



Written Statement of  
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on behalf of the  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the  
House Committee on the Judiciary  
Subcommittee on Crime, Terrorism, and Homeland Security

Re: "Indigent Representation: A Growing National Crisis"  
June 4, 2009

Mr. Chairman, Mr. Gohmert and distinguished Members of the Committee:

Thank you for inviting me to testify on behalf of the National Association of Criminal Defense Lawyers on the important and timely issue of indigent defense. NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 12,000 direct members – and 80 state, local and international affiliate organizations with a total of 35,000 members — include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

### **Introduction**

Although the vast majority of accused individuals first come into contact with the criminal justice system through a minor offense, known as a misdemeanor, remarkably little attention has been devoted to understanding what happens to defendants at the misdemeanor level. Criminal justice reform efforts often have noted that extensive problems exist in misdemeanor courts but rarely have focused exclusively on these courts.

The volume of misdemeanor cases is staggering. The exact number is not known because states differ in whether and how they count the number of misdemeanor cases processed each year. The National Center for State Courts collected misdemeanor caseload numbers from 12 states in 2006. Based on these 12 states, a median misdemeanor rate of 3,544 per 100,000 was obtained.<sup>1</sup> If that rate held true across the states, the total number of misdemeanor prosecutions in 2006 was about 10.5 million, which amounts to 3.5 percent of the American population.<sup>2</sup> While this overplays the actual prosecutions by population, because of non-citizen prosecutions and individuals charged multiple times, it is a startling reminder of the breadth of the impact of these courts.<sup>3</sup>

In late April 2009, NACDL released its comprehensive examination of misdemeanor courts, "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts." The culmination of an eighteen-month study, this report encompasses a review of existing studies and materials, site visits in seven states, an internet survey of defenders, two conferences, and a webinar. All of these pointed to one conclusion: misdemeanor courts across the country are incapable of providing accused individuals with the due process guaranteed them by the Constitution.

The explosive growth of misdemeanor cases is placing a staggering burden on America's courts. Legal representation for misdemeanants is absent in many cases. When an attorney is provided, crushing workloads often make it impossible for the defender to effectively represent her clients. Across the country, misdemeanor defenders report caseloads six and seven times greater than the national standards. In Chicago, Atlanta, and Miami, defenders carry more than 2,000 misdemeanor cases per year.<sup>4</sup> With these massive caseloads, defenders have to resolve approximately 10 cases a day – or one case every 45 minutes – not nearly enough time to mount a constitutionally adequate defense.

Counsel is unable to spend adequate time on each of her cases, and often lacks necessary resources, such as access to investigators, experts, and online research tools. These deficiencies force even the most competent and dedicated attorneys to engage in breaches of professional duties. Too often, judges and prosecutors are complicit in these breaches, pushing defenders and defendants to take action with limited time and insufficient knowledge of their cases. This leads to guilty pleas by the innocent, inappropriate sentences, and wrongful incarceration, all at taxpayer expense.

There is a growing body of evidence that suggests that innocent people frequently plead guilty. As early as the 1960s, scholars observed the likelihood that pressures to plead were resulting in innocent people pleading guilty.<sup>5</sup> Innocent defendants often plead guilty because the punishment offered by the prosecutor in the plea agreement sufficiently outweighs the risk of greater punishment at trial.<sup>6</sup> In the misdemeanor context, this pressure can be even more compelling because the punishment in the plea offer, frequently time served or probation, appears minimal, and the prospect of fighting the charge has not only the risk of more substantial punishment, but also tremendous inconvenience, including possible ongoing pretrial detention, missing additional days of work, and having to find alternate child care, among others.<sup>7</sup> Adding to this pressure is the demonstrable fact that the assigned defense attorney has neither the time nor the resources to adequately prepare a trial defense.

### **The Rights of Misdemeanor Defendants**

Misdemeanor defendants, like all those accused of crimes, are entitled to due process.<sup>8</sup> They have the right to receive evidence against them and present evidence in their defense. They have a right to confront witnesses. A misdemeanor defendant is entitled to a jury trial when facing more than six months in prison.<sup>9</sup> Most importantly, they have the right to have their guilt proved beyond a reasonable doubt.

To vindicate these rights, the Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.” In the 1972 decision *Argersinger v. Hamlin*, the U.S. Supreme Court interpreted this right to require the state to provide counsel to a defendant charged with a misdemeanor who could not afford to hire his own counsel.<sup>10</sup> The importance of counsel advising a person of his or her rights in any criminal case cannot be underestimated. Even in a simple case, the law can prove complex.

