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Crashing the Misdemeanor System

Jenny Roberts

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Crashing the Misdemeanor System

Jenny Roberts*

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I. Introduction

There is a misdemeanor crisis in the United States. The recent exponential growth in lower court prosecutions for “minor” charges has drawn increasing numbers of individuals into contact with the criminal justice system.¹ Those individuals exit with a permanent, easily accessible electronic record of that contact that can affect future employment, housing, and many other basic facets of daily life.² After two decades of declining crime,³ police, prosecutors, defense lawyers, and judges have stayed busy by shifting their focus from serious crimes to petty misdemeanors. A 2010 analysis of seventeen state courts revealed that misdemeanors comprised 77.5% of the total criminal caseload in

1. See ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT’L ASS’N CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 11 (2009) [hereinafter *MINOR CRIMES, MASSIVE WASTE*] (estimating that the volume of misdemeanor cases rose from 5 million in 1972 to 10.5 million in 2006, and that in 2006 there was a “median misdemeanor rate of 3,544 per 100,000” people).

2. See Nat’l Inst. of Justice, *National Inventory of the Collateral Consequences of Conviction*, <http://www.abacollateralconsequences.org/CollateralConsequences/QueryConsequences> (last visited Apr. 2, 2013) (search of “misdemeanor” in Texas reveals 450 entries relating to collateral consequences of “any misdemeanor” or particular misdemeanor convictions) (on file with the Washington and Lee Law Review); see also James B. Jacobs, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 178 (2008) (“This Article documents how criminal history records are expanding in scope and how their dissemination is proliferating.”).

3. See HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, *ARREST IN THE UNITED STATES, 1990-2010*, at 1 (2012), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=4515> (“The number of murder arrests in the U.S. fell by half between 1990 and 2010. The adult and juvenile arrest rates dropped substantially in the 1990s, while both continued to fall about 20% between 2000 and 2010, reaching their lowest levels since at least 1990.”); Richard A. Oppel Jr., *Steady Decline in Major Crime Baffles Experts*, N.Y. TIMES, May 24, 2011, at A17 (citing the steady decline in major crime after a peak in the early 1990s).

those courts.⁴ Although mass incarceration continues to plague states around the nation,⁵ the current criminal justice crisis is more aptly characterized as one of mass misdemeanor processing.

Legislators have added misdemeanor after misdemeanor (and many local ordinances) to the criminal law books.⁶ Law enforcement, applying “zero-tolerance” or “order-maintenance” policing policies, has aggressively enforced those statutes.⁷ These mass misdemeanor arrests happen even though the theory upon which zero-tolerance policing is based, namely broken windows theory, did not envision moving so much petty crime through the criminal judicial system.⁸ In the 1982

4. ROBERT C. LAFOUNTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012), available at <http://www.courtstatistics.org/Other-Pages/CSP2010.aspx>.

5. See *Brown v. Plata*, 131 S. Ct. 1910, 1917 (2011) (“California’s prisons are designed to house a population just under 80,000, but at the time of the decision under review the population was almost double that.”); see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (highlighting disproportionate mass incarceration of persons of color through the War on Drugs); MARC MAUER & MEDIA CHESNEY-LIND, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (2002) (exploring mass incarceration in the United States as a result of “tough on crime” political attitudes that prevailed in the 1980s–1990s and the wide-ranging effects on families and communities).

6. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 523–79 (2001) (describing the legislative process of criminalization); see also THE SMART ON CRIME COALITION, RECOMMENDATIONS FOR THE ADMINISTRATION AND CONGRESS (2011), <http://www.colorado.gov/ccjdir/Resources/Resources/Ref/SmartOnCrimeCoalition.pdf> (“Unfortunately, since the initial publication of *Smart on Crime* in 2009 . . . [w]e continue to see our criminal codes and sentences—and, therefore, the demand on law enforcement, prosecutors, and prisons—expand.”).

7. See BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 2* (2001) (describing order-maintenance policing as “proactive enforcement of misdemeanor laws and zero tolerance for minor offenses”).

8. See James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29 (linking visible public disorder, like broken windows, to the neighborhood residents’ perception of safety and, more tenuously, to violent crime in the neighborhood); see also K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 279 (2009) (“Order-maintenance policing as described in *Broken Windows* neither demands nor suggests that zero tolerance arrest policies are efficient, desirable, or effective methods to achieve order and reduce fear.”); cf. HARCOURT, *supra* note 7, at 6–7 (scrutinizing

article, *Broken Windows*, authors Kelling and Wilson described the order-maintenance function of the police officers that they had observed on foot patrol in a Newark neighborhood:

If a stranger loitered, [Officer] Kelly would ask him if he had any means of support and what his business was; if he gave unsatisfactory answers, he was sent on his way. Persons who broke the informal rules, especially those who bothered people waiting at bus stops, were arrested for vagrancy. Noisy teenagers were told to keep quiet.⁹

In this description, only one of the three scenarios ended in an arrest. And it is not clear that the one arrest would end up in a court. Indeed, Kelling and Wilson noted that “[o]rordinarily, no judge or jury ever sees the persons caught up in a dispute over the appropriate level of neighborhood order” and that “a judge may not be any wiser or more effective than a police officer.”¹⁰

Prosecutors have largely failed to exercise discretion and seek justice in sorting through the huge number of misdemeanor cases that the police send them, instead churning high volumes through the overburdened lower courts.¹¹ Indigent defense attorneys have in many instances abdicated their professional, constitutional, and ethical duties to provide effective, zealous representation to their misdemeanor clients.¹² Judges have been complicit, failing to dismiss weak

evidence and policy behind “broken windows” theory).

9. Wilson & Kelling, *supra* note 8, at 29.

10. HARCOURT, *supra* note 7, at 6.

11. See ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 24 (2007) (discussing the process in which prosecutors file charges for misdemeanors); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1716 (2010) (citing data showing low levels of prosecutorial declination of charges in petty offense cases and noting that “[t]he fact that prosecutors so rarely declined petty and public order cases reflects prosecutors’ well-substantiated expectation that these cases are likely to be disposed of summarily and successfully”).

12. See AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION’S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS 19* (2004) [hereinafter *GIDEON’S BROKEN PROMISE*], available at http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/gideons_broken_promise.html (discussing the lack of investigation, research, and

cases based on questionable police testimony or to intervene when underresourced indigent defenders fail to provide effective representation to their many clients.¹³ In short, there is little reason to have confidence in the outcome of convictions secured in our lower criminal courts,¹⁴ and much support for a “crisis” characterization.¹⁵

The adaptations that allow institutional actors to process high numbers of misdemeanor cases in overburdened lower courts are a formidable force working against solutions to the crisis. A major driver of the mass misdemeanor system is that there is relatively little immediate and obvious cost, particularly at a time when felony crime is relatively low.¹⁶ Almost no one spends enough time screening, defending, and adjudicating misdemeanors to feel the full cost; in New York City, for example, 2011 statistics show that fewer than 1 in 500 individuals charged with a misdemeanor go to trial.¹⁷ As the Supreme Court recently noted, “plea bargaining is . . . not some adjunct to the criminal justice system; it *is* the criminal justice system.”¹⁸ In misdemeanor cases, those pleas happen quickly

zealous advocacy of indigent defense attorneys); MINOR CRIMES, MASSIVE WASTE, *supra* note 1, at 38–40 (discussing barriers to zealous representation in misdemeanor courts).

13. See generally Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases*, 29 N.Y.U. REV. L. & SOC. CHANGE 425 (2004).

14. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316 (2012) (discussing the high tolerance for wrongful petty convictions).

15. See generally John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1 (2013) (discussing deprivations of right to counsel in lower courts); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 279–82 (2011) (describing the misdemeanor crisis); see also Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation’s Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 488 (2010) (noting the persistence of the indigent defense crisis, despite substantial research and evidence on the matter).

16. See SNYDER, *supra* note 3, at 1 (providing statistics showing a decline in felony arrest rates in the United States).

17. CRIMINAL COURT OF THE CITY OF N.Y., ANNUAL REPORT 2011, at 16 (2011) [hereinafter NEW YORK CRIMINAL COURT ANNUAL REPORT], <http://www.courts.state.ny.us/courts/nyc/criminal/AnnualReport2011.pdf>.

18. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

and are thus relatively cheap for the system; in some jurisdictions, for example, almost 70% of lower criminal court cases are resolved at arraignment.¹⁹

What if the criminal justice system did feel the immediate cost of mass misdemeanor processing? Michelle Alexander's provocative *New York Times* Op-Ed, *Go to Trial: Crash the Justice System*, explored the idea and potential effects of a "large scale . . . refus[al] to plea-bargain when charged with a crime."²⁰ There were understandably strong responses to the Op-Ed, many of them focused on the impracticality of the proposal, but some on the ethical problems with such an approach.²¹ What these critiques often missed was Alexander's

19. See ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THREE MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 14–15 (2011), available at www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20794 (discussing observation of 1,649 misdemeanor adjudications in twenty-one Florida counties, where "[a]lmost 70% of defendants observed entered a guilty or no contest plea at arraignment"); SPANGENBERG GRP., STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES 142 (2006), <http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf> (documenting how in 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"). While these quick misdemeanor pleas allow mass volume in the lower courts at relatively low cost, this cost calculation fails to account for long-term harms to society flowing from the misdemeanor crisis. There is an enormous societal cost in the form of a permanent and large group of individuals exiting the system with misdemeanor convictions and thus serious obstacles to finding work and housing. See MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT'L EMP'T LAW PROJECT, 65 MILLION NEED NOT APPLY: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT 25 (2011), http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1 (recognizing that despite regulations meant to protect those with criminal records, people are still being categorically banned from employment); LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 16 (2004), http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf (discussing how public housing authorities consider a person's criminal record).

20. Michelle Alexander, Op-ed., *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 11, 2012, at SR 5.

21. See, e.g., Norm Pattis, *Michelle Alexander's Dangerous Pipe Dream*, NORMAN PATTIS BLOG (Mar. 11, 2012), http://www.pattisblog.com/index.php?article=Michelle_Alexanders_Dangerous_Pipe_Dream_5309 (last visited Apr. 2, 2013) ("The suggestion that individual clients commit what will amount to individual and collective suicide to crash the system is a dangerous pipe dream. No decent criminal defense lawyer will entertain the thought.") (on file with the

larger point: “The system of mass incarceration depends almost entirely on the cooperation of those it seeks to control,” and having a critical mass of defendants refuse to play along would lead to “chaos [that] would force mass incarceration to the top of the agenda for politicians and policy makers, leaving them only two viable options: sharply scale back the number of criminal cases filed . . . or amend the Constitution (or eviscerate it by judicial ‘emergency’ fiat).”²²

One might apply Alexander’s mass incarceration critique to the mass arrest and prosecution crisis happening in the lower criminal courts. There are many potential responses to the misdemeanor crisis, including more rigorous prosecutorial screening and exercise of discretion in charging decisions,²³ better funding for defender offices,²⁴ statewide oversight of public defender systems,²⁵ caseload

Washington and Lee Law Review). Many of these responses unfairly ignored that Alexander herself raised many of these issues within the Op-Ed. For example, she described being “stunned” when someone first raised the idea of organized plea refusals with her, noting that this person “knows the risks involved in forcing prosecutors to make cases against people who have been charged with crimes. Could she be serious about organizing people, on a large scale, to refuse to plea-bargain when charged with a crime?” Alexander, *supra* note 20, at SR 5.

