Extending Meaningful Assistance to Misdemeanor Defendants

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I. INTRODUCTION

Misdemeanor cases make up a significant portion of federal and state criminal cases. In fact, most convictions in the United States are

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misdemeanors: while approximately one million felony convictions are handed down yearly, ten times as many misdemeanor cases are filed annually, "flooding lower courts, jails, probation offices, and public defender offices."[1] In California, the state with the largest court system in the world—serving a population of more than 38 million people—misdemeanor filings in superior courts totaled 926,169 for fiscal year 2012–2013.[2] Due to issues with underreporting, the national statistics are likely to be lower than the reality,[3] but misdemeanor cases still comprise a significantly larger portion of the criminal caseload than felony cases.

Yet misdemeanor cases are given inadequate attention, despite their frequency and quantity. "Massive, underfunded, informal, and careless, the misdemeanor system propels defendants through in bulk with scant attention to individualized cases and often without counsel."[4] Even in cases where counsel is provided to misdemeanants, often times the defenders' overwhelming workloads and competing responsibilities make it difficult for them to commit sufficient time and adequate attention to provide effective representation in the misdemeanor dispute.[5] Because

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[1] Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314–15 (2012); *see also* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 3 tbl.1.1 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (reporting 1,132,290 state court felony convictions in 2006) [http://perma.cc/GE2W-N7MG]; *see also* R. LAFOUNTAIN ET AL., NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx [http://perma.cc/J58R-UAJZ] (showing percentage breakdown of criminal caseload by case type in 17 states). In New York City alone, "the total number of misdemeanor arrests expanded almost fourfold between 1980 and 2011, from about 65,000 a year to over 250,000 a year." Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 639 (2014). "Misdemeanor arrests have recently declined for the first time in years[, but t]his phenomenon . . . is driven almost exclusively by decreases in marijuana and trespass arrests[,] . . . [perhaps] due to the significant amount of public pressure, media attention, and litigation around marijuana arrests, stop-and-frisk tactics, vertical sweeps in public housing, and the Clean Halls program, which collectively produced the majority of the marijuana and trespass arrests." *Id.* at 639 n.76.

[2] JUDICIAL COUNCIL OF CALIFORNIA, STATEWIDE CASELOAD TRENDS: 2003–2004 THROUGH 2012–2013 xv–xvi (2014), http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf [http://perma.cc/B8AD-Z4YV]. The criminal case category is made up of felonies, misdemeanors, and infractions. *Id.* The total filings for the individual case types are as follows: felony filings totaled 260,461 cases; misdemeanor filings totaled 926,169 cases; and infraction filings totaled 5,050,151 cases. *Id.*

[3] The exact number of misdemeanor cases is unknown, particularly because "states differ in whether and how they count the number of misdemeanor cases processed each year." ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf [http://perma.cc/VWY5-GSMX]; *see also*, Natapoff, *supra* note 1, at 1320–21 ("Unlike felony cases and convictions, . . . misdemeanor cases are radically under-documented. . . . Nationally, prosecutors report only about half of all misdemeanor case resolutions to statewide data repositories.").

[4] Natapoff, *supra* note 1, at 1315.

[5] "[M]isdemeanor courts across the country are incapable of providing accused individuals with the due process guaranteed them by the Constitution." BORUCHOWITZ ET AL., *supra* note 3, at 7. "Defenders across the country are forced to carry unethical caseloads that leave too little time for clients to be properly represented," leaving constitutional obligations unmet and resulting in a waste of

misdemeanor courts often do not make significant differentiations between the legal treatment of one defendant and another,[6] these courts have metaphorically been referred to as an "assembly line":

> On this view, everyone who is arrested pursuant to low-level policing priorities is mechanically convicted and punished, even if the sanctions are minor. Prosecutors indiscriminately charge all cases and reflexively seek convictions, and courts robotically convict and issue standard sentences without regard to individual characteristics of cases or defendants.[7]

Thus convictions are often generated in bulk, without meaningful scrutiny of the legitimacy of the convictions being processed and whether the misdemeanant's due process rights are sufficiently protected.[8]

The assembly-line nature of misdemeanor arraignments is evident in the courtroom. In New York City, an estimated 100 to 200 cases are arraigned during a single shift of approximately six hours.[9] Prosecutors often review the paperwork for less than five minutes before designing a plea offer, and defense attorneys often first meet their clients at arraignment.[10] Such meetings usually take place "either in a small, caged-in interview room [attached to] the holding cells . . . or in the hallway."[11] It is during these meetings, which last for about ten to fifteen minutes, that lawyers meet with their clients to discuss how they will approach the bench.

In the Manhattan Criminal Court, arraignments are held from 9 a.m. to 1 a.m. each day.[12] I attended an evening arraignment session at the Manhattan Criminal Court. The court's attitude towards individual mis-

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taxpayers' money. *Id.* "Legal representation for misdemeanants is absent in many cases[, and even w]hen an attorney is provided, crushing workloads often make it impossible for the defender to effectively represent her clients" because "[c]ounsel is unable to spend adequate time on each case, and often lacks necessary resources, such as access to investigators, experts, and online research tools." *Id.*; *see also* Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1172–74 (2004) (describing a lack of due process in New York's lower court system).

[6] The lack of such individualized treatment has caused some to describe lower courts as processing, rather than adjudicating, cases. *See, e.g.*, Weinstein, *supra* note 5, at 1162 ("The structural features which make lower courts process, rather than adjudicate, cases have received significant policy and doctrinal encouragement in recent years.").

[7] Kohler-Hausmann, *supra* note 1, at 622. But the author's point is that though "[t]his version of assembly-line justice may exist in some places, [it] certainly [does] not in New York City." *Id.*

[8] *See* Weinstein, *supra* note 5, at 1159–60 (arguing that "we [should] aspire to improve how we adjudicate minor cases" in misdemeanor courts which "account for most of Americans' direct exposure to the judicial aspects of the criminal justice system[, and that despite] hav[ing] been the focus of renewed attention in recent years . . . the high volume, rapid-fire, misdemeanor court persists").

[9] Kohler-Hausmann, *supra* note 1, at 654.

[10] *Id.* at 655.

[11] *Id.*

[12] New York State Unified Court System, New York City Criminal Court: Court Information by County, NYCOURTS.GOV, https://www.nycourts.gov/courts/nyc/criminal/generalinfo.shtml [http://perma.cc/6QR9-V4AK].

demeanor cases was jarring. There was one misdemeanor defendant who was slow to move off to the side after his arraignment hearing because he was asking for clarification on his next court appearance date. As the defendant hesitated out of confusion, the moderating court officer yelled at him, "You've got to step out! We've got other cases." Because the arraignment calendar seemed particularly light on the night of my visit, that such an abrasive encounter had occurred was demonstrative of the proceeding's essential focus on speed—on pushing defendants through as quickly as possible—rather than on providing adequate individualized attention to each defendant. The Supreme Court's warning in *Argersinger v. Hamlin*,[13] that "[t]he volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result,"[14] has come to fruition.

This form of mass misdemeanor processing yields consequential challenges for defense lawyers and for the misdemeanor defendants themselves. One result is that public defenders are forced to handle enormous caseloads far above the nationally recommended standard of 400 misdemeanor cases per year.[15] In at least three major cities—Chicago, Atlanta, and Miami—defenders each handle over 2,000 misdemeanor cases per year.[16] A typical defender is equipped with scarce resources and is required to perform numerous investigative and core tasks, such as interviewing the client, talking with the prosecutor, reading police reports and other relevant discovery, conducting legal research and factual investigation, preparing for court, writing motions and memoranda, and attending court hearings. Yet the performance of these tasks is compromised when a defender's caseload is excessive, and the defender is unable to provide effective representation that the misdemeanant needs.[17] Of

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[13] 407 U.S. 25 (1972).

[14] *Id.* at 34.

[15] *See* BORUCHOWITZ ET AL., *supra* note 3, at 21–22 (reporting that although the American Council of Chief Defenders "recommend[s] that defenders handle no more than 400 misdemeanors per year," statistics from several states and major cities reveal defenders handling far in excess of this recommendation).

[16] *Id.* Survey responses and reports indicated that misdemeanor defenders handled the following number of cases: part-time defenders in New Orleans were reported to be "handling the equivalent of almost 19,000 cases per year per attorney," limiting them to "seven minutes per case"; misdemeanor attorneys in Arizona handle 1,000 cases per year; misdemeanor defenders in Dallas, Texas handle 1,200 per year; the average misdemeanor caseload per attorney at a Tennessee defender's office was 1,500 per year, and "two other defenders in Tennessee reported handling 3,000 misdemeanor cases in one year, which is 7.5 times the national standards." *Id.* at 21–22.

