

An Update on State Efforts in Misdemeanor Reclassification, Penalty Reduction and Alternative Sentencing

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Executive Summary

The modification of minor misdemeanor offenses into infractions or non-jailable offenses has the potential to save states money that otherwise would be spent on litigation or expensive incarceration. The Spangenberg Project has prepared an update to a 2008 issue paper on reclassification. The present report, which reviews recent and proposed legislative action, newspaper and media reports, previous studies and reports and interviews with experts, describes general trends of efforts in penalty reclassification, reduction and alternative sentencing methods, including diversion and specialty court programs. As the following discussion explains, states have seen varying levels of success in their reclassification, misdemeanor penalty reduction and alternative sentencing efforts.

- **States successfully reclassifying misdemeanor offenses.** The largest cost savings for states occurs when a misdemeanor is reclassified into a non-jailable infraction or citation. Such reclassification eliminates the requirement of appointment counsel and often decreases the collateral consequences that are attached to a guilty plea in these cases. Few states are making progress in this area. Large cost savings can also be seen in those states in which misdemeanor offenses are reclassified into low-level misdemeanor charges that do not include the possibility of confinement, thereby eliminating the state's duty to provide counsel to indigent defendants.¹ Recently, there has been significant movement in this type of reclassification.
- **Legislation Pending.** Several states have pending legislation that would reclassify offenses into infractions or non-jailable offenses.
- **Reclassifying Marijuana Possession.** More than ten states have reclassified or are considering reclassifying the possession of small amounts of marijuana into a non-jailable offense. Given the number of charges that fall into this category, such reform likely represents a great cost-savings to those states that pursue it.
- **Alternative Methods.** Other states have not been as successful in reclassification efforts, but have established sentencing commissions to evaluate the sentencing policies and practices or have established alternative programs (e.g. diversion programs, drug courts, specialty courts, etc.) in an effort to decriminalize offenses and utilize resources efficiently.

Reclassification is an effective means to save states much needed funding without sacrificing public safety. In addition, reclassification can decrease caseloads for public defenders and appointed

¹ This does not apply to states that have extended the right to counsel to all misdemeanor offenses, a duty beyond *Argersinger v. Hamlin*. For example, California requires counsel to be appointed to all indigent defendants charged with a misdemeanor. Thus, cost savings would only be seen by reclassifying charges into infractions or violations.

counsel and reduce criminal court dockets, thus relieving members of the courtroom workgroup from some of their overwhelming responsibilities. Provided that states do not create unintended collateral consequences in reclassifying offenses, they should seriously consider reclassification as a cost- and resource-saving strategy, especially given the current economic climate.

An Update on Reclassification Efforts
An Issue Paper Prepared by The Spangenberg Project at George Mason University

In April 2008, The Spangenberg Group produced a white paper summarizing efforts in the states to reclassify criminal misdemeanors. That paper has now been updated by The Spangenberg Project at George Mason University.² Researchers surveyed academic literature, searched through popular periodicals, and consulted with known experts on the subject. What follows should be seen as a starting point in understanding reclassification, misdemeanor penalty reduction and other alternative sentencing efforts nationwide, for the trend is evolving and constantly changing, especially as state legislatures face declining revenue.

The government, of course, is obligated to supply court-appointed counsel to any indigent defendant charged with a crime for which a conviction carries the possibility of incarceration. Traditionally, criminal offenses are classified as felonies and misdemeanors which carry the possibility of jail time. Offenses for which a person may not be incarcerated but may only receive a fine (“fine-only” offenses) are sometimes classified as civil infractions or ordinance violations. In most states, there is no right to court-appointed counsel in those circumstances. However, in New York State every non-traffic violation carries a maximum of 15 days in jail.³ A number of jurisdictions have created a class of fine-only misdemeanors for which a person is not entitled to court-appointed counsel. Decriminalizing certain minor offenses not only eliminates the requirement for appointment of counsel on the underlying offense, but also reduces the number of appointments required for post-sentencing hearings (e.g., probation violations). According to a 2010 ABA Report to the House of Delegates from the Commission on Homelessness and Poverty, “problems with overcrowding, over-burdened prosecutors and public defenders with unfeasible caseloads and understaffing...” will be eased by these measures, which will provide savings to the whole justice system.⁴

Beyond the impact on efficiency and costs, one should also consider potential collateral consequences to defendants when changing sentencing guidelines, which effectively reduces the number of crimes for which a person is entitled to counsel. The conviction or guilty plea of a fine-only misdemeanor is still a misdemeanor conviction that may have serious collateral consequences, including

² In February 2009, The Spangenberg Group joined George Mason University’s Center for Justice, Law and Society to form The Spangenberg Project.

³ <http://www.courts.state.ny.us/courts/nyc/criminal/glossary.shtml>

⁴ American Bar Association, Criminal Justice Section, Commission on Homelessness and Poverty *Report to the House of Delegates* February 2010

hindering future employment, affecting one's immigration status,⁵ and causing one's driver's license to be suspended. In addition, an un-counseled conviction may be used against a defendant as a prior conviction for purposes of enhancing a sentence.⁶ In its recent decision, *Padilla v. Kentucky*, the U.S. Supreme Court decided that certain serious collateral consequences should be considered as seriously as the direct consequences of a conviction and should be discussed during plea-bargaining. Changing sentencing guidelines could create a group of offenses not subject to counsel that might have serious collateral consequences.⁷ (For further discussion, see "Collateral Consequences of Un-counseled Convictions," below.)

In the summer of 2007, Bob Johnson, district attorney in Anoka County, Minnesota, chair of the American Bar Association's Criminal Justice Section, and previous president of the National District Attorney's Association, stated, "The trend toward increased criminalization of conduct is sharply on the rise. What was once considered simply bad behavior is now criminal."⁸ As Johnson noted, as of 2006 48 million people in the United States had criminal histories; that is nearly one in six Americans. He further warned that, "Today, individual criminal records can be harvested from government offices by private companies that publish and sell the data on the Internet. Some states have bought into this new trend and created their own websites that allow the public to research individual histories. All too frequently, there is little, if any, inquiry into the type of conviction, the age of the conviction, much less any rehabilitation since the conviction. The conviction record has become a modern-day scarlet letter."⁹ Moreover, in many cases, defendants do not receive counsel for misdemeanor charges. In 1998, 38.4% of individuals facing misdemeanor charges did not receive the assistance of counsel.¹⁰ The increased focus on misdemeanor conviction and the lack of counsel for misdemeanor charges has been another factor leading to the recent re-examination of misdemeanor sentencing in many states.

