

**AMERICAN BAR ASSOCIATION**

**ADOPTED BY THE HOUSE OF DELGATES**

**FEBRUARY 8-9, 2010**

**RECOMMENDATION**

- 1 RESOLVED, That the American Bar Association urges local, state, territorial and federal
- 2 governments to undertake a comprehensive review of the misdemeanor provisions of their
- 3 criminal laws, and, where appropriate, to allow the imposition of civil fines or nonmonetary civil
- 4 remedies instead of criminal penalties, including fines and incarceration.

## REPORT

The criminal justice system is currently facing some serious challenges to the prosecution and conviction of criminals, as well as the effective representation of defendants. Problems with overcrowding, over burdened prosecutors and public defenders with unfeasible caseloads, and understaffing are among the many hindrances to the justice system. These inadequacies result in crimes reported without arrests or convictions, and prosecutors are unable to focus on more serious crimes. The extremely high level of non-valid drivers license cases and minor misdemeanors are an example of some of the barriers to efficiency within the criminal justice system. In many jurisdictions, prosecutors' offices are overwhelmed by such minor cases because they are brought by police officers without interaction with the prosecutors' offices. This recommendation will allow prosecutors and public defenders to focus on more important cases, while also maintaining oversight and control over violators of misdemeanor offenses through the civil system.

American Bar Association policy and standards have long promoted and encouraged the use of alternative sanctions for criminal behavior. Policy and standards illustrate a preference for diversion to community agencies, deferred sentencing over incarceration, and other criminal penalties that minimize permanent conviction records for offenders who are eligible for community supervision.<sup>1</sup> The American Bar Association also supports programs that offer community-based treatment alternatives to incarceration for offenders whose crimes are associated with substance abuse or mental illness.<sup>2</sup> Where an offender's problem is his or her status, treatment, not prosecution is appropriate. In Robinson v. California, the court recognized that narcotic addiction is an illness.<sup>3</sup> The court stated that it is "apparently an illness which may be contracted innocently or involuntarily... and a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment."<sup>4</sup> Furthermore, the court held that addressing prison time as punishment in the abstract is inappropriate because "even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."<sup>5</sup>

In addition to re-characterizing offenses that target status rather than behavior, alternatives to incarceration should be provided when offenders pose no risk to the community and appear likely to benefit from rehabilitation efforts.<sup>6</sup> These various standards and policies call

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<sup>1</sup> American Bar Association, Defense Function, § 4-6.1 (Duty to Explore Disposition Without Trial); ABA Commission on Effective Criminal Sanctions, *Report I: Alternatives to Incarceration* (Feb. 2007), available at <http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/ReportI.PDF.121306.pdf>

<sup>2</sup> ABA Commission on Effective Criminal Sanctions, *Second Chances In The Criminal Justice System: Alternatives to Incarceration and Reentry Strategies*, Report to the House of Delegates on Alternatives to Incarceration and Conviction 10 (2007).

<sup>3</sup> Robinson v. California, 370 U.S. 660 (1962).

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Justice Kennedy Commission, American Bar Association, *Report to the House of Delegates on Punishment, Incarceration, and Sentencing* 9 (2004).

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for an exploration of the possibilities of early case diversion to community agencies in an effort to rehabilitate offenders and create a more efficient criminal justice system.

These standards, while crucial in their own right, fail to address a pressing issue facing our criminal justice system today – the overburdening of prosecutors and public defenders due to excessive misdemeanor caseloads and the overwhelming pressure to move cases quickly to clear dockets. Some examples of crimes that will be covered by the resolution include:<sup>7</sup>

## I. INDIGENT MISDEMEANOR REPRESENTATION IS TOO OFTEN INEFFECTIVE AND INEFFICIENT.

Currently, our system of indigent misdemeanor representation is in trouble. Although the Supreme Court held in *Argersinger v. Hamlin*<sup>8</sup> that the right to counsel preserved in the Sixth Amendment<sup>9</sup> extended to misdemeanor defendants facing the possibility of jail time, defendants are too often encouraged to plead guilty, whether by the prosecutor, their public defender or the court. Moreover, not only do public defender offices face budget constraints, but also under-staffed offices are forced to contend with overwhelming caseloads, hampering their ability to provide competent and diligent representation. Caseloads in some places are so high that lawyers have less than one hour per client to do all the work on a case.

### A. Indigent Defendants Are Often Encouraged To Waive Their Right To Counsel, Or Are Unable To Secure Counsel

The absence of counsel is a serious impediment to the administration of justice in our misdemeanor courts. Even though misdemeanor defendants facing jail time have a constitutional right to a counsel, a Bureau of Justice Statistics Special Report cited surveys of jail inmates conducted in 1989 and 1996, showing that 28.3% of jail inmates charged with misdemeanors reported having no assistance of counsel.<sup>10</sup> In 1998, 38.4 of people charged with misdemeanors did not receive the assistance of counsel.<sup>11</sup> A report compiled by the National Association of Criminal Defense Lawyers (“NACDL”) indicates that this is no isolated trend; rather, jurisdictions all across the country are failing to fulfill their obligation to ensure that misdemeanor defendants who may be sent to jail receive, or are aware of their right to counsel.<sup>12</sup>

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<sup>7</sup> The American Bar Association has already recommended the decriminalization of homelessness through two policies. In February 2003, the ABA passed a recommendation (#116) to use nonmonetary remedies such as participation in community-based treatment or services to replace traditional sanctions such as fines or custody. The recommendation for the Decriminalization of Homelessness (#106) from the 2007 annual meeting advocates decriminalizing life-sustaining activities of the homeless.

<sup>8</sup> 407 U.S. 25, 37 (1972).

<sup>9</sup> U.S. Const. amend. VI.