[17] *See* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 282 (2011) (bemoaning that misdemeanor defenders "have few resources to investigate and perform the core tasks for their clients' cases[,] . . . practice in overcrowded courts where defendants are pressured to enter quick guilty pleas without adequate time to consult with the attorney they may have just met[, and t]heir potential clients often face pressure to waive the right to counsel in order to enter a guilty plea"); *see also* BORUCHOWITZ ET AL., *supra* note 3, at 21 ("The caseload standards also assume appropriate levels of support services. In

even greater concern is the number of misdemeanants who are pushed through the system without any counsel at all.[18] With defense lawyers already handling cases at maximum capacity, and with no other meaningful assistance available to misdemeanor defendants, many of these defendants are forced to proceed through the system alone and without critical guidance, resulting in serious and far-reaching consequences for the misdemeanants and their families.

Currently, there are no legal or professional standards for effective representation specific to the misdemeanor practice.[19] The Supreme Court has never applied the two-pronged ineffective assistance of counsel test announced in *Strickland v. Washington*[20] to misdemeanor cases.[21] And those lower court decisions that have applied the *Strickland* test have not tackled "the difficult question of what differences there are, if any, between effective representation in felony and misdemeanor cases."[22] Further, "[p]rofessional standards . . . do not consider the specific issues and problems relating to misdemeanor advocacy."[23] The problem, therefore, is that "there are no standards against which to judge the critical failures of [effective] representation [for misdemeanor defendants] in the lower criminal courts."[24]

The high-volume misdemeanor system is producing a critical mass of misdemeanor defendants in need of attorneys, and the current number of defenders and existing resources are not sufficient to meet the demand. Not only are there many misdemeanor defendants without counsel, even those with counsel do not receive adequate assistance. Through this paper, I will take a closer look at the current situation of misdemeanor representation and propose a more sustainable solution to address the challenges facing defenders and appropriating effective assistance of counsel to unrepresented and ineffectively represented misdemeanor defendants. In Part II, I will explain the constitutional right to

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other words, they assume that the attorney has access to secretarial assistance, paralegal assistance, basic workplace technology, legal research, and investigatory services. For full-time defender offices, the Bureau of Justice Assistance has opined that there should be approximately one paralegal, one secretary, and one investigator for every four attorneys. Offices that do not maintain the recommended ratios of support staff to attorneys must reduce their workload expectations for attorneys. For these reasons, the ACCD further recommended that each jurisdiction review its situation and amend the standards as necessary, noting that 'the increased complexity of practice in many areas will require lower caseload ceilings.' Despite these standards, across the country, lawyers who are appointed to represent people charged with misdemeanors have caseloads so overwhelming that they literally have only minutes to prepare each case.") (footnotes omitted).

[18] *See, e.g.*, Natapoff, *supra* note 1, at 1315 ("While these individuals are largely ignored by the criminal literature and policymakers, they are nevertheless punished, stigmatized, and burdened by their convictions in many of the same ways as their felony counterparts . . . often without counsel.").

[19] Roberts, *supra* note 17, at 283.

[20] 466 U.S. 668 (1984).

[21] Roberts, *supra* note 17, at 283.

[22] *Id.*

[23] *Id.*

[24] *Id.*

counsel for certain misdemeanor defendants. I will then proceed to examine a few states that report a noticeable number of misdemeanor defendants who remain unrepresented in state court proceedings and discuss potential reasons for why states are drawing the line for providing misdemeanor representation below the constitutionally mandated requirement. In Part III, I will discuss why effective assistance of counsel is crucial for misdemeanor defendants and why there is an urgent need for redressing ineffective representation. In Part IV, I will propose the introduction of a source of non-lawyer helpers ("juris case workers") to alleviate the burden on lawyers and to better meet the existing needs of misdemeanor defendants. I will follow with a discussion of the possibility of expanding existing law school and college program offerings to provide training and certification for juris case workers, and then I will discuss potential concerns associated with the introduction of this new pool of legal professionals.

II. The Constitutional Right to Counsel in Misdemeanor Cases

a. Drawing the Constitutional Line

Unlike felony defendants,[25] misdemeanor defendants are not always legally entitled to counsel. In *Argersinger v. Hamlin*, the United States Supreme Court expanded the scope of the Sixth Amendment by extending the right to counsel to misdemeanor defendants who were sentenced to any term of incarceration in addition to any defendant facing felony charges.[26] The Supreme Court announced that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[27] However, the Court did not address the question of the right to counsel with sentences that could, but do not immediately, result in incarceration. This issue was later addressed in *Alabama v. Shelton*.[28] The Supreme Court held that

[25] The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The United States Supreme Court interpreted this right to require states to provide counsel to a defendant charged with a felony who could not afford to hire his own counsel. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963). The Court stated, "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

[26] 407 U.S. at 36–37.

[27] *Id.* at 37.

[28] 535 U.S. 654 (2002).

"defendants sentenced to suspended terms of imprisonment have a right to counsel, unless either (1) the state offers an opportunity to re-litigate guilt or innocence at any later revocation proceeding or (2) the defendant is sentenced to probation that cannot trigger incarceration."[29] In practice, *Shelton* guarantees the right to appointed counsel for "all misdemeanor defendants sentenced either to probation or incarceration."[30] But importantly, *Shelton* did not extend the federal constitutional right to representation to any "other misdemeanor or petty offense defendants, including those who could have been sentenced to incarceration but instead received only a fine."[31]

Although *Shelton* extended protection to defendants facing the possibility of incarceration through a suspended sentence,[32] a defendant who is not sentenced to an immediate or suspended incarceration is not absolved of the risk of being incarcerated in the future. The financial pressures and economic instability that result from the burden of having to make fine payments are significant consequences of non-incarceral punishment that harm the defendant. Upon evaluation of the defendant's ability to pay, if a court determines that the defendant failed to meet his obligations, the defendant may at that time be incarcerated for non-payment.[33] However, per *Shelton*, a defendant who is subsequently incarcerated for non-payment does not have a right to counsel. A defendant who is incarcerated six months after his sentencing phase for defaulting on his payment schedule or a defendant who is incarcerated for non-payment of his remaining balance faces the same risks that the *Shelton* Court cautioned of. Yet both are in effect imprisoned without being afforded the right to representation. Defendants who are not within *Shelton*'s constitutional protections are left without the right to counsel and could end up facing the same realities as their protected counterparts.

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[29] Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1022 (2013) (citing *Shelton*, 535 U.S. at 655–57).

[30] *Id.*

[31] *Id.*

[32] *Shelton*, 535 U.S. at 658. In *Shelton*, the Court reasoned that defendants facing "a suspended sentence that may end up in the actual deprivation of a person's liberty" in the sentencing phase must be provided counsel. *Id.* Otherwise, "[d]eprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant . . . faces incarceration on a conviction that has never been subjected to 'the crucible of meaningful adversarial testing.'" *Id.* at 667 (quoting United States v. Cronic, 466 U.S. 648, 656 (1984)).

[33] *See, e.g.*, Bearden v. Georgia, 461 U.S. 660, 672 (1983) (holding that "[i]f the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority."). Thus, it is unconstitutional to jail indigent defendants for non-payment of a fine unless it is *willful* or the defendant failed to make a *bona fide effort* to pay. *Id.* "[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." Tate v. Short, 401 U.S. 395, 398 (1971). In the event that a defendant is brought to court for failure to pay his fine and costs, the defendant should be entitled to a hearing as to his ability to pay, during which a Court will evaluate whether the defendant had the resources to pay.

