

## THE PRICE OF MISDEMEANOR REPRESENTATION

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### ABSTRACT

*Nobody disputes either the reality of excessive caseloads in indigent defense systems or their negative effects. More than forty years after Gideon v. Wainwright, however, few seem willing to accept that additional resources will not magically appear to solve the problem. Rather, concerned observers demand more funds while state and local legislators resist those entreaties in the face of political resistance and pressures to balance government budgets. Recognizing that indigent defense systems must operate in a world of limited resources, states should reduce the number of cases streaming into those systems by significantly curtailing the appointment of counsel in low-level misdemeanor cases, thereby freeing up resources for more effective representation of those charged with more serious crimes. States can achieve this result without violating constitutional requirements by: (1) amending overbroad appointment statutes, (2) reducing penalties for certain minor offenses, (3) amending probation statutes, and (4) requiring judges and prosecutors to identify at the beginning of the proceedings those misdemeanor cases that are the most serious.*

*Although it may appear that denying counsel to some misdemeanor defendants will prejudice their interests, empirical evidence suggests that counsel in misdemeanor cases do not typically provide significant benefits to many of their clients. Rather than spending resources on low-value representation, states should use those resources to reduce the caseloads of indigent defenders, thereby*

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*increasing the quality of representation in felony and serious misdemeanor cases. To ensure that result, states should, and indeed must, couple reforms designed to reduce counsel appointment in misdemeanor cases with enforceable, numerical limits on per-attorney caseloads.*

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## INTRODUCTION

Outrageously excessive caseloads have compromised the quality of indigent defense representation.<sup>1</sup> Nationwide, even public defenders representing defendants charged with serious felonies sometimes represent as many as 500 clients per year.<sup>2</sup> As one public defender put it: “When caseloads are so high that a public defender can only spend 3.8 hours per case, including serious felony cases, [our] public defenders cannot ensure reliability.”<sup>3</sup> Despite the scarcity of attorney resources, indigent defense systems force counsel to direct significant attention to low-level misdemeanor cases. In North Carolina, for instance, an indigent criminal defendant charged with a second littering offense has a right to court-appointed counsel.<sup>4</sup> In order to help solve the indigent defense crisis, states should redirect resources now spent on such matters to reduce indigent defender caseloads so that those who represent defendants charged with more serious crimes will have more time to spend on those cases.

The two major sources of the caseload problem are easy to identify. First, the number of court-appointed criminal cases in

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1. See, e.g., Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 391-92 (1993) (identifying problems caused by excessive caseloads); Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461, 1509 (2003) (recognizing that caseload caps are critical to quality representation); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 236-37 (2004) (advocating for parity of resources between prosecutors and defense attorneys and for caseload parity); see also Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1054-57 (2006) (detailing the problem of crushing caseloads for indigent defense counsel); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 908 (2004) (identifying excessive caseloads as one of the problems confronting indigent defense systems in this country); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations To Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240-41 (1993) (noting that “staggering caseloads” lead to “burnout” among public defenders).

2. See *infra* notes 26-33 and accompanying text.

3. Backus & Marcus, *supra* note 1, at 1058.

4. See N.C. GEN. STAT. § 14-399 (2005) (making it a Class 3 misdemeanor punishable by a fine of not less than \$500 nor more than \$2000 for a second littering violation); N.C. GEN. STAT. § 7A-451(a)(1) (2005) (providing a right to counsel in any case in which a fine of \$500 or more is likely).

state and local courts has increased sharply, more than doubling and perhaps even tripling during the past twenty years.<sup>5</sup> Those increases are traceable to: (1) the Supreme Court's decision to expand the right to counsel in misdemeanor cases;<sup>6</sup> (2) steady increases in the number of cases prosecuted;<sup>7</sup> and (3) rising levels of indigence among criminal defendants.<sup>8</sup> Second, indigent defense budgets have not kept pace with the increased number of cases pouring into the indigent defense system.<sup>9</sup> Lacking sufficient funds to hire additional attorneys to handle the influx of new cases, decision makers at every level of government have simply piled additional cases on top of the existing caseloads of indigent defense attorneys.

For years, indigent defense advocates have clamored for more funding to address this crisis. Not only have those pleas fallen on deaf ears,<sup>10</sup> but the continued focus on additional resources has also obscured discussion of the other—and no less pressing—cause of excessive caseloads: the increase in the number of cases in which counsel are appointed. After all, if the total number of cases were to drop rather than to rise, caseloads would decrease even if budgets did not increase except for inflation adjustments. Although one might examine a number of factors contributing to increased caseloads, this Article focuses on low-level misdemeanor cases—cases in which states currently appoint counsel but in which those counsel do not appear to provide significant benefit to the defendants—and the ways in which a state could limit appointment in those cases.

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5. See *infra* Part II.

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

7. See *infra* Part II.A.2.

8. See *infra* Part II.A.3.

9. Although the total number of cases has more than doubled and probably close to tripled, budgets for indigent defense at most have increased 75 percent. See *infra* Part II.B.

10. Some argue that the failure to fund indigent defense adequately results from a conscious decision on the part of legislators to shortchange criminal defendants because defendants are politically unpopular. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* 148-70 (1980). Although that may be part of the explanation for budget shortfalls, another part is that many worthy and important programs do not receive sufficient funding in a world of limited resources. See Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 809 (2004) (noting that in a world of limited resources, “some funding scarcity for worthy programs will exist”).

A focus on reducing the appointment of counsel in misdemeanor cases is appropriate because new data suggest that the value added by defense counsel in misdemeanor cases is lower than the value added in more serious cases.<sup>11</sup> In terms of both overall outcome (conviction or no conviction) and sentencing outcomes (the severity of the penalty imposed in the event of conviction), pro se misdemeanor defendants in federal court have significantly better results than do represented misdemeanor defendants.<sup>12</sup> Indeed, in the federal system, pro se misdemeanor defendants have better outcomes than every category of represented misdemeanor defendants, including those who retain attorneys and those represented by appointed counsel.<sup>13</sup> The data do not definitively establish that appointment of counsel for misdemeanor defendants is not necessary, especially because data exist only for misdemeanor defendants in federal court and not state court. At the very least, however, the empirical evidence suggests that the value added by counsel in less serious misdemeanor cases is far lower than the value added in more serious cases.

In light of this data, it appears that states could reduce the number of cases in which counsel is appointed without significantly undermining the accuracy of results in those proceedings. There is, however, a significant obstacle to simply discontinuing the appointment of counsel in low-level misdemeanor cases. The difficulty is that the Constitution requires appointment of counsel for many, though not all, misdemeanor defendants, and the Supreme Court has not made it easy to ascertain, at the time the decision regarding appointment of counsel is made, whether a misdemeanor defendant has the right to counsel. Essentially, a misdemeanor defendant's right to counsel depends on the sentence he receives at the *conclusion* of the proceeding. Because it is so difficult to determine the sentence at the beginning of the case, states appoint counsel in many cases in which it later turns out no right to counsel existed. Indeed, many states have adopted statutes explicitly providing a

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11. As discussed in Part III.A, *infra*, there are no data on state court misdemeanants that would permit this sort of analysis, so the data are limited to federal court misdemeanants.

12. See *infra* Part III.A.

13. See *infra* text accompanying note 132, Table 3.

right to counsel for misdemeanor defendants even in the absence of a federal constitutional right.<sup>14</sup>

Despite the confusion created by the Supreme Court in this area, there are 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.

If implemented, these reforms should produce a decrease in the number of cases entering the indigent defense system, thereby leading to a reduction in the caseloads of indigent defenders. In order to ensure that the reduction in the total number of cases actually leads to a caseload reduction, rather than a reduction in the budgets for indigent defense systems, jurisdictions should couple these reforms with the adoption of enforceable, numerical caseload limitations. Because the Supreme Court has failed to recognize caseload limitations as a constitutional requirement, states must take the initiative in adopting them. These limits can take many forms and can be enforced through a variety of mechanisms. To be successful, however, these initiatives must include specific numerical limitations and those limitations must be enforceable. Adoption of such measures will ensure that decreases in the number of cases requiring appointment of counsel will in fact lower the caseloads of indigent defense providers.

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14. See, e.g., DEL. CODE ANN. tit. 29, § 4602 (2003) (providing a right to counsel to any “indigent person who is under arrest or charged with a crime”); N.C. GEN. STAT. § 7A-451(a)(1) (2005) (providing a right to counsel in any case in which a fine of \$500 or more is “likely to be adjudged”); *State v. Duval*, 589 A.2d 321 (Vt. 1991) (interpreting title 13, section 5231 of the Vermont Code to provide a right to counsel in all cases in which either imprisonment or a fine in excess of \$1000 is imposed).

This Article contains four parts. Part I describes the excessive caseloads in indigent defense systems and the problems associated with excessive caseloads. Part II examines the causes of those excessive caseloads, including the fact that the total number of cases has risen between 100 percent and 200 percent over the past twenty years, whereas indigent defense funding has increased, at most, 75 percent. Part III proposes reforms designed to eliminate the appointment of counsel in low-level misdemeanor cases that trigger no Sixth Amendment right, and highlights data suggesting that any benefit conferred by counsel in such cases is at best minimal. Finally, Part IV sets forth a recommendation that states adopt enforceable, numerical caseload limits so that resources conserved through the elimination of appointments in misdemeanor cases will be used to reduce the caseloads of indigent defenders representing defendants charged with more serious offenses.

## I. THE CASELOAD CRISIS

More than four decades ago, in *Gideon v. Wainwright*,<sup>15</sup> the Supreme Court held that defendants who cannot afford to hire counsel have a Sixth Amendment right to state-appointed representation.<sup>16</sup> As a result, the state must provide counsel for indigent defendants before prosecuting them. Although some commentators have referred to *Gideon* and its progeny as an “enormous unfunded mandate,”<sup>17</sup> the budget consequences of *Gideon* on states and counties were not immediately apparent because most jurisdictions were already providing some sort of counsel to defendants charged with felonies.<sup>18</sup>

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15. 372 U.S. 335 (1963).

16. *Id.* at 344. The Court held that the Sixth Amendment provides a right to counsel, and that this requirement of the Sixth Amendment applies to the states through the Fourteenth Amendment. *Id.* (overruling *Betts v. Brady*, 316 U.S. 455 (1942)). The Court previously had held that defendants charged with felonies in federal court had a Sixth Amendment right to counsel. See *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

17. Lefstein, *supra* note 1, at 843.

18. See Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103, 104-05 (1970). At the time the Court decided *Gideon*, forty states required the appointment of counsel in all felony cases, and four additional states in practice appointed counsel in all felony cases. *Id.* at 104 & n.13. Only five states—Alabama, Florida, Mississippi, North Carolina, and South Carolina—limited appointment of counsel to



The fiscal impact of the Court's decision stemmed primarily from the fact that most jurisdictions had been appointing counsel on an ad hoc basis and lacked comprehensive systems to provide counsel to indigent defendants.<sup>19</sup> In order to comply with *Gideon*'s mandate, states scrambled to create indigent defense systems. In the pre-*Gideon* period, only 3 percent of the counties in the country had indigent defender systems,<sup>20</sup> and only five states had statewide public defender systems.<sup>21</sup> By 1975, some 28 percent of American counties, home to approximately two-thirds of the nation's population, had indigent defender systems.<sup>22</sup>

Given the haste with which these systems were constructed and the budget constraints they faced, it is not surprising that the initial caseloads of indigent defense counsel working within these systems were high.<sup>23</sup> Professor Albert Alschuler, for instance, reported that "in 1970, the average caseload per defender in New York City was 922 cases; in Philadelphia, defenders 'were carrying a caseload of from 600 to 800 cases a year and often handled 40 to 50 cases a day.'"<sup>24</sup> Nor was the problem of excessive caseloads limited to isolated jurisdictions: a 1978 study estimated that roughly one-third of jurisdictions across the country reported caseloads that exceeded nationally recommended caseload standards.<sup>25</sup> In 1982, at hearings

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capital cases. *Id.* at n.13.

19. See Nancy A. Goldberg, *Defender Systems of the Future: The New National Standards*, 12 AM. CRIM. L. REV. 709, 713 (1975) (noting that at the time *Gideon* was decided, indigent defense "was a matter of judicial discretion and charitable contribution by bar associations rather than a 'system'"). One difficulty was that, before *Gideon*, many counties required lawyers to serve indigent defendants without either payment of fees or reimbursement for expenses. See Laurence A. Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 AM. CRIM. L. REV. 667, 669 (1975).

20. See Benner, *supra* note 19, at 669. The indigent defense systems in 1961 served approximately one-quarter of the population of the United States. *Id.* An indigent defender system is defined as "a method of providing indigent defense services where an attorney or group of attorneys, through a contractual arrangement or as public employees, provide legal representation for indigent criminal defendants on a regular basis." *Id.*

21. See Note, *Statewide Public Defender Organizations: An Appealing Alternative*, 29 STAN. L. REV. 157, 157 n.3 (1976).

22. Benner, *supra* note 19, at 669.

23. Another factor exacerbating the caseload issues was that in 1975, roughly half of the attorneys working in defender systems were employed on a part-time basis. See *id.* at 671.

24. Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1248 (1975) (footnotes omitted).

25. See NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND

before the American Bar Association's Standing Committee on Legal Aid and Indigent Defense, a parade of witnesses complained of the excessive caseloads that indigent defense attorneys routinely handled.<sup>26</sup>

The emergence of excessive caseloads in the immediate aftermath of *Gideon* is disturbing as a historical matter. Even more disturbing is the fact that caseloads appear to have worsened. Just as one-third of American jurisdictions failed to meet national caseload standards in 1978,<sup>27</sup> indigent defense caseloads today are no closer to staying within those standards. In 1999, the 100 most populous counties in the country handled just under 3.4 million criminal cases,<sup>28</sup> and public defenders were assigned in more than 2.7 million of them.<sup>29</sup> In addition, public defenders handled an additional 278,000 juvenile cases and roughly 390,000 other cases.<sup>30</sup> During the same period, public defender offices in those same 100 jurisdictions employed only 7,128 lawyers in litigation positions.<sup>31</sup> Thus, each attorney was assigned an average of 479 cases during that year. Even if all of the

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PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING F-1 (1982). Approximately 33 percent of the jurisdictions reported that they exceeded the felony caseload standards, and 29 percent of the jurisdictions reported violating the misdemeanor standards. *Id.* The report compared caseloads in all fifty states to the standards set forth by the National Advisory Commission on Criminal Justice Standards and Goals. Those standards recommend a maximum annual caseload of 150 non-capital felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals. *See* NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON COURTS, standard 13.12 (1973), *available at* [http://www.nasams.org/Defender/Defender\\_Standards/Standards\\_For\\_The\\_Defense](http://www.nasams.org/Defender/Defender_Standards/Standards_For_The_Defense).

