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Rethinking Misdemeanor Neglect

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ABSTRACT

Millions of criminal defendants, most of them indigent, are convicted of misdemeanor offenses every year. Many are constitutionally entitled to free legal counsel, yet in practice the quality of that counsel depends on how public defender agencies allocate attorneys between misdemeanor and felony defendants. Attorney experience is a limited, if not scarce, resource, and public defenders will often manage this resource by allocating the more experienced attorneys to those defendants charged with felony offenses. This approach seems sensible; after all, defendants charged with felony offenses risk longer incarceration periods than those charged with misdemeanors.

Yet, in this Article, I show that this widespread approach is misguided. Misdemeanor convictions are not as harmless as many assume. Every year, misdemeanor convictions saddle millions of Americans with consequences affecting their liberty, housing, employment, education, and immigration status. I argue that public defender administrators should respond to the significant costs of misdemeanor convictions by emphasizing misdemeanor representation even at the expense of felonies. An individual public defender can handle multiple misdemeanor cases with the same amount of effort necessary to represent a single felony case. Misdemeanors also have a significant effect on how much future contact a particular defendant, and the third parties within his or her network, will have with the criminal justice system. In this Article, I look beyond the dated understanding of the right to counsel to adopt a more effective approach to public defender resource allocation. This approach focuses on misdemeanor representation instead of felonies by considering how public defenders could maximize the benefits of their attorney experience resource, instead of simply relying on the severity of the statutory punishment to guide their distribution decisions.

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INTRODUCTION

In the United States, about one out of every three adults can expect to be arrested by age twenty-three.[1] The ratio rises to close to one out of every two adults for Hispanic and African-American males.[2] Public defenders represent at least 80 percent of state criminal court defendants who challenge the validity of their arrests.[3] This massive demand combined with limited resources forces public defender offices to make difficult resource allocation decisions that provide services to one client or group of clients at the expense of providing certain services to others. Administrators[4] strive to balance competing interests without compromising the constitutional and professional obligations they owe to all of their clients—namely the right to the effective assistance of counsel.[5]

These distribution decisions are particularly complicated by the prevalence of the "quality-of-life" offenses known more popularly as misdemeanors.[6] Misdemeanor offenses dominate public defender caseloads and can include crimes as serious as theft, drug possession, and assault. These offenses, however, may receive fewer public defender resources than felony offenses, which can include crimes involving weapons or assault on other persons.[7] The difference in resourcing is, ostensibly, because misdemeanors carry a maximum potential

1. Robert Brame et al., *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25 (2012).
2. *See* Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 478 (2014).
3. Lincoln Caplan, Editorial, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html?mtrref=undefined&gwh=CA1279E6FAAB795F215AFF3E4D48E424&gwt=pay&assetType=opinion [https://perma.cc/D6JC-W26C]. This number is even higher for federal courts, where public defenders represent 60 percent of criminal court defendants. *See* Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES, Aug. 24, 2013, at A14. Although federal defenders face many of the same resource constraints, this Article limits its discussion to public defenders that practice in state court because these state court defenders have different historical and financial considerations.
4. *See infra* note 17.
5. Not every criminal defendant is entitled to indigent defense services. *See* Adam D. Young, Comment, *An Analysis of the Sixth Amendment Right to Counsel as It Applies to Suspended Sentences and Probation: Do* Argersinger *and* Scott *Blow a Flat Note on* Gideon*'s Trumpet?*, 107 DICK. L. REV. 699, 705–07 (2003). In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court held the right to counsel extended to misdemeanor offenses. *Scott v. Illinois*, 440 U.S. 367 (1979), later narrowed the right to counsel for indigent misdemeanor defendants to cases where the accused receives a sentence of "actual imprisonment" and not simply a fine. *Id.* at 373–74. Actual imprisonment includes suspended sentences. *See generally id.*
6. Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 164 (2004).
7. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 818–19 (2015).

punishment of one year in prison while felony offenses can place a convicted offender at risk of spending decades, if not life, in prison.[8]

There is a certain logic to adopting resource distribution schemes that disproportionately allocate more sophisticated public defender resources to felony, rather than misdemeanor, offenses.[9] The individual defendant's risk of a longer term under state control is of proper concern to those tasked with limiting the state's intrusion into life and liberty. The vast majority of arrests, however, are for the misdemeanor offenses that risk shorter incarceration periods.[10] Additionally, although misdemeanor convictions carry a maximum incarceration period of only one year, they also carry significant collateral consequences for a variety of life experiences. For example, they can bar a convicted offender from receiving federal student loan assistance or occupying public housing.[11] Misdemeanor convictions can also affect immigration status and employment, providing prospective employers with a tool to discard certain applications with little review.[12] These consequences not only determine a particular defendant's future ability to avoid involvement in the criminal justice system, but also affect

8. *See* 18 U.S.C. § 3559(a)(2012) (classifying criminal offenses that authorize a punishment of more than one year as a felony); *see also* United States v. Graham, 169 F.3d 787, 792 (3rd Cir. 1999) ("The one-year mark was used by Congress as early as 1865."). Differences in procedural rules may also influence why felonies are treated more seriously than misdemeanors. For example, law enforcement can conduct an investigatory stop for completed felony offenses but not completed misdemeanor offenses. This strength in police power to make warrantless stops for felony offenses where they could not for misdemeanor offenses suggests that felonies are somehow more important or more damaging to the public and thus less deserving of constitutional protection. *See generally*, Rachel S. Weiss, Note, *Defining the Contours of* United States v. Hensley*: Limiting the Use of* Terry *Stops for Completed Misdemeanors*, 94 CORNELL L. REV. 1321 (2009) (providing a history of law enforcement warrantless stops for misdemeanors and felonies).

9. *See* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS 7–12 (2004) (explaining how the overwhelming problems that indigent defense systems face are caused by lack of adequate funding and resources); ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N. CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 38–40 (2009) (arguing that a lack of legal support services and inexperience lead to inadequate representation in certain indigent defense systems).

10. *See* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 281 & n.11 (2011) (noting a 2008 study that misdemeanors comprised 79 percent of the caseload in eleven state courts and a 2005 study that state court prosecutors closed over 2.4 million felony cases while closing nearly 7.5 million misdemeanor cases (citing ROBERT C. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010) and STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, NCJ 213799, PROSECUTORS IN STATE COURTS, 2005, at 6 (2006))).

11. *See* discussion *infra* Part II.A.2.

12. *Id.*

that defendant's network of family and friends. These third parties are adversely affected by the scope of the defendant's punishment and thus uniquely reliant on the quality of the defendant's counsel.[13]

The recent fiftieth anniversary of the U.S. Supreme Court's decision in *Gideon v. Wainwright*[14] and public criticism about the role of mass incarceration in American society has led to an expanded literary and public discussion on misdemeanor criminal justice.[15] This scholarship has focused primarily on how the scarcity of resources and the collateral consequences associated with misdemeanor offenses should encourage decriminalization.[16] It is relatively silent on the adjudicative dimension of this heightened understanding of misdemeanor importance, particularly from the perspective of public defender resourcing decisions. In this Article, I argue that public defenders should redirect their limited attorney experience resource from felony defendants to misdemeanor defendants. The current felony emphasis is misguided and relies on a dated understanding of the criminal justice system and the public defender's role in the criminal process. Felony offenses may place a defendant at risk of a significantly longer incarceration term than misdemeanors, but that logic fails to adequately consider the public defender's identity as a government agency tasked with providing limited resources to a large group of entitled recipients. It also relies on two assumptions that are no longer applicable in the modern-day criminal justice system: (1) Misdemeanor punishment is relatively harmless for individual defendants; and (2) a felony emphasis is more beneficial to the public defender institution and the community it represents than a misdemeanor emphasis. In this Article, I explain why these assumptions are incorrect and how this reality should encourage public defender administrators to emphasize misdemeanors instead of felonies in distribution decisions for the attorney experience resource.

13. For a description of the interests that those people other than the offender, the direct crime victim, or the general public may have in criminal litigation and the role courts and prosecutors have allowed those interests to play in decisionmaking, see Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1385–92 (2002).

14. 372 U.S. 335 (1963) (holding the Fourteenth Amendment requires states to provide counsel to indigent criminal defendants).

15. *See, e.g.*, *Protecting the Constitutional Right to Counsel for Indigents Charged With Misdemeanors: Hearing Before the Full Comm. on the Judiciary*, 114th Cong. (2015); *Robin Steinberg and Scott Levy Are Panelists at Cardozo Law Review Symposium*, BRONX DEFENDERS (Dec. 4, 2014), http://www.bronxdefenders.org/robin-steinberg-and-scott-levy-are-panelists-at-cardozo-law-review-symposium [https://perma.cc/B9RB-L4YC].

16. *See, e.g.*, Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1656–58 (2010); Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 351–58 (2013) Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 447–50 (2015).

Part I of this Article describes how public defender administrators allocate attorney experience. It outlines the ways that public defender institutions minimize misdemeanor offenses when distributing the limited attorney experience resource. It concludes by examining the assumptions that support the felony emphasis for attorney experience. Part II discusses the consequences of this misdemeanor neglect and why a better appreciation of these consequences is critical for the public defender institution. Part III details the changes public defender institutions should make in distributing the attorney experience resource. It explains how these changes would enable the institution to prioritize misdemeanor offenses and better reach its institutional goals for both misdemeanor and felony clients.

I. HOW PUBLIC DEFENDERS ALLOCATE ATTORNEY EXPERIENCE

Aside from a few circumstances, public defender administrators do not treat misdemeanor and felony clients alike when they are forced to ration limited resources.[17] Instead, decisionmakers minimize the resources dedicated to misdemeanor representation so they can concentrate their efforts on felony representation. The longer the potential period of incarceration, the more resources are dedicated to the representation of the client charged with the offense.[18] The particular resources that public defenders choose to dedicate to felony defendants instead of misdemeanor defendants determine what benefits above and beyond the basic right to the effective assistance of counsel the entitled clients can derive from public defender representation.

One scarce resource that public defender administrators may distribute in favor of felony offenses instead of misdemeanor offenses is the attorneys themselves, and more specifically, the attorneys' experience.[19] Both an indigent

17. *See* discussion *infra* Parts I.A and I.B. There is no one clear definition of public defender administrators. Neither is there one definition of the qualities and skills necessary to be an effective public defender administrator. A future paper will explore the desired expertise of a public defender administrator and compare those ideals to the current characteristics of those occupying that position in various public defender institutions. For the purpose of this Article, it is sufficient to consider a public defender administrator as an individual tasked with distributing public defender resources at the institutional level.

18. *See* Roberts, *supra* note 10, at 294–97.

19. Attorney experience is best defined as the knowledge and skill that a lawyer derives from prior practice. *See* David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1158 (2007). An experienced attorney can more easily identify patterns, contemplate what the decisionmakers may need to decide a case in his or her client's favor, and develop creative ways to obtain relief for a client. If the attorney experience resource is dedicated to misdemeanor clients, these defenders can provide a stronger service to those clients than they would otherwise. Both attorneys and attorney

defendant's overall representation and society's confidence in the result of any criminal proceeding depend on the quality and effectiveness of the defendant's attorney.[20] The Supreme Court has yet to declare a specific amount or type of experience necessary for the effective assistance of counsel, but experience can play a role in the evaluation.[21] Legal proficiency—and the knowledge and skills associated with quality lawyering—increases with practice experience. A more experienced defender is more likely to recognize the characteristics of illegal searches and seizures, unconstitutional arrests, and the circumstances that are more likely to persuade a particular prosecutor, judge, or jury to side with her client. This more experienced defender may also inspire increased confidence in her client, thereby facilitating client counseling and relationship building.[22] These skills strongly benefit the clients or class of cases to which they are dedicated. Thus, the manner in which a public defender institution distributes its attorney experience resource is critical to the outcomes in both individual client representation and an institution's ability to meet its overall goals.[23]

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experience, however, are often in short supply in under-resourced public defender institutions because of inadequate hiring processes. *See generally* Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 173–80 (2009) (discussing reasons public defender improvements should be concentrated in new hires instead of veteran attorneys). This practice would understandably lead to bottom-heavy offices where the majority of the staff is inexperienced. The attorney experience resource, however, is distinct from the amount of time an attorney contributes to a case. Public defender administrators tend to focus on time when assigning cases. The "time" distribution question turns on how many hours in the day the attorney can dedicate to a new client and is answered by evaluating that attorney's caseload. NORMAN LEFSTEIN, ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 153–59 (discussing excessive caseloads and methods for tracking public defender time for improvement). The analysis of where attorney experience or skill should be directed can be lost in this robust conversation.

20. As Justice Black noted in *Gideon v. Wainwright*: "[O]ur 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." 372 U.S. 335, 344 (1963).

21. *Strickland v. Washington* provides the standard of review for ineffective assistance of counsel claims on appeal. 466 U.S. 668, 686 (1984). It provides that effective assistance of counsel has been denied only if the appellant can show the attorney's performance fell below an objective standard of reasonableness and the deficient performance creates a reasonable probability that, but for the deficient performance, the result would have been different. *Id.* at 687–91. The attorney's actions are evaluated using prevailing norms, which may, but need not, include experience. *Id.* at 688–90.

22. For an example of how experience could help a lawyer in client counseling, see Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 3 UTAH L. REV. 515, 530–32 (1987).

23. The attorney experience resource is artificially scarce, divisible, and heterogeneous. It is artificially scarce because it is insufficient for its proscribed task but it could reasonably be improved or

In other words, the limited attorney experience resource strongly benefits the clients or class of cases to which it is dedicated. This resource can also have a profound impact on the trajectory of the public defender institution, and the community it serves, if it is distributed in an efficient and effective manner. It can influence the case law surrounding certain charged offenses, reduce the number of cases or convictions for an offense, and help stabilize communities adversely affected by the criminal and civil penalties that are associated with criminal arrests and convictions.

In their study of the Clarke County Public Defenders in Las Vegas, Nevada, David Abrams and Albert Yoon determined that defendants represented by more experienced attorneys were more likely to either avoid incarceration entirely or receive shorter sentences than average.[24] This correlation conveyed that, overall, the outcomes for clients or classes of cases dramatically improves as the experience level of the assigned attorney increases. The findings suggest that where the attorney experience is allocated has an effect on the degree of success in the defense representation. There are two ways that public defender administrators can distribute this (or any other) defined resource. They can either distribute it randomly or direct it towards particular clients and cases through a formal process or scheme. I detail these two fundamental approaches to public defender resource distribution in Part I.A.[25]

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increased by more funding or a different approach to public defender recruitment and retention. *See* JON ELSTER, LOCAL JUSTICE: HOW INSTITUTIONS ALLOCATE SCARCE GOODS AND NECESSARY BURDENS 21 (1992). The resource is divisible because it does not disappear once it is used and, in fact, actually grows or improves with use. *Id.* at 22. Attorney experience is heterogeneous because, although it falls within a single umbrella of experience, each attorney experience resource is unique as it was forged through different processes, cases, and client interactions. See *id.* at 23–24. Delicate and complex decisions about distribution are even more important when a resource is scarce, divisible, and heterogeneous because it is in such short supply but is also capable of recurring use and having a distinctive impact.

24. Abrams & Yoon, *supra* note 19, at 1149–50. Abrams and Yoon's study involved evaluation of case outcomes and attorney characteristics for cases that were randomly assigned among felony attorneys in the Office of the Clark County Public Defender. A defender with eleven years of experience reduced the amount of incarceration by 17 percent compared to an attorney in his or her first year. *Id.* at 1176. This study involved only felony representation, but see *infra* Part II.B.2 for a discussion of the ways in which representation by more experienced attorneys can also lead to better results for misdemeanor defendants.

25. These are the two predominant systems. There are a large number of public defender agencies and systems in this nation and this Article does not conduct an exhaustive empirical survey of all of the different potential distribution schemes. This Article instead evaluates two common disbursement schemes and the rationales underlying each of them.

A. Distribution Schemes

Public defender administrators wholly control the assignment of the limited attorney experience resource.[26] A public defender agency is constrained to some extent by constitutional and professional guidelines. For example, civil rights agencies or individual defendants may sue a public defender agency for failing to provide counsel consistent with the Sixth Amendment, but as long as an institution provides its clients with some level of defense representation, the claims against it are unlikely to pass constitutional muster.[27] Additionally, the American Bar Association describes the appropriate interaction between clients and attorneys in its Model Rules of Professional Conduct.[28] Ultimately, the leadership has the autonomy to design and implement whatever distribution process it deems most efficient and effective. There are two basic distribution patterns for the attorney experience resource in public defender institutions nationwide: (1) a random allotment; and (2) an elevation scheme in which the amount of experience the attorney has obtained dictates the type of cases the attorney is assigned.

1. Random Allotment

Some defender offices have no formal allocation rule for attorney experience and instead adopt a first-come, first-served distribution scheme for this limited resource.[29] Public defender administrators have the authority to make strategic

26. The American Bar Association advocates public defender autonomy in funding and assignment decisions as the first principle in its ten principles of effective public defense delivery. *See* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1 (2002).

