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Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts

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Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts

Jenny Roberts*

Most individuals accused in our nation's criminal courts are not charged with murder, rape, drug sales, or even less serious felonies. The vast majority of charges are in the lower courts, for misdemeanors such as marijuana possession, driving with a license suspension for failure to pay tickets, assault, disorderly conduct, or public intoxication. Misdemeanor adjudications have exploded in recent years, with one recent study estimating that the volume of misdemeanor cases nationwide has risen from five to more than ten million between 1972 and 2006. At the same time, violent crime and the number of felony cases across the country have decreased markedly.

A common misperception is that misdemeanor charges might lead to a night in jail and the punishment of going through the process — often requiring a number of court appearances — culminating in dismissal, deferred adjudication, or a quick guilty plea with community service, a fine, or perhaps some small amount of jail time. Yet the consequences of even the most “minor” misdemeanor conviction can be far reaching, and include deportation, sex offender registration, and loss of public housing and student loans. In addition, criminal records are now widely available electronically and employers, landlords, and others log on to check them. These “collateral consequences” of a misdemeanor conviction are often more dire than any direct criminal penalty.

What often stands between an individual and an avoidable misdemeanor conviction, with its harsh effects, is a good lawyer. Yet a profound crisis exists in the lower courts, brought about by a widespread lack of zealous representation for indigent people charged with misdemeanors. Many individuals charged with low-level crimes receive representation from defense attorneys with overwhelming caseloads, in a criminal justice system singularly focused on rapid finality in the large numbers of docketed cases. Despite this urgent situation, the body of scholarship on

the right to effective representation and the indigent defense crisis has largely ignored misdemeanors. This Article describes how ineffective assistance jurisprudence is undeveloped for misdemeanors and how published professional standards for defense advocacy have failed to address misdemeanors. There is almost no guidance about proper norms for this distinct category of cases. This Article calls for responses to the misdemeanor representation crisis from the three groups situated to make a difference in this area based on their particular institutional competencies: the judiciary, the defender community, and professional organizations that draft standards for practice. Without proper administration, including effective defense representation, the current approach to mass misdemeanor processing and prosecution significantly impedes substantive justice for the individual, public perception of justice, and public safety.

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INTRODUCTION

It is time to end the wasteful and harmful practices that have turned our misdemeanor courts into mindless conviction mills.

— Former Florida Supreme Court Chief Justice Gerald Kogan¹

In Detroit, Michigan, the Misdemeanor Defender Professional Corporation has a flat-fee contract with the City of Detroit to handle between 12,000 and 14,000 cases each year.² The five part-time

* Copyright © 2011 Jenny Roberts. Associate Professor, American University, Washington College of Law. Many thanks to Gabriel “Jack” Chin, Robert Dinerstein, Cara Drinan, Roger Fairfax, Babe Howell, Lewis Grossman, Mary Holland, Cynthia Lee, Stephen Lee, Margaret Colgate Love, Binny Miller, Rebecca Rosenfeld, Juliet Stumpf, Andrew Taslitz, Robert Tsai, and Ronald Wright, as well as participants at panels and workshops at LatCrit 2009, Syracuse University College of Law, the 2009 AALS Clinical Conference, American University, Washington College of Law, and the William & Mary School of Law Faculty Colloquium. For research assistance, thanks to Esther Cajuste, Sarah Comeau, Erin P. Creaghe, Sarah Kravitz, Jenny Bone Miller, Nick Moore, and Diana Pak.

¹ ALISA SMITH & SEAN MADDAN, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS 8 (2011) [hereinafter THREE-MINUTE JUSTICE].

² NAT’L LEGAL AID & DEFENDER ASS’N, “A RACE TO THE BOTTOM,” EVALUATION OF THE TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN 23 (2008) [hereinafter RACE TO THE BOTTOM].

Corporation attorneys must carry between 2,400 and 2,800 misdemeanors a year, which is more than 500 percent greater than the nationally recognized caseload recommendation of 300–400 misdemeanors per year for full-time defenders.³ This means that Corporation attorneys will spend an average of thirty-two minutes, or about \$51 of legal services, on each client's case.⁴ Thirty minutes south, in Woodhaven, Michigan, a similar situation occurs. There, a person charged with a misdemeanor who is entitled to court-appointed counsel will be represented at a pretrial conference by "house counsel" who represents every indigent defendant in court that day.⁵ Those facing misdemeanor charges cannot meet their attorney until the day of court, "which could be anywhere from one to three weeks after arraignment."⁶ The court administrator in Woodhaven "estimated that, in an average year, there would be one motion filed by house counsel and maybe two jury trials involving an indigent defendant."⁷

These stories of assembly-line representation in the lower criminal courts have received little attention. Instead, scholars, practitioners, and the press have highlighted inadequate representation cases such as one where a court deemed "effective" the performance of a sleeping lawyer in a death penalty case.⁸ A series of DNA exonerations of innocent men and women in high-profile cases have also "reveal[ed] a trail of sleeping, drunk, incompetent and overburdened defense attorneys."⁹ These shocking examples and others deserve continuing criticism; the stakes were high, and the representation was egregious.

Contrary to popular belief, however, the vast majority of criminal cases in the United States are not felonies. They are misdemeanors: "minor" dramas played out in much higher numbers every day in

³ *Id.*; see also *infra* note 77 and accompanying text (describing nationally recommended caseload standards).

⁴ RACE TO THE BOTTOM, *supra* note 2, at 23.

⁵ *Id.* at 27.

⁶ *Id.* (noting that "the court does not give out house counsel phone numbers until the day of court").

⁷ *Id.*

⁸ See *McFarland v. Texas*, 928 S.W.2d 482, 505 (Tex. Crim. App. 1996); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 460-63 (1996); Bob Herbert, *In America; The Death Factory*, N.Y. TIMES, Oct. 2, 2000, at A27, available at <http://www.nytimes.com/2000/10/02/opinion/in-america-the-death-factory.html?scp=2&sq=sleeping%20lawyer%20death%20penalty&st=cse>.

⁹ *Bad Lawyering*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Bad-Lawyering.php> (last visited July 11, 2011).

lower courts across the country.¹⁰ A 2008 analysis of eleven state courts revealed that misdemeanors comprised 79% of the total caseload in those courts.¹¹ In addition to comprising the majority of criminal cases, misdemeanors are also on the rise. One recent study estimated that the volume of misdemeanor cases nationwide has risen from five to more than ten million between 1972 and 2006.¹² This change has taken place across diverse jurisdictions. In New York State, misdemeanor arrests rose from 363,634 in 2001 to 423,947 in 2010.¹³ The public defender in Lancaster County, Nebraska experienced a 56% increase in the number of new misdemeanor cases between 2003 and 2007.¹⁴ In Florida, almost “a half million people, or approximately

¹⁰ See N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., ADULT ARRESTS: 2001–2010, available at <http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/NewYorkState.pdf> [hereinafter NEW YORK STATE ADULT ARRESTS: 2001–2010] (listing statistics for “adult arrests” for New York States in 2010 as 584,558 total, of which 423,947 were misdemeanors and 160,611 were felonies).

¹¹ ROBERT C. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010), available at http://www.ncsconline.org/d_research/csp/2008_files/EWSC-2008-Online%20Version%20v2.pdf; see also NEW YORK STATE ADULT ARRESTS: 2001–2010, *supra* note 10 (noting almost 600,000 arrests in 2010, with felonies comprising just over 160,000 of that total); Steve W. Perry, *Prosecutors in State Courts*, in U.S. DEP’T OF JUST., BUREAU OF JUST. STATS. BULL., at 6 (Ser. No. NCJ 213799, 2006) (“In 2005 State court prosecutors reported closing over 2.4 million felony cases and nearly 7.5 million misdemeanor cases.”), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/psc05.pdf>. The actual difference between prosecuted misdemeanors and felonies is even greater, as only 95% of all state prosecutors’ offices reported handling misdemeanor cases. *Id.* at 4 tbl.5. County attorneys or perhaps police officers presumably prosecuted misdemeanors in the remaining five percent of jurisdictions, or the court handled the disposition without any prosecutorial involvement.

¹² See ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT’L ASSOC. CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 11 (2009) [hereinafter MINOR CRIMES, MASSIVE WASTE] (citing National Center for State Courts, 2007 Criminal Caseloads Report finding that in data gathered in 12 states in 2006, there was a “median misdemeanor rate of 3,544 per 100,000” people).

¹³ See NEW YORK STATE ADULT ARRESTS: 2001–2010, *supra* note 10 (listing numbers demonstrating that misdemeanor arrests climbed substantially each year from 2000 to 2009, with the exception of 2004); see also JUSTIN BARRY & LISA LINDSAY, OFFICE DEPUTY CHIEF ADMIN. JUDGE, CRIMINAL COURT OF THE CITY OF NEW YORK: 2009 ANNUAL REPORT 26–27 (2010), available at <http://www.nycourts.gov/courts/nyc/criminal/AnnualReport2009.pdf>.

¹⁴ ELIZABETH NEELEY, LANCASTER COUNTY PUBLIC DEFENDER WORKLOAD ASSESSMENT JULY 2008, at 1 (2008), available at <http://ppc.unl.edu/userfiles/file/Documents/projects/Public%20Defender/Public%20Defender%20Workload%20Assessment.pdf>. The corresponding felony picture is quite different. Between 2000 and 2009, the violent crime rate in the United States fell by 39%. Both violent and property crime rates in 2009 were at their lowest recorded levels since 1973. Jennifer L. Truman &

3% of the state's adults, pass through [the] misdemeanor courts each year."¹⁵ These numbers reflect a recent explosion of misdemeanor adjudications flooding trial courts around the country. Although full exploration of the causes of rising misdemeanor volume are beyond the scope of this Article, the adoption of zero-tolerance policing and broken windows theory — which claim that policing minor quality-of-life offenses helps control violent crime — are largely responsible for the trend in many jurisdictions.¹⁶

The high-volume misdemeanor system is clearly in crisis. Misdemeanor defenders handle caseloads far above nationally recommended standards,¹⁷ yet have few resources to investigate and perform the core tasks for their clients' cases.¹⁸ They 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.¹⁹ Their potential clients often face pressure to waive the right to counsel in order to enter a guilty plea.²⁰

Michael R. Rand, *Criminal Victimization, 2009*, in U.S. DEP'T JUST., BUREAU OF JUST. STATS. BULL. at 2-3, (Ser. No. NCJ 231327, 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf>; cf. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., CRIME IN THE UNITED STATES 2005: PERCENT CHANGE IN VOLUME AND RATE PER 100,000 INHABITANTS FOR 2 YEARS, 5 YEARS, 10 YEARS (2009), available at http://www2.fbi.gov/ucr/cius2009/data/table_01a.html (showing how, between 2000 and 2009, the violent crime rate fell 15.2% per 100,000 inhabitants). Except for burglary, violent crime fell in every category, including murder, rape, and aggravated assault. It also fell 31.5% for motor vehicle theft during that ten-year period. *Id.* In New York, for example, violent felony arrests dropped from more than 51,000 in 2001 to 44,000 in 2010. NEW YORK STATE ADULT ARRESTS: 2001-2010, *supra* note 10 (listing overall felony total as dropping from 169,942 in 2001 to 160,611 in 2010).

¹⁵ See THREE-MINUTE JUSTICE, *supra* note 1, at 9 app. C.

¹⁶ See James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29 (introducing the "broken windows" theory); see also Peter A. Barta, Note, *Giuliani, Broken Windows, and the Right to Beg*, 6 GEO. J. ON POVERTY L. & POL'Y 165, 168-69 (1999) (summarizing Mayor Giuliani's "zero-tolerance policing" approach and its effects on New York City's homeless population); cf. BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 6-7 (2001) (scrutinizing the evidence and policy behind the "broken windows" theory).

¹⁷ See *infra* Part I.A.

¹⁸ See ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 10-11, 19 (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> [hereinafter *GIDEON'S BROKEN PROMISE*]; MINOR CRIMES, MASSIVE WASTE, *supra* note 12, at 38.

¹⁹ See *infra* Part I.D (discussing coercive aspects of plea bargaining in the lower courts).

²⁰ See *infra* Part III.D.2 (discussing waiver of the right to counsel).

The Sixth Amendment right to effective assistance of counsel applies to many misdemeanor cases and implicates many of these issues of high workloads, resource deprivation, and substantive and procedural justice.²¹ There are also ethical rules, state laws, and professional guidelines relevant to criminal defense representation. Yet, the crisis in effective misdemeanor representation confronts a blank slate of standards specific to misdemeanor practice. The Supreme Court has never applied *Strickland v. Washington*'s two-pronged ineffective assistance of counsel test in the misdemeanor context.²² Although some lower court decisions have done so, these cases do not tackle the difficult question of what differences there are, if any, between effective representation in felony and misdemeanor cases.²³ Professional standards, an important source for norms of effective assistance both as a constitutional and practical matter, also do not consider the specific issues and problems relating to misdemeanor advocacy.²⁴ In short, there are no standards against which to judge the critical failures of representation in the lower criminal courts.²⁵

Careful analysis of the current state of misdemeanor representation in the United States is inadequately developed, and the subject merits much more than the scant attention it now receives both in criminal justice literature and in practice.²⁶ Thus, at a time when some

²¹ See *infra* Part II.A (explaining how the Sixth Amendment right to counsel applies in any case where the defendant is sentenced to actual or suspended incarceration, and how many states offer more generous levels of misdemeanor representation, including states that confer the right to counsel for all misdemeanors regardless of the sentence). The vast majority of individuals charged with misdemeanors, and who have a right to counsel, qualify for state-appointed counsel. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006) ("Poor people account for more than eighty percent of individuals prosecuted.").

²² See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (noting that defendant, to win claim of ineffective assistance of counsel, must demonstrate (1) that defense counsel's representation was deficient as judged by prevailing professional norms, and (2) that this deficiency was prejudicial to the defendant). For an insightful and comprehensive examination of the Court's jurisprudential journey towards the two-prong ineffective assistance test, see Donald A. Dripps, *Effective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 269-78 (1997); see also *infra* Part II.B.1 (discussing lack of Supreme Court cases on misdemeanor ineffective assistance).

²³ See also *infra* note 157 and accompanying text.

²⁴ See *infra* Part II.B.2.

²⁵ See *infra* Part I.

²⁶ Although the literature has largely failed to examine misdemeanors and other minor adjudications separately, there are some notable exceptions. See, e.g., Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 461

commentators have called for a greater focus on the felony representation crisis at the expense of misdemeanor representation,²⁷ this Article recognizes a utilitarian argument for more attention to low-level cases, which affect so many individuals and communities and have serious hidden consequences.²⁸ As one report noted, “[E]xperts have observed innumerable times that public defender offices across the country are underfunded. What is essentially unreported is how this underfunding disparately impacts those accused of misdemeanors.”²⁹

The crisis in misdemeanor representation and the lack of specific standards for this large category of cases raises important questions for courts, professional organizations, and defender offices. Should there be separate standards for misdemeanor representation? If felony ineffective assistance jurisprudence and existing professional

(2007); John Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1222 (1994) (focusing on a “practical definition of the Sixth Amendment in the lower courts”). With respect to the realities of the lower criminal courts, see Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1069-70 & n.9 (2004); Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1160-62 (2004); Steven Zeidman, *Policing the Police: The Role of the Court and the Prosecution*, 32 FORDHAM URB. L.J. 315, 316 (2005) (discussing New York City). Recent commentary on broken windows theory, although focused on the policing aspects of minor charges, is also relevant here. See, e.g., HARCOURT, *supra* note 16, at 6-7 (questioning whether broken windows is an effective strategy). With respect to misdemeanors more generally, “there is a startling dearth of data on misdemeanor case processing.” Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 89 (2007) (noting how New York City is “something of an exception” to this general observation).

²⁷ See Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 COLUM. L. REV. 801, 801 (2004) (suggesting default rules by which indigent defense providers should ration scarce resources, including “a harm-reduction principle that gives a qualified preference to suspects facing greater potential punishments”); Hashimoto, *supra* note 26, at 461 (arguing that states should free up limited defender resources by “significantly curtailing the appointment of counsel in low-level misdemeanor cases,” but ignoring the collateral consequences of misdemeanor convictions). For a robust debate over the need for triage in criminal defense work, compare Mitchell, *supra* note 26, at 1222 (1994) (focusing on a “practical definition of the Sixth Amendment in the lower courts” and urging recognition of the need for triage in decision-making process about how to distribute defender resources), with Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911(2005) (rejecting Mitchell’s call for triage and redefinition of the Sixth Amendment right to counsel). See also John B. Mitchell, *In (Slightly Uncomfortable) Defense of “Triage” by Public Defenders*, 39 VAL. U. L. REV. 925 (2005) (responding to Freedman).

²⁸ See *infra* Part I.B.

²⁹ MINOR CRIMES, MASSIVE WASTE, *supra* note 12, at 26.

standards apply to misdemeanors, where should misdemeanor lawyers look for guidance about misdemeanor-specific issues such as higher caseloads, fewer resources, and plea offers and guilty pleas at the first court appearance? Given the many structural obstacles to development of a jurisprudence of ineffective misdemeanor lawyering,³⁰ how might courts shape ineffective assistance law to address misdemeanor-specific situations? Should professional organizations rely on commentary or rather black-letter misdemeanor-specific standards in order to guide misdemeanor representation?

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. First, people sometimes go to jail for misdemeanor convictions. Sentences may be short compared to those for serious felony charges, but six months in jail or several years of probation, often with monthly fees,³¹ is substantial for the individual and his family.³² 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.³³ Exonerations in high-profile and high-stakes cases are well documented and publicized,³⁴ and inadequate representation is one of the core causes of wrongful convictions.³⁵ Although there is no empirical study of such

³⁰ See *infra* Part III.B.1.

³¹ See, e.g., IDAHO CODE ANN. § 20-225 (West 2011) (“Any person under state probation or parole supervision shall be required to contribute not more than seventy-five dollars (\$75) per month as determined by the board of correction.”).

³² See *infra* notes 53-61 and accompanying text (describing statutes in which misdemeanors in various jurisdictions can carry up to two, four, or even ten years in jail). This observation is also based on my experience in Syracuse, New York, where failure to complete drug treatment court for misdemeanor possession regularly resulted in nine- to twelve-month sentences.

³³ See *infra* Part I.D (discussing coercion and plea bargaining in the misdemeanor context).

³⁴ See, e.g., *Innocence Project Case Profiles*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Dec. 6, 2011) (“There have been 280 post-conviction DNA exonerations in United States history. These stories are becoming more familiar as more innocent people gain their freedom through postconviction testing.”).

³⁵ See EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES 1

wrongful convictions in the lower courts, the conviction of the innocent through trial or guilty plea is surely not limited to capital cases and serious felonies.³⁶ Unfortunately, as one report noted, “There is no national Innocence Project for the hundreds of thousands of misdemeanor cases that lack DNA evidence.”³⁷

Second, the relationship between a person charged with a misdemeanor and defense counsel is a meaningful part of the overall experience that person has with the criminal justice system.³⁸ Procedural justice matters. Inadequate assistance of counsel in criminal cases affects both the individual’s and the public’s perception of the criminal justice system’s legitimacy, which may undermine future willingness to obey the law.³⁹ Third, recent research has revealed that saddling large numbers of individuals with permanent criminal records significantly impedes access to employment. This

(2010), available at http://www.innocenceproject.org/docs/Innocence_Project_IAC_Report.pdf.

³⁶ See Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1559 (“It is fair to say that the proven cases of actual innocence are just the tip of the innocence iceberg, so to speak.”).

³⁷ RACE TO THE BOTTOM, *supra* note 2, at 15.

³⁸ See Am. Council of Chief Defenders, *Statement on Caseloads and Workloads* at 2-3, available at <http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.pdf> [hereinafter *Statement on Caseloads and Workloads*] (“Excessive public defender caseloads and workloads [that] threaten the ability of even the most dedicated lawyers to provide effective representation to their clients . . . can . . . lead to the public’s loss of confidence in the ability of our courts to provide equal justice.”); see also JUSTICE POLICY INST., *SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE* 23 (2011) [hereinafter *SYSTEM OVERLOAD*].

³⁹ See TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW* 175 (2002) (“We find that people are responsive to two social aspects of their experience with legal authorities — their feelings about the procedural justice of their experience and their trust in the motives of those authorities.”); see also E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 1-2 (1988). As Roscoe Pound noted more than 80 years ago:

It is in [the handling of petty prosecutions] that the administration of criminal justice touches immediately the greatest number of people. . . . The bad physical surroundings, the confusion, the want of decorum, the undignified offhand disposition of cases at high speed, the frequent suggestion of something working behind the scenes, which characterize the petty criminal court in almost all of our cities, create in the minds of observers a general suspicion of the whole process of law enforcement which, no matter how unfounded, gravely prejudices the law.

MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 6 (1979) (quoting ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 190-191 (1930)).

leads to more crime among those individuals, thus undermining public safety.⁴⁰ Some understanding of this link has even begun to filter into the public dialogue about crime and public safety.⁴¹

Two ways in which the quality of misdemeanor representation matters more today than ever before merit particular attention: the proliferation of criminal records and the related phenomenon of an explosion in collateral consequences for minor criminal convictions. Recent technological advances allow easy access to individuals' criminal records.⁴² In some states, even cases that end in a dismissal remain publicly available and may require the individual to affirmatively file, and sometimes pay, for expungement.⁴³ This is an enormous change from only several years ago, when researching a person's criminal record often required a trip to the local courthouse or multiple courthouses.⁴⁴ The result is that employers and landlords can now quickly search criminal records, so that even when there is no legal barrier to housing or employment for the individual, there is an effective bar.⁴⁵ One commentator has aptly described "the stigma of

⁴⁰ See, e.g., N.Y. STATE BAR ASS'N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY 56 (May 2006), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=11415> ("[T]he safety of our communities and citizens is jeopardized when [convicted persons] . . . revert to a life of crime" because their permanent criminal records make it difficult, if not impossible, for them to acquire employment, housing, and other necessities."); Megan C. Kurlychek & Robert Brame, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483, 486, 490 (2006) (concluding that individuals with permanent criminal records are relatively more likely to commit future crimes).

⁴¹ See, e.g., Joseph P. Fried, *When 'Help Wanted' Comes With a Catch*, N.Y. TIMES, Sept. 17, 2006, http://www.nytimes.com/2006/09/17/jobs/17convicts.html?_r=2&scp=1&sq=conviction&st=nyt (describing hiring hurdles that those with criminal records must overcome, and noting several proposals to address these obstacles). Certainly much of the public and political concern is driven by fiscal reality. See Adam Liptak, *Right and Left Join Forces on Criminal Justice*, N.Y. TIMES, Nov. 24, 2009, at A1.

⁴² See generally James B. Jacobs, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177 (2007-2008) ("This Article documents how criminal history records are expanding in scope and how their dissemination is proliferating.").

⁴³ See, e.g., MD. CODE ANN., CRIM. PROC. § 10-105(a) (West 2011) (requiring that person petition for expungement of a nolle prosequi); MD. CODE ANN., CTS. & JUD. PROC. §7-202 (West 2011) (noting "a \$30 filing fee for docketing a petition for expungement of records in a criminal case, unless all records to be expunged relate to a charge of which the petitioner has been acquitted.").

⁴⁴ James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 401 (2006).

⁴⁵ See, e.g., Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC., 937, 958 (2003) (describing study where testers applied for real jobs with identical credentials

[a] criminal record as a ‘negative curriculum vitae.’⁴⁶ The effect of widely available criminal records cannot be underestimated at a time when, according to the U.S. Department of Justice, “[o]ver 92 million individual offenders were in the criminal history files of the State criminal history repositories on December 31, 2008.”⁴⁷

Increased access to criminal records coincides with a recent, and exponential, growth in the collateral consequences of criminal convictions.⁴⁸ The rise in misdemeanor prosecutions and convictions has negative effects that reach far beyond the confines of the criminal courthouse. Individuals with misdemeanor convictions may be automatically deportable, regardless of their work ties, time spent, and family connections in the United States.⁴⁹ They may lose or be unable

other than race and criminal record: white non-offender tester received callbacks 34% of the time he applied; white offender received callbacks for 17% of applications; and black offender tester callback ratio plummeted to 5%); see also Devah Pager, Bruce Western, & Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777 (2009) (rerunning earlier Pager study in New York City, with similar results); *Smart on Crime: Recommendations for the Next Administration and Congress*, THE 2009 CRIMINAL JUSTICE TRANSITION COALITION, 131-34 (Nov. 5, 2008), http://www.sentencingproject.org/doc/publications/inc_transition2009.pdf (recommending various executive and legislative changes to deal with bars to employment for individuals with criminal records).

Collateral — or hidden — consequences fall into two general categories. First are those enforced through civil statutes or regulations, such as immigration laws or professional licensing schemes, that apply to individuals convicted of qualifying crimes. The second category involves the more diffuse, but equally powerful and more far-reaching, effects on families and communities when a person is involved in the criminal system even on a relatively minor charge. These effects include a family struggling to survive financially, where one member must pay fines and court costs, or lose work days to numerous court appearances. See generally FEELEY, *supra* note 39; K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Misdemeanor Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 296 (2009) (describing how policing misdemeanors through criminal system imposes significant financial and legitimacy costs).

⁴⁶ Jacobs, *supra* note 44, at 420.

⁴⁷ *Survey of State Criminal History Information Systems, 2008*, at 4, Bureau of Justice Statistics (Oct. 2009) (noting how “[a]n individual offender may have records in more than one State”), available at <http://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf>.

⁴⁸ Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 770-74 (2011) (describing expanded scope and severity of collateral penalties in federal and state law in past two decades).

⁴⁹ See Anthony Lewis, *Abroad at Home; ‘This Has Got Me in Some Kind of Whirlwind,’* N.Y. TIMES, Jan. 8, 2000, at A13 (describing deportation order against Mary Anne Gehris, who was adopted and brought to United States as an infant, based on misdemeanor conviction from her young adulthood).

to get public housing and benefits, their driver's license, or access to student loans.⁵⁰ If convicted of certain misdemeanor sexual offenses, they will be required to register as a sex offender, with severe restrictions on where they can live and work.⁵¹

Unfortunately, the vast majority of indigent individuals charged with low-level crimes receive representation characterized by overwhelming caseloads and by courts singularly committed to rapid finality and churning the large numbers of docketed cases through the system.⁵² Fortunately, there are a number of institutional actors that can respond to the misdemeanor representation crisis. Legislators can relieve the numerical and fiscal pressure on the lower courts through selective misdemeanor decriminalization. Professional organizations can draft specific misdemeanor representation standards or explain why standards should be the same for felonies and misdemeanors. The defender community can articulate misdemeanor standards and institute practices leading to more effective representation. In particular, the defense community could argue for resources to provide counsel at the first appearance, to ameliorate the problem of defendants waiving the right to counsel and guilty pleas at arraignment. Finally, the judiciary has a central role in articulating standards that recognize the realities of misdemeanor practice. The judiciary must provoke state legislatures to adequately fund the criminal justice system that the legislatures — and the executive, through the police power — have chosen to populate with a wide variety of broadly enforced misdemeanor crimes.

Part I of this Article provides the definition of a misdemeanor and then sets out important differences and similarities between misdemeanor and felony representation. Part II describes the lack of constitutional and other norms, such as professional standards, that speak specifically to the effective assistance of misdemeanor counsel. Part III explores the institutional competencies of legislators, the courts, organizations that draft professional standards, and the defender community, noting ways in which each can take part in the

⁵⁰ See, e.g., 20 U.S.C. § 1091(r)(1) (2003) (listing varying ineligibility periods for federal student loans, based on number of drug-related convictions); 21 U.S.C. § 862a (2003) (bars to public benefits); 42 U.S.C. § 13661 (2003) (bars to public housing).

⁵¹ See, e.g., KAREN J. TERRY & JOHN S. FURLONG, *SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION: A "MEGAN'S LAW" SOURCEBOOK* (2d ed. 2006) (describing registration and community notification processes with which sex offenders must comply).

⁵² See *GIDEON'S BROKEN PROMISE*, *supra* note 18, at 2. *But see* Ronald F. Wright, *Padilla and the Delivery of Integrated Criminal Defense*, 58 *UCLA L. REV.* 1515, 1531-33 (2011) (describing more salutary practices in some large public defender offices).

critical dialogue about the representation necessary for fair administration of misdemeanors.