26. *See* AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON* UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING (1982), *available at* <http://www.abanet.org/legal/services/downloads/sclaid/indigentdefense/gideonundone.pdf> [hereinafter *GIDEON* UNDONE].

27. *See* LEFSTEIN, *supra* note 25, at F-1.

28. *See* CAROL J. DEFRAnces & MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999, at 5 (2000), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/idslc99.pdf>. This figure underestimates the number of cases because it does not include some misdemeanor and appellate cases. *See id.* at 8.

29. *Id.* at 5.

30. This category includes a wide range of civil and quasi-criminal cases such as mental commitments, habeas corpus, abuse and neglect, contempt, paternity, and juvenile dependency cases. *Id.*

31. *Id.* at 6. This figure includes assistant public defenders, chief public defenders, and attorneys in managerial positions who litigate cases.

criminal cases were misdemeanors, so that all indigent defense counsel were working exclusively on misdemeanor cases, that number of cases significantly exceeds national caseload standards of 400 misdemeanor cases annually.<sup>32</sup> The reality, moreover, is that a significant percentage of those cases very likely were felonies rather than misdemeanors.<sup>33</sup> The national standards provide that counsel handling felony cases are limited to 150 felony cases per year.<sup>34</sup> In short, it is clear that more than forty years after *Gideon*, caseloads of indigent defense counsel still remain shockingly high.

Reports concerning individual indigent defense systems across the country support this view. One witness who testified before an ABA commission in 2002 reported that annual caseloads in his jurisdiction extended into the thousands.<sup>35</sup> In 2003, public defenders statewide in Minnesota handled more than 900 cases per attorney per year.<sup>36</sup> In 2001, a trial staff of fifty-two lawyers at the public defender office in Hamilton County, Ohio, which encompasses much of the Cincinnati metropolitan area, handled 34,644 cases, an average of 666 cases per attorney.<sup>37</sup> In Maryland in 2002, the public defender office, which had not increased in size in five years, reported that it would have to hire 300 attorneys just to meet national caseload standards.<sup>38</sup> In 1996, staff attorneys at the Office of the Public Defender in Orange County, California maintained

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32. NAT'L ADVISORY COMM'N, *supra* note 25.

33. In addition, 278,000 of the cases were juvenile cases, *see supra* note 30 and accompanying text, and national caseload standards limit attorneys to 200 juvenile cases annually. NAT'L ADVISORY COMM'N, *supra* note 25, standard 13.12.

34. *Id.*

35. *See* AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 17 (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> [hereinafter *GIDEON'S BROKEN PROMISE*] (quoting testimony of the Executive Director of the New York State Defenders Association, stating that "[c]aseloads are radically out of whack in some places in New York. There are caseloads per year in which a lawyer handles 1,000, 1,200, 1,600 cases.").

36. *See* Backus & Marcus, *supra* note 1, at 1055-56.

37. *See* Nicole J. De Sario, *The Quality of Indigent Defense on the 40th Anniversary of Gideon: The Hamilton County Experience*, 32 CAP. U. L. REV. 43, 49 (2003).

38. *See* Lefstein, *supra* note 1, at 855.

caseloads of 610 cases.<sup>39</sup> In 2004 in Kentucky, public defenders handled an average 489 cases per lawyer.<sup>40</sup>

The problem of excessive caseloads has been exacerbated by the trend towards low-bid contracting for indigent defense services.<sup>41</sup> Although many jurisdictions now have established public defender offices to represent indigent defendants, a significant number of jurisdictions still put at least some of their indigent defense services out for contract bids.<sup>42</sup> There are different types of contract systems, but one common variant is the flat fee system, under which attorneys bid one flat fee to provide indigent defense representation to all of the defendants who need lawyers that year, regardless of the number of actual cases.<sup>43</sup> Particularly in jurisdictions that award these contracts to the lowest bidder, the system creates terrible incentives. Lawyers have an incentive to bid low so that they receive the contract. They then receive the same amount of money regardless of how many defendants they represent or how effectively they represent those defendants, thereby encouraging them to use the fewest resources possible to provide the contracted-for representation.<sup>44</sup> Not surprisingly, the caseloads of at least some of these indigent defense contractors, many of whom do indigent

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39. See Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1440-41 (1999). Caseloads of public defenders in that county were drastically increased after the county required the office to provide representation even if the office had a conflict. *Id.* at 1439-40.

40. See Backus & Marcus, *supra* note 1, at 1057.

41. See AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, standard 5-1.2 cmt. at 6 (3d ed. 1992), available at <http://www.abanet.org/crimjust/standards/providingdefense.pdf> (noting that contract systems have "failed to provide quality representation to the accused"); NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, LOW-BID CRIMINAL DEFENSE CONTRACTING: JUSTICE IN RETREAT (1977), available at <http://www.nacdl.org/INDIGENT/ind00006.htm> (lamenting the rise of low-bid contracting for indigent defense services); Paul Calvin Drechsel, *The Crisis in Indigent Criminal Defense*, 44 ARK. L. REV. 363, 381-82 (1991) (noting the trend toward use of contract systems and observing that these systems fail to provide effective assistance).

42. See DEFRANCES & LITRAS, *supra* note 28, at 3 (noting that in 1999, approximately 42 percent of the nation's largest 100 counties used contract attorneys).

43. See CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, STATE-FUNDED INDIGENT DEFENSE SERVICES, 1999, at 5 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf> (describing the different methods of providing indigent defense representation).

44. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 41 ("Fixed-price contracts, requiring representation of all cases, inevitably result in case overload and inadequate representation.").

defense work only part-time, reach into the thousands.<sup>45</sup> In 1997 and 1998, for instance, a lawyer in California who employed only two associates (one of whom had never tried a case before a jury) received a contract requiring him to provide representation to *more than 5000* defendants per year.<sup>46</sup>

Excessive caseloads carried by indigent defense counsel lead directly to deficiencies in representation, including policies of encouraging guilty pleas to save resources.<sup>47</sup> Over thirty years ago, Professor Albert Alschuler observed that a public defender under pressure from an enormous caseload who is trying to stay on top of that caseload “must inevitably enter guilty pleas for most of his clients, and as a public defender becomes attuned to his work, the guilty plea may tend to become his almost instinctive response to all but the most serious or exceptional cases.”<sup>48</sup> That observation remains true today. Overloaded indigent defense attorneys cannot keep current with their caseloads unless the overwhelming majority of their clients plead guilty.<sup>49</sup>

Related to the practice of routinely obtaining guilty pleas is a failure to investigate cases and to meet with clients.<sup>50</sup> In many jurisdictions, a practice known as “meet ‘em and plead ‘em” has become

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45. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 13-15 (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/181160.pdf> (detailing the caseload problems that can arise in contract systems).

46. See *id.* at 1.

47. See generally Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 663-75 (1986) (detailing the problems caused by excessive caseloads).

48. Alschuler, *supra* note 24, at 1254.

49. See Backus & Marcus, *supra* note 1, at 1082 (recounting story of a county in Indiana in which two *part-time* contract attorneys were assigned a total of 2668 misdemeanor cases in one year, and as a result only twelve of those cases—less than 0.5 percent—went to trial); Taylor-Thompson, *supra* note 1, at 1509 (stating that “[a] lawyer working in a defender office crippled by case overload candidly reported that prior to the increase in cases in her office, she had conceived of her role as looking for the single issue that would give her client a plausible argument to make in her defense. With case overload, that same lawyer now looked for the one issue that she could identify to convince her client to resolve the case short of trial.”).

50. See Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis Is Chronic*, 9 CRIM. JUST. 13, 15 (1994) (“The reality is that overburdened public defenders are often forced to pick and choose which cases to focus on, resulting in the inadequate handling of a large number of cases.”).

commonplace.<sup>51</sup> Under that practice, criminal defendants enter pleas of guilty on the same day they first meet with their attorneys. Over a five-year period in a county in Mississippi, for instance, 42 percent of the cases involving indigent defendants charged with *felonies* “were resolved by guilty plea on the day of arraignment, which was the first day the part-time contract defender met the client.”<sup>52</sup> Under these circumstances, it is impossible for a lawyer to do *any* investigation of the case before recommending the plea, let alone to do an adequate investigation.<sup>53</sup>

Finally, heavy caseloads lead to burnout among indigent defense lawyers.<sup>54</sup> This burnout adversely affects clients in two ways. First, overburdened attorneys are much more likely to leave their jobs a year or two after starting, creating offices that are bottom heavy with inexperienced lawyers more prone to mistakes and inefficiencies in case management.<sup>55</sup> Second, experienced attorneys often are so demoralized by their inability to spend adequate time on their cases that they are unable to exert the effort necessary even to maintain contact with clients, let alone to provide effective representation.<sup>56</sup>

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51. See *GIDEON'S BROKEN PROMISE*, *supra* note 35, at 16 (explaining the practice in certain jurisdictions where defendants plead guilty on the first day they meet their lawyers); Backus & Marcus, *supra* note 1, at 1081-84 (noting that this practice occurs in jurisdictions across the country).

52. *GIDEON'S BROKEN PROMISE*, *supra* note 35, at 16.

53. This lack of investigation also raises ethical concerns regarding whether the lawyer is adequately discharging her duties to represent her clients with competence and diligence, to be adequately prepared, and to be a zealous advocate on behalf of her client. See Backus & Marcus, *supra* note 1, at 1081-84 (discussing the ethical problems of the “meet ‘em and plead ‘em” practice).

54. See Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 85-86 (1995) (arguing that “unconscionable caseload[s]” along with other factors have led to burnout of public defenders); Spangenberg & Schwartz, *supra* note 50, at 15 (noting that in a survey of public defenders conducted by the National Institute of Justice, 76 percent said that excessive caseloads have led to attorney burnout).

55. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1851 (1994) (noting that indigent defense systems “are unable to attract and keep experienced and qualified attorneys because of lack of compensation and overwhelming workloads. Just when lawyers reach the point when they have handled enough cases to begin avoiding basic mistakes, they leave criminal practice and are replaced by other young, inexperienced lawyers who are even less able to deal with the overwhelming caseloads.” (footnote omitted)).

56. See Klein, *supra* note 1, at 393-94 (“The caseload crisis can devastate the morale of often idealistic and dedicated attorneys.”); Ogletree, *supra* note 53, at 85-86.

In short, excessive caseload problems have continued unabated, and in fact appear to have increased, in the years since *Gideon* was decided, creating massive practical problems in the representation of indigent defendants. Lawyers carrying caseloads that far exceed national standards cannot adequately consult with their clients or provide sufficient investigation. Ultimately, those attorneys fail to provide adequate representation for most, if not all, of their clients, despite the constitutional right of those clients to the effective assistance of counsel.<sup>57</sup>

## II. SOURCES OF THE CASELOAD CRISIS

The two propositions set forth in Part I—that 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.<sup>58</sup> The difficult issue is how to solve the problem. Before turning to a proposed solution, it is important to explore the factors that have given rise to the current caseload crisis so that the solution addresses those causes.

Two 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.<sup>59</sup> As the total number of cases has increased, budgets have remained relatively static, and caseloads therefore have risen.<sup>60</sup> In the past twenty

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57. See *Strickland v. Washington*, 466 U.S. 668 (1984) (providing that the Sixth Amendment right to counsel entitles a criminal defendant to the effective assistance of counsel).

58. See, e.g., Backus & Marcus, *supra* note 1, at 1054-57 (detailing the problem of crushing caseloads for indigent defense counsel); Klein, *supra* note 1, at 391-92 (identifying problems caused by excessive caseloads); Lefstein, *supra* note 1, at 908 (identifying excessive caseloads as one of the problems confronting indigent defense systems in this country); Taylor-Thompson, *supra* note 1, at 1509 (recognizing that caseload caps are critical to quality representation).

59. As discussed in Part I, in the years immediately following *Gideon*, indigent defense caseloads exceeded national caseload standards. Achieving compliance with caseload standards therefore requires that indigent defense funding increase at a rate greater than the rate of increase in total number of cases. The fact that in the past twenty years, the increase in funding levels has not come close to keeping pace with the increase in number of cases means that the problem has only been exacerbated.

60. The interrelationship of total cases, budgets, and caseloads is somewhat complicated

years, the total number of cases that have required state appointed indigent defense counsel has increased dramatically.<sup>61</sup> Although budgets have increased to some extent during that same time frame, the rate of increase has not come close to matching the increased number of cases.

*A. Providing Counsel to More Defendants: The Increasing Number of Cases*

In the past twenty years, the number of defendants receiving state appointed counsel has increased between 100 percent and 200 percent because of three factors: (1) the Supreme Court's expansion of the Sixth Amendment right to appointed counsel, (2) a steep rise in the number of prosecuted cases, and (3) increased rates of indigence within the universe of criminal defendants.<sup>62</sup>

*1. The Constitutional Standard: Broadening the Scope of the Sixth Amendment*

Although the Court made clear in *Gideon* that indigent criminal defendants charged with felonies have a right to counsel,<sup>63</sup> it did not resolve the question of whether the right to counsel extended beyond felony cases to misdemeanors and petty offenses.<sup>64</sup> A decade later, the Supreme Court answered this question in *Argersinger v. Hamlin*, holding that the constitutional right to counsel attaches in all cases in which imprisonment is imposed, whether as a result of a felony conviction, a misdemeanor conviction, or a conviction for a

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by other factors and may not be perfectly proportional. For instance, in theory it would be possible for an indigent defense system faced with a rising number of cases and a static budget to reduce salaries of existing attorneys and hire more attorneys, thereby preventing caseload increases. As a practical matter, however, the effect of a rising number of cases, in the absence of any additional budget support, will lead to higher caseloads for each attorney.