For example, the law of trespass may seem clear cut – either a person was on private property or the person was not. But, there are a number of factors that can complicate a trespass case: Was the property obviously private or was there some reason to believe it was public property? Was there a warning, either posted or verbal? Was an event occurring that was open to the public? The answer to these questions can mean the difference between innocence and guilt. Without an attorney to sort through all the facts and assess what is legally important, these critical distinctions too easily can be overlooked.

### **Severe Collateral Consequences**

The sentence and collateral consequences<sup>11</sup> can be quite different depending on which crime is found to have been committed. Therefore, a lawyer also is needed to help the accused person sort out the implications of plea bargains offered by the prosecutor.

This is no small matter. In the years since the *Argersinger* decision, the collateral consequences that can result from any conviction, including a misdemeanor conviction, have expanded significantly. These consequences can be quite grave. The defendant can be deported,<sup>12</sup> denied employment, or denied access to a wide array of professional licenses.<sup>13</sup> A person convicted of a misdemeanor may be ineligible for student loans and even expelled from school.<sup>14</sup> Additional consequences can include the loss of public housing and access to food assistance, which can be dire, not only for the misdemeanant but also for his or her family.<sup>15</sup> Fines, costs and other fees associated with convictions can also be staggering and too frequently are applied without regard for the ability of the defendants to pay the assessed amounts.<sup>16</sup>

### **Overcriminalization**

The most pervasive problem to the entire misdemeanor court system is the overcriminalization of crimes that are not a risk to public safety. The need to reduce caseloads to ensure that indigent defendants across the country receive competent representation is obvious, and overcriminalization is an impediment to that reduction.

During the course of our study, defenders and judges across the country complained that misdemeanor dockets are clogged with crimes that they believe should not be punishable with expensive incarceration. Right now, taxpayers expend on average \$80 per inmate per day<sup>17</sup> to lock up misdemeanants accused of things like turnstile jumping, fish and game violations, minor in possession of alcohol, driving with a suspended license, pedestrian solicitation, and feeding the homeless. These crimes have utterly no impact on public safety, but they have a huge impact on state and local budgets across the country.

- The offense of sleeping in a cardboard box is criminalized in New York under the New York City Administrative Code § 16-122(b). It is punishable by a fine of not less than \$50 or more than \$250, imprisonment for not more than 10 days, or both.<sup>18</sup>
- It is also a crime in New York to occupy more than one seat, sleep, or litter on a subway.<sup>19</sup> Each of these crimes is punishable by a fine of up to \$25, imprisonment for not more than 10 days, or both.<sup>20</sup>
- The city of Las Vegas prohibits a number of activities in city parks as misdemeanors, including hitting golf balls, the use of metal detectors, and feeding the homeless.<sup>21</sup>

A number of defenders explained that their courts' dockets are clogged with these crimes that defenders and judges alike think should not be punishable by jail.

Increasingly, civil infractions and diversion is seen as a practical alternative to full criminal court prosecution of minor offenses. The American Bar Association has urged "federal, state, territorial and local governments to develop, and to support and fund prosecutors and others seeking to develop, deferred adjudication/deferred sentencing/diversion options that avoid a permanent conviction record for offenders who are deemed appropriate for community supervision[.]"<sup>22</sup>

### **Lack of Counsel**

Despite the clear ruling by the U.S. Supreme Court that persons accused of misdemeanors have a right to court-appointed counsel, a significant percentage of defendants in misdemeanor courts never receive a lawyer to represent them. A Bureau of Justice Statistics Special Report in 2000 cited a survey of jail inmates conducted in 1989 and 1996. In the survey, 28.3 percent of jail inmates charged with misdemeanors reported having had no counsel.<sup>23</sup>

Documentation and reports from across the country confirm the frequency with which the right to counsel is completely disregarded in misdemeanor courts:

- **TEXAS:** “Three-quarters of Texas counties appoint counsel in fewer than 20 percent ofailable misdemeanor cases, with the majority of those counties appointing counsel in fewer than 10 percent of cases. The vast majority ofailable misdemeanor cases in Texas are resolved by uncounseled guilty pleas.”<sup>24</sup>
- **CALIFORNIA:** In Riverside County, California, more than 12,000 people pled guilty to misdemeanor offenses without a lawyer in a single year.<sup>25</sup>
- **MICHIGAN:** “People of insufficient means in Michigan are routinely processed through the criminal justice system without ever having spoken to an attorney in direct violation of both *Argersinger* and *Shelton*. Many district courts throughout Michigan simply do not offer counsel in misdemeanor cases at all, while others employ various ways to avoid their constitutional obligation to provide lawyers in misdemeanor cases.”<sup>26</sup>