I. THE DIFFERENCES, AND CERTAIN SIMILARITIES, BETWEEN MISDEMEANOR AND FELONY LAWYERING

Just what is a misdemeanor? As a general matter, jurisdictions divide crimes “into two categories — felonies and misdemeanors. Misdemeanors are the less serious offenses, for which punishment is generally limited to one year in jail.”⁵³ Despite this general method of defining misdemeanors by the penalty imposed for the offense, legislatures deviate in different ways, resulting in a broad range of crimes that qualify as misdemeanors depending on the particular jurisdiction. The result is that a misdemeanor is any crime the relevant legislature labels a “misdemeanor.”⁵⁴ For example, second-degree assault in Maryland, which encompasses common-law battery as well

⁵³ MINOR CRIMES, MASSIVE WASTE, *supra* note 12, at 11. In some jurisdictions, there are also “infractions” or “violations,” which are generally offenses that are categorized as non-criminal even though they may result in a jail sentence. *See, e.g.*, N.Y. PENAL LAW § 221.05 (McKinney 2008) (making marijuana possession a violation); N.Y. PENAL LAW § 10.00(3) (McKinney 2009) (“‘Violation’ means an offense, other than a ‘traffic infraction,’ for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.”). The federal criminal code has three categories of misdemeanors, all for crimes with a maximum sentence of less than one year. *See* 18 U.S.C.A. § 3559(a) (West 2011) (listing Class A, B, and C misdemeanors with sentences, respectively, of six months to one year, thirty days to six months, and five to thirty days). All crimes with maximum sentences under five days, or where the statute does not authorize imprisonment, are classified as “infractions.” 18 U.S.C.A. § 3559(a)(9) (West 2011). Federal criminal law also recognizes the category of “petty” offenses. *See* 18 U.S.C. §19 (2003) (including Class B and C misdemeanors as well as infractions in definition of “petty offense”). However, this distinction has been relevant only in connection with defining the right to a jury trial. *See* *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968) (“So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment’s jury trial provisions.”); *see also* *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (“[N]o offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized.”); *Williams v. Florida*, 399 U.S. 78, 86 (1970) (holding that six-person jury satisfies Sixth Amendment’s jury trial requirement). In *Baldwin*, the Court rejected New York State’s request that it “draw the line between ‘petty’ and ‘serious’ to coincide with the line between misdemeanor and felony.” *Baldwin*, 399 U.S. at 69.

⁵⁴ As the Minnesota Supreme Court has noted, “Absent any constitutional definition or classification, it is competent for the legislature, in creating or defining an offense, to name it, classify it, and prescribe the punishment for it, subject only to the limitation that excessive fines shall not be imposed, nor cruel or unusual punishments inflicted.” *State v. Kelly*, 15 N.W.2d 554, 564 (Minn. 1944).

as the mere intent to frighten by threat of battery, with no requirement of physical injury,⁵⁵ is a misdemeanor “subject to imprisonment not exceeding 10 years.”⁵⁶ By contrast, misdemeanor assault in New York State has a maximum punishment of one year in jail and a requirement of physical injury;⁵⁷ if there is no physical injury, the charge would be harassment — a class of non-criminal “violation” that carries a maximum sentence of fifteen days in jail.⁵⁸ In California, certain crimes are called “wobblers,” meaning that they can be charged as either a felony or a misdemeanor.⁵⁹ Iowa has “simple,” “serious,” and “aggravated” misdemeanors,⁶⁰ an aggravated misdemeanor conviction can result in up to two years of incarceration.⁶¹

Misdemeanors can be found throughout most sections of any jurisdiction’s criminal code, including misdemeanor charges for theft, assault, drug offenses, sex crimes, hate crimes, and fraud.⁶² Many

⁵⁵ See *Cruz v. State*, 407 Md. 202, 209 n.3 (2009) (explaining various common law crimes encompassed in Maryland’s misdemeanor assault statute).

⁵⁶ MD. CODE ANN., CRIM. LAW §3-203 (LexisNexis 2011). Many other misdemeanors carry lengthy potential sentences. See, e.g., MD. CODE ANN., CRIM. LAW §5-601 (LexisNexis 2011) (setting out maximum penalty of four years for person convicted of misdemeanor possession of controlled substance); MD. CODE ANN., CRIM. LAW §7-116 (LexisNexis 2011) (setting out maximum penalty of 10 years for person convicted of misdemeanor failure to deliver documents for merchandise).

⁵⁷ N.Y. PENAL LAW § 120.00 (McKinney 2009).

⁵⁸ N.Y. PENAL LAW § 240.26 (McKinney 2008); see also N.Y. PENAL LAW § 10.00(3) (McKinney 2009).

⁵⁹ See CAL. PENAL CODE § 17(b) (West 1999) (the same type of offense may be prosecuted as felony or misdemeanor); *People v. Statum*, 50 P.3d 355, 357 (Cal. 2002) (describing example of “wobbler” crime); see also Erin R. Yoshino, *California’s Criminal Gang Enhancements: Lessons from Interviews with Practitioners*, 18 S. CAL. REV. L. & SOC. JUST. 117, 139 (2008) (discussing “wobbler” crimes).

⁶⁰ IOWA CODE § 701.8 (2003) (“All public offenses which are not felonies are misdemeanors. Misdemeanors are aggravated misdemeanors, serious misdemeanors, or simple misdemeanors. Where an act is declared to be a public offense, crime or misdemeanor, but no other delegation is given, such act shall be a simple misdemeanor.”).

⁶¹ *Id.* § 903.1(2) (2003) (“When a person is convicted of an aggravated misdemeanor, and a specific penalty is not provided for, the maximum penalty shall be imprisonment not to exceed two years.”).

⁶² See, e.g., DEL. CODE ANN. tit. 11 § 1304(b)(1) (West 2011) (“Hate crimes shall be punished as follows If the underlying offense is a violation or unclassified misdemeanor, the hate crime shall be a class A misdemeanor.”); IND. CODE ANN. § 35-43-6-12(a)(1) (West 2011) (listing the elements of Class B misdemeanor home improvement fraud); KY. REV. STAT. ANN. § 218A.1422(2) (West 2011) (“Possession of marijuana is a Class B misdemeanor, except that, KRS Chapter 532 to the contrary notwithstanding, the maximum term of incarceration shall be no greater than forty-five (45) days.”); N.Y. PENAL LAW § 155.25 (McKinney 2010) (“Petit larceny is a class A misdemeanor.”); N.C. GEN. STAT. ANN. § 14-33(a) (West 1993) (“Any person who

public order offenses are misdemeanors.⁶³ There are also numerous misdemeanors in local ordinances, enacted by the town or city council or legislature. For example, the Broward County, Florida Board of County Commissioners made it a misdemeanor to “throw or deposit litter on any occupied private property within the county, whether owned by such person or not.”⁶⁴ Under the New York City Administrative Code General Vendor Law, it is a misdemeanor for individuals to sell goods or services in the streets, sidewalks, and public spaces of New York City without a license from the Department of Consumer Affairs.⁶⁵ Both of these local ordinances authorize jail sentences.⁶⁶

Advocacy in misdemeanor cases is similar in many respects to advocacy in felony cases. This is demonstrated by the fact that, in some jurisdictions, there are high potential penalties for misdemeanors, and certain offenses move between misdemeanor and felony categories. Additionally, however a particular crime is labeled, the collateral consequences of misdemeanor convictions render less significant the line between felonies — at least low-level ones — and misdemeanors.⁶⁷ For example, all felonies and a good number of misdemeanors lead to one or more collateral consequences located in federal, state, or local law.⁶⁸ Finally, whatever level of case they

commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a Class 2 misdemeanor.”); OR. REV. STAT. ANN. § 163.415(2) (West 2003) (“Sexual abuse in the third degree is a Class A misdemeanor.”).

⁶³ See, e.g., N.Y. PENAL LAW § 240.00-240.70 (McKinney 2008) (establishing twelve public order offenses as misdemeanors).

⁶⁴ BROWARD, FLA., CODE ch. 21, art. V, § 21-76 (2001).

⁶⁵ See N.Y. ADMIN. CODE § 20-453 (2004) (making unlawful unlicensed general vending).

⁶⁶ *Id.* § 20-472 (2004) (stating that unlicensed vending is “misdemeanor punishable by a fine of not less than two hundred fifty dollars nor more than one thousand dollars, or by imprisonment for not more than three months or by both such fine and imprisonment”); BROWARD, FLA., CODE ch. 21, art. V § 21-80 (2001) (authorizing sentence of up to five hundred dollars, imprisonment in county jail not to exceed sixty days, or both for littering misdemeanor).

⁶⁷ See ABA CRIMINAL JUSTICE STANDARDS: PLEAS OF GUILTY, at xi (3d ed. 1999) [hereinafter PLEAS OF GUILTY] (“[T]he collateral consequences of convictions . . . have increased dramatically This has also diminished the significance of the distinction between pleading guilty to a felony or a misdemeanor, as the latter may also carry significant future consequences for the defendant.”).

⁶⁸ See UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT, available at http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010final_amends.htm (“This Act deals with several aspects of the creation and imposition of collateral consequences. The provisions are largely procedural, and designed to rationalize and clarify policies and provisions that are already widely accepted in many states.”).

handle, all criminal defense lawyers must have skills in areas including interviewing, fact investigation, counseling, negotiation, and trial and sentencing advocacy.

Despite these similarities, several significant differences between felony and misdemeanor lawyering highlight the need for specific attention to standards for misdemeanor representation. This Part explores three differences: the higher caseloads misdemeanor lawyers are expected to, and indeed do, carry; the potential for using collateral consequences of misdemeanor convictions in creative plea bargaining and sentencing advocacy; and the greater prevalence of complex constitutional issues in some misdemeanor cases, particularly public order offenses.⁶⁹

⁶⁹ Another significant area with both differences and similarities between misdemeanors and felonies is that of the well-documented racial and economic disparities of individuals in the criminal justice system. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing racial and economic disparities in criminal justice system); see also Marc Maurer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, 37 HUM. RTS. 14 (2010). Although the causes of these disparities cut across both types of cases, see *id.* at 14 (describing causes of racial disparity in criminal justice system as “complicated,” but listing four key factors: disproportionate crime rates, disparities in criminal justice processing, overlap of race and class effects, and impact of “race neutral” policies), the effect of racial and economic disparity is particularly significant in the misdemeanor realm. This is in part due to the sheer volume of misdemeanor prosecutions, see *supra* notes 12-15 and accompanying text, and thus the large number of non-white individuals charged in the lower courts and leaving those courts with a permanent criminal record. See UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT, *supra* note 68 (“Minorities are far more likely than whites to have a criminal record: Almost 17% of adult black males have been incarcerated, compared to 2.6% of white males.”); see also Pager, *supra* note 45. Another factor contributing to racial disparities is that, unlike violent crime, many misdemeanor arrests flow from deliberate policing choices linked to particular neighborhoods, which are often non-white neighborhoods. See Howell, *supra* note 45, at 292-93. Finally, the “war on drugs” has a well-documented disparate effect on blacks and Latinos, and drug offenses make up a healthy part of lower court dockets. See Paul Butler, *One Hundred Years of Race & Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1048 (2010) (“Three-fourths of those imprisoned for drug offenses are black or Latino. In seven states, 80% to 90% of imprisoned drug offenders are black. Such disparities cannot be explained by disproportionate use of drugs by African Americans; blacks don’t use drugs more than any other group, and some studies have even found that they use them less.”); ROBERT C. BORUCHOWITZ, AM. CONST. SOC’Y FOR LAW & POLICY, *DIVERTING AND RECLASSIFYING MISDEMEANORS COULD SAVE \$1 BILLION PER YEAR: REDUCING THE NEED FOR AND COST OF APPOINTED COUNSEL 2-3* (2010) [hereinafter *DIVERTING AND RECLASSIFYING MISDEMEANORS*] (citing Fed. Bureau of Investigation, *Crime in the United States*, U.S. DEP’T OF JUSTICE (Sept. 2010), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2009>) (noting 2009 FBI estimates that 45.6% of the 1,663,582 drug arrests in United States were for possession of marijuana). Full exploration of the race and class dynamics of the lower courts is beyond the scope of this Article.

A. *Higher Caseloads and Workloads for Misdemeanor Attorneys*

The Department of Justice, courts, and advocacy organizations have recently focused their attention on the role of excessive defender workloads in the indigent defense crisis.⁷⁰ In 2009, caseload concerns led New York State to pass legislation directing its court administration to “promulgate rules relating to caseloads for attorneys representing indigent clients in criminal matters in cities of one million or more” and to formulate a phase-in plan for the court’s response to the caseload problem.⁷¹ Although excessive workloads are cause for concern in both the felony and misdemeanor context, individuals facing misdemeanor charges are more likely to suffer the consequences of the workload strain. As one report noted, “Although national crime rates have decreased and fewer major crimes are being committed, indigent defense providers remain burdened with excessive caseloads consisting of all kinds of cases . . . including countless minor, petty offense cases.”⁷² Thus, in Chicago, Atlanta, and Miami, defenders handle more than 2,000 misdemeanors a year,⁷³ far above recommended maximum numbers.⁷⁴ According to a 2007 Department of Justice study,

73 percent of county based public defender offices lacked enough attorneys to meet these national caseload standards,

⁷⁰ See, e.g., *State ex rel. Mo. Pub. Defender Comm’n*, 298 S.W.3d 870, 879-80 (Mo. 2009) (“The excessive number of cases to which the public defender’s offices currently are being assigned calls into question whether any public defender is meeting his or her ethical duties of competent and diligent representation in all cases assigned.”); Donald J. Farole, Jr. & Lynn Langton, *A National Assessment of Public Defender Office Caseloads*, 94 JUDICATURE 87, 90 (2010) (concluding that lack of personnel and resources across country prevents effective representation of indigent defendants); David Carroll, *Gideon Alert: DOJ Data Confirms Existence of Right to Counsel Workload Crisis in the United States*, NAT’L LEGAL AID & DEFENDER ASS’N (Sept. 17, 2010, 10:56 AM), <http://www.nlada.net/jscri/blog/gideon-alert-doj-data-confirms-existence-right-counsel-workload-crisis-united-states> (noting how recently published data by Bureau of Justice Statistics confirm that public defenders are carrying excessive workloads).

⁷¹ Steven Zeidman, *Indigent Defense: Caseload Standards*, N.Y. L.J., Mar. 24, 2010, at 6, available at http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202446663975&_Indigent_Defense_Caseload_Standards&slreturn=1&hbxlogin=1; see also A.B. 156, 2009 Assemb., 232d Sess. (N.Y. 2009).

⁷² *Justice Denied America’s Continuing Neglect of our Constitutional Right to Counsel*, THE CONSTITUTION PROJECT, 72 (2009), [hereinafter “JUSTICE DENIED”], <http://www.constitutionproject.org/pdf/139.pdf> (citing FBI crime statistics).

⁷³ See MINOR CRIMES, MASSIVE WASTE, *supra* note 12, at 21.

⁷⁴ See *infra* note 77 and accompanying text (discussing national caseload recommendations).

while 23 percent of offices had less than half of the necessary attorneys to meet caseload standards. Only 12 percent of county public defender offices with more than 5,000 cases per year had enough lawyers to meet caseload standards.⁷⁵

In our high-volume criminal justice system, the lure of assembly-line justice — where defenders fail to deliver even the most rudimentary services, such as investigation and appropriate client counseling — is an unfortunate fixture in day-to-day representation in the lower courts.⁷⁶

Still, there is general acceptance that attorneys can handle more misdemeanors than felonies, and there is thus widespread support for the National Advisory Commission on Criminal Justice Standards and Goals' recommendations of 400 non-traffic misdemeanors per year, with the number dropping to 150 for felonies.⁷⁷ These differing recommendations are likely due in part to the reality of high numbers of misdemeanors in the criminal justice system, combined with the reality of a limited pool of resources.⁷⁸ The differing numbers are also

⁷⁵ SYSTEM OVERLOAD, *supra* note 38, at 10.

⁷⁶ *See id.* at 13; MINOR CRIMES, MASSIVE WASTE, *supra* note 12, at 12, 21-22.

⁷⁷ *See Statement on Caseloads and Workloads, supra* note 38, at 3 (referencing National Advisory Commission on Criminal Justice Standards and Goals recommendations of 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, or 25 non-capital appeals per attorney per year); *see also* ABA SPECIAL COMM. ON CRIM. JUST. IN A FREE SOC'Y, CRIMINAL JUSTICE IN CRISIS: A REPORT TO THE AMERICAN PEOPLE AND THE AMERICAN BAR ON CRIMINAL JUSTICE IN THE UNITED STATES (1988), *available at* <http://www.druglibrary.org/special/king/cjic.htm> (stating that ABA endorses National Advisory Commission ("NAC") caseload numbers, although list following endorsement notes 300 misdemeanor cap rather than 400 as NAC recommends); U.S. DEP'T OF JUST. PREPARED BY THE SPANGENBERG GROUP, *Keeping Defender Workloads Manageable*, in BUREAU OF JUST. ASSISTANCE, INDIGENT DEFENSE SERIES 7-8 (Ser. No. NCJ 185632, 2001), *available at* <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf> (referencing National Advisory Council numbers, but also noting the need to differentiate between caseloads and workloads). The Washington State Bar Association has taken a more nuanced approach with its 2007 standards. On the issue of caseloads, the organization notes a difference between "simple" and "complex" misdemeanors. Although the standards recommend a caseload of no more than 300 misdemeanors, they recognize certain exceptions where caseloads might be adjusted to 400 misdemeanors. *See* WASH. STATE BAR ASS'N, STANDARDS FOR INDIGENT DEFENSE SERVICES, Standard 3 (adopted Sept. 20, 2007), *available at* <http://www.wsba.org/lawyers/groups/wsbstandards408.doc>.

⁷⁸ One study noted that "[i]n 2005 State court prosecutors reported closing over 2.4 million felony cases and nearly 7.5 million misdemeanor cases." Steve W. Perry, *Prosecutors in State Courts*, in U.S. DEP'T OF JUST., BUREAU OF JUST. STATS. BULL. 6 (Ser. No. NCJ 213799, 2006), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/psc05.pdf>. The actual difference between prosecuted misdemeanors and felonies is even greater, as only 95% of all state prosecutors' offices reported handling

undoubtedly due to the fact that there can be little disagreement that an attorney handling a complex multi-count felony indictment that exposes her client to decades in prison will require more time to prepare than an attorney handling a misdemeanor assault with two witnesses and no medical records. It is not troubling that attorneys assigned to both kinds of cases will devote more attention to clients charged with the complex felony. What is troubling is that there are no constitutional, ethical, or professional standards to guide attorneys in deciding how to divide that attention, and to ensure that attorneys provide misdemeanor clients with effective representation.

As Professor Steve Zeidman noted in his commentary on caseload caps for public defenders, “Numbers should not be the only, nor primary, way to assess defense attorney effectiveness.”⁷⁹ Thus, even if there is agreement that attorneys can handle more misdemeanors than felonies as a general matter, “[t]here are many variables to consider in evaluating attorney workloads, including the seriousness and complexity of assigned cases and the skill and experience of individual attorneys.”⁸⁰ For example, although it makes sense for new attorneys to begin with misdemeanors before moving up to a felony practice, the skewed caseload recommendations mean that attorneys new to criminal defense practice (and often right out of law school) will almost immediately handle large numbers of cases. At the same time, these new attorneys must learn basic pretrial and trial skills and familiarize themselves with the local lower criminal court culture. In some jurisdictions, misdemeanor lawyers might find themselves moving between several courtrooms, or even between different towns, in order to handle their assigned cases.⁸¹ These factors thus exacerbate the workload differences between misdemeanors and felonies.

While some felonies require more attorney time and attention than misdemeanors, this is not always the case. As described below in Section C, misdemeanor defenders handle a wide variety of charges, some of which raise complex constitutional or statutory issues not often seen with felony charges. Further, as described below in Section B, collateral consequences loom larger in misdemeanor cases, because

misdemeanor cases. *Id.* at 4 tbl.5. County attorneys or perhaps police officers presumably prosecuted misdemeanors in the remaining five percent of jurisdictions, or the court may have handled the disposition without any prosecutorial involvement.

⁷⁹ Zeidman, *supra* note 71, at 6 (applauding New York State law calling for rules on public defender caseloads, but cautioning that “[w]e must do more than zero in on caseloads”).

⁸⁰ *Statement on Caseloads and Workloads*, *supra* note 38, at 2-3.

⁸¹ *See id.* at 4 (“Local court calendar management practices . . . can . . . play havoc with attorney workloads as can legislative changes and new judicial decisions.”).

they often overshadow any potential direct criminal sentence. Thus, there is greater need to counsel clients about the cost of such consequences compared to the benefits of entering a guilty plea, and more room for creative plea bargaining in order to avoid unintended collateral consequences. This requires a working familiarity with a wide variety of potential collateral consequences, and may require coordination with one or more experts in the area of any relevant consequences in order to fully inform the misdemeanor client.⁸²

Given the ways in which misdemeanor representation requires a particular type of attention, national recognition that misdemeanor defenders can handle far greater caseloads than felony defenders, and the realities of assembly-line case processing in the lower courts, the need for further guidance on the meaning of effective misdemeanor representation is clear. These differences between felony and misdemeanor practice highlight the need for standards that are unique to the misdemeanor context.

B. Minor Criminal Convictions Lead to Major Collateral Consequences

Mary Anne Gehris was adopted by an American couple when she was two weeks old.⁸³ Her parents did not make her a U.S. citizen, but Gehris herself later filed the necessary paperwork, correctly noting a past criminal conviction. By that time, she was married to a U.S. citizen and had a young son with cerebral palsy.⁸⁴ Her effort to seek naturalization resulted in a deportation order. The basis for her deportation was her ten-year-old misdemeanor battery conviction based on allegations of fighting another woman over a man. On the advice of her attorney, she had pled guilty to the charge and received a suspended sentence with probation.⁸⁵ After extensive publicity about her deportation order, the Georgia Board of Pardon and Parole granted her a pardon, and immigration officials halted her deportation.⁸⁶ Gehris was one of the lucky few.⁸⁷ Miguel Angel Hernandez, a lawful

⁸² See Wright, *supra* note 52, at 1530-34.

⁸³ See Stephen Davis, *Deported from America*, NEW STATESMAN, Nov. 22, 2004, at 14-15, available at <http://www.newstatesman.com/200411220005>.

⁸⁴ *Id.*

⁸⁵ See Lewis, *supra* note 49, at A13.

⁸⁶ Davis, *supra* note 83, at 17. Gehris later became a U.S. citizen. See Anthony Lewis, Op-Ed., *Abroad at Home: Rays of Hope*, N.Y. TIMES, Feb. 10, 2001, available at <http://www.nytimes.com/2001/02/10/opinion/abroad-at-home-rays-of-hope.html>.

⁸⁷ MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 5 (William S. Hein & Co. ed., 2006), available at <http://www.sentencingproject.org/detail/publication.cfm?>

permanent resident, also had a misdemeanor battery conviction in Georgia. He did not get a pardon, and the Eleventh Circuit Court of Appeals denied his petition for review of his final order of deportation.⁸⁸

Misdemeanor assault is not the only minor crime with such drastic consequences. Numerous misdemeanor drug convictions can lead to automatic deportation for non-citizens. This is 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 of marijuana, is deportable.”⁸⁹ Deportation is only one of many serious collateral consequences of misdemeanor convictions.⁹⁰ In many states, a number of misdemeanor sex crime

publication_id=115 (“In at least a dozen states where a governor’s pardon is the exclusive means of avoiding or mitigating collateral disabilities, the governor has not exercised the power with any regularity for many years. The federal pardoning process has also withered in the past twenty years, producing only a handful of grants despite a steady stream of applications from people who may long since have completed their court-imposed sentences.”).

⁸⁸ *Hernandez v. U.S. Att’y Gen.*, 513 F.3d 1336, 1339-40 (11th Cir. 2008) (finding that Georgia misdemeanor battery statute met definition of “crime of violence” under federal immigration law so that Hernandez’s conviction under statute, combined with his suspended one-year sentence, rendered his conviction automatically deportable “aggravated felony” under federal immigration law).

⁸⁹ 8 U.S.C. § 1227(a)(2)(B)(i) (2011); *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).

⁹⁰ These consequences are generally referred to as “collateral consequences” of a criminal conviction because they are not imposed directly by the court as part of the sentence, but rather flow as a consequence of the conviction. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 n.8 (2010) (recognizing that courts are split over distinguishing and applying distinction between direct and collateral consequences); *see also* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 689-92 (2008) (noting inconsistency in how courts categorize direct versus collateral consequences, and how consequently there is confusing jurisprudence in this area). This Article uses the term “collateral” because it is still commonly used by courts and commentators. *See* Margaret Colgate Love, *Collateral Consequences after Padilla v. Kentucky: From Punishment to Regulation*, 30 ST. LOUIS U. PUB. L. REV. (forthcoming 2011) (manuscript at 4), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883809 (“The term ‘collateral consequences’ has become a commonplace way of describing the legal penalties and disabilities to which people are exposed when they plead guilty to a crime, though the term ‘status-generated penalties’ might be more apt if not legally precise.”); *see also* *Brown v. United States*, No. 10 Civ. 3012, 2010 WL 5313546, at *3 (E.D.N.Y. 2010); Margaret C. Love & Gabriel J. Chin, *Padilla v. Kentucky: The Right to Counsel and the Collateral*

convictions can lead to mandatory, long-term sex offender registration, and in some cases community notification via a publicly available electronic database.⁹¹ A marijuana possession conviction will lead to the loss of federal student loan assistance for at least a year.⁹² Low-level drug crime convictions can lead to eviction from public housing for the individual and his entire family, even if he is not the leaseholder or even living in the housing.⁹³

The most pervasive collateral effect of a misdemeanor conviction is the ability to find and keep work. There are a multitude of statutory and regulatory bars to employment at the local, state, and federal levels for convicted persons. For example, in New York State a person with certain misdemeanor convictions cannot work as a home health aide,⁹⁴ and in Texas a number of convictions block employment in any capacity at facilities serving the elderly, terminally ill, or people with disabilities.⁹⁵ In addition to formal restrictions, many employers take

Consequences of Conviction, 34 CHAMPION 18, 18 (2010). *But see* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of Padilla v. Kentucky and its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 802 (2011) (noting how, in wake of *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), already-problematic distinction between so-called collateral and direct consequences is even weaker, and how term "enmeshed penalty" would better reflect fact that "these penalties are intimately related to criminal charges (not just convictions), and are serious, often draconian, and lifelong"); *see also* McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 479-80 (2005) [hereinafter Smyth, *Holistic Is Not a Bad Word*] (using term "invisible" consequences).

⁹¹ *See, e.g.*, N.Y. CORRECT. LAW § 168(a) (2011) (defining sex offender to include individuals convicted of certain misdemeanors); N.Y. CORRECT. LAW §168(f) (2011) (requiring sex offenders to register); *see also* Adam Walsh Child Protection & Safety Act of 2006, 42 U.S.C. § 16911(2). *See generally* TERRY & FURLONG, *supra* note 51 (discussing SORA and community notification).

⁹² 20 U.S.C. § 1091(r)(1) (2003) (suspending student loan eligibility for varying time periods for any "student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance"). *But see id.* § 1091(r)(2) (allowing for resumption of loan assistance upon showing of "rehabilitation").

⁹³ *See* 42 U.S.C. § 1437d(l)(6) (2011) (allowing for eviction of tenant in federal housing where tenant, member of tenant's household, or guest of tenant is convicted of, or involved with, drug-related activity, even if tenant lacks knowledge of that activity); *Dep't of Hous. & Urb. Dev. v. Rucker*, 535 U.S. 125, 128 (2002) (upholding eviction of grandparent tenants under 42 U.S.C. § 1437 based on drug activity on public housing grounds, including tenants' grandsons smoking marijuana in apartment complex parking lot).

⁹⁴ N.Y. EXEC. LAW § 845-b(5)(b) (McKinney 2011).

⁹⁵ TEX. HEALTH & SAFETY CODE ANN. § 250.006 (West 2007) (listing numerous criminal convictions that are permanent or five-year bar to employment in facilities

advantage of easy electronic access to criminal records and use the information to avoid hiring anyone with any type of record, even if there is no connection between that conviction and the type of work.⁹⁶

“I’ve come to expect being turned down,” is how Justin Gannon described his ongoing search for a job.⁹⁷ He had several job offers, all later rescinded. Despite his eight years of Army National Guard service, leading to a drawer full of medals for meritorious service and a 2009 honorable discharge certification, he is among the 16% of Ohioans — 1.9 million people — with a criminal conviction. He was convicted of misdemeanor assault in 2003 after a bar fight, and says that he pled guilty because he was scared of going to jail and because he was “told the misdemeanor wouldn’t be that big of a deal on my record.” Mr. Gannon is not alone, as there were 258,000 new misdemeanor convictions in 2008 in Ohio.⁹⁸

The large number and harsh nature of collateral consequences illustrate how even a low-level conviction that seems to begin with arrest and end in front of the judge can actually have an impact not only on that person’s life, but also on the lives of family members and the person’s community. For example, an NAACP Legal Defense Fund survey of thirty women incarcerated for nonviolent offenses, designed to document “social costs” of Mississippi’s poor quality public defense system, “found that nearly half of the women lost a home or apartment, while 12 lost vehicles. More than half of the women had children living with them when they were arrested and had to move in with relatives. Eight women had elderly parents who were affected financially.”⁹⁹ These examples demonstrate how misdemeanor convictions can negatively affect a person’s ability to be a productive

serving elderly, terminally ill, or people with disabilities).