<sup>10</sup> Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, NCJ 179023 (Nov. 2000) at 6, Table 13.

<sup>11</sup> *Id.* at 3, Table 2.

<sup>12</sup> National Association of Criminal Defense Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts*, 2009. (hereinafter “*Minor Crimes*”)

Unfortunately, in many jurisdictions, indigent defendants are unable to give informed consent to waiver of counsel. Often, defendants receive a form enumerating their right to counsel and warnings regarding waiver, but are asked to sign without any inquiry as to whether or not the defendant has understood the information contained within.<sup>13</sup> The NACDL report describes an incident in Maricopa County, Arizona, where a judge told a defendant charged with reckless driving, “I want you to waive your right to an attorney, but I’m not going to give you a public defender. You would have to go hire [a lawyer], and I don’t think you’re going to do that. I think you and I are going to talk about this right here...”<sup>14</sup>

Defendants are often told that, by waiving their right to counsel, adjudication of their offense will take place more quickly, often that day. NACDL site teams reported that judges across the country told defendants, “You can wait for counsel, or you can proceed now without counsel.”<sup>15</sup> The prospect of delayed court proceedings is particularly daunting for indigent defendants, who often have to make alternate arrangements for child care, transportation, and time off work.<sup>16</sup> Defendants already in custody have further incentive to proceed without counsel, since delaying adjudication often means that they will spend more time in jail than they would if they pled guilty and were sentenced.<sup>17</sup> Not surprisingly, defendants often choose to proceed, forgoing the assistance of counsel.

Defendants are urged to speak directly with prosecutors, in violation of ethics rules barring such communication.<sup>18</sup> In Hays County, Texas, court staff instructed defendants to speak with prosecutors about plea bargaining before there was any meaningful opportunity for the defendant to request the assistance of counsel. Defendants negotiated pleas directly with prosecutors.<sup>19</sup> This phenomenon is not limited to Texas, NACDL site teams witnessed similar behavior all across the country.<sup>20</sup>

Lack of counsel, even in misdemeanor cases, can have far-reaching, often unexpected repercussions. Unfortunately, consequences of a misdemeanor conviction, even one secured through a plea bargain, can be devastating for the defendant and their family. The Supreme Court noted as much in *Argersinger*, explaining 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.”<sup>21</sup> In fact, a misdemeanor conviction can result in deportation, denial of employment or a professional license, ineligibility for student loans, expulsion from school, and loss of public housing and access to food assistance.<sup>22</sup>

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<sup>13</sup> *Minor Crimes* at 16.

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

<sup>15</sup> *Id.* at 18.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 19.

<sup>18</sup> Model Rules Of Professional Conduct, Rule 4.3 (2004)

<sup>19</sup> *Minor Crimes* at 16.

<sup>20</sup> *Id.* at 16-17.

<sup>21</sup> 407 U.S. at 38.

<sup>22</sup> *Minor Crimes* at 12.

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Even in instances where a defendant is able to secure counsel, public defenders are often tasked with managing overly-large caseloads, forcing them to divide their attention, resources, and time between far too many cases.

## B. Public Defenders Face Staggering Caseloads, Reducing Their Ability To Effectively Represent Their Clients

Increased prosecution of misdemeanors has caused caseloads across the country to skyrocket. A variety of organizations have published or passed caseload standards; by and large, many jurisdictions are unable to meet those standards, whether qualitative or quantitative in nature. The American Council of Chief Defenders' "Statement on Caseloads and Workloads" recommends that defense lawyers handle no more than 400 misdemeanors a year.<sup>23</sup> The Model Rules of Professional Conduct states that a "...lawyer shall provide competent representation to a client. Competent representation includes the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."<sup>24</sup>

Unfortunately, current misdemeanor caseloads make it extremely difficult, if not impossible, for defense lawyers to provide adequate representation to their clients. One attorney working in a federal magistrate court in Arizona reported that misdemeanor attorneys there handle 1,000 cases per year; two defenders in Tennessee reported handling 3,000 cases per year.<sup>25</sup> In at least four major American cities, Chicago, Atlanta, Miami, and New Orleans, defenders carry more than 2000 misdemeanor cases each per year. If an attorney with a caseload of 2,000 cases per year takes three weeks of vacation and ten holidays a year, never takes a day of sick leave, and works ten hours a day, five days a week, he or she will still only have one hour and ten minutes to spend on each case.<sup>26</sup> At the high end of the spectrum, part-time defenders in New Orleans deal with approximately 19,000 cases a year, which limits them to seven minutes per case.<sup>27</sup> To adequately prepare for a case, a lawyer must interview her client, speak with the prosecutor, read police reports, conduct legal and factual research, write motions and memoranda, and attend court hearings.

The American Bar Association has issued an ethics opinion that states "If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being appointed through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation."<sup>28</sup> Regrettably, this rarely occurs. In those cases, prosecutors can oppose the motion, even when caseloads are demonstrably excessive.

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<sup>23</sup> *Id.* at 21.

<sup>24</sup> Model Rules Of Professional Conduct, Rule 1.1 (2004).

<sup>25</sup> *Minor Crimes* at 21.

<sup>26</sup> *Id.* at 22.

