

THE TRIALS AND TRIBULATIONS OF PETTY OFFENSES IN THE FEDERAL COURTS

MARY C. WARNER*

Only one rule of criminal procedure applies to the trial of alleged petty offenders in federal court. This rule establishes a baseline for the trial of petty offenders. However, district courts implement that baseline in many diverse ways. The procedures vary dramatically, and there is little or no information available to defendants in order to prepare them for court. Court-appointed counsel is provided in very few cases. In this Note, Mary Warner examines the systemic problems with the current procedures governing the trial of alleged petty offenders. With the limited information available on how petty offenses are tried in various districts, she first surveys district court procedures. Based on the application of procedural rules in the various district courts, she then analyzes how current practices fall short of constitutional norms and efficient best practices.

INTRODUCTION

A boater in Florida speeds in a manatee zone. A couple takes an afternoon walk with their dog off its leash. A man drives without his seatbelt secured. All were on federal land. A federal law enforcement officer approached each. Each one received a ticket and the option to pay a fine. Each sent in a check. And by doing so, all pled guilty to a federal crime.¹ Thousands of petty offense cases go through the federal criminal justice system each day, but many such misdemeanants never realize that they have been accused of a “crime.” The citation looks like a traffic ticket. It does not apprise the recipients of the elements of the charges against them, of their right to a trial, or of the effect of paying the fine.

Despite the sixty to seventy thousand petty offenses prosecuted in the federal system annually, the procedures governing these prosecutions receive little attention. Instead, the existing scholarship emphasizes which constitutional rights apply to those trials, particu-

* Copyright © 2004 by Mary C. Warner. B.A., 1995, University of California, Berkeley; J.D., 2004, New York University School of Law. I would like to thank Professors David Klem and David Patton for their guidance. Gratitude is also owed to Emily Berman, Erin McCormack, Jen Overbeck, all those who gave their time to be interviewed, and Stacie Hendrix.

¹ The above activities are prohibited by 50 C.F.R. § 17.104 (2004), 35 C.F.R. § 2.15(a)(2) (2004), and 35 C.F.R. § 4.15 (2004), respectively. 36 C.F.R. § 1.3(a) (2004) makes violations of most National Park Service regulations punishable by up to six months in jail, a fine, or both.

larly the availability of trial by jury and the right to counsel.² When Congress passed the Federal Magistrates Act of 1968,³ giving federal magistrates jurisdiction over the trial of petty offenses,⁴ the legislators were concerned with the constitutionality of trials by non-Article III judges (i.e., magistrates), but they did not discuss the procedures that would be adopted.⁵ The Federal Magistrates Act left the procedures undefined, to be filled in by an advisory committee⁶ at a later date.

In 1969, that advisory committee passed an initial set of rules created specifically for magistrate judges.⁷ In 1990, a later incarnation of those rules⁸ was incorporated into the Federal Rules of Criminal Procedure as Rule 58.⁹ Rule 58 was created specifically for magistrates and outlines abbreviated procedures for handling petty offenses.¹⁰ The rule writes flexibility into these procedures and invites the district courts to improvise.¹¹ This Note argues that aspects of Rule 58 violate the constitutional rights of the accused.

First, the current procedures fail to protect the rights of defendants. In some districts, when an alleged misdemeanant pays a fine through the mail, he is considered to have pled guilty to a federal crime. Defendants are not informed of the potential consequences of paying the tickets, which undermines the rights of the accused.

Second, more serious crimes should invoke more serious procedural safeguards. In the petty offense system, serious charges are

² See generally, e.g., Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926) (ascertaining extent to which Congress is compelled to provide jury trial in enforcement of federal penal laws); John M. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1968) (exploring indigent misdemeanant's right to appointed counsel and suggesting possible alternatives to felony standard); Melissa Hartigan, Comment, *Creatures of the Common Law: The Petty Offense Doctrine and 18 U.S.C. § 19*, 59 MONT. L. REV. 343 (1988) (describing history of jury right for petty offenders).

³ Pub. L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. § 631-639 (2000)).

⁴ 28 U.S.C. § 636(a)(3)-(4) (2000).

⁵ H.R. REP. NO. 90-1629, at 21 (1968), reprinted in 1968 U.S.C.C.A.N. 4252, 4264.

⁶ The Federal Rules of Procedure for United States Magistrates, 46 F.R.D. 487 (1969) (abrogated 1971), the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates, 85 F.R.D. 417 (1980) (abrogated 1990), and the Federal Rules of Criminal Procedure were each developed by an advisory committee, also referred to in this Note as the drafters of the rules.

⁷ FED. R.P. U.S. MAGIS., 46 F.R.D. 487 (1969) (abrogated 1971).

⁸ MAGIS. R., 85 F.R.D. 417 (1980) (abrogated 1990).

⁹ FED. R. CRIM. P. 58 advisory committee notes.

¹⁰ FED. R. CRIM. P. 58 & advisory committee notes (defining procedures for petty offense cases).

¹¹ See FED. R. CRIM. P. 58(a)(2) ("In a case involving a petty offense for which no sentence of imprisonment will be imposed, the court may follow any provision of these rules that is not inconsistent with this rule and that the court considers appropriate.").

brought without the safeguards they merit. Both serious and less serious charges reach trial posture without a legal determination of which rights apply and which procedures must be observed. Sorting out serious charges from petty charges and providing those charged with serious offenses with the appropriate procedures should occur earlier and more efficiently in the adjudicative process.

Third, while the provision of counsel may or may not be mandated constitutionally,¹² defendants accused of petty offenses should be provided with counsel. In these abbreviated procedures, the defendant has fewer procedural safeguards to protect him, the prosecution has a greater ability to coerce him, and the defendant has no one to help him. A defense lawyer could shield the defendant from some of the harsher aspects of the abbreviated procedures.

The information and recordkeeping on petty offenses is sparse at best. As a result, I rely heavily on interviews with members of the court in various districts and on personal observations made both in the Eastern District of New York (E.D.N.Y.) and in other districts. The problems discussed in this Note could best, and perhaps only, be addressed if and when records are kept on the procedures implemented by district courts in petty offense cases. The lack of attention paid to the rights of misdemeanants is exacerbated by the lack of information available on these procedures.

This Note evolved out of my participation in the New York University School of Law Federal Defender Clinic (Clinic).¹³ In the Clinic, students serve as institutional public defenders in petty offense cases prosecuted in the E.D.N.Y. Through my experiences in the Clinic, I learned a great deal about the esoteric nature of the federal petty offense system.

Part I of this Note surveys the rights and procedures that apply, in varying degrees, to petty offenses. Part II outlines the implementation of those procedures and notes the difficulties that their implementation presents. Part III discusses three of the most egregious

¹² See *Alabama v. Shelton*, 535 U.S. 634, 679 (2002) (Scalia, J., dissenting) (suggesting that majority effectively overruled *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial”), and mandated appointment of counsel in most petty offense cases).

¹³ The New York University School of Law Federal Defender Clinic (Clinic) began in the mid-1980s under Professor Chet Mirsky. As part of the coursework, Clinic students represent accused petty offenders, A misdemeanants, and sometimes felons throughout their criminal cases, from the initial appearance through a final disposition. As a student in the Clinic from August 2003 through May 2004, I attended Petty Offense Days, see *infra* note 37 and accompanying text, interviewed clients, negotiated settlements, and cochaired a trial.

problems in the current petty offense system and suggests possible remedies. First, paying fines by mail cannot constitutionally function as a guilty plea; it must be a civil penalty, or it is unconstitutional. Second, a procedure should be implemented to sort serious crimes from petty crimes. Third, every defendant should have a lawyer. Throughout, this Note endeavors to demonstrate the arbitrary and unpredictable nature of the petty offense system.

I

PROCEDURES GOVERNING THE TRIAL OF PETTY OFFENSES

The abbreviated rules governing petty offenses create much interpretive space for district courts. The district-by-district development of procedures has created an esoteric and chaotic patchwork that variously over- and underprotects the rights of defendants. While there need not be complete uniformity, the system needs a baseline. In theory, Rule 58 provides that baseline. In practice, however, it has failed. This Part explains the rights and rules governing minor offenses and provides some snapshots of how those rights and rules play out in various districts.

A. *Federal Enclave Jurisdiction*

The appropriate treatment of petty offenders is obscured by the multiplicity of federal and state laws and federal regulations that apply to them. The criminal law that applies to an offense is the law of the locality in which the offense was committed. Thus, the criminal law of California applies to crimes committed in California, except those that take place in federal enclaves within California. If a crime is committed within a federal enclave, then federal law applies. As a general matter, criminal law is the province of the states, and each state has its own criminal law. Conversely, federal criminal jurisdiction is interstitial, and the federal government does not have an entirely holistic criminal code. For example, the federal criminal law, as codified, contains few misdemeanors and no traffic offenses.¹⁴ The Assimilative Crimes Act (ACA)¹⁵ is a gap-filling measure enacted to ensure that every federal jurisdiction has a fully developed criminal code. It does this by incorporating the criminal law of the state in which federal property resides when there is no existing federal crime

¹⁴ See, e.g., 18 U.S.C. §§ 41–42 (2000) (listing crimes subject to six months imprisonment).

¹⁵ 18 U.S.C. § 13 (2000).

covering the analogous state offense.¹⁶ In addition to the ACA, the federal agencies governing these enclaves have issued regulations incorporating noncriminal offenses, such as traffic infractions.¹⁷ In some instances, the agencies have promulgated a nearly complete set of regulations to supplant and expand the otherwise applicable state criminal codes.¹⁸ The rules governing offenses on federal land are therefore a maze of competing and overlapping laws and regulations, and substantive changes to these laws are made in obscure federal regulations. As a result, defendants without lawyers and agency representatives without legal training attempt to parse out the confusion in order to ensure the appropriate treatment of petty offenders.