61. See *infra* Part II.A.4.

62. In addition, the Court has expanded the right to counsel to require appointment at earlier stages of the proceedings, including preliminary hearings where probable cause determinations are made, *Coleman v. Alabama*, 399 U.S. 1 (1970), and custodial interrogations, *Miranda v. Arizona*, 384 U.S. 436 (1966).

63. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

64. See *Right to Counsel*, *supra* note 18, at 103-04 (noting that lower courts were "sharply divided" in determining whether *Gideon* applied only to felonies or also to non-felony offenses).



petty offense.<sup>65</sup> To phrase it slightly differently, a sentence of imprisonment for any period of time, whether a day or a year or many years, is unconstitutional unless the defendant has been afforded the right to counsel.<sup>66</sup> Although a sentence of imprisonment, regardless of length, gives rise to a right to counsel, the Court in *Scott v. Illinois* held that a *potential* sentence of imprisonment does not require appointment of counsel.<sup>67</sup> Thus, in spite of the fact that Scott was convicted of a crime that carried with it a *potential* sentence of up to one year in jail, the State's failure to appoint counsel did not violate the Sixth Amendment because Scott was sentenced only to a \$50 fine.<sup>68</sup>

The Court's decision in *Argersinger* has had an enormous financial impact on states and counties—an impact arguably greater than that of *Gideon*. Although most jurisdictions had been providing counsel to indigent defendants charged with felonies before *Gideon*,<sup>69</sup> the majority of jurisdictions were not providing counsel to all defendants charged with misdemeanors before the Court's decision in *Argersinger*. Before *Argersinger*, only nineteen states provided counsel to indigent defendants in most misdemeanor cases.<sup>70</sup> An additional twelve states provided counsel at least to *some* indigent defendants charged with offenses less serious than felonies, but the remaining nineteen states did not provide counsel in misdemeanor cases.<sup>71</sup> Indeed, according to one estimate, at the time *Argersinger* was decided, states were providing counsel in 690,000 indigent felony cases per year, but the Court's holding required states to appoint counsel in as many as 2.7 million misdemeanor cases, excluding traffic offenses, per year.<sup>72</sup>

Of particular significance, the Court's decisions in *Argersinger* and *Scott* make it difficult to determine, at the outset of a case when counsel generally is appointed, whether a particular misdemeanor

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65. 407 U.S. 25, 37 (1973).

66. Phrasing the right in this way eliminates the problem that one does not know, prior to sentencing in any given case, whether the defendant has a right to counsel. See *infra* text accompanying notes 72-75.

67. 440 U.S. 367, 373-74 (1979).

68. *Id.* at 368.

69. See *supra* note 18 and accompanying text.

70. See *Right to Counsel*, *supra* note 18, at 119-24.

71. *Id.* at 111-19.

72. See Goldberg, *supra* note 19, at 715.

defendant has a constitutional right to appointed counsel. Other trial rights guaranteed under the Sixth Amendment—such as the right to trial by jury, which is based upon the nature of the offense with which the defendant is *charged*,<sup>73</sup> or the right to confrontation<sup>74</sup> and the right to a public trial,<sup>75</sup> which exist in *all* criminal prosecutions—can be determined at the outset of a prosecution, or at least prior to trial. Because the right to counsel depends upon the sentence that ultimately is imposed, however, the court cannot know with certainty at the outset of the case whether the defendant has a constitutional right to counsel. For that reason, the right to counsel essentially operates as a limitation on punishment: An indigent criminal defendant cannot be sentenced to imprisonment upon conviction unless he has been afforded the right to counsel.<sup>76</sup>

Until 2002, the Sixth Amendment precluded only sentences of *imprisonment* for unrepresented misdemeanor defendants. This rule limited the impact of *Argersinger* because a court could impose any sentence on an unrepresented misdemeanor defendant except for a term of incarceration. In other words, the court could sentence the defendant either to probation or to a fine without appointing counsel. Because so many misdemeanor and petty offense convictions result in either probation or a fine, there were many misdemeanor and petty offense cases in which the state was not required to, and in fact did not, appoint counsel to indigent defendants.<sup>77</sup>

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73. See *Baldwin v. New York*, 399 U.S. 66, 73-74 (1970) (holding that the right to jury trial attaches if the defendant is charged with an offense that carries a *potential* penalty of more than six months imprisonment).

74. See *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (holding that the Sixth Amendment right to confront witnesses is incorporated into the Fourteenth Amendment and therefore is applicable in all state court prosecutions).

75. See *In re Oliver*, 333 U.S. 257, 272 (1948) (“[A]n accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.”).

76. See *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1973) (“Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.”).

77. As discussed *infra* in Part III.B.1, some jurisdictions provide a statutory right to counsel in all misdemeanor cases. In those jurisdictions, the state must provide counsel to all indigent defendants unless the defendant waives that right. The statutory right to counsel in

In 2002, however, the Supreme Court again dramatically expanded the number of defendants who are entitled to state-appointed counsel. In *Alabama v. Shelton*, the Court held that essentially all indigent defendants sentenced to terms of probation also are entitled to the appointment of counsel.<sup>78</sup> In *Shelton*, the defendant was sentenced to a term of imprisonment that was suspended conditioned upon his successful completion of a term of probation and payment of a fine.<sup>79</sup> If the defendant successfully completed probation, he was not required to serve any time in jail. Although the defendant was never imprisoned, the Court held that the imposition of a term of imprisonment, even if suspended, gave rise to a right to counsel under the principle articulated in *Argersinger*.<sup>80</sup>

The Court's ruling in *Shelton* has great practical significance because, in almost every jurisdiction that authorizes probationary sentences upon conviction of crimes punishable by imprisonment, a sentence of probation "suspends" imprisonment conditioned on the successful completion of probation.<sup>81</sup> If the defendant successfully completes probation, he never serves any period of incarceration. If, however, the defendant violates probation, the court can revoke probation and impose either the term of imprisonment that explicitly was suspended or, if the court did not specify the suspended term of imprisonment, any term authorized for conviction of the offense.<sup>82</sup> Because every state ties its probation system to a suspended sentence of imprisonment,<sup>83</sup> it follows that practically

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other jurisdictions, however, essentially mirrors the federal constitutional right.

78. 535 U.S. 654, 658, 674 (2002).

79. *Id.* at 658.

80. *Id.* A probation term is enforceable through imprisonment if a judge has the power to revoke probation and impose a term of imprisonment upon a determination that the defendant has violated conditions of that probation. It is important to note that the *Shelton* Court concluded that there is a right to counsel if the defendant is sentenced to probation, not just if the defendant's probation is revoked. *Id.* at 662.

81. See, e.g., ALASKA STAT. § 12.55.085 (2007) ("The court may, in its discretion, suspend the imposition of sentence ... and shall place the person on probation ....").

82. See, e.g., *id.*; CAL. PENAL CODE § 1703.3 (West 2004); COLO. REV. STAT. § 16-11-206 (1972).

83. See *Shelton*, 535 U.S. at 673 (noting concession of the state of Alabama that no state has a probation system unconnected to a suspended sentence of imprisonment). As discussed *infra* Part III.B.3, a state could create such a system, but it appears that no state has done so yet.

every indigent defendant convicted of a criminal offense punishable by imprisonment<sup>84</sup>—whether a petty offense, misdemeanor, or felony—has a right to appointed counsel unless he receives a sentence of only a fine. The Court in *Shelton* anticipated that the cost of its ruling would be minimal because many states already required the appointment of counsel in cases covered by the new rule.<sup>85</sup> In fact, however, more than half of the states did *not* provide counsel to all defendants under these circumstances at the time that *Shelton* was decided.<sup>86</sup>

The Court's expansion of the right to counsel to all cases in which a sentence of either incarceration or probation enforceable through imprisonment is imposed affects a large volume of cases. The vast majority of cases filed in state and local courts each year are misdemeanors. In 2001, for instance, just under 10 million misdemeanor cases were filed in state courts across the country,<sup>87</sup> four times the number of felony cases filed that same year.<sup>88</sup> Although there are no clear-cut data on the percentage of those defendants who were sentenced to terms of probation, it appears that at least 20 percent of those cases, and probably many more, resulted in

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84. If the offense does not carry with it any possibility of imprisonment, then there is no constitutional right to counsel.

85. *Shelton*, 535 U.S. at 668-69 (“Nor do we agree with *amicus* or the dissent that our holding will ... encumber [states] with a large, new burden.” (internal citation omitted)).

86. *See id.* at 669-70 (noting that a defendant in *Shelton*'s circumstances would not have had a right to counsel in at least sixteen states, and an additional ten states did not provide counsel in all of the circumstances covered by the Court's new rule).

87. *See* NAT'L CTR. FOR STATE COURT STATISTICS, COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2002, at 54-55, 57 (2003), available at [www.ncsconline.org/D\\_Research/CSP/2002\\_Files/2002\\_Structure\\_Full\\_Report.pdf](http://www.ncsconline.org/D_Research/CSP/2002_Files/2002_Structure_Full_Report.pdf). The misdemeanor figure excludes driving while intoxicated cases because those are counted separately from both felonies and misdemeanors.

88. *See id.* at 57. This report provides information on the percentage of cases by type of court. Some jurisdictions have adopted a unified court system in which all criminal cases are heard in the same court. *See* NAT'L CTR. FOR STATE COURT STATISTICS, COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 1998, at 65-66 (1999), available at [www.ncsconline.org/D\\_Research/CSP/1998\\_Files/1998\\_Front.pdf](http://www.ncsconline.org/D_Research/CSP/1998_Files/1998_Front.pdf). Other jurisdictions use a two-tiered court system in which one court, known as the limited jurisdiction court, has jurisdiction over all misdemeanors and only a select few felonies, while the general jurisdiction court has jurisdiction over all criminal cases. In these two-tiered systems, the vast majority of cases filed in limited jurisdiction courts are either misdemeanor cases or driving under the influence cases, while the majority of cases filed in general jurisdiction courts are felonies. *Id.*

probationary sentences.<sup>89</sup> In addition, although not all misdemeanor defendants meet the financial requirements to require appointment of counsel,<sup>90</sup> it appears that at least half of them qualify as indigent.<sup>91</sup> The bottom line is clear enough: The Court's extension of *Gideon* in *Argersinger* and subsequent extension of *Argersinger* in *Shelton* has greatly expanded state governments' duties to appoint counsel to represent misdemeanor defendants.<sup>92</sup>

## 2. Increased Number of Prosecutions

During the same time frame in which the Court has expanded the constitutional right to counsel, the number of cases prosecuted in state and local courts nationwide has exploded. In 2000, approximately 14.1 million criminal cases were filed in state courts across

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89. See Brief of Amicus Curiae by Invitation of the Court at 18-20, *Alabama v. Shelton*, 535 U.S. 654 (2002) (No. 00-1214) (citing Bureau of Justice Statistics figures that in 2000, "more than 1.7 million adults were on probation for misdemeanors" and estimating that there were approximately 8.7 million misdemeanor cases filed in state courts in 1999).

90. Standards for determining who is indigent vary considerably across jurisdictions. See RANGITA DE SILVA-DE ALWIS, THE SPANGENBERG GROUP, DETERMINATION OF ELIGIBILITY FOR PUBLIC DEFENSE (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/determinationofeligibility.pdf> (presenting standards of the ABA and seventeen states for determining indigence); Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 572 (2005) (noting that because standards for indigence vary so widely among jurisdictions, "*Gideon* means something different in Alabama than it does in Florida").

91. See *infra* Part II.A.3.

92. There is evidence that at least some misdemeanor defendants who have a right to counsel waive that right. See, e.g., Brief of the State of Texas, et al. as Amici Curiae in Support of Petitioner at 24-25, *Alabama v. Shelton*, 535 U.S. 654 (2002) (No. 00-1214) (noting that some misdemeanor defendants in Texas waive the right to counsel). But see *GIDEON'S BROKEN PROMISE*, *supra* note 35, at 23-25 (citing anecdotal evidence that many misdemeanor defendants are not informed of their right to counsel). To the extent that indigent misdemeanor defendants are not being informed of their right to counsel before waiving that right, the state violates their constitutional rights if they are sentenced to either probation or imprisonment. See *Godinez v. Moran*, 509 U.S. 389, 400 (1993) (holding that waiver of the right to counsel must be "knowing and voluntary"). Unfortunately, it is impossible to estimate the extent to which such waivers are occurring. See Ronald E. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2080-82 (2006) (noting that "precious little data exist on waivers of counsel in misdemeanor cases" but estimating that roughly 40 percent of misdemeanor defendants in North Carolina waived counsel). The fact remains, however, that the Supreme Court's rulings in *Argersinger* and *Shelton* have resulted in an increase in the number of cases in which the state is constitutionally required to appoint counsel.

the country.<sup>93</sup> This figure represents a 46 percent increase over the approximately 9.7 million filings in 1984.<sup>94</sup> The increase is at least partially attributable to a sharp rise in the number of narcotics prosecutions.<sup>95</sup> Indeed, in the five years from 1986-90, the number of convictions in state courts for drug trafficking offenses doubled, and by 1990, drug offenders constituted one-third of all people convicted of felonies in state courts.<sup>96</sup>

From 1998-2001, the total number of criminal prosecutions remained relatively stable, but new filings increased again in 2002 to reach 15.5 million cases, an increase of 60 percent over the 1984 levels.<sup>97</sup> Caseloads of courts that handle both felonies and misdemeanors rose 43 percent from 1984-2000 and then rose again between 2000 and 2002.<sup>98</sup> Of particular importance for present purposes, the recent rise in case filings is attributable in large part to increases in misdemeanor prosecutions.<sup>99</sup>

### 3. *Rising Rates of Indigence*

Finally, the number of cases in which the state must appoint counsel has increased because the percentage of defendants who are

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93. See NAT'L CTR. FOR STATE COURT STATISTICS, STATE COURT PROCESSING STATISTICS, EXAMINING THE WORK OF STATE COURTS, 2001, at 56 (2001), available at [http://www.ncsconline.org/D\\_Research/CSP/2001\\_Files/2001\\_Structure\\_Full\\_Report.pdf](http://www.ncsconline.org/D_Research/CSP/2001_Files/2001_Structure_Full_Report.pdf). This figure includes felony filings, misdemeanor filings, and filings of petty offenses.

