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Diverting and Reclassifying Misdemeanors Could Save \$1 Billion per Year: Reducing the Need For and Cost of Appointed Counsel

Robert C. Boruchowitz*

There are approximately ten million misdemeanor cases filed each year in state and municipal courts in the United States. In some courts, the combination of driving with a suspended license, possession of marijuana, and minor in possession of alcohol cases can total between 40% and 50% of the caseload.¹ Many of those courts are overwhelmed with cases and the defenders in those courts, if they are present at all, are often overwhelmed and unprepared.² The financial impact on both the defendants and the local governments is significant.

In the recent report by the National Association of Criminal Defense Lawyers (NACDL), *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, the first recommendation was to divert offenses that do not threaten public safety to violations with penalties that are less costly to taxpayers.³

Defenders and judges across the country noted in a NACDL survey cited in the report that misdemeanor dockets are clogged with crimes that they believe should not be punishable with expensive incarceration. Right now, taxpayers expend on average \$80 per inmate per day⁴

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¹ As an example, Washington State in 2007 reported that one third of its 300,000 misdemeanor cases were driving with a suspended license in the third degree (DWLS 3) and in some courts more than 60% of the filings were those cases. The suspension involved in DWLS 3 primarily results from failing to pay a traffic ticket. See JOANNE I. MOORE & DAVID K. CHAPMAN, WASH. STATE OFFICE OF PUB. DEF., DRIVING WHILE LICENSE SUSPENDED 3RD DEGREE: SURVEY OF COURTS OF LIMITED JURISDICTION (2008), available at http://www.opd.wa.gov/TrialDefense/090602_DWLS3Survey.pdf.

² A story from Minnesota illustrates the problem:

Mixing empathy with exasperation, a district court judge who once worked as a public defender provides a sobering glimpse into his courtroom: "Public defenders are woefully unprepared. I get continuance requests much more often. Many times I've had a defendant ask for a different lawyer because he hasn't even talked with his public defender before a trial or plea hearing is set to begin."

Jeff Severns Guntzel, *Minnesota's public defender shortage: 'We are fast becoming the courts of McJustice,'* MINNPOST, Oct. 13, 2010, http://www.minnpost.com/severnsuntzel/2010/10/13/22286/minnesotas_public_defender_shortage_we_are_fast_becoming_the_courts_of_mcjustice.

³ ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009), available at [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf).

⁴ A 2010 study estimated the annual cost for a jail inmate at \$26,000. See JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, CTR. FOR ECON. & POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 11 (2010),

to lock up people accused of things like turnstile jumping, fish and game violations, minor in possession of alcohol, dog leash violations, driving with a suspended license, and feeding the homeless.⁵

By diverting or reclassifying these offenses as non-criminal violations, local and state governments could save hundreds of millions, perhaps more than \$1 billion per year. In the process, as outlined in the NACDL report, the reduced burdens on millions of defendants would allow them to work and to meet their obligations, and the unfairness related to racial disparity would be reduced.

This Issue Brief will discuss successful diversion programs from Washington State to Florida that have saved money by removing misdemeanor cases from the court system and have helped people to get their licenses back and to avoid the direct and collateral consequences of criminal convictions. It will review reclassification changes such as the Massachusetts law making possession of small amounts of marijuana a violation and not a crime. It also will address how the U.S. Department of Justice could support education of criminal justice practitioners about the benefits of diversion and reclassification efforts.

I. SCOPE OF THE PROBLEM

Probably the most common misdemeanor offense, and likely the one most easily removed from the system, is driving with a suspended license when the suspension is caused for failure to pay a traffic fine. Most of the people charged with that offense are poor. A Seattle study in 1999 found that of 184 people with suspended licenses, the average person had \$2,095 in unpaid fines and a monthly income of \$810.⁶

As two law professors have written:

If fifty or even one hundred people lost their driver's licenses because of their inability to pay, the practice would raise serious justice issues. In fact, we are talking about far greater numbers. For example, in the State of Washington, 186,500 driver's licenses are suspended each year. Most of these suspensions are for nonpayment of fines, and frequently fall upon low-income minorities.⁷

Probably the second most common type of non-violent offense that could be diverted from the system is possession of small amounts of marijuana. The FBI estimates that in 2009

available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>. In New Hampshire, the average cost to incarcerate an individual in a county facility is \$35,342 a year. FISCAL NOTE, S.B. 388-FN, 2010 Sess. (N.H. 2010), available at <http://www.nhliberty.org/bills/view/2010/SB388>.

⁵ See BORUCHOWITZ ET. AL, *supra* note 3, at 53 n.117 (collecting articles about laws on feeding the homeless).

⁶ EVALUATION OF SEATTLE RE-LICENSING PROGRAM (2002), available at <http://www.cityofseattle.net/courts/PDF/RelicensingEval.pdf>.

⁷ John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. FOR SOC. JUST. 439, 443 (2005) (footnote omitted).

there were 1,663,582 drug arrests in the United States, 45.6% of which (758,593) were for possession of marijuana.⁸ In addition, there were 8,067 gambling arrests, 26,380 vagrancy arrests, 471,727 drunkenness arrests, 518,374 disorderly conduct arrests, and 89,733 curfew and loitering arrests.