⁹⁶ Many states have human rights or other state laws prohibiting employers from discriminating against individuals with criminal records unless there is a legitimate connection to the type of work. *See, e.g.*, N.Y. CORRECT. LAW § 752 (McKinney 2011) (banning unfair licensure or employment discrimination against persons convicted of one or more crimes); N.Y. EXEC. LAW § 296(15)-(16) (McKinney 2011) (making it unlawful to inquire about, or deny license or employment to any person with past convictions). However, the efficacy of such laws is open to question and their enforcement mechanisms — many largely rely on private enforcement through individual complaints — leaves something to be desired.

⁹⁷ Mary McCarty, *Criminal Records Keeping Millions of Ohioans Jobless*, DAYTON DAILY NEWS (June 25, 2011, 7:16 PM), <http://www.daytondailynews.com/news/crime/criminal-records-keeping-millions-of-ohioans-jobless-1193628.html>.

⁹⁸ *Id.* (noting numbers provided by Ed Rhine, deputy director for Ohio’s office of offender re-entry, who also noted how marking box on job application that asks about convictions is “[i]n most cases . . . sufficient to get that application tossed out”).

⁹⁹ *See* SYSTEM OVERLOAD, *supra* note 38, at 18.

member of society and, therefore, should be cause for serious concern.¹⁰⁰ This is especially true where large percentages of individuals in a particular community have criminal convictions. The public safety effect on a community when many members are incarcerated or unable to find work because of a minor conviction cannot be underestimated in a cost-benefit analysis of low-level prosecutions.¹⁰¹

The re-entry movement has brought attention to “[o]ne of the most profound challenges facing American society”¹⁰² — the re-integration of the more than 700,000 adults exiting state and federal prisons each year into their communities.¹⁰³ The movement’s focus has largely been on this prison-to-community transition, recognizing the critical link between recidivism, public safety, and the ability to work past significant obstacles in order to successfully function after leaving prison.¹⁰⁴ Re-entry from incarceration also affects large numbers of individuals, their families, and their communities.¹⁰⁵ Similarly, some of the sociological literature argues that the social costs of incarceration

¹⁰⁰ Indeed, it is hard to justify the effects of many misdemeanor convictions under traditional theories of punishment if the collateral consequences are factored into the equation. An important, related front in this area is to incorporate the consideration of third party interests into general criminal law theories of punishment. See Daryl K. Brown, *Third Party Interests*, 80 TEX. L. REV. 1383, 1408-20 (2002). Taking the collateral consequences that criminal prosecutions cause to innocent third parties (families, communities) into account in our theoretical construct for the criminal justice system means moving beyond strict retributivist or deterrence theories — or even theories that combine these two dominant strains — to include a consideration of third party interests. See generally DIEDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW* 23 (2005) (pointing out that cost-benefit analyses of punishment theories usually ignore cost of harm to person punished).

¹⁰¹ See SYSTEM OVERLOAD, *supra* note 38, at 2 (“Families are torn apart when a loved one is sent to prison or can no longer work due to the collateral consequences of a conviction. Communities suffer both in terms of public safety and through unnecessarily losing friends, neighbors and co-workers who are locked up.”).

¹⁰² JOAN PETERSILIA, *WHEN PRISONERS COME HOME* 3 (2003); see also Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, 5(3) CORRECTIONS MGMT. Q. 23 (2001).

¹⁰³ Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459 (2010). As a general matter, misdemeanor sentences involving incarceration are served in jails and longer felony sentences in prisons. See 24 C.J.S. *Criminal Law* § 2189 (2010) (“Broadly speaking, felonies are punishable by imprisonment in a penitentiary or state prison, and misdemeanors by imprisonment in a county jail or the like.”).

¹⁰⁴ See generally PETERSILIA, *supra* note 102 (noting ineffectiveness of current re-entry programs and proposing solutions to improve it).

¹⁰⁵ *Id.* at 223-28.

actually work against crime prevention.¹⁰⁶ To be sure, this is important work in an area that was largely previously ignored.

However, the collateral effects of minor convictions are to some extent lost in this analysis. The very fact of a conviction — even without any jail time — can lead to many of the same social effects described in these studies.¹⁰⁷ Yet there has not been sufficient focus on the effects of the massive number of newly minted “misdemeanants” coming from a trip to the courthouse each year. An individual who is fully informed about such things as deportation, bars to employment, or getting kicked out of public housing because of a misdemeanor conviction will be focused on avoiding any conviction that would lead to collateral consequences most relevant to that particular individual. Thus, a primary focus of misdemeanor defenders, and the institutions that set standards for effective representation, should also be the high collateral costs of lower court convictions. In this light, standards for the type and quality of misdemeanor defense counsel assistance is critical and may be different from standards in serious felony cases.

A variety of potential reforms might ameliorate counterproductive and unjustly severe collateral consequences. These include decriminalization of certain low-level offenses,¹⁰⁸ prosecutorial discretion in charging and plea bargaining to avoid unintended collateral consequences, additional resources for the reintegration of those with convictions,¹⁰⁹ and public education campaigns so that employers, landlords, and others are willing to give individuals with

¹⁰⁶ See, e.g., John Braithwaite, *Inequality and Republican Criminology*, in CRIME AND INEQUALITY 277, 283-84 (John Hagan & Ruth D. Peterson eds., 1995) (arguing that family and social networks work better for crime control than criminal sanctions); Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173 (2008) (explaining how imprisonment may have criminogenic rather than deterrent effects); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, in 28 CRIME & JUST. 1, 44-45 (Michael Tonry ed., 2001) (arguing that “life-course account” can explain desistance of criminal offenders, that changes in criminality are caused by variations in information social control and bonds, and that salient life events such as work and marriage affect these bonds).

¹⁰⁷ See Pager, *supra* note 45, at 960-62; see also MARK MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE 6-7, 13 (2d ed. 2006) (arguing that our criminal justice system is stuck in punitive response mode even though neighborhoods are perceived “safe” when clean, well-lit, and have open businesses, not when heavily policed or have the death penalty).

¹⁰⁸ See *infra* Part III.A; see also David Abel, *Voters Approve Marijuana Law Change*, THE BOS. GLOBE, Nov. 5, 2008, at B6, available at http://www.boston.com/news/local/massachusetts/articles/2008/11/05/voters_approve_marijuana_law_change/.

¹⁰⁹ For an example of some such resources, see generally REENTRY.NET, <http://www.reentry.net> (last visited Oct. 19, 2011).

convictions a chance.¹¹⁰ These are important ideas, all worthy of further attention. To the extent that they focus on remediation at the front end of a potential criminal case, such as decriminalization or the exercise of charging discretion, they confront the problem of overloaded defender systems as well as the effect of minor convictions on individuals, families, and communities. Still, they do not directly address the problem of defining appropriate standards for delivery of the right to counsel in misdemeanor cases that go forward. Such standards are critical to ensuring that justice inheres in the process itself, so that the many individuals in the misdemeanor system do not receive unwarranted convictions or overly harsh sentences.

C. Complexities of Misdemeanor Practice

Although misdemeanors are the usual training ground for new attorneys, they can also be just as complicated as typical felony cases. Like felonies, misdemeanor cases raise issues of suppression in drug and weapons cases,¹¹¹ expert testimony in drug, assault, and drunk driving cases,¹¹² and *Crawford*/Confrontation Clause issues in domestic violence and other types of cases.¹¹³ Therefore, attorneys handling misdemeanor cases grapple with many of the same legal issues as felony attorneys. Proper representation on these issues requires the same skills in interviewing and counseling the client, negotiating with the prosecution, and conducting factual investigation and legal research.

¹¹⁰ See *Sample Letters to Employers*, REENTRY.NET, http://www.reentry.net/ny/library/folder.83212-Sample_Letters_to_Employers (last visited Oct. 19, 2011) (offering sample letters educating employers about employment rights of people with criminal records).

¹¹¹ See, e.g., *State v. Remy*, No. 02CA2664, 2003 WL 21152881, at *2-3 (Ohio Ct. App. Mar. 25, 2003) (denying motion to suppress crack pipe in misdemeanor possession of drug paraphernalia case); *Russell v. State*, 74 S.W.3d 887 (Tex. Ct. App. 2002) (denying motion to suppress evidence in misdemeanor marijuana possession case on grounds that reasonable suspicion is not required for school search).

¹¹² See, e.g., *State v. McClain*, 301 S.W.3d 97, 98 (Mo. Ct. App. 2010) (noting that expert testified to weight of marijuana in grams because weight determines whether person is guilty of misdemeanor or felony under Missouri state law).

¹¹³ See *Davis v. Washington*, 547 U.S. 813, 814, 828 (2006) (finding victim's statements that identified her assailant during 911 call were not "testimonial" for purposes of Confrontation Clause because they were made to get help for immediate physical threat); *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (holding that out-of-court "testimonial" statements are inadmissible under Confrontation Clause unless declarant is unavailable to testify and accused has had prior opportunity to cross-examine).

Beyond these commonalities, misdemeanor lawyers sometimes encounter complex constitutional issues that are not found as frequently in the felony arena. For example, public order offenses such as disorderly conduct or unlawful assembly often implicate free speech, overbreadth, and vagueness issues.¹¹⁴ As the Supreme Court noted:

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. The trial of vagrancy cases is illustrative. While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions.¹¹⁵

Misdemeanor lawyers would raise such constitutional issues in pretrial motion practice, such as in a motion to dismiss a charging document as facially unconstitutional based on the vague and overbroad nature of the underlying criminal charge.¹¹⁶ Defense counsel might also engage in pretrial litigation about the sufficiency of a charging document because misdemeanors normally proceed upon an accusatory instrument — which is essentially an affidavit noting the crimes charged and basic factual allegations, signed by a police officer, prosecutor, or complaining witness — rather than a grand jury indictment or a preliminary hearing.¹¹⁷ Attorneys with overwhelming workloads will lack the time necessary to litigate these important issues. This is particularly troubling in an era of sharply rising misdemeanor and steeply declining felony prosecutions, and enormous growth in the numbers of collateral consequences of misdemeanor convictions.¹¹⁸ Challenges to problematic public order

¹¹⁴ See, e.g., *People v. Biltsted*, 574 N.Y.S.2d 272, 278 (N.Y. Crim. Ct. 1991) (finding criminal law banning unlawful assembly is not vague, overbroad, or unconstitutional where actions of individual charged “constitute an incitement which is both directed towards and likely to produce imminent violent and tumultuous conduct”).

¹¹⁵ *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972) (internal citations omitted).

¹¹⁶ See *Biltsted*, 574 N.Y.S.2d at 273-74.

¹¹⁷ See, e.g., *People v. Casey*, 740 N.E.2d 233 (N.Y. 2000) (affirming denial of defendant’s motion to dismiss, and setting forth sufficiency requirements of charging document in misdemeanor cases); see also N.Y. CRIM. PROC. LAW § 1.20 (McKinney 2011) (defining “accusatory instrument”).

¹¹⁸ See *supra* notes 10-15 and accompanying text (describing rising misdemeanor prosecutions and falling felonies); *supra* Part I.B. (describing collateral consequences of minor criminal convictions).

offenses, or to a prosecution office practice of insufficient notice to defendants in charging documents, are critical where elected officials' or legislators' beliefs about the need to be "tough on crime" can eclipse other considerations relevant to public safety and fairness in the administration of criminal justice.¹¹⁹

In addition to the potential for complex pretrial motions, misdemeanor attorneys often handle a large variety of crimes, codified in a variety of sources. A misdemeanor attorney might simultaneously handle cases from the state penal law, such as drug possession, theft, assault, or domestic violence;¹²⁰ from the traffic code, such as driving with a suspended license; and from the local administrative code, such as unlicensed general vending or sale of a weapon without a safety-locking device.¹²¹ By contrast, felony counsel may have a more limited variety of cases, particularly when the jurisdiction has a heavy number of felony drug prosecutions.¹²² When counsel handles one type of case in great volume — for example drug sales, where the main witnesses are undercover or other police officers who may refuse to speak with defense counsel, thus limiting the potential for investigation on the case — that defender will have fewer pretrial tasks than in some misdemeanor cases.

The many facets of misdemeanor advocacy provide excellent training for new attorneys, but it would demonstrate ignorance of the

¹¹⁹ See *infra* note 240 and accompanying text.

¹²⁰ See, e.g., M.D. CODE ANN. CRIM. LAW § 5-601 (West 2011); see also Table 30: *County Court Misdemeanor Filings by Type, FY 2008*, COLO. STATE JUD. BRANCH, http://www.courts.state.co.us/userfiles/File/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2008/Table30.pdf (last visited Mar. 8, 2011) (indicating that domestic violence crimes accounted for 18% of Colorado misdemeanor filings in 2008).

¹²¹ See, e.g., N.Y. ADMIN. CODE § 20-472 (McKinney 2004) (making unlicensed general vending "a misdemeanor punishable by a fine of not less than two hundred fifty dollars nor more than one thousand dollars, or by imprisonment for not more than three months or by both such fine and imprisonment"); N.Y.C., N.Y., CODE § 10-311 (2010) (making it a misdemeanor, punishable by up to 90 days in jail, \$500 fine, or both, "for any person or business enterprise to dispose of any weapon which does not contain a safety locking device").

¹²² For example, felony drug arrests accounted for 39,435 out of 124,111 total felonies in Los Angeles County in 2008. *Adult Felony Arrests, 2008, Offense by Jurisdiction and Gender*, CAL. STATE DEP'T JUST., http://stats.doj.ca.gov/cjsc_stats/prof08/19/15.htm (last visited Mar. 6, 2011). Between 1994 and 2006, drug charges comprised the largest group of felony cases in the 75 largest counties, ranging from 34% to 37% of total felony cases. Thomas Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties*, in U.S. DEP'T OF JUST., BUREAU OF JUST. STATS. BULL. 2 (Ser. No. NCJ 228944, 2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf>.

true nature of misdemeanor practice to say that it is always easier, less complex work.¹²³ The consequences — at least the direct, penal consequences — may be lower, but the work can be just as challenging as the majority of felony prosecutions in a typical jurisdiction.

D. Coercion and Plea Bargaining in the Misdemeanor Context

Judges, practitioners, and scholars have all long acknowledged the potential for, and existence of, coercion in the plea bargain process.¹²⁴ These concerns focus on the disparity between the offered sentence and the higher sentence that a defendant will receive should he lose at trial.¹²⁵ Although the limited amount of possible jail time narrows this disparity in the misdemeanor context, there are structural features of the lower courts that raise troubling — and often overlooked — issues of coercion in minor cases. As the Supreme Court has noted, “the 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.”¹²⁶

With such a high volume of misdemeanors and other minor cases, judges, defense counsel, and prosecutors all have enormous incentive

¹²³ Clearly there are felony cases that are far more complex than any misdemeanor. Death penalty cases are one example, as are homicide or other cases involving forensic issues. However, these cases do not comprise the majority of the caseload of a typical felony attorney. See Cohen & Kyckelhahn, *supra* note 122, at 2 (noting how drug charges were largest group of felony cases in the 75 largest counties between 1994 and 2006).

¹²⁴ See, e.g., Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 687-89 (1981) (describing potential coercive effects of plea bargaining); Richard Klein, *Due Process Denied: Judicial Cooperation in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349 (2004) (describing coercive powers that judges may exert on defendants during plea bargaining process); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1060-62 (1984) (listing possible inducement to plead guilty when no significant concessions were granted). The potential for coercion actually applies to the guilty plea process more broadly, bargain or no bargain, since in most instances the judge gives the defendant a significant sentence discount if he pleads guilty to all charges prior to trial.

¹²⁵ See, e.g., Frank Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992) (explaining how defendants balance benefits against drawbacks of accepting proposed plea); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 87-88 (2005) (arguing that there is significant difference between sentences imposed after guilty plea and those imposed after trial); cf. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470-96 (2004) (noting institutional features of criminal justice system that lead to atmosphere that can coerce guilty pleas).

¹²⁶ *Argersinger v. Hamlin*, 407 U.S. 25, 34-35 (1972).

to pursue early guilty pleas — as early as the initial arraignment in some jurisdictions.¹²⁷ There is serious institutional pressure from all quarters to quickly “dispose of” misdemeanor cases, often before defense counsel can undertake any investigation or adequately review any discovery material.¹²⁸ A study for New York State’s then-high court Chief Judge revealed that by the year 2000 in New York City, private attorneys representing indigent defendants through an assigned-counsel plan “were disposing of 69 percent of all misdemeanor cases at arraignment.”¹²⁹ The same study described how the Legal Aid Society, New York City’s largest provider of indigent defense services, had “permanent arraignment lawyers who . . . only take misdemeanor arraignments and . . . ‘know the going rate of a case’ on misdemeanors and violations and therefore try to take only those cases that can be disposed of at arraignment.”¹³⁰

One might argue that this early plea system is often beneficial to the defendant, who gets a good bargain without returning to court many times in exchange for his prompt decision to plead guilty.¹³¹ Although it is certainly true that some defendants (particularly those with lengthy criminal records) benefit from this type of system, many defendants do not gain much from such a process. They may feel enormous pressure from all sides to enter a quick guilty plea. In addition, although quick and early guilty pleas are encouraged in part to free up scarce resources in order to focus on more “serious” cases, the fact remains that pleas in this environment are often taken without much assistance of counsel at all. For example, counsel focused on moving misdemeanors along quickly, with a goal of clients taking pleas at the first appearance, would be hard-pressed to fulfill her ethical and constitutional duties to counsel clients about collateral

¹²⁷ See SYSTEM OVERLOAD, *supra* note 38, at 13 (“In many jurisdictions across the country defenders meet with 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.”).

¹²⁸ See Zeidman, *supra* note 26, at 331 n.86 (stating that there should be no pleas at arraignment).

¹²⁹ *Status of Indigent Defense in New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services*, THE SPANGENBERG GROUP, 142 (2006), <http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf> [hereinafter “Spangenberg Study”].

¹³⁰ *Id.* at 144.

¹³¹ See generally Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) (praising autonomy and efficiency aspects of plea bargaining).

consequences of any guilty plea.¹³² In one particularly egregious case of pressure to plead guilty early (and to waive counsel), defendants in a Broward County, Florida courtroom were handed a form explaining how the fee for court-appointed attorneys was \$50 for a plea entered at arraignment, and \$350 for a plea after arraignment.¹³³ The same study that detailed the Broward County form, a study that involved 1,649 misdemeanor adjudications in twenty-one Florida counties, showed that “[a]lmost 70% of defendants observed entered a guilty or no contest plea at arraignment.”¹³⁴

Perhaps the most coercive aspect of plea-bargaining in the lower criminal courts is pretrial detention for individuals held on bail that they cannot pay.¹³⁵ In such cases, defendants must generally choose between remaining in jail to fight the case or taking an early plea with a sentence of time served or probation. In the Florida study, the “most significant predictor of defendants entering a plea of guilty or no contest at arraignment was their custody status. In-custody defendants were more likely to enter a guilty plea than released defendants.”¹³⁶ Incarcerated individuals will find it difficult to ignore the call of immediate freedom, particularly if the person is unaware of the myriad collateral consequences of the guilty plea and thus does not factor these consequences into the cost-benefit analysis of an immediate guilty plea.¹³⁷

With misdemeanors, the problem of coercion resulting from the system’s structure, including one’s own defense counsel, is thus paramount. There is little guidance for defense counsel, or any other institutional actor, on where the line between coercion and advice lies in the lower courts.¹³⁸ The incentive structure that encourages

¹³² See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (articulating counsel’s duty to warn about deportation); see also ABA, STANDARDS FOR CRIMINAL JUSTICE § 19-2.3 (3d ed. 2004).

¹³³ See THREE-MINUTE JUSTICE, *supra* note 1, at 18 app. C.

¹³⁴ *Id.* at 14-15. A “no contest,” or *nolo contendere*, plea is when “a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty.” *North Carolina v. Alford*, 400 U.S. 25, 35 (1970).

¹³⁵ See *Bibas*, *supra* note 125, at 2491-93.

¹³⁶ THREE-MINUTE JUSTICE, *supra* note 1, at 15.

¹³⁷ See Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 *How. L.J.* 693, 725-28 (2011) (noting how full information about serious collateral consequences of criminal conviction will factor into defendant’s decision-making process about whether to plead guilty or go to trial).

¹³⁸ See generally Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 *B.C. L. REV.* 841, 888 (1998) (discussing continuum of approaches when counseling client about guilty plea, ranging from neutrality to

coercion, and the real presence of such coercion in some instances, demonstrates why guidance on effective assistance in misdemeanor cases is so important.

II. LACK OF GUIDANCE ON THE MEANING OF EFFECTIVE ASSISTANCE OF COUNSEL FOR MISDEMEANORS

If misdemeanor cases are important enough to prosecute, then they are important enough to analyze in terms of the appropriate level of representation. The message to society in prosecuting individuals in these cases is that they matter and that it is important to hold people accountable for such conduct. Whether or not one agrees with that message, a concomitant message should be that those charged with such offenses deserve a lawyer who does an effective job. In addition to upholding the constitutional right to such representation, there are a number of reasons to ensure effective misdemeanor representation.

For a number of cases, an overburdened or incompetent misdemeanor lawyer could get the same result as a committed, well-resourced public defender or high-quality private counsel. For example, a prosecutor may routinely offer some type of deferred dismissal in all first-arrest shoplifting cases, and anyone with an attorney will get this same offer.¹³⁹ The experienced defender might knock a few hours of community service off of the requirements for the dismissal, but the results are basically the same for that defender and the lawyer who simply conveys the prosecution's offer to her client without any negotiation over terms. However, many low-level cases are not so simple, and do not result in dismissal for the asking. In addition, in a significant number of cases with quality public or private representation, counsel might uncover something during the investigation or client interviewing and counseling process that will make a difference.

From a procedural justice perspective, recent research has demonstrated the importance of fair treatment if we want defendants, their families, and communities to have more faith in and respect for the criminal justice system.¹⁴⁰ Surely the quality of one's counsel must

urging).

¹³⁹ Based on my own experience in the lower courts of several different jurisdictions, prosecutors do not make the same "standard" offers to defendants proceeding *pro se*. Prosecutors will often first – and sometimes only – present *pro se* defendants with the option to plead guilty to the crime or crimes charged (in situations where a defendant represented by counsel would receive a more generous offer).

¹⁴⁰ See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW 161 (2006) (noting how

play a large role in these perceptions of legitimacy — or lack thereof.¹⁴¹

What, then, is the current state of the law on effective assistance of counsel, and what professional standards govern, in the misdemeanor context? The short answer is that these guideposts do not seem to exist. There is no developed body of case law or professional standards that address the meaning of the right to effective assistance of counsel in the specific context of misdemeanors and other low-level adjudications.

A. *The Threshold Issue of the Right to Counsel in Misdemeanor Cases*

As a threshold matter, it is important to note that the Sixth Amendment right to counsel does not apply to all misdemeanors. Generally, the Sixth Amendment confers the right to state-funded counsel for indigent defendants.¹⁴² Before 1972, the Court's right-to-counsel jurisprudence derived exclusively from felony cases, and some lower courts explicitly placed "petty offenses" outside the scope of the Sixth Amendment.¹⁴³ Since that time, the *Argersinger-Scott-Shelton*

legitimacy--defined as "the belief that one ought to obey the law"--has an effect "on people's everyday behavior toward the law" and thus "plays an important role in promoting compliance" with the law).

¹⁴¹ See, e.g., NATIONAL SYMPOSIUM ON INDIGENT DEFENSE, U.S. DEP'T OF JUSTICE, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS, at ix (Feb. 1999), www.sado.org/fees/icjs.pdf ("Ultimately, as Attorney General Janet Reno states, the lack of competent, vigorous legal representation for indigent defendants calls into question the legitimacy of criminal convictions and the integrity of the criminal justice system as a whole.").

¹⁴² See U.S. CONST. amend. VI ("[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (under Sixth Amendment, applicable to states through Fourteenth Amendment, state courts must appoint counsel to individuals who cannot afford to hire private counsel); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) ("[i]n a capital case, where the defendant is unable to employ counsel . . . it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law").

¹⁴³ See WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE §11.2(a) (5th. ed. 2009). This is in stark contrast to the British common law history of the right to counsel. "Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel." *Powell*, 287 U.S. at 61. This rule was "constantly, vigorously, and sometimes passionately assailed by English statesmen and lawyers," and ultimately "rejected by the colonies." *Id.* at 60-61; see also *Scott v. Illinois*, 440 U.S. 367, 372 (1979) (noting how pre-Sixth Amendment common law "perversely gave less in the way of right to counsel to accused felons than to those

troika of Supreme Court decisions has set forth the contours for non-felony cases, finding that any imposed or suspended sentence of incarceration triggers the right to counsel.¹⁴⁴ Under these constitutional standards governing the scope of the Sixth Amendment, some individuals charged with misdemeanor offenses enjoy the right to appointed counsel, and others do not.

The right to misdemeanor counsel is a restraint on a judge's ability to impose any sentence of incarceration when a defendant is convicted without counsel, unless that defendant entered a valid waiver of the right to counsel.¹⁴⁵ This *ex post* approach does not consider the possible sentences listed in the statute under which an individual is charged. Nor is it an affirmative directive to judges determining when they should appoint counsel in a particular case. Rather, the state can forgo appointing counsel in a misdemeanor case only if the judge is willing to forgo any potential for a sentence involving actual or suspended incarceration.¹⁴⁶

Many states extend the guarantee of counsel beyond the federal floor, with some states making it available any time the relevant

accused of misdemeanors”).

¹⁴⁴ *Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (finding that Sixth Amendment bars imposition of suspended sentence when underlying sentence followed “uncounseled conviction”); *Scott*, 440 U.S. at 371-73 (1979) (no right to counsel for sentence of fine); *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972) (“We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”).

¹⁴⁵ See *Shelton*, 535 U.S. at 662 (“Where the State provides no counsel to an indigent defendant, does the Sixth Amendment permit activation of a suspended sentence upon the defendant’s violation of the terms of probation? We conclude that it does not.”); see also *id.* at 664 (restating *Argersinger’s* command that “no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial”).

¹⁴⁶ Thus, in *Shelton* the Supreme Court affirmed the judgment of the Alabama Supreme Court, which had affirmed *Shelton’s* underlying misdemeanor assault conviction as well as that part of the sentence imposing a fine, but had vacated that part of his sentence imposing probation attached to a suspended jail sentence. *Id.* at 659, 674; see also *id.* at 671 (noting how “[a]lthough they may not attach probation to an imposed and suspended prison sentence, States unable or unwilling routinely to provide appointed counsel to misdemeanants in *Shelton’s* situation are not without recourse to another option capable of yielding a similar result,” and describing pretrial probation option for uncounseled misdemeanors). Similarly, the Court in *Scott* upheld the underlying conviction because, even though incarceration was a potential penalty for the misdemeanor theft charge in that case, the trial court imposed only a fine. *Scott*, 440 U.S. at 373-74 (“We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.”).

criminal statute in a case authorizes the judge to impose a sentence of imprisonment, regardless of the actual sentence imposed.¹⁴⁷ Unfortunately, recent studies describe how some jurisdictions fail — or even purposely refuse — to comply with either the *Argersinger* line of cases or their own more rigorous state rule. For example, a Bureau of Justice report found that 28% of jail inmates charged with misdemeanors stated, when interviewed, that they had no counsel.¹⁴⁸ Such judicial disrespect for the rules governing the right to counsel is starkly illustrated by the South Carolina Supreme Court Chief Justice's statement at that state's public bar association meeting:

Alabama v. Shelton is one of the more misguided decisions of the United States Supreme Court, I must say. If we adhered to it in South Carolina we would have the right to counsel probably . . . by dragooning lawyers out of their law offices to take these cases in every magistrate's court in South Carolina, and I have simply told my magistrates that we just don't have the resources to do that. So I will tell you straight up that we [are] not adhering to *Alabama v. Shelton* in every situation."¹⁴⁹

As the overwhelming majority of all prosecutions are misdemeanors, both rules and practice in this area play a large role in the experience

¹⁴⁷ See *Shelton*, 535 U.S. at 668 ("Most jurisdictions already provide a state-law right to appointed counsel more generous than that afforded by the Federal Constitution."). There are two ways a state can expand upon the federal standard for the right to counsel: the state high court can declare a more stringent standard as a matter of state constitutional law, or the state legislature can pass a statute granting the greater right. See, e.g., B. Mitchell Simpson, *A Fair Trial: Are Indigents Charged With Misdemeanors Entitled to Court Appointed Counsel?*, 5 ROGER WILLIAMS U. L. REV. 417, 426 (2000) (surveying varying state laws on appointment of misdemeanor counsel and noting that 36 states expand upon *Argersinger* right in various iterations). As of 2001, "All but 16 States . . . would provide counsel to a defendant . . . either because he received a substantial fine or because state law authorized incarceration for the charged offense or provided for a maximum prison term of one year." *Shelton*, 535 U.S. at 668-69 (citing relevant examples from cases and statutes in various states).