94. See *id.* at 56-57. The total number of filings may overstate the number of criminal cases in a given year. This is so because in some two-tiered jurisdictions, felony cases are first filed in the court of limited jurisdiction and then once an indictment is returned, they are filed in the court of general jurisdiction. Those cases therefore are reflected twice in the total number of cases. See *id.* That fact notwithstanding, the number of cases still increased steadily from the early 1980s until 1998. See *id.*

95. See Klein, *supra* note 1, at 398-99 (noting that the caseload crisis in New York and nationwide was "precipitated in large part by the surge in the number of drug cases").

96. See OFFICE OF NAT'L DRUG CONTROL POLICY, U.S. DEPT OF JUSTICE, DRUGS AND CRIME FACTS, 1994, at 19 (1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dcfacts.pdf>.

97. See NAT'L CTR. FOR STATE COURT STATISTICS, COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2003, at 38, available at [http://www.ncsconline.org/D\\_Research/CSP/2003\\_Files/2003\\_Full\\_Report.pdf](http://www.ncsconline.org/D_Research/CSP/2003_Files/2003_Full_Report.pdf).

98. See EXAMINING THE WORK OF STATE COURTS, 2001, *supra* note 93, at 56 (showing that case filings in unified courts and courts of general jurisdiction rose 43 percent from 1984 to 2000).

99. See *id.* at 38 (noting that "most of the increase in criminal filings between 2001 and 2002 was due to an increase in limited jurisdiction court filings" which are primarily misdemeanors).

indigent has steadily risen over the years. In 1963, when *Gideon* was decided, the rate of indigence was approximately 43 percent,<sup>100</sup> and that figure remained close to constant for the next twenty years. According to the Department of Justice, in 1982 roughly 48 percent of all defendants charged with felonies in state courts had appointed counsel.<sup>101</sup> By 1998, however, 82 percent of felony defendants prosecuted in state courts in the seventy-five largest urban counties had state-appointed counsel.<sup>102</sup> Over a period of less than twenty years, then, even without factoring in the Court's expansion of Sixth Amendment rights and the increased number of cases filed by prosecutors, indigent defense systems experienced a 70 percent increase in the number of felony defendants they had to represent.<sup>103</sup>

The percentage of misdemeanor defendants who are indigent also appears to have increased, although less significantly. An accurate calculation of the indigence of misdemeanor defendants is nearly impossible because very little information exists about the financial circumstances of misdemeanor defendants in state court. In 1996, however, 56.3 percent of jail inmates charged with or convicted of misdemeanors had court-appointed counsel.<sup>104</sup> This figure represents at least a 20 percent increase over the rates of indigence of misdemeanor defendants in 1973.<sup>105</sup>

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100. LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 7-8 (1965).

101. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 33 (1986).

102. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf>.

103. These statistics reflect the percentage of *felony* defendants who received state-appointed counsel. Although there are fewer felony cases than misdemeanor cases, increases in felony caseloads have a greater impact on the workload of indigent defenders than increases in misdemeanor caseloads because felony cases are more time and resource intensive than misdemeanor cases.

104. See HARLOW, *supra* note 102, at 6. This figure comes from a survey of misdemeanor defendants in state and local jails. Some of those defendants were already convicted and serving sentences; others were incarcerated pending trial. Incarcerated defendants might, in fact, be more likely to be indigent than non-incarcerated defendants, but there simply are no data on the indigence rates among misdemeanor defendants generally.

105. See Benner, *supra* note 19, at 668 (reporting that the average rate of indigence among misdemeanor jail inmates in 1973 was 47 percent). It is important to note that comparing the percentage of misdemeanor jail inmates who received counsel in 2005 and the average rate

#### 4. Overall Effects

The indigent defense system has experienced dramatic changes as a result of the interplay of expanded constitutional rights, a growing number of prosecutions, and increased indigence among criminal defendants. Although a lack of data precludes precise calculations of the increase in total number of cases assigned to indigent defense counsel, it appears by a conservative estimate that the number of cases more than doubled—and may even have tripled—between the early 1980s and the beginning of this century. By way of illustration, for every 100 criminal cases in 1984, roughly 20 of the cases would have been felonies, while the remaining 80 would have been misdemeanors.<sup>106</sup> Using the 1982 rates for appointment of counsel, 48 percent of the felony defendants, or 9.6 felony defendants, would have been entitled to the appointment of counsel. Similarly, 47 percent of the misdemeanor defendants, or roughly 37.6 misdemeanor defendants, were indigent.<sup>107</sup> In 2005, because of the increase in the number of cases prosecuted, the 100 cases from 1984 would become approximately 160 criminal cases.<sup>108</sup> Of those 160 cases, approximately 32 would be felony cases and the remaining 128 would be misdemeanor cases. The state would be required to appoint counsel for 82 percent of the felony defendants, or 26 felony defendants, and for 56 percent of the misdemeanor defendants, or 72 misdemeanor defendants.<sup>109</sup>

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of indigence in 1973 may understate the increase in the appointment of counsel for misdemeanor defendants. This is so because the 2005 figure measures the percentage of defendants who actually received appointed counsel (excluding defendants who either waived counsel or were not appointed counsel because they received only a fine) whereas the 1973 figure measures indigence of misdemeanor defendants regardless of whether they received appointed counsel.

106. This assumes that the 1984 felony-to-misdemeanor ratio was approximately equivalent to the ratio in 2000.

107. Although 47 percent of misdemeanor defendants were indigent in 1984, most of those defendants probably did not have appointed counsel because *Shelton* had not yet been decided, and misdemeanor defendants sentenced to probation did not have a right to counsel at that time. This figure (37.6 misdemeanor defendants) therefore is likely overstated.

108. See *supra* Part II.A.2.

109. This figure assumes that all of the misdemeanor defendants receive sentences of imprisonment or probation enforceable by incarceration.



Thus, over the course of two decades, indigent defense systems nearly tripled the number of felony defendants they had to represent. Moreover, although the increase in misdemeanor defendants does not appear as steep, nearly doubling rather than tripling (from 37.6 defendants to 72 defendants), these figures do not account for the increase in misdemeanor cases attributable to the Court's expansion of the right to counsel in *Shelton*.<sup>110</sup> If one were to include those cases, it is quite possible that the increase in misdemeanor cases requiring court-appointed counsel has also tripled.

*B. Indigent Defense Budgets: The Failure To Keep Pace*

Since 1980, indigent defense budgets nationwide have not come close to keeping pace with the caseload increases described above. In fact, when controlled for inflation, the amount of money spent per defendant has significantly decreased over that period. In the years immediately following *Gideon*, spending on indigent defense increased sharply. Between 1970 and 1978, state and local funding for indigent defense septupled, when controlled for inflation.<sup>111</sup> Part of the explanation for that increase was that indigent defense systems had not existed until the Court's decision in *Gideon*,<sup>112</sup> and the creation of those systems entailed significant costs. Even with those increases, however, it was clear by the early 1980s that indigent defense budgets were insufficient to provide adequate representation. In 1982, the American Bar Association held a series of hearings on the "Crisis in Indigent Defense Funding."<sup>113</sup> At the hearing, witnesses noted that funding of indigent defense was wholly inadequate, constituting only 1.5 percent of the total budgets for criminal justice allocated by state and local governments.<sup>114</sup>

Since that report was prepared, state and local expenditures for indigent defense, after adjustments for inflation, have increased roughly 50-75 percent. In 1982, state and local governments spent

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

111. See Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent,"* 3 OHIO ST. J. CRIM. L. 223, 225-26 (2005).

112. See *supra* notes 18-22 and accompanying text.

113. See *GIDEON* UNDONE, *supra* note 26.

114. See *id.* at 2 (summarizing the testimony of witnesses).

approximately \$1 billion on indigent defense.<sup>115</sup> As set forth in Table 1, in 2002, annual expenditures for indigent defense by state and county governments had reached a figure close to \$3 billion,<sup>116</sup> a 53 percent increase over the 1982 figure after adjustment for inflation.<sup>117</sup> In 2005, the budget increased to just over \$3.5 billion, a 75 percent increase over the 1982 funding levels, again after adjustment for inflation.<sup>118</sup>

Table 1: Indigent Defense Budgets for State and Local Governments

| 1982 budget<br>in | <b>1982 budget<br/>in</b> | 2002 budget<br>in | <b>2002 budget<br/>in</b> | <b>2005 budget<br/>in</b> |
|-------------------|---------------------------|-------------------|---------------------------|---------------------------|
| 1982 dollars      | <b>2005 dollars</b>       | 2002 dollars      | <b>2005 dollars</b>       | <b>2005 dollars</b>       |
| \$991,047,250     | <b>\$2,005,620,000</b>    | \$2,823,562,619   | <b>\$3,065,268,780</b>    | <b>\$3,520,941,367</b>    |

Another more-targeted study focused on indigent defense budgets in the 100 most populous counties.<sup>119</sup> That study concluded that indigent defense funding increased a little less than 50 percent between 1982 and 1999. Expenditures on indigent defense in 1999 totaled approximately \$1.2 billion.<sup>120</sup> That figure represents a 47 percent increase from the funding levels in 1982 when adjusted for inflation.<sup>121</sup> The bottom line is that while the total number of cases

115. See THE SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2002, at 1-2 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf>.

116. See *id.* at 2; Table 1 (concluding that state and county governments spent \$2,823,562,619 on indigent defense in fiscal year 2002).

117. Inflation was calculated according to the guidelines set forth by the Bureau of Labor Statistics on its website at <http://www.bls.gov/cpi> (last visited Oct. 13, 2007) (follow “Get Detailed CPI Statistics” hyperlink to “Inflation Calculator” hyperlink). According to those guidelines, inflation from 1982 to 2002 was approximately 86 percent.

118. THE SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2005 (2006), available at [http://www.abanet.org/legalservices/sclaid/defender/downloads/FINAL\\_REPORT\\_FY\\_2005\\_Expenditure\\_Report.pdf](http://www.abanet.org/legalservices/sclaid/defender/downloads/FINAL_REPORT_FY_2005_Expenditure_Report.pdf) (noting that state and county governments spent \$3,520,941,367 on indigent defense services in fiscal year 2005). Inflation was calculated according to the guidelines set forth by the Bureau of Labor Statistics on its website. See *supra* note 117. According to those guidelines, inflation from 1982 to 2005 was approximately 102 percent.

119. See DEFRANCES & LITRAS, *supra* note 28, at 5.

120. *Id.* at 1.

121. *Id.* Comparable data on indigent defense funding in 1982 were available for 50

has risen from 100 percent to 200 percent since 1982, budgets for indigent defense have increased only 50-75 percent after adjustment for inflation.

### III. FOCUSING RESOURCES ON SERIOUS CASES

Over the past twenty-five years, caseloads of indigent defenders have borne the brunt of the rise in the number of cases requiring court-appointed counsel. As a result of these increases, per-lawyer caseloads in many jurisdictions now radically exceed accepted standards.<sup>122</sup> In an effort to respond to the rise in caseloads, public defenders and other concerned citizens have urged governments to increase indigent defense budgets so as to facilitate the hiring of additional defense attorneys.<sup>123</sup> These efforts, however, have not

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counties, and the funding of those same 50 counties in 1999 increased roughly 47 percent.

122. As discussed in Part IV, the most widely accepted caseload standards limit annual caseloads to 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals. *See, e.g.*, NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.1, at 12 (1976), *available at* [www.nlada.org/DMS/Documents/998925963.238/blackletter.doc](http://www.nlada.org/DMS/Documents/998925963.238/blackletter.doc) [hereinafter GUIDELINES].

123. *See* Backus & Marcus, *supra* note 1, at 1096-1103 (arguing that an increase in resources is necessary); Klein, *supra* note 47, at 681-92 (arguing that state bar associations should commit lawyer registration fees to indigent defense); Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 AM. J. CRIM. L. 1, 41-46 (1999) (arguing that state legislatures should allocate more resources to fund indigent defense). In a variation on that argument, some have advocated for implementation of caseload limits through litigation so that states would be forced to allocate sufficient resources. *See* Klein, *supra* note 1, at 408-30 (arguing for broad-based litigation strategies to rectify the indigent defense funding crisis); Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex-Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 243 (1997) (arguing that indigent defense counsel should sue for resources equal to those allocated for prosecutor's offices). While litigation has been successful in a few jurisdictions, it is a solution of last resort and is unlikely to be widely successful as a mechanism to ensure funding for indigent defense nationwide. *See* Spangenberg & Schwartz, *supra* note 50, at 51-52. Others have argued simply that states must address the caseload crisis without identifying any sources of funding to implement those solutions. *See, e.g.*, Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1199 (2003) (arguing that state disciplinary boards should enforce ethics rules against indigent defenders but noting that funding is necessary and that "[p]rosecutors, courts, and disciplinary agencies should strongly urge legislatures to provide the necessary funding"); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 533 (proposing ethical standards for indigent defense attorneys, but acknowledging that this solution will not eliminate the problem as long as there is inadequate funding). As discussed in Part IV, *see infra* notes 177-214 and accompanying text, the flaw in that argument is that there is no constitutional requirement that mandatory caseload limits be adopted or enforced, and states

carried the day.<sup>124</sup> In the face of countervailing political pressures, real dollar budgets simply have not kept pace with the growing number of cases in the indigent defense system.

There is, however, another option for dealing with the growing caseload crisis because deficient budgets are only half the reason for the problems now faced by indigent defense systems. The other half lies in the rising number of cases requiring appointment of counsel. In particular, indigent defense systems now direct extensive resources to the appointment of counsel in relatively minor misdemeanor cases.<sup>125</sup> As a result, states could conserve resources by eliminating representation in many of these cases. In order to do so, states must first limit the right to court-appointed counsel to cases in which the defendant has a constitutional right to counsel. Next, they must reduce the number of cases that bring that right into play.

The argument against denying a right to counsel in large numbers of misdemeanor cases is that although this denial may not

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have not adopted such limits in large part because of the cost factor associated with those limits. It therefore is necessary to identify alternative ways to reduce caseloads.