<sup>27</sup> *Id.*

<sup>28</sup> Standing Committee on Ethics and Professional Responsibility, American Bar Association, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation* 1 (2006), available at

C. Large Caseloads Combined With Low Public Defender Pay And Reduction Of Public Defender Office Budgets Increases The Likelihood of Attorney Burnout, Lessening The Number Of Well-Trained, Dedicated Public Defenders

Aside from defenders being asked to take on far more cases than the average lawyer can handle, public defender salaries often are considerably less than those received by their prosecutorial counterparts. The average salary for public defenders and prosecutors is approximately \$45,000, however, public defenders' salaries often fall on the low side of the median.<sup>29</sup> American Bar Association standards state that there must be "parity between defense counsel and the prosecution with respect to resources."<sup>30</sup> A large portion of public defenders that responded to the NACDL survey reported that their salaries are between ten and fifty percent lower than that of their colleagues in the prosecutor's office.<sup>31</sup> With the starting salary at private law firms averaging about \$95,000 per year, public defender offices see a high turnover rate caused by defenders leaving to work in private practice, forcing a continuous re-training of new employees, many of whom are fresh out of law school.<sup>32</sup>

The continuous voluntary departure of attorneys from public defenders offices is exacerbated by budget cuts, which often affects misdemeanor public defense services first.<sup>33</sup> In 2007, the Atlanta Public Defender Office had twenty lawyers who handled roughly 21,000 cases a year. Budget cuts forced the office to lay off six lawyers; four other attorneys subsequently resigned, leaving the office with a paltry ten attorneys to handle a caseload that was estimated to reach 24,000 the next year. Press reports indicated that additional budget restraints would force the office to lay off an additional three attorneys, which would leave seven defenders to handle 3,400 cases each.<sup>34</sup>

D. Large Misdemeanor Caseloads Also Drain Valuable Resources From Prosecutors, Making It More Difficult To Obtain Convictions In Serious Cases

Prosecutors who are forced to contend with an increased number of misdemeanor prosecutions suffer much the same types of problems that public defenders do. The more cases a prosecutor must manage, the less time he will have to spend on cases he is already involved with. In 2007, a California county saw its rate of guilty verdicts on felony cases drop from 53.2% to 46.9%, and misdemeanor guilty verdicts fall from 49.7% to 41.8%.<sup>35</sup> These falling conviction

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[http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=premium&role=cp&url=/cpr/mo/premium-cp/06\\_441.pdf](http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=premium&role=cp&url=/cpr/mo/premium-cp/06_441.pdf).

<sup>29</sup> *Minor Crimes* at 42-43.

<sup>30</sup> American Bar Association, *10 Principles of a Public Defense Delivery System 1* (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

<sup>31</sup> *Minor Crimes* at 43.

<sup>32</sup> *Id.* at 42.

<sup>33</sup> *Id.* at 27.

<sup>34</sup> *Id.*

<sup>35</sup> Richard K. De Atley, *Public defender study: Riverside County juries siding with defendants*, The

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rates can be linked to a surplus of misdemeanor prosecutions and subsequent court congestion.<sup>36</sup> San Francisco Supervisor Ross Mirkarimi, who sits on the city's Public Safety Committee, has suggested that obtaining successful conviction rates sometimes requires dropping charges in more "complicated or lower-profile" cases.<sup>37</sup>

John Zakowski, a Wisconsin district attorney, agreed that decriminalizing certain offenses, such as driving with a suspended license, would be in the best interests of prosecutors. Zakowski explained that the "focus and resources of [his] office [have] to be on drunk driving, hit and run, and eluding cases... those are the serious reckless driving kinds of conduct that have to be addressed." Decriminalizing certain misdemeanors would give prosecutors more time to focus on prosecuting serious offenses.<sup>38</sup>

Just as misdemeanor caseloads can drain resources for public defenders, prosecutors also suffer when forced to try less serious cases that distract from trials of greater consequence. Decriminalizing certain misdemeanors would be less costly, and noncriminal measures may be subject to less strict procedural requirements.<sup>39</sup> Attempts to prohibit minor offenses "distract systems from [the] more important task of preventing serious crimes against persons and property."<sup>40</sup> Prosecutors suffer from this burden, and the quality of justice in serious and non-serious cases alike can be deleteriously reduced.

## II. THE RECHARACTERIZATION OF NON-VIOLENT MISDEMEANORS AND TRAFFIC AND ORDINANCE-VIOLATION OFFENSES WILL REDUCE CASELOADS, MAKING THE PROSECUTION OF SERIOUS OFFENSES MORE SUCCESSFUL.

### A. Most People Who Go To Court in the United States Do So For Misdemeanor Charges.

Although the exact number of misdemeanors per year is not known, due to states' differing methods of collecting misdemeanor statistics, the National Center for State Courts collected misdemeanor caseload data from twelve states in 2006. Those twelve states had a median misdemeanor rate of 3,544 misdemeanors per 100,000 state residents. If this rate is accurate among all fifty states, in 2006 alone there were 10.5 million misdemeanor prosecutions; in other words, 3.5% of the American population was charged with a misdemeanor in 2006.<sup>41</sup>

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Press-Enterprise, Dec. 11, 2008, *available at* [http://www.pe.com/localnews/sbcounty/stories/PE\\_News\\_Local\\_S\\_pdnumbers12.3d4869d.html](http://www.pe.com/localnews/sbcounty/stories/PE_News_Local_S_pdnumbers12.3d4869d.html).

<sup>36</sup>

*Id.*

<sup>37</sup>

Tamara Barack Apartion, *Felony prosecutions skyrocket to a 14-year high*, The San Francisco Examiner, June 3, 2009, *available at* <http://www.kamalaharris.org/news/446>.

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Andy Nelesen, *Law Change Could Jump-Start Courts*, Green Bay Press-Gazette, June 5, 2005, *available at* [http://www.nlada.org/DMS/Documents/1118066205.46/local\\_21285947.shtml](http://www.nlada.org/DMS/Documents/1118066205.46/local_21285947.shtml).

<sup>48</sup>

Richard S. Phruse, *Criminalization and Decriminalization- How the Criminal Law Has Been Used and Abused, Definition of a "criminal" Sanction*, Crime and Justice Vol. 1 (2009), *available at* <http://law.jrank.org/pages/842/Criminalization-Decriminalization.html#ixzz0JvQe74Vz&C>.