The right to counsel for many misdemeanor defendants so entitled under *Argersinger* and *Shelton* has not been enforced with the same standard compared to that of felony defendants.[34] Current doctrine regarding the constitutional guarantee of the right to counsel leaves a sizeable number of unrepresented misdemeanor defendants, which leads to serious consequences for them. Perhaps of even greater concern is the problem of non-compliance in several states with the minimum constitutional requirements mandated by *Argersinger* and *Shelton*, as discussed in the following section.

b. Misdemeanor Representation in States

A nationwide database with information on state court misdemeanor cases does not exist.[35] The limited data that is available is from the few states that make information gathered from surveys of jail inmates publicly available.[36] This absence of nationwide data "stems both from the [Bureau of Justice Statistic's (BJS)] failure to collect data on misdemeanor defendants and from the difficulty of ascertaining which misdemeanor defendants are entitled to representation."[37] Furthermore, unlike in felony cases, the right to counsel in misdemeanor cases depends upon the sentence that the defendant ultimately receives. Thus, "even if data on misdemeanor representation rates were available, that data would not necessarily reflect the extent to which defendants constitutionally entitled to counsel remain unrepresented."[38] This data asymmetry makes it difficult to assess whether misdemeanor defendants, on a nationwide basis, are receiving counsel and how many defendants actually fall within the doctrinal sweep of *Shelton* and *Argersinger*. However, the publicly available state data discussed in the following section indicate that even defendants constitutionally entitled to counsel largely remain unrepresented in state court proceedings.

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[34] Hashimoto, *supra* note 29, at 1023.
[35] *Id.* at 1025.
[36] *Id.*
[37] *Id.* "Although the BJS maintains data (including representation rates) on felony defendants prosecuted in state courts in the seventy-five largest counties in the country, it does not collect similar data on misdemeanor defendants." *Id.*
[38] *Id.* at 1025–26.

Florida

Analysis of the misdemeanor sentencing statistics in Florida raises "concerns that the patterns of appointment of counsel have shifted away from appointments in misdemeanor cases in the wake of *Shelton*."[39] In Florida before *Shelton* was decided, "if the trial judge 'filed a statement in writing that the defendant will not be imprisoned if convicted,'" appointment of counsel to a misdemeanor defendant was not required.[40] Recognizing that this rule could deprive *Shelton* defendants of their right to counsel, the Florida Supreme Court amended Florida's Rules of Criminal Procedure to "require representation in misdemeanor cases unless the trial judge filed a written order 'certifying that the defendant will not be incarcerated in the case pending trial or probation violation hearing, or as part of a sentence after trial, guilty or nolo contendere plea, or probation revocation.'"[41] Because *Shelton* created a new category of Florida defendants entitled to appointment of counsel, it was expected that the number of misdemeanor cases in which counsel would be appointed would significantly increase.[42] Contrary to this expectation, survey data from 1999 and 2007 suggested that there was in fact a reduction in the relative proportion of misdemeanor cases handled by indigent defense offices post-*Shelton*.[43] These survey findings were also confirmed by data provided by indigent defenders in various counties concerning how many misdemeanor and felony cases they handled.[44] While recognizing the limitations of the available data, "the proportional drop in misdemeanor representation in Florida rais[ed] grave concerns that a significant percentage of misdemeanor defendants who are constitutionally entitled to counsel remain[ed] unrepresented in Florida."[45]

New York

In 2006, the Commission on the Future of Indigent Defense Services issued a Final Report to the Chief Judge of the State of New York, reporting that "New York's current fragmented system of county-oper-

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[39] *Id.* at 1029.
[40] *Id.* at 1029 (quoting Amendments to Fla. R. Crim. P. 3.111(b)(1), 837 So. 2d 924, 927 (Fla. 2002)).
[41] *Id.*
[42] *Id.* at 1030 ("[O]ne would have expected the proportion of misdemeanor to felony cases to rise after Shelton and the associated Florida rule change.").
[43] *Id.* at 1029–30.
[44] *See id.* at 1030 (reporting a reduction from 1723 misdemeanor cases handled per 1000 felony cases handled to 1066 misdemeanors per 1000 felonies).
[45] *Id.* at 1031.

ated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused."[46]

In New York, city, town, and village courts serve as "'local criminal courts' and have trial jurisdiction over misdemeanors, violations, and traffic infractions."[47] The Commission reported "that the deprivation of indigent defendants' right to counsel was widespread in town and village courts."[48] It reported that many indigent defendants had "significant delays in the appointment of counsel" and had to "negotiate pleas with the prosecution while unrepresented."[49] Additionally, the Commission found that "many justices themselves lacked a clear understanding as to which cases trigger the right to counsel," and "often counsel for indigent defendants were not available to attend the numerous Town and Village Courts."[50] The Commission's report emphasized concern "that many indigent defendants in the town and village courts across the state are deprived of their state and federal right to effective assistance of counsel [because c]ounsel is either not present, not assigned in a timely manner, or not assigned at all."[51] Furthermore, while the right to appeal a decision by a local judge may exist, in practice, defendants whose right to counsel is violated in town and village courts often have a difficult time exercising their right to appeal "because town and village courts are not required to be courts of record"—such proceedings "are not held in a public place and fail to ensure full public access and open procedures."[52]

The Commission's report called into question the quality of justice provided to those with the assistance of court-appointed counsel. Commentary attached to the report noted that by 2000, New York City's 18-B attorneys[53] "were disposing of 69 percent of all misdemeanor cases at arraignment."[54] Commentators raised concerns regarding the "alarmingly high disposition rate" and called for a searching inquiry into the "frequency of guilty pleas and the corresponding lack of litigation."[55] The

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[46] COMM'N ON THE FUTURE OF INDIGENT DEF. SERV., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 15 (2006).
[47] *Id.* at 21–22.
[48] *Id.* at 22.
[49] *Id.*
[50] *Id.*
[51] *Id.* (quotation marks and footnotes omitted).
[52] *Id.*
[53] 18-B is in reference to Article 18-B of the New York County Law, "which allowed localities to choose among several options but required each county and the City of New York to establish a plan for the provision of counsel to indigent defendants . . . for investigative, expert and other services necessary for an adequate defense." *Id.* at 6–7.
[54] *Id.* add. Additional Commentary of Commission Member Steven Zeidman at 2.
[55] *Id.* In additional commentary by Steven Zeidman in which Hon. Penelope Clute, Hon. Patricia Marks, Laurie Shanks, and Hon. Elaine Jackson Stack join, in response to the Commission's report, Zeidman raised questions as to why "the plea rate [is] so high," whether "indigent defenders are in some form coercing or subtly influencing their clients into pleading guilty," and whether "defense

Commission's report also highlighted how overwhelming the caseloads of New York public defenders were.[56]

Texas

In Texas, the Texas Fair Defense Project (TFDP) filed a class action lawsuit on behalf of all individuals in Williamson County who face possible jail time on a misdemeanor charge and cannot afford to hire a lawyer. The lawsuit alleged that Williamson County was "engaged in a systematic and deliberate scheme to deprive misdemeanor defendants" of the right to counsel.[57] The named plaintiffs each faced misdemeanor charges in Williamson County that could result in up to a year in prison. They claimed to be unable to afford legal representation and further alleged that they were denied their right to court-appointed counsel. One of the named plaintiffs, Kerry Heckman, a seasonal farmworker, was unemployed at the time charges were filed against him. Despite having no income, bank accounts, or any other assets, his request for an attorney in Williamson County was denied. The court ordered him to bring a retained attorney to his next appearance.[58] Two other named plaintiffs with disabilities that prevent them from working requested appointed counsel. Both were denied. A Williamson County judge stated that they looked as though they could work.[59] The class-action complaint further alleged that the Williamson County courts failed to provide basic information to de-

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lawyers are failing to listen to their clients and/or to value the benefits to their clients of actively contesting the charges." *Id.* Zeidman demanded a "clarion call for defense lawyers to actively investigate and litigate." *Id.*

[56] *Id.* at 17. As evidence that public defenders lack "adequate staff to cover all Town and Village Courts in a given jurisdiction and that requests for additional funds to keep pace with ever growing caseloads are . . . not granted," the report noted that "[i]n one country, . . . despite average misdemeanor caseloads of 1,000 cases per attorney and 175 felony cases per attorney per year, the chief public defender annually is required to submit to the county a proposal as to how he would operate his office with a 10 to 12 percent budget cut." *Id.* at 17–18.

[57] Press Release, Texas Fair Def. Project, Texas Fair Defense Project Files Lawsuit Against Williamson County and Local Judges for Failure to Appoint Counsel (July 12, 2006), http://www.fairdefense.org/resource/texas-fair-defense-project-files-lawsuit-williamson-county-local-judges-failure-appoint-counsel/ [http://perma.cc/YAT5-D7J6].

[58] "Heckman claims that at his first court 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 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 did not offer any evidence to refute these jurisdictional facts." Heckman v. Williamson Cty., 369 S.W.3d 137, 156–57 (Tex. 2012).