This paper provides a brief description of a number of states' recent efforts and progress in reclassifying or reducing penalties for low-level offenses. Throughout the spring and summer of 2009, TSP collected information from academic journals, government and NGO reports, newspapers, and legislative records. To supplement this information, TSP researchers interviewed researchers and

⁵ In March 2010, the United States Supreme Court held that a lawyer for a non-citizen charged with a crime has a constitutional obligation to notify that client that a guilty plea could impact immigration status and may lead to deportation. *Padilla v. Kentucky*, 559 U.S. ___ (March 30, 2010).

⁶ The United States Supreme Court has held that a prior uncounseled misdemeanor conviction or plea may be used to enhance a subsequent sentence without violating the Sixth and Fourteenth Amendments. *United States v. Nichols*, 511 U.S. 738 (1994).

⁷ *Padilla v. Kentucky*, 559 U.S. (March 31, 2010)

⁸ ABA publication *Criminal Justice*, Summer 2007, p.1

⁹ *Ibid*

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

practitioners familiar with this area of research. This paper details the findings of this research. Due to time and funding constraints, this paper does not present a systematic state-by-state survey of reclassification efforts. Rather, it is a collection of research located via various primary and secondary sources.

The paper proceeds by listing states that have reclassified certain low-level offenses as civil offenses or have reduced their penalties to become fine-only misdemeanors. The discussion that follows includes states that have passed legislation intended to decriminalize certain offenses, reduce sentences for particular offenses (usually in order to deal with prison overcrowding), create innovative diversion programs, and states that have reviewed their sentencing laws. The list includes both states that have enacted legislation as well as states where legislation is pending or has been contemplated. Many jurisdictions have attempted to make these changes, but have been unsuccessful. A separate appendix summarizes this information in tabular form.

Reclassification and Penalty Reduction of Misdemeanors

Several states have made efforts to remove the possibility of a jail sentence for particular misdemeanors, thus reducing the number of indigent defense appointments and saving government revenue. In some states, this effort has seen the total reclassification of misdemeanors into violations or infractions. In other states, this effort has redefined classes of misdemeanors to include a class that comprises only charges for which imprisonment is not authorized. Charges in the latter category however, while removing the possibility of jail, still carry the collateral consequences attached to receiving a misdemeanor conviction or submitting a guilty plea.¹¹ In *Padilla v. Kentucky*, Justice John Paul Stevens wrote, "...[the Supreme Court has] never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*..." implying that the Court views serious collateral consequences to be as significant as the direct consequences resulting from a criminal conviction or plea. While the state may reduce representation costs by reducing a charge to a non-jailable misdemeanor, defendants facing serious collateral consequences from a misdemeanor conviction or plea may lose their access to counsel. As the volume of misdemeanor cases has increased dramatically in the past several decades, reclassifying misdemeanor crimes that do not present a public safety risk represents one method of saving states

¹¹ Boruchowitz, R.C., Brink, M.N., Dimino, M. (2009). *Minor Crime, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*. Washington, DC: National Association of Criminal Defense Attorneys.

considerable funds by decreasing indigent defense appointments and eliminating expensive incarceration.¹²

This section provides a brief description of states that have been successful in reclassifying misdemeanors into infractions or non-jailable offenses, states that have reduced misdemeanor penalties into becoming fine-only misdemeanors, states that have introduced legislation on reclassifying misdemeanors into non-jailable offenses, and states that have made recommendations for legislative action on reclassification.

Successful Reclassification of Misdemeanors into Infractions, Violations, or Non-Criminal Charges

Alaska – In its 1995 legislative session, Alaska amended a statute to allow the offense of minor in possession of alcohol, previously classified as a juvenile misdemeanor, to be charged by local police as a violation for which a juvenile cannot be detained.¹³

Massachusetts – In 2006, changes were made to a Massachusetts statute that allows district attorneys to treat certain misdemeanors as civil infractions.¹⁴ These include operating after license/registration suspended, disorderly persons/disturbing the peace, shoplifting, illegal possession of Class “C” marijuana, prostitution, larceny by check, trespass on land, dwelling, etc., and operating an uninsured motor vehicle. These and other misdemeanors now have the possibility of being treated as civil infractions and would therefore not require appointment of counsel; in addition, they could not be used as sentence enhancers for future charges or result in any collateral consequences normally associated with a criminal conviction or plea.¹⁵

Successful Efforts to Reduce Misdemeanor Penalties

New Hampshire – In 1992, the N.H. legislature created two classes of offenses for misdemeanors: Class “A” for which imprisonment is authorized and Class “B”, for which no imprisonment is authorized. The local prosecutor also has the authority to charge any misdemeanor as a Class “B” misdemeanor so long as

¹² Ibid

¹³ 04.16.050 (1995).

¹⁴ MA G.L. ch. 277 §70C

¹⁵ Massachusetts Committee for Public Counsel Services. (2009). *2009 Report to the Legislature on the Committee for Public Counsel Services* The Commonwealth of Massachusetts: Author.

no element of the offense involves an act of violence or threat of violence.¹⁶ If a person pleads guilty or is convicted of a class A misdemeanor but receives a sentence that involves no actual or possible incarceration, the conviction is recorded by the court as a class B misdemeanor conviction. The first year after establishment it was reported that payments to private court-appointed counsel had been reduced by \$400,000 as a result.¹⁷

Ohio – In 1974, the legislature classified five (5) categories of offenses. One category, “minor misdemeanor” does not authorize jail and is a fine-only offense.¹⁸ In 2004, the maximum fine, for minor misdemeanors increased from \$100 to \$150 and additional possible penalties were added, including restitution, reimbursement, and community service.¹⁹