<sup>40</sup>

*Id.*

<sup>41</sup>

*Minor Crimes* at 11.

With national caseloads at such high numbers, targeted re-characterization of certain misdemeanors should be actively considered by local, state, and federal governments. In place of criminal sanctions, jurisdictions should instead implement a system of civil fines and remedies to address minor offenses that pose no threat to society. Re-characterization of certain misdemeanors tends to increase the efficiency and effectiveness of the criminal justice system.<sup>42</sup>

Behavior that was once simply deemed “undesirable” and punishable by fine has been increasingly criminalized. For example, many jurisdictions around the country have misdemeanor laws targeted at riding bicycles on the sidewalk, jumping turnstiles, driving with a suspended license, walking unleashed pets, and violating fish and game laws.<sup>43</sup> In some states, conduct that is considered by many to be commonplace, if not outright acceptable, is considered a criminal offense. In California, participation in Super Bowl pools and March Madness brackets is a misdemeanor punishable by up to a \$5000 fine and a year in prison.<sup>44</sup> Furthermore, some counties, like Miami Dade, have ordinances that overcrowd courts over things like unnecessary and excessive noises<sup>45</sup>, open-air concerts<sup>46</sup>, aggressive or obstructive panhandling,<sup>47</sup> sanitary nuisances,<sup>48</sup> and obstruction of public streets.<sup>49</sup> Because these offenses are criminal in nature, every time a defendant fails to appear in court on one of these minor charges, which happens with surprising frequency, an arrest warrant ensues.

This means that in some jurisdictions, it is entirely feasible that an individual may lose a scholarship, public housing, or be denied a professional license because they once rode a bicycle on a sidewalk, or owned a dog that barked too loudly or frequently. In Tampa, Florida, the NACDL site team observed public defenders preparing a case which involved an exotic dancer who was charged with improperly soliciting a patron to purchase an alcoholic beverage.<sup>50</sup> If the defendant was dancing to supplement a partial college scholarship, a conviction might have caused her to lose her scholarship.

The most significant part of many caseloads is driving with suspended license charges.<sup>51</sup> The preponderance of suspended licenses are suspended for failure to pay tickets for a broken tail lights, parking tickets, not having insurance, failure to pay child support, or failure to appear in court.<sup>52</sup> This specific charge effectively makes payment of pending tickets impracticable; defendants are forced to make a choice between driving to work or to court to pay their fines on

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<sup>42</sup> Daniel T. Gilbert, *Decriminalization of Minor Offenses Unburdens Court*, Traffic Safety 26-28, (Nov.-Dec. 1994).

<sup>43</sup> *Minor Crimes* at 25-26.

<sup>44</sup> California State Assemblyman Kevin Jeffries, Jeffries Re-Introduces Bill To Decriminalize Super Bowl Pools, <http://arc.asm.ca.gov/member/66/?p=article&sid=165&id=218990> (last visited June 30, 2009).

<sup>45</sup> Miami Dade County, Fl., Code § 21-28.

<sup>46</sup> Miami Dade County, Fl., Code § 21-28.1.

<sup>47</sup> Miami Dade County, Fl., Code § 21-31.4.

<sup>48</sup> Miami Dade County, Fl., Code § 26A-2.

<sup>49</sup> Miami Dade County, Fl., Code § 30-255.

<sup>50</sup> *Minor Crimes* at 26.

<sup>51</sup> *Minor Crimes* at 26.

<sup>52</sup> *Id.*

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a suspended license, attempting to find alternate transportation arrangements, or relying on public transportation, which is not always feasible, particularly in rural or suburban areas.

In Texas, for example, people who can't afford to pay their traffic fines may be forced to "sit out their tickets" in jail.<sup>53</sup> Often, legal trouble can begin when a creditor has a court issue a summons for an individual, and due to changed addresses or some other failure to honor the summons, the individual is in contempt of court.<sup>54</sup> Equally likely, in this economic climate, is the possibility of a missed payment and insurance lapse of a car coupled with a subsequent stop for a broken taillight and a steep fine with exposure to a possible summons.<sup>55</sup> As Robert Solomon of Yale Law School put it: "There's just no end to it once the cycle starts...it just keeps accelerating."<sup>56</sup> Non-violent individuals with minor or non-existent criminal histories should not have to face the prospect of jail time for driving with a suspended license; imprisonment should be a sanction reserved for offenders with a violent or an otherwise extensive criminal record. Nor should the criminal justice system (courts, prosecutors, defense counsel and jails) bear the burden of the criminalization of these non violent, minor infractions.

## B. Decreasing the Prosecution of Minor Misdemeanor Offenses Will Improve Currently Overburdened Caseloads and, Subsequently, the Quality of Representation and Outcomes for All Parties.

These minimal offenses also take up the court's time with sending out notices, having more hearings, and running a longer calendar. Additionally, officers are redirected from potentially more serious arrests due to the time in effectuating an arrest on any given charge for a violation of these ordinances, as well as for transportation time in taking an individual to jail when executing subsequent arrest warrants for misdemeanor violations. The reliance on overcriminalization and procedural guarantees burdens the lower criminal courts by making it difficult to reliably sort minor cases according to their merits.<sup>57</sup> The lower criminal court in America accounts for about ninety percent of all criminal cases in the United States, and the endless supply of cases and the low stakes involved in each case make it easier to "appear very busy rather than to invest the resources adjudication on the merits requires."<sup>58</sup>

Over-criminalization has led to substantive laws that create "an inexhaustible supply of potential defendants in minor cases."<sup>59</sup> Simply using a car or public transportation frequently, or eating or drinking in public, or raising your voice too loudly results in plenty of opportunities

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<sup>53</sup> Barbara Ehrenreich, *Is it Now a Crime to Be Poor?* The New York Times, Aug. 9, 2009, available at: <http://www.commondreams.org/view/2009/08/09-4>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FDMULJ 1157, 1157-1176 (May 2004) (discussing the problems associated with overcriminalization of minor offenses in New York City).