The racial disparity in many of these categories is striking: 36.7% of the disorderly conduct arrests and 44.7 % of the vagrancy arrests were of non-white persons. According to a 2007 article, *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*:

Since 1980, the New York City Police Department (NYPD) expanded its use of arrest and detention for minor offenses under its quality-of-life (QOL) policing initiative. Arrest data indicate that during the 1990s the primary focus of QOL policing became smoking marijuana in public view (MPV). By 2000, MPV had become the most common misdemeanor arrest, accounting for 15% of all NYC adult arrests and rivaling controlled substance arrests as the primary focus of drug abuse control. Of note, most MPV arrestees have been black or Hispanic. Furthermore, black and Hispanic MPV arrestees have been more likely to be detained prior to arraignment, convicted, and sentenced to jail than their white counterparts.⁹

Similar patterns are apparent in driving with a suspended license in the third degree (DWLS 3) cases. A study in 2000 showed that African-American drivers in Seattle were nearly twice as likely as whites to be ticketed for traffic violations.¹⁰

II. COSTS OF PROSECUTING MINOR OFFENSES AND POSSIBLE SAVINGS

The costs of these arrests and the subsequent prosecutions are staggering. A University of Oregon study found that the marginal cost of prosecuting and convicting a misdemeanor in Oregon was \$1,679.¹¹ Testimony presented to the Washington State Legislature in 2009 showed that changing simple possession of marijuana to a violation could save \$16 million per year.¹² In

⁸ See Fed. Bureau of Investigation, *Crime in the United States*, U.S. DEP'T OF JUSTICE (Sept. 2010), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2009> (follow "Go to Arrest Tables" hyperlink). An interesting note is that in the western part of the country, marijuana possession cases were 34.3% of the drug arrests. In the Midwest, they were 52.8%. *Id.*

⁹ ANDREW GOLUB ET AL., NAT'L DEV. & RESEARCH INSTS., INC., *THE RACE/ETHNICITY DISPARITY IN MISDEMEANOR MARIJUANA ARRESTS IN NEW YORK CITY 1* (2007), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2561263/pdf/nihms48329.pdf>.

¹⁰ Cooper Offenbecher, *DWS: A Ticket to Debtor's Prison?*, KING CNTY. BAR BULLETIN (Apr. 2008) (citing Andrew Garber, *Seattle Blacks Twice as Likely to Get Tickets*, SEATTLE TIMES, June 14, 2000 (corrected Aug. 3, 2001)), *available at* <http://www.kcba.org/newsevents/barbulletin/archive/2008/08-04/article1.aspx>.

¹¹ HEIDI BLAINE ET AL., UNIV. OF OR., DEP'T OF PLANNING, PUB. POLICY & MGMT., *THE COSTS ASSOCIATED WITH PROSECUTING CRIME IN OREGON 11* (2010), *available at* http://www.oregon.gov/CJC/docs/U_of_O_Research_the_Costs_Associated_with_prosecuting_Crime_in_Oregon.pdf?ga=t.

¹² See S. BILL REPORT, S.B. 5615, 2009 Sess. (Wash. 2009), *available at* <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/Senate/5615%20SBR%20JUD%2009.pdf>.

2007, Washington law enforcement agencies reported 11,553 incidents involving people 18 years of age and older in which misdemeanor marijuana possession was the most serious offense.¹³ Washington courts entered 3,638 misdemeanor marijuana convictions and imposed roughly 16,183 actual jail days. At a statewide average cost of \$334 per arrest, \$757 per conviction, and \$60.71 per jail day,¹⁴ Washington spent approximately \$7.6 million in direct costs on cases involving misdemeanor possession of marijuana. Three years later, those costs are even higher.

Nationally, if only half of the 758,593 marijuana possession cases, and half of the 1,106,314 disorderly conduct, drunkenness, vagrancy, and curfew and loitering arrests were diverted or treated as non-criminal violations, 932,453 cases across the country could be removed from the system, saving more than \$1.5 billion per year at the Oregon reported cost.

The dollar savings from decriminalizing driving with a suspended license also are dramatic. If suspended driver's license cases stemming from failure to pay fines occupy the same percentage of misdemeanor prosecutions nationally as they do in Washington State, and anecdotal experience indicates that in many states they do, more than three million cases could be diverted from the system. Recognizing that costs vary among the states and that many DWLS 3 cases do not require as much work as, for example, a driving under the influence case, the savings just in diverting DWLS 3 cases still easily could exceed \$1 billion.

III. IMPACT ON DEFENDANTS

The financial impact of criminalizing driving with a suspended license can be overwhelming. Two Seattle University School of Law professors have criticized the practice: "the entire enterprise of using driver's license suspensions to collect fines from low-income individuals is seriously misguided."¹⁵ They concluded:

Whatever solution one arrives at for the problem of collecting fines, society should never revoke a driver's license for non-safety related issues. Using revocation to collect revenue is the functional heir of the debtor's prison. Most low-income individuals need to drive to continue working. But if they continue to drive, they will go to jail, avoidable only by paying the monies owed -- monies they do not have. This current variant on what is basically a medieval theme replicates that same futility and resultant harm to the interests of the wider society that debtor's prison has always borne.¹⁶

¹³ *Id.* See also WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, CRIME IN WASHINGTON 2007, and data provided upon request (on file with author).