¹⁴⁸ See, e.g., MINOR CRIMES, MASSIVE WASTE, *supra* note 12, at 14 (citing Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, in U.S. DEPT' OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (Ser. No. NCJ 179023, 2000), available at <http://bjs.ojp.usdoj.gov/content/pub/ascii/dccc.txt>). But see *id.* at 15 (noting that NACDL's own site visits for its misdemeanor report suggest that the correct percentage is even higher). The ABA has also documented the widespread failure to provide counsel in misdemeanor cases. See *GIDEON'S BROKEN PROMISE*, *supra* note 18, at 22-23; see also *Spangenberg Study*, *supra* note 129, at 86-88 (describing how misdemeanor guilty pleas are taken in New York State's town and village courts without presence of counsel).

¹⁴⁹ MINOR CRIMES, MASSIVE WASTE, *supra* note 12, at 14.

of individuals in the criminal justice system.¹⁵⁰ Indeed, they determine who is and who is not entitled to counsel, as well as whether those entitled actually get counsel. It is clear that, at least in some jurisdictions, even those entitled to counsel in misdemeanor cases do not always get to exercise that right. Obviously, the appointment of counsel for all individuals qualifying for misdemeanor representation is a necessary predicate to any examination of the meaning of effective counsel in those cases. Studies have explored some potential remedies for the serious problem of such outright denial of the right to counsel.¹⁵¹ This Article moves beyond this baseline issue to explore the type of misdemeanor assistance the Constitution guarantees.

B. *The Failure to Define Effective Misdemeanor Lawyering*

There are a number of sources that could provide guidance on the particular meaning of effective misdemeanor representation. These sources include Sixth Amendment ineffective assistance of counsel jurisprudence and professional organizations' standards for defense practice.¹⁵² This section briefly describes how each of these sources currently fails to provide norms for misdemeanor representation.

1. Lack of Misdemeanor Representation Guidance in Ineffective Assistance of Counsel Jurisprudence

In *Powell v. Alabama* and *Gideon v. Wainwright*, the Supreme Court established the right to counsel in federal and state felony prosecutions.¹⁵³ The Court then moved forward to explore the more

¹⁵⁰ See *supra* notes 10-15 and accompanying text (citing statistics on misdemeanors from several jurisdictions).

¹⁵¹ See, e.g., MINOR CRIMES, MASSIVE WASTE, *supra* note 12, at 45; *Spangenberg Study*, *supra* note 129, at 155-64 (noting need for increased funding, and stricter requirements and recertification for attorneys). Professor Paul Marcus has made a convincing argument that, in part because of the potentially severe collateral consequences of any criminal conviction, the right to counsel should extend to all prosecutions, not only those with an imposed or suspended sentence of incarceration. See Paul Marcus, *Why the United States Supreme Court Got Some (But Not a Lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 187-88 (2009).

¹⁵² See *infra* Part III.C (considering defense community as another potential source).

¹⁵³ *Gideon v. Wainwright*, 372 U.S. 335, 340-42 (1963) (holding right to counsel to apply to state felony prosecutions through Sixth Amendment); *Powell v. Alabama*, 287 U.S. 45, 50 (1932) (noting right to counsel located in Fourteenth Amendment's Due Process Clause); see also *United States v. Wade*, 388 U.S. 218, 224 (1967) (holding right to counsel applies to any "critical stage" of prosecution).

nuanced questions of the quality of guaranteed counsel under the Sixth Amendment, building on its statement that “[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.”¹⁵⁴ In the 1984 case *Strickland v. Washington*, the Supreme Court articulated a two-prong test for determining ineffective assistance of counsel claims. Under this test, a defendant must demonstrate that: (1) counsel’s representation was incompetent as judged by prevailing professional norms; and (2) this incompetency prejudiced the defendant.¹⁵⁵ The following year, the Court held this same test applicable in the guilty plea context.¹⁵⁶

Despite the variety of structural impediments to judicial review of ineffective assistance claims in misdemeanor cases explored below in Part III.A.1, the limited number of lower federal and state courts that have reviewed such claims applied *Strickland*’s two-prong analysis.¹⁵⁷ As the Supreme Court noted with respect to its right-to-counsel jurisprudence more generally, “[b]oth *Powell* and *Gideon* involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty. *Powell* and *Gideon* suggest that there are certain fundamental rights applicable to all such criminal prosecutions”¹⁵⁸ Because the right to counsel is the right to effective assistance of that counsel, it is clear that the well-established *Strickland* test is the appropriate standard for ineffective assistance claims in misdemeanor as well as felony cases.¹⁵⁹

¹⁵⁴ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

¹⁵⁵ *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *Dripps*, *supra* note 22.

¹⁵⁶ See *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). Although this landmark case established the test for ineffective assistance claims following guilty pleas, neither *Hill* nor any later Supreme Court case examined the meaning of the first (attorney competence) prong for guilty pleas. Instead, *Hill* made quick work of applying this newly declared framework to reject *Hill*’s claim. The decision devoted only two short paragraphs to its finding that *Hill* failed to demonstrate prejudice, thus rendering unnecessary any exploration of *Hill*’s claim that he pled guilty only after his attorney’s misadvice about parole eligibility. *Id.* at 60.

¹⁵⁷ See, e.g., *Smith v. Mun. Court of Franklin Cnty.*, 802 F.2d 459 (6th Cir. 1986) (noting how district court properly applied *Strickland* standard in federal habeas corpus petition claiming ineffective assistance of counsel in connection with state court misdemeanor); *United States v. Somerset*, No. 3:03-po-002, 2009 WL 3763058, at *3 (S.D. Ohio 2009) (noting, in allegation of ineffective assistance in misdemeanor case, how “[e]ach area of asserted deficient performance is analyzed in terms of the *Strickland* standard: deficient performance and prejudice”); *United States v. Busse*, 814 F. Supp. 760, 764-65 (E.D. Wis. 1993) (stating, in review of misdemeanor conviction, that “upon the facts presented, the defendant has satisfied both prongs of the *Strickland v. Washington* test for ineffective assistance of counsel”).

¹⁵⁸ *Argersinger v. Hamlin*, 407 U.S. 25, 32 (1972).

¹⁵⁹ There are a limited number of cases in which the standard in *Strickland*’s

However, the *Strickland* test offers little concrete guidance to lower courts analyzing actual claims of ineffective assistance and to defense attorneys regulated by its Sixth Amendment holding. The *Strickland* decision emphasized how courts examining ineffective assistance claims must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”¹⁶⁰ The Court’s reliance on such a presumption was a sound rejection of any type of checklist approach for ineffective assistance.¹⁶¹ The “wide range” of possible acceptable behavior, as one commentator noted, “make[s] clear that one searching for the content of the reasonably effective assistance standard must look primarily to judicial decisions applying that standard.”¹⁶²

In felony cases, particularly in the death penalty area, this content exists; the same cannot be said in the misdemeanor context. There is no well-developed body of lower court decisions on issues specific to ineffective assistance in misdemeanor cases, and the Supreme Court has never had the occasion to apply the *Strickland* test in a case challenging a misdemeanor conviction. After giving some examples of ineffective assistance norms in the felony context, the remainder of this section explores the lack of such content for misdemeanor practice.

companion case, *United States v. Cronic*, applies. *United States v. Cronic*, 466 U.S. 648 (1984). In the *Cronic* line of cases, a defendant who can demonstrate suffering from the actual or constructive denial of any counsel is relieved of *Strickland*’s prejudice requirement. *Id.* at 658; see also *Florida v. Nixon*, 543 U.S. 175, 190 (2004) (“If counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.”). However, courts rarely employ a presumed prejudice standard based on denial of counsel; rather, *Strickland* governs the vast majority of ineffective assistance claims. See Keith Cuninghame-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronic’s Call to Presume Prejudice from Representational Absence*, 76 *TEMPLE L. REV.* 827, 881 (2003) (“The application of *Cronic* outlined here will affect only a subset of cases involving ineffective assistance of counsel Most defendants with valid claims will be unable to establish that their lawyer’s impairment rose to the level of “absence” required by *Cronic*.”).

¹⁶⁰ *Strickland*, 466 U.S. at 689.

¹⁶¹ See John H. Blume & Stacey D. Neumann, “It’s Like Déjà vu All Over Again”: *Williams v. Taylor*, *Wiggins v. Smith* and *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 *AM. J. CRIM. L.* 127, 140 (2007).

¹⁶² LAFAVE, *supra* note 143, at 664 (referring to *Nix v. Whiteside*, 475 U.S. 157 (1986), and *Strickland*).

The most fully developed area of ineffective assistance jurisprudence in felony cases is defense counsel's failure to investigate. For example, there are a number of Supreme Court decisions — beginning with *Strickland* and continuing with decisions in the past two terms¹⁶³ — setting out defense counsel's duty to investigate mitigating evidence for the penalty phase of bifurcated death penalty trials.¹⁶⁴ The result is robust guidance to defense attorneys, defender offices, and judges in capital cases, mandating thorough investigation into the defendant's mental capacity, social background, and other potentially mitigating circumstances.¹⁶⁵ Indeed, the criminal defense community responded to these decisions with a spate of trainings designed to implement the Court's directives about more rigorous mitigation investigation.¹⁶⁶ The Court's application of the *Strickland* test to a particular context thus led to changes in defender practices.

The duty to investigate facts and law is not limited to the capital mitigation context. For example, in a non-capital felony case, the

¹⁶³ *Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010); *Porter v. McCullough*, 130 S. Ct. 447, 453-54 (2009); *Strickland*, 466 U.S. at 691.

¹⁶⁴ See *Gregg v. Georgia*, 428 U.S. 153, 190-91 (1976) (upholding Georgia's statute requiring bifurcated trials where there are separate guilt and sentencing phases); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 317 (1983) (stating that bifurcated trials "are essential to a constitutional death sentence").

¹⁶⁵ See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 391 (2005) (noting how defense counsel failed to examine file that "disclose[d] test results that the defense's mental health experts would have viewed as pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling"); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) ("Counsel failed to introduce available evidence that Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school.>").

¹⁶⁶ See Seminar Program, Tenn. Ass'n of Criminal Def. Lawyers, Annual Death Penalty Training: The Fight for Life (Apr. 8-9, 2005), http://www.jenner.com/files/tbl_s23Events%5CLinktoAgenda1243%5C1238%5CTACDL_Death_Penalty_Seminar.pdf (including attorney and mitigation specialist from the *Wiggins* case, with panel on Tracking Down the Witnesses & Documents You Need to Discover Your Client's Life Story."); see also Seminar Program, Washburn Univ. Sch. of Law, 2003 National Capital Defense and Mitigation Skills Training Conference (Nov. 6-8, 2003), <http://washburnlaw.edu/cle/programs/200311deathpenalty.php>; Seminar Program, Nat'l Alliance of Sentencing Advocates & Mitigation Specialists, Death Penalty Mitigation Institute, 3 (Aug. 1, 2006), http://www.nlada.org/DMS/Documents/1151007501.75/NLADA_NASAMS_2006%20Conference.pdf ("The NASAMS Death Penalty Mitigation Institute (DPMI) is a specialized one-day training event for capital mitigation specialists."); Program Schedule, DePaul Univ. Coll. of Law, Mitigation Training Program, http://www.law.depaul.edu/centers_institutes/cjcc/mitigation_default.asp (last visited Feb. 11, 2011) (describing DePaul Law School's Mitigation Training Program, located within its Center for Justice in Capital Cases).

Seventh Circuit Court of Appeals found ineffective assistance based on counsel's "failure to conduct the necessary legal investigation" into a viable justification defense to a charge of being a convicted felon in possession of a firearm.¹⁶⁷ Thus, in addition to guidance on the duty to investigate capital mitigation evidence, defense lawyers also have guidance in such areas as the duty to investigate affirmative defenses. Another example of guidance from the courts about the meaning of effective assistance is the Ninth Circuit felony case of *Riggs v. Fairman*.¹⁶⁸ There, the court found ineffective assistance where defense counsel advised Riggs to reject a plea offer with a five-year prison term, telling him that the maximum exposure he faced if convicted at trial was only nine years. After Riggs followed counsel's advice and was later convicted at trial, the court sentenced him to twenty-five years to life under California's "three strikes" law.¹⁶⁹ In finding that defense counsel's error constituted incompetent performance under *Strickland's* first prong, the court stated that "[d]efense counsel's advice to Riggs was not only erroneous, but egregious, considering the discrepancy between the two punishments."¹⁷⁰ The difference between the rejected five-year offer and eventual twenty-five years to life sentence also led the court to find that Riggs satisfied *Strickland's* prejudice prong, because "[s]uch a discrepancy between the two sentences would compel any reasonable person to take the deal offered by the prosecution."¹⁷¹

In theory, the holdings in these felony cases would guide misdemeanor representation where there is a right to counsel because, as noted above, the constitutional standard is the right to the effective assistance of counsel. Thus, misdemeanor attorneys would have a duty to investigate evidence relevant to mitigation of the sentence, a duty to investigate the facts and law surrounding potential affirmative defenses before counseling the client about a plea offer, and a duty to counsel the client about the correct maximum sentence.

In reality, these felony case holdings, grounded in the facts and practices specific to such serious felony cases, do not offer sufficient guidance for misdemeanors. This is because misdemeanor attorneys

¹⁶⁷ *United States v. Mooney*, 497 F.3d 397, 404 (4th Cir. 2007) (finding ineffective assistance where counsel failed to inform client that justification is defense to federal crime of being a felon in unlawful possession of a firearm, and where facts supported defense).

¹⁶⁸ 399 F.3d 1179, 1183 (9th Cir. 2005).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

work under the particular, often egregious, conditions of the lower criminal courts. Misdemeanor attorneys across the country handle caseloads that make almost any investigation difficult.¹⁷² These attorneys also represent clients in cases where the state or court routinely make plea or sentence offers at the first appearance or shortly thereafter, when counsel has not yet interviewed her client, let alone had time to research the law and facts of any affirmative defenses or sentence mitigation.¹⁷³ These are some of the conditions relevant to misdemeanor practice that differ from felony representation, and that call for fact-specific analysis from the courts in order to establish a jurisprudence of ineffective assistance that can realistically apply to misdemeanors. This is not to say that courts should excuse inadequate representation on the basis of egregious conditions that preclude more rigorous advocacy.¹⁷⁴ Indeed, judicial analysis of misdemeanor ineffective assistance might well result in a strong message to legislatures about the need for reform.¹⁷⁵

There is a small but significant group of cases that address some of the workload and other issues that dominate misdemeanor representation, even though they are not focused on misdemeanors. These cases involve systemic challenges to the delivery of indigent defense in a particular jurisdiction. For example, a Connecticut state court class action “challenged excessive attorney caseloads, substandard rates of compensation for attorneys, and a lack of adequate representation for juvenile defendants.”¹⁷⁶ However, of the limited number of an early group of such cases that met with initial success, “the relief . . . has not been sustained.”¹⁷⁷ Although several

¹⁷² See *supra* Part I.A (discussing caseloads in misdemeanor cases).

¹⁷³ See *supra* Part I.D.

¹⁷⁴ See *infra* Part II.A.2 (rejecting idea of resource deprivation driving constitutional rules).

¹⁷⁵ See *infra* notes 242-46 (describing constitutional road maps for legislatures in the area of criminal procedure).

¹⁷⁶ Cara Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 445 (2009) (describing *Rivera v. Rowland*, No. CV 950545629S, 1998 WL 96407, at *15-17 (Conn. Super. Ct. Feb. 20, 1998)). Professor Drinan has documented what she calls the first two generations of such challenges, and suggested approaches for the forthcoming “third generation” of indigent defense litigation. These lawsuits take various forms, including challenges to the defender system in the context of an individual criminal case, and cases that use a class action model. *Id.* at 433.

¹⁷⁷ *Id.* at 439. *But see id.* at 441-42 (noting, with respect to class action suits challenging the county or state defense system, “Despite the unavailability of a federal forum for these claims to date, it is worth noting that Luckey did create some good law for indigent defense advocates going forward. Importantly, Luckey recognized

more recent systemic challenges led to some “substantive, lasting reform,”¹⁷⁸ the current fiscal crisis has resulted in the recent rolling back of these reforms in some jurisdictions.¹⁷⁹ To the extent decisions in systemic challenge cases address issues present in misdemeanor cases, they offer some guidance for misdemeanor advocacy. However, they do not focus on the lower criminal courts and are thus of limited use in defining specific standards for misdemeanor representation.

Thus, there is insufficient case law to offer useful misdemeanor guidance. The *Argersinger* line of cases tells judges when they must appoint counsel, but not how that counsel must behave once appointed. *Argersinger*, *Scott v. Illinois*, and *Shelton v. Alabama* all involved challenges to uncounseled misdemeanor convictions; the issue of effective assistance was not before the Court.¹⁸⁰ Indeed, recent litigation involving misdemeanors and the right to counsel continues to focus on the fundamental question of whether the right applies, albeit in somewhat more nuanced circumstances. For example, the Kansas Supreme Court recently found that an uncounseled misdemeanor conviction that led to jail time — and was thus unconstitutional — could not be used for sentence enhancement purposes in a later felony proceeding.¹⁸¹

By contrast, there are relatively few cases that address claims of ineffective assistance in misdemeanor cases. A search of all reported New York state cases from 2009 until present, with the terms “ineffective assistance of counsel” and “misdemeanor,” reveals only twenty-two cases that involve only misdemeanor charges and analyze

that a defendant has the right to make a Sixth Amendment challenge outside the context of post-conviction review, reasoning that the right to counsel is more than the right to a certain result”) (citing *Luckey v. Harris*, 860 F.2d 1012, 1017-18 (11th Cir. 1988)).

¹⁷⁸ *Id.* at 444.

¹⁷⁹ See, e.g., Dave Collins, Public Defenders Feel Squeeze Conn. Cuts Create Caseload Worries, BOSTON.COM (July 21, 2011), http://articles.boston.com/2011-07-21/news/29798875_1_public-defenders-caseload-budget-cuts (noting how public defender has stated that “[s]ome public defenders’ caseloads are already at or above state guidelines set in 1999 in response to a lawsuit that said the public defender system was so overwhelmed that it could no longer fulfill clients’ constitutional rights to an adequate legal defense”).

¹⁸⁰ See *supra* Part II. A. (discussing this troika of cases).

¹⁸¹ *State v. Youngblood*, 206 P.3d 518, 525 (Kan. 2009). Although an earlier United States Supreme Court decision found that “an uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment,” *Nichols v. United States*, 511 U.S. 738, 746-47 (1994), the *Youngblood* court ruling related to a conviction that was not valid under *Scott*. *Youngblood*, 206 P.3d at 523.

a claim of ineffective assistance;¹⁸² the same search in the Second Circuit Court of Appeals and all New York State federal district courts reveals only two such cases.¹⁸³ These numbers are not surprising, because only a small percentage of individuals convicted of a misdemeanor file an appeal or seek other post-conviction review of counsel's effectiveness.¹⁸⁴ Of the twenty-four cases, seventeen relate to one particular issue: the failure to advise a client about the deportation consequences of a misdemeanor conviction in violation of the Sixth Amendment duty to warn set out in the recent Supreme Court case of *Padilla v. Kentucky*.¹⁸⁵

The concentration of cases in this one specific area of misdemeanor practice — which highlights the importance of pre-plea warnings about collateral consequences of misdemeanor convictions — is significant.¹⁸⁶ As discussed in Part I.B, misdemeanor convictions can result in many severe collateral consequences, in addition to deportation. Although *Padilla* itself involved a felony drug trafficking charge, a number of lower courts have applied *Padilla*'s duty to warn to misdemeanor cases involving deportation as well as other collateral consequences.¹⁸⁷ It is in lower-level cases — where the penal

¹⁸² Westlaw Search, WESTLAW, <http://www.westlaw.com> (online search for [Misdemeanor & "ineffective assistance of counsel" and da(aft2008)], in NY-CS).

¹⁸³ Westlaw Search, WESTLAW, <http://www.westlaw.com> (online search for [Misdemeanor & "ineffective assistance of counsel" and da(aft 2008)], in DCTNY and CTA2R).

¹⁸⁴ See *infra* Part III.B (discussing structural impediments to ineffective assistance of counsel claims in misdemeanor cases); see also JOHN SCALIA, *Federal Criminal Appeals, 1999 with Trends 1985–1999*, in U.S. DEP'T OF JUSTICE, BUREAU OF STATISTICS SPECIAL REPORT at 2-3 (Ser. No. NCJ 185055, 2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fca99.pdf> (finding that, with respect to federal court cases in 1999, "[d]efendants convicted of property, immigration, and misdemeanor offenses were among the least likely to file an appeal," and that defendants filed five appeals for every 100 convictions in misdemeanor cases).

¹⁸⁵ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010) (holding that where deportation consequences of criminal conviction are "succinct, clear and explicit," defense counsel has Sixth Amendment obligation to correctly inform client of this consequence).

¹⁸⁶ This type of case is not unique to New York. See e.g., *Ex parte Tanklevskaya*, No. 01-10-00627-CR, 2011 WL 2132722, at *11 (Tex. App. May 26, 2011) (finding ineffective assistance of counsel under *Strickland* and *Padilla* when counsel failed to advise client that pleading guilty to misdemeanor would have immigration consequences).

¹⁸⁷ See, e.g., *People v. Harding*, 30 Misc. 3d 1237(A), slip op. at 34 (N.Y. Crim. Ct. Mar. 15, 2011) (applying *Padilla* framework to failure to advise about deportation consequences); *Commonwealth v. Abraham*, 996 A.2d 1090 (Pa. Super. Ct. 2010), cert. granted, 9 A.3d 1133 (Pa. 2010) (applying *Padilla* framework to failure to warn about loss of pension); see also *State v. Powell*, 935 N.E.2d 85, 92 (Ohio Ct. App.

consequences are not as severe — that defendants are most likely to succeed in proving the second prong of the test: that the attorney’s failure to warn prejudiced the defendant.¹⁸⁸ This means demonstrating that, given full knowledge about the collateral consequence, it is reasonably likely there would have been a different outcome in the case.¹⁸⁹ Thus, although Mr. Padilla did not succeed in proving prejudice on remand from the Supreme Court,¹⁹⁰ some misdemeanor defendants will be able to show how they would not have pleaded guilty, and would have had other viable options in their case, had their attorney properly warned them about the severe collateral consequences of their “minor” misdemeanor charges.

As the nascent post-*Padilla* misdemeanor jurisprudence develops, it will send a message to defenders that warnings about deportation, and possibly other severe collateral consequences, are not only mandated in all levels of cases, but that the failure to warn is most likely going to prejudice the misdemeanor client. This means that training, interviewing, counseling, and negotiation and sentencing advocacy in this area are critical for misdemeanor attorneys. Indeed, the decision in *Padilla* has already led to numerous trainings about its practical application.¹⁹¹

2010) (finding ineffective assistance where counsel improperly advised his client about sexual offender registration).

¹⁸⁸ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¹⁸⁹ See *Padilla*, 130 S.Ct. at 1482; see also Roberts, *supra* note 137, at 698, 725 (discussing how prejudice prong’s “different outcome” requirement is broader than showing that defendant would have chosen and won trial over guilty plea and should instead be interpreted to allow for different outcomes based on negotiation or sentencing advocacy that could have led to avoidance of collateral consequence).

¹⁹⁰ *Commonwealth v. Padilla*, 01-CR-00517 (Hardin Cir. Ct. Feb. 18, 2011) (on file with author) (holding that Padilla failed to demonstrate that counsel’s failure to properly warn him about deportation consequences of his guilty plea prejudiced him).

¹⁹¹ See, e.g., *The Fifth National Training on the Immigration Consequences of Criminal Convictions*, DEFENDING IMMIGRANTS PARTNERSHIP, <http://defendingimmigrants.org> (last visited Mar. 12, 2011); *Upcoming Trainings: The Impact of Padilla v. Kentucky*, PAIR PROJECT, <http://www.pairproject.org/trainings.php> (last visited Mar. 12, 2011). For practice advisories on *Padilla*, see generally IMMIGRANT DEF. PROJECT, A DEFENDING IMMIGRANTS PARTNERSHIP PRACTICE ADVISORY: DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING AN IMMIGRANT DEFENDANT AFTER *PADILLA V. KENTUCKY* (Apr. 2010), available at http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf; DAN KESSELBRENNER, NAT’L IMMIGRATION PROJECT, A DEFENDING IMMIGRANTS PARTNERSHIP PRACTICE ADVISORY: RETROACTIVE APPLICABILITY OF *PADILLA V. KENTUCKY* (2010), and WASH. DEFENDER ASS’N’S IMMIGRATION PROJECT, HOW TO ADVISE NONCITIZEN DEFENDANTS: WHAT IS “CLEAR AND UNCLEAR” AFTER *PADILLA V. KENTUCKY* (2010).

These developments in the wake of *Padilla* demonstrate the promise of guidance for misdemeanor attorneys in other areas. Although this guidance is badly needed, there are unfortunately a number of structural and other reasons for the paucity of misdemeanor ineffective assistance jurisprudence. Before exploring these obstacles in Part III, the remainder of this section highlights another critical missing piece of guidance for misdemeanor attorneys: the lack of professional standards that address core misdemeanor issues.

2. Lack of Misdemeanor Representation Guidance in Professional Standards for Defense Representation

There are a number of non-constitutional sources that provide standards for defense representation. These sources range from published national standards to unpublished local public defender office guidelines. They include general membership organizations, such as the American Bar Association (“ABA”), and more specialized groups, such as the National Association of Criminal Defense Lawyers.¹⁹² Defense representation standards serve two main purposes: First, they offer practical guidance to criminal defense attorneys and serve as internal benchmarks for adequate defense representation. Second, courts rely on professional standards to determine the “prevailing professional norms” against which to judge an ineffective assistance of counsel claim.¹⁹³ The central role that professional standards play in guiding both practice and judicial decisions demonstrates the importance of clear standards for misdemeanor representation.

Margaret Colgate Love has called the ABA *Criminal Justice Standards* one of the “most respected sources of criminal defense lawyers’ professional duty to the client Over the years, the Standards have earned their place as a measure of ‘prevailing professional norms’ for purposes of the Sixth Amendment through the thoroughness and balance of the process by which they are developed.”¹⁹⁴ The *Criminal*

¹⁹² See generally ABA, CRIMINAL JUSTICE STANDARDS, http://www.americanbar.org/groups/criminal_justice/policy/standards.html (last visited Nov. 7, 2011) (noting how the second edition of most volumes has been completed, and how a third edition is “well underway”); NAT’L LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (2006) [hereinafter PERFORMANCE GUIDELINES], available at http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

¹⁹³ See *Strickland*, 466 U.S. at 688 (citing the ABA’s *Criminal Justice Standards*).

¹⁹⁴ Margaret Colgate Love, *Evolving Standards of Reasonableness: The ABA Standards and the Right to Counsel in Plea Negotiations*, 39 FORDHAM URB. L. J. (forthcoming 2011) (manuscript at 7), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=

Justice Standards consist of twenty-three separate sets of guidelines on diverse topics ranging from the “Urban Police Function,” to “Discovery.”¹⁹⁵ In determining attorney competency under the first *Strickland* prong, the Supreme Court relies more heavily on the ABA Standards than on other professional norms; the Court has referenced the *Criminal Justice Standards*’ “Defense Function” section in its ineffective assistance analyses,¹⁹⁶ and has also relied on the ABA’s *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*.¹⁹⁷

The Court’s decisions in the well-developed area of ineffective assistance in capital mitigation demonstrate an increasing reliance on professional standards, and, more specifically, on ABA standards.¹⁹⁸ The Court cited ABA Standards once in *Williams v. Taylor*, the first Supreme Court case to actually find ineffective assistance under the *Strickland* two-prong approach. Three years later, it cited ABA standards six times in *Wiggins v. Smith*, and then eight times in the 2005 case of *Rompilla v. Beard*.¹⁹⁹ The Court went from describing ABA standards in *Strickland* as “guides to determining what is reasonable [attorney behavior], but . . . only guides,” to characterizing them in *Wiggins* as “standards to which we long have referred as ‘guides to determining what is reasonable.’ ”²⁰⁰ Thus, the Court recently added structure to the purposely open-ended, deferential first

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¹⁹⁵ See ABA, CRIMINAL JUSTICE STANDARDS, *supra* note 192, at Standard 1 (urban review of sentences); *id.* at Standard 11 (discovery); see also Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251 (1974); Martin Marcus, *The Making of the ABA Criminal Justice Standards*, 23 CRIM. JUST., Winter 2009, at 14 (explaining how ABA Standards arise from consensus process involving defenders, prosecutors, and judges).