27. A public defender institution may remain unaffected by targeted litigation even if it appears to violate its constitutional mandate. *See generally* Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197 (2013) (arguing that indigent defense reformers should shift from seeking relief for underperforming public defender institutions under the Sixth Amendment and instead look to the Equal Protection Clause for support because Sixth Amendment claims have proven ineffectual).

28. *See e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(4) (AM. BAR ASS'N 1983) (prohibiting defense counsel from knowingly presenting false evidence); *see also Id.* r. 3.3(c) (granting counsel the discretion to refuse to present evidence that she "reasonably believes" is false).

29. *See, e.g.*, JUNAID AFEEF ET AL., ILL. CRIMINAL JUSTICE INFO. AUTH., POLICIES AND PROCEDURES OF THE ILLINOIS CRIMINAL JUSTICE SYSTEM 11 (2012), http://www.icjia.state.il.us/assets/pdf/ResearchReports/Policies_and_Procedures_of_the_Illinois_Criminal_Justice_System_Aug2012.pdf [https://perma.cc/JFL3-M9UK]; *see also* Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 418 (2016) (discussing the primary methods public defender institutions use to distribute attorney experience to clients).

decisions about how best to parcel limited resources, but those that adopt this random assignment system are simply leaving it to the luck of the draw. This type of distribution is similar to a lottery, where the game of chance, in this case the timing of the arrest, is the only determining factor in assigning an attorney with specific skills to a particularly situated client.[30] In this type of distribution scheme, little attention is paid to the quality or type of skills necessary for representing a client charged with a particular offense. The public defender administrator responsible for assigning attorneys to clients instead relies on the presumption that each attorney can provide effective assistance of counsel to any client regardless of the type of offense charged. For example, some judicially controlled public defender systems use a "wheel" to assign attorneys to qualifying clients.[31] In this process, an attorney occupies a position on a figurative or literal wheel and when a new case arises, whichever attorney occupies the next space on the wheel is assigned the new case.[32] Most of the assessment for whether this attorney is capable of handling a case occurs on the front end, in the application process that the attorney must complete to be included on the wheel or list.[33]

In 2010, approximately 20 percent of American counties used a wheel method for distributing public defender services.[34] Even in jurisdictions that used a public defender agency to provide the majority of representation, a rotating system for private appointment supplemented institutional representation.[35] In

30. *See* ELSTER, *supra* note 23, at 3. *See generally* Abrams & Yoon, *supra* note 19 (examining the Clark County Public Defender Office's random attorney assignment data to determine how an attorney's experience correlates with the outcome of a client's case).

31. Bill Piatt, *Reinventing the Wheel: Constructing Ethical Approaches to State Indigent Legal Defense Systems*, 2 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 372, 388 (2012).

32. *See id.* at 389. Instead of a physical wheel, this system often uses a database or computer algorithm that schedules attorney assignment positions. The wheel may also be more properly characterized as a list that judges or court personnel refer to when assigning attorneys to indigent defendants. Bill Piatt, *County Needs More Efficient Indigent Defense System*, SAN ANTONIO EXPRESS-NEWS (June 1, 2011, 12:01 AM), http://www.mysanantonio.com/opinion/commentary/article/County-needs-more-efficient-indigent-defense-1403588.php [https://perma.cc/3WLD-7RLV]. For example, in one Texas jurisdiction, judges simply assign cases as an attorney's name rises to the top of the list. *Id.*

33. *See, e.g.*, VA. CODE ANN. § 19.2-163.03 (2015) (requiring an attorney seeking to represent an indigent defendant in a criminal case to complete a certain number of hours of education and/or certify prior representation of defendants). Of particular interest, once an attorney has completed six hours of MCLE-approved continuing legal education developed by the Indigent Defense Commission, she is eligible for misdemeanor certification. *Id.* To receive felony assignments, an attorney must complete a certain amount of training hours, and certify that she has participated as lead or co-counsel in at least four felony cases from the beginning to its resolution. To receive juvenile assignments, an attorney must also complete a certain amount of training hours and also serve as lead or co-counsel in at least four juvenile delinquency matters from the beginning of the matter to its resolution. *Id.*

34. Piatt, *supra* note 31.

35. *Id.* at 388–89.

the state of Texas, the wheel system is the mechanism for counties that do not yet have a formal defender office.[36] Judges may sometimes go beyond the wheel to assign attorneys based on their own understanding of the attorney's experience or other factors, but these actions are most often barred by statute.[37] Judges who are noncompliant in selecting attorneys from the list are admonished for doing so for personal gain.[38] The characteristics of the attorneys that comprise the wheel also make judicial efforts to match experienced attorneys with certain clients unlikely. Attorneys who sign up under the wheel system are often inexperienced, and once they gain experience, they remove themselves from the wheel.[39]

Some low-bid public defender contracting agencies and institutional public defenders similarly incorporate the luck of the draw by assigning attorneys to courtrooms instead of cases. A courtroom assignment process exists when attorneys are assigned to practice in a specific courtroom and assume responsibility for every indigent case that arises in that courtroom.[40] In this process, there is no consideration of attorney experience in assigning cases and, thus, no directing of resources to comply with a particular public defender objective.[41] All clients are treated the same when assigned an attorney, and attorney experience is not

36. *See generally* TEX. INDIGENT DEF. COMM'N, FAIR DEFENSE LAW: A PRIMER FOR TEXAS OFFICIALS (2015) (discussing attorney selection methodologies for local indigent defense in Texas counties).

37. For example, Article 26.04(a) of the Texas Code of Criminal Procedure provides: "A court shall appoint an attorney from a public appointment list using a system of rotation . . . . The court shall appoint attorneys from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order. An attorney who is not appointed in the order in which the attorney's name appears on the list shall remain next in order on the list." TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (West Supp. 2016).

38. *See* ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVS. TO THE POOR IN CRIMINAL MATTERS, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS 11–13 (2000) (surveying judicial understanding of court appointments). A 1995 survey of 494 Texas judges with criminal court jurisdiction reported that 39.5 percent of judges believe their fellow judges make indigent appointments based on personal friendships with the attorneys. *Id.* at 4–5, 13. This same study also found that 35.1 percent of judges admitted to using an attorney's status as a political supporter in their decision, while 30.3 percent admitted to considering whether the attorney made campaign contributions. *Id.* at 13.

39. *See id.* at 6. A random survey of almost two thousand criminal defense practitioners, prosecutors, and judges in the state of Texas found that 48.3 percent of defense attorneys represent fewer indigent defendants as their careers progress. *Id.* at 5, 6. Note, however, that public defender administrators may require attorneys with a certain level of experience or training to occupy a position on the wheel.

40. *See, e.g.*, Stephen I. Singer, *Indigent Defense in New Orleans: Better Than Mere Recovery*, 33 HUM. RTS. 9, 9–10 (2006).

41. Experience does enter in to some extent if the courtroom assignment process conducts an assessment on the front end similar to that used in the wheel assignment process for public defenders.

targeted toward a specific purpose or, in some jurisdictions, even assessed.[42] Some agencies that incorporate a courtroom assignment system for distributing the attorney resource may assign attorneys of varying experience to a particular courtroom but do not necessarily distinguish between the skilled attorneys throughout the entire office.[43]

There has been a recent shift in the understanding of whether a courtroom assignment process provides meaningful representation under the Sixth Amendment.[44] This type of system encourages horizontal representation, where a client may receive counsel from different attorneys at various stages of the criminal proceedings. This differs from vertical representation, where a client has the same attorney throughout the process. There is also a tendency for certain courts to abuse courtroom assignment procedures, instead assigning their own preferred attorneys to particular cases in their courtrooms to circumvent the public defender administrator's assignment process.[45]

42. The administrator in a courtroom assignment process may make exceptions for cases involving particularly high punishments or media notoriety, such as death penalty or sex offense cases, but there is no clear guideline or requirement of the level of attorney skills or experience that is a prerequisite for general assignments. *See, e.g.*, Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 950–51 (2003) (discussing experience requirements for the appointment of counsel that are limiteed to death penalty cases); Lindsey C. Nash, *Considering the Scope of Advisal Duties Under Padilla*, 33 CARDOZO L. REV. 549, 550–51 (2011) (describing the specialized immigration information an attorney must provide to a non-citizen defendant).

43. For example, the Lake Charles Public Defenders uses various tracks to hire its attorneys. It hires attorneys that are responsible for certain types of cases, and requires a particular level of experience for those hires. It then assigns the attorneys to particular courtrooms, ensuring each courtroom has an attorney that can represent clients facing varying degrees of punishment. For detailed information, see the Bureau of Justice Assistance Criminal Courts Technical Assistance Project, *Review of Management and Organization of the Public Defender's Office in Calcasieu Parish (Lake Charles), Louisiana: Observations and Recommendations*, TA REPORT NO. 4-145 (2010); *see also* Jonathan Manning, *Public Defenders Office Losing Four Attorneys*, AM. PRESS (July 29, 2012, 8:30 PM), http://www.americanpress.com/Public-Defenders-Office-losing-four-attorneys [https://perma.cc/7Q6S-S8FC].

44. The American Bar Association has called such assignments into question to the extent that they encourage horizontal representation and prevent a client from receiving consistent, individualized care. *See* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-1.3 cmt. at 17, § 5-6.2 (3d ed. 1992) ("Another situation which may compromise the integrity of a relationship between attorney and client is the use of so-called 'horizontal' or 'stage' representation. . . . The practice of 'horizontal' representation is explicitly rejected in standard 5-6.2, and is implicitly rejected here as well.").

45. *See, e.g.*, Burnette v. Terrell, 905 N.E.2d 816, 827 (Ill. 2009) (providing that "[w]hen the public defender assigns several assistant public defenders to a particular courtroom, it is not a delegation of his authority to the judge who presides there to choose specific assistant public defenders to represent individual defendants" and that "[s]uch actions usurp the statutory authority of the public defender to hire and manage his staff").

2. Elevating Skill to Felonies

Some public defender agencies choose to be strategic about how they allocate their attorney experience resource. Instead of using a random allotment procedure, these agencies allocate attorney experience in a manner such that it is disproportionately dedicated to clients charged with felony offenses.[46] Some of the public defender institutions that operate under this type of distribution scheme hire and train new attorneys by starting their attorneys in misdemeanor court, based on the assumption that the lower statutory punishment renders the representation less risky.[47] This follows the general understanding that attorney mistakes in misdemeanor court can cost a client no more than one year of formal confinement whereas the same mistakes in felony court can lead to a substantially longer incarceration period. When these attorneys reach a level of experience that the office deems necessary for effective felony representation, they are then transferred to felony courtrooms or assignment processes.

In this second type of distribution scheme, misdemeanor courts can be relegated to a type of training ground for newer attorneys; they become stocked with inexperienced lawyers and void of senior attorneys with significantly developed practice skills. Some offices even leave clients charged with misdemeanor offenses to representation by attorneys with no formal training or legal experience. The Colorado State Public Defender, for example, allows newly hired attorneys to represent clients charged with misdemeanor offenses immediately upon hire and with no previous litigation experience, provided the new hire has completed an initial four-day intensive training within their office.[48] Other defender agencies require basic entry-level training and supervision of newer attorneys for an initial period of their employment.[49] Once the newer attorneys in these offices obtain experience, they are elevated to represent primarily, if not exclusively, clients charged with felony offenses. Regardless of whether a public defender institution adopts a model similar to the four-day intensive training that is required in Colorado or requires some other number of training days before its junior attorneys can assume responsibility of misdemeanor cases, these basic approaches to elevating experienced attorneys to felony offenses results in a

46. *See, e.g.*, ERNIE LEWIS & DAN GOYETTE, LA. PUB. DEF. BD., REPORT ON THE EVALUATION OF THE OFFICE OF THE ORLEANS PUBLIC DEFENDERS 31 (2012).

47. *See infra* Part II (discussing reasons why this assumption is incorrect).

48. *See Newly Hired Attorneys*, OFF. COLO. ST. PUB. DEFENDER, http://www.coloradodefenders.us/training/new-attorney-training-2 [https://perma.cc/F5MP-VDWV]. This does not include the experience obtained during law school clinics, internships, or externships that the defender organization may require or look favorably upon in its hiring decisions.

49. *See, e.g.*, LEWIS & GOYETTE, *supra* note 46, at 12.

system where the more inexperienced attorneys assume primary responsibility for the clients facing misdemeanor charges.

The Public Defender Service of the District of Columbia (PDS) provides another interesting example of this felony emphasis. PDS is widely accepted as a model indigent defense program.[50] PDS is a federally funded, independent legal organization founded in 1960[51]—three years before the Supreme Court in *Gideon v. Wainwright*[52] found that the Sixth Amendment guaranteed counsel to all poor defendants charged with federal offenses. The agency is authorized under federal statute to provide representation for up to 60 percent of the indigent defendants in its jurisdiction.[53] This office of highly trained, model attorneys handles only a limited number of misdemeanor cases, primarily those that began as felony offenses but were then reduced to misdemeanors through prosecutorial charging practices.[54] They also represent misdemeanor offenses that possess some other particularly unique characteristic such as juvenile sex offense cases that have major collateral consequences.[55] Even within this limitation to primarily felony offenses, the agency remains under-resourced and uses an elevation system in which staff attorneys in the trial division are assigned specific levels of cases based on experience.[56] PDS attorneys start by litigating juvenile delinquency matters, and then transition to the most serious adult offenses. This example again demonstrates the belief that experience should be distributed primarily to offenders at risk of incurring the harshest jail punishments.[57]

50. The Public Defender Service of the District of Columbia (PDS) was created to serve as a model to other public defender offices and is recognized as one of the few defender organizations in the nation that meets all of the standards outlined in the American Bar Association's Ten Principles of a Public Defender Delivery System. *See* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 26; *see also* THE PUB. DEFENDER SERV. FOR DIST. OF COLUMBIA, http://www.pdsdc.org [https://perma.cc/23Z2-49AH].

51. *See Mission & Purpose*, PUB. DEFENDER SERV. FOR D.C., http://www.pdsdc.org/about-us/mission-purpose [https://perma.cc/HW2R-BV6F]; *see also* AVIS E. BUCHANAN, PUB. DEFENDER SERV. FOR D.C., FISCAL YEAR 2016: CONGRESSIONAL BUDGET JUSTIFICATION 2 (2015) (highlighting the legal authority and mission of PDS).

52. 372 U.S. 335 (1963).

53. D.C. CODE § 2-1602(a)(2) (2001 & Supp. 2016) ("Not more than 60 per centum of the persons who are annually determined to be financially unable to obtain adequate representation and who are persons described in the above categories may be represented by the Service . . . ."); *see also* District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, tit. III, § 301, 84 Stat. 654.

54. PDS's authorizing statute permits PDS to represent "[p]ersons charged with an offense punishable by imprisonment for a term of 6 months, or more." D.C. CODE § 2-1602(a)(1)(A).

55. BUCHANAN, *supra* note 51, at 9 n.16.

56. *Id.* at 8.

57. Public defenders are not alone in leaving misdemeanor representation to the inexperienced. In many jurisdictions, misdemeanor cases are relegated to courts or dockets that have little of the procedural protections afforded to clients on felony dockets. Magistrates or commissioners who

B. Underlying Assumptions

Administrators of under-resourced public defender institutions likely rely on two assumptions to support their decisions to randomly distribute attorney experience or emphasize representation by more skilled attorneys to increasingly serious felony offenses. These assumptions are: (1) The harms associated with misdemeanor arrests or convictions are relatively minor in comparison to those related to felonies; and (2) while there is no significant benefit to emphasizing misdemeanor representation, felony emphasis can result in a larger net gain. These assumptions are rooted in a criminal justice history that considered misdemeanors petty offenses that risked little in terms of effect on a convicted offender's liberty or quality of life.[58] They also incorporate a dated understanding of the prevalence of trials, particularly jury trials, in criminal adjudications. In this Part, I address each assumption and its corresponding basis in detail.

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are not elected by popular vote or appointed through the governing channels required for judges that oversee felony courtrooms can adjudicate misdemeanor trials. *See, e.g.*, LA. DIST. CT. r. 3.2. (authorizing unelected magistrate commissioners to conduct trials for misdemeanor offenses). Misdemeanor cases are also subject to "rocket" dockets, in which court rules result in a quicker disposition for misdemeanor cases than felony cases. Jordan Smith, *Speed Bump on the Rocket Docket*, AUSTIN CHRON. (Feb. 22, 2013), http://www.austinchronicle.com/news/2013-02-22/speed-bump-on-the-rocket-docket [https://perma.cc/EJP5-DPWL]. Felonies are also subject to rocket dockets, but as is discussed in Part II.B.2 *infra*, they have more procedural protections from the errors that can result from a focus on speed, such as access to a more expansive appellate process. Although courts may not adjudicate misdemeanors in the same manner that they adjudicate felony offenses, public defender institutions must still consider how devaluation of misdemeanors with regard to the attorney experience resource implicates foundational goals. In addition, similar to the public defender lottery distribution scheme, some criminal courthouses, particularly smaller ones, adopt a lottery system for judicial assignment. *See, e.g.*, CUYAHOGA CTY. CT. r. 30.0, http://coc.cuyahogacounty.us/en-US/30-Assignment-Criminal-Cases.aspx [https://perma.cc/BM8P-CY2V]; *Case Assignment Systems for Superior Court of Liberty County*, LIBERTY COUNTY OFF. CLERK CTS. (Nov. 2007), http://www.libertyco.com/local/CaseAssignmentSystemOrder.html [https://perma.cc/9JY9-E3QH]. Under the lottery system, the only factor determining which judge receives a misdemeanor case is the timing of the arrest. By replicating the same disregard for misdemeanors that some courts may extend, public defender institutions actually harm themselves and their objectives by reducing the benefits they can provide to clients charged with misdemeanor offenses. These defenders fall into the same trap as the courts by developing attorney elevation schemes that rely on experience for advancement and adopting caseload-weighting guidelines that do not account for the expanded collateral consequences associated with misdemeanor convictions. *See infra* Part II.A.