It is indefensible that, despite *Gideon*, *Argersinger* and *Shelton*, a significant percentage of defendants in misdemeanor courts do not have a lawyer to represent them. The U.S. Supreme Court has, time and again, acknowledged that defense counsel is an integral part of the adversary system and necessary to ensure accurate outcomes in court. The absence of counsel in misdemeanor cases fundamentally undermines the fairness and reliability of the criminal justice system. Appointment of counsel should be automatic for any defendant who appears without counsel until it is demonstrated through a fair and impartial eligibility screening process that the defendant has the financial means to hire an attorney to represent him or her in the matter charged.

Counsel must be appointed to any defendant who is financially unable to hire counsel.<sup>27</sup> In other words, if a person cannot afford to hire an attorney without substantial financial hardship, counsel should be appointed.<sup>28</sup> Substantial hardship should be determined by looking at the typical cost of hiring counsel for the type of charge the defendant is facing. Moreover, the individual’s ability to pay must not only assess his or her income and available resources, but also his or her expenses, including family support obligations and debts.<sup>29</sup>

### **Staggering Caseloads**

If an indigent person is lucky enough to be appointed counsel, the attorney may be too overwhelmed by her caseload to adequately defend the client. No matter how brilliant and dedicated the attorney, if the attorney is given too large a workload, he or she will not be able to provide clients with adequate and appropriate assistance.

In many jurisdictions, cases are resolved at the first court hearing, with minimal or no preparation by the defense. This process is known as “meet-and-plead” or plea at arraignment/first appearance. Misdemeanor courtrooms often have so many cases on the docket that an attorney has mere minutes to handle each case. Because of the number of cases assigned to each defender, “legal advice” often amounts to a hasty conversation in the courtroom or hallway with the client. Frequently, this conversation begins with the defender informing the defendant of a plea offer. When the defendant’s case is called, he or she simply enters a guilty plea and is sentenced. No research of the facts or the law is undertaken.

The National Advisory Commission (NAC) on Criminal Justice Standards and Goals set the following caseload limits for full-time public defenders: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals.<sup>30</sup> Established more than 20 years ago, these standards have withstood the test of time as a barometer against which full-time indigent defender caseloads may be judged.

Similarly, in 2007, the American Council of Chief Defenders (“ACCD”) issued a “Statement on Caseloads and Workloads” recommending that defenders handle no more than 400 misdemeanors per year.<sup>31</sup> Caseloads should never surpass the maximum caseload standards. In fact, there are a variety of reasons – for example, travel distance to court and supervisory duties – that caseloads should be lower than the standards propose.

Despite these standards, across the country, lawyers who are appointed to represent people charged with misdemeanors have caseloads so overwhelming that they literally have only minutes to prepare each case. The standards are disregarded and, in some instances, the maximum caseload is exceeded by five-hundred percent:

- The acting director of the New Orleans public defender office reported that part-time defenders are handling the equivalent of 19,000 cases per year per attorney, which literally limits them to five minutes per case.
- In at least three major cities, Chicago, Atlanta, and Miami, defenders have more than 2,000 misdemeanor cases each per year.<sup>32</sup>
- According to a response to the survey, in Dallas, Texas, misdemeanor defenders handle 1,200 cases per year.
- One attorney working in federal magistrate court in Arizona reported in a survey response that misdemeanor attorneys there carry 1,000 cases per year.
- In response to the survey, one Tennessee defender reported that the average misdemeanor caseload per attorney in his office was 1,500 per year. Two other defenders in Tennessee reported handling 3,000 misdemeanor cases in one year, which is 7.5 times the national standards.

- In Kentucky, the defenders were assigned an average of 436 cases per lawyer in fiscal year 2007, of which 61 percent were misdemeanors.<sup>33</sup> In other words, each defender had 170 felonies, which is more than a full caseload for one attorney, *plus* 266 misdemeanors, which by itself is two-thirds of a full-time caseload under the national standard.
- An attorney from Utah reported that misdemeanor public defenders in that state carry caseloads of 2,500.
- In 2006, the four defenders in Grant County, Washington, misdemeanor court averaged 927 cases each.<sup>34</sup>

Nearly 70 percent of the survey respondents said that the caseload standards and limitations are not observed in their jurisdiction. Moreover, some of the respondents who noted an applicable standard referred not to a standard in their jurisdiction, but to the NAC or NLADA recommendations. Sixty-three percent said there was no limit by internal office policy.