[59] Press Release, Texas Fair Def. Project, *supra* note 57.

fendants about their right to a lawyer and failed to appoint counsel in cases that require appointment.[60]

According to the Texas Criminal Justice Coalition (TCJC), which has been monitoring Williamson County courts for over a year, "hundreds of misdemeanor defendants" had been "unwittingly stripped of their right to an attorney."[61] The TCJC stated that "the Williamson county courts completely fail[ed] to meet public expectations of how a fair and impartial court system should work."[62] If the pattern of underrepresentation in Williamson County is widespread, the number of misdemeanor defendants in Texas who are denied the right to counsel is significant.

The data from Florida, New York, and Texas tracking the experiences of misdemeanor defendants paints a concerning picture. A significant number of misdemeanor defendants are stripped of their basic constitutional entitlement to adequate legal representation. Many states continue to fall short of this requirement.

c. Funding as a Barrier to Indigent Defense Services

Inadequate funding for indigent defenders continues to be the most significant barrier to providing adequate defense for misdemeanor defendants.[63] Although funding of indigent defense has increased, it is still woefully insufficient. The failure of states to provide adequate representation to indigent defendants is still at the forefront of the problems that exist today, more than four decades since the Supreme Court's landmark decision in *Gideon*, which required states to provide counsel to indigent defendants charged with a felony.[64]

Although the Supreme Court mandated that state governments provide counsel to indigent defendants, it did not define how such systems should be created and funded. In implementing the right to counsel, state and local governments are free to decide the type of indigent defense

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Even over 35 years ago, inadequate funding of defense systems was identified as "the greatest problem faced by defender systems." NAT'L LEGAL AID AND DEF. ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES: REPORT OF THE NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 8 (1976).

[64] Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *see also* THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 52 (2009), http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf [http://perma.cc/5X3N-MMFU] ("Despite the progress since Gideon, there is still an urgent need for fundamental reform.").

systems to employ and how to fund them.[65] As a result, some local governments bear the brunt of the financial burden within the funding model adopted by its respective state, resulting in inequities among the locally funded system.[66]

In competition for state funds, indigent defense is often a low priority. As a result, special funds and other revenue sources are often the primary funding mechanism for these programs. Since these sources of revenue are unpredictable and often fall short of providing adequate representation, such a funding system undermines the goal of adequate indigent defense.[67] For example, in 2004, Georgia's legislature voted to create additional fees and surcharges as a method to fund indigent defense representation.[68] These new fees and surcharges include "additional fees in civil and criminal cases, surcharges on bail bonds, and application fees for indigent defendants."[69] Despite this legislation, these new funds do not adequately cover the rising cost of indigent defense.[70]

Some states are beginning to recognize the importance of funding indigent defense. As a result, the burden on counties has decreased, in some cases, dramatically.[71] Even so, many states still face funding shortages that can create a risk of inadequate legal representation for indigent defendants.[72]

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[65] There are three primary models for implementing the right to counsel that state and local governments choose from: 1) the *public defender* model, where full- or part-time attorneys are hired to handle the bulk of cases requiring counsel in that jurisdiction; 2) the *contract* model, where "private attorneys are chosen by a jurisdiction—often after a bidding contest—and provide representation as provided by contractual terms"; and 3) the *assigned counsel* model, where "private attorneys are appointed by the court from a formal or informal list of attorneys who accept cases for a fixed rate per hour or per case" *Id.* at 53. While "most contracts are annual and require counsel to handle certain number of cases or a particular type of case (e.g., misdemeanors)," the assigned counsel model, is "typically used for cases when public defenders or contract counsel exist but cannot provide representation." *Id.*

[66] Urban counties are often overburdened in comparison to rural counties, which have far fewer cases. Simultaneously, "a rural county, with fewer resources, may be financially crippled by the need to fund the defense of a single serious homicide case." *Id.* at 55. But "even populous counties sometimes struggle when faced with the cost of defending capital or other complex cases." *Id.* at 54–55.

[67] *Id.* at 57.

[68] *Id.*

[69] *Id.*

[70] *Id.* "Although the fund collected $45.5 million in fiscal year 2008, indigent defense [received] only $40.4 million in fiscal year 2009, with the remaining $5 million [returned] to Georgia's general fund." *Id.* at 57–58.

[71] For example, "between 1986 and 2005, Arkansas went from contributing nothing toward indigent defense to contributing 91% of the overall costs; Iowa went from contributing less than three percent to full state funding; and Minnesota went from 11% to 93% state funding." *Id.* at 55.

[72] *See id.* at 59 ("Between 2002 and 2005, *when adjusted for inflation*, many states that fully fund their indigent defense systems actually decreased their level of financial support, including Connecticut, Hawaii, Missouri, New Mexico, Oregon, and Wisconsin. Now, 37 states are facing mid-year budget shortfalls for fiscal year 2009, and 22 of these states fully fund their indigent defense systems. Obviously, when states reduce financial support for public defense, which is already underfunded, there is a substantially greater risk that accused persons will not receive adequate legal representation and that wrongful convictions will occur.").

Many states have experienced the pressure of budget cuts. In 2008, Maryland was forced to cut its budget by $432 million, costing the public defender agency $400,000 in support staff salaries.[73] In the same year, Kentucky's legislature reduced its budget for indigent defense by 6.4%, a decrease of $2.3 million.[74] The following year, the budget for Minnesota's Board of Public Defense was cut by $4 million, causing the public defender staff to be reduced by 13%.[75] This cut marked the largest reduction in staffing since 1995—when the state first began fully funding indigent defense.[76] Several counties in Florida also experienced severe budget cuts.[77] The privation was much the same in Georgia.[78]

Public defender offices across the country are underfunded, which disparately impacts misdemeanants. When funding is not adequate to staff both misdemeanor and felony cases, indigent defenders prioritize clients who are most in need—those facing the longest sentences or facing the death penalty.[79] Consequently, an attorney facing the decision of where to devote resources will likely choose a complex felony case over a misdemeanor case because of the higher stakes in a felony case.[80] Furthermore, in handling their assigned cases, lawyers defending misdemeanors in some jurisdiction have to move between multiple courtrooms, even between several towns.[81] This results in defense providers being stretched thin, diminishing the quality of misdemeanor representation. Thus, indigent defenders facing budget shortages often prioritize and allocate resources based on the stakes involved, to the detriment of misdemeanor defendants.

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[73] *Id.* at 59. Moreover, "as of October 2008, the [Maryland] Public Defender announced that it would cease to pay for private court-appointed attorneys in conflict cases," and consequentially, "the Chief Judge of Maryland's highest court has ordered the counties to pay the cost of attorneys who must be hired when the public defender has a conflict. At least one county had stated that it does not have the funds to pay those bills." *Id.* at 59–60.

[74] *Id.* at 60. "As a result, the Department of Public Advocacy announced that it will begin to refuse several categories of cases, including conflict of interest cases, some misdemeanors, and probation and parole violation cases." *Id.*

[75] *Id.*

[76] *Id.* A total of 23 public defenders were laid off, leading to expectations that public defender caseloads will increase from around 450 felony cases per attorney per year to approximately 550 such cases. *Id.*

[77] Orange-Osceola County, despite having among the state's busiest criminal courts, faced budget cuts of $3 million dollars to their prosecutor and public defender offices. *Id.* The public defender's office alone lost 40 positions overall, including 10 attorneys. *Id.* Some of the remaining costs were transferred to defendants in the form of special fees incurred upon conviction—$50 for misdemeanors and $200 for felonies. *Id.* Miami-Dade County faced a lawsuit challenging the excessiveness of its public defender's caseload due to lack of funding. *Id.* And public defender's in Broward and Palm Beach counties were on the verge of refusing case for want of funds. *Id.*

[78] By 2007 the Georgia Public Defender Standards Council "owed hundreds of thousands of dollars to attorneys representing indigent defendants in capital cases and was forced to lay off 41 employees" and in 2008 was forced to close a major office to cut cost. *Id.*

[79] BORUCHOWITZ ET AL., *supra* note 3, at 26–27.

[80] Roberts, *supra* note 17, at 296.

[81] *Id.* at 296.