¹⁴ WASH. STATE INST. FOR PUB. POLICY, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES 41, Exhibit B.2 (2006), available at <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>. Figures are adjusted for 2007 dollars utilizing the Implicit Price Deflator (GDP) rate and computations performed at <http://www.measuringworth.com/uscompare/>.

¹⁵ Mitchell & Kunsch, *supra* note 7, at 439-40.

¹⁶ *Id.* at 470-71; see also Offenbecher, *supra* note 10.

In general, the financial impact of misdemeanor convictions can be crushing. As Professor Bridget McCormack has written:

In fact, in recent years, the increasing fines, costs, and other fees assessed in misdemeanor adjudication have become staggering. The total amounts assessed per conviction, often not obvious because assessed and accounted for in so many different forms, are out of reach for many of the defendants against whom they are assessed. That is, although each newly imposed fee is often viewed as a solitary cost, the cumulative impact of all of the economic obligations creates a significant problem for most defendants. Moreover, the ad hoc fashion with which these sanctions have developed has also stymied any comprehensive evaluation of the issue.

Meanwhile, courts have demonstrated an almost total disregard for the ability of the defendants to afford the amounts assessed, regularly requiring a defendant to pay immediately a sum that is simply impossible given the defendant's income. Yet these burdens are being borne by a segment of the population least likely to be able to bear them, as a majority of the misdemeanants are indigent. To make matters worse, criminal convictions, including misdemeanor convictions, necessarily diminish one's earning capacity and employment prospects, as well as one's eligibility for other social goods, such as professional licenses, some public and subsidized housing, and other public benefits.¹⁷

If offenses are reclassified as violations, defendants do not face the barriers to employment and housing that can be caused by criminal convictions. But as outlined below, they still could face economic barriers and burdens if significant fines are imposed. In addition, depending on how the diversion agreements are fashioned, non-citizens could face adverse immigration consequences.

IV. ALTERNATIVES TO TRADITIONAL ARREST AND PROSECUTION

A comprehensive effort that, for example, eliminated all drunkenness arrests, could save money and likely would be more effective than arrest and jail in addressing chronic alcoholism. Sarasota, Florida, recently celebrated five years of such a program. According to the *Sarasota Herald-Tribune*, the county established treatment programs instead of arrest for "frequent flier" alcohol and drug addicts arrested on minor crimes or because they were dangerous to themselves. "Police and judicial leaders are calling the Community Alternatives Residential

¹⁷ Bridget McCormack, *Economic Incarceration*, 25 WINDSOR Y.B. ACCESS TO JUST. 223, 227 (2007) (footnote omitted).

Treatment initiative a success”¹⁸ The jail population is down, arrests are down, and the program reports that 50% to 60% of participants remained sober a year after leaving the program, compared with the roughly 10% average success rate for other treatment programs.

As a result of the Community Alternatives Residential Treatment initiative, drug arrests fell from a high of about 2,200 a year in 2007 to about 1,000 in 2009. Alcohol arrests fell from about 1,200 in 2007 to about 600 in 2009.¹⁹

Another example of a creative and collaborative diversion program that has won the support of local government, prosecution, neighborhood groups, and law enforcement in Seattle is LEAD, or Law Enforcement Assisted Diversion. LEAD, which was developed by The Racial Disparity Project of The Defender Association,²⁰ will offer people arrested for selling small quantities of drugs to police officers a chance to go to treatment instead of to jail and traditional prosecution. This plan is focused on felony cases, but the careful planning and collaborative approach of LEAD can be used for misdemeanor cases. In addition, as the Seattle City Attorney’s office noted in the LEAD Memorandum of Understanding completed in October 2010:

While the City Attorney does not prosecute felony drug offenses, our office handles a wide variety of misdemeanor cases that are associated with street-level drug dealing (*e.g.* car prowls, trespass, theft, assault, harassment, etc.). If the LEAD program is successful at transitioning street-level drug dealers and users away from the drug trade, there will be a significant public safety benefit in the community as the crimes associated with the drug activity are reduced.²¹

The program, with start-up funding including funds from The Open Society Foundation, is expected to begin in early 2011.

¹⁸ See Todd Ruger, ‘*Drunk tank*’ out and treatment in, in *Sarasota*, SARASOTA HERALD-TRIB., Oct. 11, 2010, <http://www.heraldtribune.com/article/20101011/ARTICLE/10111033>.

¹⁹ See *Chart: Treatment reduces repeat offenses*, SARASOTA HERALD-TRIB., 2010, <http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20101011/GRAPHICS02/101009719&template=graphics>.

²⁰ See the Defender Association website at <http://www.defender.org/> (last visited Nov. 11, 2010).

²¹ See Memorandum of Understanding Among Seattle Office of the Mayor, Seattle City Attorney’s Office, Seattle Police Department, King County Executive, King County Prosecuting Attorney, King County Sheriff, the Defender Association, and the ACLU of Washington Regarding Law Enforcement Assisted Diversion Program Coordinating Group: Formation, Governance, and Responsibilities 4 (Sept. 2010) (on file with author).