¹⁹⁶ See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (“[W]e long have referred [to these ABA Standards] as ‘guides to determining what is reasonable.’ ”); *Strickland*, 466 U.S. at 688 (describing the ABA Standards as “guides to determining what is reasonable [attorney behavior], but . . . only guides”).

¹⁹⁷ See, e.g., *Rompilla*, 545 U.S. at 387 (referring to ABA Guidelines and Standards in determining what constitutes deficient performance). The *Guidelines* are not one of the *Criminal Justice Standards*, but rather are separately published. See ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 916 (2003), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.

¹⁹⁸ See *supra* notes 163-65 and accompanying text (describing ineffective assistance jurisprudence in capital mitigation context).

¹⁹⁹ Blume & Neumann, *supra* note 161, at 151-52; see also *Rompilla*, 545 U.S. at 381; *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

²⁰⁰ *Wiggins*, 539 U.S. at 524; *Strickland*, 466 U.S. at 688.

prong inquiry by relying more heavily and explicitly on published professional standards for defense practice than it had in the past.²⁰¹

One could certainly attribute these developments to at least some Justices' increasing discomfort with and focus on the death penalty in the years after the *Williams* decision. It was during this period that Justices Ginsburg and O'Connor gave speeches voicing concerns about the troubling state of defense representation in capital cases and the possibility of executing innocent defendants.²⁰² It was also during this

²⁰¹ See *Rompilla*, 545 U.S. at 381 (noting how in judging defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to "counsel's perspective at the time" investigative decisions are made and by giving "heavy measure of deference to counsel's judgments"). There has been some commentary that one of the Court's recent ineffective assistance decisions demonstrates a move away from heavy reliance on the ABA Standards in determining prevailing professional norms. Reinstating Van Hook's death sentence in *Bobby v. Van Hook*, the Court critiqued the Sixth Circuit's reliance on the ABA's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, which were promulgated some 18 years after Van Hook's sentencing proceeding. *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009). In addition to disapproving of such prospective application, the opinion criticized the lower court for treating the ABA *Guidelines* as "inexorable commands" rather than "merely as evidence of what reasonably diligent attorneys would do." *Id.* at 17. The Court quoted liberally from its prior ineffective assistance cases, and it is not clear that *Van Hook* is a step back from that jurisprudence in terms of its reliance on the Guidelines, particularly since the opinion was *per curiam*. *Van Hook* did, however, lead to commentary on the issue. See, e.g., Memorandum from the ABA, on *Bobby v. Van Hook* (Nov. 10, 2009), available at http://www2.americanbar.org/DeathPenalty_migrated/RepresentationProject/PublicDocuments/van%20hook%20analysis.pdf ("The Court's opinion in *Van Hook* does not alter its prior jurisprudence regarding the ABA Guidelines."); Posting of Marcia Coyle, THE BLOG OF LEGAL TIMES (Nov. 10, 2009 3:15 PM), <http://legaltimes.typepad.com/blt/2009/11/a-justices-curious-comment-about-aba-guidelines-for-death-penalty-lawyers-.html> (noting differing viewpoints on the meaning of *Van Hook*'s language about the ABA Guidelines). One term after *Van Hook*, the Court cited to that decision's language about "inexorable commands," but went on in the same sentence to note how the ABA *Criminal Justice Standards* "may be valuable measures of the prevailing professional norms of effective representation," and then relied heavily on various professional standards in its analysis. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010).

²⁰² See Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 WASH. U. J.L. POL'Y 1, 10 (2001) (noting, in remarks at Access to Justice conference, how she has "yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial"); Crystal Nix Hines, *Lack of Lawyers Hinders Appeals in Capital Cases*, N.Y. TIMES, July 5, 2001, at A1 (noting Justice O'Connor's comment, in speech to Minnesota Women Lawyers, that "[p]erhaps it's time to look at minimum standards for appointed counsel in death cases"). It was also during this period that the Court held unconstitutional the execution of an individual for a crime committed when under the age of 18. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

period that the ABA updated its *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.²⁰³

However, a narrative that explains the Court's more robust ineffective assistance jurisprudence and heavier reliance on the ABA's *Standards and Guidelines* as a concern solely with capital cases has two limitations. First, although such concerns may well have animated the Court, the Court did not limit its recent ineffective assistance jurisprudence to the capital context — a move the Court certainly could have taken given that the cases all involved capital mitigation review. Indeed, as early as *Strickland*, the Court noted how “[a] capital sentencing proceeding like the one involved in this case . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel’s role in the proceeding is comparable to counsel’s role at trial.”²⁰⁴ The applicability of the Court’s ineffective assistance norms to non-death cases — and indeed to misdemeanors²⁰⁵ — is thus clear. The second limitation to a narrative that explains the Court’s interest in ineffective assistance as an interest in capital cases is that the Court found ineffective assistance for failure to warn about deportation consequences in *Padilla*, which involved a felony marijuana trafficking case where Padilla had already served his sentence by the time the Court reviewed the case.²⁰⁶ The Court began its exploration of defense counsel’s Sixth Amendment duty to warn by noting how the ABA Standards “may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.”²⁰⁷ The decision then went far beyond the Court’s more recent singular focus on the ABA Standards in its exploration of professional norms and cited a number of other standards to support its statement that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the

²⁰³ See ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 913 (2003), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.

²⁰⁴ See *Strickland*, 466 U.S. at 686 (internal citations omitted) (explaining how, “[f]or purposes of describing counsel’s duties, therefore, Florida’s capital sentencing proceeding need not be distinguished from an ordinary trial”).

²⁰⁵ See *supra* notes 157-59 (discussing *Strickland* test’s application to misdemeanors).

²⁰⁶ *Padilla*, 130 S. Ct. at 1473.

²⁰⁷ *Id.* at 1482.

risk of deportation.”²⁰⁸ These other sources included the National Legal Aid and Defender Association’s *Performance Guidelines for Criminal Representation*, the Department of Justice’s *Compendium of Standards for Indigent Defense Systems*, various criminal law and practice treatises, and law review articles.²⁰⁹ In the 2011-2012 term, the Court will decide two more non-capital claims of ineffective assistance, *Missouri v. Frye*, and *Lafler v. Cooper*. The former involves a felony charge of driving with revoked driving privileges, and the latter involves assault with intent to murder.²¹⁰ These recent and upcoming cases demonstrate the Court’s interest in professional standards for effective representation in non-capital cases,²¹¹ and the importance of having standards for misdemeanor practice.

In the wake of the Supreme Court’s emphatic reliance on professional standards in recent ineffective assistance jurisprudence, an institutional defender office or an attorney new to criminal practice might reasonably turn to published professional standards for guidance on representation in misdemeanor cases.²¹² That attorney will find different defender caseload recommendations for felonies and misdemeanors.²¹³ That attorney may also find different levels of

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Lafler v. Cooper*, 376 F. App’x 563, 565-66(6th Cir. 2010), *cert. granted*, 131 S. Ct. 856 (2011) (No. 10-209); *Missouri v. Frye*, 311 S.W.3d 350, 351 (Mo. Ct. App. 2010), *cert. granted*, 131 S. Ct. 856 (2011) (No. 10-444).

²¹¹ These cases also demonstrate what Professor Stephanos Bibas has described as “a watershed in the Court’s approach to regulating plea bargains.” Stephanos Bibas, *Regulating the Plea Bargain Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1118 (2011). Bibas notes how the *Padilla* decision marked the moment when “[t]he Court began to move beyond its fixation upon the handful of cases that go to jury trials. It recognized that the other 95 percent of adjudicated cases resolved by guilty pleas matter greatly, and began in earnest to regulate plea bargains the way it has long regulated jury trials.” *Id.* at 1118-19. *But see* Josh Bowers, *Fundamental Fairness and the Path From Santobello to Padilla: A Response to Professor Bibas*, 2 CAL. L. REV. CIRCUIT 52, 53 (2011) (disagreeing with Bibas’s characterization of *Padilla* as “watershed” decision, and describing how “the Court has regulated plea bargaining on its own terms for decades,” using fundamental fairness approach rather than “accuracy” approach it uses when regulating trials). The Court’s willingness to delve so deeply into the messy area of plea bargain regulation--and in particular into counseling about collateral consequences of guilty pleas--will surely affect misdemeanor practice; indeed, that is already the case with *Padilla*, which did not limit the duty to warn about deportation to felony cases. *Padilla*, 130 S. Ct. at 1483.

²¹² See Blume & Neumann, *supra* note 161, at 147 (“The jurisprudential shift is now evident and established. Lower courts must consider the ABA Guidelines and other national standards to determine the reasonableness of counsel’s behavior in light of prevailing professional norms as part of ineffective counsel analysis.”).

²¹³ See *supra* note 77 and accompanying text (noting how nationally recognized

compensation for felony and misdemeanor representation in her jurisdiction,²¹⁴ which suggests different expectations for felony and misdemeanor representation. However, that attorney will not find guidance in professional standards on the meaning of any such differing expectations. For example, the ABA endorses caseload caps of 300 for non-traffic misdemeanors and 150 for felonies, but does not explain what misdemeanor lawyers are expected to cut or do differently in their representation to handle a caseload that is double that recommended for felony attorneys.²¹⁵ Thus, the widely-cited ABA *Criminal Justice Standards* do not offer any separate guidelines for misdemeanors.

The *Criminal Justice Standards* do recognize, in various provisions and commentary, some of the differences between misdemeanor and felony cases. However, these references are largely in relation to the baseline issue of whether there is a right to counsel at all under the Sixth Amendment.²¹⁶ One such discussion is located in the “Guilty Pleas” Standard relating to “[a]id of counsel; time for deliberation.”²¹⁷ This Standard first states that a defendant should have reasonable time to consult with an attorney before entering a guilty plea. The second part of the Standard states that a defendant who chooses to waive counsel should have “a reasonable time for deliberation” about a guilty plea before it is accepted by the court, and after certain judicial advisement.²¹⁸ Although there is no misdemeanor-felony distinction in the text of this “aid of counsel” Standard, the commentary recognizes

standards are 400 non-traffic misdemeanors per year, with number dropping to 150 for felonies).

²¹⁴ See, e.g., 18 U.S.C. § 3006A(d)(2) (2011) (setting hourly rates and noting that payment “shall not exceed \$7,000 for each attorney in a case in which one or more felonies are charged, and \$2,000 for each attorney in a case in which only misdemeanors are charged”); see also NEV. REV. STAT. § 7.125 (2001) (setting capital and non-capital case hourly rates and capping felony or “gross misdemeanor” representation at \$2,500 and misdemeanor representation at \$750).

²¹⁵ See ABA SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC’Y, *supra* note 77, at pt. 4 (stating that ABA endorses National Advisory Commission (“NAC”) caseload numbers, although list following endorsement notes misdemeanor cap of 300, rather than 400 as NAC recommends).

²¹⁶ See, e.g., ABA, CRIMINAL JUSTICE STANDARDS: PROVIDING DEFENSE SERVICES (3d ed. 1992) (search reveals 19 mentions of “misdemeanor,” most relating to this baseline issue).

²¹⁷ See PLEAS OF GUILTY, *supra* note 67, at § 14-1.3.

²¹⁸ *Id.* This time for deliberation would come after advice by the court, spelled out in another guideline, which relates to such things as maximum sentence, the waiver of certain constitutional rights, and advisement about certain collateral consequences of a criminal conviction. See *id.* at § 14-1.4.

how this provision might work differently if the charge is a misdemeanor where the defendant does not have a right to an attorney.²¹⁹

The Commentary to the *Criminal Justice Standards* better accounts for the reality of the lower courts, by noting how the “time for deliberation” standard purposefully did not include a specific time period. The Commentary thus explains that set time periods would introduce “an undesirable degree of rigidity by requiring two initial court appearances even in those cases, such as misdemeanor traffic offenses, in which a defendant might wish to enter a plea immediately rather than being required to return to the jurisdiction for a second appearance.”²²⁰ Certainly, this commentary recognizes and advances a system where low-level offenses are treated differently from offenses carrying a greater potential criminal penalty.

Other “misdemeanor” mentions in the ABA *Criminal Justice Standards* are passing illustrative examples that just happen to be misdemeanor cases, but are not related to the question of effective assistance for misdemeanors.²²¹ There are general standards that, if applied to misdemeanors as well as felonies, would significantly raise the level of practice. For example, one Standard states that “[d]efense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.”²²² To be sure, it is an unfortunate reality that this thorough investigation often does not take place in felony cases.²²³ However, investigation is impossible in misdemeanor cases that are resolved by guilty plea shortly after a

²¹⁹ *Id.* (“[I]t would impose a significant burden on the courts to require that all defendants be represented by counsel in order to plead guilty, even in misdemeanor cases involving no prison sentence.”).

²²⁰ *Id.* (“[I]n most cases, as a practical matter, the proceedings required to ensure that the defendant has properly waived counsel will necessitate a delay between the initial court appearance and the entry of a plea.”).

²²¹ *See, e.g., id.* § 14-1.8(a)(ii) (illustrating proper consideration of guilty plea in final disposition approval, for court allowing misdemeanor guilty plea in exchange for dismissal of felony charges in order “to avoid the stigma-and some or all of the collateral consequences-of a felony conviction”).

²²² *See, e.g.,* ABA, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 4-4.1. (3d ed. 1993).

²²³ *See, e.g.,* *Knighton v. Maggio*, 740 F.2d 1344 (5th Cir. 1984) (denying ineffective assistance claim despite description of defense counsel’s investigation in capital case as extremely limited); Jane Fritsch & Matthew Purdy, *Defenders by Default: A Special Report; Option to Legal Aid for Poor Leaves New Yorkers at Risk*, N.Y. TIMES, May 23, 1994, at A1 (noting examples where court-appointed attorneys have failed to investigate their clients’ cases).

defendant meets his counsel at the first appearance, as many cases are in some jurisdictions.²²⁴ The same is true when a defender has a high misdemeanor caseload, or when office investigative resources are not available for misdemeanors.

The ABA *Criminal Justice Standards* acknowledge that misdemeanors are constitutionally different from felonies in terms of the attachment of the right to counsel.²²⁵ However, the Standards do not address the ways in which defense counsel might effectively represent misdemeanor clients, given the particular needs and challenges of misdemeanor representation, when the right to counsel applies. There is a similar lack of guidance in other standards, such as the National Legal Aid & Defender Association's *Performance Guidelines for Criminal Defense Representation*, which do not contain the word "misdemeanor."²²⁶ The current lack of guidance from professional standards can lead to one of three conclusions: the system must change to allow defense counsel in misdemeanors to adhere to existing professional standards; there must be new standards designed to address a misdemeanor-specific context; or perhaps some combination of these two potential responses.²²⁷

III. INSTITUTIONAL COMPETENCIES IN RESPONDING TO THE NEED FOR MISDEMEANOR STANDARDS

The academic and practice communities have not paid sufficient attention to the significance of a misdemeanor charge or conviction, or to the importance of defining and ensuring quality representation in these seemingly petty cases. Yet as demonstrated in Part I,

²²⁴ See, e.g., THREE-MINUTE JUSTICE, *supra* note 1, at 15 ("Almost 70% of defendants observed entered a guilty or no contest plea at arraignment."). In some jurisdictions there is no counsel at the initial arraignment or counsel is present only for the arraignment and the case is then re-assigned. In these jurisdictions, even if there is no guilty plea until the appearance after arraignment, there is simply no real opportunity for defense counsel — who is appearing on the case and often meeting her client for the first time — to investigate the facts of the case.

²²⁵ See *supra* notes 216-19.

²²⁶ See PERFORMANCE GUIDELINES, *supra* note 192 (searching for "misdemeanor" shows zero results, and guidelines do not separate "serious" from "less serious" crimes or use any similar categorization).

²²⁷ Some jurisdictions have requirements for capital cases and programs to assign "qualified" capital counsel. See Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 489-90 (1993) (listing examples); see also *id.* at 495, nn.247-50 (noting there are legal standards on capital trial issues applying specifically to that context, including death qualification, jury instructions, and bifurcation of guilt and punishment); *supra* note 203 and accompanying text (noting that ABA has a separate set of standards for capital cases).

misdeemeanors matter. Once proper consideration is given to this overlooked area of criminal law and procedure, a variety of questions flow. They include the core issues of what can be done and who can do what. This Part explores potential divisions of labor among the various institutions connected to the criminal justice system in addressing the specialized needs of misdemeanor defendants. Who can act to fill the void for standards of misdemeanor representation, given particular institutional competencies? The legislature, judiciary, professional organizations, and the defense bar are all well-situated to effectuate different, important changes. Although this Article does not attempt to fully answer the complex question of what those institutions might do, this Part does address some of the ways in which each group might react to the crisis in misdemeanor representation and the lack of standards.

Part A considers the legislative role in easing the crisis by moving certain truly low-level misdemeanors out of the criminal justice system entirely, and notes how this is an opportune moment for undertaking such cost-saving reforms. Part B describes the important role that courts play in advancing a discussion of and potential solutions to inadequate representation in the nation's lower courts. While there are numerous structural obstacles to courts articulating constitutional standards for effective assistance of counsel in misdemeanor cases, these obstacles are not a total bar to such a misdemeanor jurisprudence. Equally important as the articulation of constitutional standards is the role of the courts as provocateurs, in spurring discussion about reform. Part C is a call to professional organizations, including the ABA's *Criminal Justice Standards* project, to consider the particular context of misdemeanor representation. While there is no bright line between felony and misdemeanor representation,²²⁸ there are already separate national caseload suggestions and separate levels of compensation in many jurisdictions for the two categories of cases. Professional organizations should either promulgate misdemeanor-specific standards for representation or clarify that general standards apply equally to felonies and misdemeanors, with commentary addressing how those standards might be met in the different contexts. Finally, Part D describes the role the defender community might play in shaping misdemeanor standards. While there are unfortunately many fronts on which the defender community might begin to address the misdemeanor representation crisis, Part D focuses on two areas in particular need of

²²⁸ See *supra* notes 53-61 and accompanying text.

attention: training in the identification and use — in client counseling, negotiation and sentencing advocacy — of collateral consequences; and lowering the high rates of waiver of the right to counsel in the lower criminal courts.

A. *The Legislative Role: Moving Minor Misdemeanors Out of the Criminal Justice System*

In an open letter to the California State Senate, then-Governor Arnold Schwarzenegger explained why he was signing a bill changing the act of possessing less than one ounce of marijuana from a misdemeanor to a civil infraction that did not allow for arrest or criminal prosecution:

In this time of drastic budget cuts, prosecutors, defense attorneys, law enforcement, and the courts cannot afford to expend limited resources prosecuting a crime that carries the same punishment as a traffic ticket. As noted by the Judicial Council in its support of this measure, the appointment of counsel and the availability of a jury trial should be reserved for defendants who are facing loss of life, liberty, or property greater than \$100.²²⁹

In 2009, the year before California passed this new law, more than 60,000 individuals passed through the criminal justice system on minor marijuana possession charges.²³⁰ In Massachusetts, the move of minor marijuana possession from the criminal justice system to the civil infraction system came by way of voter ballot initiative.²³¹ A similar move is under consideration in Hawaii.²³² Driven by the stark

²²⁹ Letter from Arnold Schwarzenegger, Governor of Cal., to the Members of the Cal. State Senate (Sept. 30, 2010), available at <http://www.salem-news.com/articles/october012010/schwarzenegger-marijuana.php>. Under previous California law, possession of such small amounts of marijuana was only punishable by fine, but processed in criminal court. The new law took such cases out of criminal courts, and made possession of less than one ounce a civil offense. CAL. HEALTH & SAFETY CODE § 11357 (West 2010). Voters later disapproved — by a margin of 54% to 46%—a ballot measure fully decriminalizing marijuana possession under California law, see Miguel Helft, *Election Results 2010: California*, N.Y. TIMES, available at <http://elections.nytimes.com/2010/results/california?scp=3&sq=hawaii%20marijuana%20&st=cse>, although the new state law already did much of the work of that ballot measure by moving such cases into the civil system.

²³⁰ See *Table 4a: Total Misdemeanor Arrests*, CAL. STATE DEP'T JUST., (2009), http://stats.doj.ca.gov/cjsc_stats/prof09/00/4A.htm.

²³¹ See Abel, *supra* note 108, at B6.

²³² See *Senate Approves Marijuana Decriminalization*, HAW. REP. (Mar. 8, 2011),

fiscal reality of the high costs of low-level prosecutions in hard economic times, other states and localities have also moved certain misdemeanors out of the costly criminal justice system. For example, keeping the misdemeanor of driving with a suspended license out of the criminal justice system offers significant costs savings. A recent national report noted how “driving offenses, particularly the offenses equivalent to driving with a suspended license, make up an extraordinary proportion of the misdemeanor caseloads in many jurisdictions.”²³³ In addition, “Most of these [driving while suspended] charges result from the failure to pay fines or fees, such as tickets for a broken tail light or not having insurance, parking tickets, or even failure to pay child support.”²³⁴ In one Washington county, of the twenty-nine misdemeanor cases heard on a single day, 41% were charges of driving with a suspended license.²³⁵ The unnecessarily large amount of criminal justice resources that many jurisdictions devote to such cases has led to some creative solutions. In King County, Washington, the prosecutor, defender office, lower court, county executive, and county council worked together to keep such driving cases out of the criminal justice system. The program they created allowed individuals to work off the underlying fine that led to the suspension in exchange for dismissal of the criminal charges. A study of the early months of the program showed a reduction of 84% in prosecutorial filings in suspension cases, and a reduction of 24% in jail costs.²³⁶

The potential savings from such diversion and decriminalization is enormous. Federal Bureau of Investigation statistics for 2009 show that more than 45% of all drug arrests in the United States were for marijuana possession.²³⁷ In that same year, “there were 8,067 gambling arrests, 26,380 vagrancy arrests, 471,727 drunkenness arrests, 518,374 disorderly conduct arrests, and 89,733 curfew and loitering arrests.”²³⁸ If significant numbers of these low-level misdemeanors are moved out

<http://www.hawaiireporter.com/senate-approves-marijuana-decriminalization/123>
(describing how bill to reduce possession of small amounts of marijuana to civil infraction passed Senate and was sent to the House of Representatives).

²³³ MINOR CRIMES, MASSIVE WASTE, *supra* note 12, at 28.

²³⁴ *Id.* at 26.

²³⁵ *Id.* at 25.

²³⁶ *Id.* at 28.

²³⁷ See DIVERTING AND RECLASSIFYING MISDEMEANORS, *supra* note 69, at 1-3; *see also id.* at 1 (“In some courts, the combination of [the three misdemeanors of] driving with a suspended license, possession of marijuana, and minor in possession of alcohol cases can total between 40% and 50% of the caseload.”).

²³⁸ *Id.* at 3.

of the criminal justice system, there is potential for better levels of representation in those misdemeanor cases that remain. However, such potential can only be realized if decriminalization does not imply cuts to public defense budgets on the theory that less funding is needed due to fewer cases in the system. States and localities should see this as an opportunity to save money in some parts of the system — lower court and jail costs — with a concomitant opportunity to focus defense resources on the many individuals still facing misdemeanor charges.

Raising the bar on misdemeanor representation through such reforms as workload caps, avoiding guilty pleas at first appearances, and more investigative resources undoubtedly requires additional resources, or at least the reallocation of existing resources. However, there are significant long-term cost savings when higher quality representation leads to fewer wrongful convictions, unnecessary collateral consequences, and unnecessary incarceration.²³⁹ Despite some limited inroads to move some low-level offenses to diversion programs or the civil justice system, legislators' perceived need to be "tough on crime," as well as their belief that any concession in the criminal justice realm will be seen as "weak," makes decriminalization an unlikely route for true reform of misdemeanor representation.²⁴⁰ The bottom line is if jurisdictions want to continue to prosecute misdemeanor offenses in great number, then they must find a way to provide for effective assistance of counsel in these cases. Otherwise defenders are put in a position where they are unable to fulfill their constitutional, professional, and ethical duties to provide adequate assistance to clients charged with misdemeanor crimes.

The real and perceived obstacles to legislative change highlight the need for judicial reform. The next section discusses the important role that courts have to play in advancing standards for adequate representation in the nation's lower courts.

B. *The Role of Courts as Provocateurs*

Numerous scholars have described the critical dialogue that occurs between different institutions in shaping constitutional norms.²⁴¹

²³⁹ See generally MINOR CRIMES, MASSIVE WASTE, *supra* note 12 (describing high costs that deficient representation on misdemeanors may have on indigent defendants and their communities).

²⁴⁰ See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719 (2005) ("Conventional wisdom suggests that appearing tough on crime wins elections.").

²⁴¹ See, e.g., Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY

Professor Erik Luna has examined one facet of that dialogue — that of courts providing “constitutional road maps” to legislatures, in the context of criminal justice jurisprudence.²⁴² An example of such road mapping can be seen in *City of Chicago v. Morales*, where the Supreme Court struck down a city ordinance “prohibit[ing] ‘criminal street gang members’ from ‘loitering’ with one another or with other persons in any public place.”²⁴³ As Luna notes, “Despite agreeing that the gang-loitering ordinance was unconstitutional, [Justice] O’Connor suggested that Chicago had lawful alternatives at its disposal. Her concurrence then sketched out potential statutory provisions that would survive judicial scrutiny, offering a constitutional road map for lawmakers to follow in reenacting the ordinance.”²⁴⁴

There is a similar road mapping role for courts to play in answering the misdemeanor representation crisis and addressing the need for misdemeanor standards of representation. Professor William Stuntz outlined one such potential road map relating to adequate funding for indigent defense, noting how “ensuring an adequate quantity of representation . . . is an achievable goal — and raising quantity tends to raise quality as well.”²⁴⁵ Recognizing the problem of judges essentially setting budget lines to mandate adequate funding, Stuntz instead proposed a system of “penalty defaults” under which:

[I]n all jurisdictions that set up expert commissions to recommend appropriate funding for indigent criminal defense and then follow those recommendations, ineffective assistance doctrine will not apply. Elsewhere, ineffective assistance standards will be ratcheted up sharply. If this default rule applied, state legislators would have an incentive to establish sensible processes for fixing defense budgets, and room to experiment with different funding patterns — more money for defense lawyers in some jurisdictions, more money for investigators or defense crime labs in others.²⁴⁶

Although this is just one example of a potential road map for legislatures, there are a number of areas relating to misdemeanor

1125, 1173-85 (2000) (providing “an overview of the leading theories of interbranch dialogue”).

²⁴² *Id.*

²⁴³ *City of Chicago v. Morales*, 527 U.S. 41, 45-46 (1999).

²⁴⁴ Luna, *supra* note 241, at 1128.

²⁴⁵ William Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 837 (2006).

²⁴⁶ *Id.*

representation in which courts might provoke legislatures and professional organizations to set standards. One such area is caseloads, with some defenders recently refusing to take new cases because of high caseloads, and states passing or considering caseload caps.²⁴⁷ Here, courts could rely on national or local caseload recommendations in examining individual or systemic claims of ineffective assistance.²⁴⁸ For example, if an individual claimed ineffective assistance based on counsel's failure to meet him prior to a trial appearance, the court might examine the caseload of the defender at the time of the individual's representation and apply a rebuttable presumption of ineffectiveness if caseload numbers exceeded recommended standards. A few courts have already used such rebuttable presumptions in cases challenging the constitutionality of an indigent defender system.²⁴⁹

These examples illustrate the interconnected nature of any discussion about adequate standards for misdemeanor representation. There are different institutional competencies, and thus different potential responses, that courts, legislatures, defender offices, professional organizations, and others might bring to the misdemeanor representation crisis and the lack of standards. However, there must also be dialogue between those who fund criminal defense, examine its adequacy, write aspirational standards, and carry out the actual representation.

This Section focuses on the judiciary's role in defining the constitutional right to misdemeanor effective assistance of counsel. Courts face numerous structural obstacles to review of misdemeanor ineffective assistance claims, and this section first offers suggestions for reform to allow development of such a misdemeanor jurisprudence. The Section then considers issues courts will encounter in reviewing misdemeanor ineffective assistance claims. In ineffective assistance analyses, courts rely on three factors to determine if defense counsel offered deficient representation in violation of *Strickland's* first prong: (1) prevailing professional standards; (2) the norms of practice at the time and place of the representation at issue; and (3) court decisions applying these first two factors to a particular factual

²⁴⁷ See *supra* notes 70-75 and accompanying text.

²⁴⁸ See *supra* note 77 and accompanying text.