A lawyer who takes three weeks of vacation and 10 holidays a year has 47 weeks available to work for clients. If the lawyer never takes a day of sick leave and works 10 hours a day, five days a week,<sup>35</sup> the attorney's schedule would only allow about one hour and 10 minutes per case if the lawyer had a caseload of 2,000 cases per year. A lawyer with a caseload of 1,200 would have less than two hours to spend on each case.

The time per case has to cover the client interview, talking with the prosecutor, reading police reports and other relevant discovery, conducting legal research and factual investigation, preparing for court, writing motions and memoranda, including sentencing memoranda, and attending court hearings. That leaves no time for training, reading new appellate cases, or attending meetings at the courthouse or the local bar association related to misdemeanor practice.

### **Ethical Proscriptions**

In most state ethical rules, as in the Model Rules of Professional Conduct, the very first substantive rule states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>36</sup> A number of ethical opinions have concluded that if her caseload is threatening her ability to competently defend current clients, a public defender must refuse to accept further cases. Additionally, if refusing future cases is insufficient, the public defender has a duty to seek to withdraw from existing cases to ensure competent representation for other defendants.

More recently in 2006, the ABA issued a similar ethics opinion, finding:

All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being

assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. . . . [L]awyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers.

ABA Ethics Opinion 06-441 (2006).<sup>37</sup> The ABA Opinion further concluded that if a supervisor fails to relieve an individual defender of an overwhelming caseload, the individual defender must pursue the matter further, including seeking relief directly from the court.<sup>38</sup> Thus, all persons representing indigent defendants should be subject to caseload limits that take into account the unique nature of the jurisdiction and its misdemeanor practice and, under no circumstances, exceed national standards.

To avoid a breach of the attorney's ethical duty, a defender office or individual defender confronting an excessive caseload is obligated to move the court to cease appointment of new cases and, if necessary, move to withdraw from existing cases.<sup>39</sup> In the past few years, a number of public defender offices have successfully petitioned courts to reduce their caseloads to prevent violations of the attorneys' ethical obligations and ineffective assistance. These cases provide ample precedent for the duty of defenders to reduce caseloads to prevent breaches of their ethical obligations.

### **Caseload Standards in Practice**

A number of defender offices successfully set and maintain caseload standards. The Defender Association in Seattle, Washington, for example, maintains a caseload maximum of 380 cases per year per attorney in the Seattle Municipal Court. This limit is imposed both by city ordinance, which the Defenders helped to draft, and by collective bargaining agreement.<sup>40</sup> Similarly, the King County District Court lawyers have an annual ceiling of 450, and the county budgeting process is based on that number. The Defender Director noted that in the last several years her office has managed to keep the district court caseloads lower than the 450 case credit ceiling.<sup>41</sup>

In Massachusetts, the Committee for Public Counsel Services uses assigned counsel to handle most of its misdemeanor cases. The lawyers are limited to 300 cases a year and "[a]ny counsel who is appointed or assigned to represent indigents within the private counsel division is prohibited from accepting any new appointment or assignment to represent indigents after he has billed 1,400 billable hours during any fiscal year."<sup>42</sup>

In Wisconsin, caseload limits for public defenders are set by statute.<sup>43</sup> The standards were, in part, based on a case-weighting study conducted in the early 1990s by The Spangenberg Group.<sup>44</sup> The statute acts as a "safety-valve."<sup>45</sup> When caseloads reach the standards set forth in the statute, the public defender can obtain relief, and overflow cases are assigned to private counsel by the courts.



To the extent misdemeanor offenses carry a possibility of incarceration, the legislative body with responsibility for funding the public defender program must appropriate funds that permit defenders to maintain reasonable caseload limits. Funding should be based on estimates of the number and types of cases the program is expected to handle in the upcoming year, with the expectation that each defender will have a caseload appropriate for the jurisdiction while not exceeding national standards.<sup>46</sup> In the event that the caseload increases, the program should be permitted to seek supplemental funds, or be permitted to stop accepting cases in order to maintain appropriate caseloads.