California – A 2005 sentencing law allowed certain district attorneys to establish a pilot program whereby persons convicted of driving without a valid license could agree to be electronically monitored in a home detention program in lieu of a county jail sentence.²⁰

Hawaii – Since 1978, Hawaii has made efforts to reclassify crimes in an attempt to use criminal justice resources more effectively and efficiently. In 2005, state legislators asked Hawaii’s Legislative Reference Bureau to identify petty misdemeanors and criminal offenses that authorize imprisonment and a fine of more than \$1,000 but typically result in fines. From this research, SB2400 proposed the reclassification of a number of offenses, including many agricultural and animal offenses, conservation offenses, and transportation offenses into fine-only offenses. This bill was signed May 2008 and took effect on July 1, 2009.²¹

Maine – Maine’s Commission to Improve the Sentencing, Supervision, Management and Incarceration of Prisoners was established by the legislature to examine the factors leading to prison overcrowding, the impact of current sentencing laws, the use of alternative sentences, and means to reduce recidivism, in particular recidivism caused by mental illness and substance abuse. The Commission finished the second

¹⁶ N.H. Rev. Stat. Ann. § 625:9 (2002).

¹⁷ Spangenberg, R. (2005). *Decriminalization and Fine Only Offenses: An Issue Paper*. Newton, MA: The Spangenberg Group.

¹⁸ Ohio R.C. §2935.26

¹⁹ Ohio R.C. §2929.28

²⁰ California SB959. (2005). To be sure, the pilot project does not reduce the sentence, rather the location where it is served. But, defendants undoubtedly prefer home detention to county jail as a less punitive environment.

²¹ Available online at : <http://www.capitol.hawaii.gov/session2008/lists/getstatus2.asp?billno=SB2400>

of a two-year study and several bills were enacted in FY 2005 as a result. One bill amended a provision regarding “authorized sentences” to specify that a fine may be imposed along with any other sentencing alternative, except unconditional discharge, deferred disposition and a fine with administrative release. The bill also created a newly-authorized sentence by allowing the court to impose a sentencing alternative that includes a split sentence of imprisonment with administrative release. In addition, there were several Juvenile Sentencing reforms, including one that directs the Commissioner of Corrections to create a pilot project to determine the need for judicial review of the services provided to at-risk juveniles committed to a Department of Corrections juvenile facility.²²

Minnesota – Minnesota has a fine-only misdemeanor class called “Petty Misdemeanor,” in which a sentence may not exceed a fine of \$300. These include speeding offenses, stop sign violations, and expired licenses or expired license plates.²³

Virginia – Virginia has four classes of misdemeanors, two of which are fine-only offenses. A Class “3” misdemeanor is punishable by a fine of up to \$500 and a Class “4” misdemeanor is punishable by a fine up to \$250.²⁴

Legislation Pending – Alternative Sentencing Methods

Ohio – An effort by the Governor was made in May 2009 to seek to reduce nearly 30 traffic offenses to non-jailable offenses through his submitted budget. These proposals were ultimately dropped during budget negotiations, although the budget (HB 1) passed.²⁵ SB 22, which is currently under consideration, would give the court preference to give certain non-violent drug offenders treatment in lieu of conviction, as well as alternative community sanctions for non-payment of child support.²⁶

Pennsylvania – Legislation was passed in July 2007 directing the Sentencing Commission to adopt guidelines for fines and prescribe community service alternatives in place of fines. There is no report to date.²⁷

²² SP 521, LD 1505, 122nd Maine Legislature.

²³ Minnesota Statutes §609.131

²⁴ Virginia Code § 18.2-11

²⁵ “Sentencing Reform – Senate Bill 22 and House Bill 386” Available online at:
<http://www.opnff.net/legislative_policy_update.asp>

²⁶ “Summary of Key Provisions Substitute Senate Bill 22” Ohio Department of Rehabilitation and Correction

²⁷ SB 116 (2007), Act 37

Vermont – In 2008, a bill passed by the Senate Judiciary Committee (S. 238) would remove jail time as a possible penalty for first-time offenders arrested with a small amount of marijuana. The bill would allow first and second offenders the option of a Court Diversion Program, the successful completion of which would not result in a criminal record.²⁸ S. 238 died in the House Judiciary Committee however, without receiving a full hearing. Similar bills have been reintroduced in the current legislative session, S.71 and H.150, which would reduce the penalty for possessing up to an ounce of marijuana from up to six months in jail to a \$100 civil fine.²⁹

Recommendations for Legislative Action

Georgia – In Georgia, misdemeanors are defined as "any crime other than a felony" and are punishable by up to 12 months in jail plus a fine.³⁰ Unlike most states, virtually all motor vehicle violations in Georgia are classified as misdemeanors, including all speeding and other moving violations, and there is no grade of petty offense or infraction below the level of misdemeanor. In response to a statewide study on indigent defense and issues related to *Alabama v. Shelton*,³¹ the Chief Justice's Commission on Indigent Defense issued a recommendation to the legislature to amend the motor vehicle code to allow local courts the option of handling some traffic offenses as civil infractions. In addition to reducing the need for making court appointments, decriminalization, the commission suggests, can increase court efficiency. The commission's report cites a 1994 article by the former executive director of the National Committee on Uniform Traffic Laws and Ordinances: "When states changed the classification of certain minor traffic violations to civil infractions, the efficiency and effectiveness of the traffic court improved."³²

Iowa – In 2007, Iowa formed the Criminal Code Re-organization Study Committee with a sub-committee to meet during the 2007-2008 and 2009 legislative interims to consider proposals for criminal code revisions, reorganization, and updates. At the subcommittee's meeting in the fall of 2008, the chairperson advocated a proposal to simplify the penalty provisions in Code Chapters 123 and 321J, affecting

²⁸ Available online at: <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/bills/senate/S-238.HTM>

²⁹ Available online at: <http://www.mpp.org/states/vermont/>

³⁰ O.C.G.A. §17-10-3 (1997).

³¹ *Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense, Part II: Analysis of Implementing Alabama v. Shelton in Georgia*, The Spangenberg Group (June 9, 2003).