This empirical lack of adequate funding for indigent defense seems to indicate that states are violating the constitutional requirements set forth in *Argersinger* and *Shelton*. Conversely, it could be that states are adjusting their practices—making changes to their charging decisions, sentencing procedures, waivers, etc.—within the constitutional bounds. One cost-effective way for states to comply with *Shelton* is to "eliminate incarceration and probated sentences for low-level offenders."[82] If states find that the cost of appointing counsel to all qualifying defendants is too high, they can alternatively choose to change the penalty structure—as long as the defendant is not facing immediate incarceration, the defendant is not constitutionally required to be appointed counsel. Such changes to the penalty structure "provide[ ] states with a low-cost way to comply with the Constitution" that is "infinitely preferable to coercing waiver of the right to counsel."[83]

Either way, the reality is that the current resources made available in the form of attorneys and funding are not adequate to go around to all misdemeanor defendants in need of representation. The result is that states are practically drawing the line below the constitutionally mandated requirement. With competing demands for scarce resources from defendants charged with high-level crimes, and with the ongoing and constant struggle for adequate funding, the immediate and consequential needs of misdemeanor defendants are often overlooked and remain unaddressed.

III. Need for Change: Why Misdemeanor Defendants Need Assistance

In essence, there are two groups of misdemeanor defendants in need of systemic change: misdemeanants who have counsel yet are without adequate assistance, and misdemeanants who are left without any form of assistance from an attorney. And although the Supreme Court has not extended the right to counsel to all misdemeanor defendants, there is reason to think that all misdemeanants, regardless of the sentence they are facing, can benefit from *some* form of assistance.

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[82] Hashimoto, *supra* note 29, at 1042.
[83] *Id.*

a. Even misdemeanors can be complex, and require the assistance of a lawyer

That the law is not a fixed set of rules, but always affected by the individual circumstances of a case, is no less true of misdemeanors. As the United States Supreme Court stated in *Argersinger*:

> The requirement of counsel may well be necessary for a fair trial even in a petty offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.[84]

When a number of factors could mean the difference between innocence and guilt, misdemeanants need lawyers to sort through the facts of a case to assess what is legally important.

Misdemeanor defendants need lawyers to translate and explain the technicalities of relevant rules and to navigate complex court proceedings. Technical rules of evidence, pleading, and procedure are complicated and can be difficult to navigate for even a trained lawyer. Defendants have a right to understand the technicalities of the charges they are facing and need lawyers to translate the meaning of relevant provisions (e.g., what the statutory minimum and maximum penalties are) in layperson terms. Lawyers are also in a unique position to ensure that prosecutors comply with statutory and constitutional obligations to provide essential information to defense through discovery procedures.[85]

Lawyers are needed to provide assistance with investigative, forensic, and administrative support. Assistance with preserving evidence, locating witnesses, and gathering facts to prove factual innocence or mitigating factors would strengthen a defendant's case. Misdemeanor defendants often lack "thorough research into the facts surrounding the crime as well as the defendant's background, family, upbringing, mental

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[84] Argersinger v. Hamlin, 407 U.S. 25, 33 (1972). At the time of the *Argersinger* decision, annual caseloads across the country were estimated at between four and five million court cases. *Id.* at 34 n.4. *Argersinger*'s estimation is approximately half of the estimated annual caseload today. *See* Natapoff, *supra* note 1, at 1314–15 ("[A]n estimated ten million misdemeanor cases are filed annually.").

[85] *See* LAURENCE A. BRENNER, AMERICAN CONSTITUTION SOC'Y FOR LAW AND POLICY, WHEN EXCESSIVE PUBLIC DEFENDER WORKLOADS VIOLATE THE SIXTH AMENDMENT RIGHT TO COUNSEL WITHOUT A SHOWING OF PREJUDICE 6 (2011), https://www.acslaw.org/files/BennerIB_ExcessivePD_Workloads.pdf [http://perma.cc/N2J5-8ZJW] ("An overwhelming majority (over 90%) of both defenders and experienced private criminal defense attorneys reported that prosecutors failed to turn over evidence favorable to the defendant (Brady evidence) and delayed providing even routine information to which the defense is entitled in discovery.").

health, and character" that prove effective in defending more serious criminal cases.[86]

Effective assistance of counsel is particularly important in misdemeanor cases as their high volume "results in pressure for speedy disposition," making it more likely for prosecutors to overlook key factual issues.[87] Judges and prosecutors also have an "enormous incentive to pursue early guilty pleas—as early as the initial arraignment in some jurisdictions."[88] In New York City, 57% of all misdemeanor and violation cases reach a disposition at arraignment.[89] Early and rapid disposition is an established feature of misdemeanor justice in New York City.[90] Misdemeanor defendants need lawyers to sort out the implications of a plea bargain offered by a prosecutor and also to avoid over-punishment from within a sentence range and collateral consequences that could be associated with the crime.

b. Consequences of a Misdemeanor Conviction

Contrary to the misconception that misdemeanor convictions do not truly affect a person, the consequences of a misdemeanor conviction can be dire. As the United States Supreme Court noted in *Argersinger*, "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and reputation."[91]

Even a fine-only sentence can have a large toll on the defendant, which is manifested in the form of financial pressures and economic instability. This is particularly the case if the defendant is already having trouble making ends meet. Further, there is also the lingering risk of incarceration in cases where the defendant defaults on his payments or is ultimately unable to pay off the amount due.[92] In fact, every day defendants are sent to jail for failure to pay their court debts.[93] The alternative

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[86] Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 971 (2012).

[87] BORUCHOWITZ ET AL., *supra* note 3, at 12.

[88] Roberts, *supra* note 17, at 306–7; *see also* JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 13 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf [http://perma.cc/6UL5-CB4L] ("In many jurisdictions across the country defenders meet their clients minutes before their court appearance in courthouse hallways, often just presenting an offer for a plea bargain from the prosecution without ever conducting an investigation into the facts of the case or the individual circumstances of the client.").

[89] Kohler-Hausmann, *supra* note 1, at 654.

[90] *Id.* Over the past thirteen years, the percentage of sub-felony cases with a disposition at arraignment has fluctuated between a high of 65.5% and a low of 57.9%. *Id.*

[91] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

[92] *See supra* Part II.a.

[93] For example, in Benton County, Washington, jail records covering a four-month period in 2013 revealed "that on a typical day, a quarter of the people who were in jail for misdemeanor offenses

punishment to immediate incarceration of a misdemeanor conviction can be just as burdensome as, if not more so than, a jail sentence.

In addition to direct consequences, misdemeanor defendants are vulnerable to a myriad of collateral consequences. It is "[a] common misperception" that punishment for a misdemeanor charge involves no more than "going through the process . . . culminating in dismissal, deferred adjudication, or a quick guilty plea with community service, a fine, or perhaps a small amount of jail time."[94] What this misperception overlooks is that the consequences of even the most "minor" misdemeanor conviction can be far-reaching and severe. There no longer exists the proverbial "slap on the wrist," as a long list of collateral consequences result even from conviction for the most minor charges.[95] A misdemeanor defendant can face deportation,[96] denial of employment, or denial of access to various professional licenses.[97] A student convicted of a

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were there because they had failed to pay their court fines and fees." Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons [http://perma.cc/5B5F-TBQC]. Stephen Papa, a homeless veteran, was sentenced to 22 days in jail for failure to pay what "he owed in restitution, fines and court fees." *Id.* Another example of the "court-debt-prison cycle" is James Robert Nason, who, "when he was 18, . . . pleaded guilty to second-degree burglary in Spokane, Washington. He was sentenced to 30 days in jail, community service, and ordered to pay $735 in court costs, attorney fees and restitution. The debt began to accrue 12 percent annual interest from the day of his sentencing. [Because] Nason didn't finish the community service, and didn't keep up with the payments . . . he served more than 120 days behind bars over several years, despite arguing that he could not afford to pay . . . [because] he was both homeless and unemployed." Lisa Riordan Seville & Hannah Rappleye, *Sentenced to Debt: Some Tossed in Prison over Unpaid Fines*, NBC NEWS (May 27, 2013), http://www.nbcnews.com/feature/in-plain-sight/sentenced-debt-some-tossed-prison-over-unpaid-fines-v18380470 [http://perma.cc/ME44-Z5WT].

[94] Roberts, *supra* note 17, at 277.

[95] *See, e.g.*, Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1126 (2013) (acknowledging such consequences "rang[e] from the loss of public housing and federal student loans to the inability to find work because the majority of employers now run criminal background checks on prospective employees").