124. See *supra* Part II.B.

125. As discussed *supra* in Part II.A, two other factors have led to an increase in the number of cases entering the indigent defense system: (1) an increase in the number of cases prosecuted, and (2) increased levels of indigence. States certainly could reduce the total number of cases requiring the appointment of counsel by finding ways to limit these factors. For instance, a state could pursue strategies to reduce the prosecution of cases by, for example, allocating a fixed criminal justice budget to be split evenly between indigent defense and prosecution. Cf. Wright, *supra* note 1, at 253-55 (arguing for equivalent resource allocations for prosecution and defense attorneys). Such a system would require prosecutors to be more selective in deciding which cases to prosecute.

A state also could increase the income cutoff level for indigent defense qualification. There is some evidence that states already are pursuing this strategy. See Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 272-73 (2004) (reporting that in a survey of indigent defenders, the standard most commonly adopted was a standard related to client eligibility); Wright & Logan, *supra* note 92, at 2050 n.11 (noting that "legislatures have shown a ready willingness to offset [the increases in types of cases that give rise to a right to counsel] by lowering financial eligibility thresholds, thereby shrinking the overall pool of mandated counsel appointments"). Although there has been some suggestion that indigent defendants at the margins actually can afford to hire private counsel, see Hoffman et al., *supra* note 111, at 250 (concluding that marginally indigent defendants hire counsel if the charges are serious and they are innocent, but they use public defenders if they know the risk of conviction is high), raising eligibility standards may well deny counsel to defendants who are charged with serious offenses and do not have sufficient resources to hire a lawyer—a result that is completely antithetical to *Gideon*.

violate the Constitution, it violates the spirit of *Gideon* because counsel can provide a benefit to misdemeanor defendants. The empirical evidence suggests, however, that the appointment of counsel in these cases may not provide a significant benefit.<sup>126</sup> Because the empirical evidence indicates that counsel play a significantly less critical role in minor misdemeanor cases than they do in felony cases, limiting appointment of counsel to felony and more serious misdemeanor cases could relieve pressure on indigent defense systems while violating neither the Sixth Amendment nor the spirit of *Gideon*.

*A. Empirical Evidence of the Limited Value of Counsel in Misdemeanor Cases*

The empirical evidence currently available supports the proposition that lawyers who are appointed in federal misdemeanor cases provide no significant advantage to their clients. Indeed, pro se misdemeanor defendants in federal court appear both to have lower conviction rates and to receive more favorable sentencing outcomes than represented misdemeanor defendants. Because of this, the appointment of counsel in these types of cases may be less important than in more serious cases.<sup>127</sup>

Data are available on defendants in all misdemeanor cases filed and terminated in federal court.<sup>128</sup> In 2000-2005, of the defendants

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126. See *infra* Part III.A.

127. The appointment of counsel in minor cases may provide benefits to the indigent defense system completely separate from the benefits provided to the client. In particular, public defender offices in some jurisdictions use appointments in minor cases as training ground for their most junior attorneys. Even with the proposals set forth below, however, counsel still will be appointed in many misdemeanor cases. The primary difference is that counsel will be appointed in far fewer misdemeanor cases.

128. See Bureau of Justice Statistics, Federal Justice Statistics Resource Center, <http://fjsrc.urban.org/download/dtsheet.cfm> (last visited Oct. 13, 2007) (providing statistics concerning defendants in federal criminal cases terminated in U.S. District Courts). Data from fiscal years 2000-2005 were used for the analysis in this Article. The database records type of counsel at the time of case termination which is defined as dismissal, acquittal, or sentencing. Over the six-year period from 2000-2005, data were reported for 63,006 defendants in misdemeanor cases. Data on outcome were missing for 363 defendants, and data on sentences were missing for an additional 93 defendants. Data on type of counsel were missing for an additional 19,907 defendants. Thus, complete data for this analysis were available for 42,643 defendants.

for whom type of counsel was recorded, roughly 64 percent of all defendants charged with misdemeanors represented themselves pro se, 25 percent had appointed counsel,<sup>129</sup> and 10 percent retained private counsel.<sup>130</sup> As set forth in Table 2, the pro se defendants were less likely to plead guilty and had a better chance of being acquitted or having their cases dismissed than represented defendants.

Table 2: Outcome by Type of Counsel

|   | Guilty<br>Plea | Nolo<br>Plea | Dismissal | Jury<br>Trial<br>Convicted | Bench<br>Trial<br>Convicted | Jury<br>Trial<br>Acquittal | Bench<br>Trial<br>Acquittal |
|---|----------------|--------------|-----------|----------------------------|-----------------------------|----------------------------|-----------------------------|
| Pro Se<br>(27,191<br>cases)             | 55.1%          | 6.1%         | 30.3%     | .02%                       | 3.5%                        | --                         | 5%                          |
| Retained<br>Counsel<br>(4,275<br>cases) | 72.6%          | 4.0%         | 16.5%     | 1.0%                       | 5.0%                        | .1%                        | .8%                         |
| Public<br>Defender<br>(7,389<br>cases)  | 82.1%          | .8%          | 15.2%     | .3%                        | 1.0%                        | .2%                        | .4%                         |
| CJA<br>(3,788<br>cases) <sup>131</sup>  | 81.3%          | 4.9%         | 12.1%     | .5%                        | 1.0%                        | .1%                        | .2%                         |

Perhaps more importantly, pro se misdemeanor defendants in federal court fared better than their represented counterparts in the sentencing process. As set forth in Table 3, using a scale for outcomes from zero to six, with zero representing the most favorable outcome for the defendant (acquittal or dismissal) and six representing the least favorable outcome (a prison sentence), pro se defen-

129. Appointed counsel includes both public defenders and private counsel appointed under the Criminal Justice Act.

130. Data analysis is available from the author. Data for type of counsel were missing in approximately 32 percent of the cases.

131. "CJA" refers to attorneys appointed for indigent defendants under the Criminal Justice Act.

dants had a statistically significantly lower mean score than any category of represented defendants.<sup>132</sup>

Table 3: Mean Outcome Severity by Type of Counsel

| Type of Counsel  | Mean Severity Score | Mean Severity Score Excluding Dismissals |
|------------------|---------------------|--|
| Pro Se           | 1.661               | 2.385                                    |
| Retained Counsel | 2.626               | 3.145                                    |
| Public Defender  | 3.089               | 3.641                                    |
| CJA Counsel      | 3.505               | 3.989                                    |

Of particular significance in Table 3 is the data establishing that pro se defendants had the lowest mean outcome severity score even if dismissals are excluded from the calculation. As is evident from the data in Table 2, pro se defendants had much higher dismissal rates than represented defendants. One potential explanation for the abnormally high dismissal rate is that cases dismissed very early in the proceedings are reflected as pro se if there has been no opportunity for counsel either to be appointed or to enter an appearance. Because such dismissals, which require no action on the part of the pro se defendant, result in a lower mean severity score for pro se defendants as a category, a mean severity score excluding dismissals might more accurately measure the effect of counsel. Table 3, in its final column titled “Mean Severity Score Excluding Dismissals,” demonstrates that, even if dismissals are excluded from the severity scoring, pro se misdemeanor defendants still fare better than do represented defendants in all categories, with a mean severity score of 2.385 as compared to the next lowest score of 3.145.

One potential explanation for the fact that pro se defendants score better than represented defendants in Table 3 is that unfavorable sentencing outcomes are more likely for defendants convicted of more serious offenses, and pro se defendants may be more likely

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132. For this analysis, the following scores were used: 0=dismissal or acquittal; 2=fine; 3=probation; 4=suspended sentence; 5=split sentence; 6=prison. The most serious aspect of the sentence was used for purposes of scoring, so if, for example, a defendant received a sentence of both prison and a fine, that case would be scored as a six.

to be charged with offenses that are less serious—in particular, traffic cases—than represented defendants. In order to neutralize the effect of the type of charge, the scores in Table 3 were standardized by using a weighted average to estimate the score that defendants in each representation group would have received if they represented the average overall distribution of offenses.<sup>133</sup> As set forth in Table 4, even when the scores are standardized in this way, pro se defendants still score significantly better (although by a less dramatic margin) than any other representation group, both when dismissals are included and when dismissals are excluded.

Table 4: Standardized Outcome Severity by Type of Counsel

| Type of Counsel  | Standardized Severity Score | Standardized Severity Score Excluding Dismissals |
|------------------|-----------------------------|--|
| Pro Se           | 1.819                       | 2.652  |
| Retained Counsel | 2.524                       | 3.049  |
| Public Defender  | 2.739                       | 3.288  |
| CJA Counsel      | 3.191                       | 3.736  |

Finally, even if the mean outcome severity scores are separated by type of offense, as set forth in Table 5, pro se defendants consistently score better than represented defendants in all categories in which there are sufficient data from which to draw conclusions.<sup>134</sup>

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133. The overall offense distribution for all misdemeanor defendants is 29 percent traffic offenses, 12 percent driving under the influence, 14 percent drug offenses, 7 percent fraud offenses, 3 percent immigration offenses, and 34 percent other offenses. In order to obtain these standardized scores, the scores for each type of counsel were broken down by offense type, and those scores were weighted so that the total score for each representation type reflects the score that group would have received if the offense distributions mirrored the overall offense distribution.

134. The offense categories set forth in Tables 5 and 6 encompass roughly 65 percent of the total cases in the database.



Table 5: Mean Outcome Severity by Type of Offense

| Type of Counsel  | Drug Offenses | Driving Under the Influence | Fraud Offenses | Immigration Offenses | Traffic Offenses |
|------------------|---------------|-----------------------------|----------------|----------------------|------------------|
| Pro Se           | 1.875         | 1.999                       | 2.304          | 3.590                | 1.509            |
| Retained Counsel | 2.710         | 2.160                       | 3.163          | 3.750                | 2.231            |
| Public Defender  | 3.272         | 2.385                       | 3.360          | 4.298                | 2.400            |
| CJA Counsel      | 3.774         | 3.324                       | 3.883          | 4.809                | 2.621            |

Similarly, as Table 6 illustrates, if dismissals are excluded from these figures, pro se misdemeanor defendants perform better than represented defendants when the outcome severity scores are broken down by type of offense in all categories of cases except for driving under the influence cases. In driving under the influence cases, defendants represented by public defenders and retained counsel score marginally better than pro se defendants. In all other categories, however, pro se defendants score significantly better than all other categories of represented defendants.

Table 6: Mean Outcome Severity Excluding Dismissals by Type of Offense

| Type of Counsel  | Drug Offenses | Driving Under the Influence | Fraud Offenses | Immigration Offenses | Traffic Offenses |
|------------------|---------------|-----------------------------|----------------|----------------------|------------------|
| Pro Se           | 3.052         | 2.755                       | 3.081          | 3.650                | 2.045            |
| Retained Counsel | 3.307         | 2.748                       | 3.393          | 4.400                | 2.751            |
| Public Defender  | 3.999         | 2.642                       | 3.630          | 4.401                | 2.802            |
| CJA Counsel      | 4.476         | 3.679                       | 3.989          | 5.022                | 3.242            |

The data certainly suggest that counsel in federal misdemeanor cases do not have a meaningful impact on the ultimate outcome and sentence of defendants. By contrast, counsel in federal felony cases appear to provide some benefit to their clients. In a study of federal

felony defendants, pro se defendants were more likely to be convicted at trial than represented defendants.<sup>135</sup>

These numbers are subject to limitations. The biggest flaw is that the data concern only federal cases, and no comparable data are available for state courts.<sup>136</sup> Because the vast majority of misdemeanor defendants are prosecuted in state courts, this gap in data is significant. Outcomes of federal misdemeanor defendants, moreover, may not accurately represent outcomes of state court misdemeanants. In particular, because there are relatively few pro se federal court misdemeanor defendants, it is entirely possible that federal judges make more accommodations to ensure that the rights of those defendants are protected.<sup>137</sup> With the higher volume of state court misdemeanor defendants, state judges may not have the time or resources to make those accommodations, and as a result, pro se misdemeanor state court defendants may suffer more severe outcomes than their represented counterparts.<sup>138</sup> To the extent that the outcomes of federal court and state court pro se misdemeanor defendants vary, the outcomes of the state court defendants are more relevant for purposes of this Article than the outcomes of their federal counterparts precisely because most misdemeanor cases are prosecuted in state court.

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135. See Erica Hashimoto, *Defending the Right of Self-Representation*, 85 N.C. L. REV. 423, 451-54 (2007) (concluding that pro se felony defendants in federal court go to trial at significantly higher rates than represented defendants but that they are more likely to be convicted at trial). Because so few felony defendants represent themselves, there was insufficient data to analyze sentencing outcomes of pro se felony defendants. See *id.* at 441-43.

136. Data are collected for a sample of felony defendants in the seventy-five largest urban counties. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT PROCESSING STATISTICS: FELONY DEFENDANTS IN LARGE URGAN COUNTIES, 2002, at 4-5 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc02.pdf>. The only comparable data for state court misdemeanor defendants are based on survey samples from local jails, but some of those defendants are still pending trial, and those data also exclude defendants charged with or convicted of misdemeanors who do not receive sentences of imprisonment. See Wright & Logan, *supra* note 92, at 2080 n.161.

137. The bench trial acquittal rates of pro se misdemeanor defendants appear to lend some support to this theory. See *supra* Table 2 (demonstrating significantly higher bench trial acquittal rates for unrepresented defendants).

138. Another reason that federal misdemeanants may not be representative of state misdemeanants nationwide is that misdemeanor cases in federal court are concentrated in jurisdictions that have federal military bases, Native American reservations, or other federal land that gives rise to federal jurisdiction for crimes that otherwise would be prosecuted in state courts. These factors also may have some influence on the outcomes.

Although the lack of state data precludes any definitive conclusions about the effect of counsel in misdemeanor cases, there are data suggesting that the outcomes of pro se defendants in state court may actually be better—rather than worse—than the outcomes of their federal counterparts. In a study of felony defendants, pro se defendants in state court had better outcomes than their represented counterparts, while pro se defendants in federal court had outcomes that were worse than represented federal felony defendants.<sup>139</sup> The differential in the results of state and federal felony pro se defendants may not be representative of the results of state and federal pro se misdemeanor defendants, particularly because the volume of pro se misdemeanor defendants in state courts is so much greater than the volume of pro se felony defendants in state courts. Nonetheless, there is no data to suggest that pro se state court misdemeanor defendants enjoy lower success rates than those of their federal counterparts.