³² *The Status of Indigent Defense in Georgia, Report of the Chief Justice's Commission on Indigent Defense Part II: Analysis of Implementing Alabama v. Shelton in Georgia*, Clark D. Cunningham (draft Aug. 4, 2004), citing *Decriminalization of Minor Offenses Unburdens Courts, Traffic Safety* 26, 27 by Daniel T. Gilbert (Nov/Dec 1994).

controlled substances and operating a motor vehicle while intoxicated, respectively. The proposal was to create a separate code section within the two that would list all of the criminal and civil penalties applicable to an offender in violation of one of the codes. The subcommittee agreed to consider and review any proposals for change, though it has not yet met again.³³

Missouri – For several years, public defenders and other advocates have sought to reclassify several misdemeanor offenses to fine-only offenses. There has been no response from the legislature to date.³⁴

Nebraska – In 2008, the Lancaster County Public Defender office participated in a workload study by the Public Policy Center at the University of Nebraska. The report recommends that policymakers evaluate sentencing policies to ensure the efficient use of public defenders in the county.³⁵

Ohio – Public defenders have called for the Ohio legislature to reduce various traffic offenses to minor misdemeanors, thus eliminating the possibility of jail time and reducing their workload. A provision in the House version of the state budget on May 2009 sought to reduce 30 traffic offenses, though not some of the major offenses such as driving with a suspended license, a first-degree misdemeanor in Ohio punishable by up to six-months in jail.³⁶ These proposals were ultimately dropped.

Reclassifying Marijuana Possession

Although a conviction or guilty plea for first-time possession of a small amount of marijuana does not ordinarily carry a jail sentence, the mere possibility of incarceration requires the appointment or waiver of counsel. Ten states have removed the possibility of jail time and thus reduced the number of indigent defense appointments for such offenses. The following is a list of these states, noting the class of offense, maximum amount of marijuana possessed, and maximum fine that may be imposed:³⁷

³³ “Iowa Legislature Reorganization Subcommittee of the Criminal Code Reorganization Study Committee Briefing” 9/24/2008 < <http://www.legis.state.ia.us/lsadocs/BriefOnMeetings/2009/BMTES000.PDF>>

³⁴ McAdam, J.M. (2009). *On the Verge of Collapse: The Missouri State Public Defender’s Caseload Crisis*. Kansas Counselor, page 10. Available online at: http://www.lathropgage.com/files/upload/McAdam_On_the_Verge_of_Collapse.PDF

³⁵ Available online at: <http://ppc.unl.edu/project/LancasterCountyPublicDefenderWorkloadAssessment>

³⁶ *Supra* 25

³⁷ Information on marijuana laws available at www.norml.org.

- **California:** misdemeanor; 28.5 grams; \$100 fine³⁸
- **Colorado:** petty offense; 1 ounce; \$100 fine
- **Maine:** civil violation; “useable amount;” \$200-\$400
- **Massachusetts:** petty offense; 1 ounce; \$100 fine
- **Minnesota:** misdemeanor; 42.5 grams; \$300, possible drug education requirement
- **Mississippi:** misdemeanor; 30 grams (1st offense); \$100-\$250
- **Nebraska:** civil citation; 1 ounce (1st offense); \$100
- **Nevada:** misdemeanor; any amount, at least 21 yrs. old (1st offense); \$600; misdemeanor; any amount, at least 21 yrs. old (2nd offense); \$1,000
- **New York:** civil citation; 25 grams (1st offense); \$100; civil citation; 25 grams (2nd offense); \$200
- **Ohio:** civil citation; 100 grams; \$100 misdemeanor; 200 grams; variable fine
- **Oregon:** misdemeanor; 1 ounce; \$500-\$1,000

The following states have yet to pass bills reclassifying marijuana penalties, although movement has been made in that direction:

Connecticut – In response to concerns about the state’s deficit, two senators have sponsored a bill that proposes the decriminalization of small amounts of marijuana. Fines would be substituted for criminal penalties for those arrested for possession of less than one ounce. The bill, SB349, won support from the Joint Judiciary Committee and later was amended after debates with opposition. The amended bill would not apply to minors and would have taken effect October 1, 2009. Sponsors argued that the bill could save the state more than \$11 million in law enforcement, judicial, and probation costs; however, the bill is effectively dead after it was filibustered by key opponents in the Senate Finance Committee.³⁹ A new bill, which would make similar changes, has been introduced in the current legislative session as SB 476.⁴⁰

³⁸ While California has amended the law on possession of 28.5 grams or less of marijuana, the charge remains classified as a misdemeanor. Under California law, indigent defendants are entitled to appointed counsel for misdemeanor charges. Thus, there is likely little savings in terms of reducing the number of indigent defense appointments.

³⁹ Available online at: <http://www.mpp.org/states/connecticut/>

⁴⁰ Available online at: <http://www.cga.ct.gov/2010/TOB/S/2010SB-00476-R00-SB.htm>

Hawaii – In 2009, a bill (SB 2450) went before the Legislature to make the possession of less than one ounce of marijuana a civil offense in Hawaii, punishable by fines. Juvenile offenders would have to complete a drug awareness program. The bill was passed by members of the Committee on Public Safety and the Human Services Committee but is pending in the House Judiciary Committee. SB 2450 has passed the Senate already.⁴¹

Illinois – In July 2009 in Cook County, Illinois, the Board voted to decriminalize small amounts of marijuana. Under the new legislation, offenders possessing less than ten grams can be arrested on misdemeanor charges or they can be issued a \$200 ticket. The county board president has told the press he may veto the legislation. It would take 14 votes to override a veto. The ordinance has passed after the board president chose not to veto the legislation, however, police officers in the county have yet to issue a single ticket for marijuana possession (they continue to arrest people).⁴²

Massachusetts – In 2008, Massachusetts reclassified the possession of less than an ounce of marijuana.⁴³ In 2009, HB 2929 and SB1801 moved to regulate and tax the cannabis industry.⁴⁴ The bills state that the possession of marijuana by an adult would not constitute a violation of criminal law. In addition, the law sought to regulate the commercial production and distribution of marijuana to those aged 21 and over, and issue licensure requirements and excise taxes on the retail sale of marijuana.⁴⁵

Montana – In March 2009, HB 541 was introduced to reclassify minor marijuana possession of 30 grams or less from a misdemeanor to a civil citation.⁴⁶ The current legislation allows up to a six-month sentence for this charge. The bill died in the judiciary committee earlier this summer.