22. Alexander, *supra* note 20, at SR 5.

23. See DAVIS, *supra* note 11, at 19–41 (discussing importance and power of prosecutorial discretion in charging decisions); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 31–33 (2002) (pointing to structured prosecutorial screening as an alternative to plea bargaining).

24. See *GIDEON’S BROKEN PROMISE*, *supra* note 12, at 7–11, 13–14, 29–37, 41 (discussing various problems in indigent defense).

25. See COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006), http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report_06.pdf (outlining a proposal for a fully state-funded statewide defender system to ensure the constitutional right to quality representation for indigent defendants in New York State); GA CHIEF JUSTICE’S COMM’N ON INDIGENT DEF. 3 (2001), *available at* www.georgiacourts.org/aoc/press/idc/idchearings/idc_report.doc (“The state of Georgia lacks a statewide system of accountability and oversight to provide constitutionally adequate assistance of counsel for indigent defendants.”); NORMAN LEFSTEIN, AM. BAR ASS’N, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE, 196–228 (2011) [hereinafter REASONABLE CASELOADS], http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckd.am.pdf (analyzing state oversight of public defender programs in Massachusetts, the District of Columbia, and California).

caps,²⁶ decriminalization²⁷ (assuming that funding for indigent defense is not reduced), systemic litigation to force change,²⁸ and more rigorous standards for defense practice.²⁹ Some of these responses focus on the legislative or executive branch, some focus on defender office response or regulation, while only a few focus on how the individual defender should respond to the crisis.³⁰

It is undisputed that indigent defense is an underfunded mandate and that public defenders³¹ have workloads that make

26. See REASONABLE CASELOADS, *supra* note 25, at 54 (“In 2009, the New York legislature passed a law requiring that . . . the state’s chief administrative judge establish caseload caps in New York City for trial-level defenders. The law also provides that the caseload caps should be phased in over a four-year period, with the understanding that the increased costs associated with the caps be borne by the State of New York.”).

27. See, e.g., MASS. GEN. LAWS ch. 94C, § 32L (2008) (“[P]ossession of one ounce or less of marihuana shall only be a civil offense, subjecting an offender who is eighteen years of age or older to a civil penalty of one hundred dollars and forfeiture of the marihuana, but not to any other form of criminal or civil punishment or disqualification.”).

28. See, e.g., Brief for Plaintiffs-Appellant at 21, *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010) (No. 8866-07), 2009 WL 6409871, at *21 (complaining of “systemic deficiencies [that] create a severe or unacceptably high probability that indigent criminal defendants will receive ineffective assistance of counsel” in New York State).

29. See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d. ed. 2004) (promulgated by the American Bar Association to create standards relating to collateral consequences and discretionary disqualifications of convicted individuals); UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT (2010) (promulgated by Uniform Law Commission to encourage standards relating to collateral consequences in criminal cases).

30. In an earlier article, I focused on the lack of—and need for—constitutional and professional standards for the delivery of effective assistance of counsel in misdemeanor cases. See *Roberts*, *supra* note 15, at 309–10. That article described the misdemeanor crisis and discussed the different institutional competencies of the legislature, the judiciary, professional organizations, and the defense bar in responding to it. See *id.* at 330.

31. I use the word “public defender” in the general, nontechnical sense, to include statewide public defender offices, non- or for-profits with contracts to provide indigent defense services, and panel attorneys doing indigent defense work. See *GIDEON’S BROKEN PROMISE*, *supra* note 12, at 2 (describing three basic models for delivery of indigent defense services: the public defender, appointed counsel, and a bidding system); see also CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, STATE-FUNDED INDIGENT DEFENSE SERVICES, 1999, at 5 (2001), <http://bjs.ojp.usdoj.gov/content/pub/pdf/sfids99.pdf> (describing various methods of delivering indigent defense representation).

effective representation of all clients difficult if not impossible.³² A small but vibrant literature debates whether and how public defenders should “triage” clients’ cases.³³ There are various proposals for the method of triage, but all would focus limited resources on felonies and cut resources for “minor” misdemeanor cases. While there may be intuitive appeal to such an approach, it ignores a critical side effect of triage in favor of serious cases: allowing the misdemeanor system to continue to function in its current, harmful manner by depriving individuals charged with misdemeanors of effective means of fighting the charges against them.³⁴

What if indigent defense counsel triaged in favor of misdemeanor representation, and in particular focused on the “petty,” quality-of-life misdemeanors that flood the system and result in disproportionately harsh, permanent criminal records? What if defenders put sufficient resources into such cases so that clients felt they actually had the true choice of refusing to plead guilty? The response to such a proposal would surely parallel the negative response Alexander drew, including: it is unrealistic; clients facing serious felony charges would suffer; and criminal defense attorneys cannot reform the system on the backs of individual clients, some of whom may be better served with a quick guilty plea or other resolution in the lower courts.³⁵

Yet truly minor misdemeanors are precisely the types of cases in which a plea bargain is rarely much of a bargain for the defendant. For example, a defendant might be “offered” a sentence of time already served—which can mean the night spent in jail awaiting arraignment, or even a fictional time period if the person was never incarcerated—in exchange for pleading guilty

32. See *GIDEON'S BROKEN PROMISE*, *supra* note 12, at 16–18 (discussing problems in indigent defense).

33. See *infra* Part IV.A (discussing triage literature).

34. See Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 301 (1996) (“Lawyers influence and shape the practices and institutions in which they work, if only to reinforce and legitimate them.”).

35. Cf. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119–20 (2008) (“For the typical innocent defendant in the typical case— . . . a recidivist facing petty charges—the best resolution is generally a quick plea in exchange for a light, bargained-for sentence.”).

to a misdemeanor of disorderly conduct.³⁶ This may sound advantageous, or at least not harmful, until the actual consequences of this plea are added into the equation. This conviction can, and does, lead to proceedings to evict an individual from public housing.³⁷ It can, and does, pose a bar to demonstrating “good moral conduct” for citizenship.³⁸ Perhaps most significantly, in an era in which employers can, and do, easily access electronic criminal records,³⁹ the person taking the “harmless” disorderly conduct plea will have difficulty finding work.⁴⁰ Indeed, this employment issue alone starkly illustrates

36. See MD. CODE ANN., CRIM. LAW § 10-201 (West 2002) (stating disorderly conduct is a misdemeanor).

37. See 24 C.F.R. § 982.553(a)(2)(ii)(A) (2010) (authorizing local public housing authorities to prohibit admission based on certain types of criminal activity). This includes criminal activity that “may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity; or . . . the health or safety of the owner, property management staff, or persons performing a contract administration function or responsibility on behalf of” the public housing authority. *Id.* My clinic students have represented a client with a disorderly conduct conviction facing the loss of public housing based on that conviction.

38. See 8 U.S.C. § 1427(a) (2006) (establishing a five-year period—which includes showing “good moral character”—for naturalization requirement); *id.* § 1430(a) (establishing a three-year period showing “good moral character” as naturalization requirement for specific categories of applicants, including individuals married to and living with a U.S. citizen and individuals who obtained lawful permanent resident status as the battered spouse of a U.S. citizen).

39. In some states, these databases include both criminal and noncriminal convictions, and records of the initial charge. In Maryland, for example, the “Maryland Judiciary Case Search” database will reveal charges that resulted in a “stet” or “*nolle prosequi*,” (which are equivalent to dismissal), as well as those that ended in an acquittal. See *Maryland Judiciary Case Search*, MD. JUDICIARY, <http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp> (last visited Apr. 2, 2013) (providing “public access to the case records of the Maryland Judiciary”) (on file with the Washington and Lee Law Review). These nonconviction records will be expunged only upon affirmative application of the individual and payment of \$30, provided there are no statutory bars to expungement (for example, a conviction following a dismissal means the earlier dismissal can never be expunged). See MD. CODE ANN., CRIM. PROC. § 10-105 (West 2012) (setting forth grounds for expungement in Maryland); MD. R. 4-504 (setting forth expungement procedures). In other states, such as New York, noncriminal convictions (such as for minor, nonpublic marijuana possession) or dispositions (such as deferred dismissals) will result in immediate or eventual automatic sealing of the record. N.Y. CRIM. PROC. LAW § 160.55 (McKinney 2011).

40. See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 958 (2003) (describing her study showing serious negative effects of race and

the way in which the most minor misdemeanor conviction has serious implications for so many people.⁴¹

The underlying goal of this Article's proposal to focus defender resources on minor misdemeanors is to have more defendants choose trial over a guilty plea, or at least reject a quick, early guilty plea—understanding that declining to plead guilty may lead to trial, but may also lead to deferral or dismissal.⁴² More misdemeanor trials, or fewer guilty pleas at an early court appearance, would impose serious strain on the criminal justice system.⁴³ If these costs filter down, prosecutors

criminal record on employment prospects). The same is true for landlords' access to public criminal records, and the resulting difficulty for an individual with such a record to find private housing. See Rebecca Oyama, Note, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of The Fair Housing Act*, 15 MICH. J. RACE & L. 181, 181 (2009) ("Increased landlord discrimination against housing applicants with criminal histories has made locating housing in the private market more challenging than ever for individuals with criminal records.").

41. RODRIGUEZ & Emsellem, *supra* note 19, at 1 (explaining that many employers of all types and sizes will not consider employees with a criminal record).

42. See Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853, 867–82 (1996) (describing his analysis of clinic student representation, which showed that a significant number of clinic clients who declined to plead guilty at arraignment later got dismissals, deferred dismissals, or plea offers to reduced charges); see also M. Clara Garcia Hernandez & Carole Powell, *Valuing Gideon's Gold: How Much Justice Can We Afford?*, 122 YALE L.J. (forthcoming 2013) (manuscript at 7–8) (discussing efforts of head of El Paso, Texas Public Defender's office to raise the office's low trial rates and describing how, while the efforts were a disappointment at first glance, a closer look at the data showed a high rate of dismissal of charges) (on file with author). While Hernandez, the head public defender, and Powell note that their data needs further study and analysis, they describe how, after instituting various programs to encourage more trials:

In FY2011 and 2012 we obtained dismissals on almost one quarter of our felonies, more than one third of our misdemeanors, and one third of our juvenile cases. In prior years, [Hernandez] had only focused on trials and pleas, never on the best possible outcome, which is dismissal of charges. [Hernandez] was pleased. Also, while our trial rate was low, close to half resulted in acquittals. Moreover, 82% of all our adult cases were resolved favorably relative to the prosecutor's initial plea-bargain offer.