### **Lack of Performance Standards**

Performance standards serve to guide a defense attorney through every step of litigating a criminal case. For example, national performance standards address preparing and conducting the initial client interview, preparing for arraignment, conducting investigations, obtaining discovery, filing pretrial motions, negotiating with the prosecutor, preparing for trial, conducting *voir dire*, making opening statements, confronting the prosecution's case, presenting the defense case, making closing statements, drafting jury instructions, and preparing post-trial motions.<sup>47</sup>

While each step need not be undertaken in every case, the standards set out what steps should be considered by the defense attorney, how the attorney should evaluate whether the step is necessary, and, if the attorney decides the step is necessary, how the attorney should proceed. As one set of state standards notes, "These standards are intended to serve as a guide for attorney performance in criminal cases at the trial, appellate, and post-conviction level, and contain a set of considerations and recommendations to assist counsel in providing competent representation for criminal defendants."<sup>48</sup>

Enacting performance standards establishes an expectation about the thought process that will be used to evaluate the case of each accused defendant. They also serve to synthesize the ethical obligations with the actual practice of public defense, and provide support for defenders when they seek continuances or caseload reductions in order to ensure that all clients receive adequate representation. The absence of standards too often has the opposite effect of confirming that there should be no expectations with regard to services. The lack of standards can lead to excessive caseloads, inadequate compensation, and ineffective representation.

### **Lack of Supervision and Training**

As in other professions, before undertaking something independently, lawyers should be supervised. Supervision is critical to ensuring that attorneys just out of law school, new to the jurisdiction, or just starting to practice criminal law, do not make a mistake. For this reason, the American Bar Association's Ten Principles of a Public Defense Delivery System require defense counsel to be "supervised and systematically reviewed for quality and efficiency."

Supervision of misdemeanor defenders is sorely lacking, and, often, performance reviews are non-existent. Many defenders report that supervision in their offices is informal. One former Florida public defender noted that, officially, there were two senior attorneys assigned to supervise the approximately 30 misdemeanor attorneys in the office. However, the supervising attorneys had active felony caseloads. If a misdemeanor lawyer wanted assistance, he or she had to seek out a senior attorney and ask for assistance. She noted that,

when one did this, the attorneys were happy to help when they could. When asked about a supervisor coming to court with her, the defender said, “Occasionally you could get a senior public defender to come with you if you needed to pressure the prosecutor to offer a plea.”

Appropriate training is critical to law practice, regardless of level. Misdemeanor practice, like felony practice, involves trials. To be effective, lawyers must understand, among other things, how to conduct a direct examination and a cross-examination of a witness, how to navigate the rules of evidence, how to give an opening and closing argument, and how to authenticate evidence. Attorneys representing clients in driving while intoxicated cases need to understand the forensic evidence, such as how breath tests work, to be able to assess whether there is an appropriate challenge to the test, and how to bring such a challenge. And, in any number of crimes, defenders need to understand police identification procedures and the science behind eyewitness identification in order to understand the reliability of the evidence offered against their clients. Attorneys also need to understand sentencing options, including, for example, what is involved in domestic violence treatment, to be able to advise and advocate effectively for their clients.

## **CONCLUSION**

The problems of misdemeanor courts, and their solutions, are related and interdependent. It is unlikely that the adoption of any one recommendation alone will solve the problem. But viewed holistically, implementing caseload standards along with the decriminalization of offenses that are not a risk to public safety, will dramatically improve the functioning of misdemeanor courts, and ensure that all defendants receive justice, regardless of the seriousness of the crime with which they are charged, and regardless of socioeconomic, racial, or ethnic background.

The Federal government can play a vital role in this area by ensuring that state law enforcement and related funding is balanced with indigent defense funding. Funding only the investigative and prosecution functions – which has been the historic practice – fosters harmful imbalances in state systems and undermines the search for the truth, public safety, and our system of justice. Among the alternatives to consider is whether existing justice grant programs should be amended to require more equitable grant-making determinations.

Aside from the crisis facing many state misdemeanor courts, our study revealed another fundamental problem: there is no central repository for the collection, analysis and dissemination of public defense data. The United States Department of Justice should be required to fill this void by annually collecting and publishing data on, among other things, state indigent defense expenditures, caseloads by provider and case types, and the structures of state and local indigent defense systems.

NACDL further believes that the issue of overcriminalization, as it pertains to the federal criminal code, warrants this Committee’s attention. Hearings on this problem and a bipartisan effort to rein in the federal criminal code might help lead the way for similar state efforts.

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<sup>1</sup> National Center for State Courts, 2007 Criminal Caseloads Report at 45, *available at* [http://www.ncsconline.org/D\\_Research/csp/2007\\_files/Examining\\_percent20Final\\_percent20-percent202007\\_percent20-percent207\\_percent20-percent20Criminal.pdf](http://www.ncsconline.org/D_Research/csp/2007_files/Examining_percent20Final_percent20-percent202007_percent20-percent207_percent20-percent20Criminal.pdf) (last visited Mar. 2, 2009).