New Hampshire – In the 2008 legislative session, HB 1623, a bill to reclassify marijuana possession penalties, went before the House Criminal Justice and Public Safety Committee. If passed, the bill would have reclassified minor marijuana possession from a misdemeanor offense punishable by up to one year in jail to a civil violation of no more than \$200 for first-time offenders with less than .25 ounces in their

⁴¹ Available online at: <http://www.mpp.org/states/hawaii/alerts/hawaii-call-to-request-a.html>

⁴² Available online at: http://articles.chicagotribune.com/2010-06-22/news/ct-met-marijuana-ordinance-20100621_1_ordinance-medicinal-marijuana-ford-heights

⁴³ Available online at: http://www.boston.com/news/local/breaking_news/2008/11/question_2_setu.html

⁴⁴ Available online at: <http://www.cantaxreg.com/Massachusetts/Massachusetts.html>

⁴⁵ Ibid.

⁴⁶ Available online at: <http://www.mpp.org/states/montana/>

possession. Supporters of the bill pointed to reduced costs in the criminal justice system. In March 2008, the bill passed the New Hampshire House, though was later defeated by the Senate.⁴⁷

Collateral Consequences of Uncounseled Convictions

Although creating fine-only offenses can be a useful way to reduce attorney appointments and thus indigent defense costs, creating such a class of offenses also creates an unintended risk for many offenders who, without counsel, are often unaware of the collateral consequences of a conviction or guilty plea. Such potential collateral consequences include the use of uncounseled convictions in future court proceedings. As previously mentioned, the convictions can be used to enhance a sentence for a subsequent offense. In addition, certain convictions may be used to impeach an offender in a subsequent trial where the offender is a witness or a defendant-witness.

Collateral consequences can also have a serious impact on a defendant's life beyond the courtroom. An uncounseled conviction may trigger the loss of many rights and privileges, such as driving privileges, immigration status, the right to vote and to hold public office, the right to receive government benefits, and the right to obtain certain professional licenses. Further, potentially far-ranging collateral consequences of uncounseled convictions can be seen in the area of employment. In Georgia, for example, ex-offenders are excluded from many employment opportunities that require professional licenses and criminal background checks, including public employment.⁴⁸ Private businesses also perform criminal background checks on many job applicants.

Juveniles are subject to even more extensive consequences as a result of adjudication. Adjudication of delinquency although not a criminal conviction, is often treated as such. Juveniles face a decreased ability to participate in juvenile court, expulsion from their school, suspension or future suspension of driving privileges, as well as many of the other consequences, such as housing benefits and immigration status, that adults face. In an effort to limit such consequences, in 2010 the ABA adopted a policy on juvenile collateral consequences. The resolution recommends that "federal, state, territorial and local governments to increase the opportunities of youth involved with the juvenile or criminal justice systems and to prevent the continuing discrimination against those who have been involved with these systems in the past by limiting the collateral consequences of juvenile arrests, adjudications, and convictions."⁴⁹

⁴⁷ Available online at: <http://www.mpp.org/states/new-hampshire/>

⁴⁸ O.C.G.A §46-7-85.10 (2001); §17-6-50 (2001); §7-1-702 (2001); §7-1-682 (2001); §45-23-5 (2001).

⁴⁹ American Bar Association. 2010. Resolution 102A. Policy to Limit Juvenile Collateral Consequences. Adopted March, 2010.

Prosecutorial Discretion in Sentencing Decisions

Giving local prosecutors the ability to use their own discretion when choosing between jailable or fine-only sentencing for certain charges has been a politically popular way of reducing representation costs. While it has been an excellent way of remaining “tough on crime”, it has not been very effective in reducing costs. In Massachusetts, the legislature created the Rogers Commission in order to study the provision of counsel to indigent persons in Massachusetts in 2004.⁵⁰ The Commission found that although “district attorneys have had the discretion to treat a misdemeanor offense as a civil infraction since 1995” they have so far been unwilling to exercise this discretion to charge fine-only offenses.⁵¹ In fact, the report states that indigent defendants in Massachusetts are charged with misdemeanors more frequently than any other jurisdiction. Prosecutorial discretion has led to a similar result in Cook County, Illinois, where although the local board voted to allow prosecutors to decide between arresting possessors of less than ten grams of marijuana or issuing them a \$200 fine. This ordinance passed in July 2009, but nearly a year later, prosecutors had not opted to write a ticket in a single case.⁵²

The Rogers Commission believed that a fundamental aspect of reducing the number of non-serious misdemeanors resulting in representation costs is prosecutorial sentencing discretion. In light of the “limited incentives” for district attorneys to charge fine-only offenses, the Rogers Commission recommended that the legislature amend the laws to deem certain non-serious misdemeanors as “civil infractions unless the Commonwealth files an affidavit at arraignment establishing just cause to the contrary.”⁵³ It also suggested the total reclassification of several minor misdemeanors, including operation of a motor vehicle with a suspended license and disturbing the peace. After prosecutorial disagreement with this proposal, these reclassification changes were not adopted. The commission also suggested the creation of a permanent body in Massachusetts to examine each misdemeanor in Massachusetts and determine whether they should remain criminal offenses or become civil infractions.⁵⁴ This body has not yet been created.

Additional Progress States Have Made Related to Reclassification

States have also made progress in other areas related to reclassification. Many states have established sentencing commissions or task forces to examine sentencing policies and identify strategies for cost saving. Additionally, states continue to explore diversion programs and specialty courts in an

⁵⁰ Massachusetts Ch. 253 of the Acts of 2004

⁵¹ Rogers Commission *Report of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts* (2005) p. 10

⁵² *Supra* 42

⁵³ *Supra* 51 p. 17

⁵⁴ *Ibid* p. 18

attempt to resolve underlying problems that often increase contact with the criminal justice system and allocate resources in an efficient manner to effective programs.

