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# JUDGES NEED TO EXERCISE THEIR RESPONSIBILITY TO REQUIRE THAT ELIGIBLE DEFENDANTS HAVE LAWYERS

*Robert C. Boruchowitz\**

## I. INTRODUCTION

There are many courts in the United States, particularly misdemeanor courts, in which accused persons appear and often plead guilty without ever receiving the advice of counsel, even when they are eligible for a public defender.<sup>1</sup> In various states, between twenty-five and sixty-eight percent of the defendants in misdemeanor cases do not have lawyers.<sup>2</sup> In many courts in South Carolina, there is no public defender ever available.<sup>3</sup> The American Civil Liberties Union (“ACLU”)

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\* Robert C. Boruchowitz is a Professor from Practice and Director of The Defender Initiative at Seattle University School of Law. Work on this Article was supported by Grant No. 2013-MU-BX-K002, awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the U.S. Department of Justice’s Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in this Article are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

1. See ROBERT C. BORUCHOWITZ, MALIA BRINK, & MAUREEN DIMINO, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 14-15 (2009), [http://www.opensocietyfoundations.org/sites/default/files/misdemeanor\\_20090401.pdf](http://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf); Robert C. Boruchowitz, *Fifty Years After Gideon: It Is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, 11 SEATTLE J. FOR SOC. JUST. 891, 895-96 (2013) [hereinafter *Fifty Years*].

2. See *Testimony of Professor Robert C. Boruchowitz, Senate Judiciary Committee Hearing on Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors*, (May 13, 2015), <https://www.judiciary.senate.gov/imo/media/doc/05-13-15%20Boruchowitz%20Testimony.pdf>. I have studied misdemeanor courts and assessed public defense in those courts since 2003, initially as a Soros Senior Fellow, and since then with the assistance of several grants, from the Open Society Foundation and from the U.S. Bureau of Justice Assistance, the latter in partnership with the Sixth Amendment Center. I have conducted court observations in Washington, New York, Pennsylvania, Arizona, Utah, Idaho, Kentucky, Mississippi, Michigan, Nevada, and Louisiana.

3. See DIANE DEPIETROPAOLO PRICE ET AL., *NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, SUMMARY INJUSTICE: A LOOK AT CONSTITUTIONAL DEFICIENCIES IN SOUTH CAROLINA’S SUMMARY COURTS* 12 (2016), <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=41216>

has filed a class action lawsuit against two South Carolina cities, alleging that they are unconstitutionally denying counsel to eligible accused persons.<sup>4</sup>

There is no question that the right to counsel attaches at the first appearance before a judge or magistrate.<sup>5</sup> Having counsel to assist the accused persons when they are negotiating a guilty plea or pleading guilty and being sentenced or having a trial is a clearly established right as well.<sup>6</sup>

While the provision of appointed counsel is the responsibility of state and local governments, judges in their courtrooms have the responsibility to enforce the right to counsel. The American Bar Association (“ABA”) has recognized that obligation:

Standard 6-1.1. General responsibility of the trial judge

(a) The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.<sup>7</sup>

And the ABA specifically outlines the judge’s responsibility regarding waiver of counsel:

Standard 6-3.6. The defendant’s election to represent himself or herself at trial

(a) A defendant should be permitted at the defendant’s election to proceed in the trial of his or her case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

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&libID=41186.

4. Complaint at 14, *Bairefoot v. City of Beaufort*, 2017 WL 4586842 (D.S.C. Oct. 11, 2017) (No. 9:17-cv-2759-RMG), [https://www.aclu.org/sites/default/files/field\\_document/2017.10.12\\_bairefoot\\_v\\_city\\_of\\_beaufort\\_complaint\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/2017.10.12_bairefoot_v_city_of_beaufort_complaint_1.pdf).

5. *Rothgery v. Gillespie*, 554 U.S. 191, 211 (2008); *see also* *Michigan v. Jackson*, 475 U.S. 625, 629-30 & n.8 (1986); *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

6. *See* *Lafler v. Cooper*, 566 U.S. 156, 165-66 (2012); *Missouri v. Frye*, 566 U.S. 134, 140-41, 143-44 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 364, 373 (2010); *Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Mempa v. Rhay*, 389 U.S. 128, 137 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961).

7. STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.1 (AM. BAR ASS’N 2000), [https://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_trialjudge.html](https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_trialjudge.html).

- (i) has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when the defendant is so entitled;
- (ii) is capable of understanding the proceedings; and
- (iii) has made an intelligent and voluntary waiver of the right to counsel.<sup>8</sup>

The Supreme Court emphasized the obligation of judges in its discussion in *Argersinger v. Hamlin*, which made clear that there is a right to counsel in misdemeanor cases that can lead to incarceration:

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.<sup>9</sup>

The Supreme Court's web page describes the role of the Court: "As the final arbiter of the law, the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution."<sup>10</sup> While trial court judges do not have the ultimate authority that the Supreme Court does, the reality is that for most cases, their word is the final one, as most cases are never appealed even to the next level court. For example, in Utah, less than one percent of misdemeanor cases are appealed.<sup>11</sup> If trial court judges do not act as guardians of constitutional rights, if they do not make sure that an eligible accused person has an appointed lawyer, the right to counsel will be denied.

In an often-quoted opinion by Chief Justice Hughes, the Supreme Court wrote, "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."<sup>12</sup> The same concept applies to a state court proceeding with or without a jury.

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8. *Id.* Standard 6-3.6.

9. *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

10. *About the Court: The Court and Constitutional Interpretation*, U.S. SUPREME CT., <https://www.supremecourt.gov/about/constitutional.aspx> (last visited Nov. 15, 2017).

11. SIXTH AMENDMENT CTR., *THE RIGHT TO COUNSEL IN UTAH: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES*, at v (2015) ("In 2013, there were 79,730 total misdemeanors and misdemeanor DUI cases heard in all justice courts statewide. Only 711 of such cases were reviewed *de novo* in all district courts combined (an appellate rate of 0.89%).").

12. *Herron v. S. Pac. Co.*, 283 U.S. 91, 95 (1931).

In a small group discussion that I facilitated at a Conference in 2017 at the Maurice A. Deane School of Law at Hofstra University, several judges stated that they would prefer to have counsel available, but said that no public defender is available in their courts and they do not know a source of funding for defenders.<sup>13</sup> But as *Argersinger* makes clear, questions of resources do not justify denying counsel to eligible persons.<sup>14</sup>

Misdemeanor cases matter. The Sentencing Project has reported the following:

One in three U.S. adults has been arrested by age 23. Communities of color; lesbian, gay, bisexual, and transgender individuals; and people with histories of abuse or mental illness are disproportionately affected. As a result, between 70 million and 100 million—or as many as one in three Americans—have some type of criminal record.<sup>15</sup>

Most of those arrests and most of those criminal records are for misdemeanors. And, as United States Senator Chuck Grassley has pointed out, when defendants do not have counsel, “potentially innocent individuals plead guilty to crimes. They also then accrue a criminal record which causes them adverse consequences including difficulty finding a job and a greater criminal history that would be considered in any future sentencing determination.”<sup>16</sup>

Senator Grassley’s observation parallels that of Justice Sutherland in *Powell v. Alabama*:

Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he

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13. I refer to small group discussions at Hofstra’s Judicial Responsibility for Justice in Criminal Courts Conference, April 7, 2017. Ellen Yaroshefsky, *Symposium Introduction*, 46 HOFSTRA L. REV. 1, 7 (2017).

