLE/10111033>.

¹³² *Id.*

percent of participants remained sober a year after leaving the program, compared with the roughly 10 percent average success rate for other treatment programs. As a result of the Community Alternatives Residential Treatment initiative, drug arrests fell from a high of about 2,200 a year in 2007 to about 1,000 in 2009. Alcohol arrests fell from about 1,200 in 2007 to about 600 in 2009.¹³³

It is worth examining the charges on which jail inmates are detained. It may be that consensus can be reached in a community to find other ways to handle those cases and, in the process, save money and put fewer burdens on people accused of minor offenses.

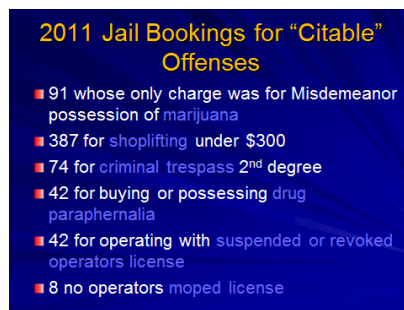


Figure 1. This chart was presented by the author at a seminar in Louisville, January 27, 2012, based on information provided by the Louisville Metro Department of Corrections.

VI. CONCLUSION

The JUSTICE DENIED report described the gap between the principles of *Gideon* and *Argersinger* and the reality in misdemeanor courts:

Whether because of a desire to move cases through the court system, a desire to keep indigent defense costs down, or ignorance, pervasive and serious problems exist in misdemeanor courts across the country because counsel is oftentimes either not provided, or provided late, to those who are lawfully eligible to be represented. Also, when counsel is not provided, all too often, the defendant's waiver of legal representation is inadequate under Supreme Court precedents. As a result, there is a shocking disconnect between the

¹³³ *Id.*

system of justice envisioned by the Supreme Court's right-to-counsel decisions and what actually occurs in many of this nation's courts.¹³⁴

There is a tremendous opportunity to correct this shocking gap and to achieve several positive results at the same time. Providing counsel for all eligible accused persons would increase respect for the law and for the courts and also provide fairness to thousands of people. Diverting minor misdemeanors from criminal courts would ease the burdens on those courts, save a large amount of money, and by providing meaningful alternatives would reduce the chances that the defendants in those cases would return on new charges.

The need for change is recognized across the political spectrum. The "Right on Crime" organization, with leaders such as Jeb Bush and Newt Gingrich, emphasizes the important role of treatment alternatives and that prisons "are not the solution for every type of offender. And in some instances, they have the unintended consequence of hardening nonviolent, low-risk offenders—making them a greater risk to the public than when they entered."¹³⁵

Oklahoma Senator Tom Coburn has said, "As a physician, I believe that we ought to be doing drug treatment rather than incarceration."¹³⁶ President Barack Obama spoke generally in a *TIME* Magazine interview about the destruction and distortion of millions of lives because of the current justice system:

But there's a big chunk of that prison population, a great huge chunk of our criminal justice system that is involved in nonviolent crimes. And it is having a disabling effect on communities. Obviously, inner city communities are most obvious, but when you

¹³⁴ NAT'L RIGHT TO COUNSEL COMM., *supra* note 25, at 85.

¹³⁵ *Statement of Principles*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/> (last visited May 15, 2013).

¹³⁶ *What Conservatives Are Saying*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/what-conservatives-are-saying/> (last visited Mar. 18, 2013).

go into rural communities, you see a similar impact. You have entire populations that are rendered incapable of getting a legitimate job because of a prison record. And it gobbles up a huge amount of resources. If you look at state budgets, part of the reason that tuition has been rising in public universities across the country is because more and more resources were going into paying for prisons, and that left less money to provide to colleges and universities.

But this is a complicated problem. One of the incredible transformations in this society that precedes me, but has continued through my presidency, even continued through the biggest economic downturn since the Great Depression, is this decline in violent crime. And that's something that we want to continue. And so I think we have to figure out what are we doing right to make sure that that downward trend in violence continues, but also are there are millions of lives out there that are being destroyed or distorted because we haven't fully thought through our process.¹³⁷

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.¹³⁸

Some of these changes can happen quickly with no need for legislative change. Judges and prosecutors, working with defenders, can and should make real access to counsel happen now.¹³⁹ It is a disgrace that fifty years

¹³⁷ Richard Stengel et al., *Setting the Stage for a Second Term*, Time (Dec. 19, 2012), <http://poy.time.com/2012/12/19/setting-the-stage-for-a-second-term/#ixzz2M2SbEmap>.

¹³⁸ 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.

¹³⁹ Access to counsel does not mean a warm body standing next to the accused person, but a trained lawyer with enough time and resources to represent the person effectively. To have the assistance of counsel requires more than a warm body in a suit next to the defendant. The legal profession's rules of ethics require that lawyers prepare their cases. Attorneys must be familiar with the law and facts in the case... Warm bodies won't do: Defendants deserve lawyers fully prepared to defend them. David A. Harris, PITTSBURGH POST-GAZETTE, (Mar. 30, 2012), <http://www.post-gazette.com/stories/opinion/>

after *Gideon* and forty-one 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 impact on people's lives is dramatic. This problem affects every American. In my discussions about these issues, I have found that almost everyone knows at least one loved one or colleague who has been charged with a misdemeanor. It is long past time to implement the requirements of the Constitution and to provide a lawyer for people who cannot afford one when they are charged with a crime.

[perspectives/warm-bodies-wont-do-defendants-deserve-lawyers-fully-prepared-to-defend-them-628869/](#).