The other major caveat to the conclusion presented above is that it is possible that the cases against the pro se defendants are significantly weaker or less serious than the cases against the represented defendants. In other words, defendants with cases that are more serious may be more likely either to retain counsel or to request appointed counsel, whereas those defendants facing weaker or less serious cases may be more likely to represent themselves.<sup>140</sup> The separate analysis of different types of offenses presented in Tables 5 and 6 provides some reason to believe that this potential critique lacks force. There is, however, no mechanism by which to completely control either for the strength of the case against the defendant or for the seriousness of the charge within the offense type.<sup>141</sup>

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139. See Hashimoto, *supra* note 135, at 447-54.

140. The opposite could also be true: Defendants may be more likely to hire counsel or ask for counsel when the case against them is weaker because they believe there are more arguments for counsel to make in the weaker case. *Cf.* Hoffman et al., *supra* note 111, at 224-26 (arguing that marginally indigent felony defendants are more likely to hire counsel when the case against them is weaker and use publicly appointed counsel when the case against them is stronger).

141. See *id.* at 247 (noting that without interviewing attorneys, it is impossible to measure the inherent strength of a case).

Despite these cautions, it remains the case that, at least in federal court, pro se defendants are achieving outcomes as good as, and perhaps better than, represented defendants. Just as importantly, pro se misdemeanor defendants in federal court achieve better results than felony pro se defendants in federal court. Thus, the data suggest that the value added by counsel is lower in misdemeanor cases than in felony cases.

*B. Reducing the Appointment of Counsel in Misdemeanor Cases*

If, as appears to be the case, counsel in less serious misdemeanor cases do not have a particularly significant impact on outcomes and sentencing, it makes sense to reallocate resources that otherwise would be spent in support of counsel in those cases by eliminating such cases from the caseloads of indigent defense counsel, thereby redirecting such resources to the support of cases in which the stakes are higher and the impact of counsel appears to be greater.<sup>142</sup> Although the Supreme Court has required appointment of counsel in any case in which the court imposes a sentence of imprisonment or a probationary sentence enforceable with the threat of imprisonment,<sup>143</sup> there are four ways that states can limit appointment of counsel in minor cases. First, some states require appointment of counsel to indigent defendants in all criminal cases, whether or not appointment is required by the Constitution. To the extent that a state is having difficulty meeting caseload standards, it should change any such rule so that counsel is appointed only when the defendant has a constitutional right to that appointment. Second, states should take steps to identify minor crimes that currently are punishable by imprisonment but for which an actual sentence of imprisonment only rarely is imposed. For those crimes, states should adjust the penalties so that imprisonment is not an available

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142. It is undoubtedly true that misdemeanor cases are less resource intensive than felony cases. *See, e.g.*, NAT'L ADVISORY COMM'N, *supra* note 25 (estimating that the workload of 150 felonies is equivalent to the workload of 400 misdemeanors). Reducing the number of misdemeanor cases in which counsel is appointed therefore has less impact on overall workload than reducing an equivalent number of felony cases. The point remains, however, that reducing the number of misdemeanor appointments will reduce caseloads and free up resources for more serious cases.

143. *See supra* Part II.A.1.

sentence. Third, states should revise probation schemes so that a sentence of probation does not always or almost always give rise to a right to counsel. States can achieve this result by, for instance, punishing probation violations with contempt sanctions rather than probation revocation. Finally, states should set up mechanisms to ensure that, to the extent that imprisonment is an available penalty for a misdemeanor offense, cases in which imprisonment is a realistic option are identified early in the process and counsel is appointed only in those cases. Taken together, these reforms would result in a significant decrease in the number of cases requiring appointment of counsel.<sup>144</sup>

*1. Amending Statutes To Require Appointment of Counsel Only When There Is a Constitutional Right*

The Constitution requires appointment of counsel in non-felony cases only if an indigent defendant is actually sentenced to imprisonment, a suspended sentence, or probation enforceable by imprisonment.<sup>145</sup> A number of states, however, currently require the appointment of counsel even in minor cases punishable only by fines.<sup>146</sup> If those states are not experiencing excessive caseload problems, the appointment of counsel in these cases is non-problematic, particularly given a criminal defendant's right to waive counsel and self-represent.<sup>147</sup> If those states are experiencing caseload problems, however, the resources spent to assign counsel in these

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144. With the existing data, it is impossible to estimate the percentage of state and local misdemeanor defendants who receive sentences of imprisonment upon conviction. An analysis of the data on federal misdemeanor defendants from 2000-2005, however, demonstrates that less than 10 percent of federal defendants charged with misdemeanors as the most serious offense are sentenced to imprisonment. If state rates are anywhere close to comparable, this means that very few misdemeanor defendants would have a right to counsel if these reforms are adopted.

145. See *supra* Part II.A.1.

146. See, e.g., DEL. CODE ANN. tit. 29, § 4602 (2003) (providing a right to counsel to any "indigent person who is under arrest or charged with a crime"); N.C. GEN. STAT. ANN. § 7A-451 (West 2005) (providing a right to counsel in any case in which a fine of \$500 or more is likely to be adjudged); *State v. Duval*, 589 A.2d 321 (Vt. 1991) (interpreting title 13, section 5231 of the Vermont Code to provide a right to counsel in all cases in which either imprisonment or a fine in excess of \$1,000 is imposed).

147. See *Faretta v. California*, 422 U.S. 806 (1975) (holding that criminal defendants have a constitutional right to represent themselves).

minor cases—cases in which the impact of counsel very likely is minimal and there is no risk of imprisonment—should be reallocated to reduce the caseloads of attorneys handling more serious offenses.<sup>148</sup>

A number of other states require the appointment of counsel in all cases in which the defendant is charged with an offense *punishable* by imprisonment, even though the Court made clear in *Scott*<sup>149</sup> that the mere potential for imprisonment does not give rise to a right to counsel.<sup>150</sup> Given the rules of *Argersinger*, *Scott*, and *Shelton*, and the resulting dependence of the right to counsel at trial on post-trial sentencing outcomes,<sup>151</sup> it is understandable that states have provided a statutory right to counsel in all cases in which imprisonment is a potential penalty. The difficulty is that a significant percentage of those defendants will not actually receive sentences of imprisonment. Appointment of counsel in those cases therefore is not constitutionally required and may not be worth the cost. As set forth below, there are steps that states can take to determine, prior to appointment of counsel, whether a defendant charged with a crime punishable by imprisonment has a constitutional right to counsel. If a state undertakes these reforms, it must amend relevant

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148. Although the stakes of cases punishable by only a fine certainly are lower than the stakes of cases punishable by imprisonment, the stakes still are higher than in civil cases. See Wright & Logan, *supra* note 92, at 2079 (noting the consequences of misdemeanor convictions). In particular, a conviction in a misdemeanor case, even if the right to counsel is not afforded, can serve as a basis for enhancing a sentence upon a later conviction. See *Nichols v. United States*, 511 U.S. 738, 740-42 (1994) (holding that an uncounseled conviction can be used to enhance a subsequent sentence). In addition, there may be immigration consequences stemming from misdemeanor convictions, even if the defendant did not have a right to counsel. See, e.g., IMMIGRANT LEGAL RES. CTR., DANGEROUS IMMIGRATION LEGISLATION PENDING IN CONGRESS, available at [http://www.ilrc.org/resources/hr4437\\_general.pdf](http://www.ilrc.org/resources/hr4437_general.pdf) (last visited Oct 13, 2007) (summarizing immigration consequences of criminal convictions if H.R. 4437 were passed). It also is true, however, that all of these consequences, in addition to a loss of liberty, are threatened in more serious cases. To the extent that a 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.

149. See *Scott v. Illinois*, 440 U.S. 367 (1979).

150. See, e.g., HAW. REV. STAT. § 802-1 (1993) (providing a right to counsel to any indigent person charged with an offense punishable by imprisonment); 725 ILL. COMP. STAT. 5/113-3(b) (2000) (providing right to counsel in all criminal cases except those punishable only by a fine); NEB. REV. STAT. § 29-3902 (1990) (providing right to counsel for all indigent defendants charged with felonies or misdemeanors punishable by imprisonment).

151. See *supra* Part II.A.1.

statutes so that defendants have a right to counsel only when they are constitutionally entitled to it—that is, when they actually receive sentences of imprisonment or probation enforceable by imprisonment.

## *2. Eliminating Imprisonment Penalties for Minor Offenses*

Once states amend statutes to require appointment of counsel only when required by the Constitution, they must next take steps to limit the number of cases in which the Constitution requires such appointments. The first step in that process is to eliminate imprisonment penalties for minor offenses.

States take widely divergent approaches to the punishment of minor crimes. In the state of New York, for example, minor traffic offenses are punishable by imprisonment<sup>152</sup> and counsel therefore are appointed in many of those cases.<sup>153</sup> In other jurisdictions, these crimes are punishable only by a fine, and the state is not required to provide counsel.<sup>154</sup> Similarly, public intoxication,<sup>155</sup> possession of an open container of alcohol,<sup>156</sup> and possession of drug paraphernalia<sup>157</sup> are all punishable by imprisonment in some jurisdictions but only by a fine in others. To the extent that a state is maintaining imprisonment as an option for these minor offenses but using it only rarely, there is little reason to incur the expense of appointing counsel in all, or even many or some, of those cases. Instead, the

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152. See N.Y. VEH. & TRAF. LAW §§ 375.1(a), 375.32, 1180 (McKinney 2004).

153. See THE SPANGENBERG GROUP, *supra* note 115, at 3 (“Some states, by statute, require counsel in minor misdemeanors, including traffic offenses, as these are treated asailable offenses.”).

154. *Id.*

155. Compare IND. CODE §§ 7.1-5-1-3 (2001), 35-50-3-3 (1977) (defining public intoxication as a Class B misdemeanor punishable by up to 180 days imprisonment and/or a fine of \$1,000), with TEX. PENAL CODE ANN. §§ 49.02 (Vernon 2001), 12.23 (Vernon 1994) (defining public intoxication as a Class C misdemeanor punishable by a fine of up to \$500).

156. Compare ALA. CODE § 32-5A-330 (2000) (defining possession of an open container of alcohol in a motor vehicle as a Class C misdemeanor punishable by not more than a \$25 fine), with KAN. STAT. ANN. § 8-1599 (1994) (providing that transportation of an alcoholic beverage in an opened container is punishable by imprisonment of up to six months or a fine of \$200 or both).

157. Compare COLO. REV. STAT. § 18-18-428 (1992) (providing that possession of drug paraphernalia is punishable by a fine of not more than \$100), with FLA. STAT. §§ 893.147 (2000), 775.082(4)(a) (2005) (defining possession or use of drug paraphernalia as a first degree misdemeanor punishable by a term of imprisonment not exceeding one year).

state should simply remove the possibility of imprisonment as a penalty.<sup>158</sup> Defendants charged with those offenses would then no longer have even a possible constitutional right to counsel, and the state could cease appointing counsel in all such cases.<sup>159</sup>

To be sure, there may be certain subcategories of particular offenses in which imprisonment is imposed with frequency, but states could easily take those circumstances into account when setting penalties. For instance, a jurisdiction could provide that certain offenses are punishable only by a fine unless the state proves that the defendant is a repeat offender after giving notice of that allegation prior to trial.<sup>160</sup> This approach would have the benefit of reserving exceptional treatment for exceptional cases. Eliminating imprisonment penalties for non-exceptional minor offenses would not impose significant burdens on the administration of justice if those penalties are being used only infrequently, and such action could result in significant resource savings for indigent defense systems.

### *3. Amending Probation Statutes*

Most indigent misdemeanor defendants who are sentenced to probation have a right to counsel.<sup>161</sup> This is so because in virtually every jurisdiction, a defendant who is sentenced to probation is subject to imprisonment if he violates the conditions of his probation and a judge revokes that probation.<sup>162</sup> If the defendant is unrepresented in the case that gives rise to the sentence of probation, that

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158. Removing imprisonment as a sentencing option also removes the possibility of probation enforceable through imprisonment, and defendants charged with those offenses therefore would have no right to counsel.

159. A state also could choose to decriminalize these offenses. *See* Backus & Marcus, *supra* note 1, at 1125 (recommending that states decriminalize non-serious misdemeanors to ease crowded court dockets). Lowering the penalties for these offenses rather than completely decriminalizing them may, however, be a more palatable option for legislators.

160. For purposes of determining whether there is a right to counsel, the notice provision is critical, since absent notice by the state that the defendant is a repeat offender, the maximum penalty would be a fine and the defendant would not be entitled to the appointment of counsel.

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

162. *See supra* notes 81-85 and accompanying text.



sentence is unconstitutional even if the state provides counsel prior to the revocation of probation.<sup>163</sup>

Although most states currently use probationary schemes in which probation is enforceable through imprisonment, such a scheme is not necessary for the effective administration of probation in many cases. To the extent that states want to preserve the option of sentencing defendants to probation without incurring an obligation to appoint counsel, they should amend those statutes so that probation can be enforced only through contempt proceedings or at hearings in which there is an opportunity to reopen the finding of guilt.<sup>164</sup>

The Supreme Court in *Shelton* certainly suggested that the former system—probation enforceable only through contempt—would not give rise to a right to counsel.<sup>165</sup> Under this scheme, a defendant who is convicted of a misdemeanor could be sentenced to a term of probation even if not afforded counsel. If, however, the defendant were alleged to have violated a term or condition of probation—if, for instance, the defendant were rearrested on a new offense—the court could not revoke probation and impose a sentence of imprisonment. Instead, imprisonment could be imposed only if the court adjudicated the defendant guilty of contempt for his failure to abide by the terms and conditions of his probation.<sup>166</sup>

The latter system—allowing the defendant to reopen the adjudication of guilt at the probation revocation hearing—may raise more serious constitutional questions. Under such a system, a state could sentence a misdemeanor defendant to a term of probation without affording the right to counsel. Before the defendant's probation could be revoked and imprisonment imposed, however, the defendant would have a right to reopen the question of whether he was

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163. See *Shelton*, 535 U.S. at 667-68.

164. A state also could utilize a pretrial probation program without appointing counsel. See *id.* at 671. Under such a program, a defendant would agree to complete a term of probation prior to adjudication of the case, and upon successful completion of that term of probation, the case would be dismissed.