V. SUSPENDED LICENSE ALTERNATIVES

The United States Supreme Court has recognized that driver's licenses can be critical to maintaining employment. In a case addressing due process required for a suspension, the Court wrote:

Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees.²²

There are successful diversion programs from Washington State to Florida that have saved money by removing misdemeanor cases from the court system. Some programs have simply removed jail as an option and relied on fines. Others have helped people to get their driver's licenses back and to avoid the direct and additional consequences of criminal convictions.

Since June 1, 2010, Florida has had a new diversion program for anyone caught driving with a suspended license. According to a law firm's blog about it, violators can opt to attend a four-hour driver improvement class and pay a \$150 fine.²³

The City of Seattle began a re-licensing program about ten years ago designed to help people get their licenses back, helping them to sort out what they owed in which courts, including those outside of the city. It allows time payment and community service programs.²⁴ In its early years, it was quite successful. An evaluation found that participants in the program had a relicensing rate of 63% compared to a rate of 25% for those who did not participate.²⁵

Changes in practice have led to recent criticism of the Seattle City program. According to Lisa Daugaard, deputy director of The Defender Association, "The re-licensing program, which used to emphasize offering reasonable payment plans to low-income people, now offers unworkable terms to many, and reportedly denies payment plans to individuals who do not have a job."²⁶

King County, Washington, where Seattle is located, offers a true pre-filing diversion program for DWLS 3. As its website describes it,

The King County Prosecutor's Office offers an invitation to enroll in the Relicensing Program in lieu of filing the criminal charges of

²² Bell v. Burson, 402 U.S. 535, 539 (1971).

²³ S. Fla. Criminal Attorney, *Driving With a Suspended or Revoked License in Florida (Part B)*, FALK & ROSS LAW FIRM (Sept. 13, 2010), <http://www.south-floridaattorney.com/traffic-cases/driving-with-a-suspended-or-revoked-license-in-florida-part-b/>.

²⁴ See *Re-Licensing Program*, MUN. COURT OF SEATTLE, <http://www.cityofseattle.net/courts/comjust/relicensing.htm> (last visited Nov. 9, 2010).

²⁵ See Evaluation, *supra* note 6, at 4.

²⁶ Email from Lisa Daugaard, Deputy Dir., The Defender Ass'n, to author (Nov. 8, 2010) (on file with author).

Driving While License Suspended in the Third Degree and No Valid Operator's License. Individuals who appear are then offered a variety of payment options including community service and the Community Work Program (work crew). The King County Department of Adult and Juvenile Detention, Community Corrections Division manages the Community Work Program. Individuals have 6 months to complete the program. The case is referred to the King County Prosecutor's Office for determination of filing once the individual is out of compliance. In addition, King County District Court allows individuals who may be suspended with no pending charges or individuals with pending charges who want help obtaining their license appear as walk-ins. Once the individual obtains their license, the King County Prosecuting Attorney has chosen not to file the criminal charge of Driving While License Third Degree or No Valid Operator's License.²⁷

A hearing is set inviting participants to voluntarily enroll in the program. At the hearing, a King County District Court Judge may mitigate and adjudicate any King County District Court infraction fines.²⁸

The King County program was the product of an initial collaboration between The Defender Association and the King County Prosecutor's office, and they helped to develop the program with officials in the court and in the county government.²⁹ The program works with a collection agency that has relationships with more than 65 courts in Washington State. After the participant makes the first monthly payment, the participating courts will remove the hold on the license. There is a community service option that allows participants to perform community service at the rate of \$10 for each hour worked. The District Court holds are released once the court receives written proof of community service hours performed. In addition, the program offers participation in work crew and credit towards King County District Court fines at the rate of \$150 for every eight-hour day worked. And another option is to make a 10% down payment on fines and monthly payments for the remaining balance.

A community-based organization, Legacy of Equality, Leadership and Organizing (LELO), assists individuals with the process and refers individuals to the Relicensing Program.³⁰

²⁷ *Re-Licensing*, KING CNTY. DIST. COURT SERVS., <http://www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx> (last visited Nov. 9, 2010)

²⁸ *See id.*; *see also infra* Appendix for sample of letter the Prosecutor sends to persons who received a ticket for DWLS 3.

²⁹ The author was involved in the initial planning for the project. See also the discussion of this and other Washington State programs in MOORE & CHAPMAN, *supra* note 1. That report discussed some jurisdictions' use of "bail forfeiture" to dispose of cases by having the accused person pay a fine and avoid a traditional criminal conviction. But the state patrol counts a bail forfeiture as a conviction, and, as most of the persons have not actually posted bail, calling it a forfeiture of bail is distorting. This author does not recommend this procedure, which also does not assist people in obtaining their licenses.

³⁰ LELO also conducts its own DWLS education programs. *See* LEGACY OF EQUAL., LEADERSHIP & ORG., <http://www.lelo.org> (last visited Nov. 12, 2010). The King County program was also discussed in an article by

As a result of the King County program, only about 1,000 DWLS 3 cases a year out of a possible 5,000 were assigned to defenders.³¹ In the first year of the program, filings were reduced by 84%.³² People who completed the program were about 2.3 times more likely to have their license status cleared or reinstated than those who did not.