<sup>58</sup> *Id.* at 1159

<sup>59</sup> *Id.* at 1165.

to commit a “crime” under the law.<sup>60</sup> Reclassifying these offenses will greatly improve the system as a whole, allowing for the more successful prosecution of serious offenses.

III. ALTHOUGH THE BROKEN WINDOW THEORY SUGGESTS THAT A DISORDERLY ENVIRONMENT INVITES CRIMINAL BEHAVIOR, RECHARACTERIZING CERTAIN MISDEMEANORS WILL NOT LEAD TO INCREASED INCIDENTS OF MORE SERIOUS CRIMES.

The Broken Window Theory promotes stopping minor offenses to restore greater order. The theory suggests that a more orderly environment gives the impression that someone is in charge, thus decreasing fear and strengthening community controls.<sup>61</sup> Therefore, efforts to cut down on minor offenses will theoretically also decrease violent and serious crimes.<sup>62</sup> Studies have shown that cleaning up the physical environment of a community is successful; however, increasing misdemeanor arrests has not proven to have the same effects.<sup>63</sup> Furthermore, this resolution will not eliminate offenses typically targeted under the Broken Window Theory. Instead, it is redirecting the manner in which they are addressed from criminal courts to civil courts.

- A. The Broken Window Theory has motivated city officials to increase arrests for minor crimes in an effort to improve the quality of community life by making neighborhoods safer and cleaner.

Social scientist James Q. Wilson and criminologist George Kelling introduced the concept of the Broken Window Theory over twenty-five years ago.<sup>64</sup> Based on the idea that people are more likely to vandalize a building with one broken window than a building with none, “since a broken window sends the message that nobody cares,” the theory led people to believe that quality-of-life offenses should not be tolerated in order to discourage more serious crimes.<sup>65</sup> The Broken Window Theory postulates that signs of disorder induce more disorder. This premise has been the rationale for cities to utilize a zero tolerance policy with easier arrestee procedures for misdemeanors.<sup>66</sup> The general claim made by the theory is that promoting order results in the deterrence of petty crime and low-level anti-social behavior, as well as the prevention of major crimes,

In cities across the country, most famously New York City and Lowell, Massachusetts, communities utilized policing strategies based on the Broken Windows Theory. New York City

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<sup>60</sup> *Id.* at 1165.

<sup>61</sup> Carolyn Y. Johnson, *Breakthrough on ‘Broken Windows’; In Lowell Experiment, Crime Linked to Conditions*, The Boston Globe, February 8, 2009, available at <http://www.innovations.harvard.edu/news/151891.html?p=1>

<sup>62</sup> James Q. Wilson and George L. Kelling, *Broken Windows*, The Atlantic Online, March 1982, available at [www.theatlantic.com/doc/print/198203/broken-windows](http://www.theatlantic.com/doc/print/198203/broken-windows)

<sup>63</sup> *Breakthrough on ‘Broken Windows’; In Lowell Experiment, Crime Linked to Conditions* at 1.

<sup>64</sup> Charles Upton Sahn, *Broken Windows Turns 25*, City Journal, Spring 2007, available at [http://www.city-journal.org/html/17\\_2\\_sndgs07.html](http://www.city-journal.org/html/17_2_sndgs07.html)

<sup>65</sup> *Id.*

<sup>66</sup> *Broken Windows* at 3

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saw a 50% reduction in crime in the 1990s during then-Mayor Rudolph Giuliani's "crac(k) down on squeegee-wielding panhandlers and the like."<sup>67</sup> Giuliani credits the success of the crime drop to the Broken Window Theory, though there are social scientists who attribute the improvement to factors like the booming economy and the decline of crack cocaine during the 1990s.<sup>68</sup>

- B. Increasing misdemeanor arrests does not have a great impact on decreasing more serious crimes in a community, and this Resolution is not in contradiction with the Broken Window Theory.

Studies done on the effects of implementing the Broken Windows Theory over time have reflected the lack of direct connection between misdemeanor arrests and occurrences of more serious offenses.<sup>69</sup> A professor at the University of Chicago, Bernard Harcourt, revealed that the Lowell experiment showed the change in appearance of a location has an effect on the level of serious crimes in a locality, but misdemeanor arrests have very little effect.<sup>70</sup> While there are some studies that show a correlation between the application of the Broken Windows Theory and a decrease in serious crimes, the link is not causal.

Rates of major crimes did drop during the 1990s, but this change happened both in cities that had adopted "zero tolerance" policies, and in those that did not.<sup>71</sup> Furthermore, there were other initiatives happening around the same time as the implementation of the Broken Windows Theory in New York, such as police reforms, housing vouchers for the poor, and programs moving over 500,000 people into jobs from welfare during a prosperous economic climate, and it has proven difficult to disentangle the effects of the "zero tolerance" approach.<sup>72</sup> Furthermore, many critics point to the waning of the crack epidemic,<sup>73</sup> and the decrease in males aged 16-24 due to demographic changes.<sup>74</sup> Initial studies that appeared to support the effects of the Broken Windows Theory have led to more sophisticated studies on the relationship between disorder and crime that do not reflect a relationship between increasing misdemeanor arrests and decreasing major offenses.