14. *Argersinger v. Hamlin*, 407 U.S. 25, 37 n.7 (1972) (“We do not share MR. JUSTICE POWELL’S doubt that the Nation’s legal resources are sufficient to implement the rule we announce today.”).

15. *Poverty and Opportunity Profile: Americans with Criminal Records*, SENT’G PROJECT, <http://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> (last visited Nov. 15, 2017).

16. Sen. Chuck Grassley, Prepared Remarks at the National Press Club Newsmakers News Conference (Apr. 27, 2015), <https://www.grassley.senate.gov/news/news-releases/grassley-statement-national-press-club-newsmakers-news-conference>.

faces the danger of conviction because he does not know how to establish his innocence.<sup>17</sup>

The failure to provide counsel has a disproportionate impact on people of color. One scholar has called misdemeanor court processes “the first formal step in the racialization of crime.”<sup>18</sup> Many reports and articles demonstrate the nationwide racial disparity in misdemeanor prosecutions. As an example, a 2016 New York report found that although there had been a decrease in arrest rates since 2011, for the period between 2002 and 2014, rates of misdemeanor arrests for individuals aged 16 to 24 increased one percent for white males, “while the rates for Asian, Black, and Hispanic males increased 53%, 14%, and 11%, respectively. The rate for White females increased 14%, while the rates for Asian, Black, and Hispanic females increased 44%, 40%, and 48%.”<sup>19</sup>

The report also found that “Black males under age 16 are 17.3 times more likely to be arrested for a misdemeanor than white male students. And Hispanic males under age 16 are six times as likely to be arrested for a misdemeanor.”<sup>20</sup>

Providing lawyers to poor people accused of crime can make a dent in the racial disparity in the courts. Having a lawyer is not just for show; an effective defender is not “a potted plant,” as Brendan V. Sullivan, Jr., famously told the senators questioning his client Oliver North.<sup>21</sup> Lawyers in misdemeanor cases obtain dismissals, acquittals, and hung juries in cases that would result in convictions if the defendants had no lawyers. For example, “[t]he Defender Association in Seattle reported that in the Seattle Municipal Court cases the Association closed in 2012, twenty-five percent resulted in dismissals.”<sup>22</sup> In 2016, thirty percent of the San Francisco Public Defender’s 174 misdemeanor jury trials resulted in a not guilty verdict, hung jury, mistrial, or dismissal.<sup>23</sup>

17. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

18. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1319 (2012).

19. N.Y.C. OFFICE OF THE MAYOR, DISPARITY REPORT 61 (2016), [http://origin-states.politico.com.s3-website-us-east-1.amazonaws.com/files/Disparity%20Report%20with%20letter\\_palacio\\_buery\\_FINAL.pdf](http://origin-states.politico.com.s3-website-us-east-1.amazonaws.com/files/Disparity%20Report%20with%20letter_palacio_buery_FINAL.pdf).

20. Laura Nahmias, *City Report Shows Racial Disparities in Health, Arrests Among Youth*, POLITICO (Apr. 4, 2016, 5:29 AM), <http://www.politico.com/states/new-york/city-hall/story/2016/04/city-report-shows-racial-disparities-in-health-arrests-among-youth-033052>.

21. *IRAN-CONTRA HEARINGS; Note of Braggadocio Resounds at Hearing*, N.Y. TIMES, July 10, 1987, at A7.

22. *See Fifty Years*, *supra* note 1, at 920 n.99.

23. SAN FRANCISCO PUBLIC DEFENDER: SKETCHES OF JUSTICE 2016 ANNUAL REPORT 17 (2016), <http://sfpublicdefender.org/wp-content/uploads/sites/2/2017/03/2016-report-2017-calendar.pdf>.

This Article discusses examples of courts that either frequently or routinely do not provide counsel, the inadequate waivers of counsel that many courts take, and why it is critical that judges accept responsibility for ensuring the right to counsel.<sup>24</sup> It outlines steps judges can take to make sure that accused persons do not give up their right to a lawyer unless they truly understand what they are doing, they want to proceed without counsel, and they are not being pressured to do so.<sup>25</sup> I suggest that judges not proceed with hearing criminal cases unless public defense counsel are available to represent eligible people who need and want a lawyer.<sup>26</sup>

## II. MANY COURTS DO NOT PROVIDE COUNSEL

The National Right to Counsel Committee began its report on the problems of public defense with these ringing words:

The right to counsel is now accepted as a fundamental precept of American justice. It helps to define who we are as a free people and distinguishes this country from totalitarian regimes, where lawyers are not always independent of the state and individuals can be imprisoned by an all powerful and repressive state.

*Yet, today, in criminal and juvenile proceedings in state courts, sometimes counsel is not provided at all . . . .*<sup>27</sup>

Despite the clearly established right to counsel and the widespread public perception that accused persons have the right to a court-appointed lawyer if they cannot afford to hire one, a significant percentage of people facing misdemeanor charges never have a lawyer.

A recent report on Utah in which I participated found that most people in misdemeanor courts do not have lawyers.

Despite U.S. Supreme Court case law defining an “arraignment” as a critical stage requiring the appointment of counsel to those of limited financial means, in every justice court observed, with the exception of Salt Lake City and County justice courts, defendants were arraigned and subsequently sentenced (another critical stage) to jail time or suspended sentences without any defense attorney present.<sup>28</sup>

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24. *See infra* Parts II–IV.

25. *See infra* Part V.

26. *See infra* Part VI.

27. NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 2 (2009) (emphasis in original).

28. SIXTH AMENDMENT CTR., *supra* note 11, at iv.

A detailed report on South Carolina's municipal and magistrate courts found a pervasive denial of the right to counsel.

Far too many accused persons are not advised of basic constitutional rights, and even when they are, those rights are not respected. As a result, many lose their liberty, sustain the life-altering consequences of a criminal conviction, and are saddled with fees and fines, the non-payment of which can have cascading impacts for years to come. And with alarming frequency these outcomes arise in derogation of the fundamental right to counsel.<sup>29</sup>

I worked with the ACLU of South Carolina to write an amicus curiae brief on appeal for a defendant who had asked in writing for a public defender in Hilton Head, South Carolina. The municipal court judge failed to rule on the motion, and after trial, said the right to appointed counsel only applied if the defendant faced jail time of one year or longer.<sup>30</sup> The appellate court reversed, finding that the trial court erred "when it imposed a sentence which included a possibility that the Appellant could be confined."<sup>31</sup> Most misdemeanor defendants, however, do not appeal or understand that they might have help from an organization such as the ACLU.

Most Americans, informed by television shows about police and courtroom practices, believe that accused persons will have their cases brought by trained prosecutors, they will have the right to a court-appointed lawyer, and the court will be presided over by a judge trained in the law. But as the South Carolina report documented, this perception sometimes is completely removed from reality.

Nearly 26% of observed defendants had their cases processed without interacting with a single lawyer: the case was prosecuted by a police officer, there was no defense counsel, and the judge was not a licensed attorney. This number rises significantly if Richland County, where over 95% of judges had law degrees, is removed. In the other counties combined, 89% of defendants were processed in courts without a single lawyer involved.<sup>32</sup>

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29. ALISA SMITH ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, RUSH TO JUDGMENT: HOW SOUTH CAROLINA'S SUMMARY COURTS FAIL TO PROTECT CONSTITUTIONAL RIGHTS 5 (2017).

30. Brief for The Defender Initiative & ACLU of South Carolina as Amici Curiae Supporting Appellant, *State v. Appellant* (S.C. C.P., Beaufort June 30, 2012), [http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1021&context=korematsu\\_center](http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1021&context=korematsu_center).