²⁴⁹ See, e.g., *State v. Smith*, 681 P.2d 1374 (Ariz. 1984) (holding that excessive caseloads of defenders lead to due process and right-to-counsel violations); *State v. Peart*, 621 So. 2d 780 (La. 1993) (finding ineffective assistance of counsel because attorney's excessive caseloads prevented adequate representation); see also *supra* notes 176-79 and accompanying text.

context, thus giving content to application of the norms.²⁵⁰ As Part II.B.2 reviews, prevailing professional standards such as the ABA *Criminal Justice Standards* offer insufficient guidance for misdemeanor representation for the first factor. Part II.B.1 also notes how there are few cases to provide content from the third factor. The second factor — practice norms at the time and place of the representation — poses a troubling issue for courts considering ineffective assistance claims: should constitutional attorney competence standards be driven by potentially low standards of practice in particular jurisdictions? The last part of this Section thus considers the many pitfalls and certain benefits of incorporating local practice norms and resource deprivation into the constitutional definition of ineffective assistance.

1. Structural Impediments to Development of Misdemeanor Ineffective Assistance Jurisprudence and Suggestions for Reform

Supreme Court precedent “make[s] clear that one searching for the content of the reasonably effective assistance standard must look primarily to judicial decisions applying that standard.”²⁵¹ For example, *Padilla v. Kentucky* addressed the right to effective assistance in the area of client counseling about collateral consequences, and *Wiggins v. Smith* informed attorneys that effective assistance includes the duty to investigate mitigation evidence in capital cases.²⁵² In areas that the Supreme Court has not directly examined, lower court decisions might provide this content,²⁵³ giving meaning to *Strickland*’s purposely vague and deferential standard of providing reasonably effective assistance of counsel.²⁵⁴

²⁵⁰ See, e.g., *Wiggins v. Smith*, 539 U.S. 510 (2003) (considering prevailing professional standards, local practice, and prior capital mitigation precedent in granting claim of ineffective assistance in capital case).

²⁵¹ LAFAVE, *supra* note 143, at 664 (referring to *Nix v. Whiteside*, 475 U.S. 157 (1986), and *Strickland v. Washington*, 466 U.S. 668 (1984)).

²⁵² See *Padilla v. Kentucky*, 130 U.S. 1473, 1485 (2010); *Wiggins*, 539 U.S. at 524; see also *supra* notes 166, 191 and accompanying text (discussing trainings in wake of *Padilla* and *Wiggins*).

²⁵³ See, e.g., *Boria v. Keane*, 99 F.3d 492, 495 (2d Cir. 1996) (finding ineffective assistance of counsel where lawyer failed to counsel defendant “that, although he never even suggested such a thought to the petitioner, it was [defense counsel’s] own view that his client’s decision to reject the plea bargain was suicidal”).

²⁵⁴ See *supra* note 201 and accompanying text (discussing need for deference in determining attorney competence); *supra* Part II.B.2.

a. *Structural Impediments*

In order for courts to provide the factual context that gives content to the vague ineffective assistance test, misdemeanor cases must work their way up the appellate ladder. However, not many misdemeanor cases make their way up this ladder, so that there is little opportunity for courts to apply general ineffective assistance norms to misdemeanor-specific facts.²⁵⁵ There are a number of reasons for the lack of appellate review in misdemeanor cases.

Perhaps the main reason courts fail to review misdemeanor cases is that the vast majority of misdemeanor convictions come after a guilty plea. For example, in New York City in 2003, less than one-third of 1% of misdemeanor convictions resulted from a trial verdict.²⁵⁶ In addition, individuals who plead guilty in the fast-paced, high-volume lower criminal courts may not even be aware of the right to appeal, or of the need to file a notice of appeal within a short time period after conviction.²⁵⁷ Even if a defendant is aware of the right to appeal, prosecutors sometimes insist on a waiver of the right as part of any plea bargain.²⁵⁸ Individuals who get past these obstacles will have long

²⁵⁵ See, e.g., SCALIA, *supra* note 184, at 2-3 (noting that in 1999, there were only five appeals for every 100 misdemeanor convictions in federal courts).

²⁵⁶ See Zeidman, *supra* note 26, at 321, n.35; see also OFFICE OF COURT ADMIN., ANNUAL REPORT FOR THE TEXAS JUDICIARY 48 (2009) (finding that only 1% of county court cases, which are predominantly misdemeanors, proceed to trial). This trend is not exclusive to misdemeanors. Percentages of felony prosecutions that end in a trial verdict have gone down from already low levels over the past few decades. See Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415-16 (2003) (noting that while by 2003 some states' federal plea rates had increased over the past decade to 99.0%, national federal trial rate was only 3.4% and decreasing).

²⁵⁷ See OR. REV. STAT. § 138.071 (2011) (defendant must file notice of appeal within thirty days after judgment entered). A recent report on the state of indigent defense in Florida's lower courts noted how "[a]fter sentencing at arraignment, only 23.7% of defendants were advised of their right to an appeal, and only 23.2% the right to an attorney for that appeal. In-custody defendants were less likely to be advised of their right to appeal than released defendants." See THREE-MINUTE JUSTICE, *supra* note 1, at 19. These troublingly low percentages were observed despite a Florida Rule of Criminal Procedure requiring trial judges to inform defendants of their right to appeal. FLA. R. CRIM. P. 3.670.

²⁵⁸ See, e.g., *United States v. Jemison*, 237 F.3d 911, 917 (7th Cir. 2001) ("An appellate waiver will be enforced if: (1) its terms are clear and unambiguous; and (2) the record demonstrates that it was entered into 'knowingly and voluntarily.'"). Such a waiver does not automatically foreclose a later claim of ineffective assistance. See, e.g., *Costin v. United States*, 588 F. Supp. 2d 280, 284 (D. Conn. 2008) ("[A] waiver is unenforceable if petitioner can prove that, because her counsel's advice was ineffective, her waiver was not knowing and voluntary."). However, courts allowing

finished any sentence by the time any appeal would be heard, thus undercutting the immediate incentive to revisit the underlying conviction.

In addition, any direct appeal of a misdemeanor conviction will rarely include consideration of an ineffective assistance claim. Direct appeal is limited to review of the trial court record, which often does not contain evidence of the alleged incompetence of defense counsel, particularly if the conviction came after a guilty plea.²⁵⁹ Thus, “almost all jurisdictions prefer that ineffective assistance claims be presented on collateral attack,”²⁶⁰ where the petitioner can develop a factual record through the petition and any evidentiary hearings. In short, a defendant has to get past direct appeal — where few misdemeanors go to begin with — and then develop a record on collateral review.²⁶¹

The first opportunity for most individuals convicted of a misdemeanor to raise an ineffective assistance claim is through a petition for post-conviction relief. Statutory and judicially created

such a claim to go forward may narrowly circumscribe the scope of review. *See Parisi v. United States*, 529 F.3d 134, 138 (2d Cir. 2008) (noting that in analyzing ineffective assistance claim where defendant waived right to appeal, court may only consider *process* by which defendant agreed to plead guilty and thus may not consider any pre-plea events). In addition, once a defendant waives the right to appeal, and there is no attorney assigned to handle the appeal, it is highly unlikely that anyone will review the case to determine if there is a viable ineffectiveness claim. It is also unlikely that the defendant will file the requisite notice of intention to appeal. *See, e.g., OR. REV. STAT. § 138.071* (2003) (defendant must file notice of appeal within 30 days after judgment entered).

²⁵⁹ In many jurisdictions the same lawyer or organization that handled the trial will handle the appeal, and that person or group is “unlikely to look to their own ineptitude in developing grounds for appeal.” KAMISAR ET AL., *ADVANCED CRIMINAL PROCEDURE* 143 (12th ed. 2008). An even more basic obstacle is that “a large number of misdemeanor convictions take place in police or justice courts which are not courts of record. Without a drastic change in the procedures of these courts, there would be no way” for the defendant to demonstrate error in the original proceeding or reconstruct evidence lost in the intervening period. *Nichols v. United States*, 511 U.S. 738, 748 (1994).

²⁶⁰ *See KAMISAR, supra* note 259, at 142; *see also United States v. Jeronimo*, 398 F.3d 1149, 1155-56 (9th Cir. 2005) (“[W]e will not remand a case from direct appeal for fact-finding related to an ineffective assistance of counsel claim, but allow a defendant to pursue the issue in district court collateral proceedings.”) (*citing United States v. Reyes-Platero*, 224 F.3d 1112, 1117 (9th Cir. 2000)).

²⁶¹ *See LAFAVE, supra* note 143, at 1333 (“Every jurisdiction has one or more procedures through which defendants can present post-appeal challenges to their convictions and sentences on at least limited grounds. In addition, through the federal writ of habeas corpus, a state defendant may challenge his state conviction on federal constitutional grounds in the federal courts. These procedures for presenting post-appeals challenges are commonly described as ‘collateral remedies.’”).

impediments to post-conviction relief are extensive. The list is too long to document here, but a few examples suffice to understand why one commentator recently noted that “[a]t enormous expense, the system grants relief to almost nobody.”²⁶² First, there is no federal constitutional right to counsel on post-conviction review, so many petitioners proceed *pro se*.²⁶³ Second, both federal and state habeas courts have numerous opportunities to find procedural default, such as for a petitioner’s failure to raise an issue in an earlier proceeding.²⁶⁴ Third, the federal habeas corpus statute as well as twenty-four state habeas statutes or rules have a jurisdictional prerequisite that an individual filing a petition be “in custody.”²⁶⁵ Courts have found custody where the individual seeking federal habeas review is imprisoned for the conviction, on parole or probation, serving a suspended sentence, or under court-ordered treatment in the community.²⁶⁶ A person seeking post-conviction relief from a

²⁶² Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 4 (2010) (referring to federal habeas corpus review); see also *id.* at 9-12 (providing an excellent explanation of myriad bars to federal habeas corpus relief).

²⁶³ See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today.”). Some states grant post-conviction counsel through statute, court rule, or at the court’s discretion, although in other jurisdictions the right is limited to death-sentenced defendants. See Thomas M. Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appoint Counsel*, 98 KY. L.J. 301, 326 (2010) (noting that “majority of states appoint counsel in collateral proceedings in non-capital cases and thirty-three states provide counsel in capital cases.”); see also Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1 app. A (2002) (providing chart breaking down how, as of 2002, 34 states discretionarily provided post-conviction counsel, 13 states guaranteed it, and 3 states did not provide for post-conviction counsel).

²⁶⁴ See, e.g., *Martinez v. Schriro*, 623 F.3d 731, 742-43 (9th Cir. 2010) (finding procedural default on federal habeas corpus because defendant failed to raise ineffective assistance claim in earlier state post-conviction proceeding, even while acknowledging that post-conviction counsel may have been ineffective for so failing to raise that claim). While there is no such state exhaustion requirement for individuals convicted in federal court, the overwhelming majority of convictions come out of the state courts. See Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2004*, in U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULL. 1 (Ser. No. NCJ 215646, 2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc04.pdf> (noting how in 2004, “94% of felony convictions occurred in State courts, remaining 6% in Federal courts”).

²⁶⁵ See 28 U.S.C. § 2254(a) (2010) (federal habeas statute); Place, *supra* note 263, at 327 n.203 (listing state statutes and court rules).

²⁶⁶ See Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 153 (2000) (citing cases).

misdeemeanor conviction will be long free of such restraints. Although the Supreme Court has never directly ruled on the question of whether severe collateral consequences (such as deportation) sufficiently restrain liberty to constitute custody, language in related decisions “strongly suggests that such collateral effects would be insufficient.”²⁶⁷ Given these obstacles, it is not surprising that a recent study of federal habeas corpus litigation in the United States District Courts found, in a sample of 1,512 non-capital cases, only “[f]ive . . . had a misdemeanor as the most serious offense of conviction.”²⁶⁸

In the end, the prospects are stark even for those few petitioners able to pick through the minefield of impediments to review of an ineffective assistance claim; in non-capital federal habeas petitions, judges grant relief in less than 1% of cases.²⁶⁹ These obstacles are a central reason that one of the three sources for ineffective assistance norms²⁷⁰ — guidance from judicial decisions — is underdeveloped and adds to the problem of a virtually non-existent jurisprudence of misdemeanor ineffective assistance.

b. Suggestions for Avoidance of Structural Impediments, and Reform

There are several ways for courts and litigants to avoid obstacles to the development of a body of law on misdemeanor ineffective assistance. One possibility is for state and federal courts to include

²⁶⁷ Yale L. Rosenberg, *The Federal Habeas Corpus Custody Decisions: Liberal Oasis or Conservative Prop*, 23 AM. J. CRIM. L. 99, 115 n.111 (1995) (discussing *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)); see also *Maleng v. Cook*, 490 U.S. 488, 491 (1989) (“[O]nce the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not in themselves sufficient to render an individual ‘in custody’ for the purposes of a habeas attack upon it.”). *But see infra* text accompanying notes 271-74, arguing that courts deciding whether severe collateral consequences satisfy the “in custody” requirement should interpret the requirement liberally, and in light of the Supreme Court’s recent *Padilla* decision.

²⁶⁸ NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 20 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

²⁶⁹ See Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 809 (2009); see also *Murray v. Giarratano*, 492 U.S. 1, 23-24 (1989) (“Federal habeas courts granted relief in only 0.25% to 7% of noncapital cases in recent years.”). In addition, as explored above there are fewer trials in misdemeanor cases, and “[p]leas account for nearly 95% of all criminal convictions. But they account for only approximately 30% of the habeas petitions filed.” *Padilla v. Kentucky*, 130 U.S. 1473, 1485 (2010) (citing VICTOR E. FLANGO, NAT’L CTR. FOR STATE COURTS, HABEAS CORPUS IN STATE AND FEDERAL COURTS 36-38 (1994)).

²⁷⁰ The other two sources being prevailing professional norms and local practice. See *supra* text accompanying note 250 (describing three factors that inform analysis of alleged attorney deficiencies).

severe collateral consequences in their interpretation of the state or federal habeas statutes' "in custody" requirement. This would be timely given the current era of growing and high stakes collateral consequences,²⁷¹ and the Supreme Court's decision establishing a defendant's right to information about deportation before any guilty plea in the wake of *Padilla v. Kentucky*.²⁷² *Padilla* is notable for Justice Stevens's discussion of the severe effect that deportation can have on an individual's life, and the Court's "view that, as a matter of federal law, deportation is an integral part-indeed, sometimes the most important part-of the penalty that may be imposed on non-citizen defendants who plead guilty to specified crimes."²⁷³ As a number of courts and commentators have noted in the wake of *Padilla*, surely other consequences are equally severe for some defendants and thus similarly integral to the criminal penalty.²⁷⁴ A broader interpretation of the "in custody" requirement would open up this avenue to consideration of claims of ineffective assistance where defense counsel failed to warn about deportation or other severe collateral consequences.

Alternatively, courts might follow the Third Circuit's example in its recent approval of the federal writ of *coram nobis* as an avenue of relief for individuals no longer "in custody" and thus unable to access federal habeas corpus relief.²⁷⁵ In *United States v. Orocio*, Gerald Orocio pled guilty in federal court to simple possession of a controlled substance in exchange for a sentence of time served plus two years of supervised probation after turning down an earlier offer to plead guilty to drug trafficking with a ten-year sentence. After completing his probation, Orocio received notice that the government had initiated removal proceedings to send him back to his birth country of the Philippines.²⁷⁶ The Third Circuit granted Orocio's petition for relief based on counsel's failure to warn him about the deportation consequence of his plea, noting how the federal writ of *error coram nobis* "is used to attack allegedly invalid convictions which have continuing consequences, when the petitioner has served his sentence

²⁷¹ See *supra* Part I.B.

²⁷² 130 S. Ct. 1473 (2010).

²⁷³ *Id.* at 1480.

²⁷⁴ See, e.g., *Taylor v. State*, 304 Ga. App. 878, 884 (Ct. App. 2010) (applying *Padilla's* duty to warn to consequence of sex offender registration); see also *Love*, *supra* note 90, at 24-25.

²⁷⁵ *United States v. Orocio*, 645 F.3d 630, 635 n.4 (3d Cir. 2011) (quoting *United States v. Stoneman*, 870 F.2d 102, 105-06 (3d Cir. 1989).

²⁷⁶ *Id.* at 634.

and is no longer ‘in custody’ for purposes of [the federal habeas corpus statute].”²⁷⁷

Some jurisdictions allow state *coram nobis* review for ineffective assistance of counsel claims that cannot otherwise be litigated,²⁷⁸ while others have effectively closed it as an avenue for such review.²⁷⁹ At least one state court has allowed use of the writ in the context of a misdemeanor conviction.²⁸⁰ Just as courts should ease the “in custody” requirement to allow for state and federal habeas claims, courts should allow more liberal use of the writ of *coram nobis* to generate critical jurisprudential development of misdemeanor effective assistance.

More ambitious solutions can be found in the recent scholarly literature condemning the current highly restrictive and wasteful state of federal and state habeas corpus. Proposing a practical solution to two related criminal procedure problems, Professor Eve Brensike Primus has called for the “relocation” of ineffective assistance claims from post-conviction review to direct appeal.²⁸¹ The first problems she identifies are the structural impediments discussed above. Second, Primus describes the waste of resources during direct review of criminal convictions, where the defendant has a constitutional right to counsel and, therefore, where public funds for a largely indigent

²⁷⁷ *Id.* at 647 n.4; *see also* 28 U.S.C. § 1651(a) (2011) (empowering federal court, under All Writs Act, to issue writ of error *coram nobis*); *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987) (noting that *coram nobis* “petitioner must show the following to qualify for *coram nobis* relief: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character”); *United States v. Kwan*, 407 F.3d 1005, 1011 (9th Cir. 2005) (same).

²⁷⁸ *See, e.g.*, *Thompson v. State*, 525 So. 2d 820, 830 (Ala. 1985) (“*Coram nobis*, therefore, can now be used to raise claims of inadequate assistance of counsel”).

²⁷⁹ *See, e.g.*, *People v. Gallardo*, 77 Cal. App. 4th 971, 987 (Ct. App. 2000) (“A claim that the defendant was deprived of effective representation of counsel is not an appropriate basis for relief by writ of *coram nobis*.”); *Commonwealth v. Morris*, 092346, 2011 WL 111692, at *5 (Va. 2011) (“[A] claim of ineffective assistance of counsel does not constitute an error of fact for which *coram nobis* will lie . . . because such a claim would not ‘have prevented rendition of the judgment.’”).

²⁸⁰ *See Desquesada v. State*, 444 So. 2d 575, 576 (Fla. Dist. Ct. App. 1984). Unfortunately, *Desquesada*’s review of the merits of the underlying ineffective assistance claim was limited to one sentence, thus failing to advance that jurisdiction’s norms for such representation. *See id.* at 576-77 (“[R]eview of *Desquesada*’s allegations of ineffective assistance of counsel, as well as a perusal of the attached affidavits and portions of the trial transcript which he submitted . . . shows that the allegations are substantively insufficient”).

²⁸¹ Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 731 (2007).

population are directed. The waste comes from the inability of appellate attorneys to raise issues on direct review that the trial attorney failed to preserve, so that “public defenders routinely spend their time arguing frivolous appeals.”²⁸² Her solution to these dual, related problems is to allow attorneys handling direct appeals to raise ineffective assistance claims and to ease up on rules barring such attorneys from looking outside the trial record to support such claims.²⁸³ Primus’s relocation proposal is particularly intriguing for misdemeanor representation,²⁸⁴ and such relocation would surely benefit the anemic jurisprudence of ineffective assistance in misdemeanor cases.

In another recent structural proposal, Professors Nancy King and Joseph Hoffman call for “a solution that would allow the states to shift dollars that they now waste at the back end forward to trial and appeal at the front end, where those resources can make the kind of meaningful difference for the accused that Strickland and post-conviction review never could.”²⁸⁵ This re-allocation of resources might, like Primus’s relocation proposal, advance ineffective assistance jurisprudence in misdemeanor cases. King and Hoffman propose a quid pro quo under which a state that “takes specified steps to effectively reform its system of defense representation at the trial and appellate level” would get the benefit of “scaled back” federal habeas review as well as federal funds for providing adequate front-end representation. In addition to this carrot, King and Hoffman propose the stick of expanded federal habeas review in jurisdictions that fail to undertake such “front-end reforms.”²⁸⁶ Although it is not clear that King and Hoffman would include non-felonies in their proposal due to financial constraints,²⁸⁷ such incentives for front-end reforms, and

²⁸² *Id.* at 682; *see also id.* at 679 n.d1 (noting that Primus was public appellate defender in Maryland).

²⁸³ *Id.* at 682.

²⁸⁴ *Id.* at 694-95 (noting “the grim reality is that the performance of trial counsel in almost all misdemeanor and many felony cases is largely unchecked,” and that ineffectiveness caused by the failure to provide adequate defender resources “appears to be at its zenith for precisely those defendants who are least likely to pursue ineffective assistance of counsel claims”).

²⁸⁵ Nancy J. King & Joseph L. Hoffman, *Envisioning Post-Conviction Review for the Twenty-First Century*, 78 *Miss. L.J.* 433, 441 (2008). For a more comprehensive exploration of this proposal, see Hoffman & King, *supra* note 269.

²⁸⁶ *Id.* at 442.

²⁸⁷ *See id.* at 447 (stating that “[a] third revenue source may be needed because the cost of providing adequate counsel to all of those facing *felony* charges probably dwarfs, in most states, the present cost of post-conviction review for those locked up long enough to seek it” (emphasis added)).

penalties for lack of reforms, would be particularly significant in the arena of misdemeanor representation.

A critical component of front-end reform to indigent defense is the willingness of those involved in ineffective assistance, including defenders, prosecutors, and judges, to act. Defenders in a number of jurisdictions, including Miami-Dade County, Kentucky, Minnesota, Missouri, Maryland, Arizona, and Tennessee, have cited their professional and constitutional duty to provide effective assistance in turning down assignments to handle more cases or suing to reduce excessive caseloads.²⁸⁸ These defender offices acted despite the difficulties for defense lawyers in turning away clients in need, and in challenging the very system within which they work. However, “[w]ith public defender workloads growing while funding is being reduced, more offices may soon follow their lead.”²⁸⁹ Judges have an important role to play in these situations, both in dealing with the defenders in their courtrooms who refuse to accept further cases, and in analyzing the issues in jurisdictions where the crisis has led to individual or class action lawsuits challenging the validity of the indigent defender system.²⁹⁰ In addition, prosecutors often witness off-the-record ineffective assistance in dealing with defense counsel during negotiations or many of the other points of contact outside the courtroom where the parties might discuss a client’s case (such as during the discovery process).²⁹¹ Although the potential for adversarial

²⁸⁸ See, e.g., *State v. Bowens*, 39 So. 3d 479 (Fla. App. 2010) (certifying public defender office’s claim of conflict-of-interest arising from excessive caseloads to Florida Supreme Court); Jeff Adachi, *Budget Cuts Threaten Promise of Equal Justice*, THE RECORDER, Feb. 13, 2009 (listing other jurisdictions), available at <http://sfpublicdefender.org/media/2009/04/budget-cuts-threaten-promise-of-equal-justice/>; see also ABA, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1 (2002) (Principle One on need for independent public defense function), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf>; Zeidman, *supra* note 71, at 6 (describing recent caseload cap initiative in New York State).

²⁸⁹ Adachi, *supra* note 288.

²⁹⁰ See Drinan, *supra* note 176, at 439-43 (discussing such systemic challenges); see also AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* 2-3 (2009) (“The system involves too many players to hold one accountable for the routine injustice happening in courtrooms across America.”)

²⁹¹ See, e.g., Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 222 n.124 (1988) (stating that “prosecutors are uniquely positioned to observe incompetent and lazy representation of defendants”); Vanessa Merton, *What Do You Do When You Meet a “Walking Violation of the Sixth Amendment” If You’re Trying to Put That Lawyer’s Client in Jail?*, 69 FORDHAM L. REV. 997, 1005-17 (2000) (describing prosecutor’s real-life experience when she witnessed ineffective representation of defendant).

advantage may be tempting, rules of professional responsibility and constitutional constraints bind prosecutors where they have knowledge of inadequate assistance of counsel.²⁹² Prosecutorial identification of ineffective assistance at the trial level, which would help enable judges to act immediately, offers another avenue for front-end reform and thus helps avoid the significant obstacles to post-conviction litigation of ineffective assistance in misdemeanor cases.

Finally, in what would perhaps be the most simple, effective, and cheapest way to move review of inadequate counsel to the front end of the criminal justice process, judges should follow the example of the trial court judge who stated: “If a defendant appearing in my courtroom is not being provided with the effective assistance of counsel, then I am obligated to intervene and protect that defendant’s rights.”²⁹³ Unfortunately, many judges witness ineffective assistance at the misdemeanor trial level on a regular basis. Judges might confront the same issues of lack of independence that plague many defender offices. However, trial courts could have great impact on the front end of delivery of defense services by being proactive when ineffective assistance unfolds in front of them and fulfilling their responsibility to identify and ameliorate constitutional violations.²⁹⁴ The deference to strategic decision-making that the Supreme Court requires in its ineffective assistance jurisprudence does not extend to the trial judge, who has the right and responsibility to ask about quality of representation.²⁹⁵ This may take a few extra minutes for each case, but

²⁹² See, e.g., MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2002) (“[L]awyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”).

²⁹³ COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK add. (2006) (Additional Commentary of Hon. Patricia D. Marks), available at http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

²⁹⁴ See generally Richard Klein, *The Relationship of the Court and DC: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531 (1988) (discussing various techniques that trial judges might use to evaluate defense counsel’s degree of pretrial preparation, including pretrial conferences and use of a pretrial worksheet for core defense tasks, in part to create a record for any post-plea ineffective assistance claims).

²⁹⁵ See Mary Sue Backus, *The Adversary System is Dead; Long Live the Adversary System: The Trial Judge as the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 951 (“This article argues that trial court judges must step into the breach and restore the integrity and fairness of the adversary system and, ultimately, the legitimacy of criminal convictions. The trial judge’s role in safeguarding the rights of the accused and the interests of the public is not simply a professional duty, but an

performing such inquiries on the record could encourage better representation, help define acceptable levels of practice, and save resources by uncovering ineffectiveness at the front end.

2. The Problem of Resource Deprivation Driving Constitutional Rules

In ineffective assistance cases that explore the attorney competence prong of *Strickland*, the dominant principle is that lack of diligence is a violation whereas simple bad judgment by defense counsel is deemed “strategic decision-making.”²⁹⁶ This creates real cause for concern in misdemeanor cases, where there is often no diligence at all. Can it ever be reasonable strategy for defense counsel to meet a client for the first time in court, spend a few minutes discussing a plea bargain with him while everyone waits impatiently, and then stand next to him as he enters a “negotiated” guilty plea?²⁹⁷ The stark situation begs the question: can triage that is necessary under the current criminal justice system be part of the ineffective assistance inquiry, thus dragging standards down to the unacceptable levels that under-resourcing creates?²⁹⁸

ethical obligation. Trial judges are uniquely situated to identify substandard defense representation.”); Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L. J. 73, 121-22 (2009).

²⁹⁶ See *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”).

²⁹⁷ See Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 144 (1986) (contending that “hurried conference” with the defendant and a near universal loss of pretrial discovery in misdemeanor cases make it impossible to view a plea bargain as a “plausible compromise by fully-informed decision makers”); see also *GIDEON’S BROKEN PROMISE*, *supra* note 18, at 16 (describing “meet them and plead them” method of representation in various states); *RACE TO THE BOTTOM*, *supra* note 2, at 15-22 (describing Michigan situation); Zeidman, *supra* note 26, at 336-43 (describing New York City criminal courts).

²⁹⁸ See Brown, *supra* note 27, at 821 n.78 (2004) (discussing how allocation of public defender resources is analogous to triage); Mitchell, *supra* note 26, at 1239-48 (discussing how realities of lower court system require public defenders to engage in “the practice of triage”); see also *GIDEON’S BROKEN PROMISE*, *supra* note 18, at 7-8, 17-18 (discussing realities of overburdened defense counsel straddled with excessive caseloads); Jane Fritsch & Matthew Purdy, *Defenders by Default: A Special Report: Option to Legal Aid for Poor Leaves New Yorkers at Risk*, N.Y. TIMES, May 23, 1994, at A1 (detailing problems with New York’s “assigned counsel” system for some indigent defendants).

Dissenting in *Strickland*, Justice Marshall raised critical questions about implementing the two-prong test announced in that case. Justice Marshall observed that the majority failed to clarify whether the reasonableness of attorney performance should be judged in relation to norms of “adequately paid retained lawyer[s]” or overburdened appointed counsel.²⁹⁹ This point is particularly potent in the context of misdemeanor cases. Courts assessing the effectiveness of a misdemeanor attorney must decide whether to judge that performance as reasonable under the particular circumstances present in that jurisdiction, which might include high workloads and few resources, or instead as reasonable where defense counsel is adequately resourced.