The Broken Windows Theory also does not implicate the minor offenses targeted by this policy. Though it could be argued that law enforcement and the criminal justice system would lose valuable opportunities to catch offenders of more serious crimes through their minor misdemeanor offenses, the types of minor crimes that would become civil offenses would be handled no differently by issuing officers in reality. Currently, minor misdemeanors such as

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<sup>67</sup> Karen Kaplan, *Graffiti Study Bolsters Broken Window Theory*, Los Angeles Times, November 21, 2008, available at <http://articles.latimes.com/2008/nov/21/science/sci-graffiti21>

<sup>68</sup> *Id.*

<sup>69</sup> *Breakthrough on 'Broken Windows'; In Lowell Experiment, Crime Linked to Conditions* at 1.

<sup>70</sup> *Id.*

<sup>71</sup> Bernard E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing*, Harvard University, 2001.

<sup>72</sup> *Id.*

<sup>73</sup> Stephen Metcalf, *The Giuliani Presidency? A New Documentary Makes the Case Against the Outsized Mayor*, available at <http://www.slate.com/id/2141424/>.

<sup>74</sup> Steven D. Levitt and Stephen J. Dubner, *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything*, New York, NY: Harper Collins (2005).

turnstile jumping, loitering, betting, and traffic violations are handled with police officers issuing citations to appear in court rather than physically arresting an individual, unless one of the following applies: “The offender requires medical care or is unable to provide for his safety, the offender cannot or does not offer satisfactory proof of identity, except pedestrian violations, or the offender refuses to sign the citation.”<sup>75</sup> Officers may not make physical arrests on traffic or criminal minor misdemeanors, and the process of issuing of citations will not differ greatly.<sup>76</sup> Because the processes for issuing citations of minor misdemeanors and civil offenses are so similar, officers will not be less likely to discover evidence of more serious offenses than they currently are. Thus, this resolution will not result in the increased occurrence of more serious crimes, and the purpose underlying the Broken Window Theory remains intact.

#### IV. CIVIL CITATION AS A MECHANISM FOR JUVENILE JUSTICE REFORM

Civil Citation for juvenile offenders is not a new concept, but rather has been utilized in many places to varying degrees and with varying success. The purpose of this process is to provide an efficient alternative to arrest, permitting an officer to issue Civil Citations to juveniles for minor crimes instead of taking them for booking. Though there are legitimate criticisms of this approach in its most basic form, comprehensive programs have been successful at improving conditions in the juvenile justice system.

Programs modeled after the Civil Citation program in Miami-Dade County have the potential to not only reduce arrests but to also prevent future arrests by pairing a minor offender with services that improve functioning and prevent future escalation of criminal behavior. This Civil Citation structure allows officers a means to avoid arresting juveniles, but still satisfy their commitment to public safety by referring youth for treatment services. The Miami-Dade model of Civil Citation is endorsed for its universal applicability and results: yielding a 20% reduction in arrests and a 34% reduction in misdemeanor cases, while attaining an 82% successful completion rate and a mere 3% recidivism.<sup>77</sup> Cost efficiencies are also relevant, as an independent economic study concluded that Civil Citation costs only \$1,280 per youth, versus \$1,749 for traditional diversion and \$3,491 for detention.<sup>78</sup>

With no court costs, booking-related costs, detention costs, and reduced paperwork Civil Citation can successfully save valuable juvenile justice funding in virtually any community. Civil Citation is also providing an alternative for minorities, as 95% of participants fall into this

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<sup>75</sup> Ohio 12.555 *Arrest/Citation: Processing of Adult Misdemeanor and Felony Offenders*, available at [http://docs.google.com/gview?a=v&q=cache:2b1JRU276ZwJ:www.cincinnati.gov/police/downloads/police\\_pdf8501.pdf+can+police+officers+run+warrant+checks+while+issuing+civil+citation&hl=en&gl=us&sig=AFQjCNG46BxBd2YVIE1AkJWwOefVE9QiNg](http://docs.google.com/gview?a=v&q=cache:2b1JRU276ZwJ:www.cincinnati.gov/police/downloads/police_pdf8501.pdf+can+police+officers+run+warrant+checks+while+issuing+civil+citation&hl=en&gl=us&sig=AFQjCNG46BxBd2YVIE1AkJWwOefVE9QiNg)

<sup>76</sup> *Id.*

<sup>77</sup> Data Sources: 1998-2009. Miami-Dade County Juvenile Services Department Data Warehouse; 2009, July. Miami-Dade County Juvenile Services Department Performance Scorecard; 2008, July. Miami-Dade County Criminal Justice Information System (CJIS).

<sup>78</sup> 2008, October. “Juvenile Services Department Cost Analysis” conducted by the Office of Strategic Business Management, Miami, Florida.

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category and would otherwise have received an arrest record.<sup>79</sup> Providing a second chance and service opportunities to these juveniles and their families is critical to beginning the urgent task of reducing disproportionate minority contact.

## A. The Miami-Dade County Civil Citation Implementation

The origin of Civil Citation in Miami is found in Florida State Statute 985.12.<sup>80</sup> The law provides an alternative process for juveniles who have committed a misdemeanor offense. In Miami, the lead agency implementing Civil Citation was the Miami-Dade County Juvenile Services Department (JSD), an agency responsible for processing all juvenile arrests in the County and providing juvenile diversion, case management, and prevention services.<sup>81</sup> Collaboration among shareholders is a central theme of the system's decade-long juvenile justice reform project. Partner agencies include law enforcement, County Public School System, the Juvenile Judiciary, the State Attorney, the Public Defender, Florida Department of Juvenile Justice, and local mental health agencies, youth shelters, and community-based organizations. All agreed that juveniles were too often arrested for minor crimes, and the exposure to the juvenile justice system typically results in permanent damage to a child's self-image, family relationship and future opportunities.<sup>82</sup> Furthermore, the desensitization to arrest increases likelihood that the child will re-offend.