31. Order Remanding for New Trials, Court of Common Pleas, County of Beaufort, South Carolina, Nos. 2010-CP-07-00844, 2012-CP-07-00746 (Dec. 19, 2012) (on file with author).

32. SMITH ET AL., *supra* note 29, at 6.



A report on Florida misdemeanor courts found similar problems. “The average arraignment proceeding lasted only 2.93 minutes. . . . Sixty-six percent of defendants appeared at arraignment without counsel. . . . Almost 70% of defendants observed entered a guilty or no contest plea at arraignment.”<sup>33</sup>

In Texas, where it took six years of litigation for a county to agree to advise defendants of their right to counsel at first appearance,<sup>34</sup> about twenty-four percent of misdemeanor defendants did not have a lawyer for fiscal year 2016 cases.<sup>35</sup> In 2005 in the county in the litigation, the court appointed counsel in only six percent of misdemeanor cases.<sup>36</sup> The 2016 fiscal year appointment rate in that county was fifty-two percent.<sup>37</sup> In fiscal year 2016, Texas appointed counsel—statewide—in only about forty-five percent of misdemeanor cases.<sup>38</sup> Appointment rates vary widely in other states, but in places where the culture has developed to expect counsel to be appointed to eligible defendants, the rates are much higher. For example, in 2014, the municipal court of Spokane, Washington, appointed counsel in 91.6% of misdemeanor cases.<sup>39</sup> Also, in 2014, the city court of Yakima, Washington, appointed counsel in 92.5% of misdemeanor cases.<sup>40</sup>

In a small court in Mississippi, I saw a woman who had been in jail for twenty-one days without a hearing and without counsel appear in court with a lay judge and neither a prosecutor nor a defense attorney. She was there for a charge of “disorderly conduct and failure to comply with command of officer.” She told the judge she cleaned houses for a living and could not afford the \$2500 bail set in her case. The judge

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33. ALISA SMITH & SEAN MADDAN, NAT’L ASS’N OF CRIM. DEF. LAWYERS, THREE MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS 15 (2011), <http://www.nacdl.org/reports/threeminutejustice>.

34. Heckman v. Williamson, 369 S.W.3d 137, 144, 156-57 (Tex. 2012). The county agreed in the settlement that judges would advise defendants of their right to counsel in plea proceedings and “defendants would not be directed or encouraged to waive the right to counsel or communicate” with the prosecutor “until pending requests for counsel have been ruled upon.” Joint Motion to Dismiss at 8-9, Heckman v. Williamson, No. 06-453-C277 (Tex. Dist. Ct. Jan. 14, 2013), <https://www.clearinghouse.net/chDocs/public/PD-TX-0001-0003.pdf>.

35. E-mail from Jim Bethke, Exec. Dir., Tex. Indigent Def. Comm’n (July 14, 2017) (on file with author).

36. *Id.*

37. *Id.*

38. TEX. INDIGENT DEF. COMM’N, ANNUAL REPORT FISCAL YEAR 2016, at 12 (2016), <http://www.tidc.texas.gov/media/50242/fy16-annual-report.pdf>.

39. See WASH. STATE OFFICE OF PUB. DEF., 2016 STATUS REPORT ON PUBLIC DEFENSE IN WASHINGTON STATE 67 (2017), [http://www.opd.wa.gov/documents/00429-2016\\_StatusReport.pdf](http://www.opd.wa.gov/documents/00429-2016_StatusReport.pdf).

40. See *id.* at 75.

released her; I learned later that when she returned to court she pled guilty without counsel.

A recent study in Nashville, Tennessee, revealed that judges in two courts “did not fully advise defendants of their right to counsel, nor did defendants waive their right to legal representation in a manner that can be characterized as ‘knowing, voluntary and intelligent.’”<sup>41</sup>

In a recent conference call of defender and bar association leaders, the Miami-Dade County Public Defender reported that half of the misdemeanor cases in his county are resolved without counsel.<sup>42</sup>

The ACLU in Colorado recently released a report in which it reported that “many municipal courts across the state persistently ignore constitutional and statutory standards.” It focused on one municipal court in which “the clerk regularly accepts guilty pleas from uncounseled defendants who are never otherwise arraigned or advised by the court.”<sup>43</sup>

New York State’s failure to provide counsel at first appearance was one of the factors leading to the lawsuit in *Hurrell-Harring v. State*,<sup>44</sup> which led to a settlement that “required the State to ensure that, within 20 months after the effective date of the Settlement, any criminal defendant charged with a crime and eligible for publicly funded representation would be provided legal representation at arraignment.”<sup>45</sup>

In issuing a request for proposals to “assist counties to implement a model that effectively demonstrates innovative and creative approaches to providing counsel at first appearance,” the New York State Office of Indigent Legal Services wrote in January 2017:

Despite recent progress in providing counsel at first appearance, significant challenges persist. Persons eligible for indigent legal defense services continue to be arraigned without counsel at first appearance. . . . This often results in unnecessary or excessive bail

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41. STEPHEN F. HANLON ET AL., AM. BAR ASS’N, SECTION ON CIVIL RIGHTS AND SOC. JUSTICE, DENIAL OF THE RIGHT TO COUNSEL IN MISDEMEANOR CASES: COURT WATCHING IN NASHVILLE TENNESSEE 14 (2017), <https://www.americanbar.org/content/dam/aba/administrative/crsj/Nashville.authcheckdam.pdf>.

42. Conference Call, Workload Committee of the National Association for Public Defense (Nov. 2, 2017).

43. COLO. AM. CIVIL LIBERTIES UNION, JUSTICE DERAILED, A CASE STUDY OF ABUSIVE AND UNCONSTITUTIONAL PRACTICES IN COLORADO CITY COURTS 14 (2017), <https://aclu-co.org/wp-content/uploads/2017/10/JUSTICE-DERAILED-web.pdf>.

44. 930 N.E.2d 217 (N.Y. 2010).

45. N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., FUNDING ANNOUNCEMENT 3 (2017) (referencing *Hurrell-Harring*).

being set and keeps people of limited financial means in jail awaiting trial.<sup>46</sup>

There are a variety of reasons why courts do not have counsel at first appearance hearings, or even provide counsel at all, usually relating to inadequate resources devoted to public defense. While it is beyond the scope of this Article, there are a number of ways in which governments can reduce the demand for public defense services, for example by diverting minor misdemeanors and/or reclassifying them as non-criminal offenses.<sup>47</sup> Sending people to jail for speeding or for not having insurance is counterproductive. Cities such as Spokane, Washington, have established diversion and relicensing programs instead of criminally prosecuting people who drive and whose licenses were suspended because the drivers did not pay traffic fines.<sup>48</sup>

Sometimes courts do not provide appointed counsel because the judges misapply the law. For example, a recent article described a Texas judge's view that if the defendant posts bail, even if the bail is paid by parents or friends, the defendant is ineligible for appointed counsel.<sup>49</sup> That is not the law.<sup>50</sup> The relevant Texas statute states in part: "The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection."<sup>51</sup> The American Bar Association's Standards for Providing Defense Services provide in part:

Standard 5-7.1 Eligibility; ability to pay partial costs

Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship. Counsel should not be denied because of a person's ability to pay part of the

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46. *Id.*

47. See, e.g., *Alternatives to Traditional Prosecution Can Reduce Defender Workload, Save Money, and Reduce Recidivism*, NAT'L ASS'N FOR PUB. DEF. (Mar. 2017), [http://www.publicdefenders.us/files/NAPD%20Demand%20Side%20paper\\_FINAL.pdf](http://www.publicdefenders.us/files/NAPD%20Demand%20Side%20paper_FINAL.pdf).