Id.

43. See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1976 (1992) ("More zealous defense means more evidence, more legal arguments, tenacious insistence on exercising every right."); George Fisher, *Plea*

would be forced to decline prosecution in more cases. This may, in turn, affect law enforcement, potentially leading the police to exercise discretion in deciding whom they actually put through the system. Finally, making the system bear more of the true costs of adjudicating misdemeanor arrests would, hopefully, give legislators a concrete reason (and perhaps some political coverage) to decriminalize and to refrain from creating more minor criminal offenses. In these ways, zealous attention to misdemeanor representation—in addition to being one way of dealing directly with the misdemeanor crisis—may advance other methods of dealing with the misdemeanor crisis.

Defense attorneys cannot force their clients to go to trial or decline to plead guilty; nor can they coerce clients to do so. But they can offer zealous representation that allows clients to make truly voluntary choices, and that representation can include an invitation (in appropriate cases) to participate in a collaborative effort to change the system by forcing it to bear some of the real costs of mass misdemeanor processing.⁴⁴ Currently, the entire

Bargaining's Triumph, 109 YALE L.J. 857, 893–936 (2000) (“Prosecutors took up plea bargaining in part to escape the enormous [caseload] burdens of their office.”); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1950 (1992) (“In order to accommodate the dramatic increase in trials [caused by an abolition of plea bargaining], the trial process itself would have to be truncated.”). *But see* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1035 (1983) (“Indeed, the usual failure of prosecutors and trial judges [in Philadelphia] to seek pleas of guilty reflected their recognition that a nonjury trial often consumed fewer resources than the process of negotiating a guilty plea and of making the record that would justify its acceptance in the courtroom.”); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1040–41, 1047–50, 1053–86 (1984) (stating that “the inevitability of bargaining depends on the assumed need for bargaining, and the theory thus can be questioned to the extent that the ‘administrative need’ can be shown to be illusory”).

44. Inviting clients to participate in a coordinated effort to “crash” the system is cause lawyering, but properly done (e.g., not coercively) does not conflict with the client’s interest. For a thorough analysis of “cause lawyering” among criminal defense attorneys, see Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1197–98 (2005) (“Sometimes criminal defendants are better represented by defense attorneys who are ‘cause lawyers’ passionately seeking to advance their political and moral visions through the representation of their clients than by attorneys who have no overriding ‘cause’ other than the representation of the individual client.”).

system—including defense counsel in many instances, often due to a lack of resources—works to coerce guilty pleas and quick dispositions in the lower criminal courts. It is a system that violates professional, ethical, and constitutional norms on a daily basis, and a system in desperate need of reform.

A defender focus on misdemeanor representation is an approach that admittedly has drawbacks, and one that might work only as a limited “experiment” in the right jurisdiction. It also clearly is not an option in jurisdictions that openly or indirectly violate the Sixth Amendment right to counsel in misdemeanor cases by failing to appoint counsel when the defendant is sentenced to an actual or suspended term of incarceration.⁴⁵ This Article explores the idea of crashing the system as one potential response to the misdemeanor crisis, at a time when the lower courts are doing serious damage to individuals and to society by burdening millions of people with arrest and conviction records for minor offenses. Part II describes the potential role for defense counsel in making the criminal justice system feel the true cost of mass misdemeanor processing. Specific strategies for a defender office focus on misdemeanors,

45. See *Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (finding that the Sixth Amendment bars imposition of suspended sentence that was entered following “uncounseled conviction”); *Scott v. Illinois*, 440 U.S. 367, 371–73 (1979) (finding no right to counsel for sentence of fine); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (“[A]bsent 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.”). In one of the more blatant statements about violating the right to misdemeanor counsel, South Carolina’s chief justice called *Alabama v. Shelton* “one of the more misguided decisions of the United States Supreme Court”:

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.

MINOR CRIMES, MASSIVE WASTE, *supra* note 1, at 15; see also Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1023 (2013) (discussing certain jurisdictions’ failure or refusal to enforce *Alabama v. Shelton*). But see *Shelton*, 535 U.S. at 668–69 (noting how, under state laws or constitutions as of 2001, “[a]ll 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” (emphasis added)).

including specialized practice groups, are discussed in Part III. Part IV begins with an explanation of various existing proposals for public defender triage, and the argument against triage; it then considers and responds to likely arguments against any effort to crash the misdemeanor system.

II. Defense Counsel's Role in Making the Criminal Justice System Feel the True Cost of Mass Misdemeanor Processing

Recently, the Bronx District Attorney's (DA) office "quietly adopted" a new policy for misdemeanor trespass cases. Rather than filing charges based on a police officer's written affidavit, with checked boxes to indicate allegedly unlawful conduct, prosecutors must now first interview the arresting officer to determine whether the arrest was lawful.⁴⁶ This was a significant reform in a borough of a city where police made more than 16,000 trespass arrests between 2009 and 2011.⁴⁷ According to a Bronx DA Bureau Chief, the office "had received numerous complaints from defense lawyers who claimed that many of the people arrested were not trespassers."⁴⁸ Indeed, public defender offices are partners in federal court litigation filed to challenge the New York City Police Department's trespass stop and arrest policies.⁴⁹ While it is difficult to assess the exact effect that lower court

46. See Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. TIMES, Sept. 26, 2012, at A1 (explaining the new trespass-case screening process).

47. Complaint at 26–27, *Davis v. City of New York*, 10 CIV. 699 SAS (S.D.N.Y. Oct. 18, 2011), 2011 WL 4946243.

48. Goldstein, *supra* note 46, at A1.

49. See Complaint, *supra* note 47, at 3, 55–56 (lawsuit filed by various organizations and law firms, including The Legal Aid Society, New York City's main indigent defense provider, alleging unconstitutionality of police department practices relating to trespass stops and arrests); see also *Ligon v. City of New York*, No. 12 Civ. 2274(SAS), 2012 WL 3597066, at *1 (S.D.N.Y. Aug. 21, 2012) (lawsuit filed by various organizations and law firms, including The Bronx Defenders, an indigent defense provider, challenging police department's "abusive practices of stopping, questioning, searching, citing, and arresting residents of Clean Halls Buildings and their visitors without adequate cause"). The Legal Aid Society is also co-counsel in a lawsuit alleging violations relating to the police Department's marijuana possession arrest practices. *Gomez-Garcia v. N.Y.P.D.*, No. 0451000-2012, 2012 WL 2362711, at *1 (N.Y. Sup. Ct. June 22, 2012).

defense attorneys had, one thing is certain: “Trespass arrests in the Bronx have fallen 38.2%, year to date, compared with 2011.”⁵⁰

One of the attorneys involved at the inception of this coordinated effort wrote about his clinic students’ representation in a trespass trial he supervised:

Dwayne’s acquittal marked the end of the Pace Clinic’s direct representation, but it was the beginning of the Clinic’s efforts to organize a citywide advocacy coalition to end this pattern of wrongful trespass arrests. Dwayne was one of twenty clients that Clinic students represented on criminal trespass charges. Fourteen of these cases were ultimately dismissed. Like Dwayne, many of our clients have become engaged in collective action against the over-policing of their neighborhoods.⁵¹

When law school clinic students represent misdemeanor clients,⁵² those students have low caseloads, close supervision, ample resources, and the opportunity to collaborate with classmates. They have sufficient time to meet with the client and to investigate the law and facts by visiting the scene, obtaining 911 calls and video surveillance, and interviewing witnesses. They file substantive, nonboilerplate motions and fully prepare

50. Goldstein, *supra* note 46, at A1. In the other boroughs of New York City, where there has yet to be prosecutorial action, trespass arrests are either down very slightly, or up considerably. *Id.*

51. M. Chris Fabricant, *Rethinking Criminal Defense Clinics in “Zero-Tolerance” Policing Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351, 353 (2012) [hereinafter Fabricant, *Rethinking Criminal Defense Clinics*]; see also M. Chris Fabricant, *Rousting the Cops: One Man Stands Up to the NYPD’s Apartheid-Like Trespassing Crackdown*, THE VILLAGE VOICE (Oct. 30, 2007), <http://www.villagevoice.com/2007-10-30/news/rousting-the-cops/full/> (last visited Apr. 2, 2013) (describing the representation of a client in a criminal trespass trial) (on file with the Washington and Lee Law Review).

52. Law students act as “student-attorneys” under the particular jurisdiction’s rules governing student practice. In most jurisdictions, they can handle, with appropriate supervision, all aspects of a misdemeanor case. See, e.g., MD. RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND, Rule 16 (setting forth requirements relating to “legal assistance by law students” in Maryland).

for any potential sentencing proceeding.⁵³ In short, these students offer high-quality representation in the lower criminal courts.⁵⁴

Obviously, a busy public defender cannot devote the same amount of time or resources that a clinic student devotes to each client. However, the example illustrates the effect such attentive clinic-student lawyering can have on clients. They are more willing to go to trial and less eager to take a quick guilty plea. Surely the reasons for this decision-making process and outcome are complex, but undoubtedly one reason is that for clinic clients, going to trial with an attorney who is prepared (if inexperienced) is a viable option.⁵⁵ There is no subtle—or not-so-subtle—message from defense counsel of being too busy to handle this minor case properly. There is no message that taking a plea is no big deal, and that taking the plea early in the case is best. The result, at least in the jurisdictions where I have supervised my own and observed other student-attorneys, is that clinic students litigate pretrial issues more often and more aggressively, bargain with more information, and go to trial more in misdemeanor cases.⁵⁶ Indeed, and rather depressingly, some prosecutors complain that clinic students are

53. They can also attend to the nondirect consequences of the criminal case, such as school suspension hearings or eviction from public housing. My students in the Criminal Justice Clinic at American University, Washington College of Law, have advocated in these and other noncriminal contexts for clients we also represent in the criminal case.

54. See Zeidman, *supra* note 42, at 870 (comparing the “overall outcomes from arraignment through final disposition” between law student representatives and defense attorneys in New York County misdemeanor cases). The comparison showed

that students’ clients plead guilty far less often than do the clients of assigned counsel, and in cases where there is a plea, students’ clients were far more likely to plead to reduced charges, and far less likely to be sentenced to jail. Additionally, students achieved dismissals or [deferred dismissals] almost twice as often as did institutional defenders (44% versus 23%).