The savings documented in an evaluation of the program were dramatic. The county saved approximately \$300, 000 in prosecution and public defense costs, and cut 1,330 jail days. The county received more than two dollars in benefits for every dollar spent, including increased fine payments received.³³

The City of Spokane, Washington, has just begun a pre-filing diversion program for DWLS 3 charges in cases for which the DWLS 3 would be the only criminal charge, effective November 1, 2010. In those cases, the defendants will be summoned to court for non-criminal violations and offered the opportunity to participate in the re-licensing and diversion programs. The city prosecutor estimates that the program will remove 35% of the criminal charges from the municipal court and from the public defender's caseload.³⁴ The strategy is to link the diversion program to the pre-existing re-licensing program, which has been successful both in helping defendants to get their licenses and in recovering approximately \$1 million in fines in the past two years that the prosecutor said otherwise would never have been paid.

The prosecutor's plan is to offer people up to six months to complete the diversion program and for those who do, the prosecutor will dismiss the DWLS 3 matter and any related tickets that were issued for the same offense. The prosecutor noted that the decision to establish the program involved many factors, including reducing the defender caseload, responding to a reduction of three prosecutor positions in the past two years and the consequent need to prioritize cases. The prosecutor noted that this is a "more common sense approach." Given the budget climate, she said, she and her colleagues decided, "Let's be better prosecutors." They can devote their resources more to crimes such as impaired driving and domestic violence.³⁵

The County of Yakima, Washington, established a charge reduction program for DWLS 3. When the cases come to court, the prosecutor reduces most of the charges, depending on the person's prior record, to a violation of no valid operator's license and offers a resolution for \$350 of fine and penalties.³⁶ This avoids the need for counsel. While some cases do get

Judge Barbara Linde, Barbara Linde, *District Court Adds DWLS 3 Re-Licensing Program*, KING CNTY. BAR BULLETIN (Jan. 2009), available at <http://www.kcba.org/newsevents/barbulletin/archive/2009/09-01/article11.aspx>.

³¹ See KING CNTY., LAW, SAFETY & JUSTICE PROGRAM PLAN (2005), available at <http://your.kingcounty.gov/budget/2005/Adopted/8LSJ.pdf>.

³² PowerPoint Presentation, Christopher Murray & Assocs., Costs & Benefits of the King County District Court Relicensing Program (2004) (on file with author).

³³ *Id.*

³⁴ Telephone interview of City Prosecutor Mary Muramatsu (Nov. 10, 2010) (notes on file with author).

³⁵ *Id.*

³⁶ Telephone conversation with Jeffrey West, Yakima Public Defender Misdemeanor Supervisor (Nov. 8, 2010) (notes on file with author); see also Notice of Amendment form, *infra* Appendix.

processed criminally and assigned to defenders, the public defender estimates that it is receiving about 900 fewer DWLS 3 cases per year under this initiative.³⁷

The downside of the program is that defendants, whose licenses were suspended because they did not pay traffic fines, often because they could not afford it, now have an additional \$350 to pay. As explained by Defender Misdemeanor Supervisor Jeffrey West:

A high percentage of these folks are very low income, often agricultural workers. They get pulled over and get a ticket, say for no insurance, that costs \$475. They cannot pay it, and when they get pulled over again, because their cars are rolling probable cause, they get a ticket for DWLS 3 and the snowball starts. They can never get licenses and never get insurance.³⁸

In addition, the Yakima County Relicensing Program, which had helped a number of people to get their licenses back and was generating an increase in fines received, was cut because of the cost of administering it.

According to Mary Wolney, a Seattle lawyer who used to run the Car Recovery Clinic (for clients whose cars had been impounded because they drove with suspended licenses) with The Defender Association and the University of Washington School of Law, four things are needed to address the problem and to develop effective diversion alternatives: education of the public about how to avoid license suspension, including on how to negotiate alternatives to fines with court magistrates; relicensing services provided by the courts and local government; lower fines that people can afford to pay; and community service programs for those who cannot afford to pay fines.

She also recommends that there be a cost benefit study by the state that she believes would demonstrate that investment in relicensing efforts and diversion programs for DWLS 3 could result in significant returns, not only in lower court and jail costs but also in economic productivity from people who legally could drive to work and take their children to child care and who also could have insurance.³⁹ Ms. Wolney, recognized as one of the leading experts on issues relating to suspended licenses, urges that the state develop incentives to motivate local jurisdictions to develop alternatives that do not include increased fines and fees and collection agency fees. The state should recognize, she argues, “the economic hardship faced by many state residents, and the unequal impact of heavy mandatory financial penalties on those who do

³⁷ The Kent, Michigan, prosecutor established a plan to reduce the time and expense involved in issuing warrants for “high” misdemeanor crimes of DWLS 2 (one year maximum jail term) and instead decided to ask police to issue tickets for the lesser offense of DWLS 1 (90 days maximum jail). In 2009, they wrote 1,046 fewer warrants as a result of this change. See *Kent County, Michigan (Grand Rapids) Prosecutor Web Page*, http://www.accesskent.com/CourtsAndLawEnforcement/ProsecutorsOffice/pros_index.htm (last visited Nov. 5, 2010).