<sup>2</sup> Other experts have presented similar estimates. Testifying in Congress on June 25, 1997, Chief Judge George P. Kazen of the U.S. District Court for the Southern District of Texas stated that in 1996 there were 9.4 million misdemeanors filed in state courts. *See* Transcript, House Judiciary Committee Hearing (June 25, 2007), *available at* [http://commdocs.house.gov/committees/judiciary/hju43386.000/hju43386\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju43386.000/hju43386_of.htm) (last visited Mar. 2, 2009).

<sup>3</sup> The volume of misdemeanors in federal court is much lower than in state court, but it is growing. A recent federal court newsletter reported: “The Border Patrol has proposed filing 26,000 petty and misdemeanor offenses a year in the Tucson division at this time, or 100 per work day added to the court’s normal daily docket. Ultimately, the goal of the Border Patrol is to prosecute an additional 700 defendants a week, or 36,000 new cases a year.” *Federal Courts Hit Hard by Increased Law Enforcement on Border*, THE THIRD BRANCH (July 2008).

<sup>4</sup> Abdon M. Pallasch, *Call to Limit Cases Amuses Public Defenders*, CHICAGO SUN TIMES, (July 24, 2006); Erik Eckholm, *Citing Workload, More Public Defenders Are Refusing Cases*, N.Y. TIMES (Nov. 8, 2008) (noting Miami misdemeanor public defenders have approximately 2,400 cases). Regarding Miami, according to documents filed in court, the defender office in Dade County had 21 misdemeanor attorneys in 2006-2007. By the 2006-2007 fiscal year, those attorneys handled 46,888 new cases (2,232 per attorney). By the 2007 calendar year, they handled 50,115 cases (2,386 per attorney).

<sup>5</sup> Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60-69 (1968) (offering anecdotal evidence that plea bargaining induces innocent defendants to plead guilty); *see also* Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practice in the Federal Courts*, 89 HARV. L. REV. 293 (1975).

<sup>6</sup> *See, e.g.,* John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants*, 126 U. PA. L. REV. 88 (1977).

<sup>7</sup> *Cf. id.* at 96-97 (noting that an innocent defendant might plead guilty because of: “the disparity in punishment between conviction by plea and conviction at trial; ... a desire to protect family or friends from prosecution; ... the conditions of pretrial incarceration; ... desire to expedite the proceedings, among other reasons”).

<sup>8</sup> *See, e.g.,* *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *Smith v. Illinois*, 380 U.S. 129 (1968).

<sup>9</sup> *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Baldwin v. New York*, 399 U.S. 117 (1970). Some states provide for a jury trial in all cases in which a jail sentence is possible. *See, e.g.,* CAL. PEN. CODE § 689 (2008).

<sup>10</sup> 407 U.S. 25 (1972).

<sup>11</sup> “The term ‘collateral sanction’ means a legal penalty, disability or disadvantage, however denominated, that is imposed on a person automatically upon that person’s conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence.” *Collateral Sanctions and*

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*Discretionary Disqualification of Convicted Persons*, American Bar Association Criminal Justice Section Standards, Standard 19-1.1.

<sup>12</sup> For a summary of New York law concerning criminal convictions and deportation, see Manuel Vargas, *Immigration Consequences of New York Criminal Convictions*, available at <http://blogs.law.columbia.edu/4cs/immigration/> (last visited Mar. 16, 2009).

<sup>13</sup> See Clyde Haberman, *Ex-inmate Denied Chair (and Clippers)*, N.Y. TIMES (Feb. 25, 2003) at B1; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 156 (1999) (noting that professional licenses for which ex-offenders can be ineligible "range from lawyer to bartender, from nurse to barber, from plumber to beautician").

<sup>14</sup> See Editorial, *Marijuana and College Aid*, N.Y. TIMES (Nov. 2, 2007) at A26.

<sup>15</sup> Most collateral consequences are established by state and local law, and thus the impact of a conviction varies widely by jurisdiction. There are a couple of guides that index the collateral consequences for specific jurisdictions. The New York State Unified Court System, in conjunction with Columbia University, created a Web site that summarizes collateral consequences in New York State. The Web site, *Collateral Consequences of Criminal Charges – New York State*, is hosted by Columbia University and is available at <http://www2.law.columbia.edu/fourcs/> (last visited Mar. 16, 2009). The Washington Defender Association publishes a guide for defenders entitled *Beyond the Conviction*, available at <http://www.defensenet.org/publications.beyond-conviction> (last visited Mar. 2, 2009).