Id.; see also Fabricant, *Rethinking Criminal Defense Clinics*, *supra* note 51, at 356 (stating that criminal defense clinic “[s]tudents are, and must be, deeply engrossed in mastering each step in the adjudication of a criminal case”).

55. Notably, clinic clients rarely raise concerns, particularly after the initial meeting with student-attorneys, about students’ lack of experience.

56. Steve Zeidman’s comparison of student-attorney and appointed counsel outcomes and performance parallels much of my anecdotal experience. See, e.g., Zeidman, *supra* note 42, at 905 (stating that “guilty pleas in cases handled by students reflect a higher percentage of charge reductions”).

pushing for trials to get experience, when they should be telling their clients to plead guilty because they are guilty. The narrative here is that the pendulum has in effect swung from coercing clients to plead guilty to coercing them to go to trial. These complaints ignore that only the client—and not the student—can decide to go to trial, and also refuse to acknowledge that some defendants actually choose trial over plea when that option is made clearly available to them. In fact, the pendulum has simply swung away from explicit or implicit coercion to plead guilty toward representation that allows defendants a truly knowing and voluntary choice about how to best proceed.

The misdemeanor trial has almost disappeared in many jurisdictions, with some high-volume courts gaining more than 99% of all misdemeanor convictions without trials.⁵⁷ This is a central part of the misdemeanor crisis, and has allowed the current, overloaded lower courts to continue to function. The lack of adjudication of public order offenses is also a large part of the crisis in the legitimacy of the criminal justice system, as the vast majority of individuals who experience that system receive the strong message that no institutional actor—judge, prosecutor, or even their assigned defense attorney—is concerned with the factual basis for a criminal charge or the legality of police conduct leading up to an arrest.⁵⁸

57. See, e.g., NEW YORK CRIMINAL COURT ANNUAL REPORT, *supra* note 17, at 5 (presenting New York City statistics).

58. As Roscoe Pound noted more than eighty years ago, and Malcolm Feeley more recently reminded us:

It is [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 190–91 (1930)); see also Howell, *supra* note 8, at 274–75 (“Unfortunately for the criminal justice system and for the millions of people subjected to summary arrest each year for minor and noncriminal order-maintenance offenses, the processing of minor offenses bears few of the hallmarks associated with perceptions of procedural fairness.”).

III. Strategies for Focusing on Misdemeanors

So what might a coordinated effort to crash the misdemeanor system look like? This section explores several strategies: a defender community focus on order-maintenance misdemeanors, meaning the petty, largely public-order-offense arrests that come out of zero-tolerance policing;⁵⁹ the creation of specialized practice groups within a defender office for expertise and efficiency purposes; defender office-wide policies to advance quality misdemeanor representation, such as systems to collect information about particular police officers who frequently make petty offense arrests; and coordinated efforts to link focused petty misdemeanor representation to other strategies, such as impact litigation and community education, to move these cases out of the criminal justice system. The ways in which a particular defender office or group might choose to focus efforts on the lower criminal courts will vary by jurisdiction, and these strategies thus offer broad suggestions that may—or may not—be the right fit in a particular jurisdiction.

A. Focusing on Public Order Offenses

The types of minor misdemeanor arrests that come out of order-maintenance policing will vary by jurisdiction, but often include prosecutions for trespass, disorderly conduct, public urination or drunkenness, loitering, and marijuana possession.⁶⁰ These cases are charged in significant numbers across the nation. For example, in 2009 more than 45% of all drug arrests in the United States were for marijuana possession;⁶¹ in that same year,

59. See *supra* notes 7–8 and accompanying text (describing “zero tolerance,” or “order-maintenance” policing).

60. See Bowers, *supra* note 11, at 1666 (noting that “[m]any of the cases in the [lower] courts (perhaps the majority in most urban jurisdictions) are petty public order cases”).

61. See FED. BUREAU OF INVESTIGATION, *Crime in the United States: Arrests* (Sept. 2010), <http://www2.fbi.gov/ucr/cius2009/arrests/index.html> (last visited Apr. 2, 2013) (depicting data about drug abuse violations throughout the United States) (on file with the Washington and Lee Law Review). This percentage includes felony and misdemeanor marijuana possession, as the FBI does not separate the two categories. *Id.*

“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.”⁶²

In trying fiscal times, these are the types of cases in which proper representation—that impose the real cost of mass misdemeanor processing—could put pressure on legislators to decriminalize and prosecutors to decline to prosecute. Indeed, such movement has already happened in some jurisdictions. Supporters of the successful November 2012 ballot measures to legalize personal marijuana possession and use in Colorado and Washington stressed that “the laws will end thousands of small-scale drug arrests while freeing law enforcement to focus on larger crimes” and “estimate[d] that taxing marijuana will bring in millions of dollars of new revenue for governments, and will save court systems and police departments additional millions.”⁶³

Minor misdemeanors are also good candidates for the exercise of prosecutorial discretion in declining to file charges. In California in 2009, Sacramento and Contra Costa prosecutors announced plans to stop prosecuting certain misdemeanors, including many minor public order offenses, in the face of severe budget cuts.⁶⁴ A memo from the Sacramento District Attorney listed petty theft,

62. See FED. BUREAU OF INVESTIGATION, *Crime in the United States: Table 29* (Sept. 2010), http://www2.fbi.gov/ucr/cius2009/data/table_29.html (last visited Apr. 2, 2013) (listing numerical data about the number of arrests in various categories in the United States) (on file with the Washington and Lee Law Review); see also ROBERT C. BORUCHOWITZ, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, DIVERTING AND RECLASSIFYING MISDEMEANORS COULD SAVE \$1 BILLION PER YEAR: REDUCING THE NEED FOR AND COST OF APPOINTED COUNSEL 1 (2010) (“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.”).

63. Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 8, 2012, at P15; see also MASS. GEN. LAWS ch. 94C, § 32L (2008) (decriminalizing marijuana); MINOR CRIMES, MASSIVE WASTE, *supra* note 1, at 28 (describing King County, Washington’s program for diversion of driving-while-suspended cases). In this program, individuals worked off underlying fines that led to suspension in exchange for dismissal of the criminal charges. *Id.* The first months of the program showed a reduction of eighty-four percent in prosecutorial filings in suspension cases and a reduction of twenty-four percent in jail costs. *Id.*

64. See Jesse McKinley, *Money Shortages Force Cuts in Cases to be Prosecuted*, N.Y. TIMES, May 8, 2009, at A13 (giving statements from the Sacramento County District Attorney and Contra Costa County District Attorney discussing plans to stop prosecuting certain minor crimes).

public drunkenness, and minor drug possession as candidates for declination, and “[d]istrict attorneys in many parts of the country say they are considering prosecutorial rollbacks, including opting not to try some minor crimes . . . and seeking to divert more defendants to so-called community court systems.”⁶⁵ While these threats, obviously closely tied to efforts to retain funding,⁶⁶ have not often been carried out, such proposals highlight concerns with the costs of the lower criminal courts and potential openness to reform. This makes it an opportune time to focus defender resources on the types of cases that legislators and prosecutors might agree should be moved out of the system altogether, should they prove too costly.

Currently, and counterintuitively, petty misdemeanors are the types of charges least likely to get prosecutorial scrutiny. Josh Bowers has analyzed data showing that:

Iowa prosecutors declined [to file charges in] public order offenses at a substantially lower rate than any other offense category Specifically, violent felonies and misdemeanors were declined almost three times as often as public order felonies and misdemeanors. And all felonies were declined over fourteen times as often as all simple misdemeanors.⁶⁷

Bowers found similar data in New York City, with the lowest rates of declination of charges in public order offense cases.⁶⁸ This is likely due in part to the high volume of petty misdemeanors in some jurisdictions, particularly busy urban courts, making it difficult for lower court prosecutors to adequately screen such cases. It is undoubtedly also due to the high percentage of “quick-and-dirty pleas with minimal resource outlay” in petty prosecutions, making the defender community complicit in the continued movement of these cases.⁶⁹ These are the cases most in need of defense scrutiny and focus.

65. *Id.* (noting that the Contra Costa prosecutor eventually “cut his own salary to avoid putting the plan in place”).

66. *See, e.g.*, A.G. Sulzberger, *Facing Cuts, a City Repeals Its Domestic Violence Law*, N.Y. TIMES, Oct. 11, 2011, at A11 (describing how Topeka, Kansas prosecutor “said he was forced to not prosecute any misdemeanors and to focus on felonies because the County Commission cut his budget”).

67. Bowers, *supra* note 11, at 1716.

68. *See id.* at 1718.

69. *See id.* at 1716.

Finally, public order offenses may be less controversial as a focus of a coordinated defender community and defendant effort than other types of offenses, because they are usually victimless. They are generally *malum prohibitum*, or wrong only because the law says so, and they are the result of discretionary arrests (as compared to, say, a domestic violence arrest in a mandatory-arrest jurisdiction). When someone is arrested for such an offense, it represents a deliberate choice of police resources (for example, sending officers in to do a “vertical sweep” of a public housing building, resulting in a number of trespass arrests).

There are a number of reasons to focus defender resources on public order offenses in an attempt to encourage more defendants to reject early guilty pleas and to go to trial. While it may seem counterintuitive to use scarce resources on minor cases, there are potential long-term benefits for all defendants and for society in the rigorous defense of individuals charged with public order offenses.

B. Specialized Misdemeanor Practice Groups

For purposes of expertise and efficiency, defender offices might assign attorneys to particular categories of offense, for example creating a “marijuana possession practice group” or a “loitering practice group.” While this would require transferring certain cases from the arraigning defense counsel to the practice group counsel, thus moving away from vertical representation in offices that use a vertical model, there would be substantial advantages to a specialized group approach.⁷⁰

Specialization would allow attorneys to quickly become experts in constitutional, statutory, and evidentiary issues in the particular type of case. As Justice Douglas noted in *Argersinger v. Hamlin*:⁷¹

70. For attorney development reasons, and because an order-maintenance misdemeanor focus would encompass only some cases in lower court, offices might have only a certain amount of each attorney’s caseload in the specialized area, with the remainder of cases more randomly assigned for diversity of caseload.

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

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.⁷²

Disorderly conduct cases raise potential free speech issues, and trespass trials are replete with evidentiary and statutory issues, as well as constitutional ones. For example, a recent clinic trespass case led to the students' preparation on the following: whether the police officer could testify about prior notice of his warning to the defendant to stay away from the location in the case or instead whether the prosecution was required to produce the written warning; whether a general warning to stay away from a store encompassed the sidewalk in front of the store so as to provide sufficient notice of trespass under the relevant statute; and whether the prosecution could rely on testimony from either the police officer or an agent for a strip mall to prove that the officer had the statutorily required authority to arrest for trespassing at a privately rented store within the strip mall. Garnering such expertise for future cases allows defense counsel to properly challenge unlawful arrests, to hold the prosecution to its burden, and to offer clients the option of a trial with several potential lines of defense.