In April 2007, JSD began piloting the project with the Miami-Dade County Police Department and then added the 36 other local law enforcement agencies to the initiative. JSD offers on-demand trainings to every police department to educate officers on the functions of a Civil Citation, the eligibility criteria, the services and consequences available, and to provide technical support. The local Association of Chiefs of Police partnered with the program to allow in the county the opportunity to participate based on universally applied qualifications.

Participants are referred to community-based organizations or other appropriate services near their home or school to address current needs and risk factors and improve his/her chance of successful completion. Services for youth may focus on individual, family, and/or community needs. Family Functional Therapy (FFT), a research-based intervention, is provided in the homes of Civil Citation participants in need of family interventions. Examples of other types of services include: Behavioral Modification, Substance Abuse Education and Treatment, Family Empowerment, and Community Outreach Programs. Case managers are required to make home and school visits based on client risk classification, which also dictates the frequency of field supervision to promote public safety and reduce recidivism. All cases are monitored for at least 90 days from the date of the offense unless restitution or other counseling components require longer supervision.

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<sup>79</sup> Available at: [http://www.miamidade.gov/jsd/civil\\_citation.asp](http://www.miamidade.gov/jsd/civil_citation.asp)

<sup>80</sup> West's F.S.A. § 985.12 (2007).

<sup>81</sup> Miami-Dade Juvenile Services Department, available at, <http://www.miamidade.gov/jsd/>

<sup>82</sup> [http://www.nctsnet.org/ncts/nav.do?pid=ctr\\_top\\_juv](http://www.nctsnet.org/ncts/nav.do?pid=ctr_top_juv)

Clinical staffing of cases by Master’s level personnel is conducted on a weekly basis to address the severity of problems presented by clients and the possible extension of program services. In addition, case managers are provided with trainings from national experts on various topics, such as: sexually aggressive behaviors, signs of suicide, crisis intervention, and recognizing underlying issues.

If the youth successfully completes his/her individualized treatment plan, the juvenile’s record will be clear of an arrest, listing only participation in Civil Citation. If the youth does not successfully complete the program or commits a new law violation during enrollment, the original offense is entered as an arrest and the State Attorney determines if a prosecution will result. As stated earlier, successful completion rates are consistently at 82% and new law violations occur in only 8% of cases.<sup>83</sup> With participation of more than 5,200 juveniles since inception, this option has made a considerable impact on the arrest population, both reducing first time offenders and preventing an untold number of re-offenses.<sup>84</sup> The financial impact is also worth note, as Civil Citation costs 63% less than detention and 27% less than traditional diversion.<sup>85</sup>

#### B. Important Considerations for Effective Civil Citation Use

The potential benefits for Civil Citation to improve outcomes in juvenile justice are substantial; however, it is necessary to acknowledge the dangers of Civil Citation, if not correctly and comprehensively utilized to ensure that these dangers do not overshadow the potential benefits of the policy. The following are some elements that are essential for Civil Citation to effectively benefit youth and public safety:

- Civil Citation should be available to all youth in a jurisdiction, not only in low-crime, higher-income areas
- Eligibility should be based on universal and equitable criteria, not only officer discretion
- Follow-up to the referral is essential. A verbal warning is not sufficient to address issues that may escalate without attention
- Evidence-based tools should be used to identify the individual issues of a youth to create a customized treatment plan
- Appropriate consequences and services should be determined by need and risk assessments
- Involvement of the family is essential, as the youth may be manifesting issues embedded in the home

#### V. STATES HAVE ALREADY BEGUN CONSIDERING AND IMPLEMENTING RECHARACTERIZATION MEASURES WITH MOSTLY POSITIVE RESULTS.

<sup>83</sup> 2009, July. Miami-Dade County Juvenile Services Department Performance Scorecard

<sup>84</sup> 2009, August. Miami-Dade County Juvenile Services Department Civil Citation Monthly Report

<sup>85</sup> 2008, October. “Juvenile Services Department Cost Analysis” conducted by the Office of Strategic Business Management, Miami, Florida.

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A number of states have already made strides towards reducing recidivism rates, court costs, and prison overcrowding by implementing a range of re-characterization measures, varied in both design and types of crimes affected.

In Miami-Dade, the courts have cut down on costs and increased efficiency by taking a different approach to driving with a suspended license or non-valid drivers license charges. There is a separate report calendar for defendants seeking a nolle prosee. These cases are set on a report calendar for the defendant to bring in proof of compliance, such as a valid drivers license. This method avoids crowding the trial calendar and frees up the time of attorneys and the court.

California recently implemented a pilot program that allows certain District Attorneys to sentence people convicted of driving without a license to be electronically monitored within their homes rather than spend time in a county jail.<sup>86</sup> Similarly, in 2006 Massachusetts amended a statute to allow District Attorneys to treat certain misdemeanors as civil infractions, such as driving with a suspended license or operating an uninsured motor vehicle, which reduces the need for appointment of counsel to indigent defendants.<sup>87</sup>

Initiatives in other states have also proven successful. In 1995, Minnesota's legislature removed the delinquency classification from certain alcohol-related juvenile offenses, among other minor crimes. By eliminating the possibility of detention for these offenses, appointment of counsel was no longer needed. This was expected to reduce the misdemeanor caseload by 8,000 cases.<sup>88</sup> In 1992 New Hampshire began classifying misdemeanors into two categories, Class A and Class B. Any non-violent misdemeanor can be charged as a Class B. Additionally, if a person is convicted of a Class A misdemeanor, but does not receive a sentence of possible or actual incarceration, the conviction will be recorded as Class B. A year after these measures were enacted, the need for court appointed lawyers dropped, saving \$40,000 in payments to assigned counsel. Delays in New Hampshire district courts were also reduced.<sup>89</sup>

In 1999, the Wisconsin legislature passed the Bicentennial State Budget Act, which reduced the penalty for possession and operation of up to five video gambling machines from a misdemeanor to a civil offense, with penalties of up to \$500 per machine per incident.<sup>90</sup> The governor cited the current inconsistent enforcement of the original misdemeanor statute, the proportionality of the new sanction to the crime, and the overcrowding of the prison system as his reasons for approving the re-characterization measure.<sup>91</sup>

Legislators are becoming increasingly more aware of the negative ramifications of prosecuting minor crimes in lieu of focusing time and resources on more serious misdemeanors.