58. In fact, the fundamental right to counsel for indigent persons was originally limited to clients charged with felony offenses. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that an indigent defendant is entitled to state-funded counsel when that individual is charged with a felony offense); *see also* Erica Hashimoto, *The Problem With Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1022 (2013) (detailing how the right to counsel in misdemeanor cases neither began nor ended with the Supreme Court's decision in *Gideon*).

Historically, the criminal process for misdemeanor offenses encouraged minimal protection because it placed an offender at little risk for formal confinement or significant socioeconomic consequences.[59] Public defenders were not assigned misdemeanor caseloads until almost a decade after the Court's finding in *Gideon*, and their responsibility to misdemeanor clients continues to be curtailed by subsequent court decisions.[60] Prior to the Supreme Court's 1972 decision in *Argersinger v. Hamlin*,[61] which provided counsel to indigent defendants charged with misdemeanor offenses, constitutional interpretation drew the line for the right to court-appointed counsel at the distinction between felony and misdemeanor offenses.[62] In fact, the right to counsel for juveniles in delinquency proceedings, regardless of the length of the potential punishment, was clarified five years before the right to counsel for adults charged with misdemeanor offenses.[63] This reflected the general notion that misdemeanor offenses did not carry harms as substantial as those attached to any juvenile offense or adult felony. In *Argersinger*, the Court noted that "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation."[64] Despite this assertion, the right to counsel is only afforded to those misdemeanor defendants who risk prison sentences.[65] Not all misdemeanors carry a significant formal punishment, and the Court seemed to reason that this variance should be the defining characteristic for evaluating the representative needs of the misdemeanor client.

The belief that trial practice, and in particular jury trial practice, was a significant feature of the criminal process also contributed to the felony dominance of public defender resources. Although the U.S. Constitution guarantees the right to a jury trial for all criminal prosecutions, the Supreme Court has held that the right does not exist for the vast majority of misdemeanors.[66] The result is

59. *See, e.g.*, Eve Brensike Primus, *Our Broken Misdemeanor Justice System: Its Problems and Some Potential Solutions*, 85 S. CAL. L. REV. POSTSCRIPT 80, 81 (2012) (detailing the ways judges perpetuate weak protection for misdemeanants).
60. *See* Young, *supra* note 5.
61. 407 U.S. 25 (1972).
62. John M. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 686 (1968) (providing a doctrinal analysis of why the Court's holding in *Gideon v. Wainwright* should extend to defendants charged with misdemeanor violations).
63. *Id.* at 691 (citing In re Gault, 387 U.S. 1 (1967)) (discussing the Court's finding regarding the right to counsel for juveniles).
64. *Argersinger*, 407 U.S. at 37 (quoting Baldwin v. New York, 399 U.S. 66, 73 (1970)).
65. *See id.*
66. Frank v. United States, 395 U.S. 147, 148 (1969) ("The Sixth Amendment to the Constitution gives defendants a right to a trial by jury in 'all criminal prosecutions.' . . . [But] so-called 'petty' offenses may be tried without a jury."); *see also* Colleen P. Murphy, *The Narrowing of the*

that jury trials are statutorily limited to adult felony offenses in many, if not most, jurisdictions.[67] Because the U.S. criminal justice system does not incorporate professional juries into the criminal process, some degree of success in jury trials depends on the knowledge and skill base of the attorney to effectively explain the rule and application of law to the jurors. Knowledgeable public defender administrators distribute their experienced attorney resource in recognition of the fact that jury trials are ripe for appellate error. The ineffective assistance of counsel claims that arise under *Strickland v. Washington*[68] are seemingly concentrated in felony representation.[69] Similarly, lawsuits challenging individual public defender practice have focused on felony court practice, particularly when they are seeking relief for past harms.[70] These administrative and appellate decisions contribute to the conception that the Sixth Amendment mandate for the effective assistance of counsel is paramount in the context of felony, rather than misdemeanor, representation. Thus, public defenders may understand their ability to avoid civil suits or individual claims against their fitness as members of the bar to depend primarily on the quality of representation they are able to provide to felony defendants alone.

The effect that longer prison sentences have on an individual offender also supports the assumption that a felony emphasis is more beneficial to the entire class of defendants that the public defender represents. Reentry programs have been a cause for concern for mainstream reformers in the recent past as states recognize they can no longer afford the community costs associated with "tough

Entitlement to Criminal Jury Trial, 1997 WIS. L. REV. 133 (discussing *Lewis v. United States*, 518 U.S. 322 (1996), in which the Supreme Court held that defendants charged with offenses that are punishable by no more than six months of incarceration are not entitled to a jury trial under the Sixth Amendment).

67. *See, e.g.*, T. Ward Frampton, Comment, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 205 (2012) (detailing the prevalence of jury trials in relation to bench trials in the criminal process). *See generally* Tina Chen, Comment, *The Sixth Amendment Right to a Jury Trial: Why Is It a Fundamental Right for Adults and Not Juveniles*, 28 J. JUV. L. 1 (2007) (detailing how the Sixth Amendment right to a jury trial does not extend to juvenile delinquency proceedings).

68. 466 U.S. 668 (1984) (establishing the standard for determining when a criminal defendant's Sixth Amendment right to counsel has been violated).

69. Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 693 (2007) ("Under the current system, only defendants sentenced to more than four or five years in prison have an incentive to challenge their convictions . . . .").

70. *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 434–46 (2009) (describing cases involving murder and robbery that were the basis for lawsuits seeking relief in Alabama and Virginia); *see also, e.g.*, State v. Peart, 621 So. 2d 780 (La. 1993) (concerning the Louisiana Supreme Court's acknowledgment that the Orleans Indigent Defender Program was unconstitutional for a defendant charged with robbery, rape, and first-degree murder).

on crime" law enforcement practices.[71] Ex-offenders generally "return to the communities they lived in—the communities where they committed their crimes—prior to incarceration."[72] Any time spent in jail disrupts their social networks, familial relationships, and financial stability. The longer the time spent away, the harder it can be to rebuild those relationships in a meaningful way.[73] Under this lens, it makes sense to view the prevention of long prison confinement as the most beneficial use of limited public defender resources and to dedicate the attorney experience resource toward those offenses risking the longest possible punishments.

* * *

The decision to randomly allot or direct the attorney experience resource to felony offenses instead of misdemeanor offenses reflects public defender administrators' understanding of how the Sixth Amendment applies to the costs associated with the different degrees of criminal conduct. It also comports with a general understanding about the impact ex-offenders have on reentering the communities they were a part of before the criminal act led to their separation. The Sixth Amendment right to the effective assistance of counsel, however, does not differentiate between misdemeanor convictions and felony convictions.[74] It affords all defendants facing potential incarceration the right to quality and competent lawyering.[75] Neither is reentry upon completing an assigned prison sentence the only consequence of a conviction that negatively affects the people that the public defender represents. In the following Part, I address how the evolved criminal justice system affects these underlying assumptions and how

71. Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POVERTY L.J. 1, 80 (2014).

72. Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 266 (2009) (citing NANCY G. LAVIGNE ET AL., URBAN INST., A PORTRAIT OF PRISONER REENTRY IN ILLINOIS 46, 51 (2003)).

73. *See infra* Part II.B.1 (providing a counterargument that even a small period of separation from one's community could have significant and long-lasting effects on a defendant's ability to reposition himself in his community).

74. Argersinger v. Hamlin, 407 U.S. 25, 30–31 (1972) (holding that the effective assistance of counsel is required for a fair criminal process even if the potential punishment is only six months and the accused is not entitled to a jury).

75. This right to counsel is limited, as discussed *supra* Part I.B., by the reach of *Argersinger* and its progeny. *See* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 979 (2012) (discussing the limitations of the right to counsel set forth in Supreme Court jurisprudence); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1127 (2013) (detailing why legal representation is not necessary in every public violation).

the evolution supports moving towards a misdemeanor emphasis for the attorney experience resource.

II. THE UNDER-APPRECIATED CONSEQUENCES OF MISDEMEANOR NEGLECT

Relegating inexperienced attorneys to misdemeanor offenses and reserving the experienced attorneys for felony offenses effectively bars skill and experience from misdemeanor practice. Similarly, elevation plans for experienced attorneys to move into felony courtrooms is a forced migration of expertise that continues the cycle of novice and sometimes ineffective representation in misdemeanor courtrooms. Even when the distribution is done randomly, the influence that attorney experience can have on both the client population and the public defender institution is limited and not able to reach its full potential for either class of defendants. As the following Part discusses, these approaches have detrimental consequences for misdemeanor clients because the mistakes of inexperienced attorneys are commonplace, can lead to a form of misdemeanor case processing that is void of procedural protections, and remain widely unaddressed and without remedy.

A. How Misdemeanor Clients Lose

Removing experienced attorneys from public defender misdemeanor practice has serious costs for the communities that public defenders represent and the laws they might help shape. The formal sentencing and collateral consequences that follow misdemeanor convictions devastate certain communities, particularly the minority communities that are suffering the higher burdens of an expanded police state.[76] The defense attorney serves as a significant screen against unlawful and unjust intrusion by the government into individual lives and collective living, or the ability to exist as part of a community.[77] This screening function, which is especially critical in poorer communities that carry very little political power, is stronger if it is accompanied by experience. It is common

76. *See* K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 272–74 (describing the impact of the "war on drugs," inflexible sentencing guidelines, three strikes sentencing laws, and other "tough on crime" legislation).

77. John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 296–303 (1980) (discussing the various screens of the defense attorney).

wisdom "that legal skill[] var[ies] [greatly] across individual[] [attorneys]" and that the degree of skill can have a significant impact on case outcomes.[78]

"[I]ndividuals perform better [at their assigned tasks] over time as they develop expertise" at navigating the specifics of the environment of their work.[79] An experienced attorney can much more easily identify patterns, develop new areas to pursue in certain types of litigation, and provide a more educated approach to addressing the particulars of a certain defense or charged offense.[80] Accordingly, empirical research shows that if a specific client or class of cases is assigned to experienced attorneys, then that client or class of cases can reasonably expect a better outcome.[81] Failing to direct the attorney experience resource to misdemeanor offenses allows these crimes to continue the large-scale damage to the marginalized communities that are served by the public defender institution. Direct and collateral consequences for the individual are only part of the narrative regarding the increasingly harsh impact of misdemeanor convictions.[82] Third parties are also affected by the quality of representation that indigent defendants receive. Family members, friends, and other citizens of the community that a particular defendant inhabits face far-reaching, derivative consequences from the particular defendant that can vary depending on the quality of representation that the related misdemeanor defendant receives.

78. Abrams & Yoon, *supra* note 19, at 1149.

79. *Id.* at 1158. Effort is undoubtedly an important part of case outcomes. An attorney's experience does not directly correlate with the amount of effort that attorney will contribute to a specific course of representation, but the experience can be extracted from case outcomes to determine a statistically significant effect.

80. *See* John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1293 (1994).

81. *See* Abrams & Yoon, *supra* note 19. It is important to note that this Article does not include a significant discussion of how prosecutors resource their misdemeanor caseloads. We might assume that prosecutors manage overwhelming caseloads in a manner similar to public defenders whereby they also dedicate their least experienced attorneys to misdemeanor practice. The balance of inexperienced attorneys in jurisdictions that operate in this manner does not absolve public defender clients from the harmful effects of misdemeanor neglect. Even if the inexperienced defenders are advocating against similarly inexperienced prosecutors, the misdemeanor clients are still not receiving the full complement of benefits, both in the courtroom and in the collateral arena, afforded by experienced defenders.

82. *See* Padilla v. Kentucky, 599 U.S. 356, 365 (2010) (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)). Prior to *Padilla*, effective assistance of counsel only required communication about the direct consequences of criminal convictions. *See id.* at 375–76 (Alito, J., concurring). The *Padilla* majority rejected that bright-line rule by stating: "We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." *Id.* at 365 (citation omitted). This finding supports the idea that some collateral consequences are so severe that they are a critical part of the punishments levied with convictions. *See* Danielle M. Lang, Note, Padilla v. Kentucky: *The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 961 (2012).

The consequences of minimizing misdemeanor convictions are serious and pervasive. The potential punishment for felony convictions may be larger when considering actual incarceration and probation or parole, but the collateral effects of misdemeanor convictions and the ability to use these minor convictions for more serious charges in the future make them no less important. The details of some of these consequences for the individual and larger community are outlined in the following Parts.

1. Direct Consequences for Individuals

As stated *supra* in Part I.A.2, a misdemeanor conviction carries a potential punishment of no more than one year in jail or prison.[83] These offenses are generally punished less severely than felony offenses, but in theory more severely than petty offenses and legal infractions.[84] Despite this foundational definition, a simple misdemeanor conviction can lead to a significant incarceration period for subsequent violations. For example, an offender's criminal history is part of the data that courts consider when determining bail amount, if any, before trial and formal sentencing.[85] That same record may also come into consideration when a judge renders a final sentence after a guilty plea or conviction after trial.[86] A judge is also permitted, and even encouraged, to consider an offender's previous involvement with the criminal justice system when given sentencing alternatives. This is the case regardless of whether those alternatives include incarceration, probation, or some type of ordered behavior by the defendant.[87] The same holds true when the judge has discretion to choose a particular period of punishment within a sentencing range upon conviction.[88]

83. *See* BORUCHOWITZ ET AL., *supra* note 9, at 11. As of 2001, all but sixteen states classified misdemeanors as offenses with a substantial fine or a maximum penalty of one year of incarceration. *See* Alabama v. Shelton, 535 U.S. 654, 668–69 & nn.7-10 (2002) (providing examples of states that provided counsel consistent with the *Argersinger* mandate for the effective assistance of counsel for misdemeanor offenses).

84. *See* Murphy, *supra* note 66, at 174.

85. Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail From Defense Attorneys' Perspectives*, 32 PACE L. REV. 800, 834 (2012); *see also, e.g.*, LA. CODE CRIM. PROC. ANN. art. 334 (2016) (detailing the proper considerations for determining bail).

86. Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. Rev. 1109, 1114–16 (2008).

87. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 51–53 (2011); Ralph Ruebner et al., *Shaking the Foundation of* Gideon*: A Critique of* Nichols *in Overruling* Baldasar v. Illinois, 25 HOFSTRA L. REV. 507, 538–39 (1996).

88. Hessick & Hessick, *supra* note 87, at 52.

There is relatively little data available on the amount or type of consequences that are imposed on clients convicted of misdemeanor offenses. Some states do not even collect data on low-level crimes, let alone report convictions to agencies for formal record keeping and evaluation.[89] The mere fact that misdemeanor offenses are criminal means the available direct consequences for convictions can range from a fine, to state supervision through probation, to physical confinement.[90] Although probation may prevent or delay formal incarceration, it can also impose serious limitations on an individual's freedom and liberty interests. Probation restricts with whom a person can associate, whom a person can contact, the freedom to travel, the ability to consume legal drugs such as alcohol, and even the right to practice certain hobbies such as hunting.[91]

Probationers are also subject to more intrusive searches and revocation of a suspended sentence without all of the fundamental rights associated with formal criminal proceedings.[92] Court monitoring programs that can also be part of probationary sentences dictate where the probationer must be at particular times, thereby affecting the individual's ability to seek and maintain certain types of employment or social activities.[93] Even inactive probation, in which a convicted defendant is not formally supervised by a correctional officer or required to attend court-mandated programs but instead must simply refrain from criminal activity, has a significant effect on an individual's freedom of movement.[94]

89. This is not necessarily the case for collateral consequences because employers, government agencies, and other organizations can ascertain whether there are any criminal convictions that place benefits or employment at risk. Johnathan J. Smith, *Banning the Box But Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 200–01 (2014).

90. *See* Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 682–83 (detailing the criteria that all judges can reasonably take into account when determining an appropriate punishment for a convicted offender); Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75 (2000) (detailing the use of probation as a sentencing tool in criminal matters and probation conditions); Aaron S. Book, Note, *Shame on You: An Analysis of Modern Shame Punishment as an Alternative to Incarceration*, 40 WM. & MARY L. REV. 653 (1999).

91. *See* Devon A. Corneal, Comment, *Limiting the Right to Procreate:* State v. Oakley *and the Need for Strict Scrutiny of Probation Conditions*, 33 SETON HALL L. REV. 447, 459–61 (2003) (discussing the need for probation conditions to be curbed in light of one's fundamental right to have children); Bowman, *supra* note 90, at 714 (arguing that judges should be permitted to consider individual characteristics in order to determine appropriate punishment).

92. *See* Tonja Jacobi et al., *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 905–39 (2014).