[96] Laws concerning criminal convictions and deportation may vary per state. For a summary of New York law on deportation, *see e.g.*, Manuel D. Vargas, *Immigration Consequences of New York Criminal Convictions*, FOUR CS: COLLATERAL CONSEQUENCES OF CRIMINAL CHARGES, COLUMBIA LAW SCHOOL, http://blogs.law.columbia.edu/4cs/immigration/ [http://perma.cc/D9WM-6SCS]. Numerous misdemeanor drug convictions can lead to automatic deportation for non-citizens, because "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less or marijuana, is deportable." 8 U.S.C. § 1227(a)(2)(B)(i) (2012). *See also* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 261 (2002) ("Deportation is a particularly significant collateral consequence imposed on non-citizens who are convicted of drug offenses.").

[97] *E.g.*, Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 156 (1999) (noting employment requiring professional licenses from which ex-offenders can be "formally excluded . . . range from lawyer to bartender, from nurse to barber, from plumber to beautician" despite no connection "between the prior offense and the employment"); Clyde Haberman, *NYC; Ex-Inmate Denied Chair (and Clippers)*, N.Y. TIMES Feb. 25, 2003, http://www.nytimes.com/2003/02/25/nyregion/nyc-ex-inmate-denied-chair-and-clippers.html [http://perma.cc/9T5S-WE29] (reporting on an inmate who was planning for parole being denied certification as a barber's apprentice due to his criminal record,

misdemeanor may be ineligible for student loans.[98] A misdemeanant on public support may lose "public housing and access to food assistance," negatively impacting the misdemeanant's family as well.[99] Financial costs resulting from conviction are often rendered without considering the defendant's ability to pay.[100] Thus, no criminal conviction should be regarded as minor or unimportant.

Misdemeanor convictions can also create a snowballing effect for future criminal charges faced by the misdemeanant. Even a minor conviction can hinder a misdemeanant's ability to dismiss a more severe prior conviction.[101] Furthermore, misdemeanor convictions can adversely affect a person in future sentencing proceedings and result in increased punishment or minimize the chance to reduce a sentence.[102] For example, a defendant with a prior misdemeanor conviction may not "utilize the controlled substances 'safety valve' statute and related provision in the federal sentencing guidelines."[103] Additionally, a defendant with a prior misdemeanor conviction carrying a sentence of thirty or more days of jail time or over a year of probation "who later faces a federal drug crime charge is ineligible" for a reduced sentence, despite a provision that grants federal judges discretion to issue sentences below the statutory mandatory minimum.[104]

Misdemeanor defendants face additional difficulties resulting from technological advancement and the increased use of electronically stored data. Misdemeanants exit the criminal justice system "with a permanent, easily accessible electronic record . . . that can affect future employment, housing, and many other basic facets of daily life."[105] This huge change has taken effect within the past few years. Previously, one had to make a trip to the local courthouse, or multiple courthouses, to retrieve an individual's criminal record.[106] However, because criminal records are now

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which the licensing authorities at the Department of State decided "indicates lack of good moral character and trustworthiness required for licensure").

[98] *See* Editorial, *Marijuana and College Aid*, N.Y. TIMES Nov. 2, 2007, http://www.nytimes.com/2007/11/02/opinion/02fri4.html [http://perma.cc/3WR7-DU2W] (describing "a law that barred even minor drug offenders from receiving federal education aid" that "affects students who commit crimes while actually receiving aid").

[99] BORUCHOWITZ ET AL., *supra* note 3, at 12; *see also* Columbia Law School, *Overview and Mission Statement*, FOUR CS: COLLATERAL CONSEQUENCES OF CRIMINAL CHARGES, http://www2.law.columbia.edu/fourcs/ [http://perma.cc/C6DS-Q5YU] (identifying most collateral consequences of New York state and local law).

[100] *See, e.g.*, Heckman v. Williamson County, 369 S.W.3d 137, 156–57 (Tex. 2012) ("Heckman claims that the court did not ask him any questions about his ability to pay for an attorney."); Press Release, Texas Fair Def. Project, *supra* note 57 (announcing a class action complaint alleging misdemeanor defendants being denied the right to appointed counsel despite an inability to pay).

[101] BORUCHOWITZ ET AL., *supra* note 3, at 13.

[102] *Id.*

[103] *Id.* at 15 (citing 18 U.S.C. 3553(f) (2012); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (U.S. SENTENCING COMM'N 2016)).

[104] *Id.*

[105] Roberts, *supra* note 95, at 1090.

[106] Roberts, *supra* note 17, at 287.

widely available electronically, potential employers and landlords can more readily access and view them.[107] This information accessibility makes it easier for hiring managers to avoid offering employment to anyone with a conviction, although the type of work and conviction may be unrelated. The permanency of these records creates an additional problem: even if a charge ultimately results in a dismissal, the charge can still be connected to the individual. In several states, such cases "remain publicly available and may require the individual to affirmatively file, and sometimes pay, for expungement" of the records.[108] Thus widely available criminal records have made the information semi-permanent; once a charge is filed, it is extremely difficult to erase from one's public record.

All criminal convictions, irrespective of the sentence imposed, "can have significant life-altering consequences for defendants" and their families.[109] It is largely because of such significant collateral consequences that it is even more crucial for misdemeanor defendants to have counsel to inform them of the possibilities:

> It is one thing to say that an individual pleading guilty to disorderly conduct does not necessarily need counsel to be assured a non-jail sentence. It is quite another to say that individual does not need counsel to understand that she will lose her public-school-system job and her public housing if she pleads guilty. Similarly, it is one thing to say a person does not need a lawyer to keep him out of jail on a public urination case. It is quite another to say he does not need serious counseling, from his own lawyer, about how, if he is in California, pleading guilty to public urination leads to lifelong sex offender registration. These are only a few brief examples; legislators continue to add to the lengthy list of collateral consequences of criminal convictions at the federal, state, and local level.[110]

Such consequences potentially impact the defendant at least to the same extent as—and arguably to a greater extent than—probation or a short incarceration.[111]

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[107] *Id.*
[108] *Id.*
[109] Hashimoto, *supra* note 29, at 1041.
[110] Roberts, *supra* note 95, at 1127–28 (footnotes omitted).
[111] Hashimoto, *supra* note 29, at 1041.

c. Information and advocacy can make a difference

Misdemeanants also need the assistance of lawyers as advocates and their knowledge to strategically alter court proceedings. Lawyers, who have "skill in the science of law," are able to "change the nature of proceedings by making them slower and more complex."[112] Better advocacy for misdemeanor defendants can also prevent defendants from facing wrongful conviction and over-punishment for the crime:

> What often stands between an individual and an unnecessary misdemeanor conviction is a good lawyer. The quality of representation that an individual gets in a misdemeanor case is significant on many levels, including substantive justice for that individual, public perception of justice, and public safety . . . An effective lawyer will advance sentencing arguments that help avoid unnecessary incarceration in appropriate cases, whereas the absence of such advocacy can lead to unjust sentences. In addition, the potential for wrongful convictions and the troubling phenomenon of innocent people pleading guilty is great in low-level cases.[113]

In some cases, convictions can be avoided all together. "For example, first misdemeanor arrests in New York City often result in an offer for an Adjudication in Contemplation of Dismissal (ACD) which allows for the expungement of the arrest from a person's record if they do not get arrested again within 6 months."[114] Especially in high-volume jurisdictions, misdemeanors are often dismissed altogether, or put on a diversion track, and then ultimately dismissed. Lawyers can advocate for a defendant to reject a plea offer, in the hopes of differed adjudication or an ACD—the issuance of which would potentially help the defendant to avoid a record.[115]

Lawyers can also advocate on behalf of misdemeanor defendants to negotiate the ultimate fine amount and payment schedule. And lowering the fine amount and establishing a manageable payment schedule helps

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[112] Barton & Bibas, *supra* note 86, at 983. And "[w]ithin the limits of professional propriety, causing delay and sowing confusion not only are [the lawyer's] right but may be his duty." *Id.* (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 325 (1985)). Therefore, "lawyers in criminal courts are necessities, not luxuries." *Id.* (quoting Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963)).

[113] Roberts, *supra* note 17, at 285.

[114] Pooja Gehi, *Gendered (In)security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357, 376 n.112 (2012); *see also* Kohler-Hausmann, *supra* note 1, at 645 (presenting data showing New York City prosecutors "declined to prosecute . . . between approximately 17,000 and 30,500 [misdemeanor arrests] in each of the previous five years").

[115] Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT'G REP. 6, 6 (2009) ("Successful participants in deferred adjudication programs see the charges against them dismissed and their arrest record expunged.").

alleviate the risk of incarceration the defendant may face in lieu of paying the fine amount.