48. See *Relicensing Program*, SPOKANE CITY, <https://my.spokanecity.org/courts/prosecutor/relicensing> (last visited Nov. 15, 2017).

49. See Emily DePrang, *Poor Judgment*, TEX. OBSERVER (Oct. 12, 2015, 8:56 AM), <https://www.texasobserver.org/poor-judgment>.

50. See *Policy Brief: Every Criminal Defendant Who Cannot Afford Counsel Has a Right to Appointed Counsel, Regardless of Whether He or She Is Released on Bond*, TEX. FAIR DEF. PROJECT, <http://www.fairdefense.org/resource/right-to-counsel-on-bond> (last visited Nov. 15, 2017).

51. TEX. CODE CRIM. PROC. ANN. art. 26.04 (West 2015).

cost of representation, because friends or relatives have resources to retain counsel or because bond has been or can be posted.<sup>52</sup>

When judges misapply the law about eligibility for appointed counsel, their colleagues and members of the bar should take steps to correct them. When there is a supervisory judge, that judge has the responsibility to correct the judge who is misapplying the law. The ABA's Model Code of Judicial Conduct provides in part:

Rule 2.12 Supervisory Duties

....

(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

....

Rule 2.15 Responding to Judicial and Lawyer Misconduct

(A) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.

....

(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.<sup>53</sup>

The failure to provide counsel at first appearance persists across the country, affecting thousands, probably millions, of people. The Washington Supreme Court has explained the harms that occur when judges disregard their legal obligations:

Our legal system is based on the foundation that an independent, unbiased, and competent judiciary will interpret and apply the laws that govern us. This is paramount to the American concept of justice and fairness. Central to our system is the belief that judges will respect and honor their office and the laws they are sworn to protect. If judges fail to follow the law, in turn, the system fails to protect the people.

The rights of the poor and indigent are the rights that often need the most protection. Each county or city operating a criminal court holds the responsibility of adopting certain standards for the delivery of public defense services, with the most basic right being that counsel

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52. STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-7.1 (AM. BAR ASS'N 1992).

53. MODEL CODE OF JUDICIAL CONDUCT r. 2.12(B), 2.15(A), (C) (AM. BAR ASS'N 2007) (commentary marks omitted).

shall be provided. . . . Disregarding our most basic and important principles weakens the legal system as a whole.<sup>54</sup>

### III. FAULTY ADVICE LEADS TO INADEQUATE WAIVERS

In addition to the problem of courts proceeding without defenders available, one major reason that defendants proceed without counsel is that many judges do not properly advise them of their right to a lawyer or conduct a proper colloquy on waiver of counsel. Often, the court's advice of rights to accused persons either rushes through the right to a lawyer or does not even mention it.<sup>55</sup> An accused person has the right to represent him or herself, but the court must determine that the waiver of the right to counsel is knowingly, intelligently, and voluntarily made.<sup>56</sup> In *Von Moltke v. Gillies*,<sup>57</sup> a case involving alleged espionage in wartime by a foreign citizen, the Supreme Court made clear that the judge must make a thorough inquiry of the accused person to be able to make that determination.<sup>58</sup>

As the Court noted fourteen years later in *Carnley v. Cochran*,<sup>59</sup> "it is settled that, where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."<sup>60</sup> Instead, the Court states that assistance of counsel must be affirmatively offered to the accused, and the offer must be made on the record: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."<sup>61</sup>

Before the court can accept a waiver, it must advise the accused person of the right to counsel.<sup>62</sup> In many courts, the judge speed reads

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54. *In re Disciplinary Proceeding Against Michels*, 75 P.3d 950, 957 & n.2 (Wash. 2003) (citing RCW 10.101.030 that "further outlines the standards a county or city operating a criminal court shall incorporate into a public defender contract or office").

55. See, e.g., SMITH ET AL., *supra* note 29, at 9, 29, 31-32.

56. See *Iowa v. Tovar*, 541 U.S. 77, 87-89 (2004); *Faretta v. California*, 422 U.S. 806, 835-36 (1975).

57. 332 U.S. 708 (1948).

58. *Id.* at 709, 723-24 ("[A] judge must investigate as long and as thoroughly as the circumstances . . . demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility.").

59. 369 U.S. 506 (1962).

60. *Id.* at 513.

61. *Id.* at 516.

62. STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-3.6 (AM. BAR ASS'N 2000).

from a book to the court full of people a series of constitutional rights, including the right to a trial, to subpoena witnesses, and to remain silent. I saw a court commissioner in Washington State go so quickly through the rights that a defendant, in jail without a lawyer, said “Slow the hell down!”

Many courts give the accused persons a sheet of paper with a list of their rights, often in small type, sometimes with a place to sign to give up the rights without a place to sign to ask for counsel.<sup>63</sup> When the defendants look around and see no public defender available, and when the judge tells them that if they ask for a defender their case will be rescheduled in two weeks, any “waiver” of counsel should be presumed invalid.

In one Washington court, I saw a court commissioner tell defendants that the prosecutor (who was not present) might be willing to negotiate a lesser charge, but that if they asked for a lawyer, they could not talk to the prosecutor. He gave defendants a piece of paper with the address and phone number of the prosecutor at the top and of the public defender at the bottom.

Many courts in their advice tell the defendants that if they plead guilty, they give up the right to a lawyer, which is simply not true.

As the Supreme Court has written, the “simple reality” is that “ninety-four percent of state convictions are the result of guilty pleas.”<sup>64</sup> Having a lawyer to negotiate those pleas is critical. And as discussed above, lawyers might advise their clients to file motions and go to trial, or seek dismissal for legal or factual reasons, but if the defendants never have a lawyer, they never become clients and they never receive that advice.<sup>65</sup>

The Supreme Court in *Argersinger* recognized the need for counsel at guilty pleas:

Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor, as well as in felony, cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.<sup>66</sup>

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63. SIXTH AMENDMENT CTR., *supra* note 11, at 32.

64. *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

65. *See supra* Part II.

66. *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972).

The National Right to Counsel Committee described the problems as follows:

When a defendant is not adequately advised of the right to counsel, the waiver almost certainly would not withstand scrutiny as a valid waiver of the right to legal representation. The invalidity of the waiver, however, typically fails to come to light, as the waiver process is of low visibility and defects rarely surface in the appellate courts. There are still some lower courts, moreover, that do not maintain a record of proceedings, so there is no way to be sure exactly how counsel was offered to the accused and if the waiver of legal representation was valid. There also is considerable evidence that, in many parts of the country, prosecutors play a role in negotiating plea arrangements with accused persons who are not represented by counsel and who have not validly waived their right to counsel. Not only are such practices of doubtful ethical propriety, but they also undermine defendants' right to counsel.<sup>67</sup>

The South Carolina report found that in one county, “more than 40% of observed cases were in courtrooms where the opening advisement omitted the constitutional right to an attorney,” and in the five counties studied, “[m]ore than half of defendants (50.9%) were not advised of their right to counsel when speaking to the judge.”<sup>68</sup>

The Utah report documented the following:

[S]ome courts use a written form that incorrectly advises the accused persons that if they plead guilty, they give up the right to a lawyer. The form lists the rights available, including to be represented by counsel, and states: “If you enter a plea of Guilty to the charge(s), you will give up the rights just mentioned . . . .”<sup>69</sup>

Michigan courts use a similar form for misdemeanor cases, telling defendants that if they plead guilty they give up various rights including the right to counsel. The form includes in relevant part the following:

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67. NAT'L RIGHT TO COUNSEL COMM., *supra* note 27, at 8.

68. SMITH ET AL., *supra* note 29, at 6.

69. SIXTH AMENDMENT CTR., *supra* note 11, at 32.

3. You have the right to an attorney at public expense if you are indigent (without money to hire an attorney) and if
  - a. the offense charged requires a minimum jail sentence, or
  - b. the court determines that it might sentence you to jail. . . .
- . . . .
6. If you plead guilty or no contest and your plea is accepted, you will not have a trial of any kind and will give up the rights listed in items 3 and 5 above.<sup>70</sup>

This simply is not the law, as discussed above, as defendants are entitled to counsel to help them negotiate a plea and to represent them at sentencing.<sup>71</sup> The form also tells people they have a right to counsel only if there is a mandatory jail sentence or the court determines it might sentence them to jail.<sup>72</sup> Many states take a different view, providing counsel if jail is a possible sentence.<sup>73</sup> Arguably, Supreme Court case law requires counsel if jail is possible, but that is beyond the scope of this Article.<sup>74</sup>

The report *The Right to Counsel in Utah*, found the following:

“Most people will waive the public defender if they can’t have representation immediately,” observed one urban justice court judge. This strongly suggests that, were the opposite to be true – that if public defenders were available to advise clients at the first critical stage, as constitutionally required – defendants would seek the assistance of a lawyer with greater frequency. In the face of such additional pressure to forego an attorney, created by cost concerns of the justice courts, the defendants’ failure to demand what should already have been provided to them does not constitute a valid waiver of that right.<sup>75</sup>

The National Right to Counsel Committee’s first recommendation included the following:

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70. *Advice of Rights and Plea Information*, ST. MICH. JUD. DIST., <http://www.courts.mi.gov/Administration/SCAO/Forms/courtforms/dc213.pdf> (last visited Nov. 15, 2017).

71. See *supra* note 6 and accompanying text.

72. *Advice of Rights and Plea Information*, *supra* note 70.

73. See, e.g., WASH. CRIM. R. CT. LTD. J. 3.1(a) (2012).

(a) Types of Proceedings. The right to a lawyer shall extend to all criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors, or otherwise.

*Id.*; see also, *McInturf v. Horton*, 538 P.2d 499, 499 (Wash. 1975) (en banc).

74. See, e.g., Brandon Buskey, *Escaping the Abyss: The Promise of Equal Protection to End Indefinite Detention Without Counsel*, 61 ST. LOUIS U. L.J. 665, 669-70, 673, 675 (2017).

75. SIXTH AMENDMENT CTR., *supra* note 11, at 35-36.



Judges should ensure that all waivers of counsel are voluntary, knowing, intelligent, and on the record, and that guilty pleas are not accepted from accused persons absent valid waivers of counsel. Prosecutors should not negotiate plea agreements with accused persons absent valid waivers of counsel and should adhere to their duty to assure that accused persons are advised of their right to a lawyer.<sup>76</sup>

This is not a complicated or novel concept. The Supreme Court has set out this knowing and intelligent requirement many times in the past seventy-nine years, from *Johnson v. Zerbst* in 1938 to *Von Moltke* in 1948, through *Iowa v. Tovar*.<sup>77</sup>

And state courts have not been shy in applying the *Johnson* and *Von Moltke* principles. For example, the Ohio Court of Appeals reversed a misdemeanor conviction, citing *Von Moltke*, because the advice by the trial judge did not adequately address the dangers and disadvantages of proceeding without counsel.<sup>78</sup>

Because both the right to counsel at trial and the right to self-representation are constitutional rights, strict compliance with the advisement and the waiver requirements is mandatory; Wamsley is not required to show prejudice, it is presumed.<sup>79</sup>

Washington State has a court rule that incorporates the “thorough inquiry” language from *Von Moltke*.

Waiver of Counsel. If the defendant chooses to proceed without counsel, the court shall determine on the record whether the waiver is made voluntarily, competently and with knowledge of the consequences. The court shall make a thorough inquiry of the defendant’s understanding before accepting the waiver. If the court finds the waiver valid, an appropriate finding shall be entered in the record. Unless the waiver is valid, the court shall not proceed with the arraignment until counsel is provided.<sup>80</sup>

Connecticut has a similar provision.<sup>81</sup>

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76. NAT’L RIGHT TO COUNSEL COMM., *supra* note 27, at 11.

77. *See* *Iowa v. Tovar*, 541 U.S. 77, 81, 87-88 (2004); *Von Moltke v. Gillies*, 332 U.S. 708, 722-24 (1948); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

78. *State v. Wamsley*, 64 N.E.3d 489, 494, 497 (Ohio Ct. App. 2016).

79. *Id.* at 497; *see also* *United States v. Wing*, No. A05-0042 CR (JWS), 2005 WL 1575667, at \*1 (D. Alaska June 20, 2005) (dismissing a federal prosecution for possession of a firearm “after being convicted of a crime of domestic violence . . . because [the] conviction for the predicate offense of a misdemeanor crime of domestic violence was obtained” as the result of an invalid waiver of counsel).

80. WASH. CRIM. R. CT. LTD. J. 4.1(d) (2010).

81. The rule provides:

Washington's Court of Appeals had made clear the thorough inquiry requirement even before the court rule was amended to include the language in 2010. In *State v. Chavis*,<sup>82</sup> the Court wrote, citing *Von Moltke*:

An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandably has been made.<sup>83</sup>

Nevertheless, misdemeanor court judges did not always comply with the requirements that appellate courts repeatedly had made clear. The Washington Judicial Conduct Commission has disciplined judges accordingly. In one case, it censured and recommended suspension of a judge who had been disciplined previously for the same deficiency. The Commission found that the judge violated judicial canons by

routinely failing to adequately advise unrepresented criminal defendants of their constitutional due process rights. The Commission found that the misconduct occurred and was compounded by the fact that Respondent was previously censured by the Commission for similar behavior (CJC 3811-F-110). The Commission censured Judge Ottinger and recommended to the Washington State Supreme Court that she be suspended from office for thirty days without pay.<sup>84</sup>

It makes sense that the judge should be careful to determine that the defendant understands and is willingly giving up the right to a lawyer, and knows that a lawyer can help the person immediately to decide what to do. I will discuss below how judges can conduct appropriate

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A waiver will be accepted only after the judicial authority makes a thorough inquiry and is satisfied that the defendant:

- (1) Has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when so entitled;
- (2) Possesses the intelligence and capacity to appreciate the consequences of the decision to represent oneself;
- (3) Comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case; and
- (4) Has been made aware of the dangers and disadvantages of self-representation.

SEC'Y OF THE STATE OF CONN., CONNECTICUT PRACTICE BOOK 422-23 (2017).

82. 644 P.2d 1202 (Wash. Ct. App. 1982).

83. *Id.* at 1205 (citing *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948) (plurality opinion)).

84. *Activity – Cases Filed with the Supreme Court*, ST. WASH. COMM'N ON JUD. CONDUCT, [https://www.cjc.state.wa.us/index.php?page=activity&section=supreme\\_court\\_filings](https://www.cjc.state.wa.us/index.php?page=activity&section=supreme_court_filings) (last visited Nov. 15, 2017) (referring to proceedings against Judge Mary Ann Ottinger, CJC No. 4475-F-119, May 5, 2006).

advice of rights and waivers for accused persons who say they do not want counsel.<sup>85</sup>

#### IV. IT IS CRITICAL THAT JUDGES ACCEPT RESPONSIBILITY FOR ENSURING THE RIGHT TO COUNSEL

As Justice Stevens wrote for the Court in *United States v. Cronin*<sup>86</sup>: “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.”<sup>87</sup>

The Court in *Gideon v. Wainwright*<sup>88</sup> emphasized the need to provide counsel to implement the constitutional safeguards designed to assure fair trials and equal treatment under the law.<sup>89</sup>

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.<sup>90</sup>

Many judges recognize that many of the defendants coming before them are afraid and ill-equipped to face criminal charges alone. In 2009, the Washington District and Municipal Court Judges’ Association wrote to the state supreme court about the need for counsel at first appearance:

The reality we see every day is that people entering our criminal justice system are confused by or ignorant of legal concepts, often unsophisticated, low on the literacy continuum, frightened, intimidated by authority, and faced by increasingly complicated direct and collateral consequences of conviction.<sup>91</sup>

Those accused persons need the judges to protect their right to counsel.<sup>92</sup>

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85. See *infra* notes 97-98, 103, 108-10 and accompanying text.

86. 466 U.S. 648 (1984).

87. *Id.* at 654 (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

88. 372 U.S. 335 (1963).

89. *Id.* at 342-45.

90. *Id.* at 344, 346 n.3.

91. Letter from Marilyn G. Paja, President-Judge, Dist. and Mun. Court Judges’ Ass’n, to Charles W. Johnson, Assoc. Chief Justice, Wash. State Supreme Court (Apr. 6, 2009) (on file with author).

92. A recent *Atlantic* article reported on a Michigan judge who has become convinced that there should be lawyers at first appearance. Maura Ewing, *When Does the Right to a Lawyer Kick*

Justice Stevens, dissenting in a case in which the Court did not find a conflict of interest, wrote the following:

When an indigent defendant is unable to retain his own lawyer, the trial judge's appointment of counsel is itself a critical stage of a criminal trial. At that point in the proceeding, by definition, the defendant has no lawyer to protect his interests and must rely entirely on the judge.<sup>93</sup>

The Washington Commission on Judicial Conduct wrote in disciplining a judge: "The judge's obligation is to ensure that a defendant knowingly, intelligently and voluntarily understands their constitutional rights before they effectively waive them or before they orally plead guilty."<sup>94</sup>

In another Washington case, the Washington Supreme Court emphasized

the principle that a judge has a duty to ensure that guilty pleas are knowingly, voluntarily, and intelligently made. . . . Under the Canons, the judge's duty is to be faithful to the law and maintain judicial and professional competence. . . . Judicial integrity is sacrificed if the canon is violated and the appearance of fairness is ignored.<sup>95</sup>

In one court I observed, the clerk asked defendants who said they wanted to have a lawyer whether they had talked with the prosecutor first. In other courts, defendants either are called by name by the prosecutor to come to talk with them or are directed by court staff to talk with the prosecutor. In those situations, the prosecutor may tell defendants that the prosecutor is not their lawyer, but they then discuss the case and offer a plea bargain before the defendants have properly waived counsel. I have seen prosecutors do this with chained, in-custody defendants. This is ethically questionable and also leads the defendants to believe that their case will be processed without a lawyer to help them.

One prosecutor told me he had gone to the jail to discuss a plea with a defendant. Any pretense of honoring the right to counsel in such a situation becomes meaningless.

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*In?*, ATLANTIC (Sept. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/09/when-does-the-right-to-an-attorney-kick-in/539898>.

93. *Mickens v. Taylor*, 535 U.S. 162, 184 (2002) (Stevens, J., dissenting).

94. *In re Mary Ann Ottinger*, CJC No. 4475-F-119 (Wash. Comm'n on Judicial Conduct May 5, 2006), [https://www.cjc.state.wa.us/materials/activity/public\\_actions/2006/4475%20Ottinger%20Decision.pdf](https://www.cjc.state.wa.us/materials/activity/public_actions/2006/4475%20Ottinger%20Decision.pdf).

95. *In re Disciplinary Proceeding Against Steven Michels*, 75 P.3d 950, 955-56 (Wash. 2003).

If prosecutors in their courts are talking with unrepresented people who have not waived counsel, judges should advise prosecutors in their courts to follow the Rules of Professional Conduct, which provide in part as follows:

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

. . . .

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing . . . .<sup>96</sup>

As discussed below, judges should organize their courts so that prosecutors are not talking with defendants before the judges do.<sup>97</sup>

When prosecutors are willing to make plea bargains with unrepresented people who have not waived counsel, when defendants are confused, frightened, ignorant of the law, and intimidated by the court process, judges need to accept their responsibility to make sure that accused persons know that they have the right to counsel and that counsel is available to advise them from the beginning of the court process. As Professor Jacqueline McMurtrie has written, “It is critical to ensure that individuals accused of crimes who are too poor to hire a lawyer are represented by competent and dedicated public defender advocates.”<sup>98</sup>

Professor Stephen B. Bright and his colleague Sia M. Sanneh wrote:

In the absence of a capable lawyer, a person accused of a crime is virtually defenseless against a prosecutor acting as both inquisitor and adversary, exercising unchecked power over everything from the crime charged to the disclosure of information to the sentence imposed. That so many are left defenseless so often is shameful.<sup>99</sup>

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96. MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2016). The Model Rules have been adopted in all fifty states and the District of Columbia. *State Adoption of the ABA Model Rules of Professional Conduct*, A.B.A., [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html) (last visited Nov. 15, 2017).

97. *See infra* Part V.

98. Jacqueline McMurtrie, *Strange Bedfellows: Can Insurers Play a Role in Advancing Gideon's Promise?*, 45 HOFSTRA L. REV. 391, 398 (2016).

99. Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon*

Senator Grassley, introducing a hearing on the right to counsel in misdemeanor cases, emphasized judges' role: "What is particularly troubling about these constitutional violations is who is committing them. It is our judicial system. The states and the state courts must adhere to the Bill of Rights. Respect for our courts as well as the rule of law demands that."<sup>100</sup>

#### V. STEPS JUDGES CAN TAKE TO MAKE SURE WAIVERS OF COUNSEL ARE VALID

State court judges can be guided by the care with which federal judges are directed to address advice and waiver of the right to counsel. The Benchbook for U.S. District Court Judges ("Benchbook") states that "[i]f counsel has not been assigned by the magistrate judge before the defendant's first court appearance, assignment of counsel should be the first item of business before the judge."<sup>101</sup> The Benchbook adds that defendants have the right of self-representation but "[w]aiver of counsel must, however, be knowing and voluntary. This means that you must make clear on the record that the defendant is fully aware of the hazards and disadvantages of self-representation."<sup>102</sup> The Benchbook directs judges to ask about a dozen questions to probe whether the waiver is knowing and voluntary and to say to the accused person something to this effect:

I must advise you that in my opinion, a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.<sup>103</sup>

Some state court judges do urge defendants not to waive counsel, but many simply accept the defendant's initial "no" or "I guess not" that has been driven by the written form that puts waiver at the bottom of the

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v. Wainwright, 122 YALE L.J. 2150, 2172 (2013).

100. Prepared Statement by Senator Chuck Grassley of Iowa, Chairman, Senate Judiciary Committee Hearing on Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors (May 13, 2015), <https://www.grassley.senate.gov/news/news-releases/grassley-statement-judiciary-committee-hearing-protecting-constitutional-right>.

101. FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 1.02, at 5 (6th ed. 2013).

102. *Id.* § 1.02(C), at 6.

103. *Id.* § 1.02(C), at 6-7.

advice of rights as well as by the defendant's having accepted a prosecutor's plea offer before ever talking with a lawyer or the judge.<sup>104</sup>

A joint project of Kentucky district court judges, county attorneys, public defenders, and criminal defense lawyers developed a guide for judges<sup>105</sup> which includes a variety of sample advice statements including the following:

The first right you have when you are charged with a crime is the right to a lawyer. You do not have to handle this case by yourself and you should not feel pressured to handle the case yourself if you want a lawyer to help you. A lawyer can go over the evidence against you, listen to your side of the story, and then help you decide which options may be best for you. A lawyer may be able to tell you whether you have a defense to the crime or whether you should have been charged with a less serious offense to begin with. If you want to try to settle your case, a lawyer may be better skilled at negotiating with the prosecutor than you on your own. Also, a lawyer may help you understand other consequences of a conviction, such as problems in areas of immigration or eligibility for public benefits like housing or student loans. If you do not have a lawyer, no one else in the court system has the job of helping you with these matters or acting only in your interest. I cannot give you advice.<sup>106</sup>

The guide points out that this language was analyzed on the Flesch-Kincaid Grade Level Scale to be on the 9.5 grade reading level.<sup>107</sup> The comprehension level of the judge's advice of rights is an important consideration, as are the speed and tone with which the judge reads the advice.

The judge, typically seated on an elevated bench looking down on the accused person, can be quite intimidating to the layperson who may be facing the most stressful situation they ever have experienced. It makes sense for the judge to explain what a lawyer can do to help the person as well as to say, "I strongly urge you not to try to represent yourself." When judges take that approach, most people will say, "Thank you, Judge, I would like a public defender."

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104. See BORUCHOWITZ ET AL., *supra* note 1, at 15-17.

105. KY. DEP'T PUB. ADVOCACY, RECITATION OF RIGHTS IN CRIMINAL CASES: A KENTUCKY BEST PRACTICES GUIDE (2012), [https://dpa.ky.gov/Public\\_Defender\\_Resources/Documents/Best%20Practices%20-%20Recitation%20of%20Rights.pdf](https://dpa.ky.gov/Public_Defender_Resources/Documents/Best%20Practices%20-%20Recitation%20of%20Rights.pdf).

106. *Id.* at 7.

107. *Id.*

Judges also should require that before a defendant waives counsel, he or she talk with a public defender. The ABA Standards on Providing Defense Services Standard 5-8.2 on in-court waiver recommends this:

If an accused in a proceeding involving the possibility of incarceration has not seen a lawyer and indicates an intention to waive the assistance of counsel, a lawyer should be provided before any in-court waiver is accepted. No waiver should be accepted unless the accused has at least once conferred with a lawyer. If a waiver is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the accused appears without counsel.<sup>108</sup>

Judges should not allow prosecutors in their court to talk to unrepresented defendants except to help them obtain counsel. If the court has a practice of bailiffs and prosecutors advising people of their rights before the judge goes on the bench, the judge should change how the docket is handled and when cases are scheduled, to make sure that the judge explains the right to counsel and addresses appointment of counsel before anything else of substance occurs. Defenders, not prosecutors, should do any group advice of rights that occurs.

Using videos to explain rights to the group of defendants may be useful, but the information in the videos must be accurate and the judge needs to conduct an individual colloquy with each defendant rather than simply saying, “Did you see the video? Do you have any questions?”

The mass arraignments and mass guilty pleas that some courts use raise serious questions about whether each individual in a group called up at one time before the judge truly understands the “waiver” they are making. Relying in part on a federal rule, but with analysis that resonates for state courts, the Ninth Circuit invalidated a guilty plea taken in a group of defendants because the judge did not adequately question the individual defendant.<sup>109</sup> The Ninth Circuit concluded “that, although the court did not err by advising the defendants of their rights *en masse*, it erred by not questioning Arqueta–Ramos individually to ensure that she understood her rights.”<sup>110</sup>

The court held that the court’s collective group questioning, where “nothing in the record . . . establishe[d] any connection between the defendants,” violated the requirement that the court “address the defendant personally in open court.”<sup>111</sup> It added:

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108. STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-8.2 (AM. BAR ASS’N 1992).

109. *United States v. Arqueta–Ramos*, 730 F.3d 1133, 1135, 1138-39 (9th Cir. 2013).

110. *Id.* at 1135 (citing *United States v. Escamilla-Rojas*, 640 F.3d 1055, 1060 (9th Cir. 2011)).

111. *Id.* at 1139 (first quoting *United States v. Roblero-Solis*, 588 F.3d 692, 700 (9th Cir.



The record reflects only “all answer yes” and “all answer no” responses from the small group of defendants. We do not know how assuredly or uncertainly Arqueta–Ramos responded to these questions; indeed, we are not certain that the magistrate judge would have even detected if Arqueta–Ramos failed to answer one of the questions.<sup>112</sup>

I mention this federal case on mass pleas because I have seen similar practices in state courts. The emphasis on speedy disposition of as many cases as possible results inevitably in diminishing the dignity of all involved and making it less likely that the individual who is waiving counsel or pleading guilty truly understands the full consequences of the action. This is particularly true for defendants who are being advised of their rights en masse, who do not have an attorney to help them, and who at their first court appearance receive a plea bargain offer from the prosecutor that they have no meaningful way to evaluate.

Rather than push as many cases through as possible without the assistance of counsel, judges should presume that eligible persons want appointment of counsel, and before accepting any waiver of counsel, the court must conduct the thorough inquiry contemplated by *Von Moltke*,<sup>113</sup> and its progeny.

As I have written elsewhere, “During the course of my work in Washington State, a number of courts have changed their practices and now routinely provide counsel to the majority of defendants at their arraignments.”<sup>114</sup> Judges have found that having lawyers at first appearance results in defendants not waiving counsel and not pleading guilty until they have had time to talk with their lawyers, and the hearings proceed more smoothly.<sup>115</sup> One judge told me he wished he long ago had made the change to requiring defenders at first appearance.

#### VI. JUDGES SHOULD NOT HEAR CRIMINAL CASES UNLESS A PUBLIC DEFENDER IS AVAILABLE

Lawyers for accused persons are needed not only to provide fairness to the individual accused person, but also to engender and preserve respect for the integrity of the courts. Most people who go to court go to misdemeanor courts. As the Washington Supreme Court has written, “Courts of limited jurisdiction serve as the window to the

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2009); and then quoting FED. R. CRIM. P. 11(b)(1)) (alteration in original) (citation omitted).

112. *Id.* at 1140 (citing *Roblero-Solis*, 588 F.3d at 700).

113. 332 U.S. 708 (1948).

114. *Fifty Years*, *supra* note 1, at 912.

115. *Id.* at 912-14.

judicial branch for many people who do not normally have contact with the judicial system.”<sup>116</sup>

There are at least ten million misdemeanor cases per year in the United States,<sup>117</sup> far more than felony cases.<sup>118</sup> For example, in California in fiscal year 2011–2012, there were 243,270 felony filings and 1,047,594 misdemeanor filings.<sup>119</sup> If people see themselves and their loved ones run through a criminal case in three minutes, with no lawyer to help them, with the consequences of a conviction including jail time and fines and fees and the ensuing loss of jobs, housing, licenses, even the ability to live in the country, they will have no respect for the court. As Justice Frankfurter wrote, “[J]ustice must satisfy the appearance of justice.”<sup>120</sup>

From a judge’s point of view, how is the judge supposed to operate in what is theoretically an adversary system when one or both of the adversary lawyers are not there? On what information does a judge make a bail decision, or, in the event of a conviction by plea or trial, how does a judge make a fair sentencing decision with no coherent information provided about the defendant? If the only information is from the prosecutor, how is that fair? And if there is no prosecutor, why is the case even proceeding? Who is presenting the government’s case when the prosecutor does not appear?

In granting a federal habeas corpus petition challenging a conviction in tribal court in which the judge had the roles of both prosecutor and judge, the court wrote, “[R]egardless of the integrity and skill of the tribal judge, a fair trial cannot be had when the judge also has the duty of prosecuting.”<sup>121</sup> The court cited the tribal judge’s testimony in the habeas proceeding: “As Judge Andera described it, his dual role makes him feel like a referee at a sporting event when only one team shows up.”<sup>122</sup> The court cited a First Circuit case invalidating a similar

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116. *In re Disciplinary Proceeding Against Steven Michels*, 75 P.3d 950, 956 (Wash. 2003).

117. Alexandra Natapoff, *Why Misdemeanors Aren’t So Minor*, SLATE (Apr. 27, 2012, 11:33 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/04/misdemeanors\\_can\\_have\\_major\\_consequences\\_for\\_the\\_people\\_charged.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged.html). In a conference on “Misdemeanor Machinery: The Hidden Heart of the American Criminal Justice System” at Boston University School of Law in November 2017, several scholars discussed research in forthcoming articles that supports the conclusion that there are between thirteen and fourteen million misdemeanor cases per year.

118. *See id.*

119. JUDICIAL COUNCIL OF CAL., *STATEWIDE CASELOAD TRENDS: 2002-2003 THROUGH 2011-2012*, at xvii (2013).

120. *Offutt v. United States*, 348 U.S. 11, 14 (D.C. Cir. 1954).

121. *Wounded Knee v. Andera*, 416 F. Supp. 1236, 1240 (D.S.D. 1976).

122. *Id.* at 1241.

procedure in Puerto Rico, “[A] combining of the judicial and prosecutorial functions in one person could not be consistent with due process in any circumstances even though the courts were all staffed with judges of ‘honest conscience.’”<sup>123</sup>

The federal court reviewing the tribal court process considered the financial difficulty faced by the tribe, and wrote, “[F]inancial obstacles cannot in any case be a reason for any governmental entity to deny persons liberties and rights secured by the federal Constitution or in this case, the Indian Civil Rights Act.”<sup>124</sup>

A similar analysis supports the conclusions that judges should not be placed in the position of acting as a defense attorney and that the financial difficulty of a local government cannot be a reason to deny appointed counsel to eligible persons.

A Washington Supreme Court case provides insight on these questions. A part-time judge in one city was asked to be a substitute (*pro tem*) judge in another city in which he was the contract public defender.<sup>125</sup> The Judicial Conduct Commission brought a disciplinary proceeding and recommended censure and a 120-day suspension from the bench without pay.<sup>126</sup> The Washington Supreme Court upheld the suspension.<sup>127</sup> The court noted the following:

At the hearing before the Commission in April 2002, documentary evidence was presented which showed 12 cases in which Judge Michels served as defense counsel and judge for the same defendant, and 8 cases in which he failed to ensure a defendant submitting a guilty plea was informed of the elements of the crimes for which they were being charged.<sup>128</sup>

The court strongly emphasized the importance of the trial judge honoring the right to counsel:

Every person charged with a crime possesses certain constitutional and due process rights. Most fundamental of these rights include the right to an attorney and the right to be advised of your rights in a way to be able to make informed decisions regarding your case. . . .

We have established that we will not and cannot tolerate any actions that do not comply with fundamental principles of due process. No shortcuts exist and any judicial officer, be he or she part-time, pro

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123. *Id.* at 1240-41 (citing *Figueroa Ruiz v. Delgado*, 359 F.2d 718, 720 (1st Cir. 1966)).

124. *Id.* at 1241.

125. *In re Disciplinary Proceeding Against Michels*, 75 P.3d 950, 952 (Wash. 2003).

126. *Id.* at 952-53.

127. *Id.* at 956-57.

128. *Id.* at 953.

tem., or full-time must adhere to these principles in order that individuals who are charged with crimes are afforded the constitutional protections they are entitled to.<sup>129</sup>

In determining that the suspension was warranted, the court noted that the judge had been on the bench for sixteen years and that during that time the court had upheld discipline on another misdemeanor judge for failing to honor basic rights.<sup>130</sup>

The fact that Judge Michels failed to keep current on the status of the law in spite of his years of service on the bench is troublesome. Sixteen years is a considerable amount of time to sit on the bench. Judge Michels owed it to the community where he served to abide by the laws of Washington, the rules outlined by this court, and our state constitution.<sup>131</sup>

Unless a public defender is available, a judge should not proceed to hear a criminal case, certainly not to take a guilty plea. If a defender is available, a defendant can have the advice of counsel before deciding first whether to waive counsel and second whether to accept any plea bargain offered by the prosecution. The court can have the benefit of the defender's advocacy on whether there is probable cause to believe the defendant committed the crime charged and on release conditions should the court find probable cause. Should there be an obvious defect in the charging document, such as a future date being listed as when the offense occurred, or a legal question such as double jeopardy because the court records show a conviction for the same exact offense, the matter can be resolved immediately, saving the parties and the court the costs of proceeding.

Requiring a defender to be present allows a judge to remain neutral, contributes to fostering respect for the court, and protects the right to counsel.

## VII. CONCLUSION

In 1967, the President's Commission on Law Enforcement and Administration of Justice, citing Dean Edward Barrett, reported on the gap between theory and reality in misdemeanor courts: "[I]t becomes clear that for most defendants in the criminal process, there is scant

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129. *Id.* at 954.

130. *Id.* at 956-57.

131. *Id.* at 956.

regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way.”<sup>132</sup>

The inattention to the right to counsel is made even more serious as the consequences of criminal convictions have become more serious. In addition to jail time and heavy fines, the consequences of prosecution and conviction can include loss of jobs, licenses, housing, student loans, and for non-citizens the right to be in the country.<sup>133</sup>

Bright and Sanneh noted in their article the disregard of fundamental constitutional protections that has a racially discriminatory impact and undercuts respect for law:

A system in which all of the key actors routinely ignore one of its most fundamental constitutional requirements is not a system based on the rule of law, no matter what it claims to be. When those actors shirk their constitutional obligations and bring the immense power of the state down most heavily on African Americans and Latinos, people cease to have confidence in the courts. The system lacks legitimacy and credibility and is undeserving of respect.<sup>134</sup>

Judges need to make sure that accused persons who cannot afford to hire counsel have access to a lawyer to help them from the beginning of the court proceeding. They need to take the time needed to provide adequate advice of rights. They need to make sure that any forms they use to advise people of their rights are accurate and do not presume waiver of counsel by only including on them a waiver, with no place for requesting appointed counsel. They need to order prosecutors not to conduct plea negotiations with unrepresented defendants who have not properly waived counsel. If the judges find cost to be an impediment to implementing the right to counsel, they need to encourage development of diversion programs and other ways to save money that could be reallocated. Ultimately, judges need to protect the right to counsel.

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132. PRESIDENT’S COMM’N ON LAW ENF’T AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (1967).

133. Natapoff, *supra* note 18, at 1324-26.

134. Bright & Sanneh, *supra* note 99, at 2155.