93. *See, e.g.*, *id.* at 926–28; *see also* Mark A.R. Kleiman, *Community Corrections as the Front Line in Crime Control*, 46 UCLA L. REV. 1909, 1918 (1999) (explaining that probation and parole departments have significant discretion over varying release conditions).

94. *See, e.g.*, Pamela R. Metzger, *Doing Katrina Time*, 81 TUL. L. REV. 1175, 1182 (2007) (detailing a defendant who was arrested for violating inactive probation).

The admonition to refrain from criminal activity or risk revocation places the same types of restrictions on the probationer's freedom. It also adds the responsibility of forecasting any events or behaviors that might be considered even slightly criminal by the court.[95] The various types of probationary periods and the restrictions they place on convicted defendants illustrate the serious effect misdemeanor convictions can have on an individual's life and should be subject to deeper consideration in public defender decisions about distributing limited resources.[96]

Certain misdemeanor convictions can also support charge enhancements to felony offenses. Habitual offender statutes may incorporate felony offenses more often than misdemeanor offenses, but it is not unheard of for multiple misdemeanor convictions to become felony charges when they implicate a particular social harm the legislature seeks to reduce. This occurs frequently with drug use or possession crimes.[97] Whereas an initial conviction for possession of a particular drug might be classified as a misdemeanor offense because it is punishable by less than one year of incarceration, a subsequent conviction for possession of the same drug might make the offender eligible for a felony charge. The Louisiana sentencing scheme for possession of marijuana provides one of the harshest examples. The first offense for simple possession of marijuana is a misdemeanor that is punishable by no more than six months of incarceration and a $500 fine.[98] Subsequent convictions for possession of marijuana can be charged as misdemeanors or multiple counts of marijuana possession at the discretion of

95. The probationer's status is available electronically for all law enforcement personnel. Thus, if the probationer were to be in a house or a vehicle that is the target of police surveillance, the contacting police officer could inform the court of the individual's presence even without any proof of criminal activity by the person.

96. It is true that probation periods for felony offenses are likely to be longer than those for misdemeanor offenses because the time assigned tends to track the prescribed statutory penalty available. Some jurisdictions allow courts to assign higher probationary periods than the misdemeanor offense allows, however. *See, e.g.*, State v. Wheeler, 688 S.E.2d 51 (N.C. Ct. App. 2010) (remanding case because defendant's twenty-four month probationary period for a misdemeanor was longer than the eighteen month period prescribed by statute and there was no court finding supporting the enhanced penalty). This finding was pursuant to N.C. GEN. STAT. ANN. § 15A-1343.2(d) (West 2016): "Unless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders sentenced under [Structured Sentencing] . . . shall be as follows: (1) For misdemeanants sentenced to community punishment, not less than six nor more than 18 months; (2) For misdemeanants sentenced to intermediate punishment, not less than twelve nor more than 24 months . . . ."; *see also* VA. CODE ANN. § 19.2-303.1 (2015) (allowing the court to suspend a sentence for a reasonable time without regard to the maximum potential sentence).

97. *See, e.g.*, Joel M. Schumm, Survey, *Recent Developments in Indiana Criminal Law and Procedure*, 36 IND. L. REV. 1004, 1019–20 (2003).

98. *See* LA. STAT. ANN. § 40:966(E) (rev. 2012 & Supp. 2016).

the prosecuting attorney.[99] Possession of marijuana charged as a third offense is classified by statute as a felony and carries a potential penalty of five years in prison.[100] Until recently, possession of marijuana charged as a fourth offense was a felony offense that subjected the offender to twenty years in prison.[101] The misdemeanor marijuana convictions that were considered minor or less complex than felonies could thus subject offenders to felony offenses that carried some of the highest prescribed penalties of the law. The ascribed punishments for these misdemeanor marijuana offenses are just one example of the ability of so-called minor misdemeanor convictions to lead to enhanced penalties for subsequent charges that are so significant that they can make a misdemeanor crime almost as punishing as any ordinary felony offense.

Misdemeanor convictions also receive less rigorous appellate review than felony convictions. This reality limits the type and quality of relief a misdemeanor client can obtain for ineffective assistance of counsel. Convicted defendants are only afforded the right to counsel for their initial appeal.[102] In most jurisdictions, the issues considered on appeal are limited to errors that appear on the face of the trial record, such as errors by the judge in rulings on the motions filed and objections by the counsel of record.[103] Although an appellate attorney could state a claim of ineffective assistance of counsel at this stage, there is little good such a claim can do for the appellant since the attorney is barred from presenting the appellate court with evidence of all the things the

99. *See* LA. CODE CRIM. PROC. ANN. art. 61 (2003). Article 61 provides the district attorney with "entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute." *Id.* Although this power is subject to the supervision of the state attorney general, this procedural rule allows prosecutors discretionary power to charge a particular marijuana offense as a marijuana multiple or as a marijuana first offense, regardless of how many prior marijuana convictions the defendant may have on his record.

100. *See* LA. STAT. ANN. § 40:966(E).

101. *See* Kevin Litten, *Bobby Jindal Signs Marijuana Reform Criminal Penalties, Medical Marijuana Access*, TIMES-PICAYUNE (June 29, 2015, 4:39 PM), http://www.nola.com/politics/index.ssf/2015/06/bobby_jindal_marijuana_laws.html [https://perma.cc/RH9J-GG9E] (reflecting changes in HB 149 and the governor's decision to sign legislation amending La. R.S. 40:966(E) and (F) which covered multiple convictions for marijuana possession).

102. *See* Roberts, *supra* note 10, at 337 (detailing the difficult appeals process for ineffective assistance of counsel claims in misdemeanor cases); *see also* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 43–48 (2013) (detailing Sixth Amendment jurisprudence on the right to counsel).

103. Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597, 606–07 (2011).

trial counsel failed to do during the initial stage of representation to support the appellate claim.[104]

Because direct appellate review does not provide a meaningful avenue for relief, misdemeanor clients usually have to look to habeas and post-conviction procedures for relief. Social and structural barriers make these claims extremely difficult.[105] The funding available for appellate advocacy is severely limited and is often reserved for clients facing more significant terms of incarceration than those imposed on misdemeanants.[106] Some jurisdictions provide that "only those defendants who are still in state custody after concluding [their] direct appellate review are permitted to file state post-conviction petitions."[107] In addition, the appellate process is a slow process that can take years to complete. Since misdemeanors, by their very nature, are limited to one year of imprisonment, it is difficult to imagine a scenario where a misdemeanor client will have the same opportunity to file a state post-conviction petition as a client convicted of a felony

104. *Id.* (explaining that a majority of jurisdictions limit the issues that can be raised on direct appeal to those that appear on the face of the record, thereby limiting ineffective assistance of counsel claims on direct appeal because additional information from off the record preparation is necessary to prevail).

105. Prevailing norms may affect how misdemeanors are reviewed on appeal. Despite their mandate to provide effective assistance of counsel for all indigent defendants, public defenders are also complicit with district attorneys and judges in the devaluing of misdemeanor convictions. *See* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1254 (1975). In many courtrooms, misdemeanor prosecution is routinized and it is not uncommon for a defense attorney to counsel a client to enter a guilty plea upon first meeting. *Id.* at 1191–92. Alschuler even went so far as to claim that a defender facing a high caseload may allow the guilty plea "to become his almost instinctive response to all but the most serious or exceptional cases." *Id.* at 1254. This problem, and various other problems caused by excessive caseloads, are outlined in 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 (1986).

106. Misdemeanor clients are used for civil rights claims aimed at improving funding for indigent defense but these actions are usually on behalf of a large group or are pursued before disposition of the actual court matter and not post-conviction. *See, e.g.*, Rodger Citron, Note, *(Un)*Luckey v. Miller*: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481 (1991) (discussing *Luckey v. Miller*, 929 F.2d 618 (11th Cir. 1991), in which attorneys initiated a class action in order to reform Georgia's deficient indigent defense system); Vidhya Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the* Gideon *Right to Counsel* (Wash. Univ. Sch. of Law, Working Paper No. 1279185, 2008), http://papers.ssrn.com/soI3/papers.cfm?abstract_id=1279185 [https://perma.cc/5W5N-C872] (detailing how post-conviction remedies failed to address systemic deficiencies of a state's indigent defense system, and made the need for prospective remedies more apparent). Mike Virtanen, *Report Details NY Indigent Defense Caseloads*, WASH. TIMES (Sept. 24, 2014), http://www.washingtontimes.com/news/2014/sep/24/report-details-ny-indigent-defense-caseloads [https://perma.cc/ST9V-UMAG] (describing a civil suit initiated by the New York Civil Liberties Union arguing that the state provides inadequate representation for indigent defendants, and therefore violates their Sixth Amendment rights).

107. Primus, *supra* note 103, at 607–08.

offense.[108] The combination of minimal appellate practice and representation by less experienced attorneys often leaves misdemeanor clients deprived of the right to effective assistance of counsel with no remedy.

2. Collateral Consequences for Individuals

The statutory penalties for misdemeanor convictions may be less than those for felony convictions, but the difference has shrunk considerably with the expansion of collateral consequences. The collateral consequences that follow misdemeanor convictions are often identical to those that attend felony convictions and undermine the argument that misdemeanor convictions lead only to minor punishments.[109] In many states, a misdemeanor sex crime can lead to mandatory sex offender registration.[110] A simple possession of marijuana misdemeanor conviction can lead to loss of eligibility for federal student loan assistance or citizenship.[111] Any low-level misdemeanor drug conviction can cause an individual and his or her entire family to be evicted from public housing, even if the individual who was convicted of the offense was not the leaseholder.[112]

108. This is true notwithstanding the stories of defendants spending months or years in jail awaiting disposition of their case. These delays occur pre-sentencing and are thus not implicated by the appellate process.

109. MARC MAUER, RACE TO INCARCERATE 56–68 (1999) (noting the effect of the "war on drugs" on increasingly harsh sentencing).

110. Roberts, *supra* note 10, at 289 (citing KAREN J. TERRY & JOHN S. FURLONG, SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION: A "MEGAN'S LAW" SOURCEBOOK (2d ed. 2006)).

111. *Id.* at 299, 298; *see, e.g.*, 8 U.S.C. § 1227(a)(2)(B)(i) (2012) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 [thirty] grams or less of marijuana, is deportable."); 20 U.S.C. § 1091(r)(1) (2012) (suspending student loan eligibility for varying time periods for any "student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance"); *see also* Anthony Lewis, *Abroad at Home; 'This Has Got Me in Some Kind of Whirlwind'*, N.Y. TIMES (Jan. 8, 2000), http://www.nytimes.com/2000/01/08/opinion/abroad-at-home-this-has-got-me-in-some-kind-of-whirlwind.html [https://perma.cc/8PK7-SSZF] (providing an example of how a simple misdemeanor can result in negative consequences other than loss of citizenship, such as deportation); Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?_r=0 [https://perma.cc/UUK8-6VB8] (highlighting the fact that the majority of the increase in deportations that occurred in the United States during the Bush and Obama administrations were a result of minor offenses such as traffic violations).

112. *See* 42 U.S.C. § 1437d(l)(6) (2012) (allowing for the eviction of a tenant in federal housing where any occupant is involved with "any drug-related criminal activity"); Roberts, *supra* note 10, at 299.

Misdemeanor convictions also have consequences for professional licensing and employment. They can prevent a person from working as a home health aide in New York, or working with the elderly or disabled populations in Texas.[113] These formal and explicit bars to employment are buttressed by the informal employer prejudice against job applicants with prior criminal records.[114] "Ban the box" movements that remove questions about prior criminal convictions from employment applications have risen in the last few decades but few jurisdictions have formally adopted this practice into their employment regulations.[115] According to one study of four major metropolitan areas in the 1990s, 62 percent of employers would probably not or definitely not hire an ex-offender.[116]

Social and professional bars are just a few of the added consequences that convicted offenders face at the conclusion of their court proceedings.[117] Prison confinement may be a primary legal and social concern for individuals charged with misdemeanor offenses, but the reality of the criminal justice system is that

113. Roberts, *supra* note 10, at 299.

114. *See* Smith, *supra* note 89, at 202; *see also* Binyamin Appelbaum, *Out of Trouble, But Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?_r=0 [https://perma.cc/TX8M-9NS3]. Technological advances make it easier than ever to access criminal records. In modern times, records that were once only accessible by physical visits to county courthouses have become easily obtainable online. *See* Roberts, *supra* note 10, at 287. This holds true even if a charge is dismissed because removing evidence of the arrest may require lengthy and expensive expungement proceedings. *See id.*

115. *See* Christina O'Connell, Note, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2804–20 (2015) (describing the history of ban-the-box statutes and differences between states that have adopted the statutes and those that have not); *see also* Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261, 281–83 (2014) (discussing "ban the box" initiatives to remove questions about past criminal convictions on employment applications as part of systemic anti-discrimination efforts). President Barack Obama recently instructed federal agencies to "ban the box" on applications for their hiring. Peter Baker, *Obama Takes Steps to Help Former Inmates Find Jobs and Homes*, N.Y. TIMES (Nov. 2, 2015), http://www.nytimes.com/2015/11/03/us/obama-prisoners-jobs-housing.html?_r=1 [https://perma.cc/Z7P8-BAUA] (detailing President Obama's executive order to "ban the box" on federal job applications).

116. Mullings, *supra* note 115, at 271 (citing Harry J. Holzer et al., *Can Employers Play a More Positive Role in Prisoner Reentry?* 2 (Urban Inst. Reentry Roundtable, Working Paper, 2002)). The proliferation of computer databases that connect all branches of the government in the public sector increase the severity of collateral consequences. *See* Gabriel J. Chin, *What Are Defense Lawyers For? Links Between Collateral Consequences and the Criminal Process*, 45 TEX. TECH L. REV. 151, 155 (2012).

117. The fines and fees associated with misdemeanor convictions have also risen considerably. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NAT'L PUB. RADIO (May 19, 2014), http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor [https://perma.cc/M96C-99ZS] (explaining that fees that were once lower or nonexistent now have a more significant effect on the nation's poor or indigent defendants). These fines and fees often become so exorbitant that they themselves become a barrier to economic advancement. *Id.*

confinement in a prison or jail is not the only, or even predominant, tool of punishment.[118] Collateral consequences provide significant effects that should be considered in evaluating the importance of misdemeanor representation.[119]

It is true that defendants charged with felony offenses often face similar collateral consequences for their arrests, incarceration periods, or convictions. Felony defendants are likewise saddled with collateral consequences that implicate their ability to live, work, or socialize as they choose.[120] The difference in scale for misdemeanor and felony arrests, however, suggests a larger prevalence of collateral consequences for misdemeanor defendants and thus a more significant impact on the public defender institution's client population. The number of individuals facing these side effects for misdemeanor offenses greatly outweighs those charged with felonies. This is particularly true if one considers the role that formal incarceration plays in removing certain collateral consequences from an agreed upon or assessed sentence.[121] Formal incarceration may prevent judges or prosecutors from levying certain collateral consequences upon a defendant. For example, if an offender is incarcerated, the court may remove the fines associated with the conviction, surmising that the individual cannot afford to pay those costs if he or she is incarcerated.[122] There is also no need to pay the fees associated with

118. In some New York jurisdictions, for example, prison or jail confinement is only assessed in approximately 12 percent of criminal dispositions. *See 2006–2010 Disposition of Adult Arrests*, N.Y. ST. DIVISION CRIM. JUST. SERVS. (reporting that during the representative period of 2006–2010, between 10.1 and 12.2 percent of those individuals arrested for misdemeanors were actually sentenced to prison or jail while another 0.5 to 0.6 percent were sentenced to a term of formal confinement in jail plus probation).

119. Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) ("Despite their innocuous name, for many convicted offenders . . . 'collateral' consequences 'are . . . the most persistent punishments that are inflicted for [their] crime.'. The collateral consequences associated with misdemeanor offenses also require neither formal incarceration nor conviction to have effect." (alteration in original) (quoting Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 51 FED. PROBATION 52 (1987))). *See generally* Jain, *supra* note 7, at 812–13 (discussing the lack of attention paid to the civil consequences of misdemeanor criminal convictions and arrests). Simply being arrested invites a potential offender into a management system where civil agents can regulate his activity. *Id.* These agents operate in the immigration, professional licensing, and education contexts that also exist post-conviction but allow for control ex ante or before the formal assessment of guilt by plea or conviction. *Id.*

120. Chin, *supra* note 116, at 155. The consequences of a felony conviction were a central issue in *Padilla v. Kentucky*, in which the Supreme Court found that the defendant's counsel was not "constitutionally competent" because the counsel failed to advise the client about the immigration consequences of his plea agreement. 559 U.S. 356, 360 (2010).

121. *See generally* Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695 (2001) (discussing plea bargaining and how it is used to circumvent collateral consequences in criminal matters).

122. *Id.* For a particularly blunt assessment of the ways that plea bargaining operates outside of ordinary legislative parameters defining punishment, see Frank H. Easterbrook, *Plea Bargaining as*

probation because the jail sentence removes the need for supervision by a probation officer. There may be fees associated with a parole officer if an offender is released from jail or prison before the completion of his sentence,[123] but the institution of those fees may be for a shorter period in consideration of the time the convicted offender spent in jail.