Additionally, lawyers make a difference in initial stages, such as the arraignment proceeding when the bail amount is set. A defendant may be released on his own recognizance or receive a lower bail amount if a lawyer is able to skillfully advocate on the defendant's behalf. This is particularly true if the defendant has an extensive criminal record or other aggravating circumstances.

Yet attorneys available to misdemeanor defendants are overburdened by overwhelming caseloads and are often incentivized to provide speedy, rather than quality, representation. Thus, they may not be positioned to deliver the zealous representation that misdemeanor defendants—facing serious direct and collateral consequences—need.

d. Need for Change

"The proliferation of criminal records and the related phenomenon of an explosion in collateral consequences for minor criminal convictions"[116] creates an urgent need to find a solution for providing quality representation to the increasing number of misdemeanor defendants who are processed through the system. Regardless of whether they are facing immediate incarceration, misdemeanor defendants need effective counsel to learn about the numerous consequences that result from a misdemeanor conviction and to skillfully navigate the legal process. Lawyers assist defendants in understanding the discretion a prosecutor has in charging and plea decisions and the discretion courts have in picking a fine amount from a range. And misdemeanants and their lawyers can explore the option of making payments in installments to accommodate a defendant's personal financial situation. Assistance with evaluating these options are within a misdemeanant's statutory right, and because of the far-reaching potential consequences of the resulting proceeding and outcome, ensuring effective assistance to minimize consequences for the defendant is of utmost importance.

IV. Solutions

While it would be ideal to assign an attorney to every misdemeanor defendant, resource constraints and other difficulties that prevent defend-

[116] Roberts, *supra* note 17, at 287.

ers from providing adequate assistance make it highly unlikely that such an ideal outcome can be achieved. The next best solution is to solicit the aid of non-lawyer helpers. Non-lawyer helpers can support lawyers in improving the quality of assistance provided to misdemeanor defendants and would provide a much needed source of assistance for those misdemeanants who do not have counsel.

a. Value of non-lawyer helpers

Soliciting the assistance of those who are knowledgeable about the law but are not necessarily trained in the law may be a cost-effective solution to fill the current gap between the inadequate supply of defenders and the pressing need for assistance among misdemeanants. In fact, many court disputes can be resolved without the involvement of a lawyer and "neither litigants nor society can afford lawyers for [every] dispute."[117] Such non-lawyer helpers, whom I will call "juris case workers," could be professional assistants whose fees would be lower than that of lawyers who offer limited legal advice and can be of help to more misdemeanants. Juris case workers would partner with under-funded, understaffed defenders to help prepare for and alleviate their misdemeanor caseload. By taking ownership of certain tasks that do not necessarily need to be performed by a lawyer—tasks that could be performed by someone without a Juris Doctor degree—juris case workers could potentially perform the same work for a lower fee. And by helping to cut down costs yet providing the manpower to perform the work to be done, they could become key players in providing more effective assistance to the many misdemeanor defendants who are without legal aid.[118]

b. Drawing from the social-worker model

Social workers are at the forefront of discussions regarding the need for non-lawyer legal services.[119] Social work has been characterized by

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[117] Barton & Bibas, *supra* note 86, at 988.

[118] In certain situations, it may be more efficient and effective to have the assistance of a non-lawyer than the help of a lawyer. *See e.g.*, *id.* at 992 (reporting that "because procedures are simpler and the stakes are lower [for misdemeanor cases], lawyers simply have much less to do"); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 496 (2007) ("[T]he data suggest that the value added by counsel is lower in misdemeanor cases than in felony cases.").

[119] *See, e.g.*, Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15, 16, 19 (1998) (presenting "a theoretical justification of the notion that social work is the appropriate profession to assist" "poor persons with simple legal problems" and

sociologist Andrew Abbott as "the profession of interstitiality, the profession whose job was to mediate between all the others. . . . [T]he heart of what [social workers] did was to broker between doctors, lawyers, and psychiatrists on the one hand, and patients, institution, and, sometimes, family on the other."[120] Such discussions propose that social workers are prime candidates to engage in non-lawyer work, such as "identify[ing] the character of the legal problem, mak[ing] contacts, prepar[ing] papers, . . . resolv[ing] routine issues," and referring clients to legal aid or private lawyers when the case involves complex, multifaceted issues.[121] This proposal advocates for giving social workers sufficient training to recognize legal issues, provide guidance for pro se hearings, offer referrals to relevant legal services, and advocate for clients in non-adversarial hearings.[122] The proposed tasks do not include what would be considered more substantive legal work, such as performing legal research or representing clients at court proceedings.[123]

One of the main arguments in support of using social workers as a medium to provide non-lawyer legal services is that social workers are already strategically placed in key stations to provide these necessary services.[124] Although the use of such non-lawyers in the justice system has been criticized in other contexts (e.g., community courts),[125] the social worker model serves as a springboard for expanding the traditionally-defined law profession.

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proposing an expansion of the role of "social workers at community centers [to] assist both new and experienced lawyers in more effectively meeting the needs of poor clients").

[120] Andrew Abbott, *Boundaries of Social Work or Social Work of Boundaries?*, 69 SOC. SERV. REV. 545, 549 (1995). "Probably the vast majority of what people with the title 'social worker' actually do in the United States is indeed connecting together services provided largely by other professions and other institutions." *Id.* at 559. "[E]ven within the profession of interstitiality, sub-professions such as medical social work and the proposed 'judicial social worker' designations can be carved out in consonance with developments in law." Bertelli, *supra* note 119, at 27, (citing Rufus Sylvester Lynch & Edward Allan Brawley, *Social Workers and the Judicial System: Looking for a Better Fit*, 10 J. TEACHING IN SOC. WORK 65, 72 (1994)).

[121] Bertelli, *supra* note 119, at 20.

[122] *Id.* at 20. Further, "[t]he long-term educational goal of the program would be to integrate a more practical legal component to the continuing education, baccalaureate, and master's level training of social workers," including "legally significant topics commonly encountered by social workers in community practice," and developing "procedures for intake and consultation with clients on legal issues." *Id.* at 20–21.

[123] *See id.* at 20 n.35 (indicating that such social workers' "main reference materials would be legal handbooks, rather than primary sources, such as case law and statutes").

[124] *See, e.g., id.* at 16 ("Many social workers, such as those working at settlement houses and community centers, are well-positioned to assist poor persons with simple legal problems.").

[125] *See, e.g.*, Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897 (2003).

c. Juris Case Workers in practice

Among the myriad needs of misdemeanor defendants that are not currently being met, there are many tasks that a juris case worker can assist with. A case worker's first task would be to make a judgment call: is the misdemeanant's need one that the juris case worker could resolve or one that requires a lawyer. In the latter case, the case worker would then make informed referrals to services the defendant may need.

One key aspect of a juris case worker's role would be *information delivery*. They would serve as the first point of contact from within the legal system. Based on the misdemeanants' citation, the juris case worker could provide an overview of the process and inform misdemeanants of their general legal rights (e.g., right to counsel or to a speedy trial[126]). The case worker could review the complaint with the client, and explain the statute that was violated and the minimum and maximum penalties associated with the violation in layman's terms.[127] This will ensure that the defendants are not left in the dark, have the chance to ask any initial questions, and can make a thoughtful decision as to whether they need a lawyer's assistance.

Juris case workers can also conduct intake interviews and instigate an informed inquiry into the defendant's background and individual circumstances. Assisting with gathering facts, preserving evidence, locating witnesses, researching the defendant's background, family situation, and upbringing, and conducting a mental health and character evaluation would be of tremendous help to lawyers. These crucial tasks often go unattended due to time and resource constraints. Such tasks are not only suitable for a juris case worker to perform but are key to discovering any mitigating evidence that should be presented to the court.

Juris case workers with a working knowledge of the court process can also be a valuable resource for advising on compliance with court procedures. For example, the case worker can assist pro se litigants with preparing various legal forms in civil matters,[128] including ensuring compliance with administrative procedures.

By alleviating portions of lawyers' workloads, juris case workers can help lawyers focus their attention on performing the more substantive legal tasks. Upon reviewing the files prepared by the juris case

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[126] *See, e.g.*, N.Y. PENAL LAW § 30.30 (McKinney 2003 & Supp. 2016) (setting forth speedy trial requirements and time limitations).

[127] In this way, the tasks of a juris case worker could be along the lines of what a clinical student or extern would perform under the supervision of a supervising attorney/professor. For example, students handling a misdemeanor weapons possession case in the Criminal Defense Clinic at Fordham University School of Law "reviewed the complaint with [the client], [took] his personal history, and advised him that he would very likely be released on his own recognizance once he appeared before the judge." Weinstein, *supra* note 5, at 1158.