Specialization is a more efficient use of defender time, as issues tend to repeat themselves within particular categories of cases. Such efficiency has the added benefit of giving attorneys more time for the type of client counseling that must be central to an approach that stresses trial rights over guilty pleas and encourages clients to seriously consider refusing guilty pleas in appropriate cases.

C. Office-Wide Policies to Advance Quality Lower Court Representation

Some strategies for working towards more minor misdemeanor trials, or at least fewer guilty pleas, will cut across

72. *Id.* at 33 (citations omitted).

all types of cases. For example, defenders should refrain from advising unincarcerated clients to accept plea bargains at the first court appearance, on the grounds that such guilty pleas violate professional and ethical standards requiring investigation in all criminal cases.⁷³ Defense counsel has a clear duty to inform clients about any plea offers,⁷⁴ and clients are free to enter a guilty plea at the first appearance should they so choose,⁷⁵ but counsel should also make each client fully aware of the consequences of any plea and the option of rejecting an early plea with the goal of trial or of a later, potentially more advantageous, disposition.⁷⁶ This would include clearly informing clients about the myriad formal and informal collateral consequences of even a minor misdemeanor conviction,⁷⁷ thus giving the client true knowledge about the consequences of a quick guilty plea and the benefits to fighting the charges.

Giving individuals facing misdemeanor charges a real opportunity for voluntary decision-making about going to trial recognizes that the current misdemeanor system is replete with coercion points, pushing defendants towards quick, uninformed

73. Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORD. URB. L.J. 315, 331 n.86 (2005) (“Pleas at arraignments fly directly in the face of the lawyer’s constitutional and ethical duty to investigate.” (citing ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 4-4.1, 4-6.1 (1980))); see also Norman L. Reimer, *Frye and Lafler: Much Ado About What We Do—And What Prosecutors and Judges Should Not Do*, 36 APR CHAMPION 7, 8 (2012) (critiquing “meet ’em and plead ’em” practices); NEW YORK CRIMINAL COURT ANNUAL REPORT, *supra* note 17, at 29 (noting that almost half of all New York City misdemeanors are resolved at arraignment).

74. See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (finding a Sixth Amendment duty to communicate formal plea offers to client).

75. See MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2012) (“In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered. . . .”); AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE Std. 4-5.2 (3d ed. 1993) (“Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel.”). The decisions to be made by the accused, after full consultation with counsel, include: “(i) what pleas to enter; (ii) whether to accept a plea agreement.” *Id.*

76. See Zeidman, *supra* note 42, at 867–82 (describing how clinic clients who declined to plead guilty early in the case often received dismissals or better offers at a later point).

77. See Roberts, *supra* note 15, at 297–303 (describing minor convictions that lead to major collateral consequences).

guilty pleas. Defense counsel has an obligation to counter these coercion points. That countering can come in a variety of forms, such as assuring the client that counsel is fully prepared to try the case, rather than suggesting that a guilty plea is “better” when that suggestion is at least partly based on counsel’s own triage concerns. Only in this way can defenders achieve truly client-centered misdemeanor representation, namely by giving individuals the tools and assistance they need to avoid minor convictions with major consequences. When Michelle Alexander, in her *Crash the System* editorial, wrote that “mass incarceration depends almost entirely on the cooperation of those it seeks to control,” the cooperation she was critiquing came in the form of guilty pleas taken under circumstances that can hardly be defined as knowing and voluntary.⁷⁸ In the lower criminal courts, this means clients trying to talk to counsel for the first time in the hallway as counsel runs between courtrooms, and having an “offer” to plead guilty pushed forward when the client does not trust counsel enough to discuss fears of deportation, loss of the family’s public housing, or potential plans for college next year that depend on an ability to get financial aid. Refusing to encourage, and indeed generally discouraging, guilty pleas at the first appearance is a seemingly small step that will go a long way to dissipating some of this coercion.

Defender offices, as some already do, should develop systems to collect and make internally available information about police officers focused on quality-of-life arrests, in order to see patterns and more easily expose “testilying.”⁷⁹ This is particularly important in public order offenses, in which police testimony is usually the only evidence. Such systems offer significant potential benefits to lower court practice because discovery is often meager and late. Even in “open file” discovery jurisdictions, prosecutors may not have relevant police or laboratory reports—and may

78. Alexander, *supra* note 20, at SR 5.

79. I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 836 (2008) (“In New York, the Mollen Commission found that perjury was ‘so common in certain precincts that it has spawned its own word: ‘testilying.’” (quoting COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, CITY OF N.Y., COMMISSION REPORT 36 (1994) (Milton Mollen (Chair) and citing Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1)).

claim that they do not have time to get them—before the trial date. The result is that many defendants plead guilty before getting any discovery, including any potential exculpatory material.⁸⁰ Internal defender systems that expose patterns of improper police conduct could lead to use of such evidence at trial or in pretrial advocacy; the negative repercussions of public exposure of such evidence might encourage more careful prosecutorial analysis of public order cases and better decision-making by police officers in forwarding such cases to prosecutors.⁸¹ Further, demanding discovery and following up on those demands in minor misdemeanor cases could significantly advance lower court practice norms, thus imposing more of the true costs of mass misdemeanor processing on the criminal justice system.

D. Supplementing Defender Focus on Misdemeanors with Other Strategies for Reform of the Lower Criminal Courts

In order to force change in the lower courts, this Article's proposal of a trial-level focus on minor misdemeanor representation should be supplemented with other strategies. These might include: impact litigation to challenge particular offenses or particular police practices, such as the Bronx trespass litigation described above;⁸² impact litigation to challenge

80. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”); see also *United States v. Ruiz*, 536 U.S. 622 (2002) (holding that defendants have no due process right to impeachment information about government witnesses prior to entering a guilty plea, but leaving open the question of whether there is such a right for nonimpeachment exculpatory evidence).

81. See *supra* notes 46–51 and accompanying text (discussing Bronx District Attorney's institution of more rigorous screening of trespass arrests after defense bar complained about improper police conduct in such arrests).

82. See *supra* notes 46–51 and accompanying text (discussing recent trends in trespass arrests made by the New York City Police Department); see also *Bery v. City of New York*, 97 F.3d 689, 689 (2d Cir. 1996) (granting preliminary injunction against enforcement of unlicensed general vending misdemeanor as applied to visual artists exhibiting or selling their work in public places); Fabricant, *Rethinking Criminal Defense Clinics*, *supra* note 51, at 363 (describing the Pace Law School criminal defense “Clinic’s experience leveraging

inadequate indigent defender systems;⁸³ decriminalization efforts, which might be nudged along by higher costs that a defense community trial-level focus would impose on the system; media advocacy; and community education.⁸⁴ Indeed, these other strategies are critical for change in the lower criminal courts and this Article's proposal is not intended to stand on its own. The proposal of focusing defender resources on petty misdemeanors is, however, a critical component of reforming the lower courts—and one that not only is missing with the current dismal state of representation in many misdemeanor cases, but is ignored as a viable method of helping to solve the misdemeanor crisis.

IV. A Different Conception of Triage: In Favor of Minor Misdemeanors

There is little disagreement that indigent defense providers face overwhelming workloads, and that this has a severely negative effect on their clients.⁸⁵ There is a body of literature that works from the assumption that high workloads are here to stay

[its] misdemeanor docket to work towards ending the pattern of wrongful trespass arrests in New York City,” and noting that the clinic’s “work involved a combination of litigation strategies in Criminal Court, impact litigation, and legislative advocacy”).

83. See Cara Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 440–75 (2009) (discussing suits raising systemic challenges to indigent defense systems); see also Martin Guggenheim, *The People’s Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 400 (2012) (“Separation of powers, which has long been a shield preventing courts from overseeing indigent defender systems, is instead a sword by which courts are authorized to decide for themselves whether indigent defender systems are adequate to allow courts to perform their constitutionally-assigned function.”).

84. See MELANCA CLARK & EMILY SAVNER, BRENNAN CTR. FOR JUSTICE, COMMUNITY ORIENTED DEFENSE: STRONGER PUBLIC DEFENDERS 7 (2010), available at http://www.brennancenter.org/content/section/category/community_oriented_defender_network (“The Brennan Center founded the Community Oriented Defender (COD) Network to support defenders and their allies who seek more effective ways to carry out the defense function.”). “Our goal is to enable defense counsel to engage community based institutions in order to reduce unnecessary contact between individuals and the criminal justice system.” *Id.*

85. See, e.g., *GIDEON’S BROKEN PROMISE*, *supra* note 12, at 38 (detailing the crisis in indigent defense systems across United States).

and in need of a rational response—namely, a principled system of triage.⁸⁶ Arguments in favor of a system of triage that diminishes representation for minor misdemeanors are, effectively, arguments to shrink *Gideon*.⁸⁷ Focusing on misdemeanor representation, with the goal of fewer guilty pleas and more trials so as to impose the true cost of mass misdemeanor processing, is an attempt to shrink the overloaded, unjust lower criminal courts.

A. *The Debate over Public Defender Triage*

As Darryl Brown has explained his view, the courts establish and define the constitutional entitlement of the right to the effective assistance of counsel, and the legislature then underfunds indigent defense so that the entitlement cannot be realized.⁸⁸ These “[f]unding decisions, in effect, delegate to trial attorneys and judges the job of rationing rights. That is, these actors have the job of choosing which of the formal entitlements courts have created will see practical implementation, and in which cases.”⁸⁹ Critiquing as unrealistic an approach that calls for “uncompromising zealous advoca[cy]” for all criminal defendants,⁹⁰ those calling for triage instead find a stark reality: “The choice in underfunded systems is not between zealous advocacy and rights rationing. It is between haphazard, ad hoc rationing and thoughtful, well-conceived allocation.”⁹¹

86. See, e.g., Darryl K. Brown, Essay, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 807 (2004) (describing the likelihood that high workloads will be persistent and responding that a principled system of triage would be a rational answer).

87. See *infra* Parts IV.A.1–3 (describing various triage proposals that essentially result in less misdemeanor representation).

88. See Brown, *supra* note 86, at 807.

89. *Id.* The triage idea builds on the important work of William Stuntz. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997) (explaining that legislatures limit defense funding in part as a response to judicial overregulation of the criminal justice system and that “[u]nderfunding of criminal defense counsel limits the number of procedural claims that can be pressed”).