B. Petty Offense Defined

A “petty” offense, by operation of statute, is an offense for which the potential punishment is no greater than six months in jail and a fine.¹⁹ An offense is “serious” if the defendant faces a potential sentence longer than six months.²⁰ The categories of “petty” offenses are B misdemeanors (offenses for which the maximum penalty is less than six months in jail), C misdemeanors (offenses for which the maximum penalty is less than thirty days in jail), and infractions (noncriminal offenses for which the maximum penalty is five days or less in jail).²¹ By contrast, a “felony,” by operation of statute, is a “serious” offense punishable by a sentence longer than one year.²² The maximum penalty for an A misdemeanor is no more than twelve months in jail.²³

An A misdemeanor is considered a “serious” offense, both in terms of the alleged conduct and the potential penalty.²⁴ Although the definition of “petty” excludes A misdemeanors, A misdemeanors committed on federal enclaves proceed through the same processes as

¹⁶ *Id.*

¹⁷ *See, e.g.*, 32 C.F.R. § 210 (2004). The authority to pass these regulations was given to the Department of Homeland Security in 40 U.S.C. § 1315 (2000).

¹⁸ *See, e.g.*, 36 C.F.R. §§ 1.3, 4 (2004). In 36 C.F.R. § 1.3, the National Park Service criminalizes the traffic infractions listed in 36 C.F.R. § 4, many of which would be noncriminal if committed off federal property. *Compare* 36 C.F.R. § 4.15(c) (2004) (defining driving without one’s seatbelt fastened as B misdemeanor) *with* N.Y. VEH. & TRAF. LAW § 383(4-a) (McKinney 2004) (defining driving without one’s seatbelt fastened as infraction).

¹⁹ 18 U.S.C. §§ 19, 3581(b)(7)–(8) (2000).

²⁰ *Baldwin v. New York*, 399 U.S. 66, 69 (1970).

²¹ 18 U.S.C. § 3581(b)(7)–(9) (2000).

²² § 3581(a)(1)–(5).

²³ § 3581(a)(6).

²⁴ Many cases cite the difference between “serious” and “petty” crimes as the relevant distinction to determine what rights are available to the accused. *See, e.g.*, *Baldwin*, 399 U.S. at 68; *Duncan v. Louisiana*, 391 U.S. 145, 161–62 (1968).

petty offenses, unless and until someone sorts them out. However, alleged A misdemeanants are entitled to greater rights than are alleged petty offenders. Unlike accused petty offenders but like accused felons, alleged A misdemeanants have the right to counsel,²⁵ the right to trial by jury,²⁶ the right to prosecution by complaint or indictment,²⁷ and the right to be tried before a district court judge.²⁸ Although federal magistrates and federal district courts have concurrent jurisdiction over A misdemeanors, a magistrate can try the case only if the offender waives his right to trial by jury in front of a district court judge.²⁹

Despite these notable differences, alleged A misdemeanants often receive the same treatment as petty offenders. A misdemeanors committed on federal enclaves frequently enter the federal criminal system in the same manner as petty offenses—through a violation notice. In fact, even alleged felons have received tickets and been placed in the petty offense system.³⁰ To the extent that alleged A misdemeanants are treated more like alleged petty offenders than alleged felons, their rights are violated.

C. Process

When a petty offense is committed on a federal enclave, a federal law enforcement officer issues a citation. One copy of the ticket is given to the offender, and another copy is sent to the Central Violations Bureau (CVB)³¹ in Texas. The ticket does not specify that the recipient has been accused of a “crime.” The following is a sample violation notice:³²

²⁵ 18 U.S.C. § 3006A(a)(1)(A) (2000).

²⁶ *Baldwin*, 399 U.S. at 69 (holding “that no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized”).

²⁷ FED. R. CRIM. P. 58(b)(1).

²⁸ FED. R. CRIM. P. 58(b)(2)(E).

²⁹ FED. R. CRIM. P. 58(b)(3)(A).

³⁰ Telephone Interview with Monty Tingle, Clerk, Public Affairs Office, Central Violations Bureau (Jan. 26, 2004). Out of ninety-five cases handled in the past year by the Clinic, at least three have included a felony charge. Interview with David Klem, Adjunct Assistant Professor of Law and Supervising Attorney, Federal Defender Clinic, New York University School of Law, in New York, N.Y. (Apr. 15, 2004).

³¹ The Central Violations Bureau is an information clearinghouse. It is the central docketing agency and record keeper for all offenses cited with violation notices on federal enclaves. *Central Violations Bureau Helps Collect Millions Each Year for Crime Victims*, THIRD BRANCH, Aug. 2003, at 7.

³² MILITARY POLICE, DEP’T OF THE ARMY, ARMY REG. 190-29, MISDEMEANORS AND UNIFORM VIOLATION NOTICES REFERRED TO US MAGISTRATE OR DISTRICT COURTS 4–6 (1984) [hereinafter *ARMY MANUAL*], available at http://www.army.mil/usapa/epubs/pdf/r190_29.pdf.

VIOLATION NO

UNITED STATES DISTRICT COURT
VIOLATION NOTICE

(Subject to the Fines Act of 1974)



45604

① LDC CODE		② BADGE NO		③ OFFICER'S SIGNATURE	
④ DATE MO DAY YA		⑤ TIME		⑥ VIOLATION CODE AM PM	
⑦ PLATE			⑧ CODE SECTION		

DESCRIPTION (for traffic violations, describe road condition)

⑨
VOID

⑩ AGAINST THIS PERSON NAME (Last, First, Middle Initial)					
⑪ STREET ADDRESS					
⑫ CITY		⑬ STATE		⑭ ZIP	⑮ PHONE
⑯ BIRTH DATE MO DAY YA		⑰ SEX	⑱ RACE	⑲ HEIGHT	⑳ WEIGHT
⑳ OR THE OWNER OR OPERATOR OF THIS VEHICLE TAG NUMBER AND YEAR		㉑ STATE	㉒ VEH MAKE	㉓ VEH BODY	㉔ YEAR
㉕ OPERATOR'S PERMIT NO.			㉖ STATE		
㉗ COURT APPEARANCE COURT ADDRESS				㉘ DATE	
㉙				㉚ HOUR	

A MANDATORY APPEARANCE If Box A is checked, you MUST appear in court at the time and place shown above.

B OPTIONAL APPEARANCE If Box B is checked, you MUST either pay the collateral amount shown by the city within 7 days, or appear in court at the time and place shown above.

If the officer did not give you a hearing date and you wish to appear in court, check Box C and report within 7 days.

C

DO FORM 1805 (Accountable Use previous edition)
82 JAN

CVB COPY

VIOLATION NO 45604
CODE 33
SECTION 34
MAG NO 35
LAST NAME 36
FIRST NAME 37
INIT 38
COLLATERAL \$ 31

39

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 133 and 8012.

PRINCIPAL PURPOSE: To record information on minor offenses which will be referred to a U.S. Magistrate for disposition.

ROUTINE USE: To inform subject individual and the appropriate U.S. Magistrate that the individual will be prosecuted for a minor offense.

DISCLOSURE IS MANDATORY: The individual's military commander or civil police as appropriate will be contacted for assistance. The individual will be charged with hindering a law enforcement official in the performance of duty.

INSTRUCTIONS

A. MANDATORY APPEARANCE. If BOX A is checked on this notice **YOU MUST APPEAR** in court at the time and place shown or as notified by the court.

B. OPTIONAL APPEARANCE. If BOX B is checked on the face of this notice **YOU MUST DO ONE OF TWO THINGS. YOU MUST EITHER:**

1. PAY THE COLLATERAL AMOUNT SPECIFIED. If you wish to dispose of your case **WITHOUT HAVING TO APPEAR IN COURT**, mail your personal check or a money order in this envelope within 7 days for the amount of the collateral specified. Do not send cash by mail. Write on your check or money order the number of the violation notice and the location code (which appear at the top of the notice) and make it payable to **CLERK, U.S. DISTRICT COURT**.

Payment of the collateral (fine) will notify to the court that you do not contest the charge nor request a court hearing. If you are charged with a motor vehicle violation, a record of your forfeiture of collateral may be reported to the Department of Motor Vehicles of your state for whatever action the state deems appropriate.

OR

2. APPEAR IN COURT. If the officer has written on the face of this form a date and a place for a court hearing, you may appear there to contest the charge(s) against you.

If no court date has been given to you by the officer and you wish a court hearing, check BOX C on the face of this notice and mail this form within 7 days. Make sure that your address and telephone number appear on the face of the notice. The court will notify you of your hearing date.

NOTICE

If you fail to return this notice within 7 days or fail to appear in court at the time scheduled for you to appear, the United States District Court may issue a summons ordering you to appear or issue a warrant for your arrest. If you are charged with a motor vehicle violation, the court may also report your non-compliance to the Department of Motor Vehicles of your state, which may affect the renewal of your driving privileges. Furthermore, the court may increase your fine or impose additional penalties. Any fine or collateral assessed is paid directly into the U.S. Treasury.

PROMISE TO APPEAR

45604

(Violation Number)

My signature below signifies that I have received a copy of the violation notice. It is not an admission of guilt. I promise to appear for trial at the time and place specified on the violation notice or any other date set by the court in the future.

(Signature of Violator)

(Signature of Officer)

(Date)

In completing the violation notice, the law enforcement officer must check either “mandatory appearance” or “optional appearance.”³³ If “mandatory appearance” is checked, the accused will be required to appear in court. The officer is supposed to consult the rules adopted by the local district court in order to determine which box to check.³⁴ The CVB does not review or evaluate the contents of the citations.³⁵ If the offender has a mandatory appearance or does not opt to mail in a fine in an optional appearance case, the CVB docket the case and notifies the defendant.³⁶ Because the CVB docket the cases for the courts, the cases tend to fall on the same day, commonly called Petty Offense Day or CVB Violations Day.³⁷

D. Forfeiture of Collateral

If the offender is eligible, the police officer can mark “optional appearance” and include a fine on the ticket.³⁸ If the accused chooses to pay the fine, the matter is closed.³⁹ Payment of the fine by mail is called “forfeiture of collateral” and is intended to be available in cases where the offense is *malum prohibitum*.⁴⁰ Rule 58 acknowledges the legitimacy of forfeiture of collateral.⁴¹ The rule allows each district court to establish a schedule of fixed-sum fines that a defendant can pay in lieu of appearing in court.⁴²

In 1980, the federal courts expanded and changed the use of forfeiture of collateral. Previous incarnations of the collateral forfeiture rule had permitted the assessment of fines in “petty offenses.”⁴³ The

³³ *Id.* at 4 (Circle 39).

³⁴ *See infra* Part I.D.

³⁵ *See supra* note 30 and accompanying text.

³⁶ *Central Violations Bureau Helps Collect Millions Each Year for Crime Victims, supra* note 31, at 7.

³⁷ Telephone Interview with Monty Tingle, *supra* note 30.

³⁸ *See ARMY MANUAL, supra* note 32, at 4 (Circle 39).

³⁹ FED. R. CRIM. P. 58(d)(1).

⁴⁰ *See* MAGIS. R. 4 advisory committee note, 85 F.R.D. 417, 426 (1980) (abrogated 1990). Rule 58, however, does not explicitly disallow forfeiture of collateral in A misdemeanors. *See* FED. R. CRIM. P. 58; *see also* McGrail & Rowley v. Babbit, 986 F. Supp. 1386, 1396 (S.D. Fla. 1997) (describing plaintiff's decision to forfeit collateral for A misdemeanor). “*Malum prohibitum*” describes offenses that are not inherently wrong, but are wrong because there is a statute prohibiting them. BLACK'S LAW DICTIONARY 960 (6th ed. 1990). For example, jaywalking is not evil or immoral, but it is against the law. Conversely, murder is considered fundamentally wrong, and the existence of the law against it merely codifies what we already know. Offenses that are inherently wrong are called “*malum in se*,” meaning evil in and of themselves. BLACK'S LAW DICTIONARY, *supra*, at 959.

⁴¹ FED. R. CRIM. P. 58(d)(1).

⁴² *Id.*

⁴³ FED. R.P. U.S. MAGIS. 8, 46 F.R.D. 489, 492 (1969) (abrogated 1971) (“When authorized by a local rule of the district court, a magistrate may accept a forfeiture of

language was changed in 1980 to reflect "the peculiarities to be found in some state codes, whereby violations which should logically be classified as petty offenses are in fact above the petty offense category because of the high penalties which are authorized by law (but seldom if ever imposed)."⁴⁴ The change expanded the forfeiture-of-collateral option to include A misdemeanors.⁴⁵

Neither Rule 58 nor its previous versions indicates whether forfeiture should be treated as a conviction of a crime. Rule 58 does provide that forfeiture is the end of all proceedings.⁴⁶ The accused never appears in court. He sends in his check, and that may be the last he ever hears of it. As previously noted, the only information the accused receives before sending in his payment is the violation notice, which does not specify that the individual has been accused of a crime and does not explain the rights that the accused may be waiving by submitting payment.⁴⁷ The documents sent to the accused do not specify or even hint at whether forfeiting collateral will leave the accused with a federal criminal record. The CVB enters the forfeiture in its records and retains it for five years.⁴⁸

E. Initial Appearance for Minor Offenders

For those with a mandatory appearance or who opt not to send in a check, Rule 58 establishes the procedure governing the initial appearance in court.⁴⁹ Rule 58 exempts petty offenses and A misdemeanors from the other Federal Rules of Criminal Procedure and outlines a set of summary procedures.⁵⁰ For example, in a felony criminal case, the charging instrument must be an indictment or an information,⁵¹ but Rule 58(b)(1) allows petty offenses to proceed under the citation notice.⁵² Under Rule 58(b), a petty offender is entitled to an initial appearance, during which the magistrate must inform him of the charges, the potential penalties, the right to retain counsel, the right to request the appointment of counsel ("unless the charge is a

collateral security, in lieu of appearance, as a proper disposition of a case involving a petty offense as defined in 18 U.S.C. § 1.")

⁴⁴ MAGIS. R. 4 advisory committee note, 85 F.R.D. at 426.

⁴⁵ *Id.* at 425-26. Rule 58 applies to "petty offense and other misdemeanor cases." FED. R. CRIM. P. 58(a)(1).

⁴⁶ FED. R. CRIM. P. 58(d)(1).

⁴⁷ See *supra* notes 31-32 and accompanying text.

⁴⁸ *Central Violations Bureau Helps Collect Millions Each Year for Crime Victims*, *supra* note 31, at 7.

⁴⁹ FED. R. CRIM. P. 58(b)(2).

⁵⁰ FED. R. CRIM. P. 58(a).

⁵¹ FED. R. CRIM. P. 7(a)-(b).

⁵² FED. R. CRIM. P. 58(b)(1); see also ARMY MANUAL, *supra* note 32, at 10 (providing example of citation-cum-charging instrument); *supra* Part I.C.

petty offense for which the appointment of counsel is not required”⁵³), the right against self-incrimination, and the right to a trial.⁵⁴ This subsection discusses the rules and rights relevant to the initial appearance.

1. *Right to Counsel*

At the initial appearance, the magistrate should appoint counsel to the defendant if he has the right to counsel and cannot afford an attorney.⁵⁵ A misdemeanants have a statutory right to counsel and should have counsel appointed to them.⁵⁶ As noted in Rule 58, financially eligible petty offenders do not have an absolute right to appointed counsel,⁵⁷ as their felon analogues do. The statute further provides for the provision of counsel to petty offenders when “the court determines that the interests of justice so require.”⁵⁸ Under *Argersinger v. Hamlin*⁵⁹ and *Scott v. Illinois*,⁶⁰ all defendants, including those accused of petty offenses, have a *constitutional* right to appointed counsel if the charges lead to “actual imprisonment,” even for a brief period.⁶¹ In *Scott*, although the statute authorized jail time and a fine, the Court held that Scott had no right to counsel because the penalty imposed on him was only a fifty-dollar fine.⁶²

In *Alabama v. Shelton*,⁶³ the Court extended the right to counsel in *Argersinger* and *Scott* to include cases where the defendant faces even the possibility of jail time.⁶⁴ Shelton was convicted of an A misdemeanor and received a fine, a thirty-day suspended sentence, and two years of probation.⁶⁵ The Court held that if Shelton violated probation, he would be incarcerated for the suspended term, and thus

⁵³ FED. R. CRIM. P. 58(b)(2)(C).

⁵⁴ FED. R. CRIM. P. 58(b)(2)(A)–(F).

⁵⁵ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”).

⁵⁶ 18 U.S.C. § 3006A(a)(1)(A) (2000).

⁵⁷ FED. R. CRIM. P. 58(b)(2)(C) (providing “the right to request the appointment of counsel if the defendant is unable to retain counsel—unless the charge is a petty offense for which the appointment of counsel is not required”).

⁵⁸ 18 U.S.C. § 3006A(a)(2) (2000).

⁵⁹ 407 U.S. 25 (1972).

⁶⁰ 440 U.S. 367 (1979).

⁶¹ *Id.* at 367; *Argersinger*, 407 U.S. at 37 (holding that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial”).

⁶² *Scott*, 440 U.S. at 373 (concluding that actual imprisonment, not mere threat of imprisonment, is line defining constitutional right to counsel).

⁶³ 535 U.S. 654 (2002).

⁶⁴ *Id.* at 674.

⁶⁵ *Id.* at 658.

impermissibly would be incarcerated for the original charge without the assistance of counsel.⁶⁶ The effect of *Shelton* on *Argersinger* and *Scott* is an open question. *Shelton* opens the door to the claim that any defendant facing the possibility of incarceration is entitled to counsel under the Constitution.⁶⁷

Rule 58(a)(2) attempts to effectuate and expand upon the rule announced in *Argersinger* and *Scott*. It enables the court, at the initial appearance, to waive jail time in minor offense cases, and then it explains how those cases can be handled differently. The rule states: "In a case involving a petty offense for which no sentence of imprisonment will be imposed, the court may follow any provision of these rules that is not inconsistent with this rule and that the court considers appropriate."⁶⁸ Arguably, unless and until that waiver occurs, accused petty offenders face the possibility of jail time and therefore retain their constitutional right to appointed counsel.

In *United States v. Ramirez*,⁶⁹ one district court adopted, on the basis of *Argersinger* and *Scott*, precisely this position—that alleged federal petty offenders have the right to appointed counsel unless jail time is waived explicitly.⁷⁰ In *Ramirez*, the court found that in *Argersinger* and *Scott*, the Supreme Court was applying the federal Constitution to state criminal proceedings, and that the basis for limiting the right to counsel in those cases rested, in part, on the burden the extension of counsel would create for "50 quite diverse States."⁷¹ Finding these concerns inapposite to the prosecution of federal misdemeanors, the *Ramirez* court read the waiver provision of Rule 58 to counsel "a preventative, rather than remedial, approach,"⁷² and held that unless an up-front waiver of jail time is made, defendants have the right to appointed counsel.⁷³

2. *Right to Be Informed of the Charges*

By the end of the initial appearance, a defendant should understand fully the charges against him. Rule 58 provides for the defendant to be apprised of the charges against him in two ways: through the charging instrument and through a magistrate's allocution at the

⁶⁶ *Id.* at 667.

⁶⁷ *Id.* at 680 (Scalia, J., dissenting) (suggesting that majority had effectively overruled *Argersinger* and mandated appointment of counsel in most petty offense cases).

⁶⁸ FED. R. CRIM. P. 58(a)(2).

⁶⁹ 555 F. Supp. 736 (E.D. Cal. 1983).

⁷⁰ *Id.* at 740–41.

⁷¹ *Id.* at 739 (quoting *Scott v. Illinois*, 440 U.S. 367, 370 (1979)) (emphasis omitted).

⁷² *Id.* at 741.

⁷³ *Id.* at 740–41.

initial appearance.⁷⁴ In addition to listing the charges, the charging instrument also must contain a statement of probable cause that outlines how the conduct of the accused meets the elements of the offense.⁷⁵ This information allows the accused to defend himself and to understand the limits of his double jeopardy protections.

II

RULE 58 PROCEDURES IN PRACTICE

In practice, Rule 58 is honored mostly in the breach. The district court practices range from informal negotiation between an agency representative and the accused to a rigid application of all the Federal Rules of Criminal Procedure. The flexibility of the summary procedures allows a court to take the “petty” nature of these crimes into account in determining the applicable procedures and punishments. To that end, the Clinic and the E.D.N.Y. have endeavored to strike a balance, with imperfect results. Because the procedures adopted in this district were negotiated between the court and the Clinic, and because of my familiarity with those procedures, this Note uses those procedures as point of comparison with the procedures in the following districts: the Southern District of New York (S.D.N.Y.), the District of New Jersey (D.N.J.), the District of Massachusetts (D. Mass.), the Eastern District of California (E.D. Cal.), the District of Wyoming (D. Wyo.), and the District of Kentucky (D. Ky.).

A. The Initial Appearance

In the E.D.N.Y., the individuals in attendance at the initial appearance are the clerk of the magistrate court, the agency representative, members of the Federal Defender Clinic, and student prosecutors.⁷⁶ Notably, no magistrate is present. After consulting with the client, the student defense attorneys negotiate with the agency representative and the student prosecutor. In the S.D.N.Y., the initial appearance is a nonpublic negotiation between the agency representative and the accused, moderated by an Assistant U.S. Attorney (AUSA).⁷⁷ These procedures differ markedly from the procedures in

⁷⁴ FED. R. CRIM. P. 58(b)(1)–(2).

⁷⁵ See, e.g., *United States v. Gayle*, 967 F.2d 483, 485 (11th Cir. 1992) (requiring that charging instrument set out essential elements of offense).

⁷⁶ CHESTER L. MIRSKY & INGA L. PARSONS, 1 FEDERAL DEFENDER CLINIC PETTY OFFENSE MANUAL 44–45 (2003) [hereinafter *PETTY OFFENSE MANUAL*] (on file with author). The Petty Offense Manual is the Clinic handbook, developed by Professors Chet Mirsky and Inga Parsons. It details the processes and strategies to be employed by Clinic students representing petty offenders.

⁷⁷ Interview with Jim Moleneli, Criminal Clerk, Arraignment Office, District Court of the Southern District of New York, in New York, N.Y. (Jan. 21, 2004).

the E.D. Cal., the E.D. Ky., the D. Mass., the D. Wyo., and the D.N.J., where the initial appearances take place before the magistrate and are on-the-record proceedings.⁷⁸

B. *Right to Counsel*

In the E.D.N.Y., the clerk makes an announcement that appointed counsel is available. At that time, if defendants so choose, they fill out a financial affidavit, on the basis of which the court determines their eligibility for free, appointed Clinic counsel.⁷⁹ Those defendants who are in court for noncriminal violations usually are not eligible for representation by the Clinic. The provision of counsel is treated as an amenity. No mention is made of a “right” to counsel, and no waiver is sought from those who choose to proceed without counsel.⁸⁰

This process varies dramatically from other districts in its compromise. In the E.D. Cal., upon arriving at Petty Offense Day, the federal defender already has parsed through the docket, and all A misdemeanants are asked to fill out a financial affidavit to determine whether they are financially eligible for appointed counsel. All eligible A misdemeanants receive counsel.⁸¹ The E.D. Ky. similarly provides all A misdemeanants with a “Right to Counsel” form, which both informs the accused of their right to counsel and allows for an explicit waiver of that right.⁸² The D.N.J. and the D. Wyo. establish the potential penalty at the outset and appoint counsel when the prosecution announces its intent to seek jail time as a penalty.⁸³

C. *Right to Be Informed of the Charges*

In the E.D.N.Y., Clinic students encourage defendants to fill out a financial affidavit and try to inform them of the pending charges and possible penalties.⁸⁴ If a defendant does not accept assistance from the Clinic, the agency representative will be the only person who

⁷⁸ Telephone Interview with Susan Adkins, Clerk of the Court of Magistrate Judge James B. Todd, Eastern District of Kentucky (Feb. 4, 2004); Telephone Interview with Danielle Eichhorn, Secretary of the Court of Magistrate Judge Gregory Hollows, Eastern District of California (Feb. 4, 2004); Telephone Interview with Debbie Parsons, Clerk of the Court of Magistrate Beeman, District of Wyoming (Feb. 4, 2004); Telephone Interview with Inga Parsons, Former Professor of Law, New York University School of Law (Feb. 4, 2004).

⁷⁹ PETTY OFFENSE MANUAL, *supra* note 76, at 46–47.

⁸⁰ *Id.* at 46.

⁸¹ Telephone Interview with Danielle Eichhorn, *supra* note 78.

⁸² Telephone Interview with Susan Adkins, *supra* note 78.

⁸³ Interview with Magistrate Judge Robert Mautone, District Court of New Jersey, in Newark, N.J. (Jan. 29, 2004); Telephone Interview with Debbie Parsons, *supra* note 78.

⁸⁴ PETTY OFFENSE MANUAL, *supra* note 76, at 46–48.

speaks to him. That representative may or may not inform the defendant of the charges, the elements of the charges, or the possible penalties.⁸⁵ In contrast, in the E.D. Cal., the D.N.J., the E.D. Ky., and the D. Mass., the magistrate informs the defendant of the charges against him during a formal arraignment.⁸⁶ In the D. Wyo., before the defendant's appearance, he is given an "Advice of Rights Form," which informs him of the charges.⁸⁷

D. Sorting

Sorting between defendants is needed to ensure that those accused of more serious offenses receive the increased rights to which they are entitled. In the E.D.N.Y., the agencies do some sorting before the initial appearance stage, with the result that some A misdemeanants have a complaint in their file that supercedes the violation notice as the charging instrument.⁸⁸ However, the bulk of the enforcement, or underenforcement, of A misdemeanants' rights is left to the Clinic.

Again, the E.D. Cal. applies the rules most rigorously; before Petty Offense Day, both the U.S. Attorney's Office and the federal defenders' office receive a copy of the docket. Both offices have the opportunity to sort out which defendants require a complaint and are entitled to appointed counsel before the initial appearance.⁸⁹ In four of the seven districts studied, sorting appears to be done sporadically by AUSAs. A misdemeanants do appear at Petty Offense Day, sometimes without counsel. Sometimes a complaint is filed; sometimes it is not.⁹⁰ By contrast, in the D. Mass., the magistrate is the first person with legal training to evaluate the charges.⁹¹

E. Factual Basis

In the E.D.N.Y., when a plea is taken at Petty Offense Day, the agency representative enters it on the papers.⁹² No one establishes a

⁸⁵ Interview with David Klem, *supra* note 30.

⁸⁶ Telephone Interview with Susan Adkins, *supra* note 78; Telephone Interview with Danielle Eichhorn, *supra* note 78; Interview with Magistrate Judge Robert Mautone, *supra* note 83; Telephone Interview with Inga Parsons, *supra* note 78.

⁸⁷ Telephone Interview with Debbie Parsons, *supra* note 78.

⁸⁸ Interview with David Klem, *supra* note 30.

⁸⁹ Telephone Interview with Danielle Eichhorn, *supra* note 78.

⁹⁰ Telephone Interview with Susan Adkins, *supra* note 78; Interview with Magistrate Judge Robert Mautone, *supra* note 83.

⁹¹ Telephone Interview with Inga Parsons, *supra* note 78.

⁹² "Entered on the papers" means writing the plea directly on the charging instrument, which the agency representative then initials. In the Eastern District of New York, this is the entire plea process. Interview with David Klem, *supra* note 30.

factual basis for the offense. At times, charge bargaining leads to a plea on an infraction unrelated to the defendant's conduct that led to the original charges.⁹³ Again, in sharp contrast, in the E.D. Cal., the E.D. Ky., the D. Wyo., the D.N.J., and the D. Mass., guilty pleas are entered in open court before the magistrate, and the magistrate conducts an abbreviated Rule 11 allocution.⁹⁴ First, the magistrate asks the defendant if he understands the charges and potential penalties. The magistrate then establishes a factual basis for the crime by asking the defendant to describe his conduct and matching the defendant's description to the elements of the offense.⁹⁵

F. Negotiation

In the E.D.N.Y., those defendants who do not request counsel are called one by one to a table where the agency representatives are seated. The defendant and an agency representative, assisted by student prosecutors, then negotiate a plea.⁹⁶ On the other hand, Clinic students interview defendants who request counsel and then conduct negotiations with the agency representative on their behalf.⁹⁷ These negotiations usually focus on the personal circumstances of the client and the adverse collateral consequences of a potential prosecution.⁹⁸ Legal arguments are raised when necessary, but they usually result in an adjournment, rather than a settlement.⁹⁹ For example, in one case a client was charged with possession of a weapon for having a baseball bat in his car while in a federal park. The Clinic student challenged the sufficiency of the evidence, questioning whether a baseball bat sitting in a car is a weapon. The prosecuting agency refused to discuss that issue, preferring instead to focus on the "worthiness" of the particular defendant.¹⁰⁰

⁹³ Cf. PETTY OFFENSE MANUAL, *supra* note 76, at 70–71 (suggesting alternative, non-criminal charges for pleas).

⁹⁴ FED. R. CRIM. P. 11(b).

⁹⁵ Telephone Interview with Susan Adkins, *supra* note 78; Telephone Interview with Danielle Eichhorn, *supra* note 78; Interview with Magistrate Judge Robert Mautone, *supra* note 83; Telephone Interview with Debbie Parsons, *supra* note 78; Telephone Interview with Inga Parsons, *supra* note 78.

⁹⁶ PETTY OFFENSE MANUAL, *supra* note 76, at 70–71.

⁹⁷ *Id.* at 57.

⁹⁸ *Id.* at 71.

⁹⁹ *Id.*

¹⁰⁰ Interview with Lauren Cusick, Student, Federal Defender Clinic, New York University School of Law, in New York, N.Y. (Feb. 12, 2004).

If the Clinic is unable to come to an agreement with the agency representatives,¹⁰¹ the case is adjourned, and responsibility for prosecution is transferred to the U.S. Attorney's Office. The Clinic then commences more formal litigation, with student prosecutors, under the direct supervision of AUSAs, assuming the lead role in prosecuting the case.¹⁰²

In the E.D. Cal., plea negotiations, at least in A misdemeanor cases where counsel has been assigned, take place after the initial appearance. The federal defender and the AUSA negotiate, and, if an agreement is reached, the plea is entered at the trial confirmation hearing, a procedure which itself is not required under Rule 58.¹⁰³

In the D. Mass., the defendant is presented with the option of either pleading guilty or going to trial that afternoon. There is virtually no room for negotiation. This process results in many trials and many acquittals.¹⁰⁴ The high number of acquittals is likely caused by the absence of prosecutorial scrutiny of the sufficiency of the evidence, as well as the lack of negotiation.

In the D.N.J., the AUSA negotiates with the defendant before the preliminary appearance. After the negotiations are concluded, the defendant is arraigned and usually pleads guilty. At times, when the defendant pleads not guilty, the magistrate instructs the prosecutor to negotiate further with the defendant to reach a settlement. These second-round negotiations seem to occur when there are multiple charges against the defendant, and they appear to lead to the dismissal of some charges and the entrance of guilty pleas to the others.¹⁰⁵

In the S.D.N.Y., the AUSA supposedly serves as a "mediator" between the agency representative and the accused.¹⁰⁶ These negotiations take place behind closed doors.¹⁰⁷

G. Intention Versus Implementation

From a comparison of petty offense rules and practices, a stark picture emerges. Different districts implement the rules that govern petty offenses in different ways. To some extent, the drafters of Rule

¹⁰¹ As a matter of Clinic policy, Clinic students negotiate only noncriminal dispositions (for example, dismissals, adjournments contemplating dismissals, pleas to violations) at Petty Offense Day.

¹⁰² *PETTY OFFENSE MANUAL*, *supra* note 76, at 45. Many cases are subsequently settled, with less than five percent of cases going to trial. Interview with David Klem, *supra* note 30.

¹⁰³ Telephone Interview with Danielle Eichhorn, *supra* note 78.

¹⁰⁴ Telephone Interview with Inga Parsons, *supra* note 78.

¹⁰⁵ Interview with Magistrate Judge Robert Mautone, *supra* note 83.

¹⁰⁶ Interview with Jim Moleneli, *supra* note 77.

¹⁰⁷ *Id.*

58 intended this result, as they granted district courts the authority to determine what procedures will be followed in petty offense cases.¹⁰⁸ In practice, however, this flexibility has led to diverse and inconsistent treatment of defendants. A person who ties her boat up to a bridge in federal waters¹⁰⁹ outside of Boston, Massachusetts will be treated very differently than a person who commits the same offense in Brooklyn, New York or Fresno, California. Further, because of the dearth of information available, she has no means of determining which of her rights will be respected before she appears in court. She can read Rule 58 and take from it what she will; it may or may not be followed at her initial appearance.

III

PROBLEMS WITH THE CURRENT SYSTEM

The current procedures fail to protect the rights of defendants. In addition to their secretive and ad hoc nature, they fail to create the efficiency envisioned by the drafters of Rule 58.¹¹⁰ This Part outlines the failures of the current procedures as implemented. First, forfeiture of collateral cannot constitutionally be maintained as a shortcut to a criminal conviction. Second, the lack of sorting among minor offenses leads to the underenforcement of rights. Third, while it is not clear that petty offenders have a constitutional right to counsel, the current system would better achieve its contemplated goals if counsel were appointed in all petty offense cases.

A. *Forfeiture of Collateral*

Rule 58(d) permits district courts to promulgate local rules that allow defendants to make a “fixed-sum payment in lieu of the defendant’s appearance and end the case.”¹¹¹ However, defendants who choose forfeiture of collateral are ignorant of the rights they are waiving.¹¹² In addition, neither Rule 58, its antecedents, nor any other federal rule or statute explains whether forfeiture of collateral equals a conviction.¹¹³ The local district court rules variously leave the ques-

¹⁰⁸ H.R. REP. NO. 90-1629, at 21 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4264 (stating that district court judges may “establish uniform procedures to be followed by all magistrates exercising minor offense trial jurisdiction within the district”).

¹⁰⁹ 36 C.F.R. § 3.6(g) (2004).

¹¹⁰ *See supra* note 108 and accompanying text.

¹¹¹ FED. R. CRIM. P. 58(d)(1).

¹¹² *See supra* notes 31–32, 47 and accompanying text.

¹¹³ The Advisory Committee minutes indicate that although it acknowledged this ambiguity, the Committee declined to decide whether forfeiture of collateral constitutes a “conviction.” ADVISORY COMM. ON CRIM. RULES, MINUTES OF THE ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE 11 (2002). Although the phrase “forfeiture

tion open,¹¹⁴ define it as an admission of guilt or a conviction,¹¹⁵ or indicate that the penalty is civil.¹¹⁶

Those courts that have considered the question have come down on both sides.¹¹⁷ Few courts, however, have addressed the issue directly or in depth. In *Scharf v. United States*,¹¹⁸ a district court held that forfeiture was a conviction, despite the court's acknowledgement of "the lack of notice on the ticket to its legal effect."¹¹⁹ The *Scharf* court rested its decision on the language of the district's local rule, which stated that forfeiture is "tantamount to a finding of guilt."¹²⁰

If forfeiture of collateral is treated as a guilty plea to a criminal offense, the conviction could be used as a sentencing consideration or impeachment device¹²¹ in a subsequent felony trial or as the basis of a criminal record.¹²² As has already been noted, the CVB keeps records of citations issued for five years.¹²³ This information could be and is used in background checks to determine whether a job applicant has a criminal record.¹²⁴ If, however, forfeiture is treated as a

of collateral" might indicate a noncriminal disposition, the Committee took it from the earlier version of the rules. FED. R.P. U.S. MAGIS. 8, 46 F.R.D. 487, 492 (1969) (abrogated 1971).

¹¹⁴ See, e.g., D. COLO. L. CR. R. 58.1(d) ("[F]orfeiture . . . shall terminate the proceeding.").

¹¹⁵ See, e.g., D. L. ALA. CR. R. 8(A) (stating that forfeiture "shall be tantamount to a finding of guilt"); S.D. FLA. L. GEN. R. 88.3(B) (same); N.D. ILL. L. CR. R. 58.1(c) (same); W.D.N.Y. L.R. CR. P. 58.3(b) (same); N.D. W. VA. L.R. CR. P. 58.01(e) (same).

¹¹⁶ See, e.g., D.D.C. L. CR. R. 57.20(d) ("[The forfeiture] shall not exceed the maximum fine which could be imposed upon conviction."); N.D. GA. L. CR. R. app. E(b) ("[S]aid collateral shall be administratively forfeited.").

¹¹⁷ Compare *Scharf v. United States*, 606 F. Supp. 379, 382 (E.D. Va. 1985) (finding forfeiture equivalent to conviction for purposes of Victims of Crime Act of 1984), *Korotki v. Goughan*, 597 F. Supp. 1365, 1367 n.5 (D. Md. 1984) (citing Maryland and Delaware statutes that equate conviction and forfeiture of collateral for some purposes), *Morrow v. District of Columbia*, 417 F.2d 728, 742 (D.D.C. 1969) (suggesting reasonableness of rule that arrest records, including forfeitures, can be forwarded to employers), and *Moss v. Maryland*, 272 F. Supp. 371, 375 (D. Md. 1967) (citing statute allowing appeals for persons convicted of offenses, and specifically stating that appeals shall be permitted from forfeiture of collateral), with *Kitchen v. United States*, 221 F.2d 832, 834 (D.C. Cir. 1955) (finding that witness's prior forfeiture of collateral did not count as conviction for impeachment purposes).

¹¹⁸ 606 F. Supp. 379 (E.D. Va. 1985).

¹¹⁹ *Id.* at 382.

¹²⁰ *Id.* (quoting E.D. VA. L. CR. R. 29(H)(3)).

¹²¹ *Awkard v. United States*, 352 F.2d 641, 642 & n.2 (D.C. Cir. 1965) (discussing use of defendant's prior forfeiture of collateral to impeach character witnesses).

¹²² See *Pelicone v. Hodges*, 320 F.2d 754, 755 (D.C. Cir. 1963) (discussing forfeiture of collateral as basis for job termination, but ultimately rejecting such use on other grounds).

¹²³ *Central Violations Bureau Helps Collect Millions Each Year for Crime Victims*, *supra* note 31, at 7.

¹²⁴ On occasion, individuals who pled guilty and later faced collateral consequences as a result of a background check have contacted the Clinic. Interview with David Klem, *supra*

civil penalty, these collateral consequences of the plea no longer apply. A record of a civil penalty does not create a “criminal record” or a “conviction,” just as a New York State speeding ticket does not create a criminal record for the driver.¹²⁵

This analysis raises the following questions: Is forfeiture of collateral a criminal or a civil penalty? If criminal, is it constitutional? This section analyzes the nature of forfeiture and argues that it should be considered a civil penalty.

1. *Is Forfeiture a Civil or a Criminal Penalty?*

Absent conclusive evidence that Congress intended a penalty to be criminal, the nature of the penalty should be determined, in the first instance, by reference to the statutory language.¹²⁶ The drafters of Rule 58’s predecessor statute “recognize[d] that forfeiture of collateral without appearance is an accepted way of terminating proceedings as to minor traffic offenses and similar infractions.”¹²⁷ Rule 58 is a procedural rule; the elements of the offenses themselves are found in some combination of the ACA, an assimilated state criminal law, a federal criminal regulation, or a federal regulation assimilating state traffic law.

Rule 58 funnels diverse charges into a single procedural mechanism. The advisory committee that drafted Rule 58’s predecessor statute noted that the rule allowing forfeiture reflects “the peculiarities to be found in some state codes, whereby violations which should logically be classified as petty offenses are in fact above the petty offense category because of the high penalties which are imposed by law (but seldom if ever enforced).”¹²⁸ This comment reflects the drafters’ intention for district courts to identify those offenses whose penalties exceed their seriousness and mitigate harsh penalties by

note 30. A federal misdemeanor conviction can affect job acquisition and retention. See *Pelicone*, 320 F.2d at 755.

¹²⁵ See N.Y. VEH. & TRAF. LAW § 383(4-a) (McKinney 2004).

¹²⁶ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (finding that divesting individual of citizenship for leaving country to avoid military service could not properly be civil penalty).

¹²⁷ MAGIS. R. 4 advisory committee note, 85 F.R.D. 417, 425 (1980) (abrogated 1990). Rule 58 replaced the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates and kept most of the same language. FED. R. CRIM. P. 58 advisory committee notes.

¹²⁸ MAGIS. R. 4 advisory committee note, 85 F.R.D. at 426. Ironically, the opposite is much more commonly observed: Many federal regulations criminalize traffic infractions and other conduct that has not been criminalized by the states. Compare 36 C.F.R. § 4.15(c) (2004) (defining driving without one’s seatbelt fastened as B misdemeanor) with N.Y. VEH. & TRAF. LAW § 383(4-a) (McKinney 2004) (defining driving without one’s seatbelt fastened as infraction).

allowing the accused to forfeit collateral.¹²⁹ Using forfeiture as a fast lane to a guilty plea undermines the drafters' intention that excessive penalties be mitigated. Therefore, the provisions creating collateral forfeiture should be read as creating a civil penalty rather than a criminal one.

When the statutory text indicates that the penalty is civil, the court must look further to see whether the penalty serves to “transform[] what was clearly intended as a civil remedy into a criminal penalty.”¹³⁰ To this end, the Supreme Court has approved a seven-factor test to determine the nature of the penalty:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment[,], whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.¹³¹

Again, these factors point toward the alternative purpose of the drafters: mitigating the harshness of the statutory penalty.¹³²

In order to examine the *Kennedy* test, consider forfeiture for the offense of driving without a seatbelt.¹³³ Forfeiture does not involve an affirmative restraint, which the Supreme Court has intimated must approach imprisonment.¹³⁴ It is difficult to determine whether forfeiture historically has been regarded as a punishment, but it looks much like typical civil penalties. *Scienter* is a requirement for some, but not all, of the “crimes” for which one may forfeit collateral. Driving without a seatbelt is a strict liability offense that does not require proof of *scienter*.¹³⁵ Forfeiture does promote one of the traditional aims of punishment—deterrence.¹³⁶ The fine is intended to prevent

¹²⁹ *MAGIS. R. 4* advisory committee note, 85 F.R.D. at 425–26.

¹³⁰ *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956).

¹³¹ *Kennedy*, 372 U.S. at 168–69. This test is used to evaluate the severity of the penalty and to determine whether the penalty can be imposed without the protections of criminal law. *Id.* This Note uses the test for the opposite purpose—to determine if the penalty is too minor to be considered criminal.

¹³² *MAGIS. R. 4* advisory committee note, 85 F.R.D. at 427 (stressing that new rules would provide “needed flexibility”).

¹³³ 36 C.F.R. § 4.15(c) (2004). This is a B misdemeanor under 36 C.F.R. § 1.3 (2004). In Massachusetts, the accused can forfeit twenty-five dollars on a seatbelt offense. *D. MASS. MAG. L.R. app. A.*

¹³⁴ *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

¹³⁵ 36 C.F.R. § 4.15(c) (2004).

¹³⁶ *Kennedy*, 372 U.S. at 169.

people from driving without their seatbelts fastened. As for an alternative purpose to the penalty, it appears from the drafters' comments that they intended to mitigate excessively harsh penalties.¹³⁷ Thus, the alternative purpose involves eliminating some of the retributive effect of the punishment. Seatbelt violations are frequently noncriminal infractions under state law.¹³⁸ To the extent that the states treat the driver's failure to secure his seatbelt as a civil offense, and to the extent that the drafters' aim was to lessen the burden on the defendant, the use of forfeiture as a criminal penalty is excessive. Thus, on the whole, application of the seven-factor test does not create a compelling case for treating forfeiture as a criminal penalty.

2. *If It Is a Criminal Penalty, Is It Constitutional?*

Forfeiture of collateral, if treated as a criminal penalty, is unconstitutional. Most clearly, to the extent that A misdemeanants plead guilty through the mail, forfeiture tramples upon their rights. The rights of A misdemeanants are well established, as are the requirements for the waiver of such rights. Further, if forfeiture is a guilty plea, the taking of that plea fails to respect the rights of defendants established in *Boykin v. Alabama*.¹³⁹

The 1980 amendments to the rule on collateral forfeiture expanded its scope, applying it not only to petty offenses, but to some misdemeanors as well.¹⁴⁰ Thus, A misdemeanants are eligible to forfeit collateral, although in some districts this rule is amended by the local rules implementing forfeiture.¹⁴¹ When defendants pay tickets for A misdemeanors, they are denied their rights to counsel, against self-incrimination, and to a jury trial before a district court judge.¹⁴²

The Supreme Court has held "that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."¹⁴³ Before pleading guilty, the defendant must be informed of his right to counsel. In addition, he should have the option to speak to an

¹³⁷ See *supra* notes 128–29 and accompanying text.

¹³⁸ See, e.g., Motor Vehicle Safety Act, CAL. VEH. CODE § 27315(h) (West 2004); COLO. REV. STAT. § 42-4-237 (2003); N.Y. VEH. & TRAF. LAW § 383(4-a) (McKinney 2004).

¹³⁹ 395 U.S. 238, 242 (1969) (holding that "[i]t was error . . . for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary").

¹⁴⁰ MAGIS. R. 4 advisory committee note, 85 F.R.D. 417, 425–26 (1980) (abrogated 1990) (expanding collateral-forfeiture rule to cover "suitable types of misdemeanors," and leaving it to local rules to determine which misdemeanors are included).

¹⁴¹ See *McGrail & Rowley v. Babbitt*, 986 F. Supp. 1386, 1397 (S.D. Fla. 1997) (holding that local rules limit forfeiture to petty offenses).

¹⁴² See *supra* Parts I.D–E.

¹⁴³ *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

attorney before he forfeits collateral. Pleading guilty to a crime by forfeiting collateral violates the defendant's statutory right to counsel.¹⁴⁴

In addition, this type of "plea" violates a defendant's rights under *Boykin*. In *Boykin*, the Supreme Court held that a defendant's guilty plea must be "voluntary and knowing" in order to be valid.¹⁴⁵ Further, the Court expressed concern that "[i]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality."¹⁴⁶ The requirement of a voluntary and knowing plea reflects the Court's determination that a guilty plea, as a conviction, demands the "utmost solicitude" and protection of the rights of the accused.¹⁴⁷ When an accused forfeits collateral, no attempt is made to apprise him of his rights or the waiver of those rights.

The applicability of *Boykin* to forfeitures is uncertain. In *Duncan v. Louisiana*,¹⁴⁸ the Supreme Court held that petty offenses could be tried without a jury, thus exempting petty offenders, at least in part, from the protections of the Sixth Amendment.¹⁴⁹ While the *Boykin* Court relied on the seriousness of potential death or imprisonment as a basis for its decision, the Court also explained that waiver of the rights against self-incrimination, to trial by jury, and to confront one's accusers cannot be presumed "from a silent record."¹⁵⁰ While the stakes are not as high in petty offense cases, petty offenders nevertheless retain the rights against self-incrimination and to confront their accusers. State courts are divided on the issue of whether *Boykin* applies to petty offenses.¹⁵¹

¹⁴⁴ This argument assumes that an A misdemeanor's *statutory* right to counsel, under 18 U.S.C. § 3006A(a)(1)(A) (2000), cannot be abridged by a procedural rule. An A misdemeanor only has a *constitutional* right to counsel when incarceration is a penalty. See *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979).

¹⁴⁵ *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969) (quoting *McCarthy v. United States*, 394 U.S. 459 (1969)).

¹⁴⁶ *Id.* at 242-43.

¹⁴⁷ *Id.* at 243-44.

¹⁴⁸ 391 U.S. 145 (1968).

¹⁴⁹ *Id.* at 158.

¹⁵⁰ *Boykin*, 395 U.S. at 243.

¹⁵¹ Some state courts have held that *Boykin* applies to petty offenses. *E.g.*, *Mills v. Mun. Court*, 515 P.2d 273, 276 (Cal. 1973); *City of Cleveland v. Whipkey*, 278 N.E.2d 374, 379 (Ohio Ct. App. 1972) (holding, however, that there is no right to trial by jury for petty crimes); *Crew v. Nelson*, 216 N.W.2d 565, 566 (S.D. 1974). However, other state courts have held that the smaller stakes involved in petty offenses render application of *Boykin* unnecessary. *E.g.*, *People v. Tomlinson*, 213 N.W.2d 803, 804-05 (Mich. Ct. App. 1973); *State v. Tweedy*, 309 N.W.2d 94, 97-98 (Neb. 1981) (limiting *Boykin*'s application to cases where defendant will be imprisoned, stating that "there is a vast difference between the

The voluntary and knowing requirement of *Boykin* applies only to the direct consequences of a plea;¹⁵² defendants are not entitled to receive notice of potential “collateral” consequences.¹⁵³ While the line between direct and collateral consequences is difficult to determine, here the breadth of the defendant’s ignorance makes it an easy case. Does the defendant understand that his forfeiture of collateral acts as a guilty plea? Does he understand that he is charged with a misdemeanor? Does he understand that sending in his money will give him a criminal record? Anecdotal evidence strongly suggests that the answer to all of these questions is “no.” My conversations with individuals charged with petty offenses indicate that even those sitting in court do not understand that they are accused of a crime. When defendants at Petty Offense Day in the E.D.N.Y. are asked if they would like counsel, they frequently respond, “No thanks, I just have a couple of tickets,” as they hold up a fistful of misdemeanor citations.¹⁵⁴ Many charges, on their face, do not appear to be criminal charges—for example, a parking ticket on Veteran Administration grounds¹⁵⁵ or a ticket for speeding in a federal park.¹⁵⁶

The rare cases involving litigation of motions to vacate pleas entered through forfeiture also support the proposition that the accused does not understand the seriousness of the charges. One example is *Pelicone v. Hodges*.¹⁵⁷ In that case, Pelicone forfeited collateral for a charge of “disorderly conduct (prostitution)” and subsequently was fired from his job with the federal government for engaging in “conduct unbecoming a [g]overnment employee.”¹⁵⁸ Pelicone’s termination was the ground for his suit, but the forfeiture, as the basis for his termination, was discussed at length by the court. The court noted that “disorderly conduct (prostitution)” was not, in fact, a crime listed in the District of Columbia Criminal Code and found that since the underlying “offense” did not exist, the defendant could not be dismissed from his job for forfeiting collateral on that charge.¹⁵⁹

impact of a waiver of constitutional rights when one’s liberty is involved as opposed to his pocketbook”).

¹⁵² See *State v. Ross*, 916 P.2d 405, 409 (Wash. 1996) (citing *State v. Barton*, 609 P.2d 1353 (1980)).

¹⁵³ See *United States v. Couto*, 311 F.3d 179, 188–90 & n.10 (2d Cir. 2002).

¹⁵⁴ Interview with Elliot Kaye and Ryan Alford, Students, Federal Defender Clinic, New York University School of Law, in New York, N.Y. (Apr. 14, 2004).

¹⁵⁵ 38 C.F.R. § 1.218(a)(12) (2003).

¹⁵⁶ 36 C.F.R. § 4.21 (2003).

¹⁵⁷ 320 F.2d 754 (D.C. Cir. 1963).

¹⁵⁸ *Id.* at 755–56.

¹⁵⁹ *Id.* at 757. Kite flying and “playing bandy or shindy in the streets,” however, were listed. *Id.*

A case handled by Clinic students in the E.D.N.Y. provides another example. In that case, the defendant forfeited collateral for only one of several citations because he could not afford to pay them all. Upon being informed that he had pled guilty to a federal crime for walking his dog off its leash, the defendant submitted a declaration, swearing that he did not understand the charges, his rights, or the waiver of those rights.¹⁶⁰ Consequently, the defendant moved to reopen and reinstate the charge for which he had forfeited collateral.¹⁶¹ The court granted the motion.¹⁶²

By definition, defendants who forfeit collateral bypass both courts and lawyers, who could explain their rights and what it means to waive them. *Boykin* places the burden on prosecutors and courts to create a record or provide some evidence that a defendant's plea was made knowingly.¹⁶³ Yet a petty offense citation does not inform a defendant of his rights or even state that he has been accused of a criminal offense. Thus, neither the government nor the court attempts to establish a record of a knowing waiver.

An additional problem arises when a defendant's forfeiture of collateral, made in a district where forfeiture does not constitute a conviction, is later used to establish a conviction in a different district. Here, the first district avoids the notice problem, but it arises in the second district, in which forfeiture is treated as a conviction. This potential problem exists as long as forfeiture can be used as a conviction in any district.

Forfeiture of collateral should not and cannot be treated as a conviction. An explanation of the criminal nature of forfeiture on the petty offense citation could remedy, in part, the defendant's lack of knowledge. In addition, the citation would need to explain that the offender was accused of a federal crime. However, since the same citations are issued for both violations and misdemeanors, the text would need to be conditional, stating: "You may be charged with a federal crime." Alternatively, the citation could include a box that the police officer would check with accompanying text stating: "If this box is checked, you are charged with a federal crime. Forfeiture con-

¹⁶⁰ Declaration in Support of Motion to Reopen and Reinstate Violation Notice No. P002600, *United States v. [Doe]* (Magis. Ct., E.D.N.Y. 2001) (on file with the *New York University Law Review*). Out of respect for the privacy of Clinic clients, the defendant's name has been replaced by "Doe" in this case citation.

¹⁶¹ Memorandum of Law in Support of [Doe's] Motion to Reopen and Reinstate Violation Notice No. P002600, [Doe] (on file with the *New York University Law Review*); Notice of Motion to Reopen, [Doe] (on file with the *New York University Law Review*).

¹⁶² Interview with David Klem, *supra* note 30.

¹⁶³ *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (quoting *Carnley v. Chochran*, 369 U.S. 506, 516 (1962)).

stitutes a conviction.” While this procedure would leave an important determination in the hands of the law enforcement officer, it would educate the accused about the potential consequences of forfeiture. Adding this text to the citation, however, does not address the problems raised by differences between districts and improper charging. As illustrated in *Pelicone*, forfeitures occur even when charges are improper or do not exist.¹⁶⁴

Pleading guilty through the mail violates the due process rights of defendants and invites the kind of errors that those rights are intended to prevent. The crimes eligible for forfeiture are *malum prohibitum* offenses—offenses that are wrong because they are prohibited, not because they are inherently evil.¹⁶⁵ As long as forfeitures are labeled as something other than convictions, they will continue to be treated as minor, and the seriousness of their consequences will be mitigated.

In a sense, this proposal is an end-run around the federal regulations and legislation that deem these offenses B misdemeanors and thus “crimes.” The federal government has already drawn a line indicating the relative importance of these crimes, which it uses to justify summary procedures and lack of rights. This distinction functions as both a sword and a shield. Because the offenses are “petty,” the defendant has limited rights and procedures to protect himself, and the government has greater leeway to impose punishment, even when the defendant’s actions do not meet the statutory definition of the offense. However, if the offenses truly are petty, they should not create a bar to employment¹⁶⁶ or to the receipt of federal loans for higher education.¹⁶⁷ When defendants are charged with offenses carrying serious consequences, they should be afforded the protections prescribed in the Federal Rules of Criminal Procedure.

B. *Sorting*

Another problem is that the CVB and some district courts do not separate A misdemeanors from petty offenses. This lack of sorting leads to underenforcement of the rights of alleged A misdemeanants. Some districts have established procedures for sorting out A misdemeanors before or during the preliminary appearance, and these dis-

¹⁶⁴ See *supra* notes 157–59 and accompanying text.

¹⁶⁵ See *supra* note 40.

¹⁶⁶ See *supra* note 124 and accompanying text.

¹⁶⁷ Higher Education Act of 1998, 20 U.S.C. § 1091(r)(1) (2000) (suspending eligibility for federal loans for students convicted of violating any state or federal law involving possession or sale of controlled substance).

tricts file complaints on A misdemeanor charges that they intend to prosecute.¹⁶⁸

In those districts that do not sort, A misdemeanants are prosecuted under an improper charging instrument.¹⁶⁹ A misdemeanors cannot be prosecuted by citation; rather, they require prosecution by complaint or indictment.¹⁷⁰ The lack of sorting also may result in A misdemeanants, who have the right to a jury trial and to appointed counsel,¹⁷¹ erroneously being tried before a magistrate and without counsel. Without a more thorough study of the practices of magistrate courts, it is impossible to speculate on the number of A misdemeanants subject to this error, but the lack of sorting raises the possibility that the number could be substantial.

The sorting problem can be addressed by the CVB. At the most basic level, the CVB could use a database of minor offenses to sort, and it could include the offense level in its docketing schedule. Such a database would serve as a starting point for the protection of the rights of alleged A misdemeanants. However, although it would serve as a source of information, it would not ensure that the information was put to use to protect the rights of defendants.

C. Access to Counsel

The petty offense system provides abbreviated procedures in order to increase efficiency. Fewer procedures means less motion practice and less work for magistrates, prosecutors, and public defenders.¹⁷² However, to the extent that abbreviated procedures eliminate negotiation and rush defendants to trial, they increase the time spent by courts and magistrates on petty offenses. This Note examines the outcomes achieved by the various districts and suggests that the presence of defense counsel and an opportunity for negotiation increase the efficiency of the petty offense system, particularly with regard to time spent in court or with magistrates.

¹⁶⁸ See *supra* Part II.D.

¹⁶⁹ See *supra* Part II.D.

¹⁷⁰ FED. R. CRIM. P. 58.

¹⁷¹ See *supra* notes 25–26 and accompanying text.

¹⁷² The federal government pays the salaries of judges, prosecutors, and appointed defense counsel. 18 U.S.C. § 3006A(i) (2000).

Table 1
Percentage of Petty Offenses Tried¹⁷³

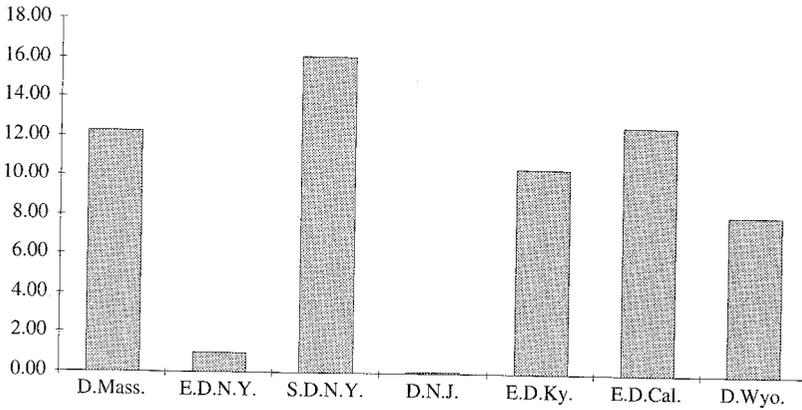
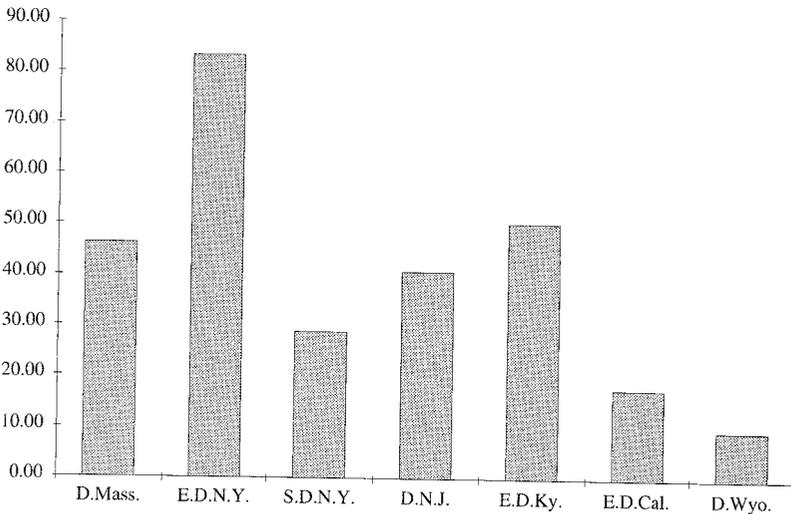


Table 2
Percentage of Petty Offense Cases Dismissed¹⁷⁴



Based on the disparate outcomes resulting from these different procedures, we can examine the relative efficiency of the various systems. In addition to observing the percentages of dismissals and trials, we must determine what those numbers represent. Dismissals represent *nolle prosequi*, or inadequate charges. Unsurprisingly, access to counsel—regularly provided to accused petty offenders (not just A misdemeanants) only in the

¹⁷³ LEONIDAS RALPH MECHAM, 2002 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 345 tbl.M-2A (2002).

¹⁷⁴ *Id.* Although unspecified, dismissals would appear to include adjournments contemplating dismissals. How pleas to lesser offenses—such as noncriminal violations and infractions—are categorized is not known.

E.D.N.Y.¹⁷⁵—correlates with a greater percentage of dismissals. In criminal cases, a lawyer can analyze the law on behalf of the accused and either convince the prosecutor that the penalties far exceed the gravity of the charges or that the conduct does not fit the elements of the crime charged. Although the right to counsel for petty offenders is unsettled, 18 U.S.C. § 3006A permits the provision of counsel to financially eligible petty offenders when it is in the interest of justice.¹⁷⁶

With counsel available, adjournments contemplating dismissals (ACDs) are a regular outcome. ACDs essentially provide for a fixed probationary period during which the charges are left pending. At the end of this period, if the defendant has not been arrested, the charges are dismissed.¹⁷⁷ If the defendant commits another federal crime during the pendency of the ACD, the prosecutor may move forward with the charges at her discretion.¹⁷⁸ Essentially a *nolle prosequi* with a good behavior limit, these dispositions frequently can be reached at Petty Offense Day and are the most common outcome in the least severe cases.

Charge bargaining, through which defendants plead guilty to a lesser charge, is another means of mitigating the harshness of petty offense penalties. In some cases, a noncriminal state equivalent to the federal charge is available. For example, “Disorderly Conduct in Veteran’s Hospital” is a B misdemeanor in the federal system,¹⁷⁹ but under the New York Penal Law, it is a violation.¹⁸⁰ Since subtlety is not a strength of the Parks Regulations,¹⁸¹ prosecutors can step in, with the help of defense counsel, to mitigate excessive penalties.

In the alternative, a dismissal may reflect improper charging. Here, defense counsel can make all the difference. Defense counsel serves as a check on the prosecution. In petty offense cases, the charges get from the ticket to the docket and often to court without any sorting by the prosecution. In cases where an agency official, rather than an AUSA, appears in court, defense counsel likely will be the only person with legal training to evaluate the charges. The baseball-bat-as-a-weapon example¹⁸² illustrates the problem. A baseball bat can be used as a weapon, but whether it meets the statutory definition of a weapon is another matter. While an argument over the charges may not result in a dismissal, it can ensure that the client does not plead guilty out of ignorance.

¹⁷⁵ See *supra* Part II.B.

¹⁷⁶ 18 U.S.C. § 3006A(a)(2)(A) (2000).

¹⁷⁷ *PETTY OFFENSE MANUAL*, *supra* note 76, at 66.

¹⁷⁸ *Id.*

¹⁷⁹ 38 C.F.R. § 1.218(a)(12) (2004).

¹⁸⁰ N.Y. PENAL LAW § 240.20 (McKinney 2004).

¹⁸¹ The National Park Service regulations use one penalty provision to cover hundreds of “crimes.” 35 C.F.R. § 1.3(a) (2004). Thus, seatbelt violations are treated as crimes instead of infractions. Compare 36 C.F.R. § 4.15(c) (2004) (defining driving without one’s seatbelt fastened as B misdemeanor) with N.Y. VEH. & TRAF. LAW § 383(4-a) (McKinney 2004) (defining driving without one’s seatbelt fastened as infraction).

¹⁸² See *supra* note 100 and accompanying text.

Though the above arguments represent the best explanations of the correlation between access to counsel and dismissals, other factors also may have an impact. For example, federal law enforcement officers in certain districts may issue fewer problematic citations. This probably would result from a systematic difference in training between districts, which is unlikely. More likely, however, is that when citing officers, instead of a general agency representative, are required to appear in court, they will receive feedback directly from the court. Over time, we would expect those officers to issue fewer improper citations. Of course, this assumes that magistrates apply the law against unrepresented defendants correctly.

The faster the defendant comes before a magistrate, the less screening of the charges occurs. This appears to be a great waste of judicial resources. In felony cases, the charges are screened by the U.S. Attorney's Office and/or a grand jury before the defendant's preliminary appearance. In place of these screening mechanisms, the petty offense system relies on the legal understanding of front-line federal law enforcement officers who issue citations. However, since those officers are not lawyers, such reliance is bound to lead to errors.

If screening is not done by law enforcement officers or magistrates, it becomes the responsibility of the lawyers. Defense lawyers can work to see that improper charges are dismissed and that the consequences of harsh and lazy drafting are mitigated. Arguably, the defense attorney, armed with attorney-client privilege and a duty of zealous representation, will ferret out weak charges more efficiently than an AUSA who has none of the same incentives.

Providing counsel to petty offenders is costly. In 2002, magistrates handled 63,293 petty offense cases.¹⁸³ It is difficult to estimate the number of additional public defenders that would be needed to handle this additional case load. However, some federal defenders' offices already manage to staff Petty Offense Days, even though they are not funded for that purpose.¹⁸⁴ Moreover, if the provision of counsel leads to fewer trials, that will free up the time and energy of magistrates and courts.

An emphasis on negotiation between sophisticated parties also serves to increase efficiency. In the E.D.N.Y., from 2000 through 2002, a total of six petty offense cases went to trial.¹⁸⁵ Until the point at which the parties agree that negotiation is fruitless and set a trial date, the magistrate is completely uninvolved in the process. While this process deviates from Rule 58 and cre-

¹⁸³ MECHAM, *supra* note 173, at 345 tbl.M-2A.

¹⁸⁴ Telephone Interview with David Patton, Deputy Federal Defender, Southern District of New York and Adjunct Professor of Law, New York University School of Law (Apr. 5, 2004).

¹⁸⁵ MECHAM, *supra* note 173, at 345 tbl.M-2A; LEONIDAS RALPH MECHAM, 2001 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 340 tbl.M-2A (2001); LEONIDAS RALPH MECHAM, 2000 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 351 tbl.M-2A (2000). According to the statistics kept by the Clinic, six additional cases went to trial in 2003 and 2004. Interview with David Klem, *supra* note 30.

ates an even more summary procedure, it introduces case-by-case analysis into the process.

In the E.D. Cal., the magistrate follows Rule 58, as well as other Federal Rules of Criminal Procedure, but does not provide defendants with appointed counsel. At the other end of the spectrum, in the E.D.N.Y., the magistrate is entirely absent from the process until the case is ready for trial, but the defendant receives a lawyer. Given the general confusion of defendants in the petty offense system, it is not clear that application of Rule 58 alone would help the accused defend themselves or their rights in a meaningful way.

Providing defense counsel would increase the efficiency of the petty offense system, thus reinforcing the goals of the drafters of the Federal Rules of Criminal Procedure. Appointed counsel also would protect the rights of defendants when those rights are underprotected by the procedures implemented in district courts. To the extent that Rule 58 creates a procedural floor for the trial of petty offenses, lawyers can ensure that the procedures afforded to defendants do not fall below the constitutional minimum.

CONCLUSION

The procedures described and criticized in this Note are unfair to defendants. Due to the lack of information and record keeping on the subject, it is difficult for outsiders to ascertain the impact of these procedures on the rights of the defendants. The most important next step is to discover how these procedures have been implemented in all districts and to create a meaningful baseline of procedures that protects the rights of the accused.

In particular, the rules on forfeiture of collateral should be amended to state explicitly the effect of forfeiture. Although forfeiture arguably is already a civil penalty, the rules must describe it as such. Otherwise, the rights of defendants who forfeit collateral by mail must be protected through other means, including a guarantee of the right to counsel.

Further, the absence of sorting and the related underprotection of the rights of defendants must be remedied. As charging documents are already scanned and computerized, the additional step of categorizing defendants by offense level would require little additional effort. One can only assume that the lack of progress in this area is related more to the absence of information on petty offense procedures than to a disregard of the rights of the accused.

Finally, counsel should be provided to all defendants. This seems to be an obvious suggestion with regard to A misdemeanants, who are entitled to counsel. However, because A misdemeanants are regularly denied access to counsel, counsel should be appointed for them. As for petty offenders, the rules already allow for the appointment of

counsel. Whether or not the Constitution requires such appointment, lawyers would help protect the rights of the accused. The evidence also indicates that more lawyers means fewer trials, which presumably benefits everyone. Moreover, appointed counsel are legally trained professionals capable of scrutinizing petty offense procedures and challenging them. If counsel had always been provided, it seems less likely that the petty offense system could have developed in such a peculiar, piecemeal fashion in the first instance.

Although certain offenses and penalties may be deemed “petty,” to defendants facing criminal convictions, process matters. These defendants have rights, and those rights must be respected.