Establishment of Sentencing Task Force or Commission

A number of states have moved to establish a sentencing task force or commission. While these groups do not focus solely on reclassifying crimes, they are tasked with exploring sentencing policies and practices, and changes that could help the criminal justice system work more efficiently. As reclassification becomes more common and is the focus of additional research, it is expected that these groups will seriously consider reclassification as a possible cost-saving strategy.

Arizona – In 2008, HB 2817 proposed to develop the Arizona Sentencing Commission. The Commission was tasked with reviewing sentencing policies and practices, and making recommendations for changes that will encourage equal and fair policies while using the state’s criminal justice resources efficiently. The commission would be able to request information, data, and reports from criminal justice agencies and hold hearings to obtain additional information. The legislation did not pass.⁵⁵

Connecticut – HB5492 contained a legislative committee’s recommendation to establish a sentencing task force to review the state’s crime and sentencing policies. The committee was to terminate upon the completion of its work on 12/1/08. It appears that the committee has not issued its final report and no information is available as to a due date. This bill did not pass.⁵⁶ A similar bill, HB 5781 did pass, creating the Connecticut Sentencing Task Force (becoming Public Act 06-193), which has the power to “make any recommendations for the revision of criminal justice and sentencing policies as deemed necessary”.⁵⁷

Colorado – In 2007, HB 07-1358 authorized a commission on criminal and juvenile justice. The commission is tasked with evaluating Colorado’s sentencing policies to ensure judicious use of criminal justice systems resources.⁵⁸ The commission submitted a final report in February 2010 which makes reclassification recommendations including eliminating mandatory jail sentences for certain non-alcohol

⁵⁵ Available online at: www.azleg.gov/legtext/48leg/2r/bills/hb2817p.pdf

⁵⁶ Available online at:

http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=5492&which_year=2006&SUBMIT1.x=0&SUBMIT1.y=0&SUBMIT1=Normal

⁵⁷ Available online at: <http://www.ct.gov/opm/cwp/view.asp?a=2976&q=383706#Offense>

⁵⁸ Available online at: <http://cdpsweb.state.co.us/cccj/index.html>

related driving violations (including driving with a suspended license) and eliminating mandatory arrest provisions for individuals on parole.⁵⁹

New Mexico – A sentencing commission was established in 2004, with a separate Juvenile Task Force created to review the juvenile code in its entirety. The Commission has yet to consider reclassification.⁶⁰

West Virginia – In 2004, a study was commissioned to examine sentencing laws. In 2010, legislation was introduced to create a Sentencing Commission.⁶¹

Diversion Programs

There also has been recent progress in diversion policies to conserve resources and limit the collateral consequences defendants experience as a result of contact with the criminal justice system.

Alabama – Alabama has recently founded the Statewide Steering Committee for the Cooperative Community Alternative Sentencing Project.⁶² The Committee acknowledges the limited resources available in corrections and seeks community-based alternative sanctions. There also has been a push for an increase in drug courts in Alabama, with criminal justice officials predicting at least one court per county within several years. Efforts during the 2009 Legislative session included amending the Community Corrections Act to give judges the discretion to sentence individuals convicted of drug sales to community corrections programs. In 2009, the Tuscaloosa County House local legislation committee approved a bill to create a pretrial diversion program as an alternative to jail or prison for certain offenders, thus relieving some of the burden on the county's criminal justice system. Offenders who participate in the diversion program may have their charges reduced or dismissed.⁶³

Florida – In 2009, CS/SB 1722, a proposal to divert from prison third-degree, non-forcible felons with a certain number of points, was entered into the most recent Legislative session and approved in May 2009, taking effect in July of the same year.⁶⁴ Proponents project increasing financial savings for the next several years, assuming fifty percent diversion. Also in 2009, CS/CS/SB 1548 was introduced to create a

⁵⁹ Colorado Commission on Criminal and Juvenile Justice Final Status Report (February 2010). Available online at: http://cdpsweb.state.co.us/cccj/PDF/2009_Nov_Report/SB09-286_FinalReport.pdf

⁶⁰ Available online at: <http://nmsc.unm.edu/>

⁶¹ H.B. 2319 (2010)

⁶² Available online at: <http://sentencingcommission.alacourt.gov/>

⁶³ HB914, Act 2009-735

⁶⁴ Chapter No. 2009-63

diversion program for convictions of retail theft. The bill increases the value threshold for charging an individual with felony grand theft while also allowing state's attorneys' offices to create and utilize retail-theft diversion programs. Advocates argue that increasing the monetary threshold will result in fewer offenders sentenced to prison. Unfortunately, this proposal died in the Insurance, Business and Financial Affairs Policy Committee.⁶⁵

Hawaii – In 2009, the Legislature passed a bill to convene a task force coordinated by the Attorney General.⁶⁶ The task force is charged with reviewing the impact that diversion of minor drug possession offenders into drug treatment would have on the criminal justice system, drug treatment program resources, and public safety. Although vetoed by Hawaii's governor, the Legislature overrode the veto and enacted the legislation in July 2009.⁶⁷

Minnesota – Effective July 2009, the Olmsted County Attorney is to establish and operate a diversion program intended to provide offenders with an alternative to confinement and a conviction while reducing costs and caseload burdens in the district courts. In the Minnesota 2009-2010 Legislative Session, SF 847 was introduced, which would establish pilot license reinstatement diversion programs in a number of jurisdictions across the state.⁶⁸ Eligible drivers may participate in the programs and receive diversion licenses. The program would run through June 2011.