90. Brown, *supra* note 86, at 821 n.72 (citing MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 65–86 (1990)).

91. *Id.* at 828; see also *id.* at 808 (“[U]nderfunding of criminal defense is, in

If one accepts that defenders must (and will) ration resources, and that a principled system for doing so is preferable to an ad-hoc response, the next step is determining the principles for rationing.⁹² Scholars have offered different

effect, a permanent feature of American criminal justice.”); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 475 (2007) [hereinafter Hashimoto, *The Price*] (“[T]hat indigent defense counsel caseloads are unacceptably high and that the quality of representation will continue to suffer until those caseloads become more manageable—are relatively uncontroversial.”). *But see* Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 936 (2010) (commenting that Brown’s “proposal, even if logically justifiable and plausible as a professional goal of public defenders, can provide no practical guidance that would meaningfully offset inadequate resources”). “Moreover, the apparent promise for more efficient allocation of resources can undermine arguments for adequate defense funding by suggesting that the priority cases can be defended well only if defenders focus their efforts on clearly observable pretrial indicators of likely innocence.” *Id.* Another approach to rationing is based on the belief that “hardly anyone in the society would want to devote the resources needed to bring us even close to a state in which rights could be generally enforced.” William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1092 (1988); *see also id.* at 1093 (“[T]he prevailing approaches to legal ethics should be faulted, not for failing to guarantee full access to the legal system, but for failing to contribute to an appropriate distribution of this necessarily scarce resource.”). Monroe Freedman and others have critiqued Simon’s views, although discussion of that lively debate is beyond the scope of this Article. *See, e.g.,* Monroe H. Freedman, *A Critique of Philosophizing About Lawyers’ Ethics*, 25 GEO. J. LEGAL ETHICS 91, 91 (2012) [hereinafter Freedman, *A Critique*] (discussing the author’s disagreement with Simon’s views).

92. The literature on criminal defense triage builds on a well-developed body of work examining triage in the civil poverty law context. For example, Paul Tremblay has suggested principles for screening potential clients in his examination of the ethics of legal services triage that include: “legal success” (when resources can make a difference); “conservation” (cases requiring “proportionally smaller amounts” of the law office’s benefits to succeed); “collective benefit” (cases likely to affect a large number of people); “attending to the most serious legal matters” (when representation can ameliorate great “pain, discomfort, or harm” of a client); and “long-term benefit over short-term relief” (as a subset of the seriousness principle). Paul R. Tremblay, *Acting “A Very Moral Type of God”: Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2490–92 (1999); *see also* Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 281, 360–63 (1982) (discussing rationing principles); Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1536–42 (1995) (same); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Service Practice*, 37 UCLA L. REV. 1101, 1103 n.7 (1990) (“Scarcity is inherent in legal services work. . . . [T]he presence of any fixed budget inevitably creates allocation choices, and without the usual market or price mechanisms some allocation methodology must be used.”). This civil

models,⁹³ falling into three general categories: innocence- and stakes-based triage; a multicategory approach that takes innocence, “seriousness of case,” and protection of the justice system into account; and a straightforward “seriousness of case” triage. A fourth category offers an ethical justification—that includes a pragmatic proposal—for refusing to triage.

1. *Innocence- and Stakes-Based Triage*

Brown’s triage approach “urges factual innocence as a predominant concern of criminal procedure over other competing goals, such as regulation of police conduct.”⁹⁴ This approach is unapologetic in denying effective representation to some in order to provide it to others. For example, a busy defender with two clients—one with a suppression motion with merit and the other “more likely to be innocent”—would forgo the motion in favor of concentrating scarce resources on the potentially innocent client, “even if the latter’s chances of ultimate success are lower.”⁹⁵

poverty law literature builds, in turn, on philosophical debates over ethical decision-making in situations of crisis or scarcity. *See, e.g.*, HUGO ADAM BEDAU, MAKING MORTAL CHOICES 5–37 (1997) (outlining the ethical problems and questions related to resource scarcity); EDMOND CAHN, THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW 71 (1981) (same). Recognizing this important foundational work, this Article focuses on the criminal defense triage literature.

93. *See e.g.*, Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH & LEE L. REV. 1287, 1290 (2013) (“[W]e must shrink the universe of cases covered by *Gideon* to preserve its core. That would mean excluding nonjury misdemeanors and perhaps probationary sentences from its ambit.”); Cara H. Drinan, *Getting Real about Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH & LEE L. REV. 1309, 1336 (2013) (stating “[b]udget constraints and excessive caseloads have made triage an essential component of modern public defense”).

94. Brown, *supra* note 86, at 808 (noting that “[t]he specifics of [his proposed rationing] approach adapt insights from recent research on the causes of wrongful convictions”). Brown acknowledges that “[t]here are certainly jurisdictions in which funding levels are so low that rationing cannot be done in any meaningful manner; there simply is not enough to ration.” *Id.* at 815 (describing Quitman County, Mississippi). His triage proposal would also not apply where there is “adequate funding of some locales that calls merely for ordinary lawyering decisions about allocation of resources.” *Id.* at 816. His approach would apply only in the “large middle range.” *Id.*

95. *Id.* at 821. One might question Brown’s statement that “[b]eyond its intuitive normative appeal, an approach giving priority to factual innocence

In addition to factual innocence, Brown would ration in favor of “charges and clients who have the most at stake or are likely to gain the greatest life benefit.”⁹⁶ The “most at stake” principle means restricting *Argersinger* rights—namely, the right to counsel in misdemeanor cases in which the defendant is sentenced to actual or suspended incarceration⁹⁷—to “the extent necessary to make *Gideon* more meaningful.”⁹⁸ In other words, the large majority of individuals facing criminal charges, those facing low-level offenses, “get deliberately poorer representation and thus face a greater likelihood of conviction and punishment than they otherwise would.”⁹⁹ Tempering this seemingly bright line between what he describes as high- and low-stakes cases, Brown notes how in some instances a defender might devote more resources to an individual facing minor charges but with a good chance of acquittal or lower sentence.¹⁰⁰ This, however, is an

draws its legitimacy from both core constitutional values and its correlation with plausible assumptions about legislative preferences.” *Id.* at 817. While it is true that language in some of the major right-to-counsel cases—including *Powell v. Alabama*, *Gideon*, and the *Argersinger* line of cases—defines the core role of defense counsel as protecting innocent clients against wrongful incarceration, later cases such as *Padilla v. Kentucky*, *Lafler v. Cooper*, and *Missouri v. Frye* offer a different conception of defense counsel, namely one that focuses on effective representation relating to guilty pleas. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2012) (stating that “negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”); *Missouri v. Frye*, 132 S. Ct. 1399, 1406 (2012) (same); *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012) (“During plea negotiations defendants are ‘entitled to the effective assistance of competent counsel.’” (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970))). In addition, ethical rules binding defense lawyers require zealous advocacy for all clients, not only those clients “likely to be innocent,” and professional standards similarly conceive defense counsel as attuned to the client’s needs and goals, irrespective of guilt or innocence. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 83 (3d ed. 2004) (discussing interpretation of zealous representation norm in Model Rules of Professional Conduct).

96. Brown, *supra* note 86, at 818.

97. *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972) (holding that it violates the Sixth Amendment right to counsel to imprison a person for any uncounseled conviction, absent a valid waiver of the right); see also *supra* note 45 and accompanying text (citing post-*Argersinger* cases).

98. Brown, *supra* note 86, at 818.

99. *Id.* (“Rationing defense services means a higher risk of error in some cases, and that risk should be allocated toward parties with less to lose.”).

100. See *id.* at 818–19 (“It is often better to put resources toward a project

exception to a rule of rationing that would generally give priority to clients facing more serious charges.

Brown is not naïve about the potential pitfalls of having public defenders—who are overwhelmed and hampered by cognitive biases—making quick, early decisions about their clients' potential innocence.¹⁰¹ Still, he would prefer even such potentially flawed decision-making to a completely ad hoc method. One critical omission from Brown's examination of potential pitfalls in his triage proposal is that these practical and cognitive obstacles to determining innocence are exaggerated in misdemeanor representation. Defense counsel in the lower criminal courts have higher caseloads than their felony counterparts, and less access to external information through discovery. A large percentage of misdemeanor cases (such as drug cases or public order offenses) rest solely on the word of law enforcement, making the likelihood of a cognitive bias in favor of the police in a "client said, police said" type of case particularly high, even by defense counsel. In the lower courts, there is almost no time to step back and carefully review the case for likely innocence, and the pressure of the context may exacerbate already strong cognitive biases.¹⁰²

with a high chance of reducing small harms than a small chance of preventing a great harm.").

101. *See id.* at 826–27 (discussing various cognitive biases that likely affect attorneys making resource allocation judgments, but remaining convinced that the innocence basis for rationing is still defensible). A major problem with Brown's proposed triage system is that it expects defense counsel to somehow sort through and separate out the likely innocent clients from the guilty clients. *See id.* at 816. First, how will defense counsel who has more clients than she can effectively handle do this sorting? Surely it should not be based on gut instinct, but often—and particularly in jurisdictions where there is restrictive discovery so that defense counsel has little information at the inception of the case—that is largely what defense counsel has to work with. Brown notes this chicken-and-egg problem with his triage proposal. *See id.* (discussing the application of his proposal). Indeed, although he finds that in the end defense counsel is up to the task of sorting likely innocent from likely guilty clients early in the case, his critique is so strong as to be a convincing argument against his proposed system of evidence-based triage. *See id.* at 820 ("All of these are complicated judgments to be sure, and in practice will sometimes be made quite roughly. But they are not different in kind from the judgments defense attorneys have long made when faced with resource constraints . . .").

102. *See generally* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

2. Multicategory Triage Approach (with a Focus on Innocence)

John Mitchell, in an early ethical and philosophical inquiry, noted how despite various theories of the role of defense counsel in the lower criminal courts, “the defender’s work is better described by the medical/disaster theory of allocation in chaos—triage.”¹⁰³ Mitchell’s view is that the need to triage does not necessarily lead to violation of the Sixth Amendment right to counsel.¹⁰⁴ Instead, he suggests that defense counsel divide misdemeanor cases into those requiring “focus,” and those in which only “pattern representation” is needed, both meeting the constitutional floor.¹⁰⁵

Mitchell proposes one catch-all and two specific categories of cases in which clients would get “focused representation,” meaning zealous representation that meets ethical and professional standards above the bare minimum required by the Sixth Amendment: (1) serious cases, meaning first priority to “the factually innocent” and secondary priority to individuals “facing extreme sentences or collateral legal consequences”; (2) “cases implicating system protection,” for example, cases presenting issues of “legally insufficient evidence, determinative evidentiary or procedural issues, [and] clear overcharging”; and (3) the catch-all of “concrete injustice,” which Mitchell describes as “cases that touch the heart and gut,” using the example of a pregnant client trying to clean up her life (so long as this category is rarely used

103. John Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1225 (1994). Mitchell’s article

considers four central, recurring principles for making rationing decisions as potential tools for developing a rationing regime for defenders in the lower courts. It then analyzes each to determine what guidance each can provide for allocating our scarce resource of focus in the lower criminal courts. The four principles are as follows: 1. Greatest good for the greatest number (utilitarianism); 2. Help those with the greatest need (egalitarianism); 3. Queues, randomness (egalitarianism); 4. Let the market decide (merit).