Although not in the misdemeanor context, a number of courts have touched on this resource issue in the wake of *Strickland* and have taken counsel’s time limitations as well as office resources into account in deciding what qualifies as effective assistance. For example, the Fourth Circuit noted how “the reasonableness of an investigation . . . must be considered in light of the scarcity of counsel’s time and resources in preparing for a sentencing hearing . . .”³⁰⁰ In another decision, granting an ineffective assistance claim for failure to pursue a viable affirmative defense, the Fourth Circuit emphasized that “in this case, counsel’s deficient performance did not . . . involve a difficult choice on how to allocate precious legal resources.”³⁰¹ This implies that resource allocation could be part of an ineffective assistance analysis, and the court’s choice of words suggests that such an analysis might excuse or give more leeway to decisions made in the face of limited resources.

In *Harrington v. Richter*, the Supreme Court stated that “[c]ounsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.”³⁰² However, both *Harrington* and the Circuit Court of Appeals decisions based their holdings of failure to show ineffective

²⁹⁹ *Strickland*, 466 U.S. at 708 (Marshall, J., dissenting).

³⁰⁰ *McWee v. Weldon*, 283 F.3d 179, 188 (4th Cir.), *cert. denied*, 537 U.S. 893 (2002); *see also* *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994) (stating that whether decision not to conduct particular investigation was reasonable “reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources”).

³⁰¹ *United States v. Mooney*, 497 F.3d 397, 404 (4th Cir. 2007); *see also* *Mahaffey v. Page*, 151 F.3d 671, 685 (7th Cir.) (citations omitted) (articulating need to “consider the limited time and resources that defense lawyers have in preparing for a sentencing hearing”), *vacated in part on other grounds*, 162 F.3d 481 (7th Cir. 1998).

³⁰² *Harrington v. Richter*, 131 S. Ct. 770, 789 (2011).

assistance largely on findings that defense counsel had sound strategic reasons to avoid the particular line of investigation.³⁰³ Thus, courts have generally avoided grappling directly with issues of resource deprivation.

Taking caseloads and resources into account would be particularly problematic with misdemeanors, where clients often get the short end of the limited-resources stick. The reality of the lower courts calls into question the firmly entrenched deference to attorneys' strategic decision-making in Sixth Amendment jurisprudence, at least insofar as strategy is analyzed as going beyond the one case under review. The circuit court decisions noted above clearly contemplated strategy to include the need to make hard resource decisions based on caseloads and funds; strategy was not specific to the case but rather to the attorney, the defender office, or the jurisdiction. Such an approach makes it constitutionally permissible to shortchange one client if such action is intended to benefit another client. For misdemeanor defendants, low on any resource-deprived attorney's or office's list, everyone else comes first. While one might argue that the Supreme Court's ineffective assistance jurisprudence is concerned with strategy within the particular case, the Court has never explicitly endorsed such an approach and, thus, has never dealt with Justice Marshall's legitimate concerns about resource limits.

To bring the resource issue to its most troubling conclusion, if strategy is not case specific, then a state or county legislature may purposely underfund lower-level cases, or even statutorily mandate that fewer resources go to such cases. Is it principled to allow inadequate representation where the legislature has so underfunded criminal defense that high caseloads and low resources are inevitable? Surely, having this built into the jurisprudence of effective assistance is a perverse incentive in an already besieged area.

3. The "Localism" Problem in Ineffective Assistance Jurisprudence

Courts consider three sources in analyzing an ineffective assistance claim: prevailing professional standards, norms of local practice, and precedent.³⁰⁴ With the second factor, norms of practice in the

³⁰³ In *McWee*, for example, counsel did not fully explore their client's family mental health history, but counsel had also decided on a sentencing case theory that "primarily focused on McWee's positive attributes and the basically good life that he led before he met George Wade Scott, his accomplice." *McWee*, 283 F.3d at 189. The Court noted that a focus on the myriad mental health problems in Harrington's family could well have undermined the chosen sentencing theory. *Id.*

³⁰⁴ See *supra* text accompanying note 250.

particular jurisdiction, the Supreme Court has directed courts to consider both “where” the case on review occurred and “when” the case was litigated in determining if a particular lawyer rose to the expected level of competence.³⁰⁵ Thus, in *Wiggins v. Smith*, the Supreme Court looked at Maryland practice at the time of the mitigation phase of Wiggins’ death penalty trial as part of the equation for determining whether Wiggins’s attorneys provided ineffective assistance.³⁰⁶ Although the result in *Wiggins* was that counsel had to rise to the level of local practice to meet the constitutional floor for effective assistance, this will not always be the case. Rather, poor representation might be excused as the local norm. For example, a defendant in Maryland would enjoy better representation than a defendant in Alabama if there were more resources — and thus a higher standard — in Maryland. Even within one state, under this approach someone charged with a crime in a city could be constitutionally entitled to a higher level of representation than someone charged with that same crime in a rural county.

The Court has not explained why it relies in part on local norms in assessing counsel’s competency. Certainly there are a number of potential benefits to incorporating local practice norms into the constitutional definition of effective assistance (referred to here as “localism”). This section briefly considers those benefits, but explains why they are either misguided or can be achieved in a better way.

One major argument for localism is that it allows for greater flexibility in recognizing that different jurisdictions have different formal rules of procedure. Local culture — both of the jurisdiction generally and of the local courthouse — also affects how lawyers interact with other lawyers, judges, clients, and juries. Navigation of the local culture requires local knowledge. This local knowledge is encapsulated in local practices and is developed through experience, making it intuitive and thus hard to clearly articulate. The complexity in clearly articulating necessary local knowledge makes it a difficult topic for critique and comparison, highlighting the need for flexibility.

Localism’s flexibility recognizes the reality that criminal cases can progress quite differently depending on the jurisdiction. These differences may call for varying levels and types of defense counsel

³⁰⁵ See *Wiggins v. Smith*, 539 U.S. 510, 511 (2003) (“Standard practice in Maryland capital cases at that time included the preparation of a social history report.”); Blume & Neumann, *supra* note 161, at 151 (“In effect, when considering the adequacy of trial counsel’s investigation, courts must now look to ABA standards, as well as local practice, in order to determine whether the Sixth Amendment has been satisfied.”).

³⁰⁶ *Wiggins*, 539 U.S. at 524.

involvement in a case. An example based on my own experience defending individuals charged with misdemeanors in three very different jurisdictions illustrates this point.³⁰⁷ Consider a Mr. Jones, an indigent man charged with misdemeanor heroin possession. Mr. Jones lives with his children in public housing; he has one prior conviction from five years earlier for misdemeanor drug possession. Imagine that the street stop of Mr. Jones, who was in front of the grocery store near his house with a group of men when searched, raises legitimate Fourth Amendment issues.

If Mr. Jones were arrested in Manhattan, he would meet his attorney for the first time at his arraignment, when he would likely receive a plea bargain offer from the prosecutor or an offer to plead guilty in exchange for an agreed-upon sentence from the judge.³⁰⁸ Because of the high volume of misdemeanors in Manhattan's arraignment courtrooms, Mr. Jones — assuming that he had only a minimal criminal record — might be told that he could have a sentence of time served should he plead guilty to the possession misdemeanor. However, his defense counsel would also know that many misdemeanors are dismissed in New York City under the state's speedy trial statute but normally only after a defendant has appeared numerous times on the case.³⁰⁹ Thus, while Mr. Jones might have a strong claim for suppression of the heroin (and thus dismissal of the case), he would not get a hearing for many months, during which time the offer to plead guilty for no additional jail time would likely be re-offered many times. If he could continue to appear in court, he might win suppression or a speedy trial dismissal.

Four and a half hours away in Syracuse, New York, Mr. Jones would be in quite a different situation. He might have been offered the option of appearing in drug treatment court, where his case would be dismissed if he completed a drug treatment program. Mr. Jones's lawyer would be invited, but not required (and perhaps not encouraged), to attend Mr. Jones's drug treatment court appearances,

³⁰⁷ My practice experience was as a public defender from 1996–2001 in New York City, and then teaching a criminal defense clinic from 2005–2009 in Syracuse, New York, and 2009 to the present in Montgomery County, Maryland. Thus, these examples reflect local practice and culture during those time periods.

³⁰⁸ See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 32 n.10, 82 (2002) (“In a charge bargain, the prosecutor agrees to dismiss some charges in return for a plea of guilty to the remaining charges,” whereas sentence bargains entail “conversation [that] relates directly to the sentence rather than to the crime of conviction.”).

³⁰⁹ See N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2011) (noting statutory speedy trial periods).

where the judge would get updates about Mr. Jones's progress or problems in treatment. After a first problem, such as a positive drug test, Mr. Jones could remain in the program only if he pled guilty to the possession charge. The court would not impose a sentence at this point, however, and would agree to vacate his guilty plea upon completion of the program. After the guilty plea, any suppression advocacy would be off the table. At a later court appearance, defense counsel might learn that Mr. Jones had failed another drug test and that the judge was going to incarcerate him until there was a bed for him at an in-patient program. Should Mr. Jones later fail to complete that program, he could expect to be sentenced (remember, he pled guilty earlier) to the maximum sentence for misdemeanor possession in New York State — one year in jail.

Finally, Mr. Jones would have yet another experience in district court in Montgomery County, Maryland. He would have no lawyer at all at his initial appearance, where the “judicial officer” would either release him or set bail.³¹⁰ He would first meet his lawyer at or just before his trial date, some thirty days later.³¹¹ Counsel would tell Mr. Jones that he would not qualify for the intensive drug education program that leads to an effective dismissal of the charges because he already had a drug conviction. He would have two choices that day. First, he could plead guilty to the charge and hope for one of a variety of potential sentences that would not involve jail time. Because district court judges will not promise any sentences before the plea, counsel would have to tell Mr. Jones that the judge could give him any sentence up to the statutory maximum of four years for misdemeanor possession. Of course counsel would also tell Mr. Jones what sentence he thought was likely. Second, he could try to win suppression in the lower criminal court. His lawyer would tell him that the suppression hearing would take place that day, in the middle of a bench trial, when the prosecution attempted to admit the heroin into evidence. Mr. Jones would also learn that, if he did not get suppression during the trial and was then convicted of possession, under Maryland's *de novo* system for misdemeanors he could appeal his case to the Circuit Court

³¹⁰ MD. RULES § 4-213 (West 2004). *But See* Richmond v. Maryland, No. 24-C-06-009911, 2007 WL 5446238 (Md. Cir. Ct. Sept. 30, 2010), *cert granted sub nom.* DeWolfe v. Richmond, 429 Md. 81 (Md. 2011).

³¹¹ This fast-track trial scheduling is based on my personal experience supervising clinic students in the District Court of Maryland for Montgomery County. There is no Maryland statute that requires this particular process.

to get another suppression hearing and a jury trial.³¹² He might also receive a plea bargain in that court.

The descriptions of these three different courts show how taking local practice into account in setting constitutional norms allows for flexibility. But they also illustrate how the chaos of the particular system may dictate a local culture of passivity instead of zealotry. There are thus two ways to view these three different descriptions of Mr. Jones's case. The first view argues that these three descriptions illustrate that local rules, practice, and culture lead to three quite different situations, all of which require different approaches to advocacy and some different skill sets. The need to quickly interview a client and witnesses, and then litigate a suppression hearing, trial, and possible sentencing in a few short hours is quite different from the need to intensively counsel a client about the pros and cons of drug treatment court, including the likelihood of winning the suppression issue that the client would have to forgo to enter drug court. These needs, in turn, are both different from the task of counseling a client under time pressure at an arraignment about a plea offer, and to explain the workings of a non-intuitive justice system where cases are on the court calendar for a year or longer, only to end in dismissal for a speedy trial violation. This first view thus embraces localism in setting effective assistance standards.

This Article advances a second view: when resource deprivation determines culture, ineffective assistance jurisprudence should not excuse inadequate representation in the name of localism. For example, lawyers struggling to adequately counsel clients facing plea decisions at a first appearance should not be excused as a necessary facet of practice in a locality that relies heavily on plea bargaining and guilty pleas at the first appearance. Similarly, the specter of lawyers attempting to meet the client for the first time, and to prepare for and possibly go to trial in several cases on the same day cannot be acceptable under a theory of localism that would be consistent with the purposes of the Sixth Amendment.

This second view is not entirely at odds with the first view. Legitimate differences in local practice that arise from valid decisions about how to administer a lower court should be taken into account in ineffective assistance jurisprudence. For example, a number of states have made the valid choice to use a *de novo* system in the lower courts,³¹³ as described above in the Maryland example of Mr. Jones's

³¹² MD. RULES §§ 7-101, 7-102(a) (West 2004) (noting how appeals from lower courts to circuit court "shall be tried de novo in all . . . criminal actions").

³¹³ See David Harris, *Justice Rationed in the Pursuit of Efficiency: De Novo Trials in*

case. Other states use one system for both misdemeanors and felonies, so that the right to appeal a conviction takes the traditional route of direct review rather than a new hearing and trial in the court of higher jurisdiction.³¹⁴ Evaluation of the reasonableness of defense counsel's actions in a case litigated in a *de novo* system might differ from actions taken in a traditional appellate system.

While a particular case might unfold in very different ways in different places, there is clearly much that defense advocacy has in common wherever it is undertaken. Thus, a clear articulation of the common tasks expected of misdemeanor lawyers — at least at a general level — would set a baseline consistent with reasonably adequate lawyering expected in all cases. All of the hypothetical lawyers representing Mr. Jones should interview him, and then investigate the case, which might include a visit to the scene of the search and seizure, review of applicable Fourth Amendment law, and inspection of the evidence. Any of the three lawyers would also counsel Mr. Jones about the viability of the suppression motion as well as any serious collateral consequences of a drug conviction, which would include the likelihood of both his children and him losing their public housing. These are just a few of the many basic, common tasks essential to the misdemeanor representation of Mr. Jones, regardless of the place of arrest.

Justice Marshall's insightful *Strickland* dissent raised a further critical issue: "It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale?"³¹⁵ Again, this discrepancy is particularly troubling when asked in the context of misdemeanor representation. Can the norms of practice control when they range from outright violation of the right to counsel (pleas taken or even trial conducted with no lawyer appointed), to "a live body next to you" representation, to excellent work in particular jurisdictions on minor cases? Certainly quick pleas with little consultation and little-to-no review of the evidence are common practice.³¹⁶

the Criminal Courts, 24 CONN. L. REV. 381, 385 (1992) (finding that "[t]wenty-four state utilize de novo systems").

³¹⁴ See, e.g., N.Y. CRIM. PROC. LAW § 460.10 (McKinney 2005) (governing appeals).

³¹⁵ *Strickland v. Washington*, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting) (citing *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970)) (noting required performance level is "customary skill and knowledge which normally prevails at the time and place").

³¹⁶ See sources cited *supra* notes 133-34 (noting such problems in variety of jurisdictions).

To put the locality issue into stark light, imagine a county defender office strapped for resources that decides to institute a practice of no investigation in misdemeanor cases so that the office can devote its entire investigatory budget to felonies. Because one of the three sources for determining levels of ineffective assistance is local norms, one must ask how a court reviewing a claim in this jurisdiction would factor in this unfortunate practice. This norm of practice arises not out of a principled determination about what level of service is necessary to ensure just outcomes, but rather comes from the inevitable abdication of defense responsibility in the face of insurmountable resource deprivation combined with overwhelming caseloads.³¹⁷ Such a practice would certainly violate professional standards, including the ABA Standard that calls for thorough investigation.³¹⁸ How will a court reconcile this conflict between local practice and national professional standards?³¹⁹ Clearly, there will always be unequal levels of indigent representation because some defender systems offer more than the constitutional minimum in terms of the services they provide. The issue here is whether the constitutional minimum — the floor of competent performance below which defense counsel cannot perform — should differ based on where a particular person is charged.

A recent report entitled *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* called for caseloads that are judged by the “unique nature of the jurisdiction and its misdemeanor practice and, under no circumstances, exceed national standards.”³²⁰ Under this approach, local calibration would come at

³¹⁷ A broader critique would be that courts rely on any norms of practice in setting effective assistance standards in any type of case. In the world of indigent defense, which comprises the vast majority of criminal cases, most defenders' practice is often not — and never exclusively — driven by careful determination of what is sufficient and what may be unnecessary. While some defender offices offer high-quality services, other jurisdictions lack any defender office and use assigned counsel plan or “lowest bidder” contracts to deliver indigent defense services. See *GIDEON'S BROKEN PROMISE*, *supra* note 18, at 2 (describing three different types of defender systems: public defender, assigned counsel, and contract). In all locations, fiscal and personnel constraints drive the norms to some extent.

³¹⁸ ABA, *STANDARDS FOR CRIMINAL JUSTICE*, *supra* note 192.

³¹⁹ This example of forgoing all investigation is a stark one. It may be unconstitutional, as *Williams* and *Wiggins* highlight the Sixth Amendment right to an attorney who investigates the case. See *Wiggins v. Smith*, 539 U.S. 510, 514 (2003); *Williams v. Taylor*, 529 U.S. 362, 390 (2000). However, both of those cases involved capital sentencing mitigation investigations, a far cry from forgoing investigation in a misdemeanor. In addition, since the right to an attorney who undertakes effective investigation is based in part upon local practice, it circles back to the original question.

³²⁰ *MINOR CRIMES, MASSIVE WASTE*, *supra* note 12, at 24 (Recommendation One, on

the front end in determining what goes into the equation. Thus, the determination of the number of cases an attorney in one jurisdiction can handle might differ from the number in another jurisdiction with a different practice. The local calibration should not come at the back end, in determining if there was indeed adequate assistance in appellate review of a post-conviction ineffective assistance claim. Assistance of counsel should always come out effective, and what one jurisdiction needs to accomplish such an outcome may vary from another.

The current incorporation of localism into ineffective assistance jurisprudence advances a race to the bottom, with the troubling phenomenon of courts excusing low practice levels simply because there are low practice levels in that locale. For misdemeanor representation, already beset with issues of resource deprivation and other systemic pressures, courts considering post-conviction ineffective assistance claims should reject these invalid aspects of localism and instead should judge attorney competency against uniform standards. There comes a point where efficiency and inadequate funding push too hard against individual rights. Individuals facing misdemeanor charges and potential jail time have a Sixth Amendment right to the effective assistance of counsel, and there is no “resource deprivation” or “triage” exception to this important constitutional guarantee.

There are a number of structural impediments to the development of a jurisprudence of ineffective assistance of counsel in misdemeanor cases.³²¹ However, courts should strive to overcome barriers wherever possible in order to add their institutional voice to the conversation about misdemeanor representation, and to prompt often-reluctant legislatures to live up the realities of the misdemeanor-driven criminal justice system that they have created. By rejecting localism in ineffective assistance of counsel analyses, courts can urge professional organizations to either adopt uniform misdemeanor-specific standards, or to clarify whether current standards apply to misdemeanors and explain how they might apply to misdemeanor advocacy. In this way, courts can act as provocateurs: pushing the other relevant institutions — including legislative bodies, prosecutors, and defender offices — to fashion workable solutions to the difficult task of defining and supporting effective misdemeanor representation.

Due to the cost of indigent defense, a strong judicial message about the need for reforming an unconstitutional system of defense delivery

excessive caseload).

³²¹ See *supra* Part III.A.1.a.

might prompt further efforts to move unnecessary cases out of the lower criminal courts. Indeed, a number of factors make this a critical time for the judiciary to add its voice to the crisis in misdemeanor representation, including: legislatures' current willingness to engage in decriminalization; the nationwide financial crisis that is putting significant pressure on state, county, and local budgets;³²² a growing awareness of the difficulties that individuals with criminal records, however minor, have in joining or rejoining the workforce; and the implications of these barriers for public safety.³²³

C. *The Role of Professional Organizations: Promulgating Standards for Misdemeanor Representation*

Professional organizations' written standards for criminal justice actors play a powerful role in reform efforts. For example, the ABA *Criminal Justice Standards* are developed and promulgated by broadly representative task forces of criminal justice practitioners that include prosecutors, judges, defense lawyers, academics, the public, and other groups that may have a special interest in the subject.³²⁴ The resulting standards build on the diversity of experience of these groups and reflect many salutary practices. One commentator noted how "[p]rosecutors and defense attorneys have found the Standards useful . . . in guiding their own conduct, and in training and mentoring colleagues."³²⁵ In addition, as explored in Part II.B.2 above, the Supreme Court has cited ABA Standards in numerous cases analyzing prevailing professional norms under *Strickland's* first prong, and recently cited a variety of other standards as well.³²⁶

³²² See Adam Skaggs & Maria da Silva, *America's Judiciary: Courting Disaster*, L.A. TIMES (July 8, 2011), available at <http://articles.latimes.com/2011/jul/08/opinion/la-oe-skaggs-dasilva-courts-20110708>; see also DIVERTING AND RECLASSIFYING MISDEMEANORS, *supra* note 69.

³²³ See *supra* notes 40, 51, 101 and accompanying text.

³²⁴ See Marcus, *supra* note 195, at 3.

³²⁵ *Id.* at 3; see also Drinan, *supra* note 176, at 457 ("These [ABA Criminal Justice] standards are beneficial to litigants because they allow plaintiffs' counsel to measure the system's shortcomings against an objective predetermined index of factors, and because they assist courts and legislative bodies in crafting appropriate remedies."); Love, *supra* note 194, at 7 ("The two most respected sources of criminal defense lawyers' professional duty to the client are the ABA Model Rules of Professional Conduct and the ABA Standards for Criminal Justice Over the years, the Standards have earned their place as a measure of 'prevailing professional norms' for purposes of the Sixth Amendment through the thoroughness and balance of the process by which they are developed.")

³²⁶ See *supra* note 208 and accompanying text (describing citation to broad group

There are currently no misdemeanor-specific professional standards from a national organization such as the ABA.³²⁷ However, there are a number of public defender offices that have developed high-level practices in the lower courts,³²⁸ providing field development of salutary, specialized misdemeanor representation that awaits incorporation into existing sets of professional standards. At a time when misdemeanor representation matters more than ever,³²⁹ yet the low quality of such representation is well documented,³³⁰ it is critical that professional organizations act. Organizations that promulgate national standards should either set out separate misdemeanor standards or should clarify that existing standards apply to both misdemeanors and felonies. However, if these organizations choose the latter route, they must provide commentary explaining what is different about misdemeanor representation that would allow misdemeanor defenders to handle — if national caseload recommendations are adhered to — between double and triple the number of cases as felony defenders.³³¹

In 1996, the Department of Justice-funded National Advisory Committee on Indigent Defense Services issued a report noting:

[T]he ever changing landscape in the criminal justice field, including increasingly complex statutory schemes and litigation, have outpaced the standards. Thus, all such national standards, whether by the ABA, NLADA, or other national criminal justice entities, need to be revised and updated to meet the modern needs of institutional defenders, contract defenders and assigned counsel in the nineties and into the twenty-first century.³³²

of sources in *Padilla*).

³²⁷ See *supra* Part II.B.2. But cf. *infra* text accompanying notes 338-343 (describing Washington State standards).

³²⁸ See *infra* text accompanying notes 346-348 (describing offices that follow a holistic defense model); see also *Legal Services*, COMMUNITY LAW OFFICE, <http://www.pdknox.org/writeup/2> (last visited Sept. 1, 2011) (explaining that Knoxville Public Defenders's office handles cases in Tennessee's misdemeanor courts).

³²⁹ See *supra* Part I.

³³⁰ See, e.g., *MINOR CRIMES, MASSIVE WASTE*, *supra* note 12 (finding that misdemeanor courts are depriving defendants of their right to counsel and are, at same time, wasting tax payer money); *THREE-MINUTE JUSTICE*, *supra* note 1 (concluding that Florida courts, in an attempt to cope with large volumes of cases, have failed to provide due process to individuals charged with misdemeanors).

³³¹ See *supra* note 77 and accompanying text (describing these national caseload recommendations).

³³² NAT'L LEGAL AID & DEFENDER ASS'N, BLUE RIBBON ADVISORY COMMITTEE ON

By suggesting that a Justice Department research branch fund and develop defense practice standards, the Committee noted how national standards that “promote both high quality defense services and efficiency are crucial to the effective functioning of the criminal justice system as a whole, and to the adjudicatory function performed by the courts, prosecution, and defense.” The Committee pointed out how “[s]uch standards are also a critical tool for defenders nationwide in their ongoing battles to secure an adequate share of fiscal resources.”³³³

At the time of its report, the Committee described a criminal justice crisis fueled by the “war on drugs,” as well as harsh penalties such as “three strikes” and mandatory sentencing laws.³³⁴ It recognized the need to revisit existing standards in order to adjust to current realities of the criminal justice system. Some fifteen years later, the crisis — as well as the underlying causes that the Committee identified — still exist. However, the exponential growth in misdemeanor prosecutions, combined with the explosion in potential collateral consequences of even minor criminal convictions and the wide availability of electronic criminal records, has created another crisis, this one located in the nation’s lower criminal courts.

By allowing for higher caseloads and different levels of experience for misdemeanor defense counsel,³³⁵ many national and local organizations at least implicitly recognize that the *type* of assistance that individuals charged with misdemeanors require differs from the type of assistance for more serious felony or capital cases. While the ABA sets forth separate guidelines for capital cases, the *Criminal Justice Standards* draw no such lines; all non-capital cases are lumped together.³³⁶ The same is true in the standards of other professional organizations, such as the National Legal Aid and Defender Association’s *Performance Guidelines for Criminal Defense Representation*.³³⁷

The ABA and other professional organizations that promulgate standards could simply clarify that their general standards apply to representation in all types of cases, from misdemeanors carrying the

INDIGENT DEFENSE SERVICES 7 (1997), available at http://www.nlada.org/Defender/Defender_Standards/Blue_Ribbon#two.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ See *supra* Part I.A.

³³⁶ See *supra* Part II.B.2. (discussing professional standards).

³³⁷ See *supra* note 226 and accompanying text (noting how NLADA Guidelines do not mention the word “misdemeanor”).

potential for little jail time to felonies carrying the potential for life in prison. However, another option would be to differentiate, and to specify more particularly what is expected of misdemeanor representation. Such misdemeanor standards could come, for example, in the form of requirements of more familiarity with and training about the myriad collateral consequences of criminal convictions.

The full content of misdemeanor-specific standards is beyond the scope of this Article, which instead focuses on the need for such standards and the particular competencies of the different institutions in articulating them. However, the Washington State Bar Association's *Standards for Indigent Defense Services* ("Washington Standards") offer one example of standards that differentiate misdemeanor representation. The eighteen standards cover topics including "Guidelines for Awarding Defense Contracts," "Limitations on Private Practice of Contract Attorneys," "Caseload Limits and Types of Cases," and "Support Services."³³⁸ By far the longest and most detailed is Standard Fourteen, entitled "Qualification of Attorneys." It seeks to define the minimum professional qualifications necessary for an attorney to fulfill the mandate of delivering effective assistance of counsel.

The first part of "Qualification of Attorneys" covers minimum qualifications for all defense counsel, while the second part sets out "[t]rial attorneys' qualifications according to severity or type of case."³³⁹ Misdemeanors are one category under this "severity or type of case" breakdown. The qualification standard for misdemeanors simply refers back to the first part of the standard, covering minimum qualifications. In other words, the *Washington Standards* are clear that misdemeanors require less experience than other types of representation. However, the minimum qualifications that apply to misdemeanor representation cover some important ground. The most basic qualifications reference the need to meet state Supreme Court requirements for practicing law, to be familiar with statutes, case law and other sources "relevant to their practice area," and to complete seven hours of continuing legal education relating to public defense practice each year.³⁴⁰ The *Washington Standards* also call for familiarity "with mental health issues and [the ability] to identify the

³³⁸ See WASH. STATE BAR ASS'N, STANDARDS FOR INDIGENT DEFENSE SERVICES at Standards 3, 7, 13, and 18 (adopted Sept. 20, 2007), available at <http://www.defensenet.org/about-wda/WSBA%20Indigent%20Defense%20Standards.pdf>.

³³⁹ The third and fourth parts deal with appellate representation and interns, respectively. *Id.* Standard 14.

³⁴⁰ *Id.* Standard 14.1(A), (B), (E).

need to obtain expert services.”³⁴¹ For anyone with practice experience in the lower criminal courts, the importance of familiarity with such issues — which arise with great frequency as individuals with mental health issues cycle in and out of the criminal justice system — is clear.