Virginia – The General Assembly has charged the Department of Corrections and the Sentencing Commission with determining what programs and services would be needed to increase the number of nonviolent offenders diverted from prison, aiming to divert up to 50% of those offenders.⁶⁹ The Secretary of Public Safety convened the Alternatives for Non-Violent Offenders Task Force, which released a final report in December 2009.⁷⁰

⁶⁵ Available online at: <http://www.myfloridahouse.gov/sections/bills/billsdetail.aspx?BillId=40959&SessionIndex=1&SessionId=61&BillText=&BillNumber=1548&BillSponsorIndex=0&BillListIndex=0&BillStatuteText=&BillTypeIndex=0&BillReferredIndex=0&HouseChamber=S&BillSearchIndex=0>

⁶⁶ HB358 (2009)

⁶⁷ Special Session 2009, Act 4. Available online at: http://www.capitol.hawaii.gov/session2009/lists/measure_indiv.aspx?billtype=HB&billnumber=358

⁶⁸ Available online at: <http://www.senate.leg.state.mn.us/bills/billinf.php?ls=86>

⁶⁹ Appropriation Act – Item 387 G. 1-2. (Regular Session, 2009)

⁷⁰ “Alternatives for Non-Violent Offenders Task Force: Report and Recommendations December 2009” Available online at: <http://leg2.state.va.us/dls/h&sdocs.nsf/4d54200d7e28716385256ec1004f3130/498947535ad4eee38525769a00568143?OpenDocument>

Washington – King County (Seattle) has a full service relicensing program to assist individuals with a suspended drivers' license. Offenders are able to enroll in the program, through which the prosecutor may drop the criminal charges of "Driving While License Suspended in the Third Degree" or "No Valid Operator's License."⁷¹ The former charge frequently occurs when an individual has his license suspended due to unpaid tickets, often a result of the inability to pay the fines. Individuals who elect to participate in the program are given a variety of payment options including community service and serving on a work crew. Offenders in the City and County of Spokane, Washington are able to participate in a similar program, the Community Relicensing Project, which allows them to avoid prosecution.⁷²

Problem-Solving or Specialty Courts

Problem-solving courts depend on the collaboration of multiple partners to identify effective practices and allocate resources efficiently. For example, drug courts, first established in 1989 in Miami, Florida, integrate alcohol and drug treatment services with criminal justice case processing.⁷³ These courts offer an alternative to traditional case processing by combining treatment with close judicial supervision. Courts rely on the cooperation of prosecution and defense attorneys, probation departments, treatment providers, and court personnel. Other specialty courts, including mental health courts, homeless courts, teen courts, and tobacco courts, are examples of how the drug court model has been applied in an attempt to resolve underlying problems that result in increased contact with the criminal justice system.

Specialty courts operate in every state in the U.S. Recent studies have shown that specialty courts save states considerable money through reduced costs of victimization and savings to the criminal justice system agencies through decreased recidivism, and, thus, the need for additional case processing and incarceration.⁷⁴

In terms of reclassification, specialty courts offer alternative sentencing, such as intensive supervision probation, deferred sentencing, and dismissed charges if treatment goals are met. Although these efforts do not negate the need for appointed counsel in specialty courts, the establishment of these courts demonstrates progress in the decriminalization movement. These efforts should not be seen as a means to avoid appointed counsel costs, as defendants are often still charged with offenses that may result

⁷¹ Available online at: <http://www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx>

⁷² Available online at: <http://www.spokanecity.org/government/legal/prosecuting/relicensing/>

⁷³ Office of National Drug Control Policy. 2009. <http://www.whitehousedrugpolicy.gov/enforce/DrugCourt.html>

⁷⁴ See Office of National Drug Control Policy at <http://www.whitehousedrugpolicy.gov/enforce/DrugCourt.html> , California Drug Court Cost Analysis Study (2006). Research Summary, Administrative Office of the Courts, Center for Families, Children and the Courts, and the National Center for State Courts Drug Courts Resources available at: <http://www.ncsconline.org/wc/courttopics/ResourceGuide.asp?topic=DrugCt>

in confinement should they not meet the specialty court program goals or their case be moved to another court for various reasons. It is important however, to structure specialty courts so that defendants' rights are not waived in order to receive access to the specialty courts. Certain systems push defendants to plea guilty in order to be transferred to the specialty court, which has shown to have a higher recidivism rate than courts that transfer at arraignment. Jurisdictions should strive to evaluate how specialty courts can work to resolve defendants' underlying problems when minor offenses that do not put public safety at risk are reclassified to a level where confinement is not allowable.

Concluding Thoughts

Reclassification and other forms of misdemeanor penalty reduction offer many benefits to defendants, taxpayers, and the public at large with few drawbacks to public safety. But these efforts must be handled properly so that they do not become an opportunity simply to jettison legal representation for the most needy, who then could be subject to unintended collateral consequences. As the states consider and implement measures to reclassify offenses, the national scene is likely to be fluid. Still, with most governments presently facing dire financial circumstances, it is likely that more states will experiment with measures that reconsider the proper penalty for minor offenses, in turn easing clogged dockets and overcrowded jails and saving states money. This trend is worth following.

Table 1. Summary of Reclassification Efforts

A. Reducing misdemeanor penalties into non-jail misdemeanors		
STATE	Statute / Legislation	Description
Alaska	04.16.050: 1995	Allows the offense of a minor in possession of alcohol, previously classified as a juvenile misdemeanor, to be charged by local police as a violation for which a juvenile cannot be detained.
California	SB959: 2005	A pilot program ending January 1, 2008, allowing certain district attorneys to electronically monitor persons convicted of driving without a valid license in a home detention program in lieu of county jail.
Hawaii	SB2400: 2008	The reclassification of a number of offenses, including many agricultural and animal offenses, conservation offenses, and transportation offenses into fine-only offenses.
Maine	1349-B: 2005	“Authorized sentences” a sentencing alternative that includes a split sentence of imprisonment with administrative release. Juvenile Sentencing reforms: a pilot project to determine the need for judicial review of the services provided to at-risk juveniles committed to a Department of Corrections juvenile facility.
Minnesota	609.0332: 2000	Petty Misdemeanors a fine-only class where a sentence may not exceed a fine of \$300, to include speeding offenses, stop sign violations, and expired licenses or expired license plates.
New Hampshire	625:9: 1992	Two classes of offenses for misdemeanors. Class “A” for which imprisonment is authorized and Class “B”, for which no imprisonment is authorized. The local prosecutor also has the authority to charge any misdemeanor as a Class “B” misdemeanor, so long as no element of the offense involves an act of violence or threat of violence.
Ohio	2935.26: 2004	The maximum fine, for minor misdemeanors increased from \$100 to \$150, and additional possible penalties were added including