³⁸ *Id.*

³⁹ Interview with Mary Wolney (Nov. 5, 2010) (notes on file with author); Email from Mary Wolney to author (Nov. 8, 2010) (on file with author).

not have access to the courts or know how to approach the courts.” And she noted the disproportionate impact on minority groups.

Ms. Wolney urges courts actively to apply the local court rules and statutes that provide authority to waive or reduce fines and to order community service in lieu of a fine.⁴⁰ She helped to draft language that became Section 46.63.110 of the Washington Revised Code, which requires courts to offer time payment plans in certain circumstances.⁴¹ But the statute also allows courts to let “outside entities” administer their payment plans and to charge the participants fees for that. While the statute allows for community restitution programs in lieu of time payments if the person is unable to make reasonable time payments, it does not require local courts to have such programs. If cities decide to let collection agencies run the time payment programs and not to have community service options, the suspended drivers can be required to pay significant fees for the administration of the time payment plan, increasing their financial burden.

While many smaller city courts are apprehensive about establishing diversion, re-licensing, and community service programs because of the administrative costs, the experience of Spokane, a city of approximately 200,000,⁴² in generating substantial additional revenue with its re-licensing program offers lessons to other cities.

VI. ALTERNATIVES TO CRIMINAL PROSECUTION FOR POSSESSION OF SMALL AMOUNTS OF MARIJUANA

The politics relating to the “war on drugs” certainly affect the ability to “decriminalize” possession of marijuana. A pre-filing diversion plan similar to what King County does on DWLS 3 cases could avoid much of that political challenge.

Some legislatures have passed laws making possession of small amounts of marijuana a violation and not a crime. For example, in Maine, possession of small amounts of marijuana is a violation and no jail is possible for it:

A person who possesses a usable amount of marijuana commits a civil violation for which a fine of not less than \$350 and not more than \$600 must be adjudged for possession of up to 1 1/4 ounces of marijuana and a fine of not less than \$700 and not more than \$1,000 must be adjudged for possession of over 1 1/4 ounces to 2 1/2 ounces of marijuana, none of which may be suspended.⁴³

⁴⁰ See WASH. INFRACTION R. CT. LTD. J. 6.2(a); WASH. REV. CODE ANN. § 46.63.120(2) (West 2010) (“The court may include in the order the imposition of any penalty authorized by the provisions of this chapter for the commission of an infraction. The court may, in its discretion, waive, reduce, or suspend the monetary penalty prescribed for the infraction. At the person’s request the court may order performance of a number of hours of community restitution in lieu of a monetary penalty, at the rate of the then state minimum wage per hour.”).

⁴¹ WASH. REV. CODE ANN. § 46.63.110 (West 2010).

⁴² SPOKANE ONLINE, <http://www.spokaneonline.com/> (last visited Nov. 10, 2010).

⁴³ ME. REV. STAT. ANN. tit. 22, § 2383(1)(A) (2010).

In Massachusetts, a new law effective January 2, 2009, reclassified possession of one ounce or less of marijuana as a violation and not a crime.⁴⁴

In the recent election, voters in nine Massachusetts districts approved the following non-binding resolution:

Regulate marijuana

Summary: Should the state representative from this district be instructed to vote in favor of legislation that would allow the state to regulate and tax marijuana in the same manner as alcohol?⁴⁵

In Seattle, the combination of a voter-approved policy to de-emphasize arrest and prosecution for marijuana possession and the election of a new city attorney who agrees with that policy has reduced the number of those offenses brought to court.⁴⁶ In 2003, Seattle voters approved Initiative 75, which requires that “the Seattle Police Department and City Attorney’s Office shall make the investigation, arrest and prosecution of marijuana offenses, when the marijuana was intended for adult personal use, the city’s lowest law enforcement priority.”⁴⁷ This became ordinance SMC 12A.20.060.⁴⁸

The Initiative also led to the formation of a Marijuana Policy Review Panel, which issued its Final Report December 24, 2007.⁴⁹ The Report found that there had been fewer referrals for marijuana possession from the police to the city attorney and fewer filings, but could not definitively attribute those reductions to the ordinance. The Panel concluded:

Bearing in mind that the numbers of marijuana case referrals and filings were already small before I-75’s passage, the Panel also concluded that there was no evidence of any adverse effect of the implementation of I-75 in any of the substantive areas examined, including: (a) no evident increase in marijuana use among young people, (b) no evident increase in crime, and (c) no adverse impact

⁴⁴ MASS. GEN. LAWS ANN. ch. 94C, § 34 (West 2010).

⁴⁵ *Ballot Questions: Overview*, BOS. GLOBE, http://www.boston.com/news/special/politics/2010/ballot_questions/results/#Regulate%20marijuana (last visited Nov. 5, 2010).

⁴⁶ See Emily Heffter, *Seattle’s new city attorney to dismiss cases of pot possession*, SEATTLE TIMES, Jan. 15, 2010, http://seattletimes.nwsourc.com/html/localnews/2010808085_marijuana16m.html; see also SEATTLE CITY ATTORNEY’S BI/ANNUAL MARIJUANA REPORT, JANUARY-JUNE 2010, at 1 (2010), available at http://www.seattle.gov/law/reports/mj/2010_Jan-June_Marijuana.pdf, portion of which is included in Appendix.