3. Collateral Effects for Third Parties

There are many stakeholders in the public defender institution. At the most basic level, the public defender goal is to provide effective assistance of counsel to indigent persons. The method for achieving that goal, however, relies on a much more nuanced approach to the provision of legal services that considers its effect on third parties.[124] Emerging views of the public defender suggest that the public defender should gain political and social support by actually reflecting the needs of the community she serves.[125] This could be achieved by becoming well-informed political actors who obtain adequate funding or by pursuing cases with an eye toward affecting the criminal justice process as a whole.[126] The latter requires a more comprehensive approach to public defender representation that is increasingly articulated in the literature and by public defender institutions that are implementing reform measures. It advocates representing the whole client and adopting more community-oriented models of public defender representation. It also recognizes that indigent defense agencies play a significant role in the defense of many poor communities in the battle against the hyper-criminalization of the justice system, and argues that these agencies have to reevaluate their purpose and redefine themselves as community improvement tools.[127]

Community members have begun to claim a position in the discourse concerning the criminal justice institutions that attempt to regulate or improve their environment. Volunteers assume roles on police oversight boards, neighborhood

Compromise, 101 YALE L.J. 1969, 1975 (1992) ("Plea bargaining is to the sentencing guidelines as black markets are to price controls.").

123. *See* Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1847–48 (2015). Fees are an important part of any prisoner's dilemma with regard to resicidsim rates. *See* Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prisoner Release*, 13 GEO. J. ON POVERTY L. & POL'Y 219, 226–29 (2006).

124. For purposes of this Article, third parties are defined as anyone other than the offender, the victim, and the general public. This term references the individuals, family members, friends, or potential employers who are uniquely and immediately affected by the experiences of the convicted offender.

125. *See* Mark H. Moore, *Alternative Strategies for Public Defenders and Assigned Counsel*, 29 N.Y.U. REV. L. & SOC. CHANGE 83, 99–106 (2004).

126. *Id.* at 100–01.

127. *See* Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 124 (2004).

watches, and court observation groups.[128] The grassroots movement called participatory defense aims to empower community members to be agents for change and force increased accountability and fairness in the criminal process.[129] Criminal justice institutions have responded in kind, developing processes to incorporate community needs more fully and directly.[130]

Creative public defender programs have expanded the notion of providing counsel to include considering third party effects. These notions recognize two approaches to meeting the Sixth Amendment mandate for the effective assistance of counsel. The first is a traditional model in which the defender focuses on the particulars of the individual client's charged offense. The second considers how the public defender can assume a role that potentially increases the client's ability to avoid future criminal conduct while also reducing the potential for criminal justice system involvement by other parties that may be related to or rely on the assigned defendant. This second approach suggests that the traditional model has given way to one that acknowledges the limitations of courtroom strategies for public defenders to achieve successful outcomes for their clients. Instead, problem-solving public defenders use the limited resources dedicated to the criminal justice system to help stabilize communities that would otherwise be destabilized by the recurring social ills or quality of life offenses that are the subject of law enforcement's focus.

Of particular note, third party interests have historically been considered to justify criminal law enforcement and provide context for sentencing decisions, such as by considering the impact of the crime on the victim or the victim's family.[131] Little attention has been paid to the role that punishment has on the experience of those individuals that possess familial, professional, or social ties to the

128. Taylor-Thompson, *supra* note 6, at 154–55.

129. *See generally* Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281 (2015) (detailing particular strategies of incorporating participatory defense in a given jurisdiction).

130. For example, law enforcement has added community policing, courts have established problem-solving courts, corrections authorities have developed reentry programs, and prosecutors have developed community prosecuting. Taylor-Thompson, *supra* note 6, at 155.

131. *See generally* Regina Austin, *Documentation, Documentary, and the Law: What Should Be Made of Victim Impact Videos?*, 31 CARDOZO L. REV. 979 (2010) (discussing the probative value of victim impact videos in the death penalty sentencing phase); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143 (1999) (detailing the negative outcomes of the rise of victim impact evidence); Alice Koskela, Comment, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157 (1997) (describing how the victims' rights movement has changed the criminal justice system).

defendant.[132] Public defender administrators should consider the effects their representation focus could have on these networks when deciding how to distribute limited resources. For example, social studies convey the very real costs that parental involvement in the criminal justice system has on children. These studies rely on the effects of formal incarceration but are applicable to the difficulties associated with collateral consequences for all defendants. The separation caused by incarceration is profound but the financial consequences also take an emotional toll on the child of an arrested or convicted offender.[133] Custody arrangements can be implicated by a parent's criminal status. Additionally, a community's ability to thrive economically may rest on the ability of its inhabitants to gain employment.[134] There is also the very real risk that the disruption in stability for a dependent child or spouse may facilitate or encourage the dependent's future involvement in the justice system.[135]

Longitudinal studies from the 1990s have spawned widely accepted theories about the risk factors for criminal offending. These theories consider individual factors such as low school achievement, familial factors such as parental neglect and parental criminal history, and environmental factors such as living in a high-delinquency neighborhood, as significant factors for future offending.[136] The

132. These effects have been taken into account in corporate prosecutions where decisionmakers consider the affect that punishment will have on the shareholders of a company. *See* Brown, *supra* note 13, at 1386–87; *cf.* Gregory N. Racz, Note, *Exploring Collateral Consequences:* Koon v. United States*, Third Party Harm, and Departures From Federal Sentencing Guidelines*, 72 N.Y.U. L. REV. 1462, 1472–76 (1997) (discussing the extent to which judges depart from federal sentencing guidelines to ensure justice for third parties that may be affected by the defendant's sentence).

133. *See* NEIL DAMRON, UNIV. OF WIS. INST. FOR RESEARCH ON POVERTY & MORGRIDGE CTR. FOR PUB. SERV., POVERTY FACT SHEET: LIFE BEYOND BARS: CHILDREN WITH AN INCARCERATED PARENT, https://morgridge.wisc.edu/documents/Factsheet7-Incarceration.pdf [https://perma.cc/BN75-7FTB]. *See generally* Tamar Lerer, *Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System*, 9 NW. J.L. & SOC. POL'Y 24 (2013) (arguing that the needs of the children of incarcerated offenders should be addressed by system stakeholders).

134. Lerer, *supra* note 133, at 34 (describing how incarceration inhibits access to legitimate work upon release, which in turn affects family formation and can lead to disruption of ties within a community); *see also* Velma LaPoint, *Prison's Effect on the African-American Community*, 34 HOWARD L.J. 537, 539 (1991).

135. *See* Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1012 (2001). Mass incarceration has significant effects on communities that are already historically marginalized. These communities often possess the characteristics of instability because there are higher levels of stress for parents, greater involvement in child welfare systems, and a depleted black workforce that could otherwise contribute to the public growth of the community or the private economy of employers. LaPointe, *supra* note 134, at 539.

136. *See generally* John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006) (providing predictive models of risk factors for violence).

prevalence of misdemeanor convictions and their associated collateral consequences implicate each of these risk factors and can be minimized if public defenders emphasized representing misdemeanor defendants in their client caseloads.

This point has been articulated both in legal scholarship and by policy-based organizations. Far from limiting its role as the guarantor of the fairness of specific criminal rules and dispositions, recent scholarship reimagines the indigent defender office as an office that interrupts power dynamics and social policies that target marginalized communities.[137] Even with funding as a significant barrier, this scholarship calls on public defender administrators to seek out various opportunities to improve the fairness and responsiveness of the criminal justice system at the institutional level.[138] For example, Kim Taylor-Thompson advocates for defenders to recognize that the lack of dichotomy between anti-crime and pro-accused individuals requires them to engage more with the communities that they serve.[139] Opening up the lines of communication between victims and defendants would help public defenders not only improve the results for their clients but also assume a role in preventing further need for their representative services. The scholarship also seeks to emphasize the public defender as a person of public value that not only protects liberty and justice but also pursues measures to reduce crime and increase community stability.

New York University's Brennan Center founded the Community-Oriented Defender Network to help advance these ideas. The Network tasks public defenders with engaging other community-based organizations to reduce contact between community members and the criminal justice system.[140] The Brennan Center developed the Ten Principles of Community Oriented Defense, the third of which recommends maintaining "a local presence in the communities we serve, and . . . form[ing] relationships with community members, community based organizations, and community institutions . . . to improve case and life outcomes for clients and to strengthen families and communities."[141] It is critical to the expanded role of the public defender to consider the effect that certain types of resource emphasis could have on third parties, particularly the defendant's family

137. *See, e.g.*, Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1076 (2013).
138. *See, e.g.*, *id.*
139. Taylor-Thompson, *supra* note 6, at 173 (describing the lines between victim and accused as permeable).
140. For more information about the New York University's Center for Justice, see Michael Waldman, *Introduction for the Brennan Center for Justice and Thomas Jorde Living Constitution: A Symposium on the Legacy of Justice William J. Brennan, Jr.*, 95 CALIF. L. REV. 2185 (2007).
141. BRENNAN CTR. FOR JUSTICE, TEN PRINCIPLES OF COMMUNITY ORIENTED DEFENSE 1, https://www.brennancenter.org/sites/default/files/legacy/Justice/COD%20Network/CODStatementofPrinciples.pdf [https://perma.cc/446J-6PEH].

members, friends, and professional stakeholders. This would help improve both the quality of individual representation by public defenders and the overall experience of the communities that the public defender institution serves.

B. Why Misdemeanors Should Dominate the Analysis

Misdemeanors serve as a key entry point to the criminal justice system.[142] Contrary to popular belief, many misdemeanor defendants are not young people in trouble for the first time, but rather adults who have had multiple interactions with the criminal courts.[143] One reason for this entanglement with the criminal justice system concerns the practical implications of criminal convictions. Misdemeanor offenses confer criminal records, and the penal and economic burdens that accompany those records, on offenders even for the most minor offenses.[144] The inability to obtain employment or develop strong and meaningful social relationships are risk factors that criminologists view as promoting increased criminal activity.[145] The public defender administrator's approach to misdemeanor offenses is an important metric for the institution's ability to achieve the updated vision of itself. If public defenders emphasized misdemeanor representation, they could prevent future engagement with the criminal justice system, thereby enabling them both to improve the experience of the clients they serve and to reduce the further need for indigent defense services and the resulting strain on their already limited resources.

Although some members of the public may have a negative view of the rights afforded to criminal defendants,[146] studies show that perceptions about the

142. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1370 (2012).

143. PREETI CHAUHAN ET AL., TRENDS IN MISDEMEANOR ARRESTS IN NEW YORK (2014), http://johnjay.jjay.cuny.edu/files/web_images/10_28_14_TOCFINAL.pdf [https://perma.cc/JE6U-FW9N].

144. Natapoff, *supra* note 142.

145. Monahan, *supra* note 136. Note that a leading theory advancing misdemeanor arrests and convictions, the Broken Windows theory, rests on the understanding that aggressive enforcement of minor misdemeanor laws can help reduce crime that is more serious. Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence From New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 272 (2006). It could, however, reasonably follow that broken windows policing actually exacerbates the problem that the theory seeks to address. By conferring criminal records on offenders for minor offenses, the system actually renders them more likely to engage in additional or more serious offenses because they are unable to obtain employment or maintain stable relationships in a manner that would reduce the likelihood of offending.

146. *See generally* Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317 (2010) (noting that judges appeal to voters by touting their administrative regulation of defendants).

pervasiveness of this belief are inflated.[147] There has also been a marked shift in the public's desire to ensure the criminal process is fair and efficient. The nation has responded strongly to the negative effects that mass incarceration has on American citizenry and safety.[148] Public defenders should similarly shift their understanding of what offenses are the most deserving of their sophisticated, yet limited, resources. These agencies should evaluate their priorities for effective punishment, their analysis of where their attorney experience resource can be most beneficial, and the possible scale of influence that a distribution system that emphasizes misdemeanors might have on its client population. I discuss each of these considerations in the following sections.

1. Priority for Eliminating Versus Reducing Punishment

In the past, formal incarceration was the primary vehicle by which the state infringed upon a criminal defendant's liberty. But the rapid expansion of the criminal code and increasing direct and collateral consequences for minor offenses have made such an understanding a relic of the past.[149] Drug laws and mandatory minimum sentences have led to more arrests, more convictions, and more plea agreements that have replaced the physical control of prison cell doors with the supervisory control of probation officers and limits on where a convicted defendant can live, work, or socialize.[150] By emphasizing felony convictions, the public defender institution has failed to grow along with the expanding criminal code and administrative state.

Notwithstanding a greater predilection for probation, the formal sentences that offenders face in the United States have ballooned in the modern age in comparison to both the country in the first half of the century and to its European

147. *See* BELDEN RUSSONELLO & STEWART, AMERICANS CONSIDER INDIGENT DEFENSE: ANALYSIS OF A NATIONAL STUDY OF PUBLIC OPINION 1, 1 (2002), http://www.sado.org/fees/Public%20Opinions%20on%20Indigent%20Defense.pdf [https://perma.cc/7S2E-J9SL]. Belden Russonello & Stewart's study sets forth that, although a majority of the general public presumes most criminal defendants are guilty, they acknowledge that defendants have important rights. *Id.* at 2. According to the surveys conducted, the general public supports each defendant receiving competent representation, which they define as lawyers with the resources necessary to defend their clients and a reasonable caseload. *Id.* at 3. Those surveyed also cited fairness and economic equity as persuasive reasons for devoting more resources to indigent defense. *Id.* at 4.

148. *See, e.g.*, Editorial, *End Mass Incarceration Now*, N.Y. TIMES (May 24, 2014), http://www.nytimes.com/2014/05/25/opinion/sunday/end-mass-incarceration-now.html [https://perma.cc/EQG4-FEMW].

149. *See* King, *supra* note 102, at 18 (noting that low-level, misdemeanor prosecutions have drastically increased in the last few decades).

150. *See* discussion *supra* Part II.A.2.

counterparts currently.[151] The excessive sentences prescribed by the legislature limit the potential gains any defense attorney can achieve through the plea-bargaining process. For example, if an offender faces a potential life sentence, any term of years can be considered a victory as it is less punishment than the offender could expect at trial.[152] The same is not true in the misdemeanor context. Felonies may plead down in charge bargaining—that is, a defendant can bargain for a reduced punishment or collateral consequences. Unlike in felony plea bargaining, it can be hard for a defendant to get a misdemeanor plea—and thus the complete removal of punishments—out of a felony charge because of the perceived severity of the underlying offense.[153] The goal in felony representation then becomes to reduce the punishment rather than to eliminate it.

For public defenders who adopt the more expansive approach to complying with the Sixth Amendment right to effective assistance of counsel, the goal should be to eliminate punishment where possible. Criminal convictions not only negatively influence an offender's social and professional opportunities, but also contribute to the individual's own understanding of their place in society. This phenomenon, sometimes called labeling theory, is a concern with misdemeanor convictions—even the Supreme Court has acknowledged the constitutionally cognizable stigma of misdemeanors.[154] The psychosocial influence of criminal justice involvement is not removed by simply lowering the potential punishment an offender faces or receives. Instead, public defenders must focus on eliminating aspects of that punishment. With the benefit of a more seasoned attorney's heightened experience, these goals are readily achievable for misdemeanor defendants.

2. Greater Utility for Attorney Experience

Although there may be a general aversion to using market terms to describe or evaluate public defender resources, the attorney experience resource seems to

151. *See* Joshua Kleinfield, *Two Cultures of Punishment*, 68 STAN. L. REV. 93, 937 (2016).

152. *See generally* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000) (detailing the history, purpose, and benefit of plea bargaining).

153. *See, e.g.*, Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9, 24–26 (2007) (providing the results of a North Carolina study that suggest prosecutors are less likely to engage in charge bargaining when it requires moving from a felony charge to a misdemeanor charge). As Professor Ingrid Eagly concluded in her Los Angeles study, "When the crime is more significant . . . a plea deviation is unlikely." Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1164 (2013).

154. *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003) (stating that even though the underlying Texas statute was only a minor misdemeanor it still implicated dignity interests that were unacceptable).

be a prime candidate for consideration under this economic lens.[155] In an ideal world, a public defender institution could provide all of its client population with the same level of attorney experience, or at least provide access to every client that desires a certain level of representation. Insufficient resources, however, have created a system in which only a particular subset of clients can have access to attorney experience.[156] Public defender turnover rates are extremely high in some jurisdictions, leaving a dearth of public defenders with experience.[157]

Although attorney experience is often in short supply, its benefits are clear. It is common sense that an experienced attorney can greatly affect the degree of success a particular litigant can have in their proceedings. Defendants who are represented by more experienced attorneys have a distinct advantage over defendants who are represented by less experienced attorneys.[158] A more experienced attorney can draw on a larger base of practical knowledge and rely on developed skills that can better or more persuasively present their client's defense. This reality is widely accepted. At least one study has shown that salaried public defenders have better client outcomes than appointed private lawyers, which confirms that one element that contributes to their success is their frequent experience with prosecutors.[159] Individual attorneys also reflect this understanding in the

155. Administrators of public defender institutions should consider attorney experience and attorney time separately when deciding how to allocate resources. Public defender administrators focus on time when allocating scarce resources or reviewing attorney caseload demands, but time is actually separate from skill. Administrators might use hours in the day to determine which attorneys can assume certain cases, providing fewer felony case assignments because of the assumption that felonies are more complex and thus more time consuming. Instead, this Article considers how skill should be distributed.