		restitution, reimbursement, and community service.
Texas	54:04: 2007	The courts can no longer sentence a juvenile to detention unless they commit an offense that would be a felony if committed by an adult.
Virginia	18.2-11: 2000	Four classes of misdemeanors, two of which are fine-only offenses. A Class “3” misdemeanor is punishable by a fine of up to \$500 and a Class “4” misdemeanor is punishable by a fine up to \$250.
B. Reclassifying misdemeanors into civil offenses		
STATE	Statute / Legislation	Description
Massachusetts	277:70C: 2006	Allows district attorneys to treat certain misdemeanors as civil infractions. These include operating after license/registration suspended, disorderly persons/disturbing the peace, shoplifting, illegal possession of Class “C” marijuana, prostitution, larceny by check, trespass on land, dwelling, etc., and operating an uninsured motor vehicle.
C. Pending Legislation		
STATE	Statute / Legislation	Description
Ohio	May 2009	Reclassify nearly 30 traffic offenses as non-jailable offenses.
Pennsylvania	July 2007 No report to date.	The Sentencing Commission was directed to adopt guidelines for fines and prescribe community service alternatives in place of fines.
Vermont	2008	Jail time removed as a possible penalty for first-time offenders arrested with a small amount of marijuana. First and second offenders have the option of a Court Diversion Program, the successful completion of which would not result in a criminal record.

D. Recommendations on Legislative Action		
STATE	Statute / Legislation	Description
Georgia	2006	Amend the motor vehicle code to allow local courts the option of handling some traffic offenses as civil infractions.
Iowa	2007 The subcommittee has not met again.	To create a separate code section that would list all of the criminal and civil penalties applicable to an offender in violation of one of the codes.
Missouri	Legislation has not been filed.	Reclassify several misdemeanor offenses to fine-only offenses.
Nebraska	2008	Evaluation by the Public Policy Center at the University of Nebraska of the sentencing policies to ensure the efficient use of public defenders in the county.
E. Working to Establish Sentencing Commissions or Task Forces		
STATE	Statute/Legislation	Description
Arizona	HB2817: 2008 Does not appear the commission has been constituted yet.	Create a Sentencing Commission –Establishment of Sentencing Committee or Task Force
Connecticut	HB5492: Does not appear the committee has issued a final report.	Establish a sentencing task force to review the state’s crime and sentencing policies. The bill would terminate upon the completion of its work on 12.1/08.
Colorado	HB 07-1358: 2007 No recommendation to date.	A commission on criminal and juvenile justice to evaluate Colorado’s sentencing policies to ensure judicious use of criminal justice systems resources.
New Mexico	Yet to consider reclassification.	Juvenile Task Force created to review the juvenile code in its entirety.
West Virginia	2004	A study was commissioned to examine sentencing laws.
West Virginia	2009	Legislation was introduced to create a Sentencing Commission.

F. Reclassifying Marijuana Possession		
STATE	Class of offense	Maximum Amount and Fine
California	Misdemeanor	28.5 grams; \$100 fine
Colorado	Petty Offense	1 ounce; \$100 fine
Maine	Civil Violation	“useable amount;” \$200-\$400
Massachusetts	Petty Offense	1 ounce; \$100 fine
Minnesota	Misdemeanor	42.5 grams; \$300, possible drug education requirement
Mississippi	Misdemeanor	30 grams (first offense); \$100-\$250
Nebraska	Civil Citation	1 ounce (first offense); \$100
Nevada	Misdemeanor	Any amount, at least 21 yrs. old (first offense); \$600
Nevada	Misdemeanor	Any amount, at least 21 yrs. old (second offense); \$1,000
New York	Civil Citation	25 grams (first offense); \$100
New York	Civil Citation	25 grams (second offense); \$200
Ohio	Civil Citation	100 grams; \$100
Ohio	Misdemeanor	200 grams; variable fine
Oregon	Misdemeanor	1 ounce; \$500-\$1,000
G. Diversion Efforts		
STATE	Statute/Legislation	Description
Connecticut	SB349: 2009 The bill was effectively dead after it was filibustered by key opponents in the Senate Finance Committee.	Decriminalization of small amounts of marijuana. Fines would substitute criminal penalties for those arrested for possession of less than one ounce. The bill would not apply to minors.
Hawaii	2009 Pending in the House Judiciary Committee	The Possession of less than one ounce of marijuana as a civil offense punishable by fines. Juvenile offenders would have to complete a drug awareness program.
Illinois	2009	Cooke County Board voted to decriminalize small amounts of marijuana. Offenders possessing less than ten grams can be arrested on misdemeanor charges or they can be issued a \$200 ticket.
Massachusetts	HB 2929 and SB1801: 2009	To regulate the commercial production and distribution of

		marijuana to those aged 21 and over, and issue licensure requirements and excise taxes on the retail sale of marijuana.
Minnesota	2009	The Olmsted County Attorney is to establish and operate a fair and just diversion program intended to provide offenders with an alternative to confinement and a conviction while reducing costs and caseload burdens in the district courts.
Minnesota	SF 847: 2009-2010	Establishment of a pilot license reinstatement diversion programs in a number of jurisdictions across the state. Eligible drivers may participate in the programs and receive diversion licenses. The program will run through June 2011.
Montana	HB541: 2009 The bill died in the Judiciary Committee.	Reclassify minor marijuana possession of 30 grams or less from misdemeanor to civil citation status.
New Hampshire	HB1623: March 2008 The bill passed in the New Hampshire House but failed in the Senate.	Reclassify marijuana possession penalties from a misdemeanor offense punishable by up to one year in jail to a civil violation of no more than \$200 for first-time offenders with less than .25 ounces in their possession.
Virginia		The General Assembly has charged the Department of Corrections and the Sentencing Commission with determining what programs and services would be needed to increase the number of nonviolent offenders diverted from prison, aiming to divert up to 50% of those offenders.
Washington		King County (Seattle) has a full service relicensing program to assist individuals with a suspended drivers' license. Offenders are able to enroll in the program, through which the prosecutor may drop the criminal charges of "Driving While License Suspended in the Third Degree" or "No Valid Operator's License."
Washington		Offenders in the City and County of Spokane, are able to participate in a similar program to King County, the Community Relicensing Project, which allows them to avoid prosecution.