165. See *id.* at 672-73. A sentence to a term of probation under such a system would be equivalent to a fine-only sentence which does not give rise to a right to counsel, as per the Court's holding in *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979), but which can be enforced through criminal contempt proceedings.

166. The defendant would be entitled to the appointment of counsel at the contempt hearing before the court could impose a sentence of imprisonment.

guilty of the offense in the first instance.<sup>167</sup> Although the Court at least suggested that it was leaving open the question of whether an uncounseled probationary sentence could be imposed if there were some mechanism to relitigate the defendant's guilt or innocence at the probation revocation stage,<sup>168</sup> the Court ultimately might rule that such a scheme is unconstitutional.<sup>169</sup> For that reason, a state seeking to reserve probation sentences as an option without triggering the right to counsel likely should amend probation statutes to utilize contempt proceedings.

#### *4. Requiring Judicial and Prosecutorial Triage*

Finally, states should take steps to determine at the outset of cases whether appointment of counsel is constitutionally required and to appoint counsel only in those cases. The Supreme Court has not made that task easy since it is often difficult to determine at the outset of a case whether a defendant charged with a misdemeanor will be sentenced to imprisonment.<sup>170</sup> Nonetheless, there are steps that a state can take to minimize the appointment of counsel when no duty to have done so will be triggered at the sentencing stage. Most defendants charged with misdemeanor offenses that are punishable by imprisonment do not actually receive imprisonment sentences.<sup>171</sup> Instead, many are sentenced to probation or fines.<sup>172</sup> The challenge is to determine at the outset of the case which of the defendants are most likely to receive imprisonment sentences if they are found guilty.

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167. As with the contempt hearing, the defendant would have a right to counsel at the probation revocation hearing before the judge could imprison the defendant.

168. See *Shelton*, 535 U.S. at 668 n.5 (concluding that the Court did not have to "decide whether or what procedural safeguards 'short of complete retrial' at the probation revocation stage could satisfy the Sixth Amendment" because Alabama did not have any mechanism for revisiting the guilt or innocence of the defendant at a probation revocation hearing).

169. See *id.* at 677 (Scalia, J., dissenting) (noting that although "the Court at one point purports to limit its decision to suspended sentences imposed on uncounseled midemeanants in States, like Alabama, that offer only 'minimal procedures' during probation revocation hearings, ... the text of [the majority's] opinion repudiates that limitation").

170. See *supra* Part II.A.1.

171. See *supra* note 144 (noting that less than 10 percent of federal misdemeanor defendants are sentenced to imprisonment).

172. This discussion assumes passage of the reforms suggested in Part III.B.1, *supra*, so that sentences of probation do not give rise to a right to counsel.

Because the point is to prevent the appointment of defense counsel unless there is a constitutional right to counsel—that is, unless the defendant will be imprisoned—either the judge or the prosecutor or both should seriously assess that likelihood at the outset of the case. There are a number of mechanisms that a state could enact to assure that prosecutors and/or judges make these determinations explicitly. For instance, a state could provide that imprisonment is not available as a penalty for certain misdemeanor offenses unless the prosecutor files a notice at the defendant's first appearance.<sup>173</sup> If no notice is filed, the defendant could not be sentenced to imprisonment and there would be no right to counsel.

Alternatively, the legislature could provide guidance for judges charged with making determinations regarding the right to counsel. In *Argersinger*, the Supreme Court clearly anticipated that judges would make these types of determinations at the outset of the case.<sup>174</sup> The difficulty has been that it does not appear that judges have been given much, if any, guidance for making those determinations. Instead, judges appear to make these decisions on an ad hoc basis. Explicit guidance from a legislature regarding the circumstances under which imprisonment should be imposed for particular offenses, or classes of offenses, would provide judges with a mechanism to assess the likelihood that a particular defendant is entitled to appointment of counsel.<sup>175</sup> Under such a system, a judge would make a preliminary determination regarding the likelihood of an imprisonment sentence under those guidelines, and make a decision on appointment of counsel accordingly.<sup>176</sup>

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173. Although there is some risk that prosecutors will routinely file such notices in all cases, prosecutors in many jurisdictions know that they will not request imprisonment in the vast majority of cases and will be willing to put that on the record.

174. See *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1973) ("Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.").

175. See, e.g., N.C. GEN. STAT. §§ 15A-1340.20 to 1340.23 (2005) (setting forth presumptive punishments for misdemeanors based upon the class of misdemeanor and the prior record of the defendant).

176. As Chief Justice Burger noted in his concurrence in *Argersinger*, judges in bench trials should not be made aware of a defendant's prior criminal record. 407 U.S. at 41-42 (Burger, C. J., concurring). In bench trial cases, some other screening mechanism therefore may need to be adopted so that the trial judge does not hear of the defendant's prior record. For

## IV. THE IMPERATIVE FOR MANDATORY CASELOAD CAPS

If adopted, the reforms proposed above will result in a reduced number of cases requiring appointment of counsel and thus should result in lower caseloads for indigent defenders. That correlation, however, assumes that budgets at the very least will remain stable in inflation-adjusted dollars. If budgets decrease, the reduction in total cases will not necessarily have any effect on the current caseload crisis. In order to ensure that these reforms actually result in reduced caseloads, it is necessary for states to adopt caseload limits. In addition, to be effective, caseload limits must incorporate enforceable, numerical mandates.

Historically, there have been no, or very few, mandatory caseload limits.<sup>177</sup> This is so because the Court has not imposed any constitutional limitation on the number of defendants that indigent defense counsel may represent. In this environment, states have had little incentive to take on this additional obligation. Even states that have adopted caseload standards have for the most part recommended, rather than required, compliance.

Maximum caseload standards have existed since the early seventies.<sup>178</sup> In 1973, in response to concerns about excessively high indigent defender caseloads, the National Advisory Commission on Criminal Justice Standards and Goals ("NAC"), a commission of the Department of Justice charged with evaluating key aspects of the administration of justice, issued recommendations on caseload limits for indigent defense counsel.<sup>179</sup> The per-attorney standards it set were numerical in nature—namely, maximum annual caseloads of 150 felony cases, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals.<sup>180</sup> Although these standards

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instance, one judge could make all of the appointment determinations.

177. See Wallace & Carroll, *supra* note 125, at 250.

178. See *id.* at 269, 278.

179. See NAT'L ADVISORY COMM'N, *supra* note 25.

180. *Id.* These standards refer to the number of cases defense counsel should handle annually, rather than the number of cases that should be open at any given time, and they were intended to be alternative, rather than aggregated, maximums. *Id.* Thus, under the standard, a lawyer can handle 150 felonies annually, but if she does, she cannot then handle any additional cases of any type.

have been the subject of some criticism over the years,<sup>181</sup> they have gained widespread acceptance as absolute maximum limits for indigent defenders,<sup>182</sup> and they remain the benchmark frequently cited and relied upon to this day. In 1989, for example, the American Bar Association's Special Committee on Criminal Justice in a Free Society adopted the NAC standards, with the single exception that it reduced the maximum number of misdemeanors from 400 to 300 cases per year.<sup>183</sup> In 2002, the American Bar Association adopted a resolution recommending that indigent defense systems comply with the NAC standards.<sup>184</sup>

Despite the existence of these standards and the almost uniform agreement that some form of caseload standard is necessary,<sup>185</sup> the Supreme Court has never intimated that the Constitution requires states to adopt such standards. The Court has held that the state must provide not only the assistance of a lawyer but also the *effective* assistance of counsel. In *Strickland v. Washington*,<sup>186</sup> however, the Court declared that a failure to provide "adequate legal assis-

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181. There are two types of criticism of the NAC standards. First, there are those who question whether caseload limits in the NAC standard represent manageable caseloads. *See, e.g.*, Mounts, *supra* note 123, at 483 n.53 (noting that the caseload limits in the NAC standard appear to have come from an earlier estimate that was based only on a "crude survey of present practice" rather than on any more critical analysis or empirical evidence). Second, there are those who question whether flat caseload standards are effective because they do not take account of either the variation in complexity of cases within particular categories or other time-consuming activities such as travel. *See, e.g.*, THE SPANGENBERG GROUP, U.S. DEP'T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 8 (2001) (recommending that workload limits be set, rather than caseload caps). Despite these criticisms, the NAC standards have served as the basis of more state caseload standards than any other standards. *See infra* notes 182-84 and accompanying text.

182. *See, e.g.*, GUIDELINES, *supra* note 122 (stating that caseloads should reflect NAC standards).

183. *See* AM. BAR ASS'N SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOCIETY, CRIMINAL JUSTICE IN CRISIS 43 (1989).

184. *See* AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, princ. 5 (2002), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> (providing, as part of Principle 5, that "[n]ational caseload standards should in no event be exceeded" and citing to the numerical caseload limits contained in the NAC standards).

185. On this point, it is significant that while those in the defense community certainly have called for caseload or workload standards, *see, e.g.*, NAT'L LEGAL AID AND DEFENDER ASS'N, INDIGENT DEFENSE CASELOADS AND COMMON SENSE, AN UPDATE (1992), the Justice Department also supports that view, having commissioned a study recognizing that some form of standards must be implemented, *see* THE SPANGENBERG GROUP, *supra* note 181, at 8.

186. 466 U.S. 668 (1984).

tance” existed only if, in the case at hand, the defendant’s lawyer “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment” *and* this “deficient performance prejudiced the defense.”<sup>187</sup>

It was under the first part of this standard, the so-called deficient performance prong, that the Court had the opportunity to set a measurable test for effective assistance, including a standard regarding defense counsel caseloads. Instead, the Court required that in order to establish a constitutional violation, the defendant must “show that counsel’s representation fell below an objective standard of reasonableness.”<sup>188</sup> In deeming the adoption of a more specific standard unjustified, however, the Court relied on “the *legal profession’s maintenance of standards* sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the [Sixth] Amendment envisions.”<sup>189</sup> The Court also noted that “[p]revailing norms of practice as reflected in [the] American Bar Association standards and the like ... are guides to determining what is reasonable.”<sup>190</sup>

Following *Strickland*, the Court has looked to American Bar Association (ABA) standards—outside the caseload context—to determine whether counsel violated *Strickland*’s “objective standard of reasonableness,” particularly when assessing the adequacy of counsel’s investigation.<sup>191</sup> Thus far, however, the Court has not acknowledged the existence of NAC or ABA caseload standards, let alone required states to comply with them.

In the absence of a constitutional duty that states implement caseload caps, few jurisdictions have imposed them.<sup>192</sup> To be sure,

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187. *Id.* at 687.

188. *Id.* at 688.

189. *Id.* (emphasis added).

190. *Id.*

191. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (invoking the ABA Standards for Criminal Justice in concluding that counsel’s failure to investigate constituted deficient performance); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (citing ABA standards in concluding that counsel’s investigation constituted deficient performance); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing ABA standards in determining that counsel’s failure to investigate defendant’s background did not meet an objective standard of reasonableness).

192. There is, of course, a limit to the amount that caseloads can increase. At some point, in the face of a rising number of cases and in the absence of budget increases, caseloads will become so high that the system will cease to function. Until the system reaches that breaking point, however, there is no imperative for state or local budgets to respond to the pressures

a handful of states have endorsed some form of caseload standards for public defenders by way of rules adopted by public defender commissions, legislatures, or judicial decree.<sup>193</sup> The problem with these standards, however, is that they typically operate only as recommendations and there is no enforcement mechanism to ensure compliance with them, even if they purport to have some measure of binding effect. For instance, the State Board of Public Defense in Minnesota adopted caseload limitations in 1991.<sup>194</sup> Those limitations, however, were characterized as a “goal,” and the Board adopted no enforcement provisions to ensure compliance.<sup>195</sup> Thus, although the “actual caseloads carried by [attorneys in one district] far exceeded” those standards, there was no recourse for public defenders in that jurisdiction.<sup>196</sup> Similarly, the Georgia Public Defender Standards Council has adopted the caseload limitations contained within the NAC standards.<sup>197</sup> The Georgia standard specifies that it “is not a suggestion or guideline, but is intended to be a maximum limitation on the average annual case loads of each lawyer employed as a public defender.”<sup>198</sup> Although the standard purports to define an absolute maximum limitation, it provides no mechanism for enforcement of the cap. Thus, if a public defender in Georgia has a caseload that exceeds this maximum limitation, there is no recourse either for the defender or for the defender’s clients.

The type of standards adopted in Minnesota and Georgia reflect a clear advance over preexisting regimes that left attorney caseloads free of any regulation. They also improve significantly upon amorphous standards that speak of maintaining “reasonable”

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caused by excessive caseloads.

193. See THE SPANGENBERG GROUP, *supra* note 181, at 11-13 (listing jurisdictions that have adopted caseload standards).

194. See OFFICE OF THE PUB. DEFENDER, MARICOPA COUNTY, ARIZ., STATE-BY-STATE COMPARISON OF MAXIMUM WORKLOAD STANDARDS, *available at* <http://www.pubdef.maricopa.gov/consults/finalrpt/Appd.pdf> (last visited Oct. 13, 2007) (citing MINN. STATE PUB. DEFENDER, CASELOAD STANDARDS FOR DISTRICT PUBLIC DEFENDERS IN MINNESOTA (1991) (setting forth annual caseload maximums of 120 felonies or 400 misdemeanors)).

195. See *Kennedy v. Carlson*, 544 N.W.2d 1, 4-5 (Minn. 1996).

196. See *id.* (concluding that public defender has no cause of action despite excessive caseloads).

197. See Ga. Pub. Defender Standards Council, Standard for Limiting Case Loads and Determining the Size of Legal Staff in Circuit Public Defender Offices, [http://www.gpdsc.com/cpdsystem-standards-limiting\\_caseloads.htm](http://www.gpdsc.com/cpdsystem-standards-limiting_caseloads.htm) (last visited Oct. 13, 2007).