⁴⁷ *Initiative 75 Text*, SEATTLE INITIATIVE 75, <http://www.yeson75.org/text.php> (last visited Nov. 9, 2010).

⁴⁸ The conflict among criminal laws prohibiting growing and selling marijuana for profit, medical marijuana laws, and the City’s “lowest priority” approach have led to some reported confusion among police officers, who raided the home of a disabled veteran who had a medical marijuana permit. This led the Mayor to ask the police chief and county sheriff to meet with him to discuss the situation. See Linda Brill, *Seattle mayor seeks clarity on clashing marijuana laws*, KING 5 NEWS (Nov. 8, 2010), <http://www.nwcn.com/news/washington/clashing-medical-marijuana-laws-Seattle-106930198.html>.

⁴⁹ MARIJUANA POLICY REVIEW PANEL, FINAL REPORT OF THE MARIJUANA POLICY REVIEW PANEL ON THE IMPLEMENTATION OF INITIATIVE 75 (2007), available at <http://clerk.ci.seattle.wa.us/~cfpdfs/309070.pdf>.

on public health. The Panel did observe some evidence of arguably positive effects, assuming that the caseload reduction was caused by the passage of I-75: (a) fewer adults experiencing the consequences of involvement in the criminal justice system due to their personal use of marijuana; and (b) a small reduction in the amount of public safety resources dedicated to marijuana possession cases, accompanied by a corresponding slight increase in the availability of these resources for other public safety priorities.⁵⁰

Two state legislators, one Republican and one Democrat, outlined the reasons to decriminalize marijuana in an op-ed article in the *Seattle Times*.⁵¹ They said, “This bill would reclassify adult possession of marijuana from a crime carrying a mandatory day in jail to a civil infraction imposing a \$100 penalty payable by mail.”⁵² They noted that the state Office of Financial Management projected annual savings of \$16 million and \$1 million in new revenue should the bill pass.⁵³ They concluded:

We now have decades of proof that treating marijuana use as a crime is a failed strategy. It continues to damage the credibility of our public health officials and compromise our public safety. At a fundamental level, it has eroded our respect for the law and what it means to be charged with a criminal offense: 40 percent of Americans have tried marijuana at some point in their lives. It cannot be that 40 percent of Americans truly are criminals.⁵⁴

VII. CONCLUSION

Imagine the impact on a local or state court system if 30% of the misdemeanors were diverted out of court, with no need for judges, court clerks, prosecutors, defenders, or jailers to handle those cases. If defenders are carrying caseloads of 600 per attorney per year, as many are, 50% above the American Council of Chief Defenders standard,⁵⁵ a one-third reduction would bring them to standard. If they already are meeting the standard, a reduction in caseload could permit a reduction in staff or reallocation of the staff to other purposes.

The direct costs to a defendant in fines and court fees can be in the thousands of dollars. As most defendants are poor, their ability to pay these costs often is minimal and many of them face probation revocation and the threat of jail for failure to pay. For many, not being able to

⁵⁰ *Id.* at iii.

⁵¹ See Jeanne Kohl-Welles & Toby Nixon, *Time for Washington state to decriminalize marijuana*, SEATTLE TIMES, Aug. 20, 2009, http://seattletimes.nwsourc.com/html/opinion/2009701673_guests21nixon.html.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See AMERICAN COUNCIL OF CHIEF DEFENDERS STATEMENT ON CASELOADS AND WORKLOADS (2007), available at <http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.pdf>.

pay the fines means they cannot get their driver's licenses back. And the additional costs of misdemeanor convictions can be staggering—loss of jobs, educational benefits, housing, and even the right to live in the United States.⁵⁶

As the City of Spokane has demonstrated, a re-licensing program can make money for a local government while helping people to remove barriers to employment, housing, and transportation. Tying such a program to diversion can increase the savings and the benefits.

So what can be done and what can the Justice Department do to help?

In King County, Washington, defenders, prosecutors, judges, and county officials were able to establish a diversion and re-licensing program for suspended driver's license cases by building a coalition of political and judicial leaders that began with an alliance between the defenders and the prosecutors. This was led by The Defender Association's Racial Disparity Project, which was initially funded by the Justice Department and later received both local and foundation funding, including support from the Open Society Institute.⁵⁷ An evaluation of the first year of the program found that it returned \$2 for every dollar spent, cut the jail population, and helped people get their licenses back. This model of initiating reform with research and advocacy by defender offices could be emulated elsewhere, and the Justice Department could consider publishing a report about such projects.

Aside from providing funding for innovative defender programs, the Department could provide education programs in different parts of the country and put materials on its web site to provide templates for people searching for ways to improve their systems and to reduce costs. DOJ could invite government and bar leaders to regional education seminars and conferences featuring successful diversion programs. They could hold these gatherings at law schools, providing a built-in way to foster engagement of the faculties and students in criminal justice reform. These meetings would educate criminal justice practitioners and policymakers about the benefits of diversion and reclassification efforts. Professor Laurence Tribe, who until recently served as Senior Counselor for Access to Justice at the Department of Justice, could convene the first such gathering at Harvard, perhaps part of a series of meetings, that could draw scholars as well as practitioners, bar leaders, judges, and government officials.