<sup>16</sup> See Bridget McCormack, *Economic Incarceration*, WINDSOR Y.B. ACCESS TO JUST. 25, no. 2, 223-46 (2007).

<sup>17</sup> Pew Center on the States, *One in 31: The Long Reach of American Corrections*, The Pew Charitable Trusts (March 2009), at 12.

<sup>18</sup> *Betancourt v. Bloomberg*, 448 F.3d 547, 554 (2d Cir. 2006), cert. denied 549 U.S. 1034 (2006) (upholding arrest for sleeping in a cardboard box against constitutional vagueness challenge).

<sup>19</sup> See 21 N.Y.C.R.R. § 1050.7; see also *Man Hauled Off by Cops for Using 2 Subway Seats*, WORLD NET DAILY (July 19, 2003), available at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=33662](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=33662) (last visited Mar. 2, 2009).

<sup>20</sup> 21 N.Y.C.R.R. §1050.10.

<sup>21</sup> Las Vegas City Code § 13.36.055. Orlando and other Florida cities have similar laws against feeding the homeless. See AP, *In Orlando, a Law Against Feeding Homeless — and Debate Over Samaritans' Rights*, Associated Press (Feb. 3, 2007), available at <http://www.iht.com/articles/ap/2007/02/04/america/NA-FEA-GEN-US-Do-Not-Feed-the-Homeless.php> (last visited Mar. 16, 2009). The same AP article reported, "In Fairfax County, Virginia, homemade meals and meals made in church kitchens may not be distributed to the homeless unless first approved by the county. ... 'We've seen cities going beyond punishing homeless people to punishing those trying to help them, even though it's clear that not enough resources are being dedicated to helping the homeless or the hungry,' said Maria Foscarinis, Executive Director of the National Law Center on Homelessness and Poverty, a non-profit in Washington, D.C." See also National Law Center on Homelessness and Poverty, *Feeding Intolerance* (Nov. 2007), available at [http://www.nlchp.org/content/pubs/Feeding\\_Intolerance.07.pdf](http://www.nlchp.org/content/pubs/Feeding_Intolerance.07.pdf) (last visited Mar. 16, 2009).

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<sup>22</sup> ABA Commission on Effective Criminal Sanctions Report I: Alternatives to Incarceration (Feb. 2007), *available at* <http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/ReportI.PDF.121306.pdf>.

<sup>23</sup> Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, NCJ 179023 (Nov. 2000) at 6, Table 13. In fiscal year 1998, 38.4 percent of people charged with misdemeanors federal court did not have counsel. *Id.* at 3, Table 2.

<sup>24</sup> Texas Fair Defense Project Web site, <http://www.fairdefense.org/about.php> (last visited Mar. 16, 2009).

<sup>25</sup> National Legal Aid and Defender Association, *Evaluation, Report & Recommendations, Riverside County Public Defender* (Dec. 2000). Since the publication of the NLADA report, Riverside County has changed its practices.

<sup>26</sup> National Legal Aid and Defender Association, *A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis* (June 2008), at 15, *available at* [http://www.mynlada.org/michigan/michigan\\_report.pdf](http://www.mynlada.org/michigan/michigan_report.pdf) (last visited Mar. 16, 2009).

<sup>27</sup> ABA Criminal Justice Standards, Providing Defense Services, Std. 5-7.1 and Commentary: Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship. Counsel should not be denied because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel or because bond has been or can be posted.

<sup>28</sup> *See id.*

<sup>29</sup> *See, e.g.*, Rev. Code of Wash. 10.101.020 (2)

In making the determination of indigency, the court shall also consider the anticipated length and complexity of the proceedings and the usual and customary charges of an attorney in the community for rendering services, and any other circumstances presented to the court which are relevant to the issue of indigency. The appointment of counsel shall not be denied to the person because the person's friends or relatives, other than a spouse who was not the victim of any offense or offenses allegedly committed by the person, have resources adequate to retain counsel, or because the person has posted or is capable of posting bail.

<sup>30</sup> A number of states also have established caseload standards. *See* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Keeping Defender Workloads Manageable* (Jan. 2001), *available at* <http://www.ncjrs.org/pdffiles1/bja/185632.pdf> (last visited Mar. 2, 2009).