Id. at 1252.

104. *See id.* at 1245–46 (“To avoid misunderstanding, one should recognize that this latter approach (pattern representation) is one which, as will be explained later, fulfills the Sixth Amendment and frequently leads to favorable results for the client.”).

105. *Id.* at 1246–48; *see also id.* at 1245–46.

and the attorney using it “continues to sincerely examine and question her cultural biases.”¹⁰⁶

Significantly, and relevant to this Article’s proposal, Mitchell notes how “focused representation” in the categories of cases he identifies will result in changes in prosecutorial behavior:

Legal-insufficiency cases and most factual-innocence ones will drop out as prosecutors begin to respond to defenders’ willingness to push those cases and their general success when they do. This in turn may well lead the prosecutor to more carefully screen cases at the inception and not even charge such cases in the first place, as well as not overcharge.¹⁰⁷

While this is an important benefit of “focused representation,” Mitchell’s description of the “pattern representation” that most lower court defendants would receive gives one pause: “Pattern representation’ means quickly categorizing cases legally, factually, strategically, and predictively by corresponding certain salient features of a case to recurring patterns the defender has abstracted from the masses of cases in which all fellow defenders have been involved.”¹⁰⁸ As Monroe Freedman has noted, this description is “strikingly similar to the inquisitorial system of judging.”¹⁰⁹

106. *Id.* at 1288–90; cf. Charles J. Ogletree, Jr., *Beyond Justification: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1278 (1993) (“A[] potential danger of empathy is that it can lead to problematic allocation of resources. . . . In a situation of extremely limited attorney resources, . . . [t]he time that I spend getting to know my clients, listening to their stories, helping them find jobs, is time that I could spend representing others.”).

107. Mitchell, *supra* note 103, at 1291.

108. *Id.* at 1293.

109. Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 915 (2005) [hereinafter Freedman, *Ethical Manifesto*] (describing Fuller’s critique of the “pattern approach” used in inquisitorial systems and his view that an “adversarial presentation . . . [is] ‘the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet known’” (quoting Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 34 (Harold J. Berman ed., 1971))).

*3. Triage Based on Case Seriousness: Cutting Back on
Misdemeanor Representation*

A very different method of rationing is simply to deny counsel to a subset of individuals charged with misdemeanors on the theory that we can identify types of cases in which defense counsel does not provide any benefit to the individual. Like Mitchell and Brown, Erica Hashimoto offers a solution to her foundational observation that “[o]utrageously excessive caseloads have compromised the quality of indigent defense representation.”¹¹⁰ Criticizing jurisdictions that “force counsel to direct significant attention to low-level misdemeanor cases,”¹¹¹ Hashimoto presents data supporting her claim that appointed counsel “do not appear to provide significant benefit to the[se] defendants;” she thus focuses on “ways in which a state could limit appointment in those cases.”¹¹²

Hashimoto examined misdemeanors in federal court from 2000 to 2005 and found that pro se defendants—some 64% of the misdemeanor defendants in the data—were much less likely than represented defendants to enter a guilty plea and much more likely to get a dismissal or an acquittal in a bench trial.¹¹³ This data also revealed that pro se defendants fared significantly better than represented defendants in sentencing outcomes.¹¹⁴ Hashimoto acknowledges limitations in her data, for example noting that federal court misdemeanor outcomes may not accurately predict state court misdemeanor outcomes, and that the relatively low numbers of pro se defendants in federal misdemeanor proceedings may lead “federal judges [to] make

110. Hashimoto, *The Price*, *supra* note 91, at 464.

111. *Id.*

112. *Id.* at 465.

113. *Id.* at 490 tbl.2.

114. *Id.* at 491. In a related study examining state court felonies, Hashimoto found that “at the state court level, felony defendants representing themselves at the time their cases were terminated appear to have achieved higher felony acquittal rates than their represented counterparts in that they were less likely to have been convicted of felonies.” Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 428 (2007).

more accommodations to ensure that the rights of those defendants are protected.”¹¹⁵

Working from this admittedly limited data, Hashimoto proposes “four steps that states can take to limit appointment of counsel to those cases in which the need for appointment is most justified”:

First, states that currently provide a statutory right to counsel in all misdemeanor cases—regardless of penalty—should amend their statutes so that the defendant’s statutory right to counsel mirrors the federal constitutional right to counsel. Second, states should modify penalties for some minor offenses so that those offenses do not give rise to a right to counsel. Third, states should alter the structure of probation so that the imposition of a probationary sentence does not give rise to a right to counsel. Finally, states should establish procedures so that determinations regarding potential sentences in misdemeanor cases are made at the outset of the case.¹¹⁶

Pointing out how these steps will lead to fewer clients for indigent defense providers, Hashimoto importantly urges states to adopt specific, numerical caseload limitations so that decreased case numbers actually lead to lower defense workloads.¹¹⁷

Hashimoto’s proposal gives short shrift to the collateral consequences of misdemeanor convictions. She notes how misdemeanor convictions can lead to sentence enhancement in a later case and possible immigration consequences for noncitizens, but states that “all of these consequences, in addition to a loss of liberty, are threatened in more serious cases. To the extent that a

115. See Hashimoto, *The Price*, *supra* note 91, at 494; see also *id.* at 495 (noting how defendants with weak or minor charges against them may be less likely to retain or request appointed counsel).

116. *Id.* at 467, 497–503.

117. *Id.* at 467, 504–13 (discussing recommendations to states regarding caseload limitations). Hashimoto claims that “[t]wo factors—the rise in total number of cases requiring appointment of counsel and the inadequacy of indigent defense budgets—have led to the current caseload crisis.” *Id.* at 475. Although she briefly notes the recent exponential growth in cases prosecuted in state and local courts, see *id.* at 481–82 (describing a “sharp rise in the number of narcotics prosecutions” and “increases in misdemeanor prosecutions”), she focuses on—and appears to place responsibility for—the rise in numbers of cases requiring counsel largely on *Gideon*, and more specifically on *Gideon*’s extension to some misdemeanor prosecutions in the *Argersinger* line of cases. See *id.* at 468–81; see also *supra* note 45 and accompanying text (discussing *Argersinger* line of cases).

resource-allocation choice must be made, the resources should go to those charged with offenses that will lead to imprisonment in the event of conviction.”¹¹⁸ But imprisonment is not always a proxy for seriousness of the consequence. Many minor criminal charges can lead to major collateral consequences that require counseling and advocacy. We might decide, for example, that counsel plays a more critical role in representing an elderly, long-term permanent resident noncitizen who faces deportation if convicted of his first offense for shoplifting (even if a jail sentence is off the table) than for a young person facing felony drug charges in a jurisdiction where he will be eligible for—and offered—a preplea diversionary program leading to dismissal of the charges upon successful completion (even if imprisonment is a theoretical possibility). Despite failing to fully account for collateral consequences, Hashimoto offers a provocative proposal based on an important, albeit limited, empirical inquiry.

4. *Refusing to Triage*

Monroe Freedman, in a strong critique of the triagists’ argument that public defenders in many jurisdictions cannot zealously represent all of their clients, proposes an alternative response to triage: defenders should refuse to take on further clients.¹¹⁹ To do this, counsel should enlist supervisory assistance, and make a record that the basis for the refusal is the defender’s inability to deliver zealous representation (which entails the type of initial fact investigation that pattern representation forecloses).¹²⁰

This refusal to triage is consistent with Freedman’s position, along with co-author Abbe Smith in their important book, *Understanding Lawyers’ Ethics*, that “zealousness continues today to be *the* fundamental principle of the law of lawyering and

118. Hashimoto, *The Price*, *supra* note 91, at 498 n.48.

119. See Freedman, *Ethical Manifesto*, *supra* note 109, at 920 (“In order to allow zealous investigation and research, defense counsel is forbidden to carry a workload that interferes with this minimum standard of competence, or one that might lead to the breach of other professional obligations.”).

120. *Id.* at 921–22.

the dominant standard of lawyerly excellence.”¹²¹ Indeed, in his critique of proposals for utilitarian triage in misdemeanor cases, Freedman has noted that “by honoring their ethical obligations, public defenders would cease to be an essential part of a fraudulent cover-up of the denial of fundamental rights to countless poor people who are caught up in a criminal justice system that is unethical, unconstitutional, and intolerably cruel.”¹²²

B. Shrinking Mass Misdemeanor Processing, Not Gideon

In the literature on triage in criminal defense practice, individuals charged with minor misdemeanors are the losers. Under all of the triagists’ models for response to overload, the “small” case, which they describe as generally without significant consequences,¹²³ does not merit much, if anything, in the way of defender resources. There is not enough to go around, something has to give, and individuals facing minor charges in the lower

121. FREEDMAN & SMITH, UNDERSTANDING LAWYERS’ ETHICS, *supra* note 95, at 71 (internal quotation marks omitted). Noting the “tepid endorsement of zealous representation” in the current version of the Model Rules of Professional Conduct, Freedman and Smith find “reason to believe” that these rules “will be interpreted to include the pervasive obligation of zealous representation.” *Id.* at 83; *see also* Freedman, *A Critique*, *supra* note 91, at 91.

122. Freedman, *Ethical Manifesto*, *supra* note 109, at 923. Indeed, 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. *See, e.g.*, *State v. Bowens*, 39 So. 3d 479, 482 (Fla. Dist. Ct. App. 2010) (certifying public defender office’s claim of conflict-of-interest arising from excessive caseloads to Florida Supreme Court); *State ex rel. Missouri Pub. Defender Comm’n v. Waters*, 370 S.W.3d 592, 612 (Mo. 2012) (holding that trial court exceeded its authority in appointing public defender to represent defendant after public defender declined additional representation because it had exceeded its caseload capacity); Jeff Adachi, *Budget Cuts Threaten Promise of Equal Justice*, RECORDER, Feb. 13, 2009 (listing other jurisdictions), available at <http://sfpublicdefender.org/2009/04/21/budget-cuts-threaten-promise-of-equal-justice>.

123. To be fair, Mitchell (and to a very limited extent, Hashimoto) does note the potential for serious collateral consequences of minor criminal convictions. *See* Mitchell, *supra* note 103, at 1274 (discussing major collateral consequences); Hashimoto, *The Price*, *supra* note 91, at 498 n.148 (discussing the potential consequences of a misdemeanor conviction (citations omitted)).

criminal courts—and most defendants in the criminal justice system are in the lower criminal courts—get the short end of the resource stick.