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<sup>86</sup> De-Crim 2 (Georgia)

<sup>87</sup> De crim 4 (Georgia)

<sup>88</sup> *Id.* at 4.

<sup>89</sup> *Id.* at 5.

<sup>90</sup> Wisconsin Legislative Budget Bureau, *Decriminalization of Video Gambling* 1, Nov. 1999, available at <http://www.legis.state.wi.us/LRB/pubs/budbriefs/99bb6.pdf>.

<sup>91</sup> *Id.* at 2.

California Assemblyman Kevin Jeffries recently introduced legislation that would re-characterize participation in sports betting pools not larger than \$2500. The legislation was motivated by the prosecution of Margaret Hamblin, 73, and Cari Gardner, 39, for operating a \$50 gambling pool at their local Elks lodge.<sup>92</sup> Jeffries noted, “[t]he state spent thousands of taxpayer dollars to arrest, investigate, and prosecute these two over a \$50 football pool? I am sure that there are more important issues that law enforcement and our courts can be addressing.”<sup>93</sup>

The Criminal Justice Section concludes that, where misdemeanors are concerned, local, state, and federal governments should re-characterize certain minor crimes that pose no threat to public safety. Furthermore, implementing a system of civil fines and remedies as an alternative to the criminal sanctions currently in place will benefit prosecutors and public defenders by decreasing their burden and helping the criminal justice system to operate more efficiently.

Respectfully submitted,

Charles Joseph Hynes  
Chair, Criminal Justice Section  
February 2010

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<sup>92</sup> *Super Bowl Pools*, *supra* note 50.

<sup>93</sup> *Id.*

## GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Criminal Justice Section

Submitted By: Joseph Charles Hynes, Chair

1. Summary of Recommendation(s).

This recommendation urges local, state, territorial and federal governments to undertake a comprehensive review of the misdemeanor provisions of their criminal codes, and, where appropriate, to allow the imposition of civil fines or nonmonetary civil remedies instead of criminal sanctions.

2. Approval by Submitting Entity.

The recommendation was approved by the Criminal Justice Section Council on November 7, 2009.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

NO.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

American Bar Association policy and standards have long promoted and encouraged the use of alternative sanctions for criminal behavior. Policy and standards illustrate a preference for diversion to community agencies, deferred sentencing over incarceration, and other criminal penalties that minimize permanent conviction records for offenders who are eligible for community supervision.<sup>94</sup> The American Bar Association also supports programs that offer community-based treatment alternatives to incarceration for offenders whose crimes are associated with substance abuse or mental illness.<sup>95</sup>

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<sup>94</sup> American Bar Association, Defense Function, § 4-6.1 (Duty to Explore Disposition Without Trial); ABA Commission on Effective Criminal Sanctions, *Report I: Alternatives to Incarceration* (Feb. 2007), available at <http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/ReportI.PDF.121306.pdf>

<sup>95</sup> ABA Commission on Effective Criminal Sanctions, *Second Chances In The Criminal Justice System: Alternatives to Incarceration and Reentry Strategies*, Report to the House of Delegates on Alternatives to Incarceration and Conviction 10 (2007).

5. What urgency exists which requires action at this meeting of the House?

The criminal justice system is currently facing some serious challenges to the prosecution and conviction of criminals, as well as the effective representation of defendants. Problems with overcrowding, over burdened prosecutors and public defenders with unfeasible caseloads, and understaffing are among the many hindrances to the justice system. This recommendation will allow prosecutors and public defenders to focus on more important cases, while also maintaining oversight and control over violators of traffic offenses through the civil system.

6. Status of Legislation. (If applicable.)

Not applicable

7. Cost to the Association. (Both direct and indirect costs.)

None

8. Disclosure of Interest. (If applicable.)

No known conflict of interest.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)

Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the February 2010 House of Delegates agenda it is being circulated to the following:

Standing Committee on Legal Aid and Indigent Defendants  
 Judicial Division  
 Litigation Section  
 Individual Rights and Responsibilities Section  
 Commission on Youth at Risk  
 Coalition for Justice  
 Young Lawyers Division  
 Children and the Law  
 Family Law Section  
 Council on Ethnic and Racial Justice  
 Government and Public Section Lawyers Division  
 Standing Committee on Ethics and Responsibility  
 Standing Committee on Lawyers' Professional Responsibility  
 State and Local Government Lawyers  
 Administrative Law

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10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. Contact Person. (Who will present the report to the House)

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## **EXECUTIVE SUMMARY**

### **A. Summary of Recommendation**

The recommendation calls for urges local, state, territorial and federal governments to undertake a comprehensive review of the misdemeanor provisions of their criminal codes, and, where appropriate, to allow the imposition of civil fines or nonmonetary civil remedies instead of criminal sanctions.

### **B. Issue Recommendation Addresses**

The criminal justice system is currently facing some serious challenges to the prosecution and conviction of criminals, as well as the effective representation of defendants. Problems with overcrowding, over burdened prosecutors and public defenders with unfeasible caseloads, and understaffing are among the many hindrances to the justice system.

### **C. How Proposed Policy Will Address the Issue**

This recommendation will allow prosecutors and public defenders to focus on more important cases, while also maintaining oversight and control over violators of traffic offenses through the civil system.

### **D. Minority Views or Opposition**

No opposition to this recommendation is known to exist at this time.