<sup>31</sup> Statement *available at* [http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCD\\_CASELOADS\\_TATEMENTsept6.pdf](http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCD_CASELOADS_TATEMENTsept6.pdf) (last visited Mar. 2, 2009).

<sup>32</sup> Abdon M. Pallasch, *Call to Limit Cases Amuses Public Defenders*, CHI. SUN TIMES (July 24, 2006), at 18; Erik Eckholm, *Citing Workload Public Lawyers Reject New Cases*, N.Y. TIMES (Nov. 8, 2008), at A1 (noting Miami misdemeanor public defenders have approximately 2,400 cases). Regarding Miami, according to documents filed in court, the defender office in Dade County had 21 misdemeanor

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attorneys in 2006-07. By the 2006-07 fiscal year, those attorneys handled 46,888 new cases (2,232 per attorney). By the 2007 calendar year, they handled 50,115 cases (2,386 per attorney).

<sup>33</sup> Kentucky Department of Public Advocate, *Realizing Justice, Defender Caseload Report Fiscal Year 2007*, at 5, available at <http://apps.dpa.ky.gov/library/DefenderCaseloadReport07.pdf> (last visited Mar. 2, 2009).

<sup>34</sup> Grant County's public defense services have been under the supervision of the court system following the settlement of a lawsuit alleging systemic deficiencies in felony representation. The caseload information is derived from monthly reports to the county commissioners by the attorney who supervises the defense contractors pursuant to the settlement. Reports were made available through a public disclosure request.

<sup>35</sup> This schedule would require working more than 2,300 hours per year, far in excess of even the billable hours required by large civil defense law firms in most major cities. National Association for Law Placement, *Billable Hours Requirements at Law Firms*, NALP BULLETIN (May 2006) ("Although billable hour requirements ranged from 1,400 to 2,400 hours per year in 2004, most offices reporting a minimum require either 1,800 or 1,900 hours (24 percent and 21 percent of offices, respectively)."). The Washington Defender Association standards recommend 1,650 billable hours per year. See Washington Defender Association, *Standards for Public Defense Services, Standard Three, Commentary*. The Office of Management and Budget (OMB) has advised agencies that of the 2,088 hours attributable on an annual basis to a federal employee, each employee works only 1,744 hours per year, which reflects hours worked after the average amount of annual, sick, holiday, and administrative leave used. *Performance of Commercial Activities*, OMB Cir. No. A-76 (Revised) (Aug. 1983), at p. IV-8.

<sup>36</sup> MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1; see also ARIZ. ETHICAL RULE, Rule 1.1.; ARK. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, Rule 1.1.

<sup>37</sup> ABA Ethics Op. 06-441, available at <http://www.abanet.org/cpr/pubs/ethicopinions.html#06441> (last visited Mar. 2, 2009). The American Council of Chief Defenders came to a similar conclusion in 2003:

A chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case. The elements of such representation encompass those prescribed in national performance standards including the NLADA Performance Guidelines for Criminal Defense Representation and the ABA Defense Function Standards. When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases.

ACCD Ethics Opinion 03-01 (2003), available at <http://www.nlada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf> (last visited Mar. 16, 2009).

<sup>38</sup> See *id.* at 6.

<sup>39</sup> See, e.g., ABA Ethics Opinion 06-411, *supra.*; ACCD Ethics Opinion 03-01, *supra.*

<sup>40</sup> See City of Seattle Ordinance 121501 (June 14, 2004).

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<sup>41</sup> Even though the 380 level is one of the lowest in the country, some defenders feel it still is too high. A lawyer from one of the other King County defender offices noted that the 380 caseload standard did not allow effective representation, and stated in her survey response: “The caseload standard is too high, and it results in us very often not being able to do as much for each client as we'd like to do.” She added that the greatest challenge in the practice is “doing justice to each case when there is such an overwhelming caseload.”

<sup>42</sup> MASS. GEN. LAWS ANN., Ch. 211D, §11 (2008).

<sup>43</sup> WIS. STAT. ANN. § 977.08(bn) (2008).

<sup>44</sup> *See Keeping Public Defender Caseloads Manageable, supra*, at 13-14.

<sup>45</sup> *Id.* at 14.

<sup>46</sup> *See Recommendations – Excessive Caseloads, supra*.

<sup>47</sup> *See generally* NLADA Performance Guidelines for Criminal Defense Representation, *supra*.

<sup>48</sup> Nevada Indigent Defense Standards of Performance, Standards 1(b), *available at* <http://www.nvsupremecourt.us/documents/orders/ADKT411AdoptStandards.pdf> (last visited Mar. 16, 2009).