156. A defender office could focus on expanding the pool of attorneys with resources, but because funding for public defender institutions is a constant source of contention in legislative debates, this approach would likely be unsuccessful. *See* Editorial, *A Big Victory for Public Defense in New York*, N.Y. TIMES (June 24, 2016), http://www.nytimes.com/2016/06/24/opinion/a-big-victory-for-public-defense-in-new-york.html [https://perma.cc/DT8C-7RA6] (describing a budget solution for public defense in New York that came into effect only after successful litigation by the New York Civil Liberties Union).

157. Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. REV. 1057, 1114 (2015).

158. Paul J. Wahlbeck, *The Development of a Legal Rule: The Federal Common Law of Public Nuisance*, 32 LAW & SOC'Y REV. 613, 623 (1998). This author's conclusion refers to litigation in the civil context, and the author notes that the numbers may be affected because more experienced attorneys have more of a choice in which cases they seek to assume responsibility over, such that they may choose cases with a greater likelihood of success. *Id.* at 623–24 n.6. Nevertheless, the knowledge and critical reasoning skills necessary to determine whether a particular case is winnable drives at the very heart of what is valuable in the attorney experience resource. This same analysis is beneficial for public defenders who may be making assessments about their clients' chances at trial or the terms of plea offers.

159. *See generally* Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* (Nat'l Bureau of Econ. Research, Working Paper No. 13187, 2007), http://www.nber.org/papers/

professional context by pursuing government employment despite the lower compensation. These attorneys find government employment attractive because of the ability to gain the type of litigation experience that is valuable in the private market.[160] Similarly, private employers are willing to pay more for attorneys with experience, thereby suggesting a marketable characteristic of attorney experience.

The positive effect an experienced public defender can have on the representation of a particular defendant is also likely greater for misdemeanors than felonies. Jury trials are rare events in the criminal process because of their administrative costs and inconveniences. Our criminal justice system is instead a system of plea bargaining; the vast majority of cases, by some estimates more than 95 percent, are resolved through plea agreements.[161] The least complicated misdemeanor charges can provide a more significant capacity for creative and effective plea bargaining than even similarly situated felonies. Prosecutors may hold significant power in the plea bargaining that dominates our criminal justice system, but the public defender plays a critical role in determining the scope and scale of the ascribed punishment. The reality of a shorter period of incarceration allows for greater creativity and risk-taking enterprises than the larger potential jail terms associated with felony convictions. Both the defense attorney and the defendant know that the highest potential punishment for a misdemeanor offense is no more than a year in prison and may find that prescribed penalty an easier risk to assume than the decades of formal confinement attached to some felony offenses. This is particularly the case if the defendant has a more experienced attorney. The combination of less experience and the administrative approach to misdemeanor courtrooms likely has a chilling effect on a client's willingness to force the prosecution to prove their claims at trial. Misdemeanor processes are often routinized and there is a pervasive tendency to pursue quick disposal or shortcut plea-bargaining processes. If a defendant has a more skilled or experienced attorney representing him for those charges that he may already be more willing to take to trial, it could increase his view of trial as an acceptable option and have a positive effect on the quality of plea offers the prosecution extends.

Multiple offender statutes and their limitation to felony offenses also play a part in reducing the likelihood of proceeding to trial in felony cases. Although some misdemeanor convictions can lead to enhanced charges for the same future

w13187.pdf [https://perma.cc/4SDM-DP8H] (noting difference in client outcomes for institutional defenders and private attorneys appointed to indigent defendants).

160. Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 629 (2005).

161. Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 183 & n.1 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.46.2002 (2004)).

conduct, those offenses are limited and not as easily aggregated as felony offenses for multiple offender enhancements. If the risk of conviction for a misdemeanor does not necessarily increase the possibility that the offender may be eligible for the significant punishments prescribed to multiple offenders, then the defendant and his defense attorney may be more inclined to fully litigate their case. This tendency could also provide defendants with more bargaining power in plea arrangements. As a result, an experienced defender's ability to achieve better outcomes for clients, and her ability to capitalize on increased bargaining power misdemeanor clients have when negotiating plea agreements, enables public defender administrators to achieve the greatest utility out of the attorney experience resource by allocating it to misdemeanors.

3. Larger Effect by Volume on Client Population

The individualized perception of indigent defense is slowly eroding into one of a more community-oriented model. Some defender offices have taken to incorporating the community into their representation models by partnering with social service institutions and providing care for client family members during the representation period.[162] These are positive advances, but defender institutions have yet to incorporate the community's needs into their decisionmaking processes about how to distribute scarce resources.

Currently, public defender administrators use public defender triage—a term taken from the medical community that refers to prioritizing individual needs when there are insufficient resources.[163] Medical triage—and thus public defender triage—adopts the utilitarian theory that appropriate resource allocation

162. *See* Steinberg & Feige, *supra* note 127, at 131.

163. *See, e.g.*, Mitchell, *supra* note 77 at 299–302 (describing the criminal justice system as a "screening out system," aiming to prioritize human dignity and autonomy over a truth-seeking process). *See generally* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013) (discussing triage as the process of prioritizing some cases over others when resources are low). Public defender triage gets its name from medical triage, a systematized medical response in emergency scenarios that originated in World War I. Wounded soldiers were classified into three groups: (1) those that could be expected to live without medical care, (2) those that would likely die even with care, and (3) those who would survive if they received some care. *See* James F. Childress, *Triage in Neonatal Intensive Care: The Limitations of a Metaphor*, 69 VA. L. REV. 547, 550 (1983). Triage continues to be a formal part of medical practice. *See* Hadley Hamilton & Samuel D. Hodge, Jr., *A Look Behind the Closed Doors of the Emergency Room—A Medical/Legal Perspective*, 16 MICH. ST. U. J. MED. & L. 1, 8–10 (2011); Kenneth V. Iserson & John C. Moskop, *Triage in Medicine, Part I: Concept, History, and Types*, 49 ANNALS OF EMERGENCY MED. 275, 275 (2007).

is that which provides the most benefit to the most people.[164] But when public defenders direct their limited attorney resource to felony offenses instead of misdemeanor offenses, they are completing only half of the required analysis. That is, they are focusing on providing the greatest good to clients since the potential statutory punishments are significantly higher for felony convictions but overlooking the smaller number of clients that this practice benefits in comparison.[165] Instead, public defender administrators should consider the number of misdemeanor clients an individual attorney can effectively represent in comparison to felonies.

There is little proof that, by their very nature as felonies, felony offenses are more complex than misdemeanor offenses. National guidelines, however, do suggest that public defenders can reasonably and effectively represent 2.5 clients charged with misdemeanor offenses for each single client charged with a felony offense.[166] Public defender agencies that adopt caseload standards adopt standards that are consistent with these national guidelines.[167]

164. *See* Fazal Khan & Brian Lea, *Paging King Solomon: Towards Allowing Organ Donation From Anencephalic Infants*, 6 IND. HEALTH L. REV. 17, 22 (2009) (providing an example of medical triage where anencephalic children are kept alive in order to preserve their organs for transplantation, thereby producing the greatest good for the greatest number of people); *see also* Paul E. Kalb & David H. Miller, *Utilization Strategies for Intensive Care Units*, 261 J. AM. MED. ASS'N 2389, 2392 (1989) (detailing triage schemes for patients in need of intensive care). *See generally* J.S. Mill, *Utilitarianism*, *in* UTILITARIANISM AND OTHER ESSAYS 272 (Alan Ryan ed., 1987) (describing the general principles of utilitarianism). There is some debate over whether medical triage really incorporates a utilitarian approach, rather than an egalitarian approach, to resource distribution. *See, e.g.*, Robert Baker & Martin Strosberg, *Triage and Equality: An Historical Reassessment of Utilitarian Analyses of Triage*, 2 KENNEDY INST. ETHICS J. 103, 104 (1992) ("[C]halleng[ing] the standard utilitarian interpretation of triage, and attempt[ing] to demonstrate that in actual wartime and peacetime practice triage is an egalitarian mode of allocation . . . ."). This debate is beyond the scope of this Article and instead the framework presented relies on the utilitarian understanding.

165. *See generally* Jack W. Snyder, *Making Medical Spending Decisions: The Law, Ethics, and Economics of Rationing Mechanisms*, 19 J. LEGAL MED. 143 (1998) (reviewing MARK A. HALL, MAKING MEDICAL SPENDING DECISIONS: THE LAW, ETHICS, AND ECONOMICS OF RATIONING MECHANISMS (1997)) (detailing disagreement in the medical community about the appropriate distribution of limited resources).

166. A public defender can reasonably handle four hundred misdemeanor offenses, one hundred and fifty felony offenses, two hundred juvenile delinquency matters, two hundred mental health cases, or twenty-five appeals in a calendar year. NAT'L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 66 (2009) (citing NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS 276 (1973)). The National Advisory Commission on Criminal Justice Standards and Goals established these guidelines in a 1973 report. *Id.*

167. The caseload limits provided by the National Advisory Commission were adopted by the American Council of Chief Defenders, a section of the National Legal Aid and Defender Association that includes the heads of public defender programs throughout the United States, as

These guidelines were established in 1973, before the massive expansion of misdemeanor punishment and collateral consequences, so the difference might not be quite as significant. The potential punishment for misdemeanor convictions has grown in the last few decades.[168] Petty offenses that historically risked only a small fine or minimal jail time now place a convicted offender at risk of collateral consequences that limit access to public benefits, enhanced penalties for future violations, and the dignity concerns that result from being relegated to an underclass in American society.[169] Regardless of how small the distinction is between the complexity of misdemeanor and felony offenses, any variant suggests that the same unit of attorney experience can help more clients if dedicated to misdemeanor offenses instead of felony offenses.

Recent studies of statewide indigent defender programs conveyed that misdemeanor representation received substantially less time in terms of attorney hours than felony offenses.[170] These studies may reflect public defender office culture more than the amount of time that is actually required for effective representation of misdemeanor and felony offenses, but they provide an interesting tool for measurement. The Sixth Amendment is both a shield and a sword in terms of prescribing what level of representation is necessary to achieve a just result. Although deeper analysis may be required, this disparity in the amount of time

recently as 2007. *See* AM. COUNCIL OF CHIEF DEFS., AMERICAN COUNCIL OF CHIEF DEFENDERS STATEMENTS ON CASELOADS AND WORKLOADS 364, 364 (2007); *see also* State *ex rel.* Mo. Pub. Def. Comm'n v. Pratte, 298 S.W.3d 870, at app. A (Mo. 2009) (stating that no more than twelve non-capital homicides, one hundred and fifty felonies, four hundred misdemeanors, two hundred juvenile cases, or twenty-five appeals should be taken per lawyer per year); Nancy A. Goldberg, *Defender Systems of the Future: The New National Standards*, 12 AM. CRIM. L. REV. 709, 731, 736 (1975) (discussing national standards for maximum attorney caseloads).

168. *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 199–243 (1979) (describing the process as the punishment for the millions of people arrested for minor offenses).

169. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4–5 (2010) (detailing the underclass created by the rapid growth of the criminal justice system).

170. RUBIN BROWN, ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 5, 6 (2014). In this Missouri study, attorneys spent an average of 11.7 hours on each misdemeanor offense and from 25.0 to 47.6 hours for each felony offense that was not categorized as a sex offense or homicide. *Id.* at 6. Also of note, juvenile offenses assumed almost double the amount of time given to misdemeanors at 19.5 hours per charge, while probation violations received just a little less than misdemeanors at 9.8 hours. *Id.* In a Texas study, misdemeanors were disposed of in 4.7 to 7.6 hours of attorney representation while low-level felonies ranged from 10.8 to 12.9 hours. DOTTIE CARMICHAEL ET. AL., PUB. POLICY RESEARCH INST., GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION, at xv (2014). Second-degree felonies received 15.2 hours with the highest-level first-degree felonies assuming 22.3 hours of defender time. *Id.*

dedicated to felonies suggests that defense attorneys already build in the capacity to represent multiple misdemeanors for each felony offense in their ordinary practice.

Most public defender clients are charged with misdemeanor offenses. The exact number is hard to determine but in some jurisdictions, misdemeanor offenses comprise almost 80 percent of court dockets and a comparable proportion of public defender caseloads.[171] The smallest percentage of criminal cases on public defender dockets belong to clients facing the harshest statutory penalties, yet the most experienced attorneys are commonly reserved for representing clients charged with those offenses.[172]

If attorney experience is a valuable and limited resource, then public defender administrators should seek to adopt a utilitarian approach to agency and direct experience to the cases that comprise the vast majority of their dockets. That resource would provide a significant good for the greatest number of clients by improving the results of individual representation and the quality of practice in misdemeanor courtrooms.[173]

* * *

With a renewed understanding of the importance of misdemeanors, and the role these offenses ought to play in decisions about public defender resourcing, the next Part turns to concrete proposals for improving the administrative analysis. It describes how administrators should pursue classifying misdemeanor offenses and provides strategies for effectively allocating the insufficient attorney experience resource. The shift in strategy would encourage a more efficient public defender approach to fulfilling Sixth Amendment obligations.

171. This number comes from an analysis of eleven state courts in R. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010).

172. The higher-level offenses that occupy the most experienced attorney's docket in many public defender agencies, the homicide and rape offenses that carry substantial imprisonment as a potential punishment, constituted just 1.7 percent of the criminal court docket in the seventy-five largest urban counties in 2009. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, NCJ 243777, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009-STATISTICAL TABLES 3 tbl.1 (2013).

173. *See* Natapoff, *supra* note 142, at 1370–72 (suggesting that the lack of a robust indigent defense practice in misdemeanor practice contributes to a general loss of confidence in the system by clients). The impact on misdemeanor law and process would also be profound. Allocating experience to misdemeanor offenses may also assist in reducing the misdemeanor gateway effect for other clients and reducing the number of clients who would need felony representation at a later stage.

III. REDIRECTING ATTORNEY EXPERIENCE

The public defender has both a virtual monopoly on the limited attorney experience for indigent persons, and also a mandate to use that resource in the most efficient and effective manner possible.[174] Consequently, administrators must consider not only the constitutional and professional mandates guiding distribution policies, but also the costs and benefits for the communities they serve and the capacity for growth the public defender agency could embrace. Insufficient resources require public defender institutions to make trade-offs when it comes to assigning the attorney experience resource, but they are making those decisions using a rationale that is both outdated and inconsistent with the evolving criminal justice system. If administrators better understood the importance of misdemeanor offenses and adopted distribution schemes that considered the most beneficial arrangement, they would not only emphasize misdemeanor representation but also improve the overall quality of their practice.

This Article does not necessarily advocate for a mandatory misdemeanor emphasis. The American Bar Association's Ethics Opinion 06-441 requires a different prioritization when a public defender agency cannot provide effective assistance of counsel to all clients. In this instance, defenders and defender managers are required to decline whichever cases will enable it to more easily reach a manageable workload limit. If the agency simply seeks to reduce caseloads by raw numbers to comply with constitutional limits, it may prove less disruptive to dismiss misdemeanor cases before felonies.[175] Every public defender agency is part of a historical framework and community environment, however, for which particular offenses may be especially detrimental to its client population.[176] This reality could be taken into account even under the ABA-prescribed rubric.

174. *See e.g.*, Dru Stevenson, *Monopsony Problems With Court-Appointed Counsel*, 99 IOWA L. REV. 2273, 2276 (2014) (detailing the problems associated with the government being the sole purchaser for all indigent defense services).

175. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006) (providing guidelines for public defenders tasked with excessive caseloads). Empirical study is necessary to see what percentage of defender institutions may fall under the purview of the ABA's Ethics Opinion, but the analysis remains helpful even for those institutions.

176. One could imagine a jurisdiction where the distribution and production of felony-level drugs such as methamphetamine or heroin are the offenses that allow for the most influence by experienced attorneys and the largest effect on the communities that are served by the public defender institution. *See, e.g.*, Brian A. Loendorf, *Methamphetamine Offender Registries: Are the Rights of Non-Dangerous Offenders Cooked?*, 17 KAN. J.L. & PUB. POL'Y 542 (2008) (discussing the concerns that regionally imposed methamphetamine offender registries raise, which may lead to a prioritization of these cases among public defenders); Patricia Stanley, Comment, *The Combat Methamphetamine Epidemic Act: New Protection or New Intrusion?*, 39 TEX. TECH L. REV. 379 (2007) (discussing the increased resources directed to prosecuting cases involving

An ameliorative framework can be easily attached to the distribution framework to correct any mistaken allocations. But prioritizing felony offenses in a blanket, all-encompassing manner simply because the potential incarceration period is longer than that available for misdemeanors is far too crude a solution to the resource sufficiency problems public defenders face. Misdemeanors can no longer be relegated to a second-class citizen status of the criminal justice system.