The Department's imprimatur could help encourage local governments to make changes that would have a major impact on reducing cost, freeing up resources for public safety needs, and improving the efficiency and fairness of the courts and the lives of the people caught in them.

⁵⁶ “Noncitizens who plead guilty to a seemingly low-level misdemeanor offense (e.g., theft in the third degree, simple assault) can face disastrous consequences.” ANN BENSON ET AL., IMMIGRATION AND WASHINGTON STATE CRIMINAL LAW i (2005), available at <http://www.defensenet.org/resources/publications-1/immigration-and-washington-criminal-law/Immigration%20Crimes%20FINAL%2001-06-09.pdf>.

⁵⁷ See the discussion on the Defender Association website at <http://www.defender.org/projects/rdp> (last visited Nov. 11, 2010).

APPENDIX

Def Appeared

Defendants Name: _____ Case No.: _____

YAKIMA COUNTY DISTRICT COURT

NOTICE OF STATE'S AMENDMENT OF CRIMINAL CHARGE TO A CIVIL INFRACTION

Greetings:

The Yakima County Prosecutor will orally move to amend the criminal charge of Driving While License Suspended in the Third Degree/No Valid Operator's License without Identification (DWLS 3/NVOL) filed against you to the civil infraction of No Valid Operators License with Identification (NVOL w/ ID) in violation of RCW 46.20.015 which carries a penalty of \$550.00 (fine and assessments) by state law. Moreover, the State will request that the court impose a penalty of \$350.00 (includes fine and mandatory statutory assessments). Because the charge is amended to a civil infraction as opposed to a criminal offense, there is no risk of the imposition of jail time.

At this hearing you have the following options:

- Pay Proposed Fine. I agree with the proposed penalty of \$350.00. I understand this will go on my driving record if the "traffic" box is checked on the citation issued by the officer. If you choose to pay the fine, you may make arrangements to pay the fine with the Court.
Mitigation Hearing. I agree I have committed the infraction(s), but I want an opportunity to explain the circumstances. I know I can ask witnesses to appear but they are not required to appear. I understand this will go on my driving record if the "traffic" box is checked on the citation issued by the officer. The court may allow time payments or reduce the penalty where allowed by law.
Contested Hearing. I want to contest (challenge) this infraction. I did not commit the infraction. I understand that another court date will be set on a contested infraction calendar and that I must appear at that court date. The State must prove by a preponderance of the evidence that I committed the infraction. I know I can require (subpoena) witnesses, including the officer who wrote the ticket, to attend the hearing. I understand this will go on my driving record if the "traffic" box is checked on the citation issued by the officer. If you request a contested hearing, you will need to provide proof to the court that you did have a valid driver's license on the day of the offense.

Notice: If you are interested in getting your license reinstated, please consult with Yakima County's Relicensing Program. If you wish to receive information about the relicensing program advise the Judge when your case is called.

My mailing address is (please print):

Name: _____ Telephone No. _____
Street: _____ City: _____ State: _____ Zip Code: _____

X _____ Signature _____ Date _____

OFFICE OF THE PROSECUTING ATTORNEY
King County, Washington
Dan Satterberg, Prosecuting Attorney

February 26, 2008

[REDACTED]

On 7/11/2007 you were stopped for the crime of **Driving While License Suspended in the Third Degree, (DWLS 3rd Degree)**, Citation #CR19798KC. This crime has a maximum penalty of 90 days in jail and a \$1,000 fine. The prosecutor has not yet filed this case. Instead, you are invited to enroll in the King County Re-Licensing Program, a voluntary service that helps suspended drivers get their licenses back. The King County Re-Licensing program may help you by:

- Reducing the amount you owe on traffic tickets you have received through any King County District Court;
- Setting up a payment plan that works for you;
- Finding different ways for you to pay off your tickets, like community service and work programs;
- Enabling you to get your license and drive legally while making payments.

If you successfully complete the re-licensing program, no criminal charges of **DWLS 3rd Degree** will be filed against you for the citation listed above.

To take advantage of this voluntary program, come to Seattle Division, King County District Court, Courtroom 338 on 3/18/2008 at 9:46:00 AM. There you will be given more information and an opportunity to enroll. The court is located at 516 Third Avenue, Room E-338, Seattle, WA. For directions, go on-line to www.kingcounty.gov/kcdc, or call 206-296-3581. You can also call the court if you have a serious scheduling conflict on this date.

You may have also received a traffic infraction ticket at the same time you were stopped for **DWLS 3rd Degree**. You should come to the Re-Licensing Program on the above date, even if you have already paid the ticket or have sent the green portion of the ticket into the court.

If you fail to respond to this notice, you will lose this opportunity to enroll in the program. The Prosecutor will then review your case and the criminal charge of **DWLS 3rd Degree** may be filed against you. Please come to the program and find out how it can help you.

Very truly yours,

For Dan Satterberg, King County Prosecuting Attorney

Margaret E. Nave
Senior Deputy Prosecutor
District Court Unit

Summary

Reports Received ¹	175
Cases Filed	1
Cases Declined ²	166
Cases Filed With Marijuana Possession as the Only Charge	0
Defendants Booked on a Marijuana Charge	15

1. May be more than one person per report
2. During this time period, regardless of original arrest date