198. See *id.*

caseloads.<sup>199</sup> Effectively unenforceable numerical standards, however, have not solved caseload problems in most jurisdictions.<sup>200</sup> In Louisiana, for example, recommended caseload standards were put in place in 1995,<sup>201</sup> but six years later, public defenders still had caseloads that exceeded those standards by a multiple of three and exceeded NAC standards by even more.<sup>202</sup> Similarly, although the Washington Defender Association has adopted caseload standards modeled on the NAC benchmarks,<sup>203</sup> caseloads continue to far exceed the state's numerical targets.<sup>204</sup>

In order for caseload standards to have a meaningful impact, they must *both* include some numerical limit *and* provide a mechanism for enforcement to ensure strict compliance. Indiana's experience illustrates this point.<sup>205</sup> Although indigent defense in Indiana is provided at the county level, the state reimburses counties for a percentage of their indigent defense costs, and it is through that

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199. See Wallace & Carroll, *supra* note 125, at 276-77 (reporting that a survey of indigent defense systems revealed that "[w]here the workload standards contained numerical caseload or workload limits ... the likelihood of the standards having the actual effect of controlling workload" more than doubled over the likelihood of success where the standards were not in numerical form).

200. See, e.g., Hon. Sylvia R. Cooks & Karen Karre Fontenot, *The Messiah Is Not Coming: It's Time for Louisiana to Change Its Method of Funding Indigent Defense*, 31 S.U.L. REV. 197, 208-09 (2004).

201. See LA. INDIGENT DEF. BD., LOUISIANA STANDARDS ON INDIGENT DEFENSE (1995), available at <http://www.lidab.com/Acrobat%20files/Chapter%201.PDF> (setting caseload standards similar to the NAC standards but with higher caseload limits).

202. See Cooks & Fontenot, *supra* note 200, at 208. This study was done prior to Hurricane Katrina. The situation for indigent defense in Louisiana post-Katrina has gotten even worse. See Fritz Esker, *Many Post-Katrina Problems Face Orleans Parish Criminal Court System*, NEW ORLEANS CITY BUS., May 22, 2006, available at [http://findarticles.com/p/articles/mi\\_qn4200/is\\_20060522/ai\\_n16411995](http://findarticles.com/p/articles/mi_qn4200/is_20060522/ai_n16411995).

203. See Wash. Defender Ass'n, Standards for Public Defense Services, Standard Three: Caseload Limits and Types of Cases, available at <http://www.defensenet.org/resources/standards/wda-standards-for-public-defense-services/standard-three-caseload-limits-and-types-of-cases/> (last visited Oct. 12, 2007) (setting forth caseload limits based upon the NAC standards with the exception that misdemeanors are limited to 300 cases).

204. See Lefstein, *supra* note 1, at 854 (quoting the chief judge of the King County Superior Court in Seattle, Washington, who said that although Washington has adopted caseload standards, "caseloads in many jurisdictions far exceed this standard").

205. See generally Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 495 (1996). Massachusetts provides another example of the success of mandatory caseload and workload standards. See Wallace & Carroll, *supra* note 125, at 317-26 (detailing the success of the Massachusetts system).



reimbursement structure that the state enforces caseload limitations.<sup>206</sup> There are two sources for caseload standards in the state of Indiana. The first, adopted by court rule, applies only in capital cases.<sup>207</sup> It strictly limits the number of felony cases and trials that counsel appointed in capital cases can maintain.<sup>208</sup> These caseload limitations are mandatory, and if a county violates the rule, the state can refuse to reimburse the county for the representation provided.<sup>209</sup> Not surprisingly, in light of the economic incentive the state provides, Indiana counties are in 100 percent compliance with the capital case standard.<sup>210</sup>

Caseloads in non-capital cases are governed by rules promulgated by the statewide Indiana Public Defender Commission, and again the existence of enforcement mechanisms has been necessary to successfully implement numerical standards.<sup>211</sup> As originally structured, Indiana's non-capital case guidelines called for only voluntary compliance. The result, not surprisingly, was that *no county* in the state met the Commission's numerical standards.<sup>212</sup> Thereafter, Indiana altered its non-capital case rules to mirror its approach to capital cases by conditioning reimbursements to counties for felony representation on compliance with numerical caseload rules.<sup>213</sup> As

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206. See Lefstein, *supra* note 205, at 501-03.

207. See IND. CRIM. R. 24 (providing limitations on caseloads while capital case is pending and prohibiting appointment of new cases in the thirty days preceding the capital trial).

208. See *id.*

209. See *Prowell v. State*, 741 N.E.2d 704, 715-17 (Ind. 2001). There was also some suggestion in *Prowell* that violation of the standard was at least relevant to a determination of whether counsel's performance was constitutionally deficient. See *id.*

210. See Wallace & Carroll, *supra* note 125, at 292 (noting the 100 percent compliance rate). Compliance with those standards has been credited with improving the quality of representation in capital cases, and since the passage of Rule 24, appellate courts have been less likely to find that defense counsel was ineffective in capital cases. See Lefstein, *supra* note 205, at 508-09.

211. See IND. PUB. DEFENDER COMM'N, STANDARDS FOR INDIGENT DEFENSE SERVICES IN NON-CAPITAL CASES 14-16 (2006), available at <http://www.in.gov/judiciary/pdc/docs/standards/indigent-defense-non-cap.pdf> (requiring that the county public defender board adopt a comprehensive plan that ensures counsel are not assigned excessive caseloads and providing recommended caseload guidelines modeled upon the NAC standards, but providing some variation depending on the level of investigative, legal, and administrative support the indigent defender has).

212. See Wallace & Carroll, *supra* note 125, at 292 (noting that when compliance with the standards was voluntary, none of the counties were in compliance).

213. See *id.* at 282-83 (explaining Indiana's reimbursement provisions). The state reimburses counties for 40 percent of the cost of representation for felony cases, and for 50

a result, many Indiana counties now comply with those caseload standards.<sup>214</sup> In contrast to the caseload compliance achieved in felony and capital cases, compliance with misdemeanor caseload standards has been spotty at best. This can be explained in large part by the fact that the state does not provide any reimbursement to counties for representation of misdemeanor defendants.<sup>215</sup> Lacking any enforcement mechanism for the misdemeanor caseload standards, the state has been unable to replicate the high rate of compliance it has achieved with regard to felony cases.

The key point is clear: Mandatory caseload caps achieve reasonable caseloads much more effectively than do voluntary caseload standards. Moreover, to work effectively, mandatory caps must include two key features. First, they must contain some form of numerical limitation, rather than requiring “reasonable” caseloads or caseloads that are “not excessive.”<sup>216</sup> These numerical caps could take the form of maximum caseload caps such as the NAC standards,<sup>217</sup> or they could take the form of case-weighted workload caps

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percent of the cost of representation in capital cases. *See id.*

214. *See id.* at 286-87 (noting that 50 of Indiana’s 92 counties have opted to receive state funding and are in compliance with the felony caseload limitations and reporting that Vanderburgh County, Indiana is in strict compliance with the felony caseload limitations because officials there “understand that the state Commission monitors caseload data closely and that exceeding the limits will jeopardize the state reimbursement”); *see also* THE SPANGENBERG GROUP, *supra* note 181, at 13 (noting that 42 of Indiana’s 92 counties were in compliance with caseload standards in 2000).

215. *See* Wallace & Carroll, *supra* note 125, at 287-88 (noting that although counties work to comply with felony caseload standards, misdemeanor caseloads exceed the state standards “by a margin of up to 97 percent”).

216. *See id.* at 276-77 (reporting that a survey of indigent defense systems revealed that “[w]here the workload standards contained numerical caseload or workload limits ... the likelihood of the standards having the actual effect of controlling workload” more than doubled over the likelihood of success where the standards were not in numerical form). Indeed, indigent defense attorneys arguably are already subject to non-numerical caseload limitations in the form of ethical rules requiring diligence, thoroughness, and adequate preparation in the representation of a client. *See* Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1195-98 (2003) (arguing that defense attorneys operating with excessive caseloads violate the rules of professional conduct even if no disciplinary proceedings are brought against them). Those standards, however, have proven woefully inadequate at solving the caseload problem. *See id.* (noting the lack of enforcement of the rules in this context).

217. The NAC-modeled maximum caseload limitation is by far the type of standard most frequently used to control caseloads. In adopting limitations based on the NAC standards, states have varied the numbers somewhat, but the basic breakdown by case type has remained resilient. *See* THE SPANGENBERG GROUP, *supra* note 181, at 8.

that assign varying weights to cases depending on the type of case and other workload factors.<sup>218</sup> Either way, the important point is that states adopt some numerical limit.<sup>219</sup>

Second, numerical caseload limitations must be enforceable in an effective way. There are a variety of enforcement mechanisms that states can utilize, and the proper mechanism very likely will depend on the way in which the state provides indigent defense services. For jurisdictions in which indigent defense services are provided and paid for at the local level with reimbursement from the state, Indiana's model of withholding reimbursement if counties fail to comply with caseload limitations makes good sense. Withholding funds as a mechanism to ensure caseload compliance also should work well in jurisdictions where indigent defense providers enter into contracts with the state to provide defense services.<sup>220</sup>

States might also ensure compliance with caseload standards by empowering indigent defense counsel to protect their own clients' interests. For instance, a jurisdiction could give indigent defenders the right to refuse to accept additional cases if caseloads reach specified limits, or to withdraw from cases if caseloads exceed the limit.<sup>221</sup> This mechanism will work, however, only if the attorney has an incentive to enforce these limitations. In particular, it is far more likely to result in compliance with caseload limits in jurisdictions that have public defender systems than in jurisdictions that use contract attorneys who are paid by the case.<sup>222</sup>

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218. *See id.* at 9-10 (describing the Colorado case-weighting system).

219. The term "states" encompasses both state legislatures and state and local indigent defense boards. Three of the jurisdictions that currently have workload or caseload limitations have passed those through statutory provisions. *See id.* at 13 (listing Wisconsin, New Hampshire, and Washington as jurisdictions that have statutory provisions limiting indigent defender workloads). In most of the other jurisdictions with workload or caseload limitations, indigent defense boards have set those limits. *Id.* at 10-12. Although indigent defense boards certainly have more experience with assessing manageable workloads for indigent defense providers than do legislatures, at this point there is no proof to suggest that one method of selecting limitations is more effective than the other.

220. This is the system that is used in Massachusetts. *See* Wallace & Carroll, *supra* note 125, at 317-26 (describing the Massachusetts system in some detail).

221. *Cf. In re* Amendment to Fla. Rules of Criminal Procedure—Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 820 So. 2d 185, 189-90 (Fla. 2002) (adopting rule with general caseload limitation for capital cases but refusing to attach numerical limits or to give public defender the right to refuse to accept representation if over the limit).

222. If an attorney is paid by the case, she does not necessarily have the same incentive to

Finally, a jurisdiction could provide indigent defendants with an enforceable right to secure adherence with caseload limits. The state, for example, could provide defendants with a pretrial right to challenge the effectiveness of counsel if there is a violation of caseload standards.<sup>223</sup> In the pretrial context, such hearings could be held much as hearings are held to determine whether counsel in a particular case has a conflict of interest. In the conflict situation, certain facts give rise to a right to a hearing, including, for instance, if counsel represents a codefendant with a potentially conflicting defense.<sup>224</sup> The trial court in such circumstances must determine whether the conflict precludes counsel from providing the defendant with effective assistance of counsel. Similarly, in the context of excessive caseloads, states could give criminal defendants represented by lawyers with caseloads exceeding national standards a right to a hearing at which a judge would determine whether counsel could provide effective assistance.

Alternatively, the state could provide a post-trial remedy for defendants convicted while represented by a lawyer with an excessive caseload. For instance, it could establish a rebuttable presumption that the defendant has received ineffective assistance of counsel if caseload standards were violated.<sup>225</sup> Yet another approach would be for states to create a private right of action to enforce caseload mandates. Standing to pursue such actions could be granted to defendants threatened with shoddy representation, to defense counsel burdened with unreasonable work demands, or to

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ensure a limited caseload, since the larger the caseload, the more she is paid.

223. See *State v. Peart*, 621 So. 2d 780, 791 (La. 1993) (holding that because the caseloads of public defenders were so high, defendants represented by public defenders were entitled to pre-trial hearings with a rebuttable presumption that they were not receiving constitutionally required effective assistance of counsel); cf. *Dripps*, *supra* note 122, at 287-302 (advocating causes of action to litigate the ability of counsel to represent the defendant prior to the criminal trial).

224. See *Holloway v. Arkansas*, 435 U.S. 475 (1978) (holding that defendants had a right to a hearing upon request where counsel represented co-defendants); see also *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (holding that a court is not necessarily required to hold a hearing absent a request by counsel).

225. See *State v. Smith*, 681 P.2d 1374, 1384 (Ariz. 1984) (holding, in a pre-*Strickland* case, that the use of a procedure for selecting indigent defense standards that resulted in serious violations of recommended caseload standards would give rise to an "inference that the procedure resulted in ineffective assistance of counsel, which inference the state will have the burden of rebutting").

others such as judges, bar associations, or even ordinary citizens, depending on state constitutional limits. Available remedies could include injunctive relief, such as mandated state appointment of additional defense counsel, state dismissal of some pending matters, or state reassignment of already-employed attorneys.

Each of these mechanisms has strengths and weaknesses. The critical point, however, overarches these concerns. That point is that each state must adopt some form of meaningful caseload limits—both numerical and enforceable—so that resources saved by reducing the total number of cases channeled into the indigent defense system are used to reduce caseloads of indigent defenders, rather than to reduce indigent defense budgets.

#### CONCLUSION

In a world of limited indigent defense resources, states must make a choice: They can provide minimal representation to all indigent defendants, or they can deny counsel to defendants facing low-level misdemeanor charges and focus those resources on the representation of defendants facing charges of the greatest severity. To date, most states have taken the former route, thus sacrificing quality representation for all defendants as caseloads have skyrocketed. Because the data suggest that the value of counsel is relatively low in misdemeanor cases, states should rethink this approach. By reducing the number of cases in which the defendant has a constitutional right to counsel and providing counsel only when the Constitution requires appointment, states can save valuable indigent defense resources. Those resources, in turn, can and should be used to implement caseload limitations for indigent defense counsel who represent defendants charged with serious offenses. In short, states should focus their indigent defense resources on those who need them most—defendants who have a constitutional right to counsel, who gain the greatest benefit from counsel's assistance, and who face the gravest consequences in the absence of forceful, focused, and skilled representation.