Finally, the “Qualification of Attorneys” standards for misdemeanor representation require familiarity “with the collateral consequences of a conviction, including possible immigration consequences and the possibility of civil commitment proceedings based on a criminal conviction.”³⁴² As noted in this Article, misdemeanor representation requires much more than familiarity with immigration consequences for non-citizen clients. Although the Washington misdemeanor qualification standards need more development, including in the area of collateral consequences, they are an important model for specific standards of misdemeanor representation. The misdemeanor standards make clear the expectations for attorneys representing clients in the lower courts. In this regard, they stand in stark contrast to other standards that make no attempt to separate out misdemeanor representation and rely on general standards, such as one that simply states: “Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.”³⁴³

The existence of such particularized standards demonstrates recognition of the need for separate rules, as well as the motivation to add them to the existing set. Standards relating to a particular area of criminal practice, such as misdemeanors, offer an important comparative data point for review of ineffective assistance claims, as well as a benchmark for appropriate defense representation. Professional standards specific to misdemeanor representation also give courts something other than local practice — which is often so poor as to drag norms to unconscionable levels³⁴⁴ — against which to judge a claim of ineffective assistance of counsel.

D. The Role of the Defender Community

When committed and innovative defender offices set high expectations for their attorneys, the resulting salutary practices can influence other offices, national practice standards, and ineffective assistance jurisprudence. Defender standards grow out of best

³⁴¹ *Id.* Standard 14.1(D).

³⁴² *Id.* Standard 14.1(C).

³⁴³ PERFORMANCE GUIDELINES, *supra* note 192, at GUIDELINE 1.2b.

³⁴⁴ *See supra* Part III.A.2.

defender practices,³⁴⁵ and thus the defender community plays an early and unique role in the development of a body of sources that might guide misdemeanor representation. Examples of such defender community leadership include the Neighborhood Defender Service of Harlem and the Bronx Defenders. Both are community-based offices that follow a holistic model of criminal defense.³⁴⁶ This approach, which has been influential on a number of levels, treats clients as individuals with a variety of potential issues in need of services rather than simply as one narrow criminal case. One goal of the holistic approach is to address underlying causes of involvement in the criminal justice system in order to avoid further involvement, including consideration of the collateral consequences of any criminal conviction as an integral part of defender practice.³⁴⁷ Integrating collateral consequences into defender practice has become a model for other offices,³⁴⁸ and it is also making its way into national standards.³⁴⁹ A more holistic approach truly entered the national discussion about the role of defenders in the wake of the Supreme Court's recent decision in *Padilla*, which held that defense counsel has a duty to warn

³⁴⁵ See NAT'L LEGAL AID & DEFENDER ASS'N, A PILOT ASSESSMENT OF THE OFFICE OF THE PUBLIC DEFENDER FOR SANTA CLARA COUNTY, CALIFORNIA (SAN JOSE), at xi app.A (2003) (“[T]here are many innovative policies and programs that have been established in indigent defense systems across the country that are nationally regarded as necessary ‘best practices’ to ensure high quality services to those of insufficient means.”).

³⁴⁶ See THE BRONX DEFENDERS, CTR. FOR HOLISTIC DEF., THE 2011 HOLISTIC DEFENSE FOR PUBLIC DEFENDER OFFICES TECHNICAL ASSISTANCE PROJECT 2-4 (2011) [hereinafter 2011 HOLISTIC DEFENSE], available at <http://www.bronxdefenders.org/sites/default/files/2011%20Technical%20Assistance%20RFP.pdf> (explaining Bronx Defenders' theory of holistic representation); NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, <http://www.ndsny.org/index.html> (last visited July 15, 2011) (noting how through a holistic approach NDS of Harlem seeks to address underlying issues, minimize future incidents, and provide referral services to problems arising out of collateral consequences); see also *Holistic Representation*, KNOX COUNTY PUB. DEFENDERS COMMUNITY L. OFF., <http://www.pdknox.org/writeup/80> (last visited Mar. 31, 2011) (explaining Knox County Public Defenders's holistic representation model).

³⁴⁷ See 2011 HOLISTIC DEFENSE, *supra* note 346, at 2.

³⁴⁸ See, e.g., MD OFF. OF THE PUB. DEFENDER, <http://www.opd.state.md.us/services.html> (last visited July 15, 2011) (describing office and services provided); see also SYSTEM OVERLOAD, *supra* note 38, at 29-32 (section entitled “Doing it Better: Holistic and Community-Based Approaches”).

³⁴⁹ UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT, *supra* note 68, at 12-14; PLEAS OF GUILTY, *supra* note 67, § 14-3.2(f) (“To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”).

clients about the deportation consequences of a conviction.³⁵⁰ The influence of this approach is also apparent in the numerous lower court decisions following *Padilla*, many of which have extended the duty to warn to collateral consequences other than deportation.³⁵¹

Although some offices have written practice standards,³⁵² many lack clear guidelines.³⁵³ Memorializing these practices in written local defender office standards has the benefit of providing clear guidance and benchmarks against which to evaluate attorney competency. In addition, these standards would come from service providers with the expertise to understand and articulate best practices.

Although voluntary adoption of best practices by defender offices benefits clients and advances defense practice norms, the lack of an enforcement mechanism for such standards can weaken their effect. One recent report on the state of indigent defense noted how, although almost all national and local practice standards are voluntary,

[A]n indigent defense program could choose to require that its attorneys adhere to them. For example, certain of the recommendations contained in NLADA's Performance Guidelines for Criminal Defense Representation could be made mandatory for an agency's attorneys, and sanctions could be imposed in instances of non-compliance. However, we are aware of no defense program that has actually developed a vigorous process to monitor and strictly enforce compliance with performance standards.³⁵⁴

The report describes how "at least one state has adopted standards that purport to be mandatory as a condition for receiving funding from the state," referring to the Indiana Public Defender Commission's

³⁵⁰ *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); see also Conference Report, Benjamin N. Cardozo School of Law, *Padilla* and the Future of the Defense Function (June 20-21, 2011), <http://www.cardozo.yu.edu/MemberContentDisplay.aspx?cmd=ContentDisplay&ucmd=UserDisplay&userid=10396&contentid=20736&folderid=360> (describing event to "bring together people with a variety of experiences in the criminal justice system to discuss the future of the role of the defense lawyer").

³⁵¹ See, e.g., *Taylor v. State*, 304 Ga. App. 878, 884 (Ct. App. 2010) (extending *Padilla* to sex offender registration); *Commonwealth v. Abraham*, 996 A.2d 1090 (Pa. Super. Ct. 2010), cert. granted, 9 A.3d 1133 (Pa. 2010) (holding that counsel must warn of possible loss of pension as a consequence to entering plea).

³⁵² See COMM. FOR PUB. COUNSEL SERVS., PERFORMANCE STANDARDS AND COMPLAINT PROCEDURES (2010), available at http://www.publiccounsel.net/private_counsel_manual/chapter_four.html.

³⁵³ MINOR CRIMES, MASSIVE WASTE, *supra* note 12, at 41.

³⁵⁴ JUSTICE DENIED, *supra* note 72, at 35.

Standards for Indigent Defense Services in Non-Capital Cases.³⁵⁵ Of course, as described in Part II.B.2 above, such standards do not specifically address misdemeanor practice.³⁵⁶

While a full exploration of the myriad ways in which the defender community might set and enforce standards for misdemeanor practice is beyond the scope of this Article, the remainder of this section briefly describes two areas in need of immediate attention for training, policy, and standards: first, the understanding and use of collateral consequences for interviewing and counseling clients, and negotiating plea bargains with the State; and second, the alarming rate of waiver of the right to counsel in many lower courts around the nation.

1. Collateral Consequences as a Focus of Misdemeanor Attorney Training and Practice

In 2002, the ABA published the *Ten Principles of a Public Defense Delivery System* in recognition of “the need for clear and concise guidance on how to design an effective system for providing public defense services.”³⁵⁷ Principle Number Six calls for a system where “[d]efense counsel’s ability, training, and experience match the complexity of the case.”³⁵⁸ The ABA intended this Principle to capture the idea that there are certain classes of cases that require a certain level of experience and expertise. For example, the commentary for this Principle cites the “Attorney Eligibility” guideline from the ABA’s *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*.³⁵⁹ Few would argue with the notion that defense counsel needs experience before handling cases that carry significant potential prison — or death — sentences, or with the idea that attorneys need particularized training to handle these cases, such as in the area of forensic evidence or capital mitigation advocacy.

Misdemeanor lawyering also calls for particularized training and ability. In a system of generally low-stakes criminal sanctions for misdemeanor convictions,³⁶⁰ defense counsel must have training and

³⁵⁵ *Id.* at 34 & n.76 (citing IND. PUB. DEFENDER COMM’N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES (1995), available at <http://www.in.gov/judiciary/pdc/docs/standards/non-cap.pdf>).

³⁵⁶ The Indiana Standards set minimum qualifications for attorneys handling felonies, but only mention minimum qualifications for misdemeanor cases in the juvenile delinquency context. *Id.* at 9.

³⁵⁷ See TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 288, at iv.

³⁵⁸ *Id.* at 1.

³⁵⁹ *Id.* at 5 & n.21.

³⁶⁰ *But see supra* notes 55-61 (describing jurisdictions such as Maryland, with 10-

expertise in the non-criminal sanctions that often overwhelm any sentence that the trial judge imposes.³⁶¹ As the Director of Bronx Defenders noted, “[W]hen a plea to disorderly conduct makes a client presumptively ineligible for New York City public housing, as it does here, or where two convictions for turnstile jumping makes a lawful, permanent resident non-citizen deportable, then something has got to change and indigent defense needs to look different.”³⁶² This observation captures the concept of focusing defender resources on issues that matter most to the client. In the case of misdemeanors with low-level sanctions, severe collateral consequences of any conviction will surely play a large role in a defendant’s cost-benefit analysis of entering a guilty plea or going to trial.³⁶³

Training for attorneys just entering defense work (and thus most likely to handle misdemeanor cases), or for attorneys who practice exclusively in the lower criminal courts, should focus on the most pervasive and common collateral consequences of criminal convictions.³⁶⁴ To be sure, there is some positive movement in this direction. However, it is still quite limited. For example, Wisconsin’s Office of the State Public Defender offers a variety of continuing legal education trainings, one of which is entitled *Handling a Misdemeanor Case from A to Z*.³⁶⁵ In 2009, the *A to Z* agenda did not list any topic relating to collateral consequences of a misdemeanor conviction.³⁶⁶ The 2010 training agenda had one hour on “Immigration Consequences of Conviction,”³⁶⁷ presumably included as a result of the Supreme Court’s *Padilla* decision.³⁶⁸ Although it is certainly an improvement that at least one collateral consequence has found its

year maximum sentences for some misdemeanors and California, where certain crimes “wobble” between misdemeanor and felony).

³⁶¹ See *supra* Part I.B (discussing the collateral consequences of misdemeanor convictions).

³⁶² *Spangenberg Study*, *supra* note 129, at 145.

³⁶³ See *supra* note 137 and accompanying text (discussing such analyses by defendants).

³⁶⁴ Smyth, *Holistic Is Not a Bad Word*, *supra* note 90, at 498.

³⁶⁵ See *Year 2010, CLE Approved Programs*, WIS. ST. PUB. DEFENDER’S OFFICE (Jan. 13, 2011), http://training.wisspd.org/file.php/1/CLE/Complete_CLE_List_1998-2010_.pdf.

³⁶⁶ See *Handling a Misdemeanor Case from A to Z*, WIS. ST. PUB. DEFENDER’S OFFICE, <http://wisspd.org/htm/ATPracGuides/Training/ProgMaterials/AZ09/MilwAgenda.pdf> (last visited Nov. 10, 2011).

³⁶⁷ *Handling a Misdemeanor Case from A to Z*, WIS. ST. PUB. DEFENDER’S OFFICE, <http://wisspd.org/htm/ATPracGuides/Training/ProgMaterials/AZ10/MadAgenda.pdf> (last visited Nov. 10, 2011).

³⁶⁸ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010).

way into these new attorney trainings,³⁶⁹ a one- or two-day training cannot cover everything; misdemeanor attorneys should be aware of more than immigration consequences for non-citizen clients. In addition to immigration, misdemeanor attorneys should learn about the jurisdiction's statutory bars to employment for individuals with a criminal record, as well as any other serious collateral consequence that would apply if the client were convicted.³⁷⁰

Once armed with important information about collateral consequences that matter to the client, misdemeanor attorneys have the greatest potential for creative use of such information in plea-bargaining with prosecutors to avoid unintended consequences in particular cases.³⁷¹ There are a number of reasons for this potential, including the fact that in low-level cases, prosecutors may be more flexible in working out bargains that avoid serious collateral consequences, and that defenders often have a number of alternative misdemeanors, noncriminal offenses, or diversion programs to choose from in proposing solutions. As Justice Stevens noted in *Padilla*:

Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.³⁷²

³⁶⁹ Immigration consequences are also now on the general CLE training list in Wisconsin. See *Immigration and Criminal Defense in the Post-Padilla Era*, WIS. ST. PUB. DEFENDER'S OFFICE (Feb. 25, 2011), <http://wispdtraining.blogspot.com/2011/02/on-demand-immigration-and-criminal.html> (describing course focusing on defense counsel's Sixth Amendment duty to counsel non-citizen clients about immigration consequences of a criminal conviction).

³⁷⁰ See *supra* Part I.B (discussing serious collateral consequences of misdemeanor convictions).

³⁷¹ For a more fully developed exploration of defenders' use of collateral consequences in negotiations, see Roberts, *supra* note 137, at 719-25.

³⁷² *Padilla*, 130 S. Ct. at 1486 ("By bringing deportation consequences into th[e] plea bargaining] process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."); see also Smyth, *Holistic Is Not a Bad Word*, *supra* note 90, at 493; Robert M.A. Johnson, *Message from the President*, PROSECUTOR, May-June 2001, at 5 (former President of the National District Attorneys Association writing that prosecutors "must consider [collateral

The *Padilla* decision thus highlighted the importance of incorporating collateral consequences into plea negotiations. However, standards for and training about negotiation are not common in defender offices; the skill of negotiation is perhaps one of the most neglected skills, beginning in law school and continuing into practice.³⁷³

Misdemeanor attorneys should also be trained to pursue any sealing or expungement mechanisms available for the client's criminal records.³⁷⁴ In some jurisdictions, there may be a certificate of relief from civil disabilities or other document to ameliorate such things as employer hesitancy in hiring individuals with criminal records.³⁷⁵ Such relief mechanisms are particularly important in an era where landlords, employers, and the general public have easy electronic access to an individual's criminal records, and in jurisdictions where dismissals remain on the record until expunged.³⁷⁶ Although felony convictions can rarely be sealed, many jurisdictions allow for sealing of misdemeanor records, and misdemeanor defenders should integrate this critical step — as well as helping the client apply for certificates of relief — into client representation.

The defender community has an important role to play in training new attorneys and attorneys focused on lower court practice. Trainings aimed at collateral consequences, expungement, sealing, or other relief mechanisms, are a critical facet of misdemeanor representation, and deserve more attention than they currently receive.

consequences] if we are to see that justice is done”).

³⁷³ This observation is based on my own practice experience, as well as my experience researching law school curricular offerings as I developed a course on plea bargaining that includes readings about and a simulation involving negotiation. Many schools offer a general Lawyer Bargaining or Negotiation type of class, but these are generally limited-enrollment seminars taken by small numbers of students. See, e.g., *Course Information Spring 2012*, SANDRA DAY O'CONNOR C. L., <http://apps.law.asu.edu/Apps/Registrar/CourseInfo/AllCourses.aspx?semester=20121> (last visited Oct. 20, 2011) (showing that there is one Negotiation course offered).

³⁷⁴ See, e.g., WIS. STAT. § 938.355 (2011) (juvenile expungement statute); WIS. STAT. § 973.015 (2011) (expungement of record in limited instances for adults).

³⁷⁵ See, e.g., N.Y. CORRECT. LAW §§ 701-03 (2011); cf. Joy Radice, *Administering Justice: Removing Barriers to Reentry*, 83 U. COLO. L. REV. (forthcoming 2012) (manuscript at 28-30, 41), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1864917 (describing how under New York law, employers must use presumption of rehabilitation when considering hiring individual presenting certificate of rehabilitation, but how “[m]any unanswered questions exist about how employers actually use certificates in their decision-making. If the court decisions described above are any indication, the consideration may be minimal at best.”).

³⁷⁶ See *supra* note 43 and accompanying text (describing Maryland's expungement statute and electronic access to records).

2. Lowering High Rates of Waiver of the Right to Counsel in the Lower Courts

Misdemeanor-focused trainings will only benefit clients who actually receive the assistance of counsel. Yet in lower courts across the country, there are high rates of waiver of the right to counsel, often under troubling circumstances. For example, under Colorado state law, indigent defendants facing misdemeanor charges must consult with a prosecutor before applying for appointed counsel. It is only after the prosecutor informs the court of any plea agreement between the state and the uncounseled defendant that the court must advise the defendant of his right to court-appointed counsel (if qualified).³⁷⁷ This troubling incentive structure is clearly constructed to encourage waiver of the right to counsel, as the first mention of counsel comes when an agreed-upon bargain is already on the table. A defendant who has already accepted such a bargain and stands before the judge ready to enter the plea is unlikely to suddenly assert his newfound right to counsel.³⁷⁸

Waiver of the right to counsel is permissible only if the judge ensures that the defendant is knowingly, voluntarily, and intelligently relinquishing this constitutional right.³⁷⁹ Yet there are high waiver rates and waiver practices in lower courts across the country that are, like Colorado's, questionable.³⁸⁰ For example, a recent study of

³⁷⁷ COLO. REV. STAT. § 16-7-301(4) (2006).

³⁷⁸ See RACE TO THE BOTTOM, *supra* note 2, at 15 (describing a similar incentive structure in Michigan's lower courts); see also Ronald E. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2087 (2006) ("Statewide court data from Minnesota and North Carolina fail to reveal any impact on waiver rates when those states enacted application fee statutes. This statewide pattern might show that defendants place a higher value on defense counsel than the amount of the application fee, or it could reflect the efforts of trial judges and defense lawyers to spare the defendants from such choices. We are more inclined to believe the latter, because it fits with the often-observed power of trial actors to dampen the effects of criminal justice policy changes imposed from the top, especially in the short-run.").

³⁷⁹ See *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) ("The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.").

³⁸⁰ See Wright & Logan, *supra* note 378, at 2080 (comparing felony and misdemeanor waiver rates in North Carolina and Minnesota). There is a pending constitutional challenge to the Colorado statute. See Complaint at 1, Colo. Crim. Def. Bar v. Ritter, No. 10-cv-2930-JLK, (D. Colo. Dec. 2, 2010) ("Plaintiffs bring this action pursuant to 28 U.S.C. § 2201(a) to obtain a declaration that Colorado violates the Sixth Amendment to the United States Constitution by deferring the appointment of counsel for certain indigent criminal defendants until after such defendants engage in

Florida's lower courts revealed that 66% of defendants came to their arraignment without counsel. Of those defendants, half waived the right to counsel.³⁸¹ Defendants who waived their right to counsel were most likely to enter a guilty plea at arraignment, with more than 80% pleading either guilty or no contest, which has the same legal effect as a guilty plea,³⁸² at that early appearance.³⁸³

A number of studies have highlighted the doubtful validity of the waiver process in a variety of jurisdictions.³⁸⁴ In one study:

In a number of jurisdictions, site teams observed judges ignoring the rules regarding waiver. Time after time, courts made clear to defendants that they must waive counsel to proceed. There were no inquiries into the education or sophistication of the defendants and very few efforts to warn defendants regarding the dangers of self-representation or the kind of assistance counsel could provide. Often the waiver was incorporated into the first part of the proceeding and was presented as a rhetorical, compound question directed at whether the defendant wanted to dispose of the case quickly. The judge asked the defendant something like, "You are waiving counsel and wish to proceed now, right?" and the defendant responded, "Yes."³⁸⁵

Even when valid, waiver of the constitutional right to counsel is troubling because it means that a defendant is representing himself in a proceeding that may result in a criminal record, a jail sentence, or some other significant outcome. Despite a defendant's satisfaction with the outcome of his case — for example a plea bargain to a seemingly minor misdemeanor that allows him to avoid incarceration — that defendant will likely be unaware of the myriad collateral consequences of that conviction.³⁸⁶ This may include ignorance of the fact that the misdemeanor can be used to enhance punishment in a later conviction. As the former Chief Justice of the Florida Supreme Court

discussions with prosecuting attorneys regarding potential plea offers.").

³⁸¹ THREE-MINUTE JUSTICE, *supra* note 1, at 15.

³⁸² See *supra* note 134 and accompanying text (explaining "no contest" pleas).

³⁸³ THREE-MINUTE JUSTICE, *supra* note 1, at 23 tbl.9; see also Wright & Logan, *supra* note 378, at 2080-82 (stating that, although "precious little data exist on waivers of counsel in misdemeanor cases," approximately 40% of misdemeanor defendants in North Carolina waived counsel).

³⁸⁴ See, e.g., GIDEON'S BROKEN PROMISE, *supra* note 18, at 39; MINOR CRIMES, MASSIVE WASTE, *supra* note 12, at 15-16.

³⁸⁵ MINOR CRIMES, MASSIVE WASTE, *supra* note 12, at 15.

³⁸⁶ See *supra* Part I (setting out various collateral consequences).

noted in one example, “[S]pur-of-the-moment decisions to plead guilty to driving on a suspended license or under the influence can be used to charge a subsequent suspended license or DUI offense as a felony in Florida.”³⁸⁷

In addition to ignorance about potential enhanced punishment based on a misdemeanor conviction, waiver means that there is no counsel to warn a defendant about serious collateral consequences of his guilty plea and conviction. This raises interesting legal issues in the wake of *Padilla v. Kentucky*.³⁸⁸ There is now a constitutional duty for defense counsel to warn clients about the deportation consequences of a criminal conviction, a duty that some lower courts have extended beyond deportation to include other serious consequences such as sex offender registration.³⁸⁹ The combination of high waiver rates in misdemeanor cases, high rates of guilty pleas after waiver in some jurisdictions, and the many serious collateral consequences that flow from misdemeanor convictions raises the question of whether a court must ensure that a defendant realizes he is giving up his right to counsel about such collateral consequences through his waiver. It also raises the question of whether a court’s inquiry about the matter is sufficient, given the inability of the court to question a defendant about things such as citizenship to determine what collateral consequences might apply. Finally, lowering high rates of waiver in the lower courts could lead to significant long-term savings, as effective defense advocacy can result in fewer unnecessary convictions and, therefore, fewer individuals saddled with a criminal record that serves as a bar to most employment.³⁹⁰ These issues illustrate the need for guidance and an updated view about standards surrounding waiver in misdemeanor cases.

The defender community’s voice on the issue of high rates of waiver in the lower courts is critical. In most jurisdictions, high workloads mean that public defenders struggle to handle existing clients’ cases.³⁹¹ A recommendation that defender offices ameliorate high waiver rates by providing counsel at the first appearance and representing more

³⁸⁷ THREE-MINUTE JUSTICE, *supra* note 1, at 7; *see also* *Nichols v. United States*, 511 U.S. 738, 738-39 (1994) (valid uncounseled misdemeanor can be used to enhance punishment in subsequent case). *But see* *State v. Kelly*, 999 So. 2d 1029, 1052 (Fla. 2008) (“[T]he State may not use an uncounseled conviction to increase a defendant’s loss of liberty in the absence of a valid waiver of counsel.”).

³⁸⁸ *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

³⁸⁹ *See sources supra* note 187.

³⁹⁰ *See supra* note 94-96 (discussing employment bars based on criminal history).

³⁹¹ *See supra* notes 72-75 and accompanying text (describing high caseloads in many jurisdictions).

clients in lower court cases sounds unrealistic. However, defenders are uniquely situated to witness inappropriate waivers and to advocate on behalf of the individuals subject to such conditions. Defender offices are also situated to take positions on standards for waiver in misdemeanor cases. Although articulating salutary practice standards may not lead to immediate change, there is certainly precedent for the defender community advancing norms of effective assistance. The decision in *Padilla* came after the development of a holistic defender movement that took collateral consequences into account in defense advocacy³⁹² and the articulation of professional standards encompassing a duty to counsel clients about deportation.³⁹³ The Court cited these developments in setting forth the constitutional standard.³⁹⁴

The defender community is the front line in defining standards for effective misdemeanor assistance. By training lawyers to incorporate collateral consequences into interviewing, counseling, negotiation, and sentencing advocacy, defender offices do more than provide a critical piece of assistance to clients facing misdemeanor charges. These offices also influence others in the defender community, as well as professional organizations that write defense practice standards and courts that decide ineffective assistance claims. This same influence could be felt in the area of waiver of the right to counsel if defender offices received resources needed to cover more of those cases.

CONCLUSION

“Most people who go to court in the United States go to misdemeanor courts. The volume of misdemeanor cases is staggering.”³⁹⁵ Yet the view expressed in one recent report is unfortunately representative of the quality of representation in many of the nation’s lower courts: “the emphasis on celerity of case processing has led many of the criminal justice stake holders . . . interviewed in one jurisdiction . . . to colloquially refer to the district [misdemeanor] court arraignment dockets as ‘McJustice Day.’”³⁹⁶ Misdemeanor defenders struggle with high workloads and few

³⁹² See *supra* notes 346-51 and accompanying text.

³⁹³ See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010) (citing numerous ABA Standards and other guidelines).

³⁹⁴ *Id.* at 1482-83.

³⁹⁵ MINOR CRIMES, MASSIVE WASTE, *supra* note 12, at 11.

³⁹⁶ RACE TO THE BOTTOM, *supra* note 2, at 15.

resources. Indeed, some defenders — and even entire offices — have found it necessary to litigate these resources issues.³⁹⁷

Despite some recent recognition of the troubling quality of representation and coercive circumstances in the lower criminal courts, the meaning of effective misdemeanor representation remains largely undefined. There is no developed Sixth Amendment jurisprudence of misdemeanor ineffective assistance of counsel to regulate attorney behavior; nor are there any professional standards for criminal defense practice that address the particular challenges of misdemeanor practice. The lack of standards and inadequate representation is a serious problem because misdemeanors matter. Even minor criminal convictions can lead to major collateral consequences, including deportation, loss of public housing and benefits, sex offender registration and community notification, and de facto bars to employment. Quality representation in misdemeanor cases can help individuals avoid unnecessary collateral consequences, as well as unnecessarily long jail sentences and wrongful convictions.

There are also social costs to inadequate misdemeanor counsel, including the effects that unnecessary misdemeanor convictions can have on employment, housing, and other issues of daily living that are critical to the quality of life for individuals, families, and entire communities. Legislatures that underfund indigent defense should consider the overall costs that inadequate presentation has on society. Currently, there is an opportune climate for legislatures to take a broad view in advancing reform in the lower criminal courts and misdemeanor defense. The fiscal crisis, as well as a growing public recognition that minor convictions can hinder productive participation in society, has led to several important decriminalization actions in various jurisdictions. By moving low-level misdemeanors out of the criminal justice system, while refraining from funding cuts for defenders, legislatures could fulfill the constitutional mandate for effective assistance of counsel through smarter spending.

There should be no dispute that there is a crisis of representation in the nation's lower courts, driven by high volume and low resource

³⁹⁷ See, e.g., *Rivera v. Rowland*, No. CV 950545629S, 1996 WL 636475 (Conn. Super. Ct. Oct. 23, 1996) (declining to grant motion to dismiss in class action suit on behalf of indigent defendants alleging inadequate representation due to excessive caseloads and insufficient resources); *State v. Bowens*, 39 So. 3d 479 (Fla. Dist. Ct. App. 2010) (certifying public defender office's claim of conflict-of-interest arising from excessive caseloads to the Florida Supreme Court); *Louisiana v. Peart*, 621 So. 2d 780 (La. 1993) (finding that indigent defendants were not provided with effective assistance of counsel due to large caseloads and lack of resources).

levels.³⁹⁸ This crisis must be taken seriously, as it leads to real harm in individual cases and threatens the very legitimacy of the criminal justice system. Development of misdemeanor representation standards alone will not reform a deeply troubled criminal justice system. Yet there is little hope of cultural or constitutional change in the lower courts, where most individuals charged with crimes experience the system, without first defining rights and responsibilities in the misdemeanor context. Standards for misdemeanor practice, articulated by defenders, professional organizations, and ineffective assistance jurisprudence, would provide a crucial baseline against which to judge the current crisis in the lower courts. The existence of standards would serve to highlight current inadequacies, pushing legislatures already concerned with fiscal realities to give serious consideration to decriminalization, better defense funding as a long-term savings strategy, and other potential solutions to the indigent defense crisis. Courts, professional organizations that write standards for criminal defense practice, and the defender community are best situated to define effective misdemeanor advocacy. Each of these institutions has particular competencies and specific roles to play in shaping misdemeanor standards.

³⁹⁸ See, e.g., *MINOR CRIMES, MASSIVE WASTE*, *supra* note 12, at 14 (“the operation of misdemeanor courts in this country is grossly inadequate and frequently unjust”); *GIDEON’S BROKEN PROMISE*, *supra* note 18, at 29 (noting how there are “deep-rooted problems in the delivery of indigent defense services, establishing a clear and pressing need for reform.”).