[128] Bertelli, *supra* note 119, at 17.

workers with the preliminary factual, background, and personal information, lawyers can perform the more substantive legal tasks, such as conducting further legal research, making discovery requests to the prosecutor, writing motions and memoranda, and preparing for and attending court hearings with the client. This joint effort between juris case workers and lawyers is necessary to provide the effective assistance and representation that the misdemeanants need.

d. Source of Juris Case Workers

Because of the nature of the proposed work to be performed by juris case workers, it is logical for the case workers to become a subset of the law profession. Thus, law schools could explore expanding their degree offerings to include a degree specifically for juris case workers, e.g., a juris case work degree. Similar to a teaching certificate, case workers could graduate with a certificate and the training required of a professional case worker.

As an alternative to focusing on the graduate professional school level, another consideration could involve expanding existing pre-law programs at colleges and universities to create a "juris case work" major. Undergraduates interested in pursuing this type of work could take clinical classes—perhaps offered at a coordinate law school—to gain hands-on experience, develop the necessary interpersonal skills, and learn about the most pertinent and high-level legal issues needed for the job. Such programs could be a great opportunity for students who are interested in client advocacy and the legal process but do not wish to pursue three years of legal education to obtain a juris doctor degree.

e. Employment structure of Juris Case Workers

There are several possible options for which institution should employ juris case workers. For example, public defender offices could employ the juris case workers, since they will be working closely with the defenders. Having the juris case workers physically present and accessible can smooth out the workflow and ensure greater efficiency in handling the cases that come through the office. Another option would be for juris case workers to be employed by the courts. Courts could maintain a list of available juris case workers and assign them to non-counsel-appointed misdemeanor cases as they come through the court docket. Fi-

nally, case workers could also be hired on a contract basis to assist local defenders in times of heavy caseloads.

f. Concerns

One concern is whether non-lawyer legal helpers can handle the complexity of misdemeanor cases.[129] Part of a juris case worker's task will be to delineate what services they can and cannot offer to the client. Juris case workers should be trained to recognize their own limits and to pass the case onto a public defender if it is outside the scope of their capability. And for the most serious misdemeanor cases, these case workers will be handling portions of the case in conjunction with the attorney assigned to the case.

As repeat players, juris case workers can be a valuable resource for pro se defendants who are encountering the judicial system for the first time. While the defendant's cooperation is necessary to put together a detailed case file, defendants themselves may not know which facts are key to establishing a certain defense or mitigating factor. Juris case workers will have knowledge and experience that the defendants themselves simply do not have in preparing their case.

Within the courtroom, defendants unfamiliar with the setting may not feel at ease when confronted with the power imbalance that is deliberately created by the solemnity of the courtroom. The power of the judge and the formalities of a court proceeding may make the defendant feel as if he cannot adequately represent himself, and juris case workers can be a resource to those who have questions or concerns prior to entering the courtroom.

One of the main benefits of obtaining the assistance of juris case workers is that their fees would be lower than that of a lawyer. A public defender office that needs to hire additional staff but that lacks adequate funds to hire full-time lawyers could benefit from hiring juris case workers who could support the existing staff at a lower cost.

Conversely, there is a concern that the prohibition against the unauthorized practice of law would bar the assistance of juris case workers. Many states forbid the practice of law by people not regularly licensed and admitted to practice in the state.[130] However, the definition of what

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[129] *See, e.g.*, Roberts, *supra* note 17, at 303 (arguing that "[a]lthough misdemeanors are the usual training ground for new attorneys, they can also be just as complicated as typical felony cases").

[130] *See, e.g.*, N.Y. JUD. LAW § 478 (McKinney 2016) ("It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself or herself in a court of record in this state . . . or to assume to be an attorney or counselor-at-law, or to assume, use, or advertise the title of lawyer . . . or equivalent terms in any language, in such manner as to convey the impression that he or she is a legal practitioner of law or

constitutes "legal services" has been at the forefront of many disputes involving alternative business services, and concerns over the regulation of juris case workers likely fall within the same grey zone. In 1995, the American Bar Association (ABA) published recommendations on the connection between prohibitions against the unauthorized practice of law and the unmet needs of individuals with low incomes for legal services. The ABA urged that:

> [w]ith regard to the activities of all other nonlawyers, states should adopt an analytical approach in assessing whether and how to regulate varied forms of nonlawyer activity that exist or are emerging in their respective jurisdictions. Criteria for this analysis should include the risk of harm these activities present, whether consumers can evaluate providers' qualifications, and whether the net effect of regulating the activities will be a benefit to the public.[131]

Recognizing that alone it "cannot provide all required legal services," the ABA acknowledged "the need for regulated non-lawyer practice."[132] Along the same line of reasoning used by states to allow businesses to provide alternative services akin to legal services,[133] states should also interpret the definition of "unauthorized practice of law" to allow the work of juris case workers.

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in any manner to advertise that he or she . . . has, owns, conducts or maintains a law office . . . or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath."); N.Y. JUD. LAW § 484 (McKinney 2016) ("No natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate, or for preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property after death, or decedents' estates, or pleadings of any kind in any action brought before any court of record in this state, or make it a business to practice for another as an attorney in any court or before any magistrate unless he has been regularly admitted to practice, as an attorney or counselor, in the courts of record in the state.").

[131] AMERICAN BAR ASSOCIATION, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 161–62 (1995), http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/non_lawyer_activity.authcheckdam.pdf [http://perma.cc/WTD9-BSQS].

[132] Bertelli, *supra* note 119, at 40; *see also* AMERICAN BAR ASSOCIATION, *supra* note 131131, at 4–5 (recognizing that "lawyers are not always available at affordable rates"; that for some claims "available fees may be too low for a lawyer to be able to undertake the work; that there are few too lawyers fluent in languages other than English who can handle the cases of non-English speaking clients; and that lawyers' significant debt burdens and rising operating costs put lawyers under economic pressure to charge higher fees").

[133] *See, e.g.*, Terry Carter, *LegalZoom Resolves $10.5M Antitrust Suit Against North Carolina State Bar*, ABA JOURNAL (October 23, 2015), http://www.abajournal.com/news/article/legalzoom_resolves_10.5m_antitrust_suit_against_north_carolina_state_bar [http://perma.cc/U33N-XKPS] (describing that as part of the settlement the state bar agreed "to support proposed legislation that would clarify the definition of 'unauthorized practice of law'" to "permit[ ] interactive legal-help websites" like LegalZoom to continue operating in North Carolina). Further, "[l]egal challenges [to LegalZoom's legality] in other states ha[ve] fallen away over the years." *Id.*

Despite these concerns, the value that juris case workers can contribute to the law profession and offer to misdemeanor defendants is significant. Allowing for such non-lawyer assistance is a practical solution for addressing the critical need that currently exists within the misdemeanor system.

V. Conclusion

The existing number of defenders and resources is not sufficient to meet the demands of the critical mass of misdemeanants produced by the high-volume misdemeanor system. Misdemeanor defendants who are without counsel because they do not fall within the constitutionally guaranteed line and those who *have* counsel but do not receive adequate assistance are equally in need of additional support. Because the collateral consequences of misdemeanor charges can be quite significant and severe, there is an urgent need to focus more attention on ensuring that those without counsel and those with inadequate counsel receive quality assistance with their cases. Over-burdened and under-funded, defenders currently lack the capacity and sufficient funds to provide adequate assistance to all misdemeanor defendants in need—there is currently no implemented sustainable solution for alleviating defenders' overwhelming workloads and competing responsibilities. As an alternative to the ideal yet unrealistic solution of assigning attorneys to every defendant's case, soliciting the assistance of non-lawyer helpers should be explored. The profession of juris case worker should be created to assist existing defenders with non-legal tasks for their misdemeanor caseload and to serve as a resource for those who do not qualify for an attorney. To this end, law schools could consider expanding their program offerings by creating a new track for those who are interested in performing the type of work envisioned above. At the very least, juris case workers assisting with non-legal tasks should not be problematic under existing unauthorized practice of law regulations. And depending on how states choose to define legal services and the unauthorized practice of law going forward, it seems unlikely that even assisting with what may be characterized as legal work would be prohibited by states. This new pipeline of helpers is exactly the change that the current misdemeanor system critically needs.