

THE EMPIRICAL CASE FOR DEFENSE COUNSEL FOR ALL, STARTING AT FIRST APPEARANCE: LESSONS FROM THE MISDEMEANOR JUSTICE PROJECT

Cecilia Low-Weiner, Jenny Roberts, & Thomas Harvey

In criminal cases, the attention and allocation of resources is focused on felonies. This is understandable, as more serious charges may have a greater impact on individuals, communities, and public safety. However, misdemeanors make up the bulk of judicial dockets and represent an often revolving door of individuals filtering in and out of the criminal justice system. Despite this, practitioners, academics, and data collectors have largely overlooked misdemeanors. This blind spot to misdemeanors presents a threat to defendants' rights, procedural fairness, and the legitimacy of the criminal justice system.

In 2013, [Arnold Ventures](#) funded [the Misdemeanor Justice Project](#) (MJP) at John Jay College of Criminal Justice. MJP aims to provide practitioners and policymakers with empirical evidence to inform the rapidly-evolving conversations around the criminal justice system's response to lower-level offenses. To bring increased attention to this area, the MJP began producing [reports](#) that document trends in enforcement of lower-level offenses as well as pretrial detention.

In July 2018, with the guidance of MJP's [National Research Advisory Board](#), MJP released a [special issue](#) of *Criminal Justice Policy Review*. This special issue was comprised of nine articles, touching on police officer use of discretion, the impact of enforcing lower-level violations and misdemeanors, pretrial detention and diversion, and court processing and legal representation in misdemeanor charges. While all nine articles provide important insights, there are two articles of particular interest to defense attorneys.

CONSEQUENCES OF NO-LAWYER-COURTS

Fair court proceedings, including the right to an attorney, are essential to obtaining any sense of justice in the criminal legal system. While the Supreme Court has defined the right to counsel in a string of cases from *Gideon v. Wainwright*¹ to *Alabama v. Shelton*², lower courts continue to misinterpret or outright ignore their ruling. In, [Right to Counsel in Misdemeanor Prosecutions After Alabama v. Shelton: No-Lawyer-Courts and Their Consequences on the Poor and Communities of Color in St. Louis](#), Harvey et al. demonstrate how unconstitutional criminal procedures and underfunded public defense offices create no-lawyer-courts. These no-lawyer-courts violate people's constitutional right to counsel and result in lengthy confinements and exorbitant bonds, abusive plea bargaining practices, invalid waivers, and unconstitutional sentences. This study finds that judges in St. Louis commonly ignore the extension of the right to counsel from *Scott v. Illinois*³ actual imprisonment doctrine to the Court's holding in *Shelton* that actual imprisonment includes suspended sentences as a term of imprisonment. Lower courts wrongly believe they have discretion in appointing counsel due in part to the convoluted holding in *Shelton*, which unduly punishes the poor and communities of color facing state prosecution. To tackle this issue and work towards more equitable court proceedings, the authors suggest the Supreme Court guarantee the right to counsel for every indigent person charged with a crime that carries the potential of incarceration.

THE IMPACT OF COUNSEL AT FIRST APPEARANCE

In, [*What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*](#), Worden et al. furthered the conclusions of the Harvey study by examining the impact and importance of defense counsel at first appearance. In 2013, New York State instituted Counsel at First Appearance (CAFA) programs in 25 upstate counties, by making funds available to provide indigent defendants with counsel at first appearance. The Worden study examined bail decisions and outcomes from periods before and after CAFA's adoption in three rural upstate New York counties. The researchers found that providing counsel at first appearance had an impact on bail and pretrial detention decisions. In one county, post-CAFA data revealed lower bail amounts and less time in pretrial detention. In the other two counties, judges released more individuals at arraignment, post-CAFA. Worden's study suggests that legislation at the state and federal level that mandate counsel at first appearance are critical in ensuring defendants' rights and fair court proceedings.

WHY IT MATTERS

Taken together, these studies highlight the critical role of defense counsel in ensuring the rights of defendants in the lower criminal courts. While access to defense counsel remains crucial to a fair criminal justice system, it is often denied or restricted, and the consequences, particularly on already vulnerable communities, are widespread. No-lawyer-courts and the failure to appoint counsel at first appearance may be invisible to some, but these flawed—and often unconstitutional—realities cause real harm to indigent defendants, their families and communities, and the very legitimacy of the criminal justice system. Having largely flown under the public and policy makers' radar, now is the time to shine the spotlight on misdemeanors.

Endnotes

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963)

² *Alabama v. Shelton*, 535 U.S. 654 (2002)

³ *Scott v. Illinois*, 440 U.S. 367 (1979)