There is nothing out of the ordinary about agencies allocating rights or resources per standards developed internally and that are consistent with professional or legal obligations. State governments allocate public benefits or access to state resources in a variety of areas, including education, housing, and healthcare. These allocation decisions focus on efficiently maximizing benefits and limiting costs while distributing resources in an equitable and just manner.[177] Efficiency and equity can coincide and indeed are often the joint goals of government agencies tasked with distributing limited resources.[178] This Part outlines some of the ways that public defender agencies can think about their decisions to improve the misdemeanor representation and make it more consistent with their overall objective of providing effective assistance of counsel to indigent persons.

A. A Classification Scheme for Misdemeanor Offenses

Institutional design, primarily used in the administrative law context, involves agencies or distribution processes that shape resource distribution to achieve certain objectives or prevent certain departures from widely desired norms.[179] Designing is a deliberate and purposeful process, not something that occurs serendipitously. Approaching the delivery of indigent defense services through an

methamphetamine); Dillon J. Steadman, Comment, *Cleaning Up Someone Else's Meth: Seeking Protection for Innocent Homebuyers Outside of Property Law*, 3 ARIZ. J. ENVTL. L. & POL'Y 1047 (2013) (describing the community costs of methamphetamine production and the limitations on homeowners who seek redress). In such a jurisdiction, the prescribed framework would still apply but may indicate that this particular subset of felonies should become the emphasis of the public defender attorney experience despite the costs to representation for other offenses.

177. *See generally* Dan W. Brock & Daniel Wikler, *Ethical Issues in Resource Allocation, Research, and New Product Development*, *in* DISEASE CONTROL PRIORITIES IN DEVELOPING COUNTRIES 259 (Dean T. Jamison et al. eds., 2d ed. 2006) (addressing ethical concerns that arise when medical resources are scarce and demand for treatment is high).

178. *Id* at 262–63. This is particularly the case when the limited resource is fundamental to life as it is with medical care and the resources that contribute to health and personal well-being. Public defender agencies must similarly find strategic ways to distribute insufficient resources that are necessary for life and liberty and, as a result, share more than a passing resemblance to the allocation decisions present in medical care.

179. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons From Administrative Law*, 61 STAN. L. REV. 869, 921(2009) ("Administrative law has long used institutional design to control the abuse of discretion in agencies.").

institutional design lens could reposition the role that public defender institutions play in a fair criminal justice system, using the macro-level allocation decisions to initiate a positive micro-level impact. Institutional design is concerned with evaluating and improving the internal performance of a given institution and its external interaction with other institutions, collectives, or individuals.[180] It is, in essence, a process of identifying the purposes of an institution and then designing the application of the issues that are central to that institution.[181] Resource allocation is a pivotal decision for any institution, particularly where those resources are scarce.

From an institutional design lens, the crucial first step for redirecting attorney experience to a more beneficial path is to acknowledge the importance of at least a subset of misdemeanors. As discussed *supra*, in Part II.B.3, the majority of cases adjudicated in criminal courts and on public defender dockets are misdemeanor offenses. This proportion suggests that the greatest good for the greatest number of people is achieved through a misdemeanor emphasis instead of a felony one. Within any community, there will be at least one group of offenses (most likely misdemeanors) that dominates the community arrest and conviction rates. An enterprising public defender administration should use data to determine which offenses dominate arrest and conviction rates and focus their attorney experience resource on fully litigating and improving representation for clients facing those charges.

The focus on misdemeanors may aid in felony representation by preserving the resources necessary to provide felony clients with the effective assistance of counsel, including by reducing the incidence of burnout, which is a substantial concern for defender agencies.[182] If implemented properly, a misdemeanor

180. *See generally* Mitchell Pearsall Reich, *Incomplete Designs*, 94 TEX. L. REV. 807 (2016) (exploring the parameters of institutional design and concluding that the mechanisms for design has an inherent fallibility in that it relies on the autonomy of the institution to make the necessary decisions in any selected design).

181. *See id.*

182. Burnout is a type of resource fatigue where an attorney suffers an eroding sense of confidence in and commitment to high-caliber defense representation. *See* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240–41 (1993). Burnout is characterized by chronic exhaustion, cynicism, and feeling increasingly ineffective at work. CHRISTINA MASLACH & MICHAEL P. LEITER, THE TRUTH ABOUT BURNOUT: HOW ORGANIZATIONS CAUSE PERSONAL STRESS AND WHAT TO DO ABOUT IT 17–18 (1997); *see also* Christina Maslach & Michael P. Leiter, *Stress and Burnout: The Critical Research*, *in* HANDBOOK OF STRESS MEDICINE AND HEALTH 155 (Cary L. Cooper ed., 2d ed. 2004) (defining burnout and its relation to various stressors). The impact burnout can have extends beyond simply personal health or mental issues for the individual attorney and can have a significant effect on the representation of an individual client and the public defender agency's ability to meet its organizational goals. An attorney suffering from burnout may provide subpar

emphasis could help reduce the incidence of burnout. Burnout often results from not feeling like one is making any change or improvement to the community she serves through her work.[183] The constant recidivism and secondary trauma that comes with experiencing the same types of offenses, caused by the same difficult backgrounds or environments, and committed by the same people can make any individual—particularly a professional who may have sought to improve the experience of poor people—to feel as if the work is pointless.[184] While a misdemeanor emphasis requiring defenders to accept misdemeanor caseloads for the entirety of the career could increase burnout, better education about the positive impact on the community that misdemeanor emphasis achieves could help combat this issue. In addition, community-oriented defenders and other holistic advocacy groups have seen success in the communities where they have dedicated resources for a singular purpose. If a public defender agency adopts one consequence or group of consequences from misdemeanor convictions as its goal for improvement, then these defenders may avoid the sense of futility that leads to burnout by conveying the positive changes its actions have made in the community it serves. For instance, a public defender agency might announce a renewed emphasis on reducing the community harms associated with drug possession to underscore its decision to direct attorney experience resources toward this end.

It is possible for public defender agencies to adopt goals that are unique to each community despite the state's power to exercise control over a public defender institution through funding streams or executive authority. Indigent defense is considered a state responsibility, so every state should provide some portion of funding for local- or county-based indigent defense. Fewer states assume management or authority over indigent defense through either a regulatory agency or executive guidelines.[185] For example, Louisiana only adopted state

representation for a client or may fail to extend the type of focused representation that is indicative of creative and innovative lawyering. Burnt out attorneys may choose to leave indigent defense work at a much higher rate than accounted for by the organization thus depriving the agency of the benefits of its initial investment into training and developing its staff.

183. *See* Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1204–07 (2004).

184. *See* Andrew P. Levin et al., *Secondary Traumatic Stress in Attorneys and Their Administrative Support Staff Working With Trauma-Exposed Clients*, 199 J. NERVOUS & MENTAL DISEASE 946, 953 (2011) (finding through a study of attorneys and support staff at the Wisconsin State Public Defender Office that attorneys exposed to clients' traumatic experiences are significantly more distressed than other staff, exhibiting signs of PTSD, depression, and functional impairment, among other health concerns).

185. For a clear breakdown of how each state provides defense services to its indigent population, visit the Sixth Amendment Center's website. *State Indigent Defense Systems*, SIXTH AMEND. CTR., http://sixthamendment.org/the-right-to-counsel/state-indigent-defense-systems [https://perma.cc/3WE7-8WVT].

executive authority in 2007 after Act 307 created the Louisiana Public Defender Board.[186] This Board is comprised of sixteen members and promulgates guidelines and standards for the forty-two public defender providers in the state.[187] Its executive power is exercised through a state agency run by a state public defender and his support staff. Although this state agency may dictate certain policies and procedures for the delivery of defense services in the entire state, individual jurisdictions are able to adopt separate practices that are both beneficial to the communities they serve and consistent with the rules set forth by the Board. Thus, a public defender institution may be controlled at the state level through funding or executive oversight and still maintain sufficient autonomy to make resourcing decisions that comply with its community's needs.

B. Strategies for Effective Allocation

1. Adopt Targeted Allocation Rules

Current popular distribution schemes for the attorney experience resource contribute to the representative process in which misdemeanor offenses and clients are improperly neglected. Random allocation, whether through wheel or courtroom assignment, is certainly easier on public defender administrators in the short term because it requires little effort, but it has significant costs in the long term. Random allocation may allow clients charged with misdemeanor offenses to access experienced attorneys, but it also undermines the effect that a more targeted distribution would have on the client and the larger community. A lottery system for the attorney experience resource fails to adequately value public defender experience and allocate the resource where it can be the most beneficial. Attorney experience is a valuable commodity that public defender administrators should use to their advantage, advancing the resource in favor of accomplishing the institution's goals more effectively and efficiently. If the public defender institution develops a normative goal of reducing the need for its services by improving the stability of the community it serves, then it should target its valuable

186. H.B. 436, 2007 Leg., Reg. Sess. (La. 2007).

187. *Id.*; D. Majeeda Snead, *Will Act 307 Help Louisiana Deliver Indigent Defender Services in Accordance With the 6th Amendment Right to Counsel Mandate*, 9 LOY. J. PUB. INT. L. 155, 172–76 (2008) (discussing the failures of Louisiana's public defender system prior to the passage of Act 307, including the inability to provide adequate legal representation for decades because of a lack of funding and overworked attorneys); Austin N. Priddy, Comment, *Rethinking Indigent Defense in Louisiana: How Speedy Trial Claims Can Actualize the Constitutional Right to Counsel Funded by the States*, 89 TUL. L. REV. 491, 499–500 (2014) (suggesting that Louisiana's ongoing failure to provide adequate indigent defense can be remedied through judicial enforcement of the constitutional right to a speedy trial).

resources toward activities that would advance that objective. Similarly, if the institution adopts a goal of providing holistic advocacy for each client, then it should adopt a distribution scheme that could effectuate this objective for a larger class of defendants.

Without a systematic rule guiding distribution of limited resources, mistaken behaviors can dominate the public defender organization's practice even if the rule does not encourage the action. A missing (or simply random) rule allows attorney experience to advance causes that the public defender may not deem important or may not even be constitutionally required to fulfill.[188] The right to a public defender does not exist for every potential criminal charge possible. Instead, it is available for indigent defendants who receive a punishment that includes a formal restriction on their liberty. A non-discriminatory distribution practice that does not rely on any allocation rule creates a favorable environment for wasted public defender effort. An attorney assigned to represent every matter in a single courtroom may represent clients that are not necessarily eligible for defense representation.[189]

There is also a legitimacy concern for institutions that distribute resources without any intentional rules. Legitimacy is a quality that an institution possesses that makes others accept its decisions and feel obligated to follow its directives.[190] Legitimacy can also be considered an institutional resource as it facilitates the actions taken by the institution with the support it needs to fulfill its objectives.[191] Public defenders can derive legitimacy from procedural justice—that is, the idea

188. In *Alabama v. Shelton*, the Supreme Court extended the right to counsel delineated in *Argersinger* and *Scott* to cases in which the defendant faces even the possibility of jail time. 535 U.S. 654, 674 (2002). If jail time is not a possibility then the client is not entitled to public defender representation. *Id.* at 661–62. Enterprising defenders may consider commissioning studies of which cases usually result in only fines or fees and no actual incarceration. These studies could help the public defender institution choose which cases receive limited resources and deal with any errors by requesting relief on the back end. These defenders could also coordinate with prosecutors or judges to only seek certain non-incarceration punishments for certain offenses that frequently result in only fines or fees.

189. This is particularly the case because of how quickly plea agreements occur in many courtrooms. It is not uncommon for an individual to receive a citation or be released from jail after a brief period, arrive in court for his or her initial arraignment, and enter a guilty plea that includes only a fine. *See, e.g.*, Erin A. Conway, Comment, *Ineffective Assistance of Counsel: How Illinois Has Used the "Prejudice" Prong of* Strickland *to Lower the Floor on Performance When Defendants Plead Guilty*, 105 NW. U. L. REV. 1707, 1711 (2011) (highlighting that the vast majority of defendants in criminal court plead guilty in an effort on the attorney's part to expedite the process, given the shortage of resources).

190. TOM R. TYLER, PSYCHOLOGY AND THE DESIGN OF LEGAL INSTITUTIONS 22–23 (2007). Legitimacy allows otherwise self-interested persons to suspend their personal considerations because they believe the authority is entitled to determine the appropriate behavior or actions in a given environment.

191. *See id.* at 24.

of fairness in the processes they use. Procedural justice is characterized by both high-quality decisionmaking and people's treatment by organizational authorities.[192] Organizational rules assume a significant role in perceptions about the quality of the decisions and the way clients are treated. If there is no rule, observers may view the game of chance as disrespectful to the very real liberty costs of the criminal process. Losing the legitimacy that comes with viewing public defender processes as just potentially deprives the public defender institution of additional resources or support in gaining more resources. The lack of a formal rule also prevents the development of an ameliorative framework that could correct any problematic distribution patterns that inhibit the public defender's ability to gain this type of value from its resources. In contrast, a formal allocation rule, if meaningfully and accurately developed and applied fairly, supports the authority of the public defender institution and may make its workload easier and more justifiable.[193]

2. Direct Attorney Experience Towards Misdemeanors

The elevation scheme in which attorney experience is directed disproportionately to felony offenses also limits the potential benefits of the attorney experience resource. The decision to emphasize felony representation is seemingly in conflict with the general utilitarian use of resources to help the most people. Misdemeanor prosecutions occupy a more substantial portion of public defender caseloads than felony prosecutions. Reliable data is difficult to find, but according to one study there were just under ten million misdemeanor cases filed in state courts nationwide in 2001, compared with only 2.5 million felony cases.[194] Another study indicates that there are at least four times as many misdemeanors filed each year in state courts than felonies.[195] Regardless of the precise ratio,

192. *Id.* at 40–41.

193. This is especially true when considering the lack of respect that currently plagues public defender institutions. Rodney Thaxton, *Professionalism and Life in the Trenches: The Case of the Public Defender*, 8 ST. THOMAS L. REV. 185, 185–95 (1995) (discussing the public view of public defenders as "people who, at best, are not good enough to be 'real lawyers'" and blaming overwhelming caseloads for this inaccurate perception).

194. Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 480 (2007). The individual path of criminal court filings is unclear as many offenses risk only a fine and not formal defense representation, or may be dismissed pending further investigation. The fact that the United States claims approximately 5 percent of the world's population but 25 percent of the world's prison inmates does suggest, however, that a significant number of these individuals litigate their arrests in criminal courts. MARC MAURER, RACE TO INCARCERATE 17–29 (1999).

195. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1063 (2015) (citing COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS 38 (Brian Ostrom et al. eds., 2003) (citing a 2003 study of forty-six states that showed 2.3 million felony cases were

when public defender administrators emphasize felony representation at the expense of misdemeanor representation, they actually choose to benefit the few over the many. If public defender caseloads are 80 percent misdemeanors and only 20 percent felonies, then an enterprising administrator should use its resources to advantage the larger portion of its client population.

The shift could also reflect changing priorities for the public defender institution that are more in concert with the evolving criminal justice system. It would prioritize eliminating certain punishments over simply reducing the scale of punishment, allow the attorney experience resource its greatest utility, and would affect a larger group of individuals. Misdemeanor emphasis does not necessarily require or lead to felony neglect. Felony offenses would still receive the constitutionally required effective assistance of counsel, as well as the appellate relief afforded it through the unique circumstances of felony convictions. Changing public defender distribution schemes in ways that would direct the attorney experience resource more towards misdemeanor offenses would simply place misdemeanors at a level of representation that is closer to felonies. Misdemeanors do not receive the same level of redress on appeal as felonies and the focused attention on the front end of the representation process could offset the lack of potential relief on the back end.

3. Reduce Automatic Misdemeanor Migration

One way to accomplish this objective is to refrain from removing public defenders from misdemeanor representation once they achieve a certain level of experience. For some public defender offices, misdemeanor courts are treated like training grounds for newer attorneys. New attorneys practice in misdemeanor courtrooms for a prescribed time and then graduate to felony courtrooms.[196] If public defender administrators stopped the automatic misdemeanor migration to felony court, they would encourage misdemeanor value by promoting continuous involvement and expertise in misdemeanor courts. This could involve allowing

filed compared to 10 million misdemeanor cases)). This Article also included a 2012 study that found 1.9 million felony filings in thirty-four states. *Id.* (citing R. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2012 STATE TRIAL COURT CASELOADS 13 (2014)).

196. This tends to happen in public defender offices that hire classes of attorneys more often than not. Some public defender offices start a new class of attorneys in the fall of a given a year and assign those attorneys to misdemeanor courtrooms for at least a year, although the assignment could be longer or shorter depending on the overall needs of the office in felony courtrooms. Only then do the offices assign these attorneys felony caseloads. *See, e.g.*, *Attorney Positions: Applying for an Entry Level Attorney Position*, OFF. COLORADO DEFENDER, http://www.coloradodefenders.us/jobs/attorney-positions/.

or encouraging public defenders to remain in misdemeanor court, requiring all public defenders to maintain a misdemeanor caseload, or even providing greater pay for those defenders who remain in misdemeanor courtrooms for the bulk of their career. Some defenders may operate with an understanding that they are only advancing in their careers if they represent clients charged with offenses that warrant the most extensive incarceration penalties, but it will be up to the public defender institution to recruit those attorneys who do not operate under that understanding. The administrators would also need to change office policies, such as lower caseloads and higher pay, that foster the view that felony offenses are more complex or more important than misdemeanor offenses. Misdemeanor offenses are at greater risk for the assembly-line justice that permeates overwhelmed and underfunded criminal justice systems. Best practices, whether they are adequate investigation or motions practices, can fall by the wayside as misdemeanor prosecution and representation become routinized.[197] Defender administrators would need to change the culture of both their office and the district court in which they operate in order to fully implement the changes they seek.