The problem with this approach is that it allows these seemingly minor cases to continue to move through the criminal justice system. Defense counsel, by failing to devote sufficient resources, in effect enhances the ability of legislators, police, and prosecutors to continue creating, arresting for, and prosecuting crimes that many might agree do not even belong in the criminal justice system.¹²⁴ The criminal defense bar has a particular role to play in forcing the hand of these other institutional actors. By neglecting the least serious types of cases, at least as judged by the likely outcome in the criminal court, defenders also fail to challenge the legitimacy of these types of prosecutions. Defenders can help clients—often by simply offering representation that gives clients a true choice to reject a quick guilty plea—push the boundaries of the system, so that it can no longer handle the volume of misdemeanors currently flowing through.

There is also no longer such a thing as a “slap on the wrist.” All convictions, even for the most minor of charges, come with a long list of “collateral consequences,”¹²⁵ ranging from the loss of public housing and federal student loans to the inability to find work because the majority of employers now run criminal background checks on prospective employees.¹²⁶ Indeed, in his

124. See, e.g., *supra* note 63 and accompanying text (describing recent ballot initiatives in Colorado and Washington decriminalizing marijuana).

125. Collateral consequences are the “wide range of status-related penalties that are permitted or required by law because of a conviction even if not included in the court’s judgment.” MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY & PRACTICE* 16 (2013); see also *id.* (recognizing that “[t]here is no consensus about how the term ‘collateral’ should be defined or about the legal implications of such a label”).

126. See, e.g., 20 U.S.C. § 1091(r)(1) (2006) (listing varying ineligibility periods for federal student loans, based on number of drug-related convictions); 42 U.S.C. § 13661 (2006) (bars to public housing); see also SOC’Y FOR HUMAN RES. MGMT., *BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS* 3 (2010), available at <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx> (noting that 73% of organizations surveyed conduct criminal background checks for all job candidates); cf. THE 2009 CRIMINAL JUSTICE TRANSITION COAL., *SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS* 131–34 (Nov. 5, 2008), http://www.sentencingproject.org/doc/publications/inc_transition2009.pdf

1970 *Argersinger* concurrence, Justice Powell noted that “the effect of a criminal record on employability . . . [is] frequently of sufficient magnitude not to be casually dismissed by the label ‘petty.’”¹²⁷ He pointed out that “[s]erious consequences also may result from convictions not punishable by imprisonment. Stigma may attach to a drunken-driving conviction or a hit-and-run escapade. Losing one’s driver’s license is more serious for some individuals than a brief stay in jail.”¹²⁸

It is one thing to say that an individual pleading guilty to disorderly conduct does not necessarily need counsel to be assured a nonjail sentence. It is quite another to say that individual does not need counsel to understand that she will lose her public-school-system job and her public housing if she pleads guilty.¹²⁹ Similarly, it is one thing to say a person does not need a lawyer to keep him out of jail on a public urination case. It is quite another to say he does not need serious counseling, from his own lawyer, about how, if he is in California, pleading guilty to public urination leads to lifelong sex offender registration.¹³⁰

(recommending various executive and legislative changes to deal with bars to employment for individuals with criminal records).

127. *Argersinger v. Hamlin*, 407 U.S. 25, 48 (1972) (Powell, J., concurring) (citations omitted).

128. *Id.* “When the deprivation of property rights and interest is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process.” *Id.*

129. *See supra* notes 36–41 and accompanying text (discussing collateral consequences associated with misdemeanors).

130. *See* CAL. PENAL CODE § 290(b)–(c) (West 2012) (“Every person described in subdivision (c), for the rest of his or her life while residing in California . . . shall be required to register . . . in accordance with the [Sex Offender Registration] Act. The following persons shall be required to register: . . . [persons convicted under] subdivision 1 or 2 of Section 314 . . .”); CAL. PENAL CODE § 314(1) (West 2012) (“Every person who willfully and lewdly, either: Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . [is guilty of a misdemeanor].”).

In more than a decade of practicing and supervising lawyers and students in several different lower criminal courts, I have seen some defendants take guilty pleas without counsel that are the same as they likely would have gotten with counsel. I have seen judges impose sentences for unrepresented defendants that are the same as that person would have gotten with counsel. (Although certainly not always; I have also seen prosecutors “offer” unrepresented individuals a plea to the minor charge, when they will offer represented defendants a diversionary program). I have not, however, seen many

These are only a few brief examples; legislators continue to add to the lengthy list of collateral consequences of criminal convictions at the federal, state, and local level.¹³¹

*C. Arguments Against Defender Focus on Minor Misdemeanors
(and Responses)*

This Part flags and briefly discusses the major arguments against a defender focus on minor misdemeanor cases. One response to all of these concerns is that any coordinated effort to “crash” or put pressure on the misdemeanor system must be locally tailored, and attempted only in certain jurisdictions.

1. What Will Give?

The most significant critique of misdemeanor-focused triage will be: what will give, if defenders focus on misdemeanor cases—and in particular on minor, quality-of-life offenses in the lower courts? Do defenders short-shrift clients charged with serious felonies? With serious misdemeanors? Put fewer resources into capital cases?

First, any triage in favor of misdemeanors would, ideally, be short-lived. It would not take long for the system to feel the cost of mass misdemeanor processing if defense counsel is no longer helping to coerce guilty pleas. Another way to mitigate the cost of focusing on minor misdemeanors is for public defenders to enlist outside assistance. Law school clinical programs might coordinate with public defenders in a time-limited, intensive focus on a particular group of cases.¹³² Coordination with law firms is another possibility. I have had a number of former criminal defense clinic students head off to large law firms with the hope of doing pro bono criminal defense work. I tell them that while

unrepresented defendants go to trial in misdemeanor cases; rather, unrepresented individuals take early, quick guilty pleas.

131. See generally *National Inventory of the Collateral Consequences of Conviction*, *supra* note 2 (cataloguing collateral consequences in different jurisdictions).

132. Cf. *supra* note 51 and accompanying text (describing clinic involvement in criminal trespass cases).

they should work to create such opportunities, most firms' pro bono dockets do not include much trial-level representation, particularly not in the lower criminal courts. While there are many reasons firms might focus pro bono criminal law work on death penalty or other high-stakes appeals, law firms could also commit to misdemeanor representation. New attorneys with no exposure to criminal court should not simply step in to handle a case or two on their own, but many clinic professors would feel comfortable having former students handle a small number of minor misdemeanor charges pro bono, particularly if the firm was providing training and had connections with local practitioners, and particularly as part of a coordinated strategy focusing on a specific group of low-level offenses.

Second, the need for crashing the system is not unique to the lower court context. One could certainly apply many of the same arguments to felony cases, and in particular to the large number of drug cases prosecuted. This Article's specific focus is on the lower criminal courts, the pressing need for change at an opportune moment when states are fiscally strapped, and one way to advance such change.

2. Trying to "Crash" the Misdemeanor System May Backfire

Will misdemeanor lawyers willing to try cases—and their clients—suffer as a result of the attorney's refusal to "meet 'em and plead 'em" and follow other such troubling aspects of regular lower court life? Prosecutors may respond to a coordinated effort to give clients the true option of going to trial in minor misdemeanors by seeking more punitive sentences in such cases, refusing to offer diversionary programs, and encouraging police officers to come to court to testify at trial (in cases that would otherwise not be a high priority for the officer).

To some extent, the answer to this is in client counseling, so that defendants know exactly what they are risking when they agree that trial (or refusing to take an early plea) is the better option. Also, a focus on quality-of-life misdemeanors will necessarily limit any retaliatory response to exercising the right to trial, as these offenses tend to have lower direct criminal sanctions. However, this concern is not without merit.

3. *Losing the Benefit of Lower Criminal Court Chaos*

What about individuals who benefit from the lower court chaos? These are generally repeat defendants, those who cycle through the system multiple times and benefit from the sheer volume in lower court by getting decent plea offers for cases in which (given their records) they might otherwise spend more time in jail. In some jurisdictions, particularly those with speedy trial statutes,¹³³ the chaos of the lower criminal courts benefits individuals willing to come to court many times and wait things out; those individuals are more likely to gain a speedy trial dismissal or to wear the prosecution down and get a deferred adjudication.

As those who have practiced in multiple jurisdictions know, particular benefits from chaotic courts are not universal.¹³⁴ And the very same process costs that an overburdened system imposes to the benefit of some defendants works to the great detriment of many others who lose valuable work days and money coming to court multiple times.¹³⁵ Most important, those who benefit from chaos due to sheer volume will certainly benefit more if they were never part of that volume in the first place.

V. *Conclusion*

Things have changed radically since Kelling and Wilson described the Newark beat cop who told loiterers to move on and noisy teens to keep quiet, and the judge who rarely saw people “caught up in a dispute over the appropriate level of neighborhood order.”¹³⁶ Today, millions of misdemeanors—many of them low-level, order-maintenance misdemeanors—end up in

133. See, e.g., N.Y. CRIM. PRO. LAW § 30.30 (McKinney 1972) (setting out New York’s statutory speedy trial limitations).

134. For example, student-attorneys raising a speedy trial dismissal issue in Syracuse, New York, under the same statute used with frequent success some 250 miles away in New York City, were apparently the first to do so in recent memory in that courthouse.

135. See FEELEY, *supra* note 58, at 292 (discussing the costs associated with overburdened defense attorneys); Howell, *supra* note 8, at 292–306 (same).

136. Wilson & Kelling, *supra* note 8, at 29.

the lower criminal courts.¹³⁷ The result is mass misdemeanor processing through a criminal justice system that saddles individuals, and thus society, with harmful arrest and criminal records for minor offense convictions.

Failures in the delivery of *Gideon*'s promise of effective representation for indigent defendants have led some to call for triage in the lower criminal courts, with less attention paid to those charged with minor misdemeanors, or even the total denial of counsel. Instead, public defenders should focus resources on misdemeanors, encouraging clients to reject quick, seemingly "easy" (but actually quite burdensome) guilty pleas, whether the result is a better disposition later in the case or a trial. Either way, refusing to process individuals quickly through the lower criminal courts will impose some of the real cost of mass misdemeanor processing on that system, in the hopes of "crashing" it. The "crash" would not be a dramatic event. Instead, if defense counsel litigated some of the many factual and legal issues that misdemeanors present, the system would grind to a halt under its own weight. The representation would be nothing more than *Gideon* and its progeny require, but would place the burden of mass misdemeanor processing on the courts and prosecution. Under this weight, legislators might act to reduce the short- and long-term costs of mass misdemeanor policing. Prosecutors, who should exercise discretion to reduce volume in the overburdened courts, would likely exercise this discretion. Police officers, who should exercise discretion on the street, would be encouraged to maintain order without making unnecessary arrests.

137. MINOR CRIMES, MASSIVE WASTE, *supra* note 1, at 11 (estimating that "the total number of misdemeanor prosecutions in 2006 was about 10.5 million").