4. Reform Attorney Supervisor Programs

Public defender administrators often exemplify inadequate distribution rules for attorney experience by acknowledging that experience is important for misdemeanor representation but failing to fully commit to this approach. For example, institutional leaders may require senior attorneys to supervise less experienced attorneys in misdemeanor court.[198] Having supervisors assist junior attorneys in misdemeanor courts provides those clients with some of the benefits of the attorney

197. *See* Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 55–56 (1991) (critiquing the erosion of defendants' constitutional right to counsel in the interest of expediency); Maria C. Pena, Comment, *Sixth Amendment Right to Counsel: Broaden the Scope, Decriminalize, and Ensure Indigents a Fair Chance in Court and in Life*, 25 ST. THOMAS L. REV. 373, 393–94 (2013) (calling for the extension of the Sixth Amendment right to counsel to all criminal prosecutions); *see also* Young, *supra* note 5, at 706 (arguing that the Sixth Amendment must apply to all criminal proceedings where imprisonment is an authorized penalty). These could be characterized by such practices as combining motions to exclude with trial testimony and encouraging representation by only one attorney instead of two at trial.

198. *See* Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 317–21 (2004) (discussing the selection process for defense attorneys accepting cases in Massachusetts). It is important to note that not all supervisors will have the skills or training necessary for effective supervision skills. Supervision skills are different from the litigation skills that a defender must develop, and agencies often fail to implement formal management programs. Some public defender agencies require new supervisors to attend formal management training by private contractors or the National Legal Aid and Defender Association, but many do not. *Id.* at 299–300.

experience resource, but it still reduces the potential influence the attorney experience can have on misdemeanor cases. Although supervisors are present and involved to some degree, it is still the junior or less experienced attorneys that assume primary responsibility for clients facing misdemeanor charges.[199] These less experienced attorneys are usually responsible for identifying or recognizing key issues of fact or law and relaying them to the more experienced attorneys.[200] There is limited proactive involvement from the senior attorney who, in many offices, will have their own high caseload to manage in addition to their supervisory responsibilities.[201]

The misdemeanor court structure also makes supervision more difficult if a public defender office removes attorneys with experience from misdemeanor case assignment. Misdemeanor and felony courts can be located in separate courtrooms or facilities.[202] This is an understandable consequence of decisions in large

199. Public defender supervisors do not necessarily second chair or co-chair the supervisee's cases. These supervisors, instead, review their supervisee's cases, assist their supervisees in developing case strategies, observe these attorneys in court, and provide feedback. The supervisee is ordinarily the only attorney of record. The supervisor simply operates as a point of reference, if desired, for the supervisee and a tool for management to ensure there is some guidance for newer attorneys. *See id.* at 300.

200. Some agencies use supervisors mainly as a resource for attorneys who are struggling with particular issues or caseload concerns. Rather than expect supervisors to proactively teach or offer training opportunities to their subordinates, under this approach, attorneys are trained to bring their concerns to their supervisor. The supervisor is then tasked with developing strategies for the defender to manage the caseload or removing cases from the defender's caseload. The supervisor may also coordinate with the system's managers, funding authorities, or other stakeholders, to find comprehensive solutions to the caseload problems. *Id.* at 301. For an ethical approach to handling these types of problems, see Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 920–21 (2005).

201. There has been some research advocating for staff ratios in public defender offices. Nearly two-thirds of respondents in a study requested internal staffing ratios for public defender agencies. *See* Wallace & Carroll, *supra* note 198, at 280. This request considered the ratios of attorneys to support staff, attorneys to investigators, attorneys to social workers, and attorneys to supervisors. *Id.* at 280–81.

202. Indeed, misdemeanors are often processed in different courtrooms than felonies. BORUCHOWITZ ET AL., *supra* note 9, at 11. For example, in the Orleans Parish Criminal District Court misdemeanor offenses are primarily disposed of in Magistrate Court Sections M1-M5, and felony offenses are disposed of solely in Criminal District Court Sections A-L. The magistrate court is located on the first floor of the criminal court building while the felony courts are located on floors two and three. *See Magistrate Court*, ORLEANS CRIM. DISTRICT CT., http://www.criminalcourt.org/magistrate.html [https://perma.cc/4NXK-YFVY]; *Court Sections*, ORLEANS PARISH CLERK CRIM. DISTRICT CT., https://www.opccdc.org/court-sections.html [https://perma.cc/ZQ5F-X3JU]; Gwen Filosa, *Judges' Work Habits Targeted by Court Watch NOLA Report*, TIMES-PICAYUNE (Sept. 21, 2010), http://www.nola.com/crime/index.ssf/2010/09/judges_work_habits_targeted_by.html [https://perma.cc/4766-ZEN7] (discussing judges' failure to arrive in court for scheduled sessions at Orleans Parish Criminal District Court). Additionally, the district attorney has begun funneling certain misdemeanors to municipal court, which is an entirely different building located nearby. *See* Editorial, *Distributing the Caseload at Orleans Parish Criminal District Court: An Editorial*, TIMES-PICAYUNE (July 11, 2011, 7:30 AM), http://www.nola.com/opinions/index.ssf/2011/07/distributing_the_caseload_at_o.html [https://perma.cc/VBK2-

jurisdictions to have misdemeanor cases reviewed by appointed magistrates or commissioners instead of popularly elected judges.[203] If each court's docket begins and ends at generally the same time of day, it is almost impossible for a senior attorney with a caseload of felonies to remain in misdemeanor court at any significant level to supervise the junior attorneys. Some senior attorneys may attend misdemeanor court because of interesting cases that may help with their own caseload or to witness a particularly interesting charge or client, but for the most part their own work responsibilities limit the time they can dedicate to watching other attorneys practice.[204] This means that even when public defender administrators seek to incorporate attorney experience in misdemeanor representation, they do so with a default approach that only secondarily dedicates attorney experience to misdemeanor offenses.

R6FA] (detailing how the Orleans Parish Municipal Court has begun to assign misdemeanors to municipal court); Claire Galofaro, *Criminal Court Threatened With 30 Percent Budget Cut for 2013*, TIMES-PICAYUNE (Nov. 12, 2012, 1:38 PM), http://www.nola.com/politics/index.ssf/2012/11/criminal_court_threatened_with.html [https://perma.cc/AA8H-FCR8] (discussing the Orleans Criminal District Court's impending severe budget cut, which would make it even more difficult for the court to function efficiently and effectively); Katy Reckdahl, *New Orleans Judges Say They Lack the Resources to Protect Domestic-Violence Victims*, TIMES-PICAYUNE (Dec. 19, 2011, 8:00 AM), http://www.nola.com/crime/index.ssf/2011/12/new_orleans_judges_say_they_la.html [https://perma.cc/M2T2-AWVQ] (describing how a court's lack of resources can have disastrous consequences for victims of domestic violence). Any attorney who has felony court matters will find it very difficult to attend to misdemeanor matters in magistrate court and almost impossible to attend to matters in municipal court. Some supervisors may assume responsibility for misdemeanor matters because they are attached to a client's felony case, but court rules dictate that these misdemeanors are ordinarily adjudicated with the attached felony case in whatever felony section of court it was assigned. *See* LA. DIST. CT. r. 14.0, App. 14.0A (noting that where multiple courts with different class counts are included in a bill of information or indictment, the highest class control the courtroom assignment process).

203. This practice is no longer permissible in Louisiana as the Louisiana Supreme Court found that the Louisiana Constitution does not permit it. *See* State v. Smalls, 48 So. 3d 212 (La. 2010) (finding the continued practice unconstitutional in Orleans Parish Criminal District Court in 2010); State v. O'Reilly, 785 So. 2d 768 (La. 2001) (finding the practice impermissible as per the state constitution in 2001); Laura Maggi, *Louisiana Supreme Court Orders Change in Orleans Parish Misdemeanor Trials*, TIMES-PICAYUNE (Oct. 19, 2010, 9:15 PM), http://www.nola.com/crime/index.ssf/2010/10/louisiana_supreme_court_orders.html [https://perma.cc/J3BY-WN47] (reporting a ruling by the Louisiana Supreme Court that forbid prioritizing expediency by having unelected commissioners issuing judicial determinations in misdemeanor trials).

204. This also happens in public defender offices that do not have a formal supervisory system. Defendants charged with felony offenses are entitled to jury trials, the exciting experience that leads many defenders to pursue the work. Many defense attorneys, and the public at large, view these jury trials as intriguing and make efforts to watch them. Even senior attorneys seek to witness these jury trials because they are so rare. This public and agency interest creates a type of community-oriented supervision that is not as readily available for the bench trials that are the mainstay of misdemeanor courts.

5. Focus on Influencing Judicial Policymaking

Another consequence of coordinating attorney experience through supervision alone is the limited role that the attorney experience resource can play in effecting judicial policymaking. Judicial policymaking occurs when judges identify certain social problems and implement a coordinated solution.[205] These judges create new rights or doctrines through formal opinions and regulatory remedies.[206] In their book, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*, Malcolm Feely and Edward Rubin question why courts have failed to make policy for indigent defense.[207] They assert that the explanation may lie in courts not perceiving an indigent defense problem at all or not recognizing that the indigent defense problem incorporates "a widely held principle of social morality."[208] Active involvement by attorneys with experience could do much to solve this invisibility. If judicial policymaking is even a possibility in lower courts, attorneys with experience could better effectuate much-needed changes to the criminal justice arena and the mass incarceration that is increasingly viewed as problematic.[209] Misdemeanor courtrooms would certainly be ripe for judicial policymaking, as the strong, moral language in *Gideon* and its progeny would support such judicial activism.[210] It would also not be difficult to develop a coordinating idea for improving the right through either sentencing or client

205. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 4–6 (2000).

206. *Id.*

207. Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1787–89 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998)).

208. FEELEY & RUBIN, *supra* note 205, at 161.

209. This is really more a result of the sheer quantity of misdemeanor offenses. See *supra* notes 199–200 and accompanying text for estimates on the number of misdemeanor cases filed each year.

210. See Justice Black's commentary, *supra* note 20, for sweeping, broad language from the *Gideon* decision about the nation's duty to provide counsel for all persons regardless of class; *see also* Larry Alexander & Frederick Schauer, *Is Policy Within Law's Limited Domain?*, 26 U. QUEENSLAND L.J. 221, 232–34 (2007) (arguing that constitutional and statutory rules actually incorporate policy standards and norms); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1067–73 (1975) (arguing that courts should decide cases based on rights rather than policy); Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 445 (1999) (arguing that judges could use the therapeutic lens to inform and shape policies and procedures in the law). Although Dworkin's article may argue for the counter result, the very potential for judicial policymaking in 1975, when the criminal justice system had yet to reach its expansive state, suggests that policymaking should be a very real concern for enterprising public defender institutions.

remedies.[211] Like public defender agencies, courts have been slow in responding to the changing nature of the criminal justice system and a direct response from the courts may serve to improve things more expediently and thoroughly than other behaviors undertaken by public defender institutions.[212] Experienced attorneys in misdemeanor courts could help accomplish that objective.

* * *

211. In fact, judges could adopt Michelle Alexander's or Jenny Robert's ideas about encouraging every defendant to exercise their constitutional right as a means of "crashing" the court system. *See* Michelle Alexander, Op-Ed, *Go to Trial: Crash the Justice System*, NY TIMES, Mar. 11, 2012, at SR5; Roberts, *supra* note 10, at 309. These judges could allow every defendant to go forth with trial without fear of enhanced punishments that serve as trial penalties. They could also refuse to accept certain plea agreements or proceed forward on cases where the judge does not feel that the defender has received adequate time to investigate the case or does not have adequate experience to represent the client to the level of effectiveness the court thinks is proper. Releasing indigent defendants who cannot afford bond from jail could also help reduce the number of pleas, as individuals would not feel forced to choose between going to court or exercising their full constitutional rights. *See, e.g.*, Michael Kunzelman, *Judge Cites Weak Indigent Defense, May Order Defendants Freed*, DAILY REP. (Mar. 30, 2007), http://www.dailyreportonline.com/id=1202552163809/Judge-cites-weak-indigent-defense-may-order-defendants-freed [https://perma.cc/ZU5W-8LL9] (detailing an Orleans Parish judge's decision to release forty-two criminal defendants because he determined they were not being adequately represented by the public defender office).

212. In all fairness, the institutional public defender response to the changes in the criminal justice system has been slow because of the instability of public defender practice. It is difficult to identify and reach agency goals and objectives when funding is both insufficient and inconsistent. Funding schemes differ annually for all but the most stable public defender agencies. The shortage of reliable data for misdemeanor offenses may also contribute to this problem. The magnitude of misdemeanor representation is still unclear because state repositories and other reporting mechanisms do not capture all of the data. The lack of data makes it difficult for public defender administrators to make intelligent decisions about how their monetary resources are best distributed. *See* Natapoff, *supra* note 142, at 1320. Indigent defense practice also differs from jurisdiction to jurisdiction. Public defenders may all abide by one national guideline in the Sixth Amendment and any resulting Supreme Court extension of explanation of that rule, but the practical meaning of these definitions will depend heavily on the particular environment in which the public defender institution exists and the community it serves. Rural public defender institutions will likely have very different concerns than urban public defenders even if they are both located in the same state or region of the country. For example, although urban public defenders may have to worry about staffing arraignment proceedings every day of the week, a rural court may have arraignment proceedings once a week or every two weeks. For a description of how different public defender delivery is within a given state, see LA. PUB. DEF. BD., LPDB 2015 ANNUAL BOARD REPORT (2015), http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/2015%20LPDB%20Annual%20Report.pdf [https://perma.cc/873V-T2NN]. It is difficult to extrapolate one national, common course of action when basic scheduling concerns will differ depending on which county or state houses a particular public defender agency.

CONCLUSION

The last few decades have witnessed a changing view of the public defender. Chronic underfunding has led to a severe limit on the availability and performance of public defenders and the public defender institution has had to respond accordingly.[213] Institutional administrators have made strategic decisions about how best to parcel limited resources that result in some clients receiving a higher level of lawyering than others do.[214] These administrators can make these decisions because the constitutional rule for effective assistance of counsel does not entitle indigent defendants to the optimal, all-inclusive lawyering that can be purchased on the open market.[215] These decisions, however, do have a larger impact on the public defender's ability to operate consistently with its historical purpose of instilling fairness in the criminal justice community.

Relegating misdemeanor offenses to a basic level of representation has severe consequences on the communities that public defenders serve and on the ability of those defenders to affirm the legitimacy of the criminal justice system. Instead of seeking solutions that are based solely on increasing funding or reducing the scope of their representative obligation, defender agencies should look at the distribution mechanisms they employ for a better and more effective structure for the delivery of services. The way that public defender institutions distribute their resources is particularly important when those resources are scarce. Because resources that are provided to one client or group of clients are no longer available for other clients occupying the same space or time, the distribution schemes that are used for these resources are both complex and crucial. The explosive social, financial, and political impact of misdemeanor charges and convictions in recent

213. *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1046–53 (2006) (detailing the perils facing the American criminal justice system, such as a lack of access to attorneys and abuse of plea bargains, and providing various solutions to them, including decriminalization, salary parity with prosecuting attorneys, law student loan forgiveness, and increased federal funding); Stephanie L. McAlister, Note, *Between South Beach and a Hard Place: The Underfunding of the Miami-Dade Public Defender's Office and the Resulting Ethical Double Standard*, 64 U. MIAMI L. REV. 1317, 1332–34 (2010) (describing the implications of the Miami-Dade Public Defender Office's refusal to represent certain indigent defendants on the grounds that its attorneys faced overwhelming caseloads).

214. *See* Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 364–69 (1993); Joe Gyan, Jr., *Hiring Freeze Means Overburdened Attorneys in Public Defenders Office to Get Even More Cases*, ADVOCATE (Mar. 10, 2015, 4:04 PM), http://www.theadvocate.com/baton_rouge/news/article_80e01f1f-225d-5f7c-acf6-f25ef79e1010.html [https://perma.cc/2TJ2-6MPK].

215. For a description of what type of defense a committed public defender could provide and the minimal standard necessary to provide the effective assistance of counsel, see generally Mitchell, *supra* note 77.

years encourages a new approach to resourcing misdemeanor representation. Although misdemeanors were often paid little attention in both practice and legal scholarship, the nation is no longer silent about the role that misdemeanors play in facilitating or encouraging the oft-criticized system of mass incarceration.[216] The reform conversation includes claims for decriminalization of certain minor offenses or increased review of prosecutorial charging practices but fails to include a robust discussion of what public defenders can do with limited resources to change the dynamic.

216. *See, e.g.*, BORUCHOWITZ ET AL., *supra* note 9, at 10 ("The vast majority of accused individuals first come into contact with the criminal justice system through a minor offense, known